Equal
Treatment
Benchbook

SUPREME COURT
OF QUEENSLAND

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Published by the Supreme Court
of Queensland Library

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Brisbane

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FOREWORD

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 recognize 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). 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 inevitably arise. I commend the publication to all judicial officers in the State.

The Hon P de Jersey AC
Chief Justice

Acknowledgements

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Chapter 1 Justice and Equality

1.1 Introduction

This is a book which is intended to provide judges with information which may be of assistance in the conduct of cases. While this book has been prepared by judges of the Supreme Court, it has been prepared with a view to sharing information among 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 a 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 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. Whether a judge adopts any remedial measure, whether identified in this book or otherwise, will depend on all 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 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 areas of possible 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 an injustice or a perceived injustice.

> "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."

Lord Irvine of Lairg, Lord Chancellor, September 1999.[1]

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 race, religion, sex or disability. 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 and/or economic advancement.

The equal treatment of all persons, regardless of sex, race, impairment or religion, is assisted by an understanding of the differences between

[1] Judicial Studies Board, *Equal Treatment Bench Book*, London (March 2004) at 1-4, para [1.1.1].

different groups. Unless judges have this understanding, there is a prospect that in some cases, the equal treatment of different persons before the Court will not be achieved by affording the same treatment. Unless judges are alert to racial and cultural diversity, and to the particular problems affecting some groups as they encounter the justice system, there is not only a risk of an unequal treatment of litigants or witnesses, there is also a risk of a perception of inequality, which in itself is damaging to the administration of justice.

The 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."[2]

1.2 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 and we aim to avoid perceptions of injustice. Some of those perceptions are unavoidable because they are so unreasonable that no level of quality of justice could satisfy some persons that they have received equal treatment. That having been said, to some extent, these perceptions of inequality can be reduced 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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[2] Judicial Studies Board (2004), above note 1 at 1-4, para [1.1.1].

Chapter 2 Ethnic diversity in Queensland

2.1 Introduction

Australia is a nation that is rich in ethnic and cultural diversity. This chapter provides a context for subsequent chapters by statistically outlining ethnic communities in Queensland.

Today just over one in six of the people who live in Queensland were born outside Australia and therefore many of them may face language and cultural difficulties when they come into contact with the court system. The figures available show the wide diversity of places from which people have come to live in Queensland. All of the statistical data in this chapter is taken from the Australian Bureau of Statistics, *Expanded Community Profile, Queensland (State 3) 2001 Census, Community Profile Series*, and, unless otherwise stated, the figures referred to in this chapter are those in that census.[3]

2.2 Migrants

Of Queensland's 3.58 million residents, 616,168 were born overseas: see Table 1. Most of these people were born in the United Kingdom and New Zealand as indicated on the table below. Just over half of the migrants born overseas (349,335) came from other predominantly English speaking countries with judeo-christian values.[4] Although these migrants[5] may be ethnic minorities,[6] it is likely that they will have familiarity with the language, although their customs and culture may be different.[7] A substantial number of migrants come from almost 50 countries where the main language is not English.

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3 Department of Premier and Cabinet, People of Queensland: Statistics from the 2001 Census at http://www.premiers.qld.gov.au/About_the_department/publications/multicultural/People_of_Queensland/, accessed 2 November 2004.

4 Predominantly English-speaking countries include: Canada, Ireland, New Zealand, United Kingdom, United States of America, and South Africa.

5 A migrant may be defined as a person who moves temporarily or seasonally from place to place (OED). According to the 2001 ABS Census Dictionary, this variable records the year of arrival in Australia for people born overseas who intend to stay in Australia for at least one year.

6 'Ethnic' may be defined as pertaining to or having common racial, cultural, religious or linguistic characteristics, especially designating a racial or other group within a larger system: OED. The 2001 ABS Census similarly accounted for these factors by using variables such as ancestry, birthplace, indigenous status, language spoken at home, proficiency in spoken English, religious affiliation and year of arrival in Australia to collate information about 'ethnicity'. See also 'ancestry' in note 15. 'Ethnic minority' may be defined as a group of people differentiated from the rest of the community by racial origins or cultural background: OED.

7 MacDonald Peter in Hartley Robyn (ed) *Families and Cultural Diversity in Australia* NSW, Allen and Unwin:1995 at 25.

Table 1

Country of Birth	Persons	Country of Birth	Persons
Australia	2,738,442	Sri Lanka	3,965
United Kingdom	177,856	Croatia	3,635
New Zealand	127,344	France	3,240
Germany	19,115	Thailand	3,036
Philippines	15,368	Hungary	2,988
Netherlands	15,288	Bosnia and Herzegovina	2,924
Italy	15,197	Austria	2,876
South Africa	14,353	Malta	2,821
Papua New Guinea	12,266	Spain	1,828
Viet Nam	11,619	Romania	1,653
United States of America	9,997	Egypt	1,511
China	8,848	Chile	1,307
Taiwan	8,419	Russian Federation	1,262
Malaysia	8,007	Iran	1,170
Fiji	7,574	Cyprus	1,135
India	7,182	Lebanon	1,122
Ireland	6,914	Mauritius	992
Hong Kong (SAR of China)	6,646	Cambodia	939
Japan	6,571	Turkey	921
Canada	6,036	Ukraine	888
Federal Republic of Yugoslavia	5,458	Argentina	846
Poland	5,226	Macedonia	808
Indonesia	4,639	Portugal	807
Singapore	4,512	Iraq	628
Republic of South Korea	4,064	East Timor	484
Greece	3,979		

Many of Queensland's migrants arrived before 1986 and most before 1995: see Table 2.[8] For example, nearly 80 per cent of those migrants born in the UK arrived in Australia before 1986. Similarly, over 96 per cent of those migrants from Italy, 90 per cent from the Netherlands and 91 per cent from Germany arrived before 1986. 91 per cent of migrants from Viet Nam and 74 per cent of those from the USA arrived before 1995.

[8] These numbers only reflect the percentage of those stating an arrival date. A small percentage of those responding from each country did not state their date of arrival. These migrants are not included in the percentages calculated here.

Table 2

Arrivals of Migrants by Year	**% arrived before 1986**	**% between 1986-1990**	**% between 1991-95**	**% before 1995**
United Kingdom	79.16%	7.94%	5.36%	92.46%
New Zealand	38.87%	20.98%	11.52%	71.36%
Germany	84.10%	5.19%	3.62%	92.90%
Netherlands	90.23%	3.18%	2.18%	95.59%
Italy	96.16%	1.26%	0.96%	98.38%
Philippines	28.98%	29.26%	21.54%	79.79%
South Africa	33.96%	12.33%	9.55%	55.83%
Viet Nam	50.68%	22.25%	18.51%	91.43%
United States of America	50.12%	11.88%	12.13%	74.14%
China	31.13%	21.91%	15.64%	68.67%

2.3 Ethnicity

Although just over 600,000 residents of Queensland were born overseas, a much greater number identify with an ethnic group other than Australian: see Table 3.[9] A probable reason for this is that children born of migrants may identify with their parents' country of birth in addition to Australia. Many Queenslanders identify as English or Irish. The next most common identifications are German, Scot, Italian, Chinese and Dutch. 3.1 per cent of Queenslanders identify as Indigenous people.[10] Issues relating to Indigenous peoples are considered in Chapters 7, 8, 9 and 10.

Table 3

Ethnic Identification	***Persons***		Ethnic Identification	***Persons***
English	1,353,347		People of the Americas	22,682
Irish	433,354		Filipino	19,631
German	211,309		Polish	18,350
Scottish	114,914		Indian	17,116
Italian	91,456		Vietnamese	13,292
Chinese	58,544		Maltese	11,896
Dutch	50,648		Serbian	9,752
New Zealander	37,153		Russian	8,616
Other Australian Peoples	29,262		Croatian	7,730
Greek	26,389		Lebanese	4,899

[9] 1,423,719 Queenslanders identify as Australian not Aboriginal, Torres Strait Islander and Australian of South Sea Islander descent.

[10] Being of Aboriginal or Torres Strait Islander or Australian of South Sea Islander descent.

2.4 Religion

71 per cent[11] of Queensland's population identifies with some Christian denomination. The second largest group[12] described in the 2001 census said they did not identify with any religion. Buddhism makes up the second largest religious group in Queensland, with nearly 38,000 followers; followed by Islam, with 14,990 followers; Hinduism with 8,970 followers; and Judaism with 4,271 followers. Some 14,738 persons in Queensland identify with other religions not described. Relevant aspects of the major religions will be described in Chapter 3.

2.5 Language

According to the 2001 census, 88 per cent[13] of Queenslanders, whether born in Australia or overseas, speak English only. An additional 220,875 speak another language in addition to English. A little over 40,000 people indicated in the census that they did not speak English well. This represents 1.1 per cent of the total Queensland population. Of those, about 8,500 could not speak English at all; nearly half of those people were younger than four years of age. People most likely not to speak English well or at all were born in Viet Nam, Italy, China, South Korea, Hong Kong as well as some people born in Australia: see Table 4.

The most commonly spoken languages other than English are Italian, Cantonese, Mandarin, German, and Vietnamese. Those most likely to speak only a language other than English are identified in Table 4.

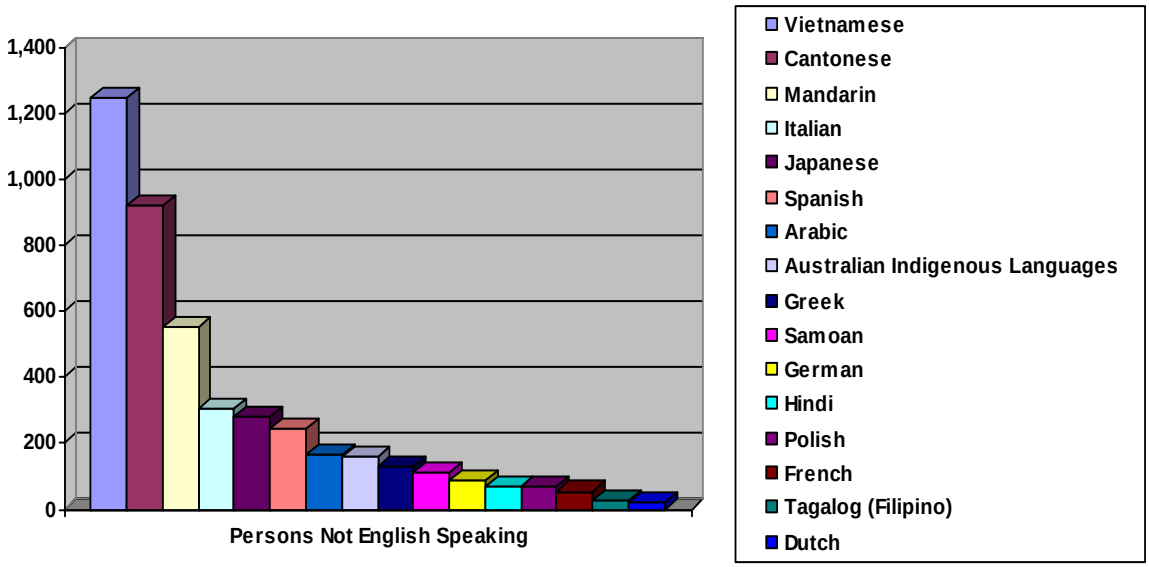
Table 4

Language Spoken	***Persons Not English Speaking***		***Language Spoken***	***Persons Not English Speaking***
Vietnamese	1,249		Greek	127
Cantonese	923		Samoan	114
Mandarin	554		German	87
Italian	303		Hindi	69
Japanese	278		Polish	68
Spanish	246		French	54
Arabic	166		Tagalog (Filipino)	26
Australian Indigenous Languages	162		Dutch	21

11 A total of 2,547,532 persons identify with sixteen named churches and other unnamed Protestant and other Christian denominations.

12 529,966 persons

13 3,173,390 persons



2.5.1 Italian

Of the 91,000 people who identify themselves as ethnic Italians, over 35,000 of those people are children of parents born in Australia. An additional 17,000 people had one parent who was born overseas and 36,726 were born of parents born overseas. 98 per cent of migrants from Italy arrived before 1995. Italian born Queenslanders tend to settle in the northern and south-eastern areas of the state.[14]

2.5.2 Cantonese and Mandarin

According to ABS 2001 census, 58,544 Queenslanders identify themselves as Chinese. Chinese can include people born in, or descendents of people born in, the People's Republic of China, Taiwan, Hong Kong and Macau, Singapore, Malaysia, Indonesia, Viet Nam and Papua New Guinea. 43,358 of these had both parents born overseas. Just over 4,000 had one parent born overseas and the remaining 10,000 either did not say or had both parents born in Australia.

The two main spoken Chinese language groups are Cantonese and Mandarin. It is highly probable that speakers of one language also speak the other. There is only one written Chinese language.

Speakers of Cantonese in Queensland could include people from China (8,932); Hong Kong and Macau (6,709); Malaysia (8,072); Viet Nam (11,758); Singapore (4,553); and Indonesia (4,726). Of migrants, over half arrived before 1990. The remainder have immigrated since 1991 at an average rate of 400 per year.

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[14] *Diversity – A Queensland Portrait*, Queensland Government, 1999, at 46.

Of Mandarin speakers living in Queensland, 554 identified themselves as not speaking English at all and another 3,164 said they did not speak English well.

2.5.3 German

211,309 Queenslanders identify themselves as being of German ancestry.[15] Over 145,000 of these residents were born of Australian born parents and another nearly 25,000 had at least one Australian born parent. Only 41,000 were born of foreign-born parents or did not say where their parents were born. 93 per cent of German migrants arrived here before 1995. Fewer than 100 German speakers identified themselves as not being able to speak English at all.

2.5.4 Vietnamese

The 59 million people who speak Vietnamese[16] originate mainly in Viet Nam and adjacent countries. Vietnamese is also widely used as a second language by ethnic minorities and in neighbouring countries of Laos, Cambodia and Thailand where a significant Vietnamese population exists.[17] Queensland is home to 14,367 Vietnamese speakers, 1,249 of whom do not speak English at all. An additional 3,902 do not speak English well. 13,292 Queenslanders identify themselves as being of Vietnamese ancestry. Of these only 413 had one or both parents born in Australia.

2.6 Socio-economic status

Some migrants to Queensland experience relatively high levels of unemployment.[18] The group with the highest employment figures come from countries in which English is spoken.[19] The ability to speak English is tied directly to the ability to find work in Queensland. Of the 29,000 people in Queensland who speak English poorly or not at all, around only 24 per cent are employed. Many of them find it difficult to have their qualifications recognised and this contributes to both unemployment and under-employment.[20]

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15 Ancestry, according to the 2001 ABS dictionary, provides a good indication of the ethnic background of first and second generation Australians. Respondents in the 2001 Census were asked to mark the ancestry they most identified with as far back as three generations.

16 Grimes, C.E., *Field guide to recording language data*, Kangaroo Ground, Vic: South Pacific Summer Institute of Linguistics, 1992.

17 The UCLA Languages Project Vietnamese Profile at http://www.lmp.ucla.edu/profiles/profv01.htm, accessed 29 July 2003.

18 Unemployment is defined by the Australian Bureau of Statistics as people who are not earning money for work of at least 1 hour per week and are actively seeking work.

19 This has been defined as people from New Zealand, South Africa, Canada, Australia, USA, Fiji, Malaysia, Sri Lanka, India, Philippines, and Ireland.

20 Communication, Stephen Maguire, Director, Multicultural Affairs, Queensland, 23 September 2004.

2.7 Geographic Distribution

Southeast Queensland has the highest concentration of overseas born persons while the western areas have the lowest.[21] 24 per cent of Queenslanders live in Brisbane. A comparison of the proportion of overseas born residents living in Brisbane indicates that Brisbane is the most popular place for migrants to settle.

Almost 3.5 per cent of Queenslanders live in Ipswich. Migrants from Chile, Viet Nam, Spain, Netherlands, Malaysia and Romania have settled there in higher than average proportions. In fact, although over 45 per cent of the 1,310 Chilean migrants live in Brisbane, 13.05 per cent live in Ipswich. Similarly, most of the nearly 12,000 Vietnamese immigrants live in Brisbane and nearly 7 per cent or 814 persons live in Ipswich.

Information from the 1996 census indicates that outside of the metropolitan areas in the Southeast, migrants were likely to settle in Hervey Bay, Mackay, Townsville and Cairns but settlement in those areas is much less concentrated than in the Southeast.[22] After Brisbane and the Gold Coast, Italian born Queenslanders are most likely to live in north Queensland around Cairns.[23] Cairns is also popular with people from Japan, Papua New Guinea, East Timor, Mauritius, Thailand, Austria, and the Philippines.

German, Netherlands and Philippines-born migrants were evenly distributed across the state.[24] New immigrants from South Africa are settling around the state with only slight concentration in Brisbane. The third highest population in Mount Isa is Philippines-born migrants. Migrants from Papua New Guinea were most likely to live in the South-east corner of the state and in Cairns, Townsville and Toowoomba.[25] Viet Nam-born migrants were most likely to live in Brisbane, Ipswich and Logan.[26]

2.8 Involvement in Criminal Proceedings

The Australian Institute of Criminology has indicated that there are significant difficulties in relying on available statistics on the involvement of migrant or ethnic groups in crime,[27] so it is with some caution that such statistics should be received. Significantly, much research which attempts to explain the relationship between ethnicity and crime fails to make reference to social and economic factors as

21 Diversity – A Queensland Portrait, Queensland Government, 1999, at 24.
22 Above note 21 at 25 - 26.
23 Above note 21 at 46.
24 Above note 21 at 40, 52 and 58.
25 Above note 21 at 64.
26 Above note 21 at 70.
27 Mukherjee S 'Ethnicity and Crime' *Trends and Issues in Crime and Criminal Justice No. 117* Canberra, Australian Institute of Criminal Justice, May 1999.

distinguishing variables.[28] Statistics indicate that migrants with poor knowledge of English, little formal education, low status occupations, and high unemployment rates tend to display high arrest and imprisonment rates.[29]

Victorian research has revealed that young men born overseas were arrested at a higher rate than Australian-born alleged offenders and most often in relation to property offences.[30] The results of the 1998 National Prison Census of Australia showed 24.3 per cent of the prison population was born overseas.[31] In the period 1982 to 1998:

- the imprisonment rates of prisoners born in Turkey, Lebanon and New Zealand was substantially higher than those born in Australia;
- the number of New Zealand-born and Vietnamese-born inmates whose most serious offence was a violent offence increased;
- the number of Vietnamese-born prisoners whose most serious offence was a drug offence substantially increased.[32]

Statistics from New South Wales in 1994 showed that after young Indigenous people, Indo-Chinese (Vietnamese, Cambodia and Laotian), Maori and Lebanese juveniles were significantly over-represented in detention, on control orders and on remand.[33]

This over-representation of certain ethnic and cultural minorities within the criminal justice system can lead to a perception, which is widespread in the community and expressed in the media, that a person's race, ethnicity or cultural background is in some way a contributing factor to his or her propensity to engage in criminal behaviour. For example, there is a community perception of racial conflict between various minorities, such as a suggested conflict in Sydney between young Lebanese and young Vietnamese –Australians, but as the Ethnic Affairs Commission of New South Wales concluded in its investigation into alleged racial conflict in that particular context, "superficial and selective media reporting … has led to a public opinion that the causes behind such brawls are racial when in reality they are of a 'territorial' nature."[34] Participation in "street cultures" seems to be

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28 Mukherjee S (May 1999), above note 27 at 5.

29 Mukherjee S *Ethnicity and Crime*: *An Australian Research Study – A Report Prepared for the Department of Immigration and Multicultural Affairs* (November 1999) Australian Institute of Criminology, Executive Summary at 2 and Conclusions at 117-118. Also see Mukherjee S, (May 1999), above note 27.

30 Mukherjee S (November 1999), above note 29, Executive Summary at 7.

31 Mukherjee S (November 1999), above note 29, Conclusions at 127.

32 Mukherjee S (November 1999), above note 29, Executive Summary at 6-7.

33 Legal Information Access Centre 'Ethnicity and Juvenile Justice' *Hot Topics* (1999) 3.

34 Ethnic Affairs Commission NSW Not a single problem: Not a Single Solution: Report to the Premier & Minister for Ethnic Affairs on the recent clashes between youth in Bankstown & Marrickville (1986) at 3.

no different for ethnic minority youth compared to other young Australians in similar circumstances: '[i]n these cases, the processes of poverty and marginalisation are obviously important rather than ethnicity per se'.[35]

The fact of a person's race or that of a group involved in criminal activity can thereby divert our attention from the truly relevant facts and circumstances in the trial and sentencing process. There is a risk of error not only from not identifying the relevant facts and circumstances which are explained by a person's race or ethnic group, but also in other cases from giving the matters of race and ethnic origin a relevance which they should not have. As Sir Gerard Brennan has said:

> "Attitudes based on race, religion, ideology, gender or lifestyle that are irrelevant to the case in hand may unconsciously influence a judge who does not consciously address the possibility of prejudice and extirpate the gremlins of impermissible discrimination. Such gremlins are not extirpated by mere declaration".[36]

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35 Cunneen C "Ethnic Minority Youth and Juvenile Justice: Beyond the Stereotype of Ethnic Gangs" in C*urrent Issues in Criminal Justice* (1995) 6(3) 387 at 391.

36 "*Judicial Independence*" delivered at the Australian Judicial Conference on 2 November 1996.

Chapter 3 Religions in Queensland

3.1 Introduction

71 per cent[37] of Queensland's population identifies with a Christian denomination. The second largest group[38] described in the 2001 census said they had no religious identification. Buddhism makes up the second largest religious group in Queensland with nearly 38,000 followers; followed by Islam, with 14,990 followers; Hinduism with 8,970 followers; and Judaism with 4,271 followers. Some 14,738 persons in Queensland identify with other religions. As knowledge and understanding of Christianity is widespread, this chapter provides information about other religious beliefs and practices.

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

3.2 Religion in Australia/Queensland

3.2.1 Buddhism

The Buddhist community in Queensland can be divided into two groups.[39] The first are referred to as 'ethnic' Buddhists: people who were born in a Buddhist family. The second group are sometimes called 'western' Buddhists. These are people who, not having grown up in a Buddhist tradition, have chosen to become Buddhists.[40] Most Buddhists in Australia belong to the first group.[41]

The first permanent Buddhist community in Queensland 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

37 A total of 2,547,532 persons identify with sixteen named churches and other unnamed Protestant and other Christian denominations.

38 529,966 persons.

39 Communication, Dharmachari Vikaca of Brisbane Buddhist Group, 25 June 2003 on file.

40 Torevell, D "Buddhism" in Markham I S and Ruparell T (edd) *Encountering Religion* Oxford, UK, Blackwell Publishers Inc, 2001, Chapter 9 at 209 – 213.

41 Racism – No Way. *Fact Sheets: An introduction to Buddhism in Australia* at http://www.racismnoway.com.au/classroom/ Factsheet/25.html, visited 30 August 2003.

industry. By the 1890s the Thursday Island community's 500 members built a temple.[42] There are now a significant number of Buddhists in Australia.

There are two main Buddhist traditions. One is Theravada which has its roots in Sri Lanka and Southeast Asia. The other is Mahayana which is prevalent in China, Japan, Tibet, Nepal, Mongolia, Korea, Taiwan, Viet Nam, Bhutan and India.[43]

There is therefore great diversity within Buddhism. However, the groups are in agreement regarding the key beliefs and practices outlined below.

3.2.1.1 Key Beliefs and Practices

There are four Noble Truths in Buddhism:

1. "That there is suffering;
2. That suffering has a cause;
3. That suffering has an end;
4. That there is a path that leads to the end of suffering."[44]

The Eightfold Noble Path is a guide to living a Buddhist life.[45] 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.[46]

Being a vegetarian is not necessarily a requirement of Buddhism, but it is left to the discretion of the individual. Buddhist vegetarianism is based on the belief that to take a life is negative.

Meditation is a key practice that evinces wisdom and concentration.[47] "Early mornings and evenings are common times for Buddhists to practice meditation."[48]

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42 Above note 41.

43 Fisher, M P *Living Religions* New Jersey, USA, Prentice-Hall Inc, 2002 at 156.

44 Australasian Police Multicultural Advisory Bureau *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, 2nd Edition at http://www.apmab.gov.au/guide/religious2/, visited 15 September 2003 at 22.

45 Torevell, above note 40 at 196 – 197.

46 Fisher, above note 43 at 150 – 152.

47 Torevell, above note 40 at 202.

48 Above note 44 at 23.

3.2.1.2 Holy Books and Scriptures

There are numerous holy scriptures associated with the many forms of Buddhism.[49] There is no collective term for the Buddhist holy scriptures. The teachings of the Buddha are collectively known as the *dhamma*, often translated as "the path", and so some groups call parts of the holy scriptures the *dhammapada*. Often, temples will reproduce parts of the Buddhist teachings for its adherents. The lack of a holy book reflects Buddhist rejection of material items and reliance on material objects.

3.2.1.3 Forms of Worship and Festivals

Many Buddhist Temples hold regular weekly services and additional services related to festivals. On the full moon in May the main Buddhist date is Vesak, which is the date of the Buddha's birth, liberation and passing away.[50] This date varies depending on the culture.[51]

3.2.1.4 Appearance before the Court

Bowing is common among Buddhists. It is a way of showing honour and respect. Clasped hands in a prayer-like gesture often accompanies a bow, especially when directed towards a person in authority. A bow with clasped hands is the general proper form of greeting to monks.

For religious reasons, monks and nuns from Cambodia, Sri Lanka, Thailand, Burma and Viet Nam may not directly look at a member of the opposite sex.

3.2.2 ISLAM[52]

"The Arabic word 'Islam' means 'submission'[53] and is derived from a word meaning 'peace'. In a religious context it means complete submission to the will of God. Sometimes Islam is referred to as *Mohammedanism*. This is a misnomer because it suggests that Muslims worship Muhammad (peace be upon him (pbuh)) rather than God. 'Allah' is the Arabic name for God, which is also used by Arab Christians and Muslims alike. Islam means submission to God in every aspect of life including faith, family, peace, love and work."[54]

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49 Torevell, above note 40 at 85 – 87.

50 Above note 44 at 23.

51 Above note 44 at 30.

52 Much of the information on Islam is taken with permission from: Australian Federation of Islamic Councils *Appreciating Islam* at http://www.afic.com.au/apislam.htm, visited 15 September 2003.

53 Welch, A T "Islam" in Hinnells, J R (ed) *A New Handbook of Living Religions* Hammondsworth, UK, Penguin, 1998, 162 – 235 at 162.

54 Above note 16.

There are 1.3 billion Muslims from many races, nationalities and cultures throughout the world. The largest Muslim country is Indonesia with 220 million adherents. There are 180 million Arab Muslims. In addition there are significant numbers of Muslims in Africa, Malaysia and other countries in Asia. There are approximately 16 million Muslim in Europe and 10 million in America. According to the 2001 census almost 300,000 Muslims live in Australia.[55] Muslims in Australia come from over 70 different countries and are therefore very ethnically and culturally diverse.[56]

There are two main groups within Islam: Shi'a and Sunni. The disagreement between the two groups relates to the successor to Mohammed; 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 Mohammed himself; whereas the Sunnis elect their leader.[57] The majority of Muslims are Sunnis.[58]

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.[59]

3.2.2.1 Key Beliefs and Practices

The Australian Confederation of Islamic Councils sets out the following:

"Muslims believe in One, Omnipotent, Compassionate, Beneficent and Indivisible God (Allah). Muslims believe in the Angels created by God; in 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.[60] Muslims are guided by the teachings of the Holy Qur'an and the sayings or traditions of Prophet Muhammad (pbuh). 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."[61]

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55 Racism – No Way *Fact Sheets: An introduction to Islam in Australia* at www.racismnoway.com.au/classroom/factsheet/26.html, accessed 15 September 2003.

56 Ibid.

57 La'Porte, V "Islam" in Markham I S and Ruparell T (edd) *Encountering Religion* Oxford, UK, Blackwell Publishers Inc, 2001, Chapter 15 at 341 – 340.

58 See also Welch, above note 53 at 178.

59 See also La'Porte, above note 57 at 344; Fisher, n 43 at 377 – 381.

60 See also Welch, above note 53 at 172.

61 See also Welch, above note 53 at 162.

3.2.2.2 Holy Books and Scriptures

"The Holy Qur'an is a comprehensive guidebook on the basic mechanisms for a healthy and harmonious society,[62] including codes of conduct, morality, nutrition, modes of dress, marriage and relationships, business and finance, crime and punishment, laws and government and so on."[63] It is considered the final, unaltered and unalterable word of Allah.

The second most important source of authority in Islam is the recorded teachings and practices of the Prophet Muhammad (known as the Sunna).

The Qur'an and Sunna together provide the primary sources for the Shariah or body of Islamic laws, which provides guidance for Muslims on all matters of private and public concern.

The Shariah thus comprises both:

1. a set of rules governing the individual's relationship with God, defined in terms of religious practice (the five pillars) which are non-negotiable, but vary in detail between five established schools of law (the Sunni majority Muslim population adhering to any one of the four schools of law (Maliki, Hanafi, Hanbali, Shafi'i) and the minority Shia population adhering to the fifth); and

2. a body of rules governing corporate relations which are flexible and open to change according to the principles of a highly developed jurisprudence.[64]

3.2.2.3 Forms of Worship and Festivals

"Five duties, known as the Five Pillars of Islam,[65] are regarded as central to the life of the Islamic community. The first duty is the profession of faith [*shahada]*: 'There is no God but Allah and Mohammed is his Prophet'". [66] 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

62 See also La'Porte, above note 21 at 345.

63 Above note 16.

64 Judicial Studies Board *Equal Treatment Bench Book* London (2004) at 3-46; http://www.gulf-law.com/islamic_law.html, visited 27 August 2004; De Seife, RJA *The Shar'ia: An Introduction to the Law of Islam* San Francisco – London, Austin & Winfield, 1994; Hussain, J *Islam: Its Law and Society* Sydney, The Federation Press, 2004.

65 Welch, above note 53 at 178; also known as the Five Pillars of Faith, see La'Porte, above note 1at 355.

66 Above note 16

be said facing Mecca.[67] "The third duty of a Muslim is to pay *zakat* (alms to the poor). The fourth duty is to fast during the month of Ramadan. The fifth duty is the pilgrimage to Mecca [*hajj]*."[68]

"There are two main festivals in Islam. The first festival is Eid-ul-Fitr-Ramazan Bayram which signifies the end of the month of fasting called 'Ramadan'".[69] 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."[70] The second is the Eid-ul-Adha-Kurban Bayram which commemorates the sacrificing of a sheep by the prophet Ibrahim (Abraham). A Muslim sacrifices a sheep and shares it with poor people and friends on that day.

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."[71] It is compulsory for men to attend the Mosque around mid-day for sermon and prayers. Women may also attend.

3.2.2.4 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, goat and seafood. Muslims are commanded to consume healthy and wholesome food and only the meat of these animals on which the name of God has been taken. Food that fits these criteria or has been prepared accordingly is termed "Halal" food.

Muslims cannot eat carrion but may eat forbidden foods "in extreme cases of a life threatening nature such as starvation. The Prophet taught that 'your body has rights over you', and therefore the consumption of wholesome food and the leading of a healthy lifestyle are seen as religious obligations."[72] This means not only approved foods but also the avoidance of "any toxins and the consumption of harmful products including drugs and alcohol."[73]

3.2.2.5 Dress Requirements

Within Islam, there is a wide spectrum of beliefs about the wearing of the *hijab*, ranging from a belief that it is a religious obligation for all

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67 Youth Action and Policy Association *NSW Islamic Young People* at http://www.yapa.org.au/facts/IslamicYoung.pdf, visited 23 April 2004.

68 Above note 16

69 Above note 16

70 Welch, above note 53 at 192 – 193.

71 Welch, above note 53 at 187 – 191.

72 Above note 16

73 Above note 16

women to cover their faces as well as heads, to a belief that it is un-Islamic to veil women.[74]

3.2.3 HINDUISM[75]

Hinduism is a remarkably diverse religion. It has evolved in many ways by different communities in India over thousands of years. Hinduism is one of the oldest living religions in the world. Hindus believe that their religion is cyclical – without beginning or end – preceding the existence of this earth and the other worlds beyond.[76]

Hinduism is unusual as a religion, having "no founder, no central creed and no central administration or hierarchy of ministers."[77] 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."[78]

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."[79]

3.2.3.1 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".

The three letters composing "Om" represent the Trinity, which is composed of the three supreme Hindu Gods: Brahma, the creator; Vishnu, the preserver; and Shiva, the destroyer.[80] It is believed that when "Om" is pronounced correctly, an invigorating effect is created in the body. Because of its significance this sacred syllable is spoken before any chant.

The symbol for "Om" also represents the universe.

The concepts of good and evil, sin and virtue are defined by a saying: *Punya* (virtue or good) is doing good to others; and *Papa* (sin, evil) is harming others.

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74 La'Porte, above note 21 at 356 – 361.

75 Much of the information about Hinduism is sourced from Australasian Police Multicultural Advisory Bureau *A Practical Reference to Religious Diversity for Operational Police and Emergency Services* 2nd Edition at http://www.apmab.gov.au/guide/religious2/, accessed 16 September 2003.

76 Ruparell, T "Hinduism" in Markham I S and Ruparell T (edd) *Encountering Religion* Oxford, UK, Blackwell Publishers Inc, 2001, Chapter 8 at 168 – 169.

77 Weightman, S "Hinduism" in Hinnells, J R (ed) *A New Handbook of Living Religions* Hammondsworth, UK, Penguin, 1998, 261 – 309 at 261.

78 Ruparell, above note 40 at 169.

79 Above note 39.

80 Ruparell, above note 76 at 179.

An example of *Papa* is found in the injunction that one should never tell lies, but always speak the truth. Sin is accumulated if one gives up truth and tells lies. Similarly, performing one's duties and actions ordained by the Sastras will earn one *Punya* or merit.

"Hindu scriptures give universal moral and ethical principles applicable to all sections of society. Designated as *Samanya Dharma* or common virtues, the list comprises *Ahimsa* (non violence), *Satya* (speaking the truth), *Asteya* (non stealing), *Daya* (compassion), *Dana* (giving gifts), *Titiksha* (forbearance), *Vinaya* (humility), *Indriyanigraha* (restraining the senses), *Santi* (keeping the mind at peace), *Saucha* (purity of body), *Tapas* (austerity) and *Bhakti* (devotion to God). If every one sincerely tries to cultivate these virtues in his [or her] personal life, there is no doubt that the whole society will be uplifted to greater levels of peace and joy."[81]

3.2.3.2 Holy Books and Scriptures[82]

"Most Hindu holy books are written in Sanskrit, an ancient language which is only spoken by scholars. The *Vedas* are the oldest of the Hindu holy books. Hindus believe that they came from God and are the basic immutable truths. Instructions about how Hindus should live their lives are contained in 2685 verses in the books of the *Laws of Manu"*[83] which were written down before 300CE.[84]

There are numerous Hindu holy books. The *Ramayana*; *Mahabharata* and *Bhagavadgita* are acceptable to the orthodox tradition and are venerated by most groups of Hindus.

The *Ramayana* contains the life and deeds of Sri Rama. The *Mahabharata* deals with the story of the Pandava Kaurava princes and of Sri Krishna.

The *Bhagavadgita* is more commonly known as the Gita and is a part of the *Mahabharata.* It is an extremely popular scripture. The Gita is a dialogue between Lord Sri Krishna and the mighty Pandava warrior,

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81 *An Introduction to Hinduism* at http://www.hindubooks.org/hinduqa/Q_1_10/question5.htm, accessed 16 September 2003.

82 See also Smith, "Religion and Scripture: The function of the Special Books of Religion" in Markham I S and Ruparell T (edd) *Encountering Religion* Oxford, UK, Blackwell Publishers Inc, 2001, Chapter 4.

83 Racism – No Way *Fact sheets: An introduction to Hinduism in Australia* www.racismnoway.com.au/classroom/factsheet/35.html, accessed 16 September 2003.

84 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. N.B. The abbreviation CE always goes after the year, never before (ie 2004 CE is the same as AD 2004): *Macquarie Dictionary*.

Arjuna. Set on the battlefield of Kurukshetra, its central message is that one should discharge one's duty, however hard and unpleasant, bravely and with selfless dedication.[85]

3.2.3.3 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.[86]

There are Hindu festivals almost every month. They are based on the Lunar Calendar and the dates vary from year to year. The main festivals observed in Australia are:

- Thaipusam in January;
- Sivarathiri in March (whole night vigil);
- Hindu New Year in April;
- Krishna Jeyanthi in September;
- Navarathiri in September/October (10 day festival); and
- Deepavali in October/November.

Festivals are happy occasions. It is believed that group energy attracts the gods, and overcomes evil.[87]

3.2.3.4 Dietary Rules and Taboos

Hindus believe in the interdependence of life and will not eat any food that has involved the taking of life. Consequently, most Hindus, especially women, are vegetarians. Amongst Hindus in Australia, there is some relaxation of the rules relating to food. Many Hindus are vegetarians only on Hindu festivals, eating fish and meat (but not 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.[88]

Fasting is common among Hindus, especially widows and elderly women. Normally Hindus fast for a day's duration; however, sometimes a vow is taken to fast for a specific number of days.[89]

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85 Above note 45.
86 Fisher, above note 43 at 111.
87 Fisher, above note 43 at 114.
88 Above note 39.
89 Above note 39.

3.2.4 JUDAISM[90]

A Jew may be any person whose mother was a Jew[91] or who has converted to Judaism. In Australia, the Jewish community consists of 84,000 people in over sixty congregations ranging from reformist to ultra-orthodox traditions.[92] Jews in Australia have a history extending back to arrival with the First Fleet.

"In Judaism, actions are far more important than beliefs, although there is certainly a place for belief within Judaism."[93]

3.2.4.1 Key Beliefs and Practices

Rambam's (also known as Moses Maimonides) thirteen principles of faith are a widely-accepted list of Jewish beliefs.[94] The following principles are considered to be the minimum requirements of the Jewish faith:

- "God 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' prophecies are true, and Moses was the greatest of the prophets;
- The Written Torah (first 5 books of the Bible) and Oral Torah (teachings now contained in the Talmud and other writings) were given to Moses;
- There will be no other Torah;
- God knows the thoughts and deeds of men;
- God will reward the good and punish the wicked;
- The Messiah will come;
- The dead will be resurrected."[95]

Although very basic and general principles, there has nevertheless been argument regarding how integral each principle is to Judaism. In particular, the liberal movements of Judaism dispute many of the principles.

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90 Much of the Information on Judaism is taken from: Rich T R *Judaism 101* at http://www.jewfaq.org/beliefs.htm, accessed 17 September 2003.

91 Unterman, A in Hinnells, JR (ed) *A New Handbook of Living Religions* Hammondsworth, UK, Penguin, 1998, 11 – 54 at 29.

92 Racism – No Way *Fact Sheet: An Introduction to Judaism in Australia* at http://www.racism.noway.com.au/classroom/Factsheet/27.html, accessed 22 April 2004.

93 See Ramsey, E "Judaism" in Markham I S and Ruparell T (edd) *Encountering Religion* Oxford, UK, Blackwell Publishers Inc, 2001, Chapter 12, at 273.

94 Ramsey, above note 57 at 279; See also Unterman, above note 91 at 22 – 24.

95 Torah Atlanta at http://www.torahatlanta.com/articles/ accessed 2 May 2005.

The Sabbath, or Shabbat, is a holy day for Jews and extends from sunset on Friday to sunset on Saturday.[96] Jews are commanded to remember and observe the Sabbath. This means turning one's mind to the meaning of Sabbath and praying; and refraining from any physical labour.[97]

3.2.4.2 Holy Books and Scriptures

The *Torah* contains 613 mitzvot or commandments for a holy way of life.[98] These include the Ten Commandments. Mitzvot have been expanded over the centuries through interpretation by Jewish spiritual leaders (rabbis). The interpretations, together with the Torah, comprises Jewish law (Halakhah), which covers all aspects of life, including theology, ethics, marriage, food, clothing, education, work and holy days.

3.2.4.3 Forms of Worship and Festivals

The most important festivals are:

- Rosh Hashanah, the anniversary of the creation of the world;
- Yom Kippur, Day of Atonement, the fast of Yom Kippur is the holiest day of the Jewish year when Jews repent their sins;
- Passover (Pesach), recalls the Exodus of the Israelites from slavery in Egypt;
- Pentecost (Shavu'ot), celebrates the giving of the Torah on Mount Sinai.
- Sukkot remembers the journey of the Jews through the desert on the way to the Promised Land.[99]

3.2.4.4 Dietary Rules and Taboos

Kashrut is the body of Jewish law dealing with which foods may be consumed and the proper preparation of food. "Kashrut" comes from the Hebrew meaning fit, proper or correct. It has the same root as the word "kosher," which describes food that meets these standards. The word "kosher" can also be used to describe ritual objects made in accordance with Jewish law. Kosher is not a style of cooking. Any food can be kosher if it is prepared in accordance with Jewish law. The degree of observance of kashrut can vary greatly among the many traditions of Judaism.

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96 Ramsey, above note 57 at 285.

97 At http://www.jewfaq.org/shabbat.htm, accessed 23 April 2004.

98 See Smith, above note 46 at 70 – 74.

99 Ramsey, above note 57 at 286.

Food that is not kosher is referred to as treyf (literally torn, from the commandment not to eat animals that have been torn by other animals).

The details of *kashrut* are extensive:[100]

- Certain animals may not be eaten. This includes the flesh, organs, eggs and milk of the forbidden animals. For example, no pork products may be eaten.
- Of permitted animals, birds and mammals must be killed in accordance with Jewish law. This involves draining or broiling out all blood before consumption.
- Certain parts of permitted animals may not be eaten.
- Meat (the flesh of birds and mammals) cannot be eaten with dairy. Fish, eggs, fruits, vegetables and grains can be eaten with either meat or dairy. (According to some views, fish may not be eaten with meat).
- Separate utensils must be used for meat or dairy and kosher or non-kosher foods. Contaminating contact may not occur when the food is hot.

3.3 Conclusion

This has been a very brief overview of the beliefs and practices of the major religions other than Christianity who have adherents in Queensland so that the court can be more aware of any issues that arise because of those beliefs and practices. Not all people will accept everything which has been set out as conforming to their own beliefs. Representatives of the various religions have been consulted and the information has been confirmed as representing at least a mainstream understanding of the issues discussed. There are always variations in religious practice and belief and judges should try to be sensitive to the possibility of such variations.

100 Fisher, above note 43 at 269.

Chapter 4 Family Diversity

4.1 Introduction

Families are diverse in terms of their composition, economic wellbeing, culture, language and religion. Our families, each in their unique ways, affect the way we live. The purpose of this chapter is to highlight some of the issues which arise from family relationships in recognition of the diversity that exists. The discussion of these issues overlaps with the issues considered in other chapters of this book, such as ethnic and cultural background and the role of children. The emphasis of this chapter is to consider these differences in the context of family relationships and how they affect family relationships.

This chapter is divided into two sections. First, it looks at and describes various family compositions and some of the current social trends. Then it looks at some of the specific issues which arise in the context of families and family relationships. This chapter is intended to provide a general description and an overview of the main relevant issues.

4.2 Family Compositions

4.2.1 Definition: Family

For statistical purposes, the Australian Bureau of Statistics defines 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."[101] Whilst recognising that this may be a useful and practical definition, this concept of family is limited. Most people would consider family as extending beyond those living in their household.

Australia is one of the most culturally diverse societies in the world.[102] In a pluralist society that recognises, appreciates and cultivates diversity, there is not one model of family.[103] This is evidenced by the growth of diverse family structures. For many ethnic groups, in particular, the concept of 'family' extends beyond the members of a household.

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101 Australian Bureau of Statistics Australian Social Trends: Family and Community – Living Arrangements: Changing Families 2003.

102 Swiss Federal Statistical Office 1998, "Monitoring Multicultural Societies: A Siena Group Report" in Australian Bureau of Statistics *Australian Social Trends 2000: Family Formation – Cultural Diversity in Marriage* at http://www.abs.gov.au/Ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/0820d37f8aca348fca256a7100188a57!OpenDocument, accessed 30/03/2004.

103 McDonald P "International Year of the Family: What are the Issues?" *Family Matters,* 1994, no 37 at 4.

4.2.2 Indigenous Families

There are many different groups of Aboriginal or Torres Strait Islander descent with their own traditions, cultural characteristics, languages or dialects and family life in Australia.[104] Differences in life style and residence combined with intermarriage have resulted in differences in family structure and culture in those groups. European arrival in Australia has affected all aspects of Indigenous Australians' lives. When approaching issues relating to Indigenous Australian families, it is important to be sensitive to culture, traditions and beliefs.[105]

For Indigenous Australians, their family shapes their identity.[106] Indigenous Australian families are characterised by the important role that Elders hold within a family and the strong sense of kinship which extends beyond the nuclear family.[107]

Indigenous Australians have a complex understanding of kinship. Kinship is organised in a way that defines rights and obligations of its members, as well as lines of action, rules of marriage and continuity of community life. While traditional kinship structures have weakened in some communities, extended families play a vital role in Indigenous family life, social organisation and provide psychological and emotional support. Without this kinship structure, Indigenous Australians are more likely to feel insecure and vulnerable, particularly when they are faced with problems.[108]

Elders play an extremely important role in Indigenous Australian families as role models, care providers and educators. They are strongly relied upon as key decision-makers within families as they enjoy a very high status and considerable power. Elders teach children skills, pass on tradition, care for young children and act as mediators in disputes. For example, much of the upbringing of children is undertaken by grandparents and, particularly, the grandmother. It is also often the case that when problems occur between parents and children, grandmothers are the ones from whom children seek security.[109]

Indigenous families are discussed further in Chapter 8.

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104 Horton D (ed) *The Encyclopaedia of Aboriginal Australia: Aboriginal and Torres Strait Islander History, Society and Culture* Canberra, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1994 at 934.

105 Sarantakos, S *Modern Families: an Australian Text* South Melbourne, Macmillan Education Australia 1996 at 74.

106 McDonald, P *Families in Australia: a Socio-Demographic Perspective* Melbourne, Australian Institute of Family Studies, 1995 at 7.

107 Walker Y, 'Aboriginal Family Issues' *Family Matters* (1993) vol 35 at 51 – 53.

108 Sarantakos, above note 105 at 73 – 74.

109 Walker, above note 107 at 53.

4.2.3 Families from Diverse Ethnic and Cultural Backgrounds[110]

Australia is a multicultural society with over 140 cultures. The numerically dominant people in Australia descend from Western and Northern Europe.[111] This Chapter does not discuss Western and Northern European cultural and ethnic groups on the basis that understanding of family compositions in this group is currently reflected in Queensland law and in the courts. The main cultural and ethnic groups in Queensland include: Italian, Chinese, Greek, Filipino, Vietnamese and Indian.[112] There are also a significant number of persons who identify as Lebanese, South American and African.[113] In addition, there are a number of migrants to Australia from Pacific Island communities.

Families from diverse ethnic and cultural backgrounds are identified on the bases of background (at least one parent of diverse cultural or ethnic extraction), identity (the family identifies itself as a family from a diverse cultural or ethnic background and acts as such), and recognition (the family is seen by the community as a family from that community and is accepted and treated as such). Only some features of families from diverse cultural or ethnic background are discussed in the following paragraphs as there is significant diversity due to cultural or ethnic background,[114] whether one or both parents were born overseas, in the same or different countries, whether they are first or later generation migrants and whether they adhere to their cultural or ethnic values. In addition, religious differences have a significant impact on family structures.

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110 In using the term 'Families from Diverse Ethnic and Cultural Backgrounds', the authors do not fail to recognise that long time Australians can be ethnically Irish / English / Scottish / German etc. We use the term in the sense of families ethnically different to the majority. Historically, Australian immigration policy had a vision of itself as being ethnically Western and Northern European ('the White Australia Policy') and this has led to the identification of 'Australian' with 'Anglo-Australian'.

111 MacDonald, P in Hartley, R (ed) *Families and Cultural Diversity in Australia* NSW, Allen & Unwin: 1995 at 25.

112 See Department of Premier and Cabinet *Diversity Figures – Brochure* http://www.premiers.qld.gov.au/library/pdf/divfig_brochure2.pdf, accessed 6 July 2004. This document details only those persons *born* overseas and therefore does not take account of those persons who identify with one or more of these cultural backgrounds because one or both of their parents were born overseas. These figures can be read in conjunction with Office of Economic and Statistical Research *Diversity: a Queensland Portrait* http://www.oesr.qld.gov.au/views/statistics/topics/demography/demo_fs.htm, accessed 6 July 2004. In particular the figures for "major source countries" should be viewed in the light of the figures for "birthplace of parents" and "languages spoken at home" to approximate the diversity of cultures in Queensland and which ones predominate.

113 Above note 112.

114 Especially for people who identify as ethnically Chinese, their country of origin could be Peoples' Republic of China, Taiwan, Hong Kong, Malaysia, Indonesia, Papua New Guinea, Viet Nam or Singapore.

Although there is significant diversity, there are also a number of factors common to many families of diverse cultural or ethnic backgrounds. For example, for all groups the family is the key to maintaining their cultural and ethnic identity. Many groups hold similar attitudes towards the family unit as being of more importance than the individual. Other common factors include: large families; extended kinship networks and neighbourhoods of families; systems of authority; concepts of family honour and shame; obligations to overseas family members; courtship and marital customs; care of the aged and care of children.[115]

For most of these cultures, family life is characterised by *familism,* a view that puts family before the personal rights, ideals, ambitions and interests of its members. In that sense, family welfare comes before personal happiness and welfare, and family identity is stronger and more important than personal identity.

For migrant families, the family is also one of the links to their country of birth. Especially for the later generations, the family can be one of the reasons why they identify as a particular ethnicity.

In many Chinese and Vietnamese families, hierarchical structure and Confucian values require members of the family to act according to their roles in the family (that is, as father, mother, brother, sister, aunt, uncle, etc); their individuality is subsumed within the family unit. This is reflected in the language, where most family members have a title indicating their position in the family (eg. Anh Hai (Vietnamese) – eldest brother / brother number two). Many decisions, whether related to vocation, marriage, study or recreation are made collectively by the family, rather than the individual.

Similar attitudes toward family can be seen in families from sub-Saharan Africa. Their families conventionally take the form of large, multi-generational units called lineages.[116] The social and economic status of individuals is determined by their place in their lineage and ownership of property is vested in the lineage. Marriage is arranged by elders with partners from different lineages and the bride is exchanged for payment, called bride wealth.

Ethnic families may be large, having an extended family network and often living in the same, or nearby suburbs. This wide kinship network acts as an economic, social and personal reference group providing companionship, assistance, emotional security, guidance, sources of role models and a sense of belonging. The extended family includes

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115 Much of the following material is collated from: Hartley, R (ed) *Family and Cultural Diversity in Australia* NSW, Allen & Unwin, 1995 and Sarantakos, S *Modern Families: An Australian Text* South Melbourne, MacMillan Education Australia, 1996.

116 McDonald, above note 106 at 10 – 11.

maternal and paternal grandparents, aunts, uncles, cousins, siblings and their children and can also include in-laws and their immediate family.

Kinship is nurtured and expanded through marriage and also through christenings and serving as the best man/woman in marriage. For example, for Greeks the best man at weddings or the sponsor at a child's baptism (*Koumparos*) is considered a *spiritual relative* and enters lasting and binding commitments; the sponsor of *Kivrelik* (the ritual performed through the rite of circumcision) becomes a part of the family of the young male and assumes duties related to the education and wellbeing of the young man. The Vietnamese consider in-laws as additional extended family, from whom emotional and financial support can be expected.

The concept of 'honour' is found in some form in all migrant groups. It can be a significant element in family life, acting as a control mechanism and guiding socialisation in ethnic families. For example, Chinese families' concept of honour (face) translates into being self-sufficient as a unit, rarely seeking help outside the bounds of the family. Family honour relates to reputation, premarital virginity and adherence to moral values. Deviation from the relevant values and standards not only brings shame to the family but also affects the future and marriage prospects of young women.

A key area in which the concept of family honour differentiates some families of diverse cultural or ethnic backgrounds from other Australian families is in court support. For example, in the eyes of the court it may be of benefit to an accused that his or her family members are present during a trial or sentence hearing. However, in Chinese and Vietnamese families, support is more often expressed via absence. The honour of the family as a whole is threatened by the individual's transgression and therefore, family members may not be present not because they do not support the individual but because it is too shameful to do so publicly. Of course, it is not necessarily detrimental to an accused that family members or other support persons are not present in court; however, it is worthwhile noting that absence of family members may be due to other, possibly culturally based, reasons.

In many migrant families, choice of marriage partner is a family decision and there is a strong emphasis on marrying from the same ethnic or cultural group, or a group that is perceived as sufficiently similar.

In addition to strong obligations extending beyond households, migrants have ties to other countries; usually the country of origin but also any country in which family members may reside. These ties include sending remittances overseas, family reunion sponsorships, and arrangements for marriages across countries.

Old age is well respected and honoured in families of diverse ethnic and cultural backgrounds. Older people are usually well integrated with the family structure of their children. This is based on mutuality – that is, filial responsibility for the aged. Many families have grandparents living with the core family unit (multi-generational household). This is especially common of Chinese, Greek and Vietnamese families. In Chinese and Vietnamese families, it is the duty of the eldest son to care for their elderly parents. For the Vietnamese, if the eldest son is unable or unwilling to perform this duty, the youngest daughter is expected to remain unmarried so as to support her parents. In Greek families, it is the responsibility of women to provide aged care.

Intergenerational conflict, which occurs throughout the community, may be exacerbated when there are marked differences in acculturation between first and second generation migrants. The conflict that sometimes arises between family of origin norms and broader cultural norms may cause considerable stress on some families and lead to behaviours viewed as outside the "norm or stereotype". First generation migrants may be concerned if they perceive that their children are moving away from their culture.[117]

4.2.4 Mixed Race Families

Mixed marriages are marriages between people from different birthplace groups.[118] According to the Australian Bureau of Statistics, the birth groups identified are:

- overseas-born (people who were born overseas and migrated to Australia);
- second generation (people born in Australia who had at least one parent born overseas – birthplace group is assigned based on father's country of birth, or if only one parent was born overseas than the country of birth of that parent); and
- long time Australian (people who were born in Australia and whose parents were born in Australia).[119]

Mixed race marriages can be indicative of the degree of integration with or acceptance by the local community, and the strength of ties amongst groups of different ethnicities.

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117 Communication, Stephen Maguire, Director, Multicultural Affairs, Queensland, 23 September 2004.

118 The following information is from: Australian Bureau of Statistics *Australian Social Trends 2000: Family Formation – Cultural Diversity in Marriage* at http://www.abs.gov.au/Ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/0820d37f8aca348fca256a7100188a57!OpenDocument visited 30/03/2004.

119 This categorisation does not account for people who identify as a certain ethnicity (particularly Greek, Italian and Chinese) but who may be third or later generation. Such people would come under the long time Australian category.

For overseas born Australians, 30 per cent married within their birthplace group. Of the other 70 per cent which were mixed race marriages, 30 per cent were marriages with long time Australians and 40 per cent were marriages with people from a different birthplace group. Overseas born women were marginally more likely than men to form mixed race marriages. There was variation among birthplace groups in relation to the number of mixed marriages. People born in the Netherlands were more likely to form mixed marriages with long time Australians, while people born in Viet Nam, Greece, China, Lebanon, Hong Kong and the former Yugoslav Republic were the least likely to form mixed marriages with long time Australians. About one third of women from the Philippines formed mixed marriages with long time Australian men.

Second generation Australians have a greater tendency to form mixed marriages with long-time Australians than their overseas born counterparts. Over half of those whose parents were born in New Zealand, Viet Nam, China, Philippines, India, Malaysia, Hong Kong and Poland formed mixed marriages with people from birthplace groups different to their own. The groups least likely to marry long time Australians were second generation people from Lebanon and second generation women from Viet Nam.

In mixed-race families, differences in parties' racial, ethnic and cultural backgrounds may give rise to particular issues and problems.

One issue concerns the acceptance or non-acceptance of the relationship or family by other family and friends of the parties involved. Non-acceptance, which may be due to a number of reasons, may result in biases and "taking sides" or in alienation of the parties from their family. Such issues may exacerbate or contribute to breakdowns leading to litigation and may be a relevant consideration for the court.

A further issue is that parties bring with them into the relationship understandings and inherent expectations which the other party may be completely unaware of. Therefore, there is the potential for apparent agreement being based on actual misunderstandings. While these differences could arise in any relationship, such issues are more prevalent in mixed race relationships because of the parties' particular cultural or ethnic background.

Lastly, in some mixed race relationships one party may be particularly vulnerable for reasons such as lack of English skills, lack of education, fewer social contacts etc, which may place the other party in a position of power and control over the vulnerable party. Such power differentials can exacerbate and/or contribute to abuse in the family relationship.

4.2.5 Sole Parent Families[120]

Sole parent families are formed as a result of separation, divorce or the death of a spouse and include parents who were single at the time of the birth of their child and who did not later form couple relationships. However, the statistics for this type of sole parent family are unreliable as they are dependent on looking at the numbers of births outside registered marriage. There is presently no reliable way to separate sole parent births from births to de-facto couples.

A characteristic of sole parent families is that a high proportion is female headed (83 per cent in 2001). Sole mothers also tend to have younger children living with them.[121] In contrast, 56 per cent of sole fathers had children over the age of 15 years living with them, compared with 39 per cent of sole mothers.

Sole parent families have the highest incidence of family poverty in Australia. There are a number of reasons for this.[122] First, the proportion of sole parent families not in paid employment is higher than the proportion of two parent families where both parents are not in paid employment. Second, there is a significant disadvantage in finding work compatible with a sole parent's more onerous family responsibilities. Third, as most sole parent families are female headed, and as rates of pay are still not equitable, sole parent families may earn significantly less. Fourth, child support payments are unable to offset the financial disadvantage that custodial parents will suffer on separation. Fifth, sole parents are disadvantaged in finding affordable housing. Last, there is a high degree of reliance on government income support payments.

4.2.6 Same-sex Parents

Up to ten per cent of gay men and 20 per cent of lesbian women are parents.[123] Children of gay and lesbian parents may have been born in the context of a previous heterosexual relationship, have been fostered or adopted, or increasingly, born through donor insemination. As more gay men and lesbian women choose to raise children outside the

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120 Australian Bureau of Statistics *Australian Social Trends: Family and Community – Living Arrangements* at http://www.abs.gov.au/Ausstats/abs@.nsf/46d1bc47ac9d0c7bca256c470025ff87/ea563423fdbffd30ca256d39001bc33c!OpenDocument visited 30/03/2004; McClelland note 122.

121 22 per cent of sole mothers had at least one child under the age of 4 years, compared with only 9 per cent of sole fathers.

122 McClelland A, "Families and Financial Disadvantage" *Family Matters,* no 37, 1994, 30

123 Millbank, J, *Meet the Parents: A review of the research on lesbian and gay families*, Gay and Lesbian Rights Lobby (NSW), Sydney, 2002, 21.

traditional two parent heterosexual relationships, "new family forms are appearing without the social or legal categories to recognise them".[124]

The lack of legal recognition of such relationships can cause difficulties for families, for example in a Canadian study:

> "Several non-biological mothers reported difficulties in getting children admitted to hospital or in to see a doctor because they could not prove their maternal identity or their legal right to make medical decisions for the child. This legal barrier had emotional repercussions for the non-biological mothers, who could not help feeling excluded from their childrens' lives when in the public realm."[125]

4.3 Family Issues

4.3.1 Interdependencies

While the composition of families may be different among different groups, family relationships are defined by such qualities as commitment, emotional and financial interdependence.[126] Research shows that families are the most important source of practical, emotional and financial support in society.[127]

Therefore, the family relationship can be a subject of exploitation. This is especially true in relationships in which the power differential is greatest; characterised by a subordinate party who is unable to access resources or protect their own interests other than from the family relationship and a more powerful party who has discretionary control of resources.[128] The relationship of children and young people to adult caregivers is one such example.

4.3.2 Children and Young People

In most communities, children rely on the altruistic exercise of power by adults to protect their interests.[129] A parent's responsibilities, rights and duties to direct and guide their children should be respected. [130]

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124 Millbank, J, And then…the brides changed nappies: Lesbian mothers, gay fathers and the legal recognition of our relationships with the children we raise, Gay and Lesbian Rights Lobby, Sydney, 2003, 4

125 Nelson, F, *Lesbian Motherhood: An Exploration of Canadian Lesbian Families*, U of T Press, Toronto, 1996, 85, quote in Millbank, n124, 25.

126 The Hon Chief Justice A Nicholson "The Changing Concept of Family: The Significance of Recognition and Protection" (1997) 11 *Australian Journal of Family Law* 13 at 18.

127 McDonald P "International Year of the Family: What are the Issues?" *Family Matters,* 1994, no 37, 4.

128 Rayner, M 'Human Rights, Families and Community Interests' *Family Matters,* no 37, 1994, 61.

129 Rayner, above note 128.

However where there is a conflict between parental authority and the child's "best interests", that conflict is resolved in terms of the child's rights, not parental authority. Child abuse includes at least physical, sexual and emotional abuse and neglect[131] and describes forms of violence inflicted or allowed to be inflicted upon children by their parents, and may include physical, emotional, social or sexual non-accidental behaviour, injury, exploitation or neglect.[132]

Further issues in relation to children are discussed in Chapter 13.

4.3.3 Family Violence

Family violence is any form of action, emotion or neglect that has the intent to control, hurt or destroy a family member.[133] It varies in intensity and extent, seriousness and severity.[134] When approaching issues of family violence, one needs to be free of subconscious stereotypes. Family violence may involve wife abuse, husband abuse, mutual assault, child abuse, parent abuse or elder abuse.[135] In the *Domestic and Family Violence Protection Act* 1989 (Qld) ("the DV Act"), domestic relationships are defined as spousal, intimate personal, family or informal care relationships.[136]

Abuse includes[137] physical violence, emotional abuse, verbal abuse, social abuse (actions and behaviour that have the intent to restrict the partner's social actions and relationships; ability to express and fulfil ambitions; or performance of established and practised family role,), sexual abuse, passive violence (entailing some form of neglect) and marital rape. It is worth noting that the figures on family violence relate almost exclusively to physical violence, ignoring other forms of violence.[138] In s11 of the DV Act, domestic violence is defined as any of the following acts:

- wilful injury
- wilful damage to property
- intimidation or harassment
- indecent behaviour
- threat to commit any of the above acts.

Abuse may be difficult to prove as the perpetrators are a very heterogenous group, who vary in terms of background, personality and

130 Children have a right to 'appropriate direction and guidance' by parents in the exercise by the child of the rights recognised in Article 5, *Convention on the Rights of the Child* and the Common Law.
131 Sarantakos, note 105 at 302.
132 Above note 105 at 301– 302.
133 Above note 105 at 265.
134 Above note 105 at 265.
135 Above note 105 at 267.
136 s 11A.
137 Above note 105 at 269.
138 Above note 105 at 271.

social characteristics.[139] For example, social abuse may be as destructive as any other form of abuse, and can be inflicted by both spouses on each other and on their family members.

The consequences of violence depend on various factors, but the two most significant are physical and psychological harm. Victims report feeling guilty for having been subjected to violence, for staying, for knowing that if they had to leave the abuser they would cause or facilitate the destruction of the family. In many cases they also feel ashamed and degraded, experience a sense of failure and demonstrate low self-esteem.[140]

The powerlessness experienced by those suffering domestic violence, in particular women, is frequently exacerbated for people "from non-English-speaking backgrounds. They may have little or no English, be isolated by cultural attitudes to women's roles in families, have poor opportunities for employment, be confronted by racism and prejudice in their daily lives and have limited access to information and support targeted at those from non-English-speaking backgrounds."[141]

4.3.4 Relationship Breakdowns

The growth of de facto relationships has been a significant recent change in the Australian family structure. Before the amendment to the *Property Law Act* 1974*,* relief after the breakdown of a de facto relationship was sought under the general law. This was criticised for lack of predictable outcome as there were a large range of possible remedies (under contract law or trusts, doctrines of unjust enrichment or unconscionable conduct or estoppel) and many parties did not pursue just claims.[142] For a de facto relationship[143] that ends after 21 December 1999, the resolution of financial matters is facilitated by Part 19 of the *Property Law Act* 1974 (Qld).[144] The Part is aimed at the just and equitable resolution of financial matters at the end of the relationship. Part 19 does not, however, affect a right of a de facto partner to apply for a remedy or relief under another law.[145]

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139 Above note 105 at 273.

140 Above note 105 at 289.

141 Moss, I *State of the Nation: A Report on People of Non-English speaking Background* Human Rights and Equal Opportunity Commission, AGPS, Canberra.

142 Explanatory memorandum to the *Property Law Amendment Act* 1999 at 2.

143 Part 19 does not deal with property settlement at the end of a marriage nor with the custody of children as these issues fall within the jurisdiction of the Family Court. The Part defines de facto relationship, de facto partner with further definition of de facto partner in the *Acts Interpretation Act* 1954, s 32DA.

144 *Property Law Act* 1974 (Qld), s 255(a).

145 *Property Law Act* 1974 (Qld), s 258.

De facto partners have relatively wide autonomy in the resolution of their financial affairs. Division 3 allows de facto partners to make cohabitation agreements,[146] separation agreements[147] and recognised agreements[148] to exclusively regulate the resolution of their financial affairs.[149] An agreement applies even where one de facto partner dies before the provisions of the agreements have been carried out.[150] A recognised agreement is not varied unless it results in serious injustice or if it is impracticable.[151] These agreements, however, cannot exclude the jurisdiction of the courts[152] and are subject to the law of contract.[153]

Division 4 provides for the resolution of financial matters by the courts. Most importantly, a court may make orders to adjust property interests to ensure just and equitable property distribution at the end of a de facto relationship.[154] Matters for consideration as to what is just and equitable are wide ranging and include non-monetary contributions. These include:

- contributions to property or financial resources;[155]
- contributions to family welfare;[156]
- effect on future earning capacity;[157]
- child support provided by either de facto partner;[158]
- other orders which the court considers should be taken into account;[159] and
- other matters in subdivision 4[160] which the court considers are relevant.[161]

146 *Property Law Act* 1974 (Qld), s 264.
147 *Property Law Act* 1974 (Qld), s 265.
148 *Property Law Act* 1974 (Qld), s 266.
149 *Property Law Act* 1974 (Qld), s 269.
150 Unless the agreement expressly provides otherwise: *Property Law Act* 1974 (Qld), s 273.
151 *Property Law Act* 1974 (Qld), s 276.
152 *Property Law Act* 1974 (Qld), s 271.
153 *Property Law Act* 1974 (Qld), s 272; for example, effect of mistake, fraud, duress, undue influence or unconscionability in relation to a cohabitation or separation agreement is decided by the law of contract.
154 *Property Law Act* 1974 (Qld), ss 282, 286.
155 *Property Law Act* 1974 (Qld), s 291.
156 *Property Law Act* 1974 (Qld), s 292.
157 *Property Law Act* 1974 (Qld), s 293.
158 *Property Law Act* 1974 (Qld), s 294.
159 *Property Law Act* 1974 (Qld), s 295.
160 Age and health, resources and employment capacity, caring for children, necessary commitment, responsibility to support others, government assistance, appropriate standard of living, contributions to income and earning capacity, length of relationship, financial circumstances of cohabitation, effect of relationship on earning capacity, child maintenance, and other facts and circumstances.
161 *Property Law Act* 1974 (Qld), s 296.

Division 5 provides for declaratory relief as to the existence or non existence of a de facto relationship.[162] The period for which the de facto relationship existed must be stated.[163]

A court has wide powers to make orders,[164] to set aside or vary orders[165] and to deal with circumstances where a transaction is aimed at defeating an existing or anticipated order.[166]

Generally, Part 19 provisions closely reflect those matters that may be considered by the Family Court under *Family Law Act* 1975 and regard should be had to case law and principles from the application of the *Family Law Act* 1975.

Same sex relationship breakdowns are encompassed within the de facto relationship framework. Prior to the enactment of any legislation in New South Wales relating to de facto relationships, Glass JA in *Allen v Snyder* stated that:[167]

> "… the rules, however they come to be formulated, ought to apply indifferently to all property relationships arising out of cohabitation in a home legally owned by one member of the household, whether that cohabitation be heterosexual, homosexual, dual or multiple in nature."

Such a position is reflected in the definition of 'de facto partner' found in s 32DA of *Acts Interpretation Act* 1954 (Qld). In particular, s 32DA(5)(a) states "the gender of the persons is not relevant" to the definition of de facto partner in subsection (1), being persons living together as a couple on a genuine domestic basis. Section 32DA was inserted by the *Discrimination Law Amendment Act* 2002 and became operative on 1 April 2003.

Further issues in relation to breakdown of same sex families are discussed in Chapter 15.

4.4 Conclusion

This chapter has been a very general overview of concepts of family and issues relating to families. The 'family' impacts on many areas of life and legal issues. This is especially true for families from diverse

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162 *Property Law Act* 1974 (Qld), ss 316, 319, 320, 321.

163 *Property Law Act* 1974 (Qld), s 321.

164 *Property Law Act* 1974 (Qld), s 333.

165 *Property Law Act* 1974 (Qld), s 334.

166 *Property Law Act* 1974 (Qld), s 335.

167 [1977] 2 NSWLR 685 at 689; quoted in Malcolm, The Hon. Justice David "Same Sex Couples: Equity's Response" in *Murdoch University Electronic Journal of Law* (1996) vol 3, no 3 http://www.murdoch.edu.au/elaw/issues/v3n3/malcolm.html, accessed 8 April 2004 at [36].

cultural and ethnic backgrounds where the family is more intertwined with all aspects of life and where ideals are less individualistic.

Chapter 5 Oaths and Affirmations

5.1 Introduction

At common law, no testimony can be received except on oath. Sworn testimony can be given only by those who believe in a God, who will punish them should they be untruthful in their evidence.[168]

From the 17th Century, the common law recognised that a witness who was not of the Christian faith, was competent to give sworn evidence.[169] What is essential for any sworn evidence, is that the oath be administered in a form and manner which affects the witness's conscience.[170]

Whether the administration of an oath to a witness is lawful does not depend upon the detailed observances of a particular religion, but concerns two matters – 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 himself or herself considers to be binding on his or her conscience.[171]

Part 6 of the *Oaths Act* 1867 (Qld) prescribes certain forms of oath, but permits the use of an alternative form which is to the same effect.

Section 39 of the *Oaths Act* provides that whenever it is found to be impracticable to administer the oath in the form and manner required by the witness's religion to make it binding on the witness's conscience, then the witness must make an affirmation. So a particular requirement for the administration of an oath is unlikely to preclude that person's evidence being given. Many people strongly believe that a witness who is able to give sworn evidence should have both the opportunity and obligation to do so. This may be important to the witness, to a party or to a juror.

The importance of providing a means by which an oath 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 more common religions.

5.2 Facilitating alternatives

It is important, especially in a jury trial, for the need for a particular form and manner of oath to be identified before the witness reaches

168 Cross on Evidence (Australian Edition) at [13050]; R v Brown [1977] QdR 220 at 221-222.

169 Queensland Law Reform Commission: Report on the Oaths Act (QLRC Report No. 38, 31 March 1989) at 74.

170 *Omychund v Barker* (1745) 1 Atk 21; 26 ER 15.

171 *Kemble v R* (1990) 91 Cr App R 178 at 180.

the witness box and is about to be sworn. This would also enable the appropriate holy book to be available when required. And some witnesses may not realise that they are able to take the oath in a way which is appropriate for them, and instead may simply agree to take the oath on the Bible when it is provided by the bailiff.

Section 17 of the *Oaths Act* provides that if a person objects to being sworn as a witness, an affirmation can be made instead. Section 17 provides:

> "**Affirmation instead of oath in certain cases**
>
> **(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 for the objection to be stated and nor does it expressly require the court to be satisfied of the sincerity of the objection. But the objection to taking the oath must be apparent to the court, for otherwise the giving of evidence on affirmation is permitted only in circumstances relevant to s 39.[172] Where possible however, it is preferable to have the fact of that objection made apparent to the court in the absence of the jury so that a jury does not improperly rely on any such matter in evaluating the credit of a witness.[173]

Section 37 was left unchanged when s 17 was amended. It still provides that:

> "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

[172] In this respect, the amendment to s 17 did not adopt in full the recommendation of the Queensland Law Reform Commission in its report on the Oaths Act, which was that a witness should not have to disclose in open court either the grounds for the objection or the objection itself: see pages 96, 126.

[173] QLRC Report at 96 citing Gibbs J in *Demirock v R* (1977) 137 CLR 20.

> 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."

The amendment to s 17 removed not only the requirement in subsection (1) that the Court be "satisfied of the sincerity of such objection" but also subsection (3) which had provided that the objection to being sworn might be based on an absence of religious beliefs, conscientious grounds, or such other grounds as were considered reasonable. As the evident intention of s 17 is to permit a person to make an affirmation upon his or her objection to being sworn, without the grounds for or sincerity of that objection having to be established to the Court's satisfaction, there is some tension between sections 17 and 37. But where there is an objection by a witness to being sworn, it is s 17 which should be applied.

In that context, it is unnecessary and inappropriate to inquire as to the reasons for the objection.

At present, the court has no practice direction in terms corresponding with Practice Note 16 in the Federal Court, which provides that:

> "The 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 has other requirements to facilitate the taking of an oath in accordance with his or her beliefs)."

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 Equal Treatment Benchbook published by the Judicial Studies Board (UK)[174] recommends the following as matters of good practice:

- "the sensitive question of whether to affirm or swear an oath should be presented to all concerned as a solemn choice

[174] *Judicial Studies Board*: Equal Treatment Benchbook London (March 2004) at 3-8 [3.2.1].

between two procedures which are equally valid in legal terms;

- the primary consideration should be what binds the conscience of the individual;
- one should not assume that an individual belonging to a minority community will automatically prefer to swear an oath than affirm;
- all faith traditions have differing practices with regard to court proceedings and these should be treated with respect."

5.3 Alternative Oaths

5.3.1 Buddhism

As Buddhist culture can vary across countries, it is impossible to prescribe a form of oath which would be acceptable to all Buddhists. However, as a general rule, it is not acceptable for a Buddhist to swear a promise on a text. Above all, a Buddhist must not be presumed to be Christian or asked to swear on a Bible. This would have no meaning at all and can create hostility.[175] Generally, as legal matters are seen as secular in nature in Buddhism, no outward sign of worship is appropriate.[176] The Buddhist Council of Victoria, in its submissions to the Victorian Parliament Law Reform Committee, 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 other submissions received by the Victorian Parliament Law Reform Commission, Buddhists should not be asked to swear in the name of Buddha.[177] Hence, an affirmation which begins with the words, "I declare in the presence of Buddha…," is not acceptable.[178]

It must also be kept in mind that Dhamma is not recognised as a deity by Western Buddhists. Thus, any form of oath which refers to the deity Dhamma is insulting to Western Buddhists and has no effect on their conscience.[179]

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175 Buddhist Council of Victoria, 'Submission to the Victorian Parliament Law Reform Committee on the Inquiry into Oaths and Affirmations with Reference to the Multicultural Community,' 2002 at http://www.parliament.vic.gov.au/lawreform/ accessed 1 September 2004.

176 Ibid.

177 Victoria Parliament Law Reform Committee *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community* Melbourne, Government Printer, October 2002 at 121.

178 Above note 174 at 3-12 [3.2.3].

179 Above note 177 at 116-117.

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 stipulate the above type of practice and does not have the appropriate book with them, they should affirm as indicated above.[180]

5.3.2 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.[181] Muslims would be aware of the injunction found in the Qur'an, their holy book, "…do not break oaths once they have been sworn. You have set up God as a surety for yourself. God knows whatever you do."[182] Hence, the validity of the oath and the obligation it imposes flow directly from the invocation in the name of God. As long as the words, "in the name of Allah (or God)," are included, it would be recognised as an oath.[183] An oath in the following form would be acceptable to The Islamic Council of Victoria. The Victorian Parliament Law Reform Committee suggested the following oath: [184]

> **"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".**

The Islamic Council of Queensland has confirmed that this is an acceptable form of oath.

A Qur'an should be available for Muslim witnesses. There are rules as to how the Qur'an should be dealt with. The book should be kept covered at all times, except when being touched by the witness taking the oath. There is no religious significance in the colour of the cloth covering.[185] The witness may wish to wash before taking the oath on the Qur'an and, as the person administering the oath would not be in a state of ritual purity, they should not touch the book.

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180 Above note 174 at 3-12 [3.2.3].

181 Islamic Council of Victoria, 'Submissions to Inquiry by the Victorian Parliament Law Reform Committee into Oaths and Affirmations with Reference to the Multicultural Community,' 1 August 2002 at http://www.parliament.vic.gov.au/lawreform/ accessed 1 September 2004.

182 16:91.

183 Above note 177 at 91-92.

184 Above note 181.

185 Communication, Abdul Jalal, Islamic Council of Queensland, 31 August 2004, on file.

Women may ask to affirm when they are menstruating.[186] When the oath is being taken, the witness should hold the Qur'an in the right hand, as certain significance is attached to tasks according to with which hand they are performed. The book should not be marked in any way as this devalues it.

5.3.3 Hinduism

There are a number of holy books in the Hindu faith, but the best known book is the Bhagavad Gita. It is inappropriate for a Hindu to swear on the Bible; the Gita should be used.[187] The form of oath taken by a Hindu witness need not differ from the Christian form of oath.

The handling of the holy Gita requires care. It should be kept wrapped in cloth, preferably red, and remain covered except when the witness touches it to take the oath. No one but the witness should touch the book and it should not be marked in any way. The witness may wish to remove their shoes and bow before the Gita with folded hands before or after taking the oath.[188] When the witness is taking the oath, they should hold the Gita in their right hand or place it on their head. There is a view that the right hand is significant as it is always used for important actions.[189]

There is also authority for forms of Hindu oaths including swearing "by the holy water of the Ganges and by the sacred animal, the cow" and asking, "If I do not tell the truth may my soul be damned", and using the standard Christian wording but touching the hand or foot of a Brahmin.[190] But these forms may be inappropriate for some witnesses.

An appropriate form of oath is:

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

5.3.4 Sikhism

It is inappropriate for Sikhs to take an oath on the Bible.[191] The main holy book of the Sikh faith is the Guru Granth Sahib ("the Granth"). 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. In fact, the Punjab High Court has ruled

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186 Above note 174 at 3-10, 3-14; and as instanced in *Kemble* at 180.

187 Above note 177 at 114.

188 Above note 174 at 3-10.

189 Above note 174 at 3-38.

190 Above note 177 at 118.

191 Australasian Police Multicultural Advisory Bureau *A Practical Reference to Religious Diversity for Operational Police and Emergency Services* 2nd ed Melbourne, Australasian Police Multicultural Advisory Bureau, at 80.

that on no account may a Granth be brought into court.[192] The Sunder Gutka ("the 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.

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. 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 his or her possession. The book should only be directly handled by the witness.

Sikhs taking the oath will usually wash their hands and take off their shoes. They may also wear a small cloth, called a Patka, to cover the head if they are not wearing a turban.[193] The witness should then hold the Gutka in both hands while the oath is administered. Women who are menstruating may choose to affirm at these times.[194]

A suggested form of oath 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".**[195]

5.3.5 Judaism

The New Testament is not used in Jewish worship and hence, any Bible which contains the New Testament is not appropriate for an oath by a Jewish witness. Since 1688, Jews have been permitted to take the oath on the Old Testament and many Jews are happy to do this.[196] The appropriate holy book for a Jewish person is the Torah. The proper Bible which should be available for a Jewish person to take an oath upon is a Hebrew Bible. This would contain either only the 5 Books of Moses; or those plus the other 36 Books of the Old Testament (Judges, Prophets etc.), and the Bible should be written in the Hebrew Language (Ivrit). However, others will state that taking an oath is contrary to their religion and will request to make an affirmation.

Many Jewish men wear a skull cap, or kippah. The kippah signifies that they are in the presence of God. Some men will only wear the skull cap while taking the oath, others may cover their head at all

192 Above note 177 at 118.
193 Above note 191 at 81.
194 Above note 174 at 3-10, 3-14.
195 Above note 174 at 3-71.
196 Weinberg, M 'The Law of Testimonial Oaths and Affirmations' 1976 *Monash University Law Review* 3 November at 25-40.

times. This should not be considered disrespectful to the court.[197] 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 wear the kippah when taking the oath or affirmation.

A common form of oath is:

> **"I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth and nothing but the truth".**

5.4 Other Oaths

5.4.1 Chinese witnesses

A number of different ceremonies have been used in courts in common law countries for Chinese witnesses' oaths. These include breaking a saucer, or snuffing out a candle or match. However, Weinberg states that these are "merely rituals attaching to certain societies which have been adapted to the judicial procedure of Her Majesty's Courts of Justice."[198] These types of ceremony have no special significance for Chinese witnesses. A religiously appropriate oath or an affirmation should therefore be preferred.

5.4.2 African Cultures

Whilst many Africans will be Muslim or Christian, some will maintain their own traditional religious heritage, for which the religious tradition is oral. Making an affirmation would be appropriate in such cases.[199]

5.4.3 Rastafarians

Rastafarians are not Christians, but do hold the Bible in great reverence. Hence, they will often be willing to be bound by an oath on the Old or New Testament.

It is customary for Rastafarians to wear a hat or beret in and out of doors. This should not be seen as disrespectful to the court and they should not be asked to remove their headwear.[200]

5.4.4 Baha'i

Baha'i witnesses can take an oath that binds their conscience on the Bible. However, it would be preferable if a Baha'i-specific book, such as the Kitab-i-Aqbas, was used instead.[201]

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197 Above note 174 at 3-58.
198 Above note 196.
199 Above note 174 at 3-13.
200 Above note 174 at 3-14.
201 Above note 191 at 20.

5.4.5 Alternative oaths for some Christians

Most traditional Christians will prefer to take the standard oath as set out above. Some alternative practices have emerged with different Christian religions. However, it can be presumed that most Christians will be prepared to take the oath on the Bible in the standard manner.

Witnesses from some Christian denominations would prefer to make affirmations. The main groups that this applies to are Quakers (otherwise known as the Society of Friends), Moravians and Separatists. Usually, they will object to taking an oath on the Bible because they believe that a religious oath sets up a "double standard of truthfulness, whereas sincerity and truth should be practised in all dealings of life."[202] Hence, members of these groups are 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 dealt with in the *Oaths Act*. Section 18 sets out the proper form of the 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 united brethren called Moravians *as the case may be*] do solemnly sincerely and truly affirm and declare."**

Section 19 gives the form of affirmation for 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."**

[202] Above note 177 at 90.

Chapter 6 Effective Communication in Court Proceedings

6.1 Introduction

In its 1992 report *Multiculturalism and the Law* the Australian Law Reform Commission stated what appears to be a self-evident proposition:

> "Fundamental principles of access and equity require that all Australians know their legal rights, duties and responsibilities, the role of the state, the basis on which it will intervene and how the courts and the legal system operate. They also demand that services and support provided by government are accessible to all who are entitled to use them, without discrimination or hidden barriers."[203]

Like many things, this is far less simple than it sounds. Many people in the Australian community who were born and raised in Australia lack this level of knowledge about their legal system. The ALRC acknowledged this fact, but noted that people from a non-English speaking background face an additional barrier to acquiring such information.[204] This barrier may come in the form of a lack of understanding of the English language, or it may present in subtler forms due to the litigant's lack of familiarity with general Australian cultural norms.

Dr Sussex in his article, "*Intercultural communication and the Language of the Law*,"[205] noted:

> "If counsel needed to be informed on cultural issues in order to exploit a witness or an argument, or to defend their client appropriately, then judges are even more urgently required to master this knowledge in order to preserve equity in the courtroom. In this instance, intercultural knowledge is needed in order to control a situation where miscommunication or misinterpretation may result from a knowledge shortfall."

In the 1996 Census over 200,000 Queenslanders stated that they spoke a language other than English at home. The most common language spoken was Chinese (13.8 per cent, but this was not broken down into dialects), followed by Italian (11.9 per cent) and German (7.9 per cent). Based on statistics derived from this Census, the Australian Bureau of Statistics estimates that 16.8 per cent of the Queensland population was born overseas. 5.1 per cent of those born overseas – about 30,000 Queenslanders – stated that they either did not speak

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203 Australian Law Reform Commission *Multiculturalism and the Law* Report no 57 Canberra, Australian Government Print Service, 1992 at [2.2].

204 Above at [2.3].

205 (2004) 78 ALJ 530 at 539.

any English or considered that they did not speak it very well.[206] Over 200 languages are regularly spoken in Australia.[207] This indicates the existence of a significant group of people within the Queensland community whose lack of English and/or lack of familiarity with cultural norms may impede their access to justice, and access to the courts in particular. Such people pose a particular challenge to the legal system in its aim to deliver justice according to law for all. The Australian Law Reform Commission noted in 1992 that its consultation with the community "reveal[ed] a general perception that there is widespread cultural insensitivity in the operation and administration of the law",[208] but a general description of the problems faced by people from a non-English speaking background in their encounters with the legal system is beyond the scope of this Chapter. This Chapter focuses on the issues which Judges may encounter when dealing with cases which involve people from a non-English speaking background, as well as practical strategies which Judges may choose to employ to address these issues. These are issues of which all legal practitioners should be aware. The first part of this Chapter discusses the use of interpreters and translators in Court, while the second part turns to the evaluation of non-verbal forms of communication.

6.2 Working with Interpreters and Translators

The relevant Australian accreditation authority for interpreters and translators is the National Accreditation Authority for Translators and Interpreters (NAATI), a corporation owned by the Commonwealth, State and Territory governments of Australia. NAATI accreditation is the only officially accepted qualification for translators and interpreters in Australia. NAATI was established in 1977.[209]

A person may be accredited both as a translator and as an interpreter, but these are distinct qualifications and skills. Although these terms are often used loosely in general speech, 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."[210] An interpreter should be employed to interpret court proceedings to a witness, party or defendant. A translator should be used to translate texts, for example a recorded conversation or a contract. It will be apparent that interpreters will commonly be encountered assisting parties in Supreme Court proceedings, and that translators will generally be called as witnesses. In *Butera v Director of Public Prosecutions for the State of*

206 Australian Bureau of Statistics *2001 Queensland Year Book* Canberra, Australian Bureau of Statistics, 2001 at 56 – 57.

207 Sussex R (2004), above note 205 at 540.

208 ALRC no. 57, above note 203 at [2.5].

209 See http://www.naati.com.

210 NAATI *Concise Guide for Working with Translators and Interpreters in Australia* ACT, NAATI Ltd, 2003 at 2; available from http://www.naati.com.au.

Victoria[211] the High Court held that a properly proved translation may be admitted into evidence and suggested that, when the accuracy of the translation has been questioned, a transcript of the cross-examination of the translator should also be supplied to the jury.[212]

A professional interpreter may employ any one of the following techniques when interpreting a conversation:

> "Dialogue interpreting involves interpretation of conversations and interviews between two people. The interpreter listens first to short segments before interpreting them. The interpreter may take notes.
>
> Consecutive interpreting is when the interpreter listens to larger segments, taking notes while listening, and then interprets while the speaker pauses.
>
> Simultaneous interpreting is 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 proceedings.
>
> 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."[213]

6.2.1 Accreditation of Interpreters and Translators

NAATI accredits translators and interpreters at the following levels:[214]

Paraprofessional interpreter/translator

Persons accredited at this level can interpret general conversations or translate non-specialised information. Accreditation at this level was discontinued as of 31 December 1994, except for languages of special community need. This is generally limited to languages spoken by recent immigrant and refugee arrivals, and the Aboriginal languages. This was previously known as "Level Two" accreditation, and after 1994 persons so accredited were expected to upgrade to the professional levels.

Interpreter/Translator

This is the first professional level and represents the minimum level of competence for professional interpreting and translating. It was

211 (1987) 164 CLR 180.
212 Above note 211 at 191.
213 Above note 210 at 2.
214 Above note 210 at 3-5.

previously known as “Level Three.” Interpreters and translators at this level are capable of working across a wide range of subjects, but they may choose to specialise. This is the minimum qualification which should be required for court proceedings.

Interpreters at this level are capable of using the consecutive mode, but Auslan interpreters at this level generally employ the simultaneous mode. Translators may be accredited to translate into one language (e.g. Mandarin Chinese into English) or into both languages (Mandarin Chinese into English and English into Mandarin). It is most common for a translator to translate into his or her first language.

Conference Interpreter/Advanced Translator

This is the advanced professional level, and designates persons who can handle complex, technical and sophisticated interpreting or translation, compatible with international standards. It was previously known as “Level Four.” Conference interpreters are capable of using both the consecutive and the simultaneous modes, as required. As with Interpreters and Translators, persons may choose to specialise in a certain field, and translators may be accredited to translate into one or both languages.

Conference Interpreter (Senior)/Advanced Translator (Senior)

This is the highest accreditation, and reflects the person’s competence and experience. It is awarded to translators and interpreters who have achieved excellence in their fields.

NAATI accreditation is presently available in 57 languages,[215] and may be obtained by passing a NAATI test, completing an approved course of studies at an Australian institution, or by providing evidence of specialised overseas qualifications or membership of a recognised international professional association. Interpreters and translators of rarer languages may be granted NAATI Recognition status, which is not based on formal assessment but is intended to acknowledge the fact that the candidate has had regular and recent experience as a practitioner. Documentary evidence to this effect must be provided. NAATI’s online Practitioners’ Directory provides the most comprehensive and up to date record of accreditation, and is available at http://naati.com.au.

[215] Albanian, Amharic, Arabic, Assyrian, Auslan, Bangla, Bosnian, Bulgarian, Burmese, Cantonese, Croatian, Czech, Dari, Dutch, Eastern Arrernte, Filipino, Finnish, French, German, Greek, Hakka, Hindi, Hungarian, Indonesian, Italian, Japanese, Khmer, Korean, Kurdish (Kurmanji and Sorani), Lao, Macedonian, Malay, Maltese, Mandarin, Persian, Pertame, Pitjantjatjara, Polish, Portuguese, Punjabi, Pushto, Romanian, Russian, Samoan, Serbian, Sinhalese, Slovak, Somali, Spanish, Tamil, Thai, Tongan, Turkish, Ukranian, Urdu and Vietnamese; above note 210 at 7.

The Australian Institute of Interpreters and Translators Incorporated (AUSIT) is the national professional association for interpreters and translators, and aims to promote the highest standards in the profession. Ordinary or Associate Members must be NAATI-accredited and must also abide by the Institute's Code of Ethics, which is based on the principles of professional conduct, confidentiality, competence, impartiality, accuracy, individual responsibility for the quality of work, professional development and professional solidarity. The Code was adopted in 1995 and is available from the AUSIT website (http://www.ausit.org). The Institute maintains a register of members, which is also available on its website.

The Translating and Interpreting Service (TIS) which is operated by the Commonwealth Department of Immigration and Multicultural and Indigenous Affairs provides a national, 24 hour telephone interpreting service, as well as on-site interpreters and a translation service. The national telephone number is 131 450. TIS employs about 2000 professional interpreters and translators in more than 100 languages and dialects. It is the main provider of interpreting services in Queensland.[216] TIS generally provides services on a fee-for-service basis, although some fee-free services are provided for recent migrants, medical practitioners, members of Parliament, trade unions, local government authorities, emergency services and some non-governmental organisations. TIS was established in 1973 and was known at this time as the "Telephone Interpreting Service." It is the oldest interpreting service in Australia. More information about this service is available on its official website (http://www.immi.gov.au/tis/index.htm). There are also private practitioners who may have equal qualifications and who may provide services at lower costs than TIS.[217]

Legal interpreting is a more specialised field than generalist interpreting, and the Bureau of Ethnic Affairs and Department of Justice have identified the following required competencies for legal interpreters:

- Comprehensive knowledge about the Australian legal system;
- Thorough understanding of the roles of lawyers and judicial officers;
- Sensitivity to legal culture;
- Command of legal terminology;
- Understanding of the structure of the legal systems in Australia and the country where the target language is

216 Bureau of Ethnic Affairs and Department of Justice *Interpreters and the Courts: A Report into the Provision of Interpreters in Queensland's Magistrates Courts* Brisbane, Queensland Government, 1997 at 49.

217 Communication, Stephen Maguire, Director, Multicultural Affairs, Queensland, 23 September 2004.

spoken; Tertiary-level education or equivalent life experience;
- Ability to interpret consecutively and simultaneously;
- Commitment to ethical principles in legal settings;
- Understanding of lawyer's expectations and how to work professionally with them.[218]

It should be noted that the general accreditation available for translators and interpreters in Australia differs from the specialist approach to legal interpreting which prevails in the United States.[219] Although an Australia-wide system for the registration of specialist legal interpreters was recommended by the Human Rights and Equal Opportunity Commission in 1991, this has not occurred.[220] However, some Australian states (Victoria, New South Wales and South Australia) do maintain specialist legal interpretation services, although there is no such service available in Queensland. In this State, the best basis on which to recruit a practitioner for work in Court proceedings is to require a minimum NAATI accreditation of Interpreter/Translator (previously known as Level Three), as well as relevant work experience in the Courts.

NAATI recommends that interpreters should be given regular breaks, as interpreting requires a high degree of concentration. Speakers should be careful to speak clearly, articulately and slowly.[221] The first person should always be used when putting questions via an interpreter, for example asking, "Where do you live?" as opposed to, "Would you ask him where he lives?"[222]

Judges should be prepared for an interpreter to ask questions to clarify meaning. This may be very necessary in certain situations, as there may be significant differences between the two languages being used. For instance, there may be a lack of semantic equivalence between the languages, or the grammatical structures being used may be very different. Roberts-Smith gives the following examples (among many others) to illustrate the problem of lack of semantic equivalence:

- "The simple Russian sentence 'Ivan udaril Petra nozom ruky' (John hit Peter on the arm/hand with a knife) cannot be interpreted into English without additional information

218 Above note 216 at 16-17; See also Commonwealth Attorney-General's Department *Access to Interpreters in the Australian Legal System* Canberra, AGPS, 1991 at 82.

219 Above note 210 at 15.

220 Human Rights and Equal Opportunity Commission *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* Canberra, AGPS, 1991 at 305-312.

221 Above note 210 at 18.

222 Above note 210 at 19.

because the Russian word 'ruka' corresponds to the English word for both 'hand' and 'arm'."[223]

- There are two possible Polish words for the word 'Soviet': "the first 'radziecki', is a word introduced and fostered by the post-Second World War Polish Government and implies love and respect for the Soviet Union; the second word, 'sowiecki', implies the exact opposite. Use of the inappropriate word could provoke an unfortunate outburst or similar reaction; with the danger that a judge or magistrate, who did not realise what had in fact prompted it, might construe that outburst as in some way reflecting adversely on the credibility of the witness."[224]

As Roberts-Smith comments, "it is not simply words or grammatical constructions that have to be interpreted, but the concepts and ideas, the *meaning*, behind them. A sentence is, after all, no more than an expression of a thought. Interpreters often have to seek further information before a reasonable interpretation is even possible."[225] It may not be possible or accurate to translate the exact words used in the English question into the target language. In order to do their jobs properly, interpreters will need to have a detailed understanding of the nuances of both languages, and the goal must be to convey the accurate meaning of the questions and answers, not necessarily the exact words used.

Obviously, the quality of a translation or interpretation depends in large part on the skill level of the practitioner involved. If an incompetent practitioner is used, an accused person's right to a fair trial may be compromised. For example, in the case of *R v Saraya*[226] 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. A re-trial was ordered on the basis that the accused had not been able to give an effective account of his defence. To avoid this situation, professional NAATI-accredited practitioners should, wherever possible, be used.

Interpreters should be sworn in both civil and criminal trials pursuant to sections 26 to 30 of the *Oaths Act 1867*. Section 26 provides the interpreter's oath for civil proceedings generally, s 27 applies for a voir dire in civil proceedings, s 28 applies on the arraignment of an accused person, s 29 applies when interpreting between a witness or the accused person when giving evidence and the Court, and s 30 applies where the witness and the prisoner speak different languages, and two interpreters are required to interpret between the witness and the

223 Roberts-Smith, LW "Communication breakdown" 1989 *Legal Service Bulletin* Vol 14 No 2 April at 75.

224 Ibid. NB. This distinction, although valid, is no longer as current as it was prior to the collapse of communism in Poland.

225 Above note 223 at 76.

226 (1993) 70 A Crim R 515.

prisoner, and then into English. The oath should be adapted to the interpreter's religious beliefs: see Chapter 5.

6.3 Interpreters in Criminal Cases

In a criminal trial the assistance of an interpreter may be required in two situations: to interpret the evidence of a witness who is not fluent in English to the Court (which may include the defendant, if he or she testifies), or to interpret the Court proceedings to an accused person who is not capable of following the proceedings in English. In Queensland, there cannot be said to be a right to the assistance of an interpreter in either of these situations, either at common law or pursuant to legislation. Instead, the trial Judge retains a discretion regarding whether an interpreter may be used.

The factors which should govern the exercise of this discretion relating to a witness were discussed by the Queensland Court of Criminal Appeal in *R v Johnson*.[227] All Judges agreed that usually it would be obvious when a witness required an interpreter, and that "Ultimately the 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."[228] In this regard two needs should 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."[229] Generally, witnesses in criminal trials are allowed to give evidence via interpreters if they think this is required, and the Crown bears the costs associated with providing such interpreters.

The *Evidence Act 1995* (Cth) codifies when a witness in a trial in a federal court is entitled to an interpreter:

> "**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."

This section derives from a recommendation of the Australian Law Reform Commission in its report no. 38, *Evidence*. It reverses the ordinary position at common law in favour of allowing an interpreter unless the witness is sufficiently competent to allow the evidence to be

227 (1987) 25 A Crim R 433.

228 Above per Williams J at 440; see also Shepherdson J at 434, Derrington J at 442.

229 Above per Shepherdson J at 435.

given in English, and similar provisions apply in New South Wales, South Australia and the Australian Capital Territory.[230]

Queensland Courts also retain a discretion whether to allow an accused person to receive the assistance of an interpreter for the purposes of following the proceedings, although the High Court has held that "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."[231] Courts have the power to safeguard against an unfair trial by ordering a stay of the proceedings,[232] as the High Court noted in *Ebatarinja* a nineteenth-century Queensland case where a Judge was reported to have ordered four Aboriginal prisoners to be discharged on a murder charge, when no interpreter could be found to interpret between them and the Court.[233]

The Court held in *R v Johnson* 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 also noted "the importance of the accused person's right to instruct counsel."[234] Reference was made to the decision of the English Court of Criminal Appeal in *R v Lee Kun*, where Lord Reading, when 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." [235]

The Australian Law Reform Commission's recommendation was in similar terms:

> Allowing an accused person to have an interpreter beside him or her to interpret the whole of the proceedings may irritate and distract the other participants. In a long trial, the cost of providing an interpreter throughout the proceedings would be high. However, the financial and

230 *Evidence Act* 1995 (NSW), s 30; *Evidence Act* 1929 (SA), s 14; *Evidence Act* 1971 (ACT), s 63A.

231 Judgment of the Court in *Ebatarinja and Anor v Deland and Ors* (1998) 194 CLR 444 at 454.

232 *Dietrich v The Queen* (1992) 177 CLR 292.

233 (1998) 194 CLR 444 at 454, referring to *R v Willie* (1885) 7 QLJ (NC) 108.

234 *R v Johnson*, above at 434-435.

235 *R v Lee Kun* [1916] 1 KB 337 at 343.

> other costs must be weighed against the right of the accused person to a fair trial, which requires that he or she is present, is able to understand the case made against him or her and has an opportunity to answer it. Allowing an interpreter to interpret the proceedings is necessary to put a non-English speaking defendant in the same position as an English speaking one, so far as it is possible to do so. It would implement Australia's obligations under the ICCPR. The involvement of a competent, professional interpreter is not generally disruptive and courts have power to deal with disruption where it does occur.[236]

If a defendant in a criminal proceeding has a grant of legal aid, an interpreter for the defendant will generally be paid from this grant. If this is not the case, it is suggested that the Crown should bear the cost, as part of its costs in prosecuting the matter. However, a Court does have power in criminal cases to order that the State provide an interpreter, pursuant to s 131A of the *Evidence Act 1977* (Qld). This section provides:

> "**131A Court may order interpreter to be provided**
>
> (1) In a criminal proceeding, a court may order the State to provide an interpreter for a complainant, defendant or witness, if the court is satisfied that the interests of justice so require."

Queensland courts have adopted a policy that their registries will pay for interpreters when ordered by the Court pursuant to this section, but that otherwise this is the responsibility of the defence and prosecution.[237] 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 suggested that important factors would be whether the accused is able to afford an interpreter, and the degree to which the accused is able to follow the trial and therefore give meaningful instructions to his or her legal representatives. The interests of justice would be particularly acute where an accused is self-represented, especially where this is due to the fact that legal aid has been denied. Fortunately, legal aid is rarely denied to people facing criminal charges in the Supreme Court.

It may become apparent after a witness has started giving evidence that his or her English is not good enough to cope with the demands of a courtroom. Kirby P commented in *Adamopoulos* about the additional demands placed on a person's language skills in a formal public setting, and his Honour's comments will strike a chord with many who have studied foreign languages:

> "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

236 ALRC 57, above note 203 at [3.33] (footnotes omitted).

237 Bureau of Ethnic Affairs and Department of Justice, above note 216 at 58.

> 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."[238]

Judges do not underestimate the difficulty of speaking in a foreign language, and are therefore unlikely to refuse the use of an interpreter when a witness or accused person considers that this is necessary, even though this may make it more difficult for the finder of fact to make an assessment of the witness.[239]

An extreme example of an injustice which resulted from a lack of a competent interpreter appears in the 1991 case of *R v Iqbal Begum*. In that case, the conviction of a woman who had pleaded guilty to murder was quashed because the English Court of Appeal accepted that the appellant had not had the charge explained to her in a language which she understood, including the critical difference between murder and manslaughter in a case where a background of domestic violence against the woman had been alleged. Despite her years living in Great Britain, the woman (who was born in Pakistan) spoke little if any English, her native language was Punjabi and she had some knowledge of Urdu, although she spoke a combination of Punjabi and Urdu and moreover in a dialect of her region of birth (Mirpur). The interpreter whom her solicitors had employed at the time of her trial spoke Gujarati, Hindu and a limited amount of Urdu, but no Punjabi. The Court commented:

> "It is beyond the understanding of this court that it did not occur to someone from the time she was taken into custody until she stood arraigned that the reason for her silence, in the face of many questions over a number of interviews upon the day of the hearing and upon many days previously at various times, was simply because she was not being spoken to in a language which she understood. We have been driven to the conclusion that that must have been the situation. … It has been said on a number of occasions here that unless a person fully comprehends the charge which that person faces, the full implications of it and the ways in which a defence may be raised to it, and further is able to give full instructions to solicitor and counsel so that the court can be sure that that person has pleaded with a free and understanding mind, a proper plea has not been tendered to the court.

238 *Adampolous v Olympic Airways SA* (1991) 25 NSWLR 75 at 77-78.

239 For instance, see Justice Williams' comments in this regard in *R v Johnson* (1987) 25 A Crim R 433 at 440, but note the discussion of non-verbal communication below.

> The effect of what has happened in such a situation as that is that no proper trial has taken place. The trial is a nullity".[240]

Australia has international obligations in this regard, pursuant to the International Covenant on Civil and Political Rights. Article 14(1) of the Covenant guarantees the right to a "fair and public hearing", 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,"[241] and must "have the free assistance of an interpreter if he cannot understand or speak the language used in court."[242] Article 26 of the Covenant 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. Similarly, Article 5(a) of the International Convention on the Elimination of All Forms of Racial Discrimination guarantees "the right to equal treatment before the tribunals and all other organs administering justice," without distinction as to race, colour or national or ethnic origin. It will be noted that these international human rights guarantees go further than Australian domestic law.

In contrast to this piecemeal situation regarding the right to an interpreter at trial, a person being questioned by the police who does not have 'reasonable fluency in English' has a statutory right to an interpreter, pursuant to s 260 of the *Police Powers and Responsibilities Act 2000* (Qld). This provides:

> "**260 Right to interpreter**
>
> (1) This section applies if a police officer reasonably suspects a relevant person is unable, because of inadequate knowledge of the English language or a physical disability, to speak with reasonable fluency in English.
>
> (2) Before starting to question the person, the police officer must arrange for the presence of an interpreter and delay the questioning or investigation until the interpreter is present.
>
> (3) In this section—
>
> ***investigation*** means the process of using investigative methodologies, other than fingerprinting, searching or taking photos of the person, that involve interaction by a police officer with the person, for example, an examination or the taking of samples from the person."[243]

240 *R v Iqbal Begum* (1991) 93 Cr App R 96 at 100.

241 Art. 14(3)(a).

242 Art. 14(3)(f).

243 However, note the problems identified by the Court of Appeal when considering this provision in *R v Cho* [2001] QCA 196 at [24]-[27] regarding whether an objective or subjective belief is required on the part of the police officer.

A similar provision applies to officials investigating offences against federal law.[244]

6.4 Interpreters in Civil Cases

There cannot be said to be any right at common law for a party or witness in a civil trial to give evidence in a language other than English; rather, the trial judge retains a discretion to decide whether this should occur.[245] There is no provision in Queensland legislation similar to s 30 of the *Evidence Act 1995* (Cth),[246] so the common law position still applies in Queensland. The High Court stated in *Acquilina*:

> "We agree with the decision of the Full Court of the Supreme Court of New South Wales in *Filios v Morland* 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."[247]

The position that at common law a party has no legal right to an interpreter was reinforced by the NSW Court of Appeal in *Adamopoulos v Olympic Airways*.[248] Kirby P however commented in this 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."[249] Mahoney JA commented that when deciding how best to ensure that the trial process is "acceptably fair":

> "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 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

244 *Crimes Act* 1914 (Cth), s 23N; see also *Customs Act* 1901 (Cth), s 219ZD.

245 *Dairy Farmers Co-operative Milk Co Ltd v Acquilina* (1963) 109 CLR 458 at 464, per curiam, approving the decision of the Full Court of the Supreme Court of NSW in *Filios v Morland* (1963) SR (NSW) 331; see also *Adamopolous and Anor v Olympic Airways SA and Anor* (1991) 25 NSWLR 75.

246 See above note 230 regarding other legislative provisions in Australian jurisdictions which grant rights to interpreters. These provisions apply to both criminal and civil trials.

247 Above note 245 at 464.

248 (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.

249 Above note 248 at 78.

> 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."[250]

However, in a civil trial the provision of an interpreter, either for a witness or for a party, is generally considered to be the responsibility of each party, and a trial Judge is unlikely to interfere with a party's assessment in this regard. A successful party may recover its costs of an interpreter as part of the costs order at the end of the trial.

The ALRC noted in 1992 that the need to pay for an interpreter poses an additional barrier to access to justice for people from a non-English speaking background. The Commission considered that parties who required an interpreter should be entitled to one, and suggested that consideration be given to establishing a fund to meet the cost of interpreters.[251] The Commission suggested that there be a cap on the amount which could be paid out in relation to any particular proceedings.[252] This appeared to be based on the practice in South Australia, where a levy on court filing fees was used to fund the provision of interpreters.[253]

6.5 Non-verbal communication

A large part of the assessment of a witness's credit is conducted using non-verbal forms of communication.[254] The observation of a person's demeanour is an important tool in assessing that person's believability and trustworthiness; this is why findings of fact by trial courts are treated with respect on appeal, as the trial Judge has had the advantage of directly observing witnesses.

However, behaviour and demeanour are conditioned by culture. When Judges or juries need to make factual determinations based on

250 Above note 248 at 81.
251 ALRC 57 above note 203 at [3.38], [3.44].
252 Above note 203 at [3.44].
253 Above note 203 at [3.37].
254 It has been suggested that on some estimates about 70 per cent of information is conveyed through non-verbal means: Sussex, above note 205 at 530 – 531.

observations of witnesses, they must assess the believability of a witness based on that person's behaviour and demeanour, as well as the actual words which he or she says. Usually this task is relatively straightforward, as both parties share a common cultural background. But what happens when the witness comes from a different cultural background? If the common cultural background which usually forms the background to a trial is absent, Judges as finders of fact must perform the potentially difficult task of ensuring that what is being observed is an accurate reflection of the witness's personality, and that they are not being misled by responses which are attributable to cultural factors.

For instance, an impressive witness according to Anglo-Australian culture will look his or her questioner in the eye and answer questions confidently and clearly. In many other cultures, however, direct eye contact may be considered to be rude and/or challenging. This has been suggested to be true of Aboriginal Australians,[255] Vietnamese people[256] and for females in South Asian cultures. Children in many cultures may also avoid eye contact with a questioner, as a way of showing respect for an authority figure. Such responses may be misunderstood as demonstrating evasiveness or shiftiness on the part of the witness.

Similarly, in some Asian cultures it is considered impolite to flatly disagree with a questioner. A person answering questions from this cultural perspective may 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 perspective may interpret this politeness as a lack of certainty. This may be critical when these types of responses are given when counsel is putting his or her own instructions to the witness.

People who are familiar with a different legal system may find the Australian common law system challenging and be deterred by this. They may be confused by the adversarial nature of the Australian legal system, especially when compared to an inquisitorial system. The ALRC has noted in this regard that such witnesses may expect to give evidence by giving their own account of what occurred, not by responding to a series of questions.[257] Similarly, people from countries which do not have jury trials may be very concerned at the notion of allowing ordinary people, not experts or Judges, to make critical findings of fact in a case which affects them.[258]

However, it is generally not possible to create absolute rules about how a person from a given cultural background will act. A person who seeks

255 Above note 205 at 532.
256 Roberts-Smith, LW above note 223 at 77.
257 ALRC Report no. 57 above note 203 at [10.40].
258 Above note 203 at [10.44].

to generalise in this manner runs the risk of creating a cultural stereotype which does not reflect the differences within a group. Indeed, many groups are not discrete or homogenous, and so are not easily categorised. Even if this was possible in all cases, due to the multicultural nature of contemporary Australian society it would not be possible for a Judge to be fully aware of the nuances of every culture which he or she might conceivably encounter in a courtroom. Judges must therefore be prepared to make assessments of witnesses who come from cultures which they have not directly experienced and, in order to do so accurately, they must be alert to the dangers of ethnocentrism – using one's own cultural assumptions to interpret other people's behaviour. Judges should be alert to this potential for culturally based misunderstanding, and ask the legal practitioners involved for clarification when cultural factors might be clouding the issue. It may be necessary to receive expert evidence in this regard. The areas of potential misunderstanding are likely to include politeness, body language, power dynamics, metalinguistics factors, such as pitch, volume and silence, and the difference between individualistic and collectivistic cultures.[259]

It should be noted that a Judge may 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.[260] If this is the case the trial Judge may make various orders, including excluding persons from the courtroom in which the witness is giving evidence, allowing the witness to give evidence in a remote room, or allowing a support person to be present. Judges may also take a witness's cultural background into account when deciding whether a question should be disallowed as an improper question pursuant to s 21 of the *Evidence Act.*

6.6 Appropriate terminology

Modern English speakers should avoid identifying people by gratuitously mentioning their racial, ethnic, cultural or religious features. Examples of such gratuitous use can be found in newspaper headlines such as "Italian youth ambushed in backyard" or "Turks in insurance rip-off'".[261] The question should always be asked: is this person's ethnicity, racial origin, cultural or religious background relevant to this situation, or does the use of an identifier in such a way only signify difference from the cultural norm? It should never be assumed that the majority is the standard by which other members of society are judged. The gratuitous use of racial, ethnic, cultural or religious features reinforces this assumption. Racial, ethnic, cultural or religious features

259 Sussex R above note 205 at 535-538.

260 s 21A(1).

261 University of New South Wales *Non Discriminatory Presentation and Practice* at http://www.infonet.unsw.edu.au/poldoc/racedisc.htm, accessed 2 September 2004.

should not be used to describe a person to the exclusion of 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, not members of a monolithic group. For example, it would be preferable to identify a person as being from Hong Kong or Viet Nam, rather than simply as Asian, as this better reflects the diversity of this region. It is also important to accurately identify groups, and it is important in this regard not to automatically equate religious groups with ethnic groups. For example, the majority of Muslims are not Arabs, and 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 a person's or group's ethnicity or cultural background, a qualifying adjective or adjectival phrase should be used, such 'Greek Australian' or 'Vietnamese born Australian.' However, people should be aware when using such descriptors that some Australians may object to being identified in this way. Generally, a useful rule is to be guided by how the person describes himself or herself.

6.7 Useful contacts

The best way to access NAATI's directory of accredited practitioners is by using the Internet: http://www.naati.com.au.

Similarly, AUSIT maintains registers of members which are readily accessible via the Internet: http://www.ausit.org.

The phone number for the Translating and Interpreting Service's telephone interpreting service is 131 450, and this is available 24 hours a day, seven days a week on a fee for service basis to individuals. General information about TIS may be found at http://www.immi.gov.au/tis/index.htm. Information about TIS's user charges is available at http://www.immi.gov.au/tis/tischarges1.htm.

6.8 Names and Forms of Addresses

6.8.1 In General

This appendix will give a brief overview of names and forms of address. It is a guide only.

Be prepared to ask how a name is spelt and pronounced;

- Respect an individual's wishes;
- It is preferable to ask for a person's "given" name rather than "Christian" name;

- Do not abbreviate names without that person's express request to do so;
- There is always diversity within an ethnic group regarding how names are constructed or used.

Naming is influenced by family, cultural and religious backgrounds. In Queensland, the main cultural groups are: Italian, Chinese, Greek, Filipino, Vietnamese and Indian.[262] There are also a significant number of persons who identify as Lebanese, South American and African.[263] The main religious groups are Christian, Buddhist, Muslim, Hindu and Jewish.[264] Issues relating to these groups have been discussed in Chapters 2 and 3 respectively. Indigenous names and forms of addresses are discussed in Chapter 8.

Although it is important to respect an individual's wishes regarding his or her name, this may not always be possible in the formal context of the court room. An individual may not be comfortable being asked how to pronounce his or her name, nor what his or her preferred form of address is; or, if asked, will simply wish to assent to what the presiding judge prefers. It is desirable that an individual's representative, where he or she has one, informs the Court about pronunciation and preferred form of address.

Many long-time Australians of diverse cultural and ethnic backgrounds may have adopted the English naming style or be familiar with the English naming style such that he or she will modify his or her name in official situations. So, for example, a Vietnamese person who is aware that 'in English the name is inverted' will name himself or herself in accordance with the English naming style. Due to the multi-cultural nature of Australian society, there has been much interchange of cultures and some long time Australians of diverse cultural and ethnic backgrounds may have adopted for themselves or named their children English names or names from other cultural and ethnic backgrounds.

A brief guide is provided below. Generally, Italian, Greek, Lebanese, African and South American naming styles do not differ greatly from the English naming style.

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262 See Department of Premier and Cabinet *Diversity Figures – Brochure* at http://www.premiers.qld.gov.au/library/pdf/divfig_brochure2.pdf, accessed 6 July 2004. This document details only those persons *born* overseas and therefore does not take account of those persons who identify with one or more of these cultural backgrounds because one or both of their parents were born overseas. These figures can be read in conjunction with Office of Economic and Statistical Research *Diversity: a Queensland Portrait* at http://www.oesr.qld.gov.au/views/statistics/topics/demography/demo_fs.htm, accessed 6 July 2004. In particular the figures for "major source countries" should be viewed in the light of the figures for "birthplace of parents" and "languages spoken at home" to approximate the diversity of cultures in Queensland and which ones predominate.

263 Ibid.

264 See Chapter 3.

6.8.1.1 Chinese Names

Composition and Order:
Family name, given names (in that order).
What appears as a 'middle name' is often a part of a Chinese person's given name and is occasionally hyphenated (eg. Zhou Li-Wei).[265]

Guide to Pronunciation of Chinese Names:
Because the written Chinese language is ideographic, when Chinese names have been converted into written English, this has usually been done so phonetically. Sounding out the spelling is usually sufficient. Vowel diphthongs[266] are common.

Common Family Names are (pronunciation in brackets):
Chen, Cheng, Cheung, Huang (Wang), Gao, Li/Lee, Lin, Liu (Leu), Ma, Sun (Seun), Tang, Wang, Xu, Yang, Yie, Yip, Zhang, Zhao, Zhou, Zhu.

Address:
Generally, a person's given name is used to address them: Ms Li-Wei. However, it is equally acceptable and polite to address in the mainstream style, using the family name: Ms Zhou.

6.8.1.2 Vietnamese Names

Composition and Order:
Family name, middle name, 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 feminine first name.

Guide to Pronunciation of Vietnamese Names:
Vietnamese is a tonal language. In the written language, the Roman script[267] is used but accents, circumflexes, crescents, acutes, dots and commas are used to indicate the tone that may change meanings of words. As English does not use accents etc, transcribing Vietnamese names into English therefore deprives names of their pronunciation guides. This is especially problematic with names beginning with 'D'. Some Ds are pronounced and some are silent: there is no guide to which is which in English.

- *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: Hue is pronounced Way.
- *Nh* is a common endSing for names. The h is silent.
- *Uo* is a common diphthong and is pronounced like a short u.

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265 Gaudart, H *The Trouble with Names: Forms of Address in Asia* Singapore, Raffles, 1999 at 51.

266 A union of two vowels, pronounced in one syllable: *Oxford English Dictionary*.

267 English also uses the Roman script.

Many vowels strung together is common and pronounced as one syllable: the ieu in Kieu is pronounced ew.

Common family names are: Nguyen, Tran, Le, Ly, Ho, Ngo.

Address:
Generally, a person's given name is used to address them: Ms Kieu. However, where that person is significantly older, this may be disrespectful. It is acceptable and polite to address in the mainstream style, using the family name: Ms Nguyen. Where uncertain, it is also acceptable to address using the full name: Ms Nguyen Thi Kieu.

6.8.1.3 Italian & Greek Names

Generally, emphasis is placed on the penultimate syllable: Thessaloniki.

In Italian, c is pronounced ch; whereas ch is pronounced k.

6.8.1.4 Filipino Names

The Filipino naming style resembles the English naming style: ie given name, middle name, family name. However, Filipinos commonly have nicknames and, in certain situations or relationships, may know a person's nickname only and not that person's full name; this may occur with friends or family members.[268]

It is appropriate to address a Filipino person formally, until they tell you otherwise.

6.8.1.5 Indian Names

There is great diversity within India relating to naming systems. In some areas, the village name is used within a name; whilst in other areas one's caste may be used within a name.

A person of Sikh origin may have a suffix after his or her name: *Singh* for men and *Kaur* for women.[269]

'*Achi*' after a woman's name indicates that she is married.[270]

Sometimes an initial is used within a name. The initial stands for the person's father's name or the name of the ancestors.[271]

It is most appropriate to use an Indian person's full name.

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268 Gaudart, above note 265 at 182.
269 Gaudart, above note 265 at 70 – 71.
270 Gaudart, above note 265 at 74.
271 Gaudart, above note 265 at 75.

6.8.1.6 Muslim Names

Naming is important to followers of the Islamic faith, as Mohammed in his teachings stipulates "to keep good names".[272]

Some common prefixes of names are: Ibn (meaning son of); Abu (meaning father of); Ummul (meaning mother of).

Certain positions have titles, so the religious leader is called Imam.

6.8.1.7 Jewish Names

A common prefix is: Ben (meaning son of).

6.8.1.8 Slavic Languages Names

Slavic languages include Russian, Czech, Ukrainian, Polish, Croatian, Serbian.[273]

- A common ending of Slavic, especially Serbo-Croatian, names is ic, pronounced as ich.[274]
- C may be pronounced as ts or ch.
- H is pronounced as kh (aspirated).
- J is pronounced like the consonant y.
- S is pronounced like sh.
- Z is pronounced like zh.
- R and L can be pronounced as vowels: ie. ir or el (as in the underlined parts of circle).

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272 Noble, WTS *Names from Here and Far: The New Holland Dictionary of Names* Sydney, New Holland Publishers Pty Ltd, 2003 at 16.

273 *Behind the Names: Etymology and History of First Names* at http://www.behindthename.com/languages.html, accessed 1 September 2004.

274 The following guide to pronunciation was sourced from Lew, MD *Serbian Epic Poetry* 1999 at http://home.earthlink.net/~markdlew/SerbEpic/spelling.htm, accessed 1 September 2004.

Chapter 7 Indigenous Queenslanders

7.1 Introduction

The 2001 Census recorded 460,140 persons of Aboriginal or Torres Strait Islander descent in Australia.[275] This is 2.4 per cent of the total estimated resident population of Australia. In Queensland 3.5 per cent of the population identify themselves as being of Aboriginal or Torres Strait Islander origin.[276] Importantly a quarter of Australia's Aboriginal population and over half of the Torres Strait Islander population live in Queensland.[277]

FIGURE 1

2001 CENSUS, ESTIMATED RESIDENT POPULATION, PRELIMINARY – 30 JUNE 2001[278]

INDIGENOUS (a)	Aboriginal(b)		Torres Strait Islander(b)		Total		Non-Indigenous		Total		Portion of population which is Indigenous
State/Territory	'000	%	'000	%	'000	%	'000	%	'000	%	%
New South Wales	130.5	30.3	8.7	17.8	135.3	29.4	6474.0	34.0	6609.3	33.9	2.0
Victoria	26.0	6.0	3.1	6.3	27.9	6.1	4794.7	25.2	4822.7	24.8	0.6
Queensland	107.5	25.0	28.7	58.6	126.0	27.4	3509.1	18.4	3635.1	18.7	3.5
South Australia	24.8	5.8	1.4	2.9	25.6	5.6	1489.2	7.8	1514.9	7.8	1.7
Western Australia	65.1	15.1	2.5	5.1	66.1	14.4	1840.0	9.7	1906.1	9.8	3.5
Tasmania	16.1	3.7	2.4	4.9	17.4	3.8	455.5	2.4	472.9	2.4	3.7
Northern Territory	56.9	13.2	1.9	3.9	57.6	12.5	142.5	0.7	200.0	1.0	28.8
Australian Capital Territory	3.8	0.9	0.3	0.6	3.9	0.8	317.7	1.7	321.7	1.7	1.2
Australia(c)	**430.8**	**100.0**	**49.0**	**100.0**	**460.1**	**100.0**	**19025.1**	**100.0**	**19485.3**	**100.0**	**2.4**

(a) Indigenous population estimates are experimental.[279]

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275 Australian Bureau of Statistics *4705.0: Population Distribution Aboriginal and Torres Strait Islander Australians* Canberra, Australian Bureau of Statistics, 2001 at 1. Note that this refers to resident population. Unless otherwise stated, all statistics and conclusions drawn from statistics are derived from the Australian Bureau of Statistics.

276 Above note 275 at 24.

277 Ibid.

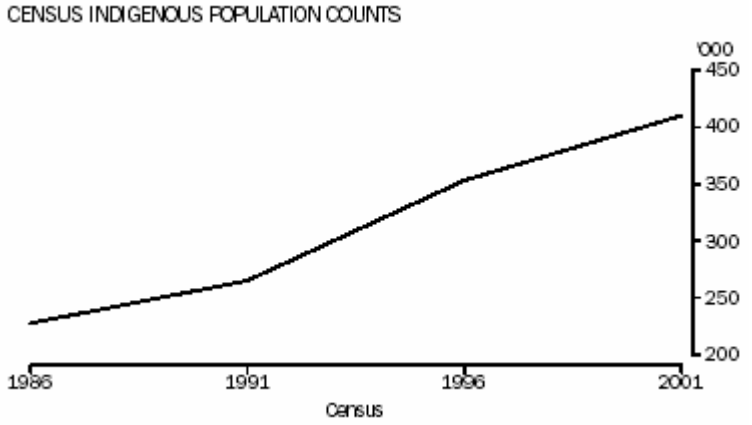
278 Ibid.

279 "Estimates of the Indigenous population are experimental in that the standard approach to population estimation is not possible because satisfactory data on births, deaths and internal migration are not generally available. Furthermore, there is significant volatility in census counts of the Indigenous population, thus adding to the estimation problems. This volatility can in part be attributed to changes in the propensity of persons to identify as being of Indigenous origin. …
Indigenous estimates based on the 1996 Census of Population and Housing are significantly higher than those which would have been expected if the

(b) Includes persons of both Aboriginal and Torres Strait Islander origin.
(c) Includes Other Territories.

Between the 1996 and the 2001 Census there was a 16 per cent increase in the Aboriginal or Torres Strait Islander population[280] whereas Australia's total population only increased by 6 per cent. Of this figure, 12 per cent may be attributable to an increased birth rate and 4 per cent may be attributed to an increase in the number of persons identifying themselves as being of Aboriginal or Torres Strait Islander origin. Interestingly, this phenomenon was also recorded between the 1991 and the 1996 Census. In that period 19 per cent of the increase in the Aboriginal and Torres Strait Islander population was attributed to the increased tendency for people to identify themselves as being of Aboriginal or Torres Strait Islander descent.[281]

FIGURE 2[282]



7.2 Geographic Distribution

Brisbane has the largest Indigenous population of any region in Queensland. 34,809 or 8.5 per cent of the total resident Indigenous population of Australia reside in Brisbane. The second largest Indigenous population is in Cairns with 16,515 persons of Aboriginal or Torres Strait Islander origin.

As a proportion of the population, Cooktown and the Torres Straits have the largest number of residents who identify themselves as being of Aboriginal or Torres Strait Islander origin. In the Torres Strait Area,

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Indigenous population in 1991 had been subject to expected levels of natural increase and migration over 1991 to 1996 intercensal period": *Demographic Estimates and Projections: Concepts, Sources and Methods Appendix 5. Estimating the Indigenous Population* at http://www.abs.gov.au/Ausstats/abs@.nsf/66f306f503e529a5ca25697e0017661f/a05e31291767e596ca25697e0018fc8e!OpenDocument, accessed 8 December 2004.

280 Above note 275 at 14.

281 Ibid.

282 Above note 275 at 1.

6,214 persons or 76.8 per cent of the residents identify themselves as Aboriginal or Torres Strait Islander. This represents 1.5 per cent of the total Indigenous population in Australia. Similarly, Cooktown has 6,224 residents who identify themselves as Aboriginal or Torres Strait Islander. Again this equates to 1.5 per cent of the total Indigenous population in Australia.

FIGURE 3

2001 CENSUS, INDIGENOUS POPULATION COUNTS[283]

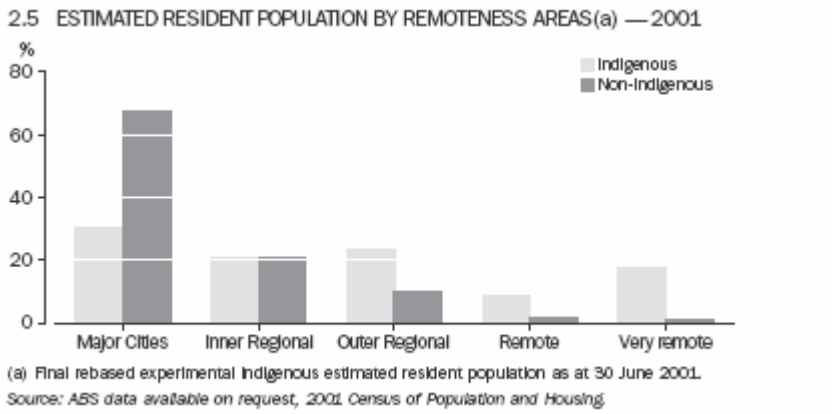
INDIGENOUS STATUS PROPORTION OF POPULATION

	Indigenous		Non-Indigenous	Status Unknown	Total	Indigenous	Status Unknown
ATISC Region (a)	no.	%	no.	no.	no.	%	%
Brisbane	34 809	8.5	2 179 634	79 049	2 293 492	1.5	3.4
Cairns	16 515	4.0	155 801	8 822	181 138	9.1	4.9
Mount Isa	7 147	1.7	21 167	2 076	30 390	23.5	6.8
Cooktown	6 224	1.5	5 362	846	12 432	50.1	6.8
Rockhampton	12 679	3.1	336 634	13 150	362 463	3.5	3.6
Roma	10 568	2.6	264 688	9 324	284 580	3.7	3.3
Torres Strait Area	6 214	1.5	1 398	481	8 093	76.8	5.9
Townsville	16 428	4.0	281 265	11 659	309 352	5.3	3.8

(a) An ATSIC Region is a legally prescribed area for the purposes of administration by ATSIC and the Torres Strait Regional Authority. The ATSIC Region boundaries and Census statistics produced for these areas are derived from Collection Districts (CDs).[284]

In general, persons of Aboriginal and Torres Strait Islander origin are more likely than non-Indigenous Australians to reside in remote areas. Although about 30 per cent of Indigenous people live in areas where access to services is highly accessible (major cities), one in four live in areas classified as "very remote" or remote as compared to only two per cent of the non-Indigenous Australian population.[285]

FIGURE 4[286]



283 Above note 275 at 27.

284 Above note 275, Glossary at 269.

285 Australian Bureau of Statistics *4704.0: The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples* Canberra, Australian Bureau of Statistics 2003 at 16-17.

286 Above note 285 at 17.

7.3 Socio-economic Status

In 1989, the National Aboriginal Health Strategy Working Party defined "health" as "not just the physical well being of the individual but the social, emotional and cultural well being of the whole community. This is a whole-of-life view and it also includes the cyclical concept of life-death-life."[287] It is becoming apparent that there is a corresponding relationship between socio-economic status, physical environment and health.

In 2003 the Australian Bureau of Statistics, in collaboration with the Australian Institute of Health and Welfare, published the fourth edition of its series *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*. The publication provides a comprehensive overview of the indicators of socio-economic status including education, health, employment, income and housing. The report stated that:

> "Many Indigenous people live today in conditions of clear economic disadvantage due in large part to their lower education and employment levels. All of these things interact to contribute to poor health in many groups of Indigenous people."[288]

7.3.1 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. On the night of the 2001 Census, 7,782 households indicated they were living in dwellings defined as "improvised".[289] Such dwellings include "sheds, humpies, tents (other than in caravan parks) and park benches."[290] Of the number of Australian households in improvised dwellings 19 per cent were Aboriginal or Torres Strait Islander.[291] Five per cent of the usual population of discrete Indigenous communities "occupied temporary dwellings, including caravans, tin sheds without dividing walls, 'humpies', 'dongas' and other makeshift shelters."[292]

There are increased instances of overcrowding in Indigenous as compared to non-Indigenous households. The 2001 Census shows that households with Aboriginal and Torres Strait Islander persons are larger on average than non-Indigenous Australian households. This disparity increases with remoteness.[293] Whereas, for non-Indigenous Australian households, the numbers of persons residing in a household remains constant.

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287 Extracted from above note 285 at 9.

288 Above note 285 at xiii.

289 Above note 285 at 37.

290 Ibid.

291 Ibid.

292 Data from the Community Housing and Infrastructure Needs Survey, 2001 as quoted in above note 285 at 36, 38.

293 Above note 285 at 38.

FIGURE 5[294]

3.2 AVERAGE HOUSEHOLD SIZE, BY REMOTENESS(a) — 2001

	Households with Indigenous person(s)		*Other households*	
	Dwellings	*Average persons per dwelling*	*Dwellings*	*Average persons per dwelling*
Major Cities	54 916	3.2	4 550 931	2.6
Inner Regional	33 347	3.3	1 409 792	2.5
Outer Regional	32 756	3.4	689 503	2.5
Remote	10 193	3.6	100 839	2.5
Very Remote	13 520	5.3	32 434	2.5
Total	**144 732**	**3.5**	**6 783 499**	**2.6**

(a) Based on usual residence. Excludes non-private dwellings and visitor households. See Glossary for definition of households with Indigenous person(s) and Other households.

Source: ABS data available on request, 2001 Census of Population and Housing.

At the time of the 2001 Census count 11 per cent of Indigenous households in major cities and 42 per cent in "Very Remote Australia" were defined as "overcrowded".[295] The comparable figures in the non-Indigenous population were 4 per cent in major urban areas and 3 per cent for both urban and rural areas.[296]

Persons of Aboriginal or Torres Strait Islander origin are less likely to own or be purchasing their own home (roughly 30 per cent as compared to 70 per cent of non-Indigenous households) and more likely to rent (63 per cent).[297]

7.3.2 Community Infrastructure

In 2001 a *Community Housing and Infrastructure Needs Survey* ("CHIN") was conducted by the Australian Bureau of Statistics. An earlier CHIN survey had been conducted in 1999. A total of 1,216 discrete Indigenous communities in Australia, with a combined population of 108,085[298] were identified and surveyed. Discrete Indigenous Communities are defined as a:

> "geographical location with a physical or legal boundary that is inhabited or intended to be inhabited predominantly (more than 50 %) by Indigenous people, with housing and infrastructure that is either owned or managed on a community basis."[299]

294 Ibid.

295 There is no universally accepted standard for the measurement of 'overcrowding'. The method adopted in measuring the figures outlined in this section were based upon 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: ibid at 38-39.

296 Above note 285 at 20.

297 Above note 285 at 39.

298 Above note 285 at 43.

299 Above note 285, Glossary at 272.

The survey indicated that a total of 186 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.[300] 21 communities had no organised water supply.[301]

FIGURE 6

3.10 MAIN SOURCE OF DRINKING WATER, ALL COMMUNITIES — 2001

	Communities with a population of						
	Less than 20	20 to 49	50 to 99	100 to 199	200 or more	Total	Reported usual population
Main source of drinking water							
Connected to town supply	35	40	41	36	34	186	18 134
Bore water	426	188	53	33	84	754	66 531
Rain water tank(s)	27	10	5	4	7	53	4 017
River or reservoir	54	19	2	6	18	99	17 580
Well or spring	33	14	1	1	2	51	1 535
Other organised water supply	21	1	—	—	—	22	198
All communities with an organised drinking water supply	596	272	102	80	145	1 195	107 995
No organised water supply	20	1	—	—	—	21	90
All communities	**616**	**273**	**102**	**80**	**145**	**1 216**	**108 085**

Source: ABS 2002c.

Seven per cent of the discrete Indigenous communities (representing one per cent of the total population) surveyed had no sewerage system.[302] Septic tanks were the most common sewerage system. Of the communities with sewerage systems, 327 communities with populations of greater than 50 people reported having problems with their sewerage system over the previous 12 months.[303]

Seven per cent of the discrete Indigenous communities surveyed were without an electricity supply.[304]

7.3.3 Health

A 1998-1999 survey of health expenditure conducted by the *Australian Institute of Health and Welfare* indicated that expenditure on health services directed towards Aboriginal or Torres Strait Islander peoples was 22 per cent higher than for services for non-Indigenous people.[305] This figure represents expenditure by the Commonwealth, state and local governments as well as expenditure from private sources such as through private health insurance.

This rate is actually less then expected, given the much poorer health of Indigenous persons as compared to non-Indigenous persons.[306]

300 Above note 285 at 45.
301 Ibid.
302 Above note 285 at 46.
303 Above note 285 at 47.
304 This represented 0.6 per cent of the population: ibid.
305 Above note 285 at 52.
306 Ibid.

The pattern of health expenditure for persons of Aboriginal or Torres Strait Islander origin also varied from that for non-Indigenous people (see table below):

FIGURE 7

ESTIMATED GOVERNMENT AND PRIVATE EXPENDITURE ON HEALTH SERVICES (a) – 1998-99

	Indigenous				Non-Indigenous				
			$m	$			$m	$	
	Govt funding	Private funding	Total expenditure	Per Person	Govt funding	Private funding	Total expenditure	Per person	Ratio(b)
Government programs									
Public hospitals – admitted patients	443	14	457	1 125	9 330	947	10 278	558	2.02
Public hospitals – non-admitted patients	124	1	125	307	2 247	316	2 562	139	2.21
Mental health institutions	26	-	26	64	444	21	465	25	2.53
High level residential aged care(c)	34	7	40	99	3 025	828	3 853	209	0.47
Community and public health	340	15	355	874	2 970	168	3 137	170	5.14
Patient transport	40	3	43	106	244	333	577	31	3.39
Medicare and other medical	66	7	73	179	7 490	1 146	8 632	468	0.38
PBS medicines	20	4	25	61	3 014	597	3 611	196	0.31
Administration and research	37	4	41	101	1 162	159	1 324	72	1.40
Total govt program expenditure	1 130	55	1 185	2 917	29 927	4 514	34 439	1 868	1.56
Non-govt programs									
Private hospitals	2	8	10	25	1 052	3 040	4 092	222	0.11
Dental & other professional	1	16	17	42	182	3 746	3 928	213	0.20
Non-PBS medicines & appliances	-	27	27	66	50	2 603	2 653	144	0.46
Medical (compensable, etc)	-	4	4	11	-	688	688	37	0.30
Administration	-	1	2	5	129	494	622	34	0.14
Total non-govt program expenditure	3	57	60	148	1 412	10 570	11 982	650	0.23
Total	1 133	113	1 245	3 065	31 339	15 085	46 421	2 518	1.22

(a) Government program expenditures includes expenditure through programs managed by the Commonwealth, State and local governments.
(b) Ratio is equal to Indigenous expenditure per person divided by non-Indigenous expenditure per person.
(c) The level of residential aged care services described as nursing home care prior to the changes implemented by the 1997 Aged Care Act.

Source: AHW Health Expenditure Database.

Access to health services is a pressing issue for people in discrete Indigenous communities. A 2001 *Housing and Infrastructure Survey*[307] conducted by the Australian Bureau of Statistics indicated that 57,222 Aboriginal or Torres Strait Islanders were located 100 or more kilometres from the nearest hospital. Of that number 37,758 were located 250 kilometres or more from the nearest hospital:

307 ABS Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities 2001, Canberra, ABS, 2002 at 28.

FIGURE 8

3.23 DISTANCE TO NEAREST HEALTH FACILITY, ALL COMMUNITIES AND REPORTED USUAL POPULATION

	Hospital		*Community health centre*	
	Communities	*Reported usual population*	*Communities*	*Reported usual population*
Distance to nearest health facility				
Located within the community	9	15 800	183	59 902
Less than 10kms	118	13 894	98	2 616
10–24kms	76	6 232	200	4 283
25–49kms	68	5 019	207	4 095
50–99kms	102	9 909	225	4 231
100–249kms	298	19 464	135	2 657
250kms or more	543	37 758	39	598
All communities(a)	**1 216**	**108 085**	**(b)1 216**	**(b)108 085**

(a) Includes 'Distance to nearest health facility' not stated.

(b) Includes communities located within 10 kilometres of a hospital

Although 59,902 Aboriginal or Torres Strait Islanders lived within 10 kilometres of a community health centre, 3,255 were located more than 99 kilometres from a health centre.

These statistics tend to indicate that Indigenous people experience lower levels of access to health services than the remainder of the population. Although it is difficult to ascertain a true picture of Indigenous health,[308] the available data suggests that the Indigenous population is more likely to be affected by ill health than the non-indigenous population in Australia.

In the 1999 – 2001 period there was a higher proportion of Indigenous deaths in age groups under 75 years as compared to non-Indigenous deaths; the proportion was almost double that of the non-Indigenous population.[309]

After adjusting for different population compositions, Aboriginal and Torres Strait Islander people are reported as dying at three times the total population rate.[310]

308 Above note 285 at 51.

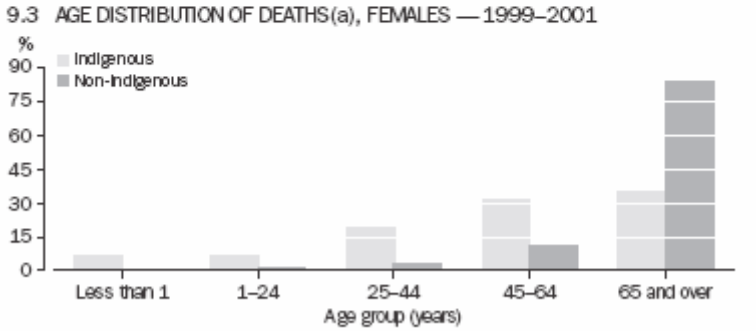
309 Above note 285 at 7.

310 Ibid.

FIGURES 9 AND 10

(a) Data for Queensland, South Australia, Western Australia and Northern Territory combined. Based on year of registration.

Source: ABS data available on request, Deaths Registration Database.



(a) Data for Queensland, South Australia, Western Australia and Northern Territory combined. Based on year of registration.

Source: ABS data available on request, Deaths Registration Database.

The main causes of death in this period for the Indigenous population were diseases of the circulatory system, deaths due to external causes and cancer.[311]

7.3.4 Education and Employment

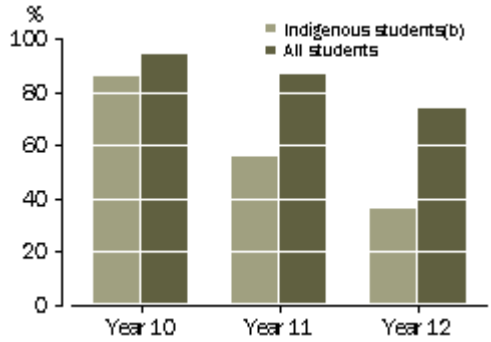
Although retention rates for Indigenous full-time students has increased since the 1980s, Indigenous students were less likely than all students to remain in school beyond year 10. In 2001, the proportion of Indigenous students continuing to year 10 was 86 per cent compared with 94 per cent of all students. The proportion of Indigenous students continuing to year 12 was almost half that of all students (36 per cent compared with 73 per cent).[312]

311 Above note 285 at 191: see at 179-181 regarding the limitations of this statistical analysis.

312 Australian Bureau of Statistics, *Australian Social Trends 2002: Education – Participation in Education: Education of Aboriginal and Torres Strait Islander peoples* at http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/cfb6f8f97d5f60d6ca256bcd008272fc!OpenDocument, accessed 9 December 2004.

FIGURE 11

APPARENT RETENTION RATES (a) FOR YEARS 10, 11 AND 12 - 2001



(a) From Year 7/8 for full-time students only.
(b) Indigenous apparent retention rates are influenced by the degree to which students identify as Indigenous, which may have increased between 1998 and 2000.

Source: ABS 2001 National Schools Statistics Collection.

From 1996 to 2000, a 60 per cent increase in the numbers of Indigenous students studying a vocational education and training (VET) course has been recorded. There was a 34 per cent increase in the numbers of VET students overall. Indigenous VET student were more likely than other students to be studying Arts/Social Science/Humanities, Education, Agriculture/Animal Husbandry and Health/Community Services and were also less likely to be studying for a higher level qualification. The rate of completion of VET modules was lower (61 per cent) than for the total VET student population (75 per cent). Although the rate of unsuccessful results for Indigenous VET students was higher than for all students, the rate of withdrawal was almost double that of the total population: 14 per cent of modules attempted were recorded as withdrawals, as compared with 8 per cent of all VET students.[313]

In higher education, Aboriginal and Torres Strait Islander students are most under-represented. The data indicates that between 1997 and 2000, there has been a decline in the number of students beginning higher education courses, although there was little change in the proportion of Indigenous students in higher education. 64 per cent of Indigenous higher education students were female as compared with 55 per cent of all students.[314]

Indigenous persons were almost three times more likely than non-Indigenous persons to be unemployed: 20 per cent compared with seven per cent in the general population.[315]

313 Ibid.

314 Ibid.

315 ABS, *Population Characteristics , Aboriginal and Torres Strait Islander Australians*, 4713.0 (2001) at

59 per cent of Indigenous persons were employed, with a higher proportion of men than women employed (47 percent compared with 37 per cent).[316]

24 per cent of Indigenous persons stated their occupation as being "labourers and related workers" as opposed to 8.6 per cent of the non-Indigenous population. This was the most commonly stated occupation for Indigenous people. The most commonly stated occupation for non-Indigenous people is "professional" at 18 per cent, as opposed to 10.2 per cent of the Aboriginal or Torres Strait Islanders population.[317]

The mean household weekly income for Indigenous persons was $364 as compared to $585 for non-Indigenous persons. Income levels declined with increasing geographic remoteness.[318]

For Indigenous persons, income in the major cities and regional areas was equal to about 70 per cent of the corresponding income for non-Indigenous persons; in remote areas, this was equal to about 60 per cent and in very remote areas, 40 per cent.[319]

http://www.abs.gov.au/Ausstats/abs%40.nsf/e8ae5488b598839cca25682000131612/2b3d3a062ff56bc1ca256dce007fbffa!OpenDocument, accessed 9 December 2004; 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.

316 Ibid.

317 Ibid.

318 Ibid.

319 Ibid.

Chapter 8 Indigenous Culture, Family and Kinship

8.1 Introduction

This Chapter provides general background information on fundamental aspects of traditional indigenous culture and society. It aims to assist the reader to understand the next two chapters. It must be kept in mind that much of the Indigenous culture discussed in 8.2 has been profoundly affected by Western colonisation. A contemporary portrait of Indigenous people is given under 8.3.

8.1.1 Respecting the difference

Australia has two Indigenous peoples: the Aboriginal peoples and the Torres Strait Islander peoples. Ethnically and culturally, the Aboriginal peoples and Torres Strait Islander peoples are distinct.[320] In some sections within this document, the term "Indigenous peoples" will appear and, unless explicitly stated to the contrary, this terminology refers to both the Aboriginal and Torres Strait Islander peoples.

8.2 Aspects of Traditional Indigenous Australia

8.2.1 Indigenous Spirituality

Aboriginal and Torres Strait Islander spirituality is a complex concept which exists in many forms and is exhibited in the many different practices and beliefs of Indigenous Australians. These practices and beliefs include ceremonies, customary dealings, stories told and values held by Indigenous peoples, which in turn affect the social structures that exist in Indigenous society.[321]

The source of spirituality for each of the Indigenous peoples differs: for Aboriginal Australians it derives from stories of the Dreaming, whereas for Torres Strait Islander Australians it comes from stories of the Tagai.[322] However, fundamentally the essence of spirituality for Indigenous peoples is linked to the land.[323]

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320 Department of Foreign Affairs and Trade *Australia's Aboriginal and Torres Strait Islander peoples* at <http://dfat.gov.au/facts/indg_overview.html> accessed 25 August 2004.

321 Australasian Police Multicultural Advisory Bureau *A Practical Reference to Religious Diversity for Operational Police and Emergency Services* 2nd ed Melbourne, Australasian Police Multicultural Advisory Bureau at 5.

322 *Indigenous Australia, Spirituality 1* at <http://www.dreamtime.net.au/indigenous/spirituality.cfm> accessed 24 August 2004.

323 Department of Aboriginal and Torres Strait Islander Policy *Protocol for Consultation & Negotiation with Aboriginal People* Queensland Government, 1998 at 9.

It must be understood that for some contemporary Indigenous people the concept of spirituality has also been mixed with religious beliefs and values that were introduced with colonisation.[324]

There are many similarities among Aboriginal groups in relation to the Dreaming but there is also much diversity. For example those living in the desert had a very different lifestyle to those living in coastal areas.[325] Despite this, all Aboriginal groups had a period of creation called the Dreaming.[326] The Dreaming is a complex network encompassing "knowledge, faith and practices" that comes about from stories of creation and which was fundamental to all aspects, spiritual and physical, of Aboriginal life.[327]

During the period of the Dreaming, the world was created by spirits who created the land, humans and animals: "These spirits gave ceremonies that explained the rules to live by".[328] The stories of the Dreaming set out the rules that govern social behaviour and ceremonial practices, and the social structures within groups, which were said to "maintain the life of the land."[329]

In some areas, the spirit was recognised as the Rainbow Serpent, who created the landscape (for example, the rivers, valleys, hills, rocks and inlets) as she moved across the land.[330] Particular areas in the land are considered to be secret or sacred sites to Aboriginal people. These sites are also linked to Aboriginal totems.[331]

Torres Strait Islander people's life is "interwoven with relationships which were conducted in the language of family, kinship, home island, totemism and spirituality."[332] Torres Strait Islander people derive their spirituality from stories of the Tagai which focus on the stars and identify the Torres Strait Islanders as a people connected to the sea.[333] The stories show that everything in the world has a place and provide instructions to the people about how everything is ordered in the world.[334]

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324 Indigenous Australia, above note 322 at 2.

325 Behrendt, L *Aboriginal Dispute Resolution* Sydney, Federation Press, 1995 at 14.

326 Ibid.

327 Indigenous Australia, above note 322 at 2.

328 Behrendt, above note 325 at 14

329 Indigenous Australia, above note 322 at 2.

330 Behrendt, above note 325 at 14.

331 DATSIP, above note 323.

332 DATSIP, *Mina Mir Lo Ailan Mun: Proper Communication with Torres Strait Islanders* at www.indigenous.qld.gov.au/pdf/minamir.pdf, accessed 9 December 2004 at 8.

333 Indigenous Australia, above note 322 at 4.

334 Ibid.

8.2.2 Totems

Depending upon family or social kinship systems and location of birth, every Aboriginal person was given a totem. This was usually an animal and was another way that an Indigenous person was connected to the universe, the land and all other creatures on it. Generally, a person had three totems: a clan totem linking the person to other people; a family totem linking the person to the natural world; and a spiritual totem linking the person to the universe.[335] The animal that represented the family totem was treated with respect; it being believed that a person descended from that totem. As a consequence the family acted to protect the animal and refused to eat the meat from that totem animal.[336]

8.2.3 Connection with land

Aboriginal people believe the land gives life and is central to their culture, heritage and identity.[337] Aboriginal people have always felt a great attachment to their traditional land and consider the land to be very important to their way of life.[338]

> "The relationship to the land is the same in all Aboriginal communities on mainland Australia. 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."[339]

Boundaries of tribal areas were determined through stories that were passed down through the generations by the Elders of a tribe.[340] Aboriginal people believed that the spirits of their ancestors lived within the tribal area and generated life.[341] Historical associations tied individuals and groups to land they traditionally lived in and land used for specific cultural practices.[342]

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335 Behrendt, above note 325 at 15.

336 Ibid.

337 Ibid; see also Aboriginal and Torres Strait Islander Commission (ATSIC) *Issues: Land* at http://www.atsic.gov.au/issues/land/Default.asp> accessed 24 August 2004.

338 Behrendt, above note 325 at 15.

339 Behrendt, above note 325 at 14-15.

340 Ibid.

341 Ibid.

342 Trigger D 'Land rights legislation in Queensland: the issue of historical association' in Peterson P and Langton M (edd) *Aborigines, Land and Land Rights* Canberra, Australian Institute of Aboriginal Studies, 1983. For a more detailed discussion regarding the difference between Aboriginal historical and traditional connections to land within Queensland focussing on the dynamic features of Aboriginal societies, refer to 196.

8.2.4 Social Organisation

A variety of social units exist within Aboriginal culture in Queensland Aboriginal society.[343] The basic social unit is comprised of close knit extended families in which normal everyday living is "defined by a set of complex social laws, customs and beliefs all of which differed from one group to another according to their creation ethic or Dreaming".[344]

The concept of a family is different from traditional Western families. 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.[345] The extended relationships within the family are considered central to Indigenous kinship systems and are fundamental to the organisation of Indigenous society and to the way culture is passed on.

Family members provided support for one another and were "guided by the values and teachings of the elders and the lore".[346] Children were taught about their place in the kinship system and educated about all facets of life including health, survival, child-rearing practices and responsibilities to family and kin.[347]

Torres Strait Islander people traditionally lived in established village communities, with life revolving around hunting, fishing, gardening and trading relationships. Ritual, celebration and exchange of gifts were a large part of Torres Strait Islander people's social and spiritual life.[348]

8.2.5 Kinship system

Aboriginal people have a complex system of family relations, where each person knows their kin and their land. Kinship systems defined where a person fitted into the community and bound the people together.[349]

"Kinship laws" existed based on age and gender and these affected how a person communicated within the kinship system and what social activities they took part in.[350] "A person's relationship to others would dictate how to treat them and what a person's obligations were to

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343 Eades, D *Aboriginal English and the Law* Brisbane, Queensland Law Society, 1992 at 9.

344 DATSIP, above note 323 at 9.

345 Behrendt, above note 325 at 13.

346 DATSIP *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (revised edition) Queensland, Queensland Government, 2000 at 47 [2.2].

347 Ibid.

348 DATSIP, *Mina Mir*, above note 332 at 8.

349 Sutton, P *Native Title and the Descent of Rights* Perth, National Native Title Tribunal, 1998 at 11.

350 DATSIP, above note 323 at 9.

them".[351] Each person had social and cultural responsibilities and a breach of those responsibilities could result in admonishment or punishment. [352]

Aboriginal peoples who held the same or neighbouring land under their 'traditional laws and customs' were normally kin, or relations, and addressed and referred to each other as such.[353]

Although differences may exist today as to the form of lifestyle adopted by Aboriginal people and their socio-economic situation, "Aboriginal people in Australia [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."[354]

Kinship and reciprocity are the underlying principles of Torres Strait Islander social structure and relationships.[355]

8.2.6 Culture and Customs

The following information relates predominantly to the Aboriginal peoples of Australia.

8.2.6.1 The Role of Elders

Those who were given power in a tribal group, who commanded authority and were considered custodians of the law were the Elders.[356] It was the Elders' obligation and responsibility to honour and maintain the law and pass it down to the next generation. The position of Elder was not decided on the basis of age.[357] Those who attained the status of Elder were generally the most intelligent and diligent within a group and possessed the greatest knowledge of religious and ceremonial affairs.[358] Elders, together with traditional healers, were considered authoritative figures in a group and carried out the functions of teachers, judges and spiritual leaders.[359] As a consequence, "the community was governed by those who had shown themselves to be consistently wise and dedicated to the continuance of the culture of the group."[360] It is important to note that although certain clans-people were more influential, no one individual had ultimate power.[361]

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351 Behrendt, above note 325 at 13-14.
352 DATSIP, above note 346 at [2.2].
353 Sutton, above note 349 at 7.
354 Eades, above note 343 at 10.
355 DATSIP, *Mina Mir*, above note 332 at 8.
356 Fryer-Smith, S *Aboriginal Benchbook for Western Australian Courts* Victoria, Australian Institute of Judicial Administration Incorporated, 2002 at 2:14 [2.5.1].
357 Behrendt, above note 325 at 16.
358 Ibid.
359 DATSIP, above note 346 at 47 [2.2].
360 Behrendt, above note 325 at 17.
361 Ibid.

8.2.6.2 The Role of Men and Women

Men and women shared responsibility equally within the tribal group. They both involved themselves in important communal decision making that affected their community.[362] Aboriginal society focused upon the group as being most important; its strength lay in the group dynamics as opposed to that of the individuals.[363]

Although men and women were considered equal in the community, it should be noted that each gender carried out distinct practices which were sacred to that gender. Women possessed a sacred knowledge to carry out certain rituals ('women's business') which complemented that of men.[364]

8.2.6.3 Visual Art, Literature, Songs and Dancing

The basis of Indigenous culture is oral; however Aboriginal and Torres Strait Islanders' attachment to the land was expressed through the media of song, art, dance and painting.[365] These media of expression were passed on through the generations and it was understood that this was how the ancestral land was passed on to the younger generation to care for.[366] This knowledge in turn,

> "created an obligation to care for the land, protect the land, respect the past, to not exploit the land's resources, to take the responsibility of passing the country on to future generations and to maintain the religious ceremonies that needed to be performed there." [367]

Special religious significance is attached to the resting places of great ancestors. These places are known as sacred sites.[368] Knowledge of these sacred sites was passed down from generation to generation by the Elders in the form of stories.

Mythical stories which Elders told dictated appropriate modes of behaviour and set collective standards.[369] These standards were enforced by applying social pressure to ensure conformity. Children were taught acceptable modes of behaviour through stories and were taught by example.

362 Behrendt, above note 325 at 13.
363 DATSIP, above note 323.
364 Fryer-Smith, above note 356 at 2:14 [2.5.2].
365 Behrendt, above note 325 at 15.
366 Behrendt, above note 325 at 15-16.
367 Behrendt, above note 325 at 14-15.
368 DATSIP, above note 323 at 9-10.
369 Behrendt, above note 325 at 16.

8.3 Aspects of Contemporary Indigenous Australia

8.3.1 Cultural Survival, Change and Diversity

Colonisation had a profound impact upon all Indigenous people. However due to the geographic location of the Torres Strait Islanders the impact upon Aboriginal culture was more severe.[370]

"The impact upon Aboriginal people of colonisation, dispossession and urbanisation has resulted in the breaking down of many cultural ties, traditional practices and beliefs."[371] The loss of land had devastating effects on Aboriginal communities.[372] Aboriginal culture was lost by the removal of people from ancestral lands so that stories could not be passed down. The prolonged separation from land, family and kin has been associated with profound despair and depression amongst Indigenous people.[373] Despite the fact most Aboriginal people have been moved off their lands, land remains important to them.

The loss of traditional languages and practices does not reduce the authenticity of a person's Aboriginality.[374] Aboriginal people today "both individually and collectively as a community, define themselves by their culture not the colour of their skin."[375] Aboriginal and Torres Strait Islander peoples' ways of thinking and acting remain strong throughout Queensland, and do not depend solely on traditional lifestyle and language.[376] Despite tremendous change in the material situation of most Indigenous people this century, strong cultural continuities exist even in cities like Brisbane. Importantly, it must be understood that Indigenous people today do not have one culture but many and have many identities formed in personal or family relationships, within the community or the broader society.[377]

8.3.2 References to Deceased Persons

Each Indigenous community deals with the death of an individual differently.[378] Culturally, a person may not be able to mention the deceased person by name in the presence of the deceased's family. In many Indigenous communities, the depiction or mention of a person who is deceased can cause great distress amongst people, as can showing other images through visual media. If in doubt about naming or visually showing someone who has passed away, it may be culturally appropriate to seek advice from within that particular

370 DATSIP, above note 346 at 48 [2.2].
371 Fryer-Smith, above note 356 at 3:4 [3.2.1].
372 Behrendt, above note 325 at 23.
373 DATSIP, above note 346 at 49 [2.2].
374 Fryer-Smith, above note 356 at 3:4 [3.2.1].
375 DATSIP, above note 323 at 19; also DATSIP, *Mina Mir*, above note 332 at 16.
376 Eades, above note 343 at 11.
377 DATSIP, above note 346 at 273 [4.8.7].
378 ABC Online *Message Stick, Cultural Protocol: Death in a community* ABC, 2003 at <http://www.abc.net.au/message/proper/death.htm> accessed 24 August 2004.

community regarding protocol on such a matter.[379] Some of these difficulties in, for example, the context of sentencing remarks, may be overcome by prefacing the remarks with a warning that they will contain references to such matters: see 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".

8.3.3 Cultural Identity

A distinction exists between the concepts of 'race' and 'cultural identity'. It is a fact that considerable numbers of Indigenous people are now of mixed descent. However whether an individual is of 'mixed' or 'full' descent bears little relevance. It is the culture with which the individual chooses to identify which is relevant. It is the fact of socio-cultural knowledge and identity rather than 'race' which is important.

"Indigenous identity is made up of several elements; the land, sea-spirit, culture and people".[380] "Indigenous people believe they are made by their ancestors, who also made the land in a continually changing and evolving process."[381]

8.4 Queensland Courts and Indigenous Communities

The Royal Commission into Aboriginal Deaths in Custody recommended that incarceration be used only as a last resort when sentencing Indigenous people. Throughout Queensland there are examples of local Indigenous community groups working constructively with the police and the courts in deterring and dealing with Indigenous crime[382] and assisting in the sentencing process. Communities such as Mt Isa, Palm Island, Kowanyama, Yarrabah, Rockhampton and a number of the Cape Communities provide examples of local Community groups working to do something constructive in deterring and dealing with crime.

The Murri Court was officially opened in Brisbane in August 2002 and serves to assist Magistrates, court officers and, in particular, Indigenous defendants. The purpose of the Brisbane Murri Court is "to impose appropriate sentences by having regard to the offence committed and the defendant's personal and cultural background."[383]

The Murri Court seeks to integrate certain legislative requirements, particularly those found within s 9(2) *Penalties & Sentence Act* (Qld) 1992 and s16 *Crimes Act* 1914 (Cth). It formalises these provisions by

379 ABC Online, above note 378.
380 DATSIP, above note 346 at 267 [4.8.1].
381 Trigger, above note 342 at 197-198.
382 DATSIP, above note 346 at Appendix 4.
383 Ho, M Presentation by members of the Director of Public Prosecutions (Cth) (2003), on file.

"taking into account relevant cultural issues relating to the defendant [and] by providing a forum where Indigenous people have an input into the sentencing process." It seeks to overcome language and cultural barriers by having an Elder present to assist in dialogue between the defendant, Magistrate and other court officers.

Chapters 9 and 10 deal with Indigenous language and communication and Indigenous people and the courts.

Chapter 9 Indigenous Language and Communication

9.1 Introduction

It is a challenge for our court system to ensure fair proceedings for a witness, accused or party who is not fluent in spoken English, or who does not comprehend written or spoken English well. Where it is recognised early, a difficulty communicating with the court can to some extent be overcome. These issues are dealt with in chapter 6.

The trial process could operate "unfairly to Aboriginal witnesses and accused, because that process is often outside their experience, either linguistically or culturally."[384]

This chapter therefore seeks to provide a working guide for judges in their dealings with Aboriginal people and Torres Strait Islanders. It provides an overview of some of the languages and dialects spoken by Indigenous Queenslanders with a particular focus on Aboriginal English. It also discusses cultural barriers to effective communication, the use of interpreters in court, and other strategies for enhancing communication. It includes a glossary and a list of useful contacts. Appendix A is a list of issues and difficulties arising for Indigenous people in their contact with the courts prepared by Judge Bradley of the District Court.

9.2 Past Recommendations

The *Final Report of The Royal Commission into Aboriginal Deaths in Custody*[385] recognised the importance of cross-cultural understanding within the judiciary. Recommendation 96 suggested judicial officers and other court staff who come into contact with Aboriginal people participate in cultural awareness training programs and in informal discussions with members of the Aboriginal Community.[386]

In 1995, the Australian Institute of Judicial Administration Inc. (AIJA), with funding from the Commonwealth, implemented a two day cross-cultural awareness seminar conducted by the Aboriginal and Torres Strait Islander Studies Unit at the University of Queensland. Most of Queensland's judges and magistrates attended the seminar.[387] This

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384 Hon. Justice D Mildren 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21 *Criminal Law Journal* 7 at 12.

385 Johnston E, QC *Royal Commission Into Aboriginal Deaths in Custody National Report* ('Aboriginal Deaths in Custody Report') Australian Government Publishing Service, Canberra, 1991.

386 Aboriginal Deaths in Custody Report, note 385, Recommendation 96 in Vol 5 at 91.
Note: The Qld Department of Justice Skills Development Centre offers all department staff a 2-day Indigenous Cultural Awareness course.

387 Criminal Justice Commission *Aboriginal Witnesses in Queensland's Criminal Courts* Brisbane, Goprint, June 1996 at 32-33.

was followed by attendance in 1996 at a national seminar program jointly organised by the AIJA and the Judicial Commission of NSW. In October 2001, the District Court held a two day Aboriginal and Torres Strait Islander Justice Workshop presented by the Department of Aboriginal and Torres Strait Islander Policy. Subsequently, an Aboriginal and Torres Strait Islander Justice Resource Manual was produced.

The Qld Criminal Justice Commission (CJC) report *Aboriginal Witnesses in Queensland's Criminal Courts*[388] contains many recommendations concerning the judiciary, particularly in relation to socio-cultural and linguistic issues. These include recommendations about further cross-cultural awareness information and training, the receipt of evidence from Aboriginal witnesses and the use of interpreters.

9.3 Aboriginal Language Regions

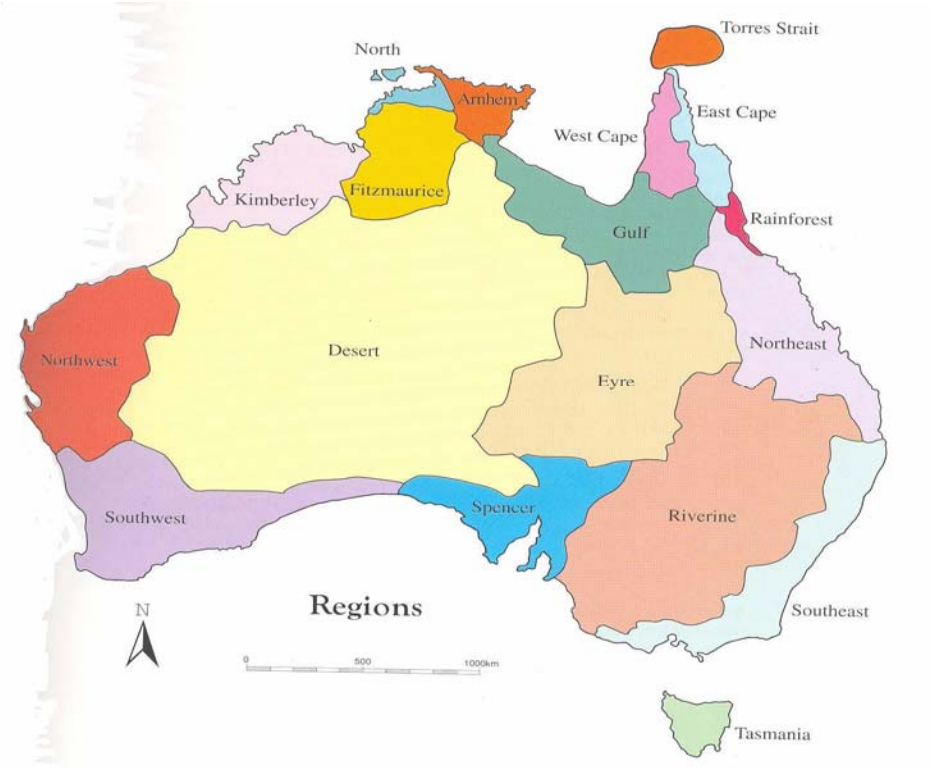
Regional differences in Aboriginal culture and society continue to exist.[389] Below is a map of Australia taken from the *Encyclopedia of Aboriginal Australia*[390] identifying those regions.[391]

388 Above note 387; Criminal Justice Commission *Reports on Aboriginal Witnesses and Police Watchhouses*: *Status Recommendations* Brisbane, GoPrint, November 1997.

389 Horton D (ed) *Encyclopaedia of Aboriginal Australia* Canberra, Australian Institute of Aboriginal and Torres Strait Islander Studies, Aboriginal Studies Press, 1994, Vol 2 at 935.

390 Horton, above note 389, Vol 2 at 935.

391 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.



9.4 What Languages do Aboriginal People Speak?

Most Aboriginal people speak English when speaking with non-Aboriginal people. However, it cannot be assumed that an Aboriginal person is speaking standard Australian English. A number of different languages may be spoken by Aboriginal people including traditional languages, pidgins or Creoles, and Aboriginal English. Each language is different and many Indigenous speakers are fluent in more than one.[392]

9.4.1 Traditional Languages

Approximately two thirds of the hundreds of original Aboriginal languages are considered to be extinct or nearly extinct.[393] In the 2001 Census, less than 5 per cent of people in Queensland identifying as Indigenous (5,599 people) stated that they spoke an Australian Aboriginal or Torres Strait Islander language.[394] Of those languages, Wik Mungkan is the most widely spoken in Queensland with an estimate of 1,000 speakers in 1992.[395] In the Torres Strait regions, Meriam Mir is spoken in the eastern Torres Strait, Kala Lagaw Ya is

392 Federation of Aboriginal and Torres Strait Islander Languages (FATSIL) *Australian Indigenous Languages* at http://www.fatsil.org/lgs.htm, accessed 22 September 2004.

393 Schmidt A *The Loss of Australia's Aboriginal Language Heritage* Canberra, Aboriginal Studies Press, 1990 at 1, 2. See also FATSIL above note 392.

394 Australian Bureau of Statistics *Census of Population and Housing: Indigenous Profile*, Queensland (2001) Commonwealth of Australia, 2002.0.

395 CJC, above note 387 at 15.

spoken in the central and western areas, and a dialect of Kala Lagaw Ya, Kalaw Kawaw Ya is spoken in some western communities.[396]

"In the 1996 Census, 13% of Aboriginal people (48,200 people) stated that they spoke an Indigenous or Australian creole language at home. Most of those people lived in the more remote central and northern regions of Australia."[397] "Of the Australian creoles, 2,200 people identified as Kriol speakers and 1,700 as Torres Strait Creole speakers.[398] In the 1996 Census, 95% of the Aboriginal people who stated that they spoke an Aboriginal language were English-speaking. The Census did not measure fluency in English, but provided for self-rating: 74% of Aboriginal language-speakers said that they spoke English well or very well."[399]

9.4.2 Pidgins and Creoles

"A pidgin is a language that is formed from two or more different languages spoken by two linguistically distinct groups, and is used only for limited purposes arising from interaction between the groups."[400] Regional pidgins developed in Queensland in 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.

9.4.3 Torres Strait Islander Creole

Torres Strait Islander Creole has become the common language (or lingua franca[401]) amongst Torres Strait Islanders in the Strait and in mainland Queensland. 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.[402] This language may

396 Department of Aboriginal and Torres Strait Islander Policy (Qld) (DATSIP), *Proper Communication with Torres Strait Islanders* at http://www.indigenous.qld.gov.au/pdf/mm1.pdf at 8.

397 Australian Bureau of Statistics Census of Population and Housing: Population Growth and Distribution, Australia, 1996, 2035.0.

398 Language experts believe that these numbers were underestimates: Australian Bureau of Statistics *Australian Social Trends 1999: Population, Population Composition, Indigenous Languages* Australia, 1999.

399 Ibid.

400 CJC, above note 387 at 16.

401 DATSIP, above note 396 at 8.

402 CJC, above note 387 at 16.

also be referrred to as “Broken”, “Biz” “Blaikman”, “Creole”, “Cape York Creole” or “Lockhart Creole”. [403]

9.4.4 Kriol

A second creole, known as Kriol (or Roper River Creole), is spoken in areas of Western Australia, the Northern Territory and Queensland.[404] It also has some influence on the Aboriginal English spoken in the more remote parts of Queensland.[405] “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.”[406]

9.4.5 Aboriginal English

Many Aboriginal people speak, as their first language, dialects 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.”[407] 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 standard 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*.[408]

a) Some sounds may be pronounced differently,[409] for example:
   - “h” at the beginning of a word is often not pronounced.
   - In heavier Aboriginal English the sounds “f” and “v” may be changed to “p” or “b” so that the phrase “we had a fight” becomes “we ad a bight”.

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403 Eades D, *Aboriginal English and the Law* Brisbane, Queensland Law Society Inc, 1992 at 23.

404 Amery R & Bourke C ‘Australian Languages: Our Heritage’ in Bourke C et al (eds) *Aboriginal Australia* St Lucia, University of Queensland Press (2nd ed), 1998, Ch 7, 122-146 at 138.

405 CJC, above note 387 at 16.

406 Amery & Bourke above note 404 at 138.

407 Queensland Department of Justice and the Department of Aboriginal and Torres Strait Islander Policy *Aboriginal English in the Courts* (2000) Brisbane, GoPrint, 2000 at 8.

408 Above note 387 at 16-17.

409 See also Eades, above note 403 at 25.

b) The tense of verbs may be indicated differently,[410] for example:
   - The ends of words with more than one consonant sound may be simplified so that, for example, "they locked him up" becomes "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".

c) Standard English words may have different meanings in Aboriginal English,[411] 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.

d) Some words in standard English may have no equivalent in Aboriginal English[412] (that is, a lack of semantic equivalence), for example:
   - The Wangatha word "pika" is used for anything from pain to any type of injury or illness. The differentiation comes from the context.
   - The Wangatha word "paarlpa" is used for blood vessel, tendon, sinew and any other stringy bit in the body.

e) Confusion of Subject and Object[413]

   - *"That's why they bin moving old people*.
     Meaning: *That's why the old people moved*.
     Misunderstood as: *That's why they moved the old people*.
   - *We paint up all the Jakamarra and Jupurrula*.
     Meaning: *All of us Jakamarras and Jupurrulas get painted up*.
     Misunderstood as: *We paint up all the Jakamarras and Jupurrulas."*

These differences between Aboriginal English and standard 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 some Aboriginal people may be "bi-culturally competent, adept at switching between standard English and Aboriginal" English,[414] many are not:

410 CJC, above note 387 at 16-17.

411 CJC, above note 387 at 17.

412 Extracted from an interview with Ms Dagmar Dixon, Coordinator of Interpreter Programs at Central Metropolitan TAFE in Perth in Fryer-Smith S *Aboriginal Benchbook for Western Australian Courts* Melbourne, AIJA Inc, 2002 at 5:9 [5.3.2].

413 *Aboriginal English and the Courts*, above note 407 at 30.

414 Amery & Bourke, above note 404 at 138.

> "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."415

Aboriginal people are more likely to speak Aboriginal English or a creole than Standard English even in places where traditional Aboriginal languages are no longer spoken.[416]

9.5 Risk of Misinterpretation

"Several difficulties can arise when a court, hearing the use of some English words, does not appreciate that a witness is not fluent in Standard Australian English."[417] It can be difficult for an untrained observer to detect different words, grammar and accents.[418]

See for example the comments of Justice Muirhead in *Jabarula:*[419]

> 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."420

Misunderstandings may have a significant impact on the outcome of court proceedings.[421] 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 disclose the circumstances of the offence which included a history of sexual violence against her by the victim.[422]

What follows is a discussion of some of the significant elements of communication in Aboriginal culture and consideration of how these cultural differences can affect court proceedings.

> "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."423

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415 Eades, above note 403 at 11.
416 CJC, above note 387 at 17 and Eades, above note 403 at 2.
417 CJC, above note 387 at 17.
418 Eades D, 'Communicating with Aboriginal Clients' in *Law Society Journal* 31 (June 1993) 5 at 41.
419 (1984) 11 A Crim R 131.
420 at 137; quoted in Goldflam R ''Silence in Court!' Problems and Prospects in Aboriginal Legal Interpreting' in *Australian Journal of Law and Society* 13 (1997) 17 at 26.
421 CJC, above note 387 at 18 and Eades, above note 403 at 25.
422 Unreported, CA No 221 of 1993 (29 November 1993) Fitzgerald P, Davies & McPherson JJA, Brisbane; for discussion, see Chapter 10.
423 Roberts-Smith L 'Communication Breakdown' in *Law Society Journal* (1989) 75 at 77.

9.6 Non-Verbal Communication

Non-verbal communication, through facial expression, eye movement, gestures and posture, may form a significant part of face-to-face communication.

Styles of non-verbal communication vary, and are interpreted differently in different cultures. Some of the important non-verbal aspects of Aboriginal communication are outlined below.

9.6.1 Avoidance of Direct Eye Contact

In Aboriginal society, avoidance of direct eye contact is intended to demonstrate politeness and respect particularly in relation to persons of authority.[424] Direct eye contact with anyone other than the person's intimate peers and relations may be considered rude, disrespectful or even aggressive.[425] This is something which could be drawn to the attention of jurors to avoid the risk of misinterpretation.[426]

9.6.2 Silence

Silence is a common and positively valued part of communication[427] which may indicate that the person wants to think, to adjust to a situation, or some other factor.[428] Silence may indicate a lack of authority to speak on the topic or in the presence of a particular person.[429] Silence may be a witness's response to questions they have already answered.[430] It may indicate 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.[431]

Silence can be easily misinterpreted as indicative of evasion, ignorance, or guilt.[432] Longer periods may need to be allowed for Indigenous witnesses to answers questions.[433] Courts and juries should be made aware that silences are not necessarily indicative of an unwillingness to respond.[434]

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424 Fryer-Smith, above note 412 at 5:5 [5.2.2]; CJC, above note 387 at 25.

425 Eades, above note 403 at 47; Sussex R "Intercultural Communication and the Language of the Law" (2004) 78 ALJ 530 at 532.

426 *Aboriginal English and the Courts*, above note 407 at 38.

427 CJC, above note 387 at 23; Eades (1993), above note 418 at 46; Sussex R (2004), above note 425 at 532.

428 Fryer-Smith, above note 412 at 5:5 [5.2.3]; Eades (1992), above note 403 at 46; CJC, above note 387 at 23.

429 Mildren (1997), above note 384 at 16.

430 CJC, above note 387 at 21.

431 CJC, above note 387 at 24.

432 Eades (1993), above note 418 at 46.

433 DATSIP, above note 396 at 18.

434 *Aboriginal English and the Courts*, above note 407 at 39; *R v D* [2003] QCA 347 at [11].

9.6.3 Sign language and gestures

Sign language and gestures are also important features of communication in traditional Indigenous cultures.[435] "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"."[436]

Some gestures, including movements of the eyes, head and lips, may go unnoticed by non-Aboriginal people but can have a significant meaning.[437] Questioners should be alert to such gestures and seek to clarify with further questions.[438]

9.7 Cultural Barriers to Effective Communication

Dr Diana Eades, an anthropological linguist, has identified a number of barriers to effective communication between Aboriginal and non-Aboriginal people. These are summarised below.

9.7.1 Family or Kin Loyalty

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.[439] 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 to each other directly.[440]

9.7.2 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.[441] 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."[442] Direct questioning may be offensive so

435 DATSIP, above note 396 at 19.
436 *Aboriginal English and the Courts*, above note 407 at 37.
437 Fryer-Smith, above note 412 at 5:5 [5.2.4], Eades D (1992), above note 403 at 71.
438 *Aboriginal English and the Courts*, above note 407 at 37.
439 Eades (1992), above note 403 at 92, CJC, above note 387 at 27.
440 CJC, above note 387 at 27.
441 Eades (1992), above note 403 at 10 and 27; and *Aboriginal English and the Courts*, above note 407 at 13. See also CJC, above note 387 at 49.
442 CJC, above note 387 at 19.

that the exchange may be rendered unproductive or unreliable.[443] "When Aboriginal people volunteer information about a matter, it can be intensely embarrassing for them to have their knowledge questioned."[444]

> "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."445

"Unsophisticated" 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;[446]

each of which is common in court proceedings.

9.7.3 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,[447] an "unsophisticated" Aboriginal person is likely to gratuitously concur with a proposition put to him or her as a means of conveying cooperation and avoiding conflict.[448] This has otherwise been described as a tendency to "take the line of least resistance".[449]

> "That is, 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'."[450]

Gratuitous concurrence may signify feelings of hopelessness or resignation to the futility of a particular situation.[451] An Aboriginal person may also gratuitously concur rather than admit they do not

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443 DATSIP, above note 396 at 18.
444 CJC, above note 387 at 20.
445 CJC, above note 387 at 19.
446 Fryer-Smith, above note 412 at 5:7 [5.3.2]; *Aboriginal English and the Courts*, above note 407 at 13.
447 CJC, above note 6 at 21.
448 Fryer-Smith, above note 31 at 5:8, Eades (1992), above note 403 at 26 and *Aboriginal English and the Courts*, above note 407 at 14, CJC, above note 387 at 21; Sussex (2004), above note 425 at 532.
449 Hore-Lacy D 'Koori Justice?' paper delivered at the Eighth International Criminal Law Congress: The Criminal Lawyer and Human Rights (October 2002) Melbourne at http://www.crimbarvic.org.au/horelacyb.html at [15].
450 Eades (1992), above note 403 at 26.
451 *Aboriginal English and the Courts*, above note 407 at 9.

understand the question.[452] Particularly in police interviews, "[i]f it means admitting something, rather than attempting to explain it in a non-preferred language, so be it".[453]

The dangers of misinterpreting an answer given in gratuitous concurrence is clearly illustrated in the unreported case of *R v Kennedy.*[454] The extract below is from the accused's audio-taped record of interview with police:

> "Right. Now Cedric, I want to ask you some questions about what happened at Jay Creek the other day. Do you understand that? – Yes.
> Right. Now it's in relation to the death of [that dead fellow]. Do you understand that? – Yes.
> 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? -- Yes.
> Now. Do you have to tell me that story? -- Yes.
> Do you have to, though? -- Yes.
> Do you, am I making you tell me the story? – Yes.
> Or are you telling me because you want to? -- Yes.
> Now I want you to understand that you don't have to tell me, right? -- Yes.
> Now do you have to tell me? -- Yes."455

The court in which an Indigenous witness is giving evidence needs to be aware of, and guard against, gratuitous concurrence.[456]

Paragraphs 9.7.1 to 9.7.3 can be seen as instances of a single overarching theme: that information exchange in traditional Aboriginal society is always subordinate to 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. This is at odds with the Western cultural belief that information can be objective, independent of relationship. The legal system appears to be rooted in the belief that trustworthy information can only be gleaned in the absence of a close personal relationship; eg. the issue of conflict of interest may arise where a relationship exists between parties taking part in legal proceedings.

As the concern of a traditional 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. Hence the appearance of gratuitous concurrence.[457]

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452 CJC, above note 387 at 22. There is no equivalent in Aboriginal languages of the concept of understanding (Ms Dagmar Dixon in WA Benchbook). To admit one does not understand is humiliating.

453 Hore-Lacy, above note 449 at [15].

454 Unreported, Northern Territory Supreme Court (Gallop J) 30 November 1978.

455 Extracted in CJC, above note 387 at 22.

456 *R v D* [2003] QCA 347 at [11].

457 Communication, R Pensalfini, on file.

9.7.4 Scaffolding

Scaffolding refers to the tendency of people whose first language is not standard Australian English to adopt the wording and grammatical structure of the other speaker in their reply.[458] The borrowed words, however, may not convey the person's intended meaning. Because the speaker is not fluent in the language being used, he or she may not have the language skills necessary to frame a different and more precise reply. An answer using borrowed wording may not be reliable.[459]

9.7.5 Unwillingness to Answer

Responses like "I don't know" may not indicate a lack of knowledge of the issue, but rather a reaction like, "This is not an appropriate way for me to provide information."[460]

9.7.6 Quantitative Estimates

In traditional Aboriginal societies, there is a preference to specify matters in terms of geographical, climatic or social events.[461] As a consequence, numbers, times, and distances may be used vaguely, inaccurately or inconsistently.[462] If asked the number of people present, for example, an Aboriginal person will commonly list the names of those people rather than provide a number.[463]

> "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 he or she thinks is desired."[464]

9.8 Other Observed Difficulties

A number of more specific observations about language differences between Aboriginal and non-Aboriginal people are contained in the *Aboriginal Benchbook for Western Australian Courts*[465] and are summarised below.

- Aboriginal languages do not contain the concept of 'understanding' in the sense of comprehension. The nearest is the concept of 'knowing' in the sense of 'being aware of'.

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458 CJC, above note 387 at 18, and Mildren (1997), above note 384 at 16.

459 CJC, above note 387 at 18.

460 Sussex (2004), above note 425 at 532.

461 Fryer-Smith, above note 412 at 5:8 [5.3.4]; *Aboriginal English and the Courts*, above note 407 at 15.

462 Eades (1993), above note 418 at 41.

463 Mildren, above note 384 at 15.

464 CJC, above note 387 at 26.

465 Extracted from an interview with Ms Dagmar Dixon, Coordinator of Interpreter Programs at Central Metropolitan TAFE in Perth in Fryer-Smith, above note 412 at 5:9 – 5:10 [5.3.5].

- Each Aboriginal community has its own taboo words which must not be spoken. These words are often everyday words.

9.9 Speech and Hearing Impairment

Other impairments may also affect speech. Respiratory and dental health is poor in many communities, and this makes older people often very hard to understand.

It should not be overlooked that an estimated 40 per cent of the Aboriginal community suffers hearing loss.[466] This is largely due to the high incidence of the disease *Otitis Media*, a middle ear infection, in Aboriginal and Torres Strait Islander communities. This disease accounts for at least 70 per cent of hearing impairments in Indigenous children.[467]

9.10 Expert Evidence: Linguists and Anthropologists

In its report on Aboriginal witnesses, the CJC recommended that where an Aboriginal witness's evidence would otherwise be misunderstood, evidence from an expert linguist or anthropologist could usefully be called.[468] In an appropriate case, evidence of the language and culture of a particular community or person may be admissible.[469]

9.11 Leading Questions in Cross-Examination

> "The experience of the justice system has shown that many Aboriginal people will readily agree with any suggestion put to them in cross-examination."470

Justice Mildren of the Northern Territory Supreme Court has suggested in his paper 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System'[471] 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. He refers particularly to an extract from the Victorian case *Mooney v James:*[472]

> "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."

466 CJC, above note 387 at 29.
467 CJC, above note 387 at 28-29.
468 CJC, above note 387 at 41 and see Hore-Lacy, above note 449 at [39].
469 *R v Watson* [1987] 1 Qd R 440 at 465-466.
470 Hore-Lacy, above note 449 at [26].
471 Mildren, above note 384 at 15-16.
472 [1949] VLR 22 at 28 per Barry J.

In such circumstances the judge may intervene: "in the exercise of his power to control and regulate the proceedings the judge may properly require counsel to abandon a worthless method of examination".[473]

9.12 Special Witnesses

Section 21A of the *Evidence Act* provides for orders to be made in respect of witnesses who, in the court's opinion, would be likely to suffer emotional trauma, be so intimidated as to be disadvantaged as a witness, or be disadvantaged as a witness as a result of intellectual impairment or cultural differences.

In respect of such "special witnesses" the court may make various orders, providing the defendant in criminal proceedings is not prejudiced, including:

- obscuring the defendant from the witness' 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.

Despite the applicability of these provisions to Aboriginal witnesses,[474] where for example a significant police presence in the courtroom may significantly intimidate an Aboriginal witness, such orders seem rarely to be sought.[475]

9.13 Interpreters

In *Ebatarinja v Deland*,[476] 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," and 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." For this was cited *Johnson v The Queen*.[477] The High Court also cited with approval this

473 *Mooney v James* [1949] VLR 22 at 28; Cross on Evidence [17165], [17465], [17495].

474 Mildren, above note 384 at 17: these provisions may be particularly useful in helping to overcome a witness' silence.

475 CJC, above note 387 at 89.

476 (1998) 194 CLR 444 at 454.

477 (1987) 25 A Crim R 433 at 435 (Shepherdson J).

passage from *Kunnath v The State*[478] where the Judicial Committee of the Privy Council said at 1319:

> "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.

9.13.1 Determining Competency in English

Ordinarily, there will be no issue as to the need for a competent interpreter. But when an interpreter is not available, and there is an issue as to whether the accused has a sufficient competency in English as to be capable of understanding the proceedings so as to be able to make a proper defence, then that issue is to be determined by a jury empanelled for that purpose pursuant to s 613 of the *Criminal Code*: see *Ngatayi v R*.[479] That procedure is discussed at 7.1 of the Queensland Supreme and District Courts Benchbook.

9.13.1.1 Competency in English

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."480

A person's proficiency in English may easily be over-estimated.[481] The court must be careful not to assume that if a person can speak basic English, he or she also has a high level of comprehension.[482]

9.13.2 Practical Difficulties in Aboriginal Interpreting

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478 [1993] 1 WLR 1315.

479 (1980) 147 CLR 1 at 7.

480 CJC, above note 387 at 63.

481 Cooke M *Indigenous Interpreting Issues for Courts* Melbourne, AIJA Inc, 2002 at 13.

482 Bureau of Ethnic Affairs and Department of Justice Interpreters and the Courts: A Report into the Provision of Interpreters in Queensland's Magistrates Courts Brisbane, Queensland Government, 1997.

Many practical difficulties exist in relation to obtaining the assistance of competent Aboriginal interpreters in court proceedings. Some of these are summarised below.

9.13.2.1 Lack of Trained Interpreters

The Australian National Accreditation Authority for Translators and Interpreters (NAATI) prescribes a number of standards for translating and interpreting. NAATI accreditation is the only officially accepted qualification for translators and interpreters in Australia.[483] The minimum NAATI-prescribed standard for interpreting in court proceedings is "Translator and Interpreter", the Australian professional standard (formerly NAATI Level 3).[484] Accredited interpreters are bound by a Code of Ethics which includes commitments to impartiality and accuracy.[485] Accreditation is not available for many traditional Indigenous languages, but is available for *Wik Mungkan*, *Dyrbal, Torres Strait Creole*, and *Kala Lagaw Ya.*[486] It appears, however, that very few Aboriginal interpreters have acquired this level of competency and accreditation.

> "The result, as Justice Mildren has noted, is that the standard of interpreters presently available in the court system 'ranges from excellent to rather poor, with many Aboriginal interpreters at the lower end of the scale'."487

9.13.2.2 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. R Goldflam from the Northern Territory Legal Aid Commission has described these reasons as including:[488]

- that insufficient notice is given to the relevant interpreting service organisation. A demand for an interpreter immediately often cannot be met;
- that an interpreter trained in the relevant Aboriginal language or dialect is not available in the location where the proceedings are to be conducted. Indeed, the majority of traditional Aboriginal languages are spoken by only small groups in remote areas.[489]

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483 National Accreditation Authority for Translators and Interpreters (NAATI), *Concise Guide for Working with Translators and Interpreters in Australia* ACT, NAATI, 2003 at 3.

484 NAATI, above note 483 at 11.

485 NAATI, above note 483at 16.

486 *Aboriginal English and the Courts*, above note 407 at 8.

487 CJC, above note 387 at 64.

488 Goldflam, above note 420 at 49.

489 CJC, above note 387 at 64.

- that an appropriately-trained interpreter who is otherwise available becomes "unavailable" for reasons attributable to that interpreter's own local relationships. The interpreter may believe that his or her involvement in the court proceedings will be construed as "taking sides" in the matter. Within his or her community, the interpreter might be blamed for the verdict in the trial, and accordingly punished or "paid back" by the accused, his or her family or members of the broader community.[490]

9.13.2.3 Effect of Court Environment

Legal interpreting requires a higher level of competency including command of legal terminology.[491] "There is evidence that second language competency decreases markedly under trauma or stress." The formal court environment and the use of technical legal language may be overwhelming for an Aboriginal interpreter."[492]

9.13.2.4 Use of Untrained Interpreters

"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." [493]

9.13.2.5 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.[494] 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.[495]

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490 Ibid.

491 *Interpreters and the Courts*, above note 477 at 16-17.

492 Ethnic Affairs Commission ("EAC") Use of Interpreters in Domestic Violence and Sexual Assault Cases: A Guide for Interpreters Sydney, EAC, 1995.

493 Laster K & Taylor V *Interpreters and the Legal System* Sydney, The Federation Press, 1994 at 91. See also *Singh v Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 4.

494 Roberts-Smith, above note 423 at 75.

495 McRae H et al *Indigenous Legal Issues* Sydney, LBC, 1997 at 372. Such inability to understand technical legal concepts, of course, may apply equally to non-Aboriginal people.

9.13.2.6 Language/Semantic Differences

An English word may have one or more different meanings in Aboriginal languages, and vice versa.[496] 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 murder the complainant, but to "kill her a little bit", "kill her on the leg".[497]

Numerous reports, including *Access to Justice: An Action Plan*[498] and *Multiculturalism and the Law*[499] have reinforced the urgent need for sufficient, competent Aboriginal interpreters in the conduct of criminal proceedings.

9.14 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.[500] The Queensland Department of Aboriginal and Torres Strait Islander Policy has also compiled information intended to assist inter-cultural communication. Numerous examples are found in the *Aboriginal Benchbook for Western Australian Courts*. It is suggested that communication with Aboriginal witnesses could be enhanced by following the guidelines summarised below.

9.14.1 Clear, Simple and Slow Speech

When communicating with a speaker of Aboriginal English who is not fluent in standard English, the use of simple words, simple sentence structure, and slow speech, will assist greatly in the communication process.

9.14.2 Ordinary Tone of Voice

An ordinary tone of voice, and everyday manner of speech, should be used. Loud voices and/or harsh tones of voice suggest rudeness, aggression, or lack of respect. Especially in the courtroom context, a loud voice and/or a harsh tone may intimidate a speaker of Aboriginal

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496 Roberts-Smith, above note 423 at 75.

497 Coldrey J 'Aboriginals and the Criminal Courts' in K Hazlehurst (ed) *Ivory Scales: Black Australia and the Law* Sydney, UNSW Press, 1987, 81 at 87-88.

498 Commonwealth of Australia, Access to Justice Advisory Committee, 1994.

499 Australian Law Reform Commission Report No 57 Commonwealth of Australia, 1992.

500 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 the judges.

English to the point they will exhibit gratuitous concurrence (as if being bullied) or become incapable of responding to the speaker.

9.14.3 Appropriate Name

At the earliest opportunity, ascertain the name by which the speaker of Aboriginal English wishes to be addressed. It may be helpful to note down a phonetic spelling of the name."[501]

9.14.4 Indirect Questions

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.

9.14.5 Difficulties with "Either-Or" Questions

"Either-or" type questions which ask the respondent to choose between one of two alternatives may be confusing.[502] "The use of such questions increases the risk that the witness's answers may be unreliable, either because of his or her misunderstanding of the question or the court's misunderstanding of what it is that the witness is actually agreeing to."[503] 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:

> 'Maybe you were at the shop. Maybe you were at the pub. Tell me where you were then?'; or simply -
>
> 'Where were you then?'" [504]

9.14.6 Other difficulties

- Attempting to speak Aboriginal English. Attempts by non Aboriginal English speakers to speak Aboriginal English may be interpreted as mocking or patronising, as well as being likely to be incorrect.
- Using long and/or complex sentence constructions.[505]
- Using figurative speech. An expression such as "as clear as mud", or "raining cats and dogs" may confuse a speaker of Aboriginal English.
- Asking negative questions, such as "You didn't do that, did you?" Such questions may easily confuse a speaker of Aboriginal English.
- "Correcting" the speech of a speaker of Aboriginal English.

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501 Above note 29 at 5.4.
502 Eades (1992), above note 403 at 55.
503 CJC, above note 387 at 37.
504 CJC, above note 387.
505 CJC, above note 387 at 23.

9.14.7 Use of appropriate descriptions and names

When referring to Aboriginal people, it is important to use appropriate descriptors and names:

- 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;[506]
- Some Aboriginal people may prefer to be referred to by their own group names for example: "Koori" for Aboriginal people from NSW, Vic and Tasmania; "Murri" for Aboriginal people from Qld; "Nyunga" for WA. Care should be taken when using these names. Only use these names if it is the Aboriginal person's preference, the latter two for example are gross over generalisations. The terms "Yolngu" and "Anangu" refer to very specific peoples of those regions. Using "Anangu" to refer to a Warlpiri person, for example, is inaccurate and could offend.
- Torres Strait Islanders have a very different cultural and linguistic identity from Aboriginal people and should be referred to as Torres Strait Islanders.[507]
- The terms "full-blood Aborigines"; "part Aborigines"; or "half castes" are considered insulting and inaccurate.[508]

9.15 Judge's Role

In his paper, '*Redressing the Imbalance Against Aboriginals in the Criminal Justice System*',[509] Justice Mildren of the Supreme Court of the Northern Territory suggests there are really two key functions judges should routinely fulfil in criminal trials involving Aboriginal witnesses and/or accused:

- Giving suitable directions to the jury prior to the opening of the prosecution case;[510] and
- Exercising the discretion to disallow questions and/or forms of questioning which are unfair.[511]

The CJC *Report into Aboriginal Witnesses in Queensland's Criminal Courts* also recognised that judges have a significant role in ensuring proceedings involving Aboriginal witnesses are conducted fairly.

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506 Aboriginal with a lower case refers to the indigenous peoples of any part of the world. Aboriginal Australians should be identified with a capital A, and to show respect: see Glossary.

507 Judicial Studies Board (2004) at 1-16.

508 Horton, D (ed) *The Encyclopaedia of Aboriginal Australia*, Canberra, AIATSI, 1994 at 3.

509 Above note 384.

510 at 13.

511 at 14.

9.15.1 Unfair Questioning and Matters of Evidence

The types of questions and questioning methods which Justice Mildren suggests might properly be disallowed include leading questions; either/or questions; questions seeking quantifiable specification as to numbers or time; and offensive questions.[512]

Judges should also give consideration to the use of guided narrative evidence-in-chief; the applicability of provisions in respect of special witnesses; and the appropriateness of admitting expert linguistic and cultural evidence.

9.15.2 Assessing Language Proficiency

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.[513]

It is suggested that judges familiarise themselves with the communication difficulties faced by Aboriginal witnesses and seek to make a reasoned decision as to the witness's proficiency in English. Judges must seek to ensure that questions are asked fairly, and that, in criminal trials, the jury is instructed as to relevant linguistic and cultural issues.

The question whether a witness or accused requires an interpreter is a matter for the discretion of the judge. 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.[514]

Dr Michael Cooke regards the determination of whether an interpreter is needed as involving two related considerations: the person's competence in English; and the communicative context in which they are required to speak (that is, the courtroom environment).[515] 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 counsel and understand advice given by counsel.[516]

Questions to consider in evaluating the communicative demands of the proceeding would include; how fast do the barristers speak, will the questions be linguistically challenging (rapid-fire questions, trick

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512 Mildren, above note 384 at 14-15.

513 *Interpreters and the Courts*, above note 477 at 28.

514 CJC, above note 387 at 66; see also Laster K & Taylor V, above note 493 at 96-97.

515 Cooke, above note 481 at 29.

516 Cooke, above note 481 at 30.

questions, complex questions), and will the questions be culturally alien to the witness?[517]

In the Northern Territory, three different methods are used to assess a witness's need for an interpreter in the context of a court proceeding:[518]

- 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.

9.15.3 Directions to Jury

In criminal trials, it is important that juries be informed of relevant linguistic and cultural matters which will assist in their assessment of the evidence. Ideally, counsel would foreshadow the likelihood of communication difficulties with the judge before the proceedings commence. In its report on *Aboriginal Witnesses in Queensland's Criminal Courts*, the CJC published proposed jury directions for cases involving Aboriginal and Torres Strait Islander witnesses and for defendants.[519] One is relevant for cases where the witness or defendant is a speaker of Aboriginal English and the other is relevant for cases where the witness or defendant speaks Torres Strait Creole. Excerpts which may be useful are extracted in Appendix B to this Chapter. They have been slightly adapted and will require further adaptation to the particular circumstances. For example, Aboriginal residents of Aurukun generally speak to each other in Wik Mungkan and only speak English to those for whom English is a first language. Similarly many residents of the Torres Strait will ordinarily communicate with each other in their indigenous language.[520]

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517 Cooke, above note 481 at 30.

518 Cooke, above note 481 at 31.

519 CJC, above note 4 at Appendix 4; see also Mildren, above note 1 at 7.

520 See 9.4.1.

9.16 Glossary

***Aboriginal**:* (adjective) the official definition is someone of Aboriginal descent who identifies as such and is recognised by their Aboriginal community to be so.[521] 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).[522] 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.[523]

***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.[524]

***Aborigine**:* (noun) one of a race of tribal peoples, the earliest known inhabitants of Australia and their descendants. *Aboriginal*, *Aboriginals*, and *Aboriginal* people are the preferred terms.[525]

***Anangu**:* The name by which some Aboriginal people in Central Australia refer to themselves.

***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.[526]

***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*.[527]

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521 Horton, above note 389, Vol 1 at 3.
522 Delbridge A et al (eds) *The Macquarie Dictionary* (3rd ed) (1997) at 5.
523 See for example Department of Aboriginal and Torres Strait Islander Policy, Protocols for Consultation and Negotiation with Aboriginal People, Qld Government at 19; www.indigenous.qld.gov.au/resources/cultures.cfm
524 Horton, above note 389, Vol 1 at 13.
525 *The Macquarie Dictionary*, above note 522 at 6.
526 Horton, above note 389, Vol 2 at 866.
527 Horton, above note 389, Vol 1 at 559.

***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.[528]
***Murri**:* The name commonly used to identify Aboriginal people from Queensland. Variations include *Marri, Murree,* and *Marria*.

Nyunga (also Noongar, Noongah): The name by which some Aboriginal people from Western Australia refer to themselves.

***Pidgin**:* A restricted language that enables speakers of mutually unintelligible languages to communicate with each other for a limited range of purposes.[529] 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*.[530] 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.[531]

Yolngu: The name by which some Aboriginal people from the Arnhem region in the Northern Territory refer to themselves.[532]

528 Horton, above note 389, Vol 2 at 867.
529 Horton, above note 389, Vol 2 at 866.
530 Eades (1992), above note 403 at 23.
531 Horton, above note 389, Vol 2 at 1089-1092; and DATSIP, above note 396 at 8.
532 Horton, above note 389, Vol 2 at 1230.

9.17 Useful Contacts

9.17.1 Aboriginal Languages

The Federation of Aboriginal and Torres Strait Islander Languages (FATSIL)
301 Churchill Road, Prospect, 5082, SA
ph (08) 8342 2081
fax (08) 8342 2083

9.17.2 Aboriginal Interpreters

There is a searchable directory of accredited interpreters and translators available at www.naati.com.au. Accredited interpreters are also listed under "translating and interpreting services, Commonwealth and State Government" in the Yellow Pages.

NAATI State Office Brisbane
Yungaba Centre, 120 Main St, Kangaroo Point, 4169
ph (07) 3393 1358
fax (07) 3393 0745
NAATI National Hotline
Canberra direct
1300 557 470

9.17.3 Aboriginal Policy and Affairs

Department of Aboriginal and Torres Strait Islander Policy (DATSIP)
South Queensland Regional Office
Level 1, 141 George Street, Brisbane
ph (07) 3225 8982
fax (07) 3225 8981

9.18 Acknowledgements

Much of the content of this section is derived from the *Aboriginal Benchbook for Western Australian Courts* written by Stephanie Fryer-Smith and published by the Australian Institute of Judicial Administration Inc. in 2002 as a model Indigenous bench book. The AIJA kindly gave permission to adopt parts of its bench book in this publication.

Two works particularly have informed this section; *Aboriginal English and the Law* written by Dr Diana Eades and published by the Queensland Law Society in 1992 and *Aboriginal English in the Courts*; a joint publication produced by the Queensland Department of Justice and the Department of Aboriginal and Torres Strait Islander Policy.

Finally, the Qld Crime and Misconduct Commission kindly gave permission to reproduce the proposed jury directions published by the Criminal Justice Commission in 1996 in its report *Aboriginal Witnesses*

in Queensland's Criminal Courts. This report has also informed much of the content of this section.

Thanks must also be given to Dr Rob Pensalfini of University of Queensland for his comments on an earlier draft.

9.19 Appendix A

Issues and difficulties arising for Indigenous people in their contact with the courts.

- Very real danger of miscommunication both with police and the courts;
- Lack of comprehension by many Indigenous people of the criminal justice system and of conflicting cultural and legal assumptions and values; eg the right to remain silent;
- Inability to speak, read or understand Standard English;
- Deference to, and intimidation by, authority;
- Different concepts of time and distance;
- Customary law or cultural inhibitions;
- Health problems – especially hearing problems and those arising from alcohol abuse;
- Unused to air conditioned buildings;
- Lack of understanding of police and judicial officers of crime and response within the context of a particular community;
- Unawareness of lawyers of necessity to use simple, or even, Aboriginal English;
- Lack of understanding of lawyers and judicial officers of customary law and cultural issues.

9.20 Appendix B: Directions to Jury Concerning Indigenous Witnesses (Speakers of Aboriginal English)[533]

9.20.1 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.

9.20.2 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.

9.20.3 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.

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533 Dr Diana Eades in consultation with the Hon. Justice D Mildren of the Northern Territory Supreme Court and Mr Michael Cooke of Batchelor College, Northern Territory, extracted in CJC, above note 387 at Appendix 4.

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.

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.

9.20.4 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.

9.20.5 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.

9.21 Directions to Jury Concerning Indigenous Witnesses (Speakers of Torres Strait Creole)[534]

9.21.1 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.

9.21.2 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.

534 Ms Helen Harper of Batchelor College, Northern Territory, extracted in CJC, above note 387 at Appendix 4.

Chapter 10 Indigenous People and the Criminal Justice System

10.1 This chapter deals with a number of issues which may have particular impact on Aboriginal people or Torres Strait Islander people. These issues include:

- The admissibility of confessions;
- Difficulties for Indigenous women;
- Children;
- Imprisonment; and
- The use of Community Justice Groups

10.2 Confessions

For the reasons outlined in Chapter 9, Indigenous 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.

10.2.1 Law relating to the admissibility of confessions

A confession which has been induced by any threat or promise by a person in authority shall not be received in evidence in any criminal proceeding: *McDermott v R*.[535] A confession will be presumed to have been made voluntarily: *A-G (NSW) v Martin*.[536] However, where there are circumstances to suggest a confession was obtained by an inducement, threat or promise, the prosecution must prove that it was made voluntarily: *R v Thompson.*[537]

10.2.2 The Anunga Rules

In *R v Anunga*[538] the Supreme Court of the Northern Territory outlined guidelines for the interrogation of Indigenous persons. These "Anunga Rules"[539] form part of the operational procedures of the Queensland Police Service and are binding on officers and staff.[540] In *R v Wilson*[541] the Court of Appeal held that although the description of the rules as

535 (1948) 76 CLR 501 at 511 per Dixon J.
536 (1910) 9 CLR 713.
537 [1893] 2 QB 12; [1891-1894] All ER Rep 376.
538 (1976) 11 ALR 412.
539 Perhaps more appropriately described as the *Anunga Guidelines*.
540 *Police Service Administration Act* 1990 (Qld), s 4.9(3).
541 [1997] QCA 265; CA 182 of 1997, 29/08/1997.

"guidelines"[542] suggests they are not intended to be binding as a matter of law, it is relevant to consider breach of the Anunga Rules in determining whether it is fair to admit the results of the interrogation of an Indigenous person.[543]

The Anunga guidelines are set out in part 2.14.11 of the *Operational Procedures Manual* for the Queensland Police Service.[544] The guidelines are:

> "(i) when an [Indigenous] 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 [Indigenous] person's language should be present, and [his or her] assistance should be utilised whenever necessary to ensure complete and mutual understanding;
>
> (ii) when an [Indigenous 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 [Indigenous person] has apparent confidence…;
>
> (iii) 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 [Indigenous 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 [Indigenous person] has apparent understanding of his [or her] right to remain silent…;
>
> (iv) 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;
>
> (v) 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…;
>
> (vi) because [Indigenous] 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;

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542 *R v Anunga*, above note 538 at 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".

543 *R v Wilson*, above note 541 at 4.

544 The Queensland Police Service *Operational Procedures Manual* 2002 is available on CDROM at the Supreme Court Library.

(vii) it is particularly important that [Indigenous] 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 unreasonabl[y] long time;

(viii) should an [Indigenous person] seek legal assistance reasonable steps should be taken to obtain such assistance. If an [Indigenous person] states [he or she] does not wish to answer further questions or any questions the interrogation should not continue; and

(ix) 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."

10.2.3 The *Police Powers and Responsibilities* Act

It is noted in the manual that the guidelines have, in part, been replaced by various provisions of the *Police Powers and Responsibilities Act* 2000 (Qld) ("*PPRA*").

10.2.3.1 Right to interpreter

The first guideline is said to be superseded by s 260 PPRA "Right to an interpreter". That section provides:

"**260 Right to interpreter**

(1) This section applies if a police officer reasonably suspects a relevant person is unable, because of inadequate knowledge of the English language or a physical disability, to speak with reasonable fluency in English.

(2) Before starting to question the person, the police officer must arrange for the presence of an interpreter and delay the questioning or investigation until the interpreter is present.

(3) In this section –

investigation means the process of using investigative methodologies, other than fingerprinting, searching or taking photos of the person, that involve interaction by a police officer with the person, for example, an examination or the taking of samples from the person."

10.2.3.2 Right to communicate with friend, relative or lawyer

The second guideline is said to have been replaced by s 249 of the *PPRA* "Right to communicate with friend, relative or lawyer" which provides:

"**249 Right to communicate with friend, relative or lawyer**

(1) Before a police officer starts to question a relevant person for an indictable offence, the police officer must inform the person he or she may –

(a) telephone or speak to a friend or relative to inform the person of his or her whereabouts and ask the person to be present during questioning; and

(b) telephone or speak to a lawyer of the person's choice and arrange, or attempt to arrange, for the lawyer to be present during the questioning.

(2) The police officer must delay the questioning for a reasonable time to allow the person to telephone or speak to a person mentioned in subsection (1).

(3) If the person arranges for someone to be present, the police officer must delay the questioning for a reasonable time to allow the other person to arrive.

(4) What is a reasonable time to delay questioning to allow a friend, relative or lawyer to arrive at the place of questioning will depend on the particular circumstances, including, for example -

(a) how far the person has to travel to the place; and

(b) when the person indicated he or she would arrive at the place.

(5) What is a reasonable time to delay questioning to allow the relevant person to speak to a friend, relative or lawyer will depend on the particular circumstances, including, for example, the number and complexity of the matters under investigation.

(6) Unless special circumstances exist, a delay of more than 2 hours may be unreasonable."

10.2.3.3 Cautioning

The third guideline is said to have been replaced by s 260 *PPRA* "Right to an interpreter" and s 258 *PPRA* "Cautioning of Persons". Section 258 provides:

"**258 Cautioning of persons**

(1) A police officer must, before a relevant person is questioned, caution the person in the way required under the responsibilities code.

(2) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person can not hear adequately.

(3) If the police officer reasonably suspects the person does not understand the caution, the officer may ask the person to explain the meaning of the caution in his or her own words.

(4) If necessary, the police officer must further explain the caution.

(5) This section does not apply if another Act requires the person to answer questions put by, or do things required by, the police officer."

10.2.3.4 Questioning of intoxicated persons

The seventh guideline is said to have been replaced by s 254 *PPRA* "Questioning of intoxicated persons" which provides:

"**254 Questioning of intoxicated persons**

(1) This section applies if a police officer wants to question or to continue to question a relevant person who is apparently under the influence of liquor or a drug.

(2) The police officer must delay the questioning until the police officer is reasonably satisfied the influence of the liquor or drug no longer affects the person's ability to understand his or her rights and to decide whether or not to answer questions."

10.2.3.5 Questioning of Aboriginal people or Torres Strait Islanders

The eighth guideline is said to have been replaced by s 251 *PPRA* "Questioning of Aboriginal people or Torres Strait Islanders" which provides:

"**251 Questioning of Aboriginal people and Torres Strait islanders**

(1) This section applies if -

(a) a police officer wants to question a relevant person; and

(b) the police officer reasonably suspects the person is an adult Aborigine or Torres Strait islander.

(2) Unless the police officer is aware that the person has arranged for a lawyer to be present during questioning, the police officer must –

(a) inform the person that a representative of a legal aid organisation will be notified that the person is in custody for the offence; and

(b) as soon as reasonably practicable, notify or attempt to notify a representative of the organisation.

(3) Subsection (2) does not apply if, having regard to the person's level of education and understanding, a police officer reasonably suspects the person is not at a disadvantage in comparison with members of the Australian community generally.

(4) The police officer must not question the person unless –

(a) before questioning starts, the police officer has, if practicable, allowed the person to speak to the support person, if practicable, in circumstances in which the conversation will not be overheard; and

(b) a support person is present while the person is being questioned.

(5) Subsection (4) does not apply if the person has, by a written or electronically recorded waiver, expressly and voluntarily waived his or her right to have a support person present.

(6) If the police officer considers the support person is unreasonably interfering with the questioning, the police officer may exclude the person from being present during questioning."

10.2.3.6 Search

Finally the ninth guideline is said to be superseded by s 388 *PPRA* "Protecting the dignity of persons during search" which provides:

"**388 Protecting the dignity of persons during search**

(1) If reasonably practicable –

(a) the police officer must, before conducting the search –

(i) tell the person he or she will be required to remove clothing during the search; and

(ii) tell the person why it is necessary to remove the clothing; and

(iii) ask for the person's co-operation; and

(b) the person must be given the opportunity to remain partly clothed during the search, for example, by allowing the person to dress his or her upper body before being required to remove items of clothing from the lower part of the body.

(2) The search must be conducted in a way providing reasonable privacy for the person.

Example for subsection (2) –

Reasonable privacy may be provided by conducting the search in a way that ensures, as far as reasonably practicable, the

> person being searched can not be seen by anyone of the opposite sex and by anyone who does not need to be present.
>
> (3) Also, the search must be conducted as quickly as reasonably practicable and the person searched must be allowed to dress as soon as the search is finished.
>
> (4) The police officer conducting the search must not make physical contact with the genital and anal areas of the person searched, but may require the person to hold his or her arms in the air or to stand with legs apart and bend forward to enable a visual examination to be made.
>
> (5) If the police officer seizes clothing because of the search, the police officer must ensure the person is left with or given reasonably appropriate clothing.
>
> *Example for subsection (5)* –
>
> The clothing may be evidence of the commission of an offence."

10.3 Difficulties for Aboriginal Women

In addition to issues facing Indigenous people regardless of gender, Aboriginal women may face particular difficulties giving evidence in court. These difficulties are discussed in the CJC *Report on Aboriginal Witnesses in Queensland's Criminal Court.*[545] Many socio-cultural factors contribute to a reluctance by many Aboriginal women to give evidence. These are summarised below.

10.3.1 Aboriginal Women as Victims of Violence

Many female Aboriginal witnesses and defendants in criminal proceedings may be victims of domestic violence and sexual assault. There is a high incidence of such 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 exacerbated by other cultural factors.[546]

The difficulties for a defendant in this situation are illustrated by *R v Kina.*[547] 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. On appeal, 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

545 Criminal Justice Commission (Queensland) *Aboriginal Witnesses in Queensland's Criminal Courts* Brisbane, GoPrint, 1996.

546 Above note 545 at 94.

547 Unreported, CA No 221 of 1993 (29 November 1993) Fitzgerald P, Davies and McPherson JJA, Brisbane.

> communication between her legal representatives and the appellant because of:
>
> 1) her Aboriginality;
> 2) the battered woman syndrome; and
> 3) 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."[548]

10.3.2 Women's Business

Traditionally, women's issues (or "women's business") is only discussed and dealt with by women. Generally, Aboriginal women do not discuss matters concerning sex or genitals.[549] It is particularly difficult for an Aboriginal woman to give evidence concerning sexual assault, for example, in the presence of men.[550]

10.3.3 Community Pressure

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.[551]

10.3.4 Mistrust of Police and the Legal System

Aboriginal women are also reluctant to complain about violence because of fears of harassment from police, embarrassment and concern about the apparent lack of care and sympathy from police in dealing with sexual assault matters.[552] More generally, Aboriginal women are mistrustful of the criminal legal system particularly given the over-representation of Aboriginal women in prisons.[553]

10.3.5 Intimidation of the Court Room

It is widely acknowledged that female Aboriginal witnesses tend to "freeze up" when giving evidence.[554] Lack of pre-trial preparation for witnesses will exacerbate the feeling that "the whole environment [is] foreign".[555]

10.3.6 Lack of Awareness of Legal Profession

Significantly, there appears to have been a lack of appreciation of the issues facing female Aboriginal witnesses and defendants by the legal

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548 per Fitzgerald P and Davies JA at [63]-[64].
549 CJC, above note 546 at 27.
550 CJC, above note 546 at 94.
551 CJC, above note 546 at 95.
552 CJC, above note 546 at 95.
553 CJC, above note 546 at 95-96.
554 CJC, above note 546 at 96.
555 CJC, above note 546 at 96.

profession.[556] 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, where very shameful matters.[557]

10.4 Vulnerable Witnesses: Children

Indigenous children may be particularly susceptible to the difficulties associated with giving oral evidence.[558] These difficulties can be caused by a lack of cross-cultural linguistic skills,[559] maturity, confidence or educational background.

10.5 Indigenous Imprisonment

This section provides some information about the over-representation of Indigenous Australians in the criminal justice system. In the ten years from 1988 to 1998, the number of Indigenous prisoners in Australia increased by 6.9 per cent on average per year, 1.7 times the annual growth of the non-Indigenous prison population.[560] The Human Rights and Equal Opportunity Commission has found that Indigenous women are incarcerated at a higher rate than any other group in Australia.[561] In 1997, 73 per cent of Indigenous prisoners had a history of previous imprisonment compared with 56 per cent of the non-Indigenous prison population.[562] The 1986 National Prison Census showed Indigenous offenders were most often imprisoned in relation to offensive behaviour, assault, and driving and property-related offences.[563] They are, however, over-represented in respect of almost

556 CJC, above note 546 at 97.

557 Ibid.

558 Fryer-Smith, S *Aboriginal Bench Book for Western Australian Courts* Victoria, Australian Institute of Judicial Administration Incorporated, 2002 at 7:36 [7.4.2].

559 Eades, D "Cross Examination of Aboriginal Children: The Pinkenba Case" (1995) (3) 75 *Aboriginal Law Bulletin* 10 at 10.

560 Carach C et al *Australian Corrections: The Imprisonment of Indigenous People* Canberra, Australian Institute of Criminology, November 1999 at 2.

561 Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2002 – Chapter 5: Indigenous Women and Corrections – A Landscape of Risk* Canberra, Human Rights and Equal Opportunity Commission, 2002.

562 Queensland Government *Queensland Aboriginal and Torres Strait Islander Justice Agreement* (July 2001) signed 19 December 2001 at 7.

563 Hazlehurst K & Dunn A 'Aboriginal Criminal Justice' *Trends and Issues in Crime and Criminal Justice No. 13* Canberra, Australian Institute of Criminology, May 1998 at 2.

all offences.[564] The reasons for this over-representation are complex and much has been written on this subject.[565]

While the number of Indigenous deaths in custody has decreased since the Royal Commission into Aboriginal Deaths in Custody,[566] the rate of imprisonment of Indigenous persons has actually increased. Only 2.4 per cent of the resident population of Australia and 3.5 per cent of Queensland residents were recorded in the 2001 Census as being of Aboriginal or Torres Strait Islander descent.[567] Despite this, as at the end of June 2004, 23.4 per cent of the prison population of Queensland was Indigenous.[568]

As at 30 June 2000, 1,112 persons of Aboriginal or Torres Strait Islander origin were in prison or youth detention in Queensland.[569] Approximately 57 per cent of those in youth detention centres were Aboriginal or Torres Strait Islander.[570] As at 30 June 2004, 1,233 persons of Aboriginal or Torres Straight Islander origin were in prison or youth detention.[571] In 2003, the total rate of incarceration for Indigenous adults and youths was 1,697.6 per 100,000 Aboriginal and Torres Strait Islanders as compared to 153.4 per 100,000 in the non-Indigenous population.[572]

Queensland has the fifth highest rate of Indigenous imprisonment as compared to non-Indigenous imprisonment in Australia behind Western

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564 Walker J & McDonald D 'The Over-Representation of Indigenous People in Custody in Australia' *Trends and Issues in Crime and Criminal Justice No. 47* Canberra, Australian Institute of Criminology, August 1995 at 3.

565 See for example, Cunneen C & McDonald D *Keeping Aboriginal and Torres Strait Islander People Out of Custody* Royal Commission into Aboriginal Death in Custody. Office of Public Affairs, ATSIC, 1997.

566 Williams P 'Deaths in Custody: 10 Years on From the Royal Commission' *Trends and Issues in Crime and Criminal Justice No. 203* Canberra, Australian Institute of Criminology, April 2001. For discussion from a judicial perspective as to possible reasons for continued overrepresentation see Lobez S, 'Aborigines and the Criminal Justice System' *The Law Report,* ABC Radio National, interview with Victorian Supreme Court Justice Geoff Eames.

567 Australian Bureau of Statistics, Population Distribution Aboriginal and Torres Strait Islander Australians (2001) at 1-2.

568 Office Of *Economic* And Statistical Research, *Corrective Services: June Quarter 2004* at http://www.oesr.qld.gov.au/data/briefs/society/corrective_services/corrective services_200406.pdf, accessed 10 December 2004.

569 Office of the Government Statistician, Brisbane Indigenous Persons in Prison or Youth Detention at 30 June: Queensland 1991 to 2000 at www.oesr.qld.gov.au/data/tables/cjsq2000/table_3_3.htm, accessed 2 September 2004.

570 Ibid.

571 Above note 568; there was no update as to the percentage of Aboriginal or Torres Strait Islander persons in youth detention centres.
Office Of Economic And Statistical Research, *Prisoners in Australia: 2003* at http://www.oesr.qld.gov.au/data/briefs/society/prisoners_in_australia/ prisoners in_australia_2003.pdf, accessed 10 December 2004.

Australia, South Australia, Victoria and New South Wales.[573] Notwithstanding, this rate has increased since 1988.

There is also a higher rate of recidivism amongst the Aboriginal and Torres Strait Islander population. In 1997, 73 per cent of those prisoners identifying themselves as Indigenous had a history of previous imprisonment as compared to 56 per cent in the non-Indigenous prisoner population.[574]

10.6 Community Justice Groups

Judges can obtain assistance with sentencing from Community Justice Groups. Section 9 (2) of *Penalties and Sentences Act* 1992 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 *Juvenile Justice Act* 1992 is in similar terms for a child offender who is an Aboriginal or Torres Strait Islander person.

These provisions allow a court sentencing an Indigenous person to be apprised of relevant information as to the Indigenous person's community and not generally applicable to other offenders; the court is required to take such information into account.

The Supreme Court and District Court, in its practice directions, have facilitated the making of such submissions.[575]

Apart from being involved with sentencing, Community Justice Groups are involved in providing a range of local initiatives intended to reduce crime and divert Indigenous offenders from the Criminal Justice System. In addition, the Community Justice Groups use traditional structures to resolve disputes, address family problems and deal with a range of anti-social behaviours.[576]

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573 Carach, above note 560 at 4.

574 Queensland Government and Aboriginal Torres Strait Islander Advisory Board *Queensland Aboriginal and Torres Strait Islander Justice Agreement* Queensland Government, July 2001 at 7.

575 Supreme Court *Practice Direction* No 5 of 2001; District Court *Practice Direction* No 3 of 2001.

576 Department of Aboriginal and Torres Strait Islander Policy and Development *Community Justice Groups* at

The work of community justice groups, and specifically their involvement with the courts, has been effective in diverting offenders from the criminal justice system.[577] This success can be attributed to the involvement of local communities and the particular knowledge that the local communities have of many cultural, social, economic and other factors relevant to an Indigenous offender.

http://www.indigenous.qld.gov.au/pdf/kainedbiipitli/5.pdf, accessed 2 September 2004 at 61.

577 Gant F and Grabosky P "Community Justice Groups: Kowanyama and Palm Island" in *The Promise of Crime Prevention* Canberra, Australian Institute of Criminology, 2000, 44 at 45.

Chapter 11 Disability

11.1 Introduction

People with a disability may play a number of different roles in a court setting eg. lawyers, litigants, witnesses, jurors, judges, court staff. This chapter is aimed at assisting judges and court staff in dealing with issues that arise in court in relation to disabilities.

In Australia in 1998, around one in five adults had a disability (21 per cent).[578]

Findings from a survey conducted by the Australian Bureau of Statistics (ABS) in 1998 on disability, ageing and carers indicated that certain impairment types were more common than others.

> "2.3 million or 74% of adults with a disability were restricted by a physical impairment and almost a million by a sensory impairment or speech loss.579 Lower numbers of people with disabilities were restricted by psychological impairments, intellectual impairments or by head injury, stroke or brain damage (less than 300,000 for each)."[580]

The survey conducted by the ABS in 1998 also indicated that the rate of disability increases with age.

In 1998, there were an estimated 686,700 people with disabilities living in Queensland.[581] This number represented 19.9 per cent of the Queensland population or approximately one in every five people.[582] Males accounted for 52.4 per cent of all people with disabilities and 52.7 per cent of all people who were restricted by their disability.[583] Physical conditions were the main disabling factors for 85.4 per cent of

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578 Australian Bureau of Statistics (ABS) *Australian Social Trends 2001: Disability among Adults* Canberra, 2002 at <http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/99d78f1319336c9eca256bcd00825573!OpenDocument>, accessed October 2003.
The findings from the survey conducted by the ABS in 1998 are contained in: ABS *4430.0 Disability, Ageing and Carers, Australia: Summary of Findings*, 1998.

579 Ibid; the data collected by the ABS in the 1998 *Disability, Ageing and Carers, Australia survey* concerned the adult population aged 15 years and over.

580 Ibid.

581 The estimated resident population in Queensland in 1998 was 3,456,345; see note 582.

582 Disability Services Queensland *Disability: A Queensland Profile* Brisbane, 1999 at 2, available at <http://www.disability.qld.gov.au/publications/profile99.pdf >.

583 Ibid at 3.

people with disabilities (586,400).[584] "The most frequently reported conditions were: musculoskeletal disorders such as arthritis (231,300); disorders of the ear and mastoid process, including hearing loss (58,700); and respiratory diseases (52,700)".[585] "Mental and behavioural disorders were reported by 100,300 people."[586]

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 dealing with people with a disability within the Supreme Court of Queensland. Much of the information in this chapter relates to people with disabilities as witnesses. Most of the information provided in this regard is based on common sense.

When looking at the issue of people with a 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 e.g. trial management, communication, interpreters. These and other issues will be discussed below.

It is noted that the Queensland Department of Justice and Attorney General launched a Disability Action Plan consistent with the *Disability Discrimination Act* 1992 (Cth) on 14 December 2004.[587]

11.2 Terminology

Some major disability groups include:

- "People with physical disabilities: conditions that result in physical disabilities include spinal cord injury, arthritis, cerebral palsy, acquired brain injury, multiple sclerosis and a number of other conditions of the muscular, nervous and respiratory systems.[588]
- People with intellectual disabilities: the term 'intellectual disability' refers to a group of conditions caused by various genetic disorders and infections.[589] These conditions result in a limitation or slowness in an individual's general ability

584 Ibid at 4.

585 Ibid.

586 Ibid.

587 Disability Services Queensland *The Second Progress Report on Queensland Government Strategic Framework for Disability 2002-2005 (Revised Version of 2000- 2005*), Brisbane at <http://www.disability.qld.gov.au/about_us/strat_framework/progress_report2/docs/FullReport_all.pdf>; <http://www.justice.qld.gov.au>.

588 Commonwealth Department of Family and Community Services: Office of Disability Policy, Commonwealth Disability Strategy Fact Sheet 3: *What is a disability?* <http://www.facs.gov.au/disability/cds/fs/fs_03.htm>, accessed March 2004.

589 Ibid.

to learn and difficulties in communicating and retaining information.[590]

- People with psychiatric disabilities: 'psychiatric disability' is a term that covers disability resulting from a number of underlying medical conditions such as schizophrenia, manic depression, phobias and neuroses."[591]
- People who are blind or vision impaired.
- People who are deaf or hearing impaired.

It must be remembered that a witness or litigant attending court may have more than one disability. Sometimes the disabilities and impairments may be difficult to recognise when first encountered.[592]

In 1980, the following distinction was made by the World Health Organisation, "in the context of health experience, between impairment, disability and handicap:[593]

Impairment	refers to any loss or abnormality of psychological, physiological, or anatomical structure or function.
Disability	refers to any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.
Handicap	refers to a disadvantage for a given individual, resulting from an impairment or disability, that limits or prevents the fulfillment of a role that is normal, depending on age, sex, social and cultural factors for that individual."

The terms by which a person with a disability is described may not only offend that person but may also affect others' perceptions of that person. It is preferable to be specific about a person's circumstances and avoid stereotypes, generalisations and assumptions based on

590 Ibid.

591 Ibid.

592 Judicial Studies Board *Equal Treatment Bench Book* London, March 2004 at 5-2 [5.1.1].

593 World Health Organisation (WHO) *The International Classification of Impairments, Disabilities and Handicaps (ICIDH-1)* Geneva, 1980. It is noted that ICIDH-1 has since been revised by WHO.

limited information. If it is not necessary to mention a person's disability, then it should not be referred to.[594]

"It can be difficult to know which particular terminology is most appropriate, accurate and acceptable to people with a disability."[595] **Appendix A** contains a useful table of words to avoid and suggested alternatives as recommended by Disability Services Queensland.[596]

All written information provided by the Supreme Court should contain appropriate language when referring to people with disabilities.

11.3 Trial Management

In the context of pre trial management in the Supreme Court, events that may alert a judge and court staff to a possible need to cater for people with disabilities include but are not limited to:

- lodgement of the parties' pleadings: rule 150 *Uniform Civil Procedure Rules* 1999 (Qld) requires certain matters to be specifically pleaded by parties, eg. "want of capacity, including disorder or disability of mind;"[597]
- 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;"[598]
- where a document "is required to be served personally on a person with impaired capacity;"[599]
- where the appointment of "a litigation guardian for a person under a legal incapacity is required;"[600]
- where "a settlement or compromise of a proceeding in which a party is a person under a legal incapacity is required to be sanctioned by the court;"[601]

There are a number of key elements which a judge may need to consider when a person has a disability.[602] For example:

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594 Disability Services Commission (WA) *Putting People First: Disability and Appropriate Language – a Guide*: Fact Sheet 11, Perth, 2003 at http://www.dsc.wa.gov.au/cproot/859/2/FactSheet11.pdf, accessed October 2003.

595 Disability Services Queensland *A Way With Words: Guidelines for the Portrayal of People with a Disability* at 11; available at <http://www.disability.qld.gov.au/publications/waywithwords.pdf>.

596 Above note 595 at 12 – 15.

597 *Uniform Civil Procedure Rules* 1999 (Qld), r 150 (1)(t).

598 Uniform Civil Procedure Rules 1999 (Qld), r 18.

599 Uniform Civil Procedure Rules 1999 (Qld), r 109.

600 Uniform Civil Procedure Rules 1999 (Qld), r 93, r 95.

601 Uniform Civil Procedure Rules 1999 (Qld), r 98.

602 Judicial Studies Board, above note 592 at 5-7 [5.1.4].

a) such persons may need more time;
b) the stress of coming to court may exacerbate their symptoms;
c) making any special arrangements in advance will save time and embarrassment at the trial;
d) 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;
e) some ailments may make it impossible to attend court at all.

11.3.1 Competence to give evidence

Under s 9 of the *Evidence Act* (Qld) 1977, "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."

> "In considering whether or not a person is competent as a witness, the court will consider whether the witness' disability will affect the reliability of evidence on the facts of a particular case, not whether the witness has a general lack of capacity."[603]

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 (ie where the proportion of correct to incorrect information is greatest) are open, free recall questions (eg '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 information overall, they do appear to include the most important details." (notes omitted)[604]

However, 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.

11.3.2 Witnesses with intellectual disabilities

People with intellectual disabilities may find the court environment very daunting and stressful. "A witness with an intellectual disability may

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603 Lawler, M and Smith, M (eds) *The Queensland Law Handbook* Brisbane, Caxton Legal Centre, 2002 at 512. In cases where there is an issue raised about the competency of a person called as a witness to give evidence in a proceeding, s 9A(2) of the *Evidence Act* 1977 (Qld) provides that the person is competent to give evidence in the proceeding if, in the court's opinion, the person is able to give an intelligible account of events which he or she has observed or experienced. Section 9A(3) of the Act applies even though the evidence is not given on oath. Under s 9C of the Act expert evidence is admissible in the proceeding about the person's level of intelligence, including the person's powers of perception, memory and expression, or another matter relevant to the person's or child's competence to give evidence, competence to give evidence on oath, or ability to give reliable evidence.

604 Kebbell MR, Hatton C and Johnson SD "Witnesses with intellectual disabilities in court: What questions are asked and what influence do they have?" (2004) 9 *Legal and Criminological Psychology* 23 at 24.

have difficulty understanding the court procedure, their role in it, and overcoming the anxiety involved in giving evidence."[605]

Guidelines published by the Disability Services Commission for courts in Western Australia, identify that the following characteristics of people with an intellectual disability may determine the way they participate in the court process.[606]

11.3.2.1 "Communication difficulties

- difficulty understanding complex information and processes, including directions, procedures and forms;
- a restricted vocabulary;
- a short attention span and easily distracted;
- difficulty understanding questions;
- responds to questions either inappropriately or with inconsistent answers;
- memory difficulties, especially for details; and
- difficulty with abstract thinking, including moral reasoning.

11.3.2.2 Behaviour

- difficulty managing themselves and their stress levels in a formal environment;
- hiding their disability by appearing to understand;
- behaving in a way that is inappropriate such as laughing in court; and
- impulsivity or acting without thinking

11.3.2.3 Task performance

Difficulty with tasks such as:

- reading and writing;
- keeping appointments;
- understanding the varied roles of the different courts;
- following long, complex sentences;
- giving directions to a place they would be expected to know; and
- organising, structuring and expressing information in an orderly way, for example, they may start their story at the end."

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605 New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues*- Discussion Paper 35, Sydney, October 1994 at [7.2] at http://www.austlii.edu.au/au/other/nswlrc/dp35/chap7.html#IntRef1.

606 Disability Services Commission (WA) *People with an Intellectual Disability: Issues for Consideration of the Courts* Perth, 2000 at 8 – 9 at <http://www.dsc.wa.gov.au/cproot/623/2/81_Court_IssuesA5.pdf>.

11.3.2.4 Evidence Act 1977 (Qld)

Application of s 21A *Evidence Act* 1977 (Qld) may make it less distressing for a witness with an intellectual disability to give evidence in a proceeding.

In cases concerning the evidence of a person with an intellectual impairment, consideration may also be given to the tendering of written statements under s 93A of the *Evidence Act* 1977 (Qld).[607] For the purposes of s 93A, "intellectually impaired person" is defined in the Act to mean:[608]

> "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—

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607 s 93A provides:
"(1) In any proceeding where direct oral evidence of a fact would be admissible, any statement tending to establish that fact, contained in a document, shall, subject to this part, be admissible as evidence of that fact if—
(a) the maker of the statement was a child or an intellectually impaired person at the time of making the statement and had personal knowledge of the matters dealt with by the statement; and
(b) the child or intellectually impaired person is available to give evidence in the proceeding.
(2) Where a statement made by a child or intellectually impaired person is admissible as evidence of a fact pursuant to subsection (1), a statement made to the child or intellectually impaired person by any other person—
(a) that is also contained in the document containing the statement of the child or intellectually impaired person; and
(b) in response to which the statement of the child or intellectually impaired person was made;
shall, subject to this part, be admissible as evidence if that other person is available to give evidence.
(3) Where the statement of a person is admitted as evidence in any proceeding pursuant to subsection (1) or (2), the party tendering the statement shall, if required to do so by any other party to the proceeding, call as a witness the person whose statement is so admitted and the person who recorded the statement.
(3A) For a committal proceeding for a relevant offence, subsections (1)(b) and (3) do not apply to the person who made the statement if the person is an affected child.
(4) … In the application of subsection (3) to a criminal proceeding—
"party" means the prosecution or the person charged in the proceeding.
(5) In this section—
"affected child" see section 21AC.
"child" means—
(a) a child who is under 16 years; or
(b) a child who is 16 or 17 years and who is a special witness.
"relevant offence" see section 21AC."

608 *Evidence Act* 1977 (Qld), Schedule 3.

(i) a substantial reduction of the person's capacity for communication, social interaction or learning; and

(ii) the person needing support."

11.3.2.5 Considerations Relevant to Witnesses with Intellectual Disabilities

The *Equal Treatment Bench Book* compiled by the Judicial Studies Board in the United Kingdom recommended that the following matters be considered when having regard to taking evidence from a witness with mental disabilities:[609]

1. Speak more slowly, use simple words and sentences, and do not go on too long without a break.
2. Avoid 'yes/no' answers and questions suggesting the answer or containing a choice of answers which may not include the correct one.
3. 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.
4. 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').
5. 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).
6. 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).
7. 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.
8. 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.

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.[610]

609 Judicial Studies Board, above note 592 at 5-26 – 5-27 [5.3.3].

610 *Evidence Act* 1977 (Qld), s 21(2)(a).

Under the *Evidence Act 1977* (Qld), in criminal proceedings other than summary proceedings under the *Justices Act 1886*, a witness who is an intellectually impaired person is a protected witness.[611] Cross-examination by an unrepresented accused of an intellectually impaired person whom the court has declared to be a protected witness is prohibited.[612]

Some matters which court staff should be aware of when dealing with witnesses with an intellectual disability include:

- "It is important for people with an intellectual disability to familiarise themselves with the courtroom before appearing in court as an accused, witness or party to the proceedings.[613]
- People with an intellectual disability will need additional special instruction in the use of the closed circuit television in order to participate.[614]
- When swearing in a person with an intellectual disability as witnesses, administer the oath or affirmation courteously and slowly.[615]
- 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."[616]

Issues relating to court technology and interpreters for people with an intellectual disability are discussed below.

11.3.3 Witnesses with psychiatric disabilities

There is a distinction between people with intellectual disabilities and people with mental illness (psychiatric disability). Mental illness may be thought of as "a thinking or mood disorder", while intellectual disability is "a learning deficit".[617]

Witnesses with psychiatric disabilities may find the court environment especially stressful. At hearing, it must be recognised that a witness with a psychiatric disability may find it difficult to concentrate and remember. Adjustments may be necessary for witnesses with psychiatric disabilities. Some examples include:

611 See the meaning of "protected witness" *Evidence Act* 1977 (Qld), s 21M.
612 See *Evidence Act* 1977 (Qld), ss 21N and 21O.
613 Disability Services Commission (WA) Guidelines to support people with an Intellectual Disability through the Court system: Guidelines for Clerks of Court, Court Officers including Security Officers and Volunteers Perth, 2001 at 8 at: <http://www.dsc.wa.gov.au/cproot/622/2/80_Courts_Guidelines.pdf>.
614 Above note 613 at p 11.
615 Above note 613 at p 10.
616 Above note 613 at p 12.
617 Above note 613 at p 6.

- 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.

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.

11.3.4 Witnesses with physical disabilities

11.3.4.1 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; eg. 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.[618]

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.[619]

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

618 Supreme Court *Practice Direction* 1 of 2000; *Criminal Practice Rules* 1999 (Qld), r 53; *Uniform Civil Procedure Rules* 1999 (Qld), r 392; *Evidence Act* 1977 (Qld) Part 3A.

619 See *Supreme Court Act* 1995 (Qld), s 223, s 289; *Uniform Civil Procedure Rules* 1999 (Qld), r 49.

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.
- Advise Listings staff and bailiffs if a witness will need the assistance of a carer in the courtroom.
- Advise Listings staff and bailiffs whether a witness may require periodic breaks when giving evidence.
- Advise Listings staff whether the witness will require the use of technology in the courtroom eg. real time transcript, document viewers.
- Advise Listings staff whether the witness will be giving evidence via telephone or video link up.

11.3.4.2 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 eg. trolleys/ boxes of evidence must not prevent easy access to the witness box.
- If a witness with a physical disability is without the assistance of a carer on the day, the witness may require the assistance of court staff to help them move around the court building eg. opening heavy doors to courtrooms.

11.3.5 Witnesses with a vision impairment

Here vision impairment includes witnesses who are blind and witnesses who have limited vision.

> "It is estimated that there are about 300,000 Australians who are blind or have some kind of vision impairment.[620] While some people have a

620 See footnote 588.

> total absence of vision, approximately 90% of people classified as legally blind have some useable vision."[621]

The correct method of communicating with a visually impaired person in a courtroom should be established at the outset of the trial.[622] Documents may need to be provided to the witness in Braille, Moon[623] 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[624] 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.

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. [625]

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621 Ibid.

622 Judicial Studies Board, above note 592 at 5-9 [5.1.4].

623 Braille and Moon are codes of raised symbols that correspond to the alphabet.

624 Note however that Chapter 22, Part 1, Division 1 of the *UCPR* does not apply to a document used with and mentioned in an affidavit; *UCPR*, r 960.

625 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 the *Guide Dogs Act* and

11.3.6 Witnesses who have a hearing impairment

Approximately 30,000 deaf people in Australia have no useable hearing and Auslan is their first language.[626] In addition to this figure approximately "between one and three million Australians have varying degrees of hearing impairment."[627]

Witnesses who have a hearing impairment may rely on speech and lipreading in the courtroom. Communication and information guidelines published by the Disability Services Commission in Queensland on people with sensory disability make the following observations about speech and lipreading:

> "Speech reading is an extremely complex art. It requires firstly that the person knows the language the other person is speaking. Many sounds look the same on the lips, (eg, baby, pay me, maybe). It is estimated that 70 per cent of sounds look like other sounds on the lips. However, when lipreading, the person does more than watch the lips. He/she looks at facial expression, body language and anything else that provides information about what is being said."[628]

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 ensure the witness is giving evidence in a room with sound reinforcement, and in any event, ensure 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;
- modify lighting conditions in the courtroom to ensure glare free lighting to enable speech and lip reading;
- always face the witness and speak clearly;
- if the witness is to refer to printed material ensure there are sufficient copies;
- when the case is ready to start, do not forget that the person with hearing impairment may not hear it being

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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.

626 Australian Sign Language.

627 See footnote 588.

628 Disability Services Queensland online Communication and Information Guidelines: People with a Sensory Disability, Chapter 5 at para 5.2.3. <http://www.disability.qld.gov.au/publications/sensory/sensoryguide_contents.html>, accessed March 2004 (no longer available online).

called on. The person who calls the case on will need to alert them;[629]

- consideration may need to be given 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.[630]

11.4 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 required to give evidence. Some examples include:

11.4.1 Real time transcript

For witnesses who are hearing impaired, there may be some scope to utilise this type of reporting.

Real time reporting is the simultaneous display onto computer monitors in the courtroom of the transcript of the trial as it is recorded by the court reporter. The State Reporting Bureau is responsible for making real time reporting available if requested.

Computer monitors displaying the transcript can be made available by the State Reporting Bureau for use both at the bar table and whilst the person is giving evidence in the witness box.

11.4.2 Audio reporting

Where audio reporting has been utilised for the proceedings, audio tapes of most proceedings can be purchased from the State Reporting Bureau upon payment of the appropriate fee. This may be of benefit to parties to the proceedings who are blind or have a vision impairment.

11.4.3 Sound reinforcement systems

Infra-red transmission systems linked into sound reinforcement systems in certain court rooms in the Brisbane Law Courts Complex allow for headsets to be worn and can be used by people with a hearing impairment eg. jurors, parties, witnesses.

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629 Department for Constitutional Affairs, Court Service (UK) online *The Disability Discrimination Act and the service we provide* London, 2003 at 10, <http://www.courtservice.gov.uk/docs/about_us/our_performance/dda.pdf>, accessed December 2003.

630 See comments made at footnote 625 in relation to the *Guide Dogs Act* 1972 (Qld).

11.4.4 Document viewer (visualiser)

For people with a vision impairment a document viewer can be connected to the courtroom television and can display documents or any other evidence. The viewer can magnify the evidence using zoom and auto focus controls.

11.4.5 Data projection

Data projection is available in certain courtrooms and can be used whenever large screen data or video evidence is required.

11.4.6 Use of video conferencing

Certain courtrooms, which have been made capable for video conferencing, are linked to a witness protection room for the taking of evidence.

Telephone Typewriters (TTY) are not presently available in the registry or courtrooms for those people with hearing or speech impairment.

11.5 Communication/Interpreters

Some reference to effective communication with witnesses with disabilities has already been made in part 0 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.

11.5.1 People who are deaf or hearing impaired

As noted in 11.3.6 many people who are deaf use Auslan[631] as their preferred language. Deaf people lead bilingual lives and use mostly Auslan as well as written and spoken English, with varying levels of competence, in their everyday lives.[632] Some deaf people may not be fluent in spoken English, and engaging an Auslan translator is important because speech and lipreading may be unreliable.

The Australian Association of the Deaf ("AAD") believes that "in situations where Deaf people appear, for whatever purpose, in Courts of Law, the importance of qualified and competent Sign Language interpreters is of paramount importance".[633] The AAD's policy on sign language interpreters in courts of law provides that:[634]

631 The sign language uses signs (hand shapes), body movements and facial expressions including mouth and eye movements, mime and gesture.

632 Australian Association of the Deaf online *Policy on Sign Language Interpreters in Courts of Law* at http://www.aad.org.au/download/courts.pdf, accessed March 2004.

633 Ibid.

634 Ibid.

1. "Any Sign Language Interpreter working with a Deaf person in a Court of Law must have NAATI Interpreter accreditation.
2. Any Sign Language Interpreter working in a Court of Law must have experience of working in these situations.
3. To ensure that Interpreters acquire this experience, training programs for Sign Language Interpreters must include 40 hours of practicum in Courts of Law as a partner with a Sign Language Interpreter experienced in these situations.
4. Only after having completed these 40 hours of practicum should a Sign Language Interpreter be assigned to work alone in a Court of Law.
5. AAD recognizes that interpreting in legal situations can be highly stressful for Interpreters. For this reason, unless the assignment is for less than one hour, Sign Language Interpreters should always work in teams of at least two in Courts of Law.
6. Under no circumstances is an Interpreter of lower level qualifications and experience acceptable. If no appropriately qualified and experienced interpreters are locally available then the Court must bear the cost of transporting and accommodating suitable Interpreters.
7. If no appropriately qualified and experienced Interpreters are available the court appointment must be postponed until such a time when Interpreters can be provided. Under no circumstances is a Deaf person who requires an Interpreter to appear in a Court of Law without an Interpreter."

11.5.2 People who are deafblind

People who have severe vision and hearing impairments often adopt a "hands-on" signing method. The person places his or her hands lightly on the signing person's hands in order to comprehend Auslan, Deafblind Sign Language or any other manual system such as the deafblind alphabet. The person communicating a message spells it out on the hands of the person who is deafblind.[635]

11.5.3 People with intellectual disabilities

It is accepted that deaf people use interpreters in court. However, there is no authority for using interpreters for people with intellectual disabilities.[636]

In its 1994 discussion paper *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues,* the New

635 Disability Services Queensland online Communication and Information Guidelines: People with a Sensory Disability, Chapter 5 at para 5.3 at <http://www.disability.qld.gov.au/publications/sensory/sensoryguide_contents.html>, accessed March 2004 (no longer available online).

636 Lawler, M and Smith, M (eds), above note 603 at 512.

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.[637] The Commission observed that:

> "A person with an intellectual disability may not be able to communicate in a conventional manner, but may be able to use simple sign language, a communication board, or a combination of speech, gestures and pointing to symbols (for example, 'Compic' symbols) to communicate. A person familiar with the means used can 'interpret' the answers of the witness. Alternatively the person may not need to use such methods as a communication board, but his or her language may still be limited or hard to understand. It has therefore been argued that appropriate support people should be recognised in the same way as a court interpreter in those cases."[638]

The Commission went on to note that it has been "recognised that there is a possibility of bias (actual or perceived) where a close relative acts as interpreter of a victim in a criminal trial."[639]

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 *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.

11.6 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*, 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.

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637 New South Wales Law Reform Commission *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* - Discussion Paper 35, Sydney, October 1994 at http://www.austlii.edu.au/au/other/nswlrc/dp35/chap7.html#IntRef1 at [7.9].

638 Ibid.

639 Ibid; the New South Wales Law Reform Commission recognised the comments made in *No More Victims: A Manual to Guide the Legal Community in Addressing the Sexual Abuse of People with a Mental Handicap* The Roeher Institute, Ontario, 1992; the Guardianship and Administration Tribunal have not allowed requests for family members to interpret for people with intellectual disabilities when this has been raised (communication, A Lyons, 19/08/04 on file).

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 the management of trials, particularly should there be a need to make arrangements for the jury to be accommodated because jury deliberations are continuing.

With respect to trials proceeding in the Supreme and District Courts at Brisbane, figures provided by the Sheriff's office indicate that in 2003 there was generally at least one juror using a wheelchair every four week service period. In the Brisbane Law Courts Complex further modifications are being planned to ensure better accommodation of jurors using wheelchairs.

For certain jurors with disabilities, particularly where service is required on lengthy trials, regular short breaks during proceedings may need to be scheduled.

11.7 Summary

1. In 1998, approximately one in every five people living in Queensland had a disability.
2. A litigant/witness may have more than one disability. Some disabilities are not easily recognisable when first encountered.
3. Avoid labels and put the person first by saying 'person with a disability'.
4. The way we refer to people with a disability has an important impact upon the way we perceive them.[640] All written information provided to external clients by the Supreme Court should contain appropriate language when referring to people with a disability.
5. Disability is defined in a variety of ways depending on who does the defining, for what purpose and in what circumstances.[641]

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640 Lawler, M and Smith, M (edd), above note 603, at 501.

641 Human Rights and Equal Opportunity Commission On the Sidelines: Disability and People from Non-English Speaking Background Communities Sydney, 2000 <http://www.humanrights.gov.au/racial_discrimination/on_the_sidelines/index.html> at 15. Appendix B of this paper provides an overview of a range of definitions including eg. definitions found in Commonwealth and State

There are a number of key elements which a judge may need to consider when a person has a disability.[642] For example:

a) such persons may need more time;
b) the stress of coming to court may exacerbate their symptoms;
c) making any special arrangements in advance will save time and embarrassment at the trial;
d) the person with a disability may not be able to hear, read or be understood whilst in court, or fully to comprehend what is taking place;
e) some ailments may make it impossible to attend court at all.[643]

6. People with intellectual disabilities may find the court environment very daunting and stressful. Application of s 21A *Evidence Act* 1977 (Qld) may make it less distressing for a witness with an intellectual disability to give evidence in a proceeding.
7. Witnesses with psychiatric disabilities may find the court environment stressful. At hearing it must be recognised that a witness with a psychiatric disability may find it difficult to concentrate and remember. Adjustments may be necessary for witnesses with psychiatric disabilities. Practitioners should provide appropriate amounts of time in their estimates for trial to accommodate necessary adjustments.
8. Matters to be considered at the pre-trial stage when dealing with a witness with a physical disability include the length of the trial, the use of telephone and video link-up and a change of venue for trial or transferring proceedings closer to where the witness resides.
9. Practitioners should alert court staff about people with physical disabilities proposed to be called as witnesses to give evidence at trial.
10. The correct method of communicating with a visually impaired person in a courtroom should be established at the outset of the trial.[644] Documents may need to be provided to the witness in Braille, Moon or in large print.
11. 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 required to give evidence.
12. Where possible, ensure witnesses with a hearing impairment give evidence in a room with sound reinforcement.

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legislation, definitions used in population research and in the provision of government services

642 Judicial Studies Board, above note 592.

643 Ibid.

644 Ibid.

13. In the Supreme and District Courts in 2003, there was generally at least one juror using a wheelchair every four week service period. For certain jurors with disabilities, particularly where service is required on lengthy trials, regular short breaks during proceedings may need to be scheduled.
14. Many people who are deaf use Auslan (Australian Sign Language) as their preferred language. Some deaf people may not be fluent in English, and engaging an Auslan translator is important because speech and lip-reading may be unreliable.
15. There may be some scope to have a witness with an intellectual disability give evidence by way of statement tendered under s 93A *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.

11.8 Useful Contacts

Some useful contacts in this area include (but are not limited to):

The Commonwealth Disability Strategy website at
http://www.facs.gov.au/disability/cds/index.htm

Disability Services Queensland
Central Office
GPO Box 806
Level 3A Neville Bonner Building
75 William Street
Brisbane Qld 4001
Phone (07) 1800 177 120
Fax (07) 3224 8037
Internet: http://www.disability.qld.gov.au

Queensland Deaf Society
473 Annerley Road, Annerley Qld 4103
PO Box 173, Annerley DC Qld 4103
Phone: (07) 3892 8500
Fax: (07) 3392 8511
Internet: www.qds.org.au

Physical Disability Council of Australia
PO Box 77
Northgate Qld 4013
Phone: (07) 3267 1057
Fax: (07) 3267 1733
Internet: http://www.pdca.org.au

National Council on Intellectual Disability
PO Box 771
Mawson ACT 2607
Phone: (02) 6296 4400
Fax: (02) 6296 4488
Internet: http://www.dice.org.au

Blind Citizens Australia
13 Barrett Street
Kensington VIC 3031
Phone: (03) 9372 6400
Fax: (03) 9372 6466
Internet: http://www.bca.org.au

National Accreditation Authority for Translators and Interpreters (NAATI)

Internet - http://www.naati.com.au

11.9 APPENDIX A[645]

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.[646]

WORDS TO WATCH	**SUGGESTED ALTERNATIVES**
Abnormal, subnormal. Negative terms that imply failure to reach perfection.	Specify the disability.
Birth defect, also congenital defect, deformity.	"person with a disability since birth", "person with congenital disability".
Blind (the), visually impaired (the).	"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.	Specify the disability. "has a physical or mobility disability".
Deaf (the). People who are deaf are those who identify as a part of the deaf community or who use sign language. "The deaf community" is only appropriate when referring to the group.	When speaking about an individual say "person who is deaf".
Deaf and dumb. May imply intellectual disability when the disability is purely physical.	Inability to hear and speak. "hearing impaired".
Defective, deformed.	Specify the disability.
Mentally retarded also defective, feeble minded, imbecile, moron, retarded, Cretin. Offensive, inaccurate terms.	"person with an intellectual disability".
Mongol. Outdated and derogatory.	"has Down Syndrome".
Physically/intellectually/vertically challenged, differently abled. Ridiculous euphemisms for disability.	"person with a disability".

645 Appendix A contains information taken from Disability Services Queensland *A Way With Words: Guidelines for the Portrayal of People with a Disability* at <http://www.disability.qld.gov.au/publications/waywithwords.pdf> at 12 – 15.

646 Consultation with John Mayo, Manager, Community Relations, Spinal Injuries Association, Queensland 15/2/2005.

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".
Vegetative. Some regard the term as offensive and degrading.	"in a coma", "comatose" or "unconscious".

11.10 APPENDIX B: Relevant Statutory provisions

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; or
(k) is imputed to a person."

The *Anti-Discrimination Act* 1991 (Qld) prohibits discrimination on the basis of impairment.[647] 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;

647 *Anti-Discrimination Act* 1991 (Qld), s 7(h).

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; or

(h) previously existed but no longer exists."

Uniform Civil Procedure Rules 1999 *(Qld)* ("*UCPR*")

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), s 59*."*

Schedule 4 of the *UCPR* provides that the meaning of the term "person under a legal incapacity" is that contained in Schedule 2 of the *Supreme Court of Queensland Act* 1991 (Qld). Schedule 2 defines "person under a legal incapacity" to mean: -

"(a) a person with impaired capacity; or
(b) a young person."

Schedule 2 of the *Supreme Court of Queensland Act* 1991 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)[648] ('the GA Act')

The enactment of this legislation resulted as a consequence of a report[649] 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 ("GAAT") came into being on 1 July 2000 and replaced the Intellectually Disabled Citizens Council of Queensland. The Tribunal has the authority to appoint guardians and administrators for adults with impaired decision-making capacity.

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[648] The Queensland Department of Justice and Attorney-General website makes available a range of fact sheets and general information concerning the role of Courts and Tribunals in Queensland. Fact sheets concerning the Guardianship and Administration Tribunal can be accessed at <http://www.justice.qld.gov.au/guardian/gaat.htm>.

[649] Queensland Law Reform Commission *Assisted and Substituted Decisions* Report No 49*,* 1996.

Subject to s 245 of the GA Act,[650] GAAT has exclusive jurisdiction for the appointment of guardians and administrators for adults with impaired capacity for matters.[651]
The GA Act categorises "matters" as:[652]

- "personal matter
- special personal matter
- special health matter
- financial matter."[653]

GAAT has concurrent jurisdiction with the Supreme Court for enduring documents and attorneys under enduring documents.[654]

Under s 164 of the GA Act, an eligible person[655] 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:[656]

> "(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

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650 Section 245 of the *Guardianship and Administration Act* 2000 (Qld) provides:
(1) This section applies if, in a civil proceeding—
(a) the court sanctions a settlement between another person and an adult or orders an amount to be paid by another person to an adult; and
(b) the court considers the adult is a person with impaired capacity for a matter.
(2) The court may exercise all the powers of the tribunal under chapter 3.
(3) Chapter 3 applies to the court in its exercise of these powers as if the court were the tribunal.
(4) As soon as practicable after a court makes an order under this section, the registrar of the court must give a copy of the order to the tribunal.
(5) In this section —
"court" means the Supreme Court or the District Court.
"settlement" includes compromise or acceptance of an amount paid into court.

651 Guardianship and Administration Act 2000 (Qld), s 84.

652 Guardianship and Administration Act 2000 (Qld), s 10.

653 *Guardianship and Administration Act* 2000 (Qld), Schedule 2 contains definitions of types of matters.

654 Guardianship and Administration Act 2000 (Qld), s 8.

655 Definition of eligible person is contained in *Guardianship and Administration Act* 2000 (Qld), s 164 (3).

656 Guardianship and Administration Act 2000 (Qld), s 5.

(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."

Schedule 1 to the GA Act "sets out a number of general principles that must be applied by any person or entity acting on behalf of someone with impaired decision-making capacity."[657] The first of those general principles is the presumption of capacity, that is, "an adult is presumed to have the capacity to make his or her own decisions unless incapacity for that particular decision is established."[658]

Under the GA Act, "impaired capacity" for a person for a matter, means the person does not have capacity for the matter.[659] "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."[660]

Criminal Code Act 1899 (Qld)

In criminal proceedings the following 2 defences may be pleaded:

Defence of insanity

The defence of insanity is a complete defence.

Under section 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."

Defence of diminished responsibility

This defence is only available for murder charges.

Section 304A(1) 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

657 *Guardianship and Administration Act 2000 (Qld),* s 11.
658 *Guardianship and Administration Act 2000 (Qld*), Schedule 1.
659 *Guardianship and Administration Act 2000 (Qld*), Schedule 4.
660 *Guardianship and Administration Act 2000 (Qld)*, Schedule 4.

> 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)**[661]

The *Mental Health Act* 2000 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.[662]

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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661 The Queensland Department of Justice and Attorney-General website makes available a range of fact sheets and general information concerning the role of the Courts and Tribunals in Queensland. Some information referred to here has been taken from Fact sheet 33: *The Mental Health Court* available on the Department's website at <http://www.justice.qld.gov.au/courts/factsht/factsheet33.htm>.

662 *Mental Health Act* 2000 (Qld), s 382.

- the Attorney-General;
- the District Court or Supreme Court.

Section 12 (1) of *Mental Health Act* 2000 (Qld) 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 or choosing of an allied person; and

(b) freely and voluntarily making decisions about the person's assessment, treatment 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."

Chapter 12 Self Represented Parties

12.1 Introduction

All litigants have a right to appear in person.[663] As the Chief Justice recently observed, "The right to represent oneself in court proceedings is fundamental to accessible justice." But his Honour also warned that, "… in many instances, exercising that right will inevitably reduce your chances of securing justice."[664]

Recent studies have found that the appearance of self represented parties in courts and tribunals is increasing.[665] Many issues arise for the Court when a party appears without legal representation which affect the capacity of the court to administer justice both fairly and efficiently.

Mahoney JA observed in *Ley v R De W Kennedy (Finance) Pty Ltd*[666] as cited in the later decision of *Raybos Australia Pty Ltd & Anor v Scitec*[667] that the right of a litigant to present his or her 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, 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."

663 *Collins (alias Hass) v R* (1975) 133 CLR 120 at 122; *Supreme Court Act* 1995, s 209.

664 Paul de Jersey CJ *Legal Educators' State Conference Keynote Address* delivered on 13 August 2004 at http://www.courts.qld.gov.au/publications/articles/speeches/2004/dj130804.pdf accessed 30 November 2004.

665 The Honourable Justice ML Pearlman, AM and The Honourable Justice N Pain *Fingers on the Scales: The Dilemma Presented by the Litigant in Person in Merit Hearings – A Judge's Perspective* at http://www.lawlink.nsw.gov.au/lec/lec.nsf/pages/pain1 accessed 23 June 2003.

666 NSWCA, CA No 127 of 1978, 26 June 1978.

667 NSWCA, CA No 146 of 1986, 16 June 1986; see also Wilson J in *Ivory v Telstra Corp Ltd & Anor* [2002] QCA 457; CA No 4059 of 2001 and 4423 of 2001, 1 November 2002.

In criminal matters, the right to choose the manner and form of one's defence has been described as "fundamental".[668] In criminal proceedings a self represented accused has no right to representation at the public expense, but he or she has a right to a fair trial.[669]

The term "self represented" is used in the discussion below, although other terms are "unrepresented litigant/party", "self litigant", "litigant in person" and, in the US, "pro se litigant". Whichever term is preferred, it is a description for a diverse group of people who, for a variety of reasons, appear unrepresented in court. Their ability to represent themselves varies greatly.[670]

The following information does not intend to criticise or detract from the right of a person to appear self represented. It does, however, aim to raise some of the important issues that arise for the Court and for parties to litigation when a litigant is self represented.

12.1.1 Who are self represented litigants and what are their reasons for self representation

Self represented litigants are a diverse group of people. The Family Court Report 2000[671] found that these people "are more likely than the population as a whole to have limited formal education, limited income and assets and to have no paid employment."[672] A significant group of them tend to be dysfunctional serial litigants.[673] These people lack the skills and abilities usually associated with legal professionals. Their limited knowledge of the relevant law almost inevitably leads to ignorance of the issues that are needed for resolution of the matter in court.[674]

Reasons for self representation vary and include:

- A choice by the litigant to represent themselves;
- Disillusionment with legal representatives and the legal system, including being either suspicious or resentful of the legal profession;

668 *R v Zorad* (1990) 19 NSWLR 91.

669 *Dietrich v R* (1992) 177 CLR 292 at 330.

670 Dewar, J, Smith, B and Banks, K *Litigants in person in the Family Court of Australia* (The Family Court Report) Research Report No 20, (2000) as referred to by below note 704 at 2.

671 Above note 670; a later Family Court Report launched on 2 August 2002, *The Changing Face of Litigation: Unrepresented Litigants in the Family Court* as researched by the Law and Justice Foundation NSW, by Rosemary Hunter, Ann Genovese, April Chrzanowski and Carolyn Morris, also found in their qualitative study that unrepresented litigants in appeal cases were not a homogeneous group and exhibited a range of differing characteristics.

672 See above note 670.

673 AIJA, Litigants in Person Management Plans: Issues for Courts and Tribunals (2001) at 2.

674 Above note 673 at 3.

- Not being able to afford legal representation;
- Not qualifying for legal aid;
- Not knowing they are eligible for legal aid;
- The person believing they are capable of running the case without a lawyer, despite legal advice that they cannot win;[675]
- The unwillingness of legal representatives to act as a result of perceived difficulties with the litigant's personal conduct or behaviour. "Such perceived difficulties may be the result of a disability, mental illness or an inability to communicate effectively in English;"[676]
- There may be a withdrawal of instructions or the legal representatives may cease to act before a matter is listed for trial or hearing. The litigant may take some time to find alternative representation at such a late stage and in the interim is forced to act on his or her own behalf.[677]

Whatever their reasons for self representation, litigants in person may be stressed, usually as there is a lot at stake. It is to be expected that they may experience "feelings of fear, ignorance, frustration, bewilderment and disadvantage, especially if appearing against a represented party." Judges should aim to maintain a balance between assisting the self represented litigant and protecting their represented opponent from problems arising from the self represented party's lack of legal knowledge.[678]

12.1.2 Self represented litigants' access to information

Today, self represented litigants potentially have access to more information, than in the past, due to the multiplicity of legal websites. The availability of the internet is increasing. For example, the internet is now available in most public libraries. The expanding volume of legal information available on the internet is becoming an important source of legal assistance and information to self represented litigants.

The Court provides free limited internet access for the public through a small number of wireless (Wi-Fi) connection points or "hot spots". These wireless hot spots are installed in the Law Courts Complex and, amongst other things, allow self represented litigants to conduct on-line legal research.

675 ALRC, Managing Justice: A Review of the Federal Civil Justice System Report No 89, AGPS, Canberra, 2000, at [5.147]

676 Above note 673 at 3.

677 Ibid; Jarrett v Westpac Banking Corporation [1999] FCA 425.

678 Judicial Studies Board *Equal Treatment Bench Book* London, May 2004 at [1.3].

Access to electronic information still depends on the litigant's ability to locate and operate an on-line computer. Some disadvantaged persons may lack the resources, knowledge or skills necessary to obtain such information. These people may include people with sensory disabilities, the elderly, people with low levels of education and literacy, and people living in some institutions. These self represented litigants still, therefore, depend on the information being made available in hardcopy form and may be faced with problems such as the lack of interpretation, comprehension and other skills which are required to understand the legal process.[679]

There are numerous Information Sheets available for self represented litigants in the Queensland courts system. Most are in electronic and hard copy form. They include:[680]

- Representing yourself on a bail application;
- How to make an application for an order exempting payment of filing fees;
- Applying for a grant of probate in a deceased estate matter;
- The Supervised Case List in the Supreme Court;
- Information for self-represented litigants about hearings before the Court of Appeal;
- General civil appeals in the Court of Appeal;
- Appealing against a criminal conviction;
- Applications to the Court of Appeal for leave to appeal against sentence;
- Criminal appeals from the District Court to the Court of Appeal;
- Court of Appeal guidelines for the preparation of an appeal record book in a civil appeal.

12.1.3 Areas of difficulty faced by self represented litigants

Difficulties faced by self represented litigants vary, and the degree of difficulty faced will depend on the litigant's individual capabilities, the complexity of the proceedings, what type of party they are in the proceeding (eg an applicant, respondent, accused) and the extent of assistance available by people such as advisers and court staff.[681]

12.1.3.1 In general

Generally, some self represented litigants may lack:

679 Law and Justice Foundation of New South Wales, *Access to Justice and Legal Needs: Executive Summary* at <http://www.lawfoundation.net.au/publications/reports/a2jln/ic/summary1.htm>; ALRC, *Managing Justice: A Review of the Federal Civil Justice System* Report No 89, Canberra, AGPS, 2000, at [5.169] – [5.171].

680 www.courts.qld.gov.au/publications/infosheets/registry.htm.

681 Above note 673 at 3.

- Knowledge and understanding of the relevant law leading to ignorance of the issues;
- Comprehension of court procedures including such things as courtroom formalities and the court process;
- Familiarity with the language and specialist vocabulary of legal proceedings;
- The ability to suitably assess the merits of their claim, which may lead to more frivolous or vexatious litigation;
- Suitable legal skills;
- Objectivity and emotional distance from the court proceedings;[682]
- Suitable reading and writing skills;
- Advocacy skills and the ability to cross-examine or test evidence;
- The ability to grasp the true issues of the case;
- An understanding of the purpose of the proceedings;
- The ability to translate court papers etc if not proficient in English;
- Court experience and confidence, and therefore may be more vulnerable to being bluffed.[683]

12.1.3.2 In criminal matters

The duties cast on a judge when the accused is not represented are set out in the Queensland Supreme and District Courts Bench Book, Chapter 6: see www.courts.qld.gov.au/practice/benchbook.htm.

When the accused is self represented, the court must give so much information as is necessary to enable a fair trial, including advice as to procedural rules such as a right to voir dire.[684]

12.2 Working Guide for Judges – Matters for consideration

Gray J in *Nagy v Ryan* stated that:

> The adversarial justice system is designed to be conducted with the assistance of persons of appropriate professional skill. It is, therefore, inevitable that the presence of self represented litigants may give rise to problems.[685]

The Law Reform Commission of Western Australia acknowledged that self represented litigants "have the capacity to unbalance the adversarial nature of the justice system and undermine efforts at impartiality by judges, magistrates and court staff." The Commission

682 *Dietrich v R* (1992) 177 CLR 292 at 302 per Mason CJ and McHugh J.

683 Giddings J, Dewar J and Parker S "Being expected to do more with less: Criminal Law Legal Aid in Queensland" (1999) 23(2) Crim LJ 69 at 79 – 81.

684 *MacPherson v R* (1981) 147 CLR 512.

685 *Nagy v Ryan* [2003] SASC 37, 19 February 2003 per Gray J at [39]-[40].

acknowledged that a judge can be forced into an "interventionist style" and "inadvertently becomes more of a manager of the trial while continuing to be the adjudicator." Dangers inherent in excessive judicial intervention included 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."[686]

The Australian Institute of Judicial Administration's (AIJA) *Courts and the Public Report* 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."[687] The AIJA suggested that there should be guidelines prepared by the judicial officers so that best practice is identified and shared about how to conduct a hearing where one or both parties are self represented.

There have been attempts to exhaustively list the attributes necessary to ensure a fair trial for self represented litigants; however, it should be recognised that each case is different and it is hard to make a general statement.[688] The Full Federal Court said in *Abram v Bank of New Zealand* that "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".[689] The appendix reproduces some examples of 'guidelines' which have been suggested, including the Honourable Justice T H Smith's 'Possible Guidelines for the Trial of Litigation involving unrepresented parties".

12.3 The Judge's role before a court appearance

Problems that arise during the hearing usually stem from the pre-hearing stage and include such things as the self represented litigant's:

- Failure to define the issues;
- Poor preparation in gathering the evidence;
- Failure to put evidence into a useful or acceptable form;
- Failure to file evidence in time.

These pre-hearing problems impact on the nature and quality of the evidence presented at the hearing.[690]

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686 Law Reform Commission of Western Australia (LRCWA) *Review of the Criminal and Civil Justice System: Final Report* Western Australia, Law Reform Commission, 1999 at 154 -155 [18.7]; The Hon R D Nicholson "Litigants in Person", Supreme and Federal Court Judges' Conference, 25 January 2001; also (2001) 5 (2) *The Judicial Review* 181.

687 Parker, S *Courts and the Public* AIJA 1998 at 166.

688 *Nagy v Ryan* [2003] SASC 37, 19 February 2003 at [43].

689 [1996] ATPR 41-507.

690 Above note 665.

A self-represented litigant must comply with the rules of court including the rules as to pleading the case so that the trial of the matter is able to proceed with issues to be determined clearly defined, so that time is not wasted on irrelevant matters.[691]

Self represented litigants sometimes fail to understand their obligations to comply with pre-hearing directions and directions imposing time deadlines. Judges should ensure that a self represented "party leaves a directions hearing appreciating exactly what is required of him or her. A judge should always be ready to explain fully the precise meaning of any particular direction or court order."[692]

The duty to disclose documents may be neglected by self represented litigants, causing delay. When a pre trial hearing takes place, a timesaving measure is for the judge to make a short clear explanation of the duty of disclosure and the test as to whether or not a document needs to be disclosed.

Many self represented litigants 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, self represented litigants may not appreciate the need for documents to be in chronological order and paginated.

Self represented litigants may need to be asked whether they have tried to resolve their differences by negotiation. Furthermore, 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.[693]

12.4 The Judge's role during a hearing

The court process and atmosphere can be unnerving for self represented litigants. There is a danger that they will give a poor account of the case to be tried.

It is suggested that at the hearing the judge should explain to the self represented litigant:

- that the issue is decided on the evidence, documentary and oral, before the court;[694]
- 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.

691 Von Risefer & Ors v Permanent Trustee Company Pty Ltd & Ors [2004] QSC 248; [2005] QCA 109; [2005] QCA 136.

692 Judicial Studies Board, note 678 at [1.3.3].

693 Ibid.

694 Judicial Studies Board, note 678 at [1.3.4].

It is advisable that the judge inform the self represented litigant from the outset to speak slowly and take time in the presentation of their case. At the beginning of the proceeding, the judge should also identify and if possible get the self represented party to agree upon the true issues in the case. Careful explanation is required so that the litigant agrees to proceed on the basis identified, and most importantly to appreciate why that decision has been taken. This may help to shorten the proceedings.[695]

If the substance of the submissions of the self represented litigant is clarified by the judge, it may help to eliminate any problems which arise because of garrulous or misconceived advocacy which causes substantive issues to be ignored, given little attention or obfuscated.

The judge may assist the self represented litigant to take basic information from witnesses called such as name, address and occupation. [696]

Self represented litigants sometimes have problems understanding the specialist vocabulary of legal proceedings. Language therefore throughout the hearing should, as far as possible, be kept simple and clear. [697]

If during the hearing a judge does something which might be perceived to be unfair or controversial in the self represented litigant's mind, the judge should explain precisely what he or she is doing and why.

Different problems can arise depending on whether both parties are self-represented in the proceeding. When only one party is self represented, a primary difficulty can be maintaining the perception of impartiality. Judges may wish to ensure that all relevant evidence is heard, relevant questions asked of witnesses, and that the self represented party knows and enforces their procedural rights. The represented party may see such judicial intervention as partisan and judges must ensure they do not apply different rules to self represented litigants.[698]

Sometimes self represented litigants have trouble understanding the role of case law and authorities. They may be confused and troubled by the fact that the judge or tribunal appears to be referring to someone else's case. A brief explanation by the judge of the doctrine of

695 Ibid.

696 Above note 665.

697 Hunter, R "Litigants in Person in Contested Cases in the Family Court", (1998) 12 AJFL 171.

698 Australian Law Reform Commission, *Managing Justice: Review of the Federal Justice System*, Discussion Paper 62, August 1999 at [9.21].

precedent may enable a self represented party to understand why reference is made to earlier cases.

The judge may wish to ensure that the self represented litigant understands that there are rules under which parties must proceed, so that he or she is not deprived of a fair hearing by virtue of a failure to understand some of the more obvious rules which are second nature to legal practitioners and those who regularly appear in court.[699]

Many self represented litigants "do not appreciate the requirement to prove what they say by evidence and accordingly do not approach witnesses in advance or ask them to come to court."[700] The need for expert evidence is also frequently misunderstood. Where self represented litigants have not arranged for witnesses, whether an expert or a witness of fact to be present to testify, a judge may be met with an adjournment application.

If a change in the normal procedure is requested by the other parties, such as calling witnesses out of order, the judge should explain to the self represented litigant his or her right to object to that course.[701]

12.4.1 Evidentiary issues

Problems arise in relation to the self represented litigant's inability to present the evidence as well as their inability to deal with the evidence presented by the other party. Furthermore, self represented litigants sometimes do not fully appreciate the need to present admissible evidence.

Evidence presented by the self represented litigant can be sometimes unfocused and difficult to follow and they may present the evidence in an illogical sequence. Sometimes they present too much evidence involving large extracts from many documents without identification of the original source. This places a significant burden on the judge and the other party to sift through the evidence and determine what is relevant.

Evidence may not be given in an acceptable format, such as affidavits not being properly sworn or filed out of time. These litigants may also try to given opinions from the bar table as to their version of events and consequences without offering any form of proof or corroboration. Their submissions often focus on fairness or hardship. Emotional attachment to their case can often prevent them from seeing the real issues.

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699 *Moore-McQuillan v Police* (1998) 196 LSJS 488 at 496-497 per Bleby J; see also *Brehoi v Minister for Immigration* [2001] FCA 932.

700 Above note 16 at [1.3.3]

701 Above note 697.

Self-represented litigants may not have the skills of 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, resulting in delay to the litigation. Self-represented litigants may also face problems cross-examining expert witnesses of the other party.

When self represented litigants have problems phrasing questions in examination in chief or in cross examination, a judge may inform the litigant of the need to ask questions and should explain the difference between evidence and submissions.[702]

If evidence is sought to be tendered, which is or may be inadmissible, the judge should advise the self represented litigant of the right to object to inadmissible material, and enquire whether he or she so objects to that material. If a question is asked or evidence is sought to be tendered in respect of which the self represented litigant has a possible claim of privilege, the judge should inform the self represented litigant of his or her rights.[703]

12.4.2 Request for a McKenzie Friend

A request for a McKenzie Friend[704] occurs when the self represented litigant wishes to have assistance in their court proceedings. A discretion exists to accept an application for such assistance.[705] It is not usually exercised favourably where the litigant has not applied for or has refused legal assistance.[706]

In *Damjanovic v Maley* [2002] NSWCA 230, the Court acknowledged that the cases indicate that there are at least six principles relevant to the exercise of the court's discretion regarding the granting of leave for a party to proceedings to appear by a person other than a barrister or solicitor:

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702 Above note 665; The Hon Mr Justice DA Ipp "Judicial Intervention in the Trial Process" (1995) 69 ALJ 365.

703 Above note 697 referring to rules outlined by the Full Court of the Family Court.

704 *McKenzie v McKenzie* [1971] P 33 where the Court of Appeal applied the statement of Lord Tenterden in *Collier v Hicks* (1831) 2 B and Ad 663 at 669 "Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices."

705 *Schagen v R* (1993) 65 A Crim R 500; *Smith v R* (1985) 159 CLR 532 at 534

706 Perry, "The Unrepresented Litigant" AIJA 6th Conference September 1998 at 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* [2003] NSWCA 230.

1) the complexity of the case;
2) the difficulties faced by the unrepresented party;
3) the absence of a disciplinary code for non-lawyers;
4) the protection of both parties;
5) whether the matter is heard in a higher or lower court; and
6) the interests of justice.

In particular, the cases emphasise that lay advocates do not have the duty of absolute probity owed by a legal practitioner to the Court and to his/her opponent; they do not have the training, qualifications and experience of a legal practitioner; and they are uninsured, placing their clients at considerable risk.

12.4.3 Pro bono representation

During 1999-2000, the Judges of the Court of Appeal, with the assistance of the Bar Association and the Law Society, established a pro bono scheme to represent appellants convicted of murder or manslaughter who had been refused legal aid. In 2002-2003, the scheme was extended to juveniles and those under an apparent disability.[707]

The Queensland Public Interest Law Clearing House Incorporated (QPILCH) assesses applications for legal assistance in public interest cases for referral to member law firms and barristers who act for free or at reduced fee. Details of referral criteria and procedures are found at the QPILCH website at www.qpilch.org.au. QPILCH also provides an opportunity to marshal the resources of private firms, government, corporate lawyers, university law schools and the community sector in advancing the public interest, and through targeted projects, assisting those who are the most disadvantaged and marginalised. QPILCH can be contacted at:

GPO Box 1543
Brisbane Qld 4001
Phone: 07 3012 9773
Fax: 07 3012 9774
E-mail: contact@qpilch.org.au

12.4.4 How much assistance is necessary from the court?

What a judge must do to assist a self represented litigant depends on the litigant, the nature of the case and the litigant's intelligence and understanding of the case.[708] The Court should also have regard to the position of the other party or parties concerned and to the efficient conduct of the proceedings.[709]

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707 Supreme Court of Queensland *Annual Report* 2002-2003 at 20.

708 Abram v Bank of New Zealand [1996] ATPR 41-507 applying Neil v Nott (1994) 121 ALR 148 at 150. Abram was followed in Minogue v Human Rights and Equal Opportunity Commission (1999) 84 FCR 438.

709 cf *R v Morley* [1988] QB 601.

The Court must be careful not to assume the advocate's role.

If the court decides to allow the self represented litigant to have complete discretion to present the case as they see it, the disadvantage is that the case may be prolonged, often with little benefit to the self represented litigant.[710]

The New South Wales Bar Association in *Guidelines for barristers on dealing with self represented litigants* noted that the self represented litigant should not be given legal advice by the judicial officer nor give advice as to what decisions they should make in relation to the proceedings because "such an approach may not only give the appearance of unfairness to other parties, but also it may be given without full knowledge of the facts".[711] Whilst in some contexts a judge may provide information to a self represented litigant, such as the need to prove facts by evidence, a judge should not advise. The judge's role is limited to providing information rather than advice.

As the Chief Justice recently 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 self-represented litigants the degree of judicial intervention will depend very much on the particular circumstances of each case." (footnotes omitted)[712]

12.4.5 Maintaining impartiality

Impartiality is the central theme of the judicial oath or affirmation of office. The community puts a great deal of weight on the judicial attribute of impartiality; that is to be fair and even handed, to be patient and attentive, and to avoid stepping in the arena or appearing to take sides. [713]

12.4.6 Vexatious litigants

There is a current schedule of vexatious litigants in Queensland pursuant to the *Vexatious Litigants Act* 1981 (Qld).[714] It is available

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710 Above note 665; see also *R v Morley*, above note 709.

711 New South Wales Bar Association *Guidelines for barristers on dealing with self-represented litigants*, October 2001 at 15 [71]; above note 665.

712 Chief Justice de Jersey AC, above note 664 at 9.

713 AIJA, *Guide to Judicial Conduct* Victoria, The Australian Institute of Judicial Administration Inc, 2002, at 3.

714 www.courts.qld.gov.au/practice/vexatious_litigants.htm.

from the Supreme Court Registry Manager and is available on the Queensland Courts website.

Vexatious litigants in person create problems[715] that might call for a more active or interventionist approach by the court.[716]

12.4.7 Matters specific to civil proceedings

Issues which the Court should consider in civil proceedings when there is one or more self represented party include the following:

- The judge should tell the parties that the role of the Court is dispute resolution in civil proceedings and they should be asked whether they have tried to resolve their differences by negotiation;[717]
- A self represented litigant is required to observe the distinction between evidence and submissions. A self represented litigant should not be permitted to say what he or she wants to say by way of evidence from the bar table without oath or affirmation. It must be explained that he or she is entitled to read and rely upon any affidavit that has already been filed on his or her behalf, he or she may give sworn evidence in the witness box and that he or she may be cross-examined on that evidence.[718] He or she should understand that he or she is entitled to make submissions about the evidence from the bar table without being subject to cross-examination;[719]
- The trial judge should not give legal advice to a self represented litigant. Excessive intervention and assistance by the trial judge may amount to an error of law in that the judge's duty to observe procedural fairness to both parties may be breached.[720]

A self-represented litigant should not contact the Court after the matter is reserved unless they have first written to the legal representative for the other party or parties providing a copy of

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715 "Curbing Litigants in Person" *The Times*, 31 July 2003 at 37, published an article about how the Court of Appeal have set guidelines on the range of remedies available to the courts under their inherent jurisdiction to protect their processes from being abused by litigants who persisted in making applications or instituting procedures which were totally devoid of merit: *Bhamjee v Forsdick & Others* (No 2) [2003] EWCA Civ 799, 25 July 2003; J Lobo, "Unreasonable Behaviour" *New Law Journal* 19 September 2003, 1387.

716 Above note 696.

717 Judicial Studies Board, above note 678.

718 Byrne, L & Leggat, CJ "Litigants in Person – Procedural and Ethical Issues for Barristers", (1999) 19 *Australian Bar Review* 41 at 44.

719 Ibid; *Randwick City Council v Fuller* (1996) 90 LGERA 380.

720 *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389 per Kirby P at 397 citing *Escobar v Spindaleri* (1986) 7 NSWLR 51.

the proposed communication with the Court. Any contact with the Court must be in writing addressed to the Judge's Associate. As the litigant should be told, that applies to all parties, whether represented or not.

12.5 The Judge's role after the hearing

If the judgment is reserved, the self represented litigant should be told, if possible, approximately when judgment is likely to be handed down.[721]

If the self represented litigant is entitled to costs but has not made any submissions, the judge should consider drawing the question of costs to that party's attention, without offering any specific advice. If an application is made that a self represented litigant pays the costs, the judge should give an explanation and an opportunity to argue as to why he or she should not pay the costs.[722] A court has no power to order professional costs in favour of a self represented litigant.[723]

12.6 Further sources of information relating to self represented litigants which may be helpful

- The Australian Institute of Judicial Administration has a web site with links to recent information about self represented litigants that is available in electronic form: http://www.aija.org.au/LIP.htm.
- Australian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001).
- Bench Book, "Unrepresented Defendant" (Queensland) – available on the Queensland Courts website.
- Dewar, Smith and Banks, *Litigant in Person in the Family Court of Australia* – Research Report No 20 (2000).
- Hunter, Genovese, Chrzanowski and Morris, *Unrepresented Litigants in the Family Court*, Law and Justice Foundation of NSW, 2002.
- (Smith J of the Supreme Court of Victoria), *Possible Guidelines for the Trial of Litigation involving unrepresented parties*, (see appendix below).

721 Byrne, L and Leggat, CJ "Litigants in Person – Procedural and Ethical Issues for Barristers" (41) (1999) 19 *Australian Bar Review* 41 at 45,46.

722 Judicial Studies Board, above note 678.

723 *Cachia v Hanes* (1994) 179 CLR 403 at 414 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.

- Albrecht, Greacen, Hough and Zorza, “Judicial Techniques for Cases Involving Self-Represented Litigants”, *Judges’ Journal*, Winter 2003, Vol 42, No 1, American Bar Association, Illionois, 6 (extracts below)

- County Court of Victoria, *Self-Represented Parties: A Trial Management Guide for the Judiciary*.

12.7 Example of working guidelines

12.7.1 APPENDIX A

Smith J of the Supreme Court of Victoria, *Possible Guidelines for the Trial of Litigation involving unrepresented parties*:

"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.

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?"

The Hon Justice T H Smith

Supreme Court of Victoria[724]

[724] Appendix 2 of the AIJA Litigants in Person Management Plans: Issues for Courts and Tribunals (2001).

12.7.2 APPENDIX B

The Full Court of the Family Court set out guidelines for assisting self-represented litigants in the decision of *In the Marriage of F.*[725] These guidelines have been adopted by the Federal Court.[726]

"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.*[727]

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;

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725 (Litigants in person guidelines case) [2001] Fam CA 348; (2001) 161 FLR 189 at 226-227 [253].

726 Brehoi v Minister for Immigration & Multicultural Affairs [2001] FCA 931 at [6].

727 (1994) 64 ALJR 509 at 510.

- 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.

12.8 APPENDIX C

The Judicial Studies Board[728] has suggested the following guidelines for judges during hearings:

"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:

- attempting to elicit the extent of the understanding of that party at the outset and giving explanations in everyday language;
- 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

Basic conventions and rules need to be stated at the start of a hearing.

- The judge's name and the correct mode of address should be clarified.
- Individuals present need to be introduced and their roles explained.
- Mobile phones must be switched off, or at least in silent mode.
- 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.
- The purpose of the hearing and the particular matter or issue on which a decision is to be made must be clearly stated.
- A party may take notes but the law forbids the making of personal tape-recordings.
- If the unrepresented party needs a short break for personal reasons, they only have to ask.
- 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."

728 Judicial Studies Board *Equal Treatment Bench Book* London, March 2004 at [1.3.4].

12.9 APPENDIX D

Albrecht, RA et al "Judicial Techniques for Cases involving Self-represented Litigants" *Judges Journal* Winter (2003), Vol 42, No 1, American Bar Association, Illinois, 16 at 45-48.

This article explored various judicial techniques which may be used by judges when litigants are not represented. Below is a summary of the salient points of the article. It is based on the American experience.

"**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 … They 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 the 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.

…

- Create an informal atmosphere for the acceptance of evidence and testimony.

[Formal rules of procedure and evidence may be relaxed for cases involving self represented litigants. (eg 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 self represented litigants 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 self-represented litigants 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. They 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: [see *Oko v Rogers* 466 N.E. 2d 658 (Ill.App.3d 1984) at [6]].

Problems arise when counsel advocate for their clients 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

…

[This is where counsel are] 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."

Chapter 13 Children

13.1 Introduction

The general topic of children and the law has been the subject of law reform in recent years. Between 1995 and 1997 the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission conducted an inquiry; the findings of which were published in the 1997 report *Seen and Heard: Priority for Children in the Legal Process*.[729] This generally focused on the treatment of children under federal law, including the treatment of children charged with offences under federal law and the receipt of evidence from child witnesses in both criminal and civil proceedings. In 2000 the Queensland Law Reform Commission published its report no. 55, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*,[730] which focused on issues affecting child witnesses.

This Chapter will examine the issues which the Supreme Court faces when dealing with proceedings involving a child. This divides into four main sections: first, the receipt of evidence from child witnesses in both criminal and civil proceedings; second, issues relating to communication with child witnesses; third, case management procedures for proceedings involving children, and fourth, issues relating to the conduct of criminal proceedings against juvenile defendants. In the Supreme Court it is relatively uncommon for children to be complainants or defendants in criminal proceedings or for young children to be witnesses in any proceeding.

13.2 Competence to give evidence

The law in Queensland as to the competency of witnesses to give evidence, whether or not on oath, has recently undergone significant reform. The *Evidence (Protection of Children) Amendment Act* 2003 repealed sections 9 and 9A of the *Evidence Act* 1977 and in their place inserted a new Division 1A, titled: "Competency of witnesses and capacity to be sworn." These amendments implemented the recommendations of the Queensland Law Reform Commission made in Report no. 55, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, which was published in December 2000.[731]

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729 Australian Law Reform Commission (ALRC) *Seen and Heard*: *Priority for Children in the Legal Process* Report No 84, Canberra, Australian Government Printer 1987.

730 Queensland Law Reform Commission *The Receipt of Evidence by Queensland Courts: The Evidence of Children* Report no. 55 Brisbane, QLRC, 2000. Both parts of this report are available on the Internet at http://www.qlrc.qld.gov.au/publications.htm#1.

731 Evidence (Protection of Children) Amendment Bill 2003 Explanatory Notes at 26.

Section 9 now provides that every witness, including a child, is presumed to be competent to give evidence in a proceeding, and competent to give that evidence on oath.[732] Section 9A establishes a new test to determine competency to give evidence which applies even though the evidence is not given on oath. The test is whether "the person is able to give an intelligible account of events which he or she has observed or experienced." This test is similar to that found in s 106C of the *Evidence Act 1906* (WA), which has been in effect since 1992.[733] Competency is determined on the voir dire by the judge alone. Competency may be decided by reviewing a s 93A tape or by other means suggested to the judge.

The new s 9B provides that a person "is competent to give evidence on oath if the person understands that:

- the giving of evidence is a serious matter; and
- "in giving evidence, he or she has an obligation to tell the truth that is over and above the ordinary duty to tell the truth."

The *Evidence (Protection of Children) Amendment Act* 2003 reversed the previous approach to determining competency, so that the first issue a Court must now determine is whether a witness is competent to give evidence (s 9A), and then, if the witness proposes to give that evidence on oath, whether he or she is competent to give sworn evidence (s 9B).[734]

If the witness "is competent to give evidence in the proceeding but is not competent to give the evidence on oath, the Court must explain to the person the duty of speaking the truth."[735]

Some questions that may assist in assessing competency to give sworn evidence are:

i. Do you know you are here to give evidence to the court today?

ii. Do you understand that giving evidence is a serious matter?

iii. In giving evidence, do you promise to tell the truth?

iv. Do you understand that telling the truth is a serious matter?

v. Do you understand that it is more important to tell the truth if you promise to tell the truth?

a) Do you understand that in giving evidence it is even more important to tell the truth than it usually is?

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732 *Evidence* Act 1977, s 9(1); the ALRC also recommended this in its report cited above note 729, at recommendation 98, [14.59] – [14.64].

733 It was inserted into the Act by the *Acts Amendment (Evidence of Children and Others) Act 1992* (WA), upon the recommendation of the Law Reform Commission of Western Australia (LRCWA) in *Report on Evidence of Children and Other Vulnerable Witnesses*, Report no. 87, Western Australia, LRCWA, April 1991 at 130.

734 Evidence (Protection of Children) Amendment Bill 2003 Explanatory Notes at 26.

735 *Evidence Act* 1977 (Qld), s 9B(3).

Section 9C provides that expert evidence is admissible to determine whether a person is competent to give evidence under the new s 9A or swear an oath under the new s 9B. If evidence is admitted under s 9A and is not given on oath, the jury should be directed that the probative value of the evidence is not decreased only because the evidence is not given on oath.[736] 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.[737]

13.3 Special measures to protect child witnesses

13.3.1 Section 21A

Section 21A and s 93A were inserted into the *Evidence Act 1977* by the *Criminal Code, Evidence Act and other Acts Amendment Act 1989* (Qld). The following special measures can be taken pursuant to s 21A to protect child and other vulnerable witnesses ("a special witness") in both civil and criminal proceedings:

- In a criminal proceeding, the accused may be excluded from the courtroom (but must be allowed to see and hear the witness's testimony by means of an electronic device or otherwise: s 21A(4));
- The accused may be obscured from the special witness's view, for example by use of a screen;
- Unnecessary persons may be excluded from the courtroom;
- The special witness may give evidence in a remote room;
- A support person approved by the Court may be present;
- A video-taped recording of the special witness's evidence may be made and viewed;
- Directions may be made by the trial Judge regarding rest breaks, the necessity for questions to be kept simple, etc.

The Court of Criminal Appeal considered the operation of s 21A in *R v West*,[738] shortly after the provision commenced. It held that independent of s 21A, a power existed at common law to obscure an accused person from a witness's view, if the witness was likely to be intimidated by the presence of the accused.[739] Thomas J (with whom the other members of the Court agreed) noted that although it may be important for an accused person to look his or her accuser in the eye, and although the trial Judge may not be certain of the true reason why a witness is inhibited, "where a prima facie intimidation appears to affect the ability of the witness to give evidence, it seems proper to make some arrangement [pursuant to s 21A] which will minimise or

736 *Evidence Act* 1977 (Qld), s 9D.
737 See *Criminal Code Act* 1899, s 632(3); *A* [2000] QCA 520 at [142]; *Robinson* (1998) 102 A Crim R 89.
738 (1992) 1 Qd R 227.
739 (1992) 1 Qd R 227 at 230.

eliminate the problem, subject always to the protection of the accused from 'unfair prejudice'."[740] Section 21A applies to children under 16, with provision to extend the section to older witnesses if the requirements of s 21A(1)(b) are fulfilled.[741]

Generally, child witnesses report that the prospect of confronting the accused person in Court is very intimidating. In a 1995 study conducted by the Judicial Commission of New South Wales, 75 per cent of the child witnesses interviewed[742] and 65 per cent of their parents rated seeing the defendant as either the worst aspect of the process of going to court, or the aspect they would most like to change.[743] When special measures such as closed-circuit television and screens were used, they were seen by the respondents to the survey as being very helpful.[744]

Section 21A which deals with the evidence of special witnesses was amended by the *Evidence (Protection of Children) Amendment Act 2003* to apply to children under 16 years. The new Division 4A, however, has far greater application to the evidence of child witnesses. Judges now have specific powers pursuant to s 21A(2)(f) to direct that questions for a special witness be limited by time, and/or that the number of questions for a special witness be limited. Section 21A(8) provides that where a special measure is employed in a trial on indictment, the judge must instruct the jury that no inference as to the defendant's guilt should be drawn, that the probative value of the evidence is not increased or decreased by the special measure, and that the evidence is not to be given any greater or lesser weight. Section 21A(8) only applies to special measures in s 21A(2)(a) to (e).

13.3.2 Section 93A

Before the 2003 amendments, s 93A of the *Evidence Act* only applied to child witnesses under the age of 12 years and to intellectually impaired witnesses in criminal and civil proceedings. The following conditions applied:

- The statement must be contained in a 'document.' Section 3 of the *Evidence Act* gives this a wide definition, which includes drawings, photographs and video- and audio-tapes.

740 Above, note 739 at 231.

741 Previously, s 21A applied to the evidence of children under 12 years of age, although it could be applied to an older witness if the requirements of s 21A(1)(b) were fulfilled.

742 Cashmore, J "The perceptions of child witnesses and their parents concerning the court process" in *The Evidence of Children* Sydney, Judicial Commission of NSW, 1995. All the children were complainants in sexual assault cases (at 25).

743 Above, note 742 at 29-30.

744 Ibid.

- The child must have had personal knowledge of the matters dealt with by the statement;
- The statement must have been made soon after the occurrence of the fact or be made to a person investigating the matter; and
- The child must be available to give evidence in the proceeding.

While the child must have had personal knowledge of the relevant matters when the statement was made, it is not necessary for the s 93A statement to remain admissible that the child still retain this knowledge at the time of the trial.[745] Section 93A statements may be excluded if the Court considers it to be "inexpedient in the interests of justice that the statement be admitted" (s 98), or if the Court is "satisfied that it would be unfair to the person charged to admit the evidence" (s 130). In deciding whether this latter discretion should be exercised, "regard should be had to whether, and if so how adequately, it will be possible to test that evidence by cross-examination."[746]

Section 93A was amended by the *Evidence (Protection of Children) Amendment Act 2003* to apply to children under 16, as well as people aged 16 or 17 who satisfy the s 21A definition of 'special witness.' The requirement that a statement made other than to a person investigating an alleged offence be made soon after the commission of the offence has been removed.

13.3.3 Section 21

A Court also retains a discretion pursuant to s 21 of the Act to disallow any 'improper' question, which is defined as a question which "uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive."[747] In deciding whether a question is an improper question, a Court must take into account "any other matter about the witness the court considers relevant, including, for example, age …"[748] This provision was enacted by the *Criminal Law Amendment Act 2000* in response to concerns that the previous power to disallow questions, which applied to questions which were "indecent or scandalous," "intended only to insult or annoy" or "needlessly offensive in form", was too narrow to prevent misleading and confusing questioning of child witnesses.[749]

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745 R v Cowie, ex parte Attorney-General [1994] 1 Qd R 326.

746 *R v FAR* [1996] 2 Qd R 49 at 55 per Fitzgerald P; see also 61 per Davies JA.

747 *Evidence Act* 1977 (Qld) s 21(4).

748 *Evidence Act* 1977 (Qld) s 21(2)(b).

749 For instance, see the concerns raised by the QLRC, above note 730 Part 2 at 267 ff. Also note the QLRC's discussion of the Court's inherent power to control questioning witnesses at 267.

13.4 New provisions inserted by the Evidence (Protection of Children) Amendment Act 2003

The powers in the *Evidence Act 1977* have been augmented by the amendments contained in the *Evidence (Protection of Children) Amendment Act 2003*. These changes were designed to "make our courts more sensitive when dealing with children who are victims or witnesses and will ensure the legal process does not add to their stress or suffering,"[750] and are intended to "completely change the environment for children in the Queensland criminal justice system."[751] These changes were recommended by the Queensland Law Reform Commission in 2000 in response to widespread concern about the treatment of child witnesses, especially complainants in sexual abuse cases.[752]

The new s 9E of the *Evidence Act 1977* establishes the following principles for dealing with a child witness:

"**(1)** Because 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.

(2) The following general principles apply when dealing with a child witness in a proceeding –

(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.

(3) In this section –

"child" means a child under 16 years."

13.4.1 New Division 4A

The purpose of the new Division 4A is set out in s 21AA:

"**21AA Purposes of div 4A**

The purposes of this division are—

a) to preserve, to the greatest extent practicable, the integrity of an affected child's evidence; and

750 Attorney-General Rod Welford, *Hansard*, Second Reading Speech, 13 May 2003 at 1696.

751 Ibid.

752 For instance, see the concerns raised by the QLRC, above note 730 at e.g. 5; see also Radio National's Law Report program, 20 May 2003 at http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s857955.htm.

b) to require, wherever practicable, that an affected child's evidence be taken in an environment that limits, to the greatest extent practicable, the distress and trauma that might otherwise be experienced by the child when giving evidence."

Section 21AB provides that this is to be achieved in criminal proceedings by pre-recording an affected child's evidence in the presence of a judicial officer, in advance of the proceeding. If this is not possible, the child's evidence may be given at the proceeding using an audio-visual link or with the benefit of a screen. An affected child's evidence at a committal proceeding will be given by a statement, and the child will not ordinarily be called for cross-examination.

An "affected child" is defined by s 21AC to be a child who is a witness, but not a defendant, in a "relevant proceeding", defined as a criminal proceeding for a "relevant offence" or a civil proceeding arising from the commission of a "relevant offence". A "relevant offence" is defined as an offence of a sexual nature, or an offence involving violence if there is a "prescribed relationship" between the child witness and a defendant in the proceeding. A "prescribed relationship" is defined as a relationship (including half, adoptive or step relationship) where the defendant is the child's parent, grandparent, sibling, uncle, aunt, niece, nephew or cousin; or where the defendant lived in the same household as the child at the time of the commission of the alleged offence; or where the defendant had the care of, or exercised authority over the child in a household on a regular basis.

Section 21AD defines 'child' for the purposes of Division 4A:

"**21AD Meaning of 'child'**

(1) For the purposes of a proceeding for this division, a '**child**' is—

(a) if the proceeding is a criminal proceeding—

(i) an individual who is under 16 years when the first of the following happens—

(A) the defendant in the proceeding is arrested;

(B) a complaint is made under the *Justices Act 1886*, section 42 in relation to the defendant in the proceeding;

(C) a notice to appear is served on the defendant in the proceeding under the *Police Powers and Responsibilities Act 2000*, section 214; or

(ii) an individual who is 16 or 17 years when the first of the matters mentioned in subparagraph (i) happens and who is a special witness; or

(b) if the proceeding is a civil proceeding arising from the commission of a relevant offence—

(i) an individual who is under 16 years when the proceeding starts; or

(ii) an individual who is 16 or 17 years when the proceeding starts and who is a special witness.

(2) An individual remains a '**child**' for the purposes of giving evidence for a proceeding if the child gives evidence for the proceeding at any time before the child turns 18 years."

13.4.2 Subdivision 2 – Committal proceedings

Subdivision 2 of Division 4A applies to the giving of affected children's evidence at committal proceedings. In brief, a child's evidence in chief must be given by statement (s 21AF(1)), and a magistrate must not allow the child to be cross-examined unless the magistrate is satisfied that (s 21AG(3)(a)):

"(a) the party seeking to cross-examine the child has—

(i) identified an issue to which the proposed questioning relates; and

(ii) provided a reason why the evidence of the child is relevant to the issue; and

(iii) explained why the evidence disclosed by the prosecution does not address the issue; and

(iv) identified to the magistrate the purpose and general nature of the questions to be put to the child to address the issue; and

(b) the interests of justice can not adequately be satisfied by leaving cross-examination of the child about the issue to the trial."

The Explanatory Notes state that this test "is designed to link the ability to cross-examine to an identified issue relevant to the proper purposes of the committal."[753] If a child is called as a witness for cross-examination, his or her evidence must be taken under subdivision 3 (i.e. pre-recorded) or subdivision 4 (taken using an audio link or a screen).[754]

13.4.3 Subdivision 3 – Pre-recording of affected children's evidence

Subdivision 3 creates a scheme for the pre-recording of affected children's evidence for summary trials of relevant offences, committal proceedings for relevant offences (where a magistrate has directed that the child should be cross-examined) and, relevantly for the Supreme Court, for trials on indictment for relevant offences (s 21AI(1)). It does not, however, apply to an affected child who is a defence witness (s 21AI(2)), and does not extend to civil trials.

Where the proceeding is a trial on indictment, the indictment must be presented before the child's evidence can be taken under this division (s 21AJ), to "ensure that the charges are settled and particularised and

753 Evidence (Protection of Children) Amendment Bill 2003 Explanatory Notes at 30.

754 *Evidence Act* 1977 (Qld) s 21AG(7)(a).

that the examination is conducted on the indictment to which the accused will be called upon to plead."[755]

The child's evidence must be taken and videotaped at a preliminary hearing presided over by a judicial officer (s 21AK), and this hearing may be conducted by audio visual link. A different judicial officer may preside over the preliminary hearing than will preside over the trial (or adjourned committal hearing), and different counsel may appear at the preliminary hearing (s 21AK(7)). However, when considering a similar provision the Western Australian Court of Appeal indicated that this should be "avoided if possible" and that one judicial officer should manage the entire course of proceedings, although the Court recognised this might not always be possible.[756] The Court held that the judicial officer who presided over the preliminary hearing had to determine whether the witness was competent to give sworn or unsworn evidence, and the trial Judge would be bound by this decision unless it was obvious to the trial Judge that the evidence was inadmissible or that its prejudicial effect outweighed its probative value.[757]

The defendant must not be in the same room as the child while his or her evidence is being taken, but the defendant must be able to see and hear the child (s 21AL(4)). The tape-recording of the child's evidence is admissible at trial and at any re-hearing, re-trial or appeal (s 21AM). Although Parliament intends that an affected child's evidence will normally be taken pursuant to subdivision 3, the Court may order that this not happen, having regard to the child's wishes and the purposes of the division (s 21AO(3)).

Issues relating to the case management of cases involving children, including the listing of pre-trial procedures, are discussed below.

13.4.4 Subdivision 4 – Audio-visual link or screen

This subdivision applies to similar types of proceedings to subdivision 3 (including, relevantly for the Supreme Court, trials on indictment), as well as to civil proceedings arising from the commission of a relevant offence (s 21AP). It provides that if there is an audio-visual link within the court precincts, the presiding Judge must direct that an affected child's evidence be given by audio-visual link, or that the defendant be held in another room and the child's evidence be transmitted to that room by the audio-visual link (s 21AQ(2)). The child's evidence must be videotaped if the AV link enables video-taping (s 21AQ(4)), and this videotape is admissible in any re-hearing, retrial of or appeal from the proceeding, or associated proceedings (s 21AQ(6)). If an AV link cannot be used, a screen must be placed so that the child cannot see

755 Evidence (Protection of Children) Amendment Bill 2003 Explanatory Notes at 31.

756 *R v Stevenson* (2000) 118 A Crim R 20 at 32-33 [49].

757 Above note 756 at 33 [50].

the defendant (s 21AQ(5)). As with subdivision 3, a Judge may order that this subdivision not apply (s 21AR).

13.4.5 Subdivision 5 – General provisions

The prosecutor or applicant must inform the court when an indictment is presented in a relevant proceeding, or when an application is commenced in a relevant proceeding, that an affected child may give evidence: s 21AS(1).

When an affected child is giving evidence about an offence of a sexual nature, or in other cases where the interests of justice do not require the affected child's evidence to be heard in open court, all non-essential persons must be excluded from the court: s 21AU.

An affected child is also entitled to have a 'support person' present, in close proximity to the child and within the child's sight. This support person must have been approved by the Court: s 21AV. Previously, only a special witness pursuant to s 21A was entitled to have a support person present, which meant that this right was restricted to children under 12 unless an older witness otherwise satisfied the criteria set out in s 21A. Although the legislation provides no guidance as to what factors should be taken into account in deciding whether to approve a person to act as a special witness, the Queensland Law Reform Commission stated that "the most important factors in 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."[758] The Commission considered that it would generally be undesirable for a witness in a proceeding to act as a support person for a child witness, although it recognised that this may on occasion be unavoidable.[759] 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.[760]

If any of the special measures contained in division 4A are used in a trial on indictment, the jury must be instructed that:

> "(a) the measure is a routine practice of the court and that they should not draw any inference as to the defendant's guilt from it; and
>
> (b) the probative value of the evidence is not increased or decreased because of the measure; and
>
> (c) the evidence is not to be given any greater or lesser weight because of the measure."[761]

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758 QLRC, above note 730, Part 2 at 84.

759 Ibid.

760 QLRC, above note 730 at 85.

761 *Evidence Act* 1977 (Qld) s 21AW(2).

New subdivision 4B governs how recordings made under s 21A or division 4A are to be dealt with, and prohibits the unauthorised possession (s 21AZB) or publishing (s 21AZC) of such recordings.

These reforms are based on similar provisions from the *Evidence Act 1906* (WA) which have been in force in that jurisdiction since 1992. Judge Hal Jackson of the Western Australian District Court has commented that in his opinion these reforms have enhanced the fairness of the trial process, both for child witnesses and for accused persons:

> "[Prosecutors] know what the evidence of the child is going to be before the trial proper starts, so that the charges can be laid in accordance with the evidence that the child has already given, and the prosecution can open to the jury … knowing what evidence the child has already given. So that actually makes it better and I suppose easier for the prosecution. Similarly the defence, before they come to trial, know the evidence the child has given and presumably that makes it also easier for them."[762]

Judge Robertson of the Queensland District Court has observed that in his Honour's experience, the use of CCTV in trials involving child witnesses enhances the fairness of the process, both for the child and for the accused person:

> "In my opinion the receipt of evidence from children by way of closed circuit television, if anything tends to enhance the fairness of the trial, from the point of view of the accused. It certainly makes the trial fairer from the child's point of view. This is a purely subjective assessment and is not based by any empirical research. In my experience the potential prejudicial effect upon a jury of 12 citizens of a young child in court giving evidence about matters of sexual misconduct can't be under-emphasised."[763]

13.4.6 Court facilities

At the Supreme Court in Brisbane, court 15 on level 3 and the Court of Appeal on level 5 are both fitted out with CCTV, and these courtrooms link to a witness room located on level 2 of the Court. A bailiff does not usually stay with the witness in this room, but there is usually a support person present for child witnesses. The equipment in court 15 has been upgraded recently and sound reinforcement has been installed, and it is now possible to videotape evidence given from the remote room.[764] The existing remote witness room on Level 3 of the District

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762 Radio National's Law Report program, 20 May 2003, at http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s857955.htm.

763 Judge J Robertson *Young People – As Offenders, as Witnesses, as Victims* Speech delivered at the 2001 Symposium, Gold Coast, Queensland on 3 March 2001 at http://www.courts.qld.gov.au/publications/articles/speeches/Robertson_March01.pdf, accessed 2 December 2004 at 9-10.

764 Communication, Neil Hansen, Sheriff of the Supreme and District Courts, 15 September 2003 on file. CCTV has been installed in the District Court in

Court Building will be refurbished (including the provision of purpose built furniture for children) as part of the creation of a 'Child witness suite' for the Supreme and District Courts encompassing two remote CCTV witness rooms, adjoining waiting rooms in appropriate décor equipped with a TV/entertainment facilities, separate kitchenette and a separate toilet (unisex, disabled) all linked by a secure corridor. An additional room in the suite has been earmarked for a court child witness support officer/manager – as a future initiative.[765]

13.5 Communication with Child Witnesses

Competent use of language is of critical importance in legal proceedings. The difference between an experienced barrister, sophisticated in the use of the English language, and a child witness may be extreme, and this may put the child at a heightened disadvantage vis-à-vis an adult witness. As Brennan and Brennan commented in their leading study of child witnesses under cross-examination:

> "Lawyers are masterful language users. They may not be aware of the intricacies of their language usage at a conscious or descriptive level but they have at their disposal the benefits of fine training in the use and abuse of words, phrases, and structures. Their careers are built on words since these are the currency of the law. They know how to choose their words and structures to gain maximum effect, and they are skilled at using the words of others for their own benefit. In few other contexts are words and their meanings so tightly prescribed. To the child, a relative novice on the continuum of language usage, the distance between the language of the court and their own experiences of how and why language is used must appear immense".[766]

Judges have an important role to play in ensuring that a witness's best evidence is given in Court. The Full Court of South Australia considered this issue in the 1991 case of *R v Arthur*.[767] King CJ commented:

> "Although the regular course of trial involves that the questioning of witnesses by counsel be the norm, the judge undoubtedly has a role to play in ensuring that the true story emerges. He must ensure that there is no misunderstanding between counsel and the witness and is entitled to re-frame questions to avoid any such misunderstanding. He should guard against the possibility that a witness, particularly an uneducated or inarticulate witness or one who is under a disability, has not conveyed his true meaning by the words which he has used. He should ask appropriate questions to overcome that danger. He must protect the witness against loaded questions and may intervene to ensure that the witness's true meaning emerges. These are examples,

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Court 18 on level 3, and is also available in courts 24, 25, 26, 27, 28 and 29 by using a mobile trolley with video conferencing gear on it.

765 Communication, Court Administrator, 21 September 2004, on file.

766 Brennan M and Brennan RE *Strange Language – Child Victims Under Cross-Examination* (2nd ed) Wagga Wagga, Riverina Murray Institute of Higher Education, 1988 at 59.

767 Unreported, 24/12/1991.

> but by no means exhaustive examples, of the circumstances in which a trial judge may, and in some circumstances ought to, intervene if he is to perform his proper role in the trial.
>
> … Questions from counsel standing at the bar table may intensify that shyness and reticence and produce a reluctance to tell the story. Questions from the presiding judges may provide the reassurance which is necessary for the truth to emerge. In asking questions for that purpose, the judge is undoubtedly, to my mind, performing his proper role in the trial."

The following linguistic styles, sometimes used in cross-examination can be problematic in some cases. It is not suggested that questions of this kind when addressed to a child witness should necessarily be disallowed but the potential for misunderstanding and thereby injustice from questions of this kind, which could exist in a particular case, must be kept in mind.[768]

13.5.1 The use of the negative

Even though the negative is commonly used in general speech, the ways in which barristers use it in court have the potential to confuse child witnesses. Questions which use structures such as "Didn't X happen?" and "Isn't X true?" are generally too complex, as they require double processing before they can be answered. The use of the negative is usually unnecessary, only serving to complicate the question. There is therefore a significant chance that a child's answer to a question phrased in such a manner will not reflect his or her true meaning.

Answers which children give to these sorts of questions may also be unclear, as it may be difficult to identify the part of the question to which the answer relates. Brennan and Brennan give the following example to illustrate this problem. A 12 year old girl was asked in cross-examination:

Q: "Now you had a bruise, **did you not**, near one of your breasts, do you remember that?"
A: "No."

As the authors point out, the witness's answer may have been a response to any one of three questions:

1. Did you have a bruise?
2. Was it near your breast?
3. Do you remember that?

13.5.2 Juxtaposition of unrelated topics

In everyday conversations there are generally logical links between topics covered. However, cross-examiners sometimes suddenly switch topics, and the new questions may be unrelated to the previous topic under discussion. A child is more likely to be disoriented and confused

768 Brennan, above note 766, Chapter 9 at 62-77.

by an unexpected change than an adult witness, and so efforts should be made to contextualise questions for children.

13.5.3 Unduly long and complex questions

Questions which are unusually long and complex obviously have the potential to confuse any witness, but children are especially vulnerable to confusion. Usually, such a question has been poorly phrased. Counsel and judges should simplify questions, and aim to limit themselves to one concept per question. Brennan and Brennan give the following example of a question, which was asked of a seven year old child:

> Q: "And you told the policeman that Daddy said "Mum's coming." Now that's not true is it. Do you remember telling the court here just a few moments ago, you said "Mum's coming." That is true is it not?"
> A: "Yes."

13.5.4 Specific and difficult vocabulary

Counsel and judges should be careful not to use vocabulary and sentence structures which are too sophisticated for the child giving evidence. This particularly applies to unfamiliar legal terminology which is frequently used in courtrooms. Commonly used phrases such as "I'll withdraw that" and "I put it to you that …" have a specific meaning in a courtroom context which many children will not understand. As an example, Brennan and Brennan point to the commonly used phrase, "You told His Worship earlier …" A child witness may be confused by this terminology, as the witness would have been answering questions put by counsel, not by the judge.

13.5.5 Repetition of questions

Poole and White have identified that the repetition of specific questions within an interview session may also confuse a child witness, as a child may be more likely than an adult to interpret this as an indication that his or her first answer was wrong and change it as a consequence. Child witnesses are particularly vulnerable to this technique, as "children are more prone than adults to change answers to yes-no questions, specific leading questions, and non-leading questions following negative feedback."[769] Open-ended questioning did not have this effect, and was found to be of some benefit in preserving memories over time. The authors concluded:

> "Across-session repetition generally delays forgetting for subjects of all ages; exposure to misleading information or suggestive questioning,

[769] Poole DA and White LT "Tell Me Again and Again: Stability and Change in the Repeated Testimonies of Children and Adults" in Zaragoza MS et al (eds) *Memory and Testimony in the Child Witness* California, USA, Sage Publications, 1995, 24 at 40. See also the discussion by Lane P and Warren AR in "Effects of Timing and Type of Questioning on Eyewitness Accuracy and Suggestibility" at 46-47 of the same volume.

> rather than multiple interviews per se, is responsible for significant memory reconstruction over time. The consequences of within-session repetition are more complex. Children and adults who have no motive to conceal information generally maintain accuracy across answers with non suggestive procedures and primarily open-ended questions. Preschool children are more likely to change answers to yes-no questions, and children in general show performance decrements across repetitions when they have difficulty understanding or remembering the target material or when interviews contain numerous specific and misleading questions." [770]

In a 1995 survey conducted by the Judicial Commission of New South Wales of child witnesses in sexual assault cases, many children were critical of the length and the repetitiveness of the cross-examination they had faced. Many children did not understand why the questioning had been so repetitive, and were confused by this.[771] The Judicial Commission concluded:

> "The appropriateness of the language also affected children's perceptions of their court experience. The more lawyers adapted their language to that of the children, the fairer children rated the court process and their treatment there. The harder children found it to understand the questions, the less they thought they had a chance to say what they wanted in court, and the harder they said it was to answer the questions." [772]

As discussed above, Judges do have power pursuant to s 21 and now s 21A of the *Evidence Act* to control questioning of children.

Even if the special measures outlined above are implemented, the receipt of children's evidence may be hampered because of specific issues associated with communicating with children. A good example of this is the Western Australian case of *R v Stevenson.*[773] Special measures were used to take the five year old witness's evidence: the child's evidence was pre-recorded at a preliminary hearing conducted within ten months of the commission of the alleged offence and a video link was used at that hearing. The Court of Criminal Appeal held that the trial judge had rightly decided that the child was able to give an intelligible account of events and was therefore a competent witness. Even so, communication with this child at this preliminary hearing was generally difficult:

- When asked the question, "Are you comfortable?" the child did not respond as she did not understand the meaning of the word 'comfortable.'[774]
- When the trial Judge asked, "What is your name, Rebecca?" the child was confused and asked people in the remote room why the Judge had asked for her name when he already knew it. When his Honour was advised of this, he asked her, "What is your full name?" and received an appropriate response.[775]

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770 Above, note 769 at 41-42.
771 Cashmore, above note 742 at 33-34.
772 Cashmore, above note 742 at 35-36.
773 (2000) 118 A Crim R 20.
774 Above note 773 at [27].
775 Above note 773 at [27]-[28].

- The trial judge questioned her about her last birthday, asking if she had had a party or received presents. The child responded, "I didn't have my birthday yet … I don't have any birthdays," apparently using the word 'birthday' synonymously with 'birthday celebration.'[776]
- When the prosecutor asked, "Do you know why we're here today?" the child responded, "I don't know." As the Court of Appeal pointed out, this question was ambiguous and could be understood to refer to the presence of the Judge, counsel and other court staff.[777]
- The prosecutor asked the child whether the accused was a friend of her mother. The child answered, "No," although the accused was in fact known to the child and her mother. The child had interpreted the question literally and did not see the accused as being a friend of her mother.[778]

After the video link had been switched off, the trial Judge stated that he knew that it was very difficult and he had the feeling that some of the problems being experienced were due to a lack of experience with the system. His Honour commented, "I think we have all got to learn about how to handle young children in this situation".[779]

13.6 Case Management

Cases which involve children as defendants or as significant witnesses attract a high priority in the Supreme Court listings process. The Queensland Law Reform Commission found that the time between arrest and committal mention is usually about six weeks, and that committals are generally completed two to three months later.[780] Once indictments are presented in the Supreme Court almost three quarters of cases are disposed of within six months, with most of the remainder being disposed of within twelve months.[781] Section 21AJ of the *Evidence Act* 1977 provides that a child's evidence cannot be taken pursuant to Division 4A of the Act (as discussed above) until the indictment has been presented. Therefore, delays in taking affected children's evidence should be limited to four to five months.

However, delays in bringing a case to trial may cause significant problems, both in prolonging any trauma suffered by the child in connection with the court process and in affecting the quality of his/her evidence. The amount of detail child witnesses recall may decrease or fluctuate over an extended period of time, making the child's account appear less credible.[782] The new s 21AS of the *Evidence Act* 1977 provides that the prosecutor must tell the Court at the presentation of an indictment that an 'affected child' within the meaning of Division 4A is involved in the case. This should allow the Court to identify and make

776 Above note 773 at [23]-[24].
777 Above note 773 at [37].
778 Above note 773 at [37]-[38].
779 Above note 773 at [24].
780 QLRC, above note 730, Part 2 at 27.
781 Supreme Court *Annual Report* 2002-2003 at 3.
782 This was discussed in detail by the QLRC, above note 730, Part 2 at 29-34.

appropriate arrangements for the expedition of these cases, as recommended by the QLRC,[783] as well as make arrangements for evidence to be taken pursuant to Division 4A.

The recent amendments to the *Evidence Act* 1977, which inter alia amended s 93 and inserted the new Division 4A, were designed "to preserve, to the greatest extent possible, the integrity of the evidence of a child witness; to limit, to the greatest extent possible, the distress or trauma experienced by a child witness as a result of giving evidence; and to ensure that, in a criminal matter, an accused person receives a fair trial."[784] If these goals are to be met, it is desirable that cases involving affected children proceed as quickly as possible. Consideration may be given to allocating a trial judge as soon as possible where the Court has been informed that an affected child is involved.[785] Practice Direction 3 of 2004 deals with duties of the Director of Public Prosecutions and the Principal Registrar with regard to the videotaping of evidence.

13.7 Child Defendants

13.7.1 Criminal Responsibility and Jurisdiction

In Queensland an irrebuttable presumption exists that a child under the age of 10 years is not criminally responsible for his/her actions, and a rebuttable presumption exists that a child under the age of 14 years is not criminally responsible. For a child aged between 10 and 14 to be criminally responsible, it must be proved that at the time of the commission of the alleged offence the child had the capacity to know that he or she ought not to do the act or omission alleged.[786]

A person is a 'child' for the purposes of the *Juvenile Justice Act 1992* (Qld) if he or she has not turned 17 years.[787] Therefore, child defendants aged between 10 and 17 will generally be subject to the special procedures contained in the *Juvenile Justice Act 1992* for the prosecution of young offenders.

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783 QLRC, above note 730, Part 2 at 38-39; see also ALRC, above note 729, recommendation 96.

784 Evidence (Protection of Children) Amendment Bill 2003 Explanatory Notes at 2.

785 The Western Australian Court of Criminal Appeal has indicated that where possible, one judge should manage the entire proceedings: *R v Stevenson* (2000) 118 A Crim R 20 at [49]. See the discussion of this above.

786 *Criminal Code*, s 29.

787 *Juvenile Justice Act* 1992 (Qld), sch 4. Note that Section 6 of this Act allows the Governor in Council to fix a day after which a person will be a child for the purposes of the Act so long as the person has not turned 18. This age of majority was criticised by the ALRC, which recommended that it be raised to a uniform age of 18 in all Australian jurisdictions: ALRC, above note 729, recommendation 196. When the *Juvenile Justice Act 1992* was introduced, it was intended to raise this age to 18 at a later time: *Explanatory Notes* 1992, at 407 (notes to cl 6).

As a result of the amendments to the *Juvenile Justice Act 1992* that came into effect on 1 July 2003, the Children's Court has been granted the central role befitting a specialist court regarding children charged with offences.[788] The right of election for committal to another court of competent jurisdiction[789] has been abolished, and Children's Court Judges now sit with juries.[790] The District Court no longer has criminal jurisdiction over children,[791] except in the following circumstances:

- a District Court Judge may constitute the Children's Court when a Children's Court Judge is not available, usually in remote areas which receive District Court circuits;[792]
- the District Court may try a child on an indictment which also charges the child with an offence committed as an adult;[793]
- the District Court may sentence a child where the child is also appearing for sentence on an offence committed as an adult, and[794]
- proceedings may in certain circumstances be removed to another Court of competent jurisdiction if the child is to be tried on indictment with another person.[795]

The Children's Court may not hear offences over which the District Court does not have jurisdiction due to s 61 of the *District Court of Queensland Act* 1967.[796] As a result, the Supreme Court retains jurisdiction over children charged with the most serious offences, including homicide and serious drug offences.

13.7.2 Bail Proceedings

Subject to Part Five of the *Juvenile Justice Act* 1992, the *Bail Act 1980* applies to children charged with offences.[797] A child charged with an offence must be brought promptly before the Children's Court,[798] and a Children's Court judge may grant bail to a child charged with any offence,[799] including Supreme Court offences. A child defendant must be released[800] unless the child poses an unacceptable risk regarding whether he or she will:

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788 Juvenile Justice Act 1992 (Qld), s 99; Juvenile Justice Amendment Act 2002, s 26.

789 *Juvenile Justice Act* 1992 (Qld), Act no. 44 of 1992, ss 70 and 71, renumbered as ss 87 and 90 and later replaced with Part 6, Div 2, per *Juvenile Justice Amendment Act* 2002 (Qld), s 26.

790 *Juvenile Justice Act* 1992 (Qld), Part 6, Division 7, Subdivision 2.

791 District Court of Queensland Act 1967 (Qld), s 61A.

792 Children's Court Act 1992, s 5.

793 District Court of Queensland Act 1967 (Qld), s 61A(2)(a).

794 District Court of Queensland Act 1967 (Qld), s 61A(2)(c).

795 *Juvenile Justice Act* 1992 (Qld), part 6, division 8, subdivision 2; *District Court of Queensland Act* 1967 (Qld), s 61A(2)(b).

796 *Juvenile Justice Act* 1992 (Qld), s 99 and sch 4, definition of 'supreme court offence.'

797 *Juvenile Justice Act* 1992 (Qld), s 47(1).

798 *Juvenile Justice Act* 1992 (Qld), s 49(1).

799 Juvenile Justice Act 1992 (Qld), s 59.

800 *Juvenile Justice Act* 1992 (Qld), s 48(4).

- surrender into custody when required;
- commit an offence while released;
- endanger anyone's safety or welfare; or
- interfere with any witnesses or otherwise obstruct the course of justice.[801]

A child may be released on his or her own undertaking, or with a surety, with a deposit of money or upon other special conditions.[802] A court may in all cases release a child into the custody of his or her parent or permit the child to go at large,[803] subject to a condition that the child surrender into the custody of the court when required.[804] The Australian Law Reform Commission recommended that conditions imposed on a young person's bail should not be unrealistic or excessive (e.g. 24 hour curfews, which the ALRC commented "are tantamount to detention, disrupt education and may exacerbate problems in the home"), and should not criminalise a young person's non-offending behaviour (e.g. conditions which attempt to deal with anti-social behaviour such as petrol or glue sniffing).[805]

It should be noted that recent amendments to section 16 of the *Bail Act 1980* have removed the requirement for juvenile defendants to 'show cause.'[806] Each juvenile defendant's bail application will now be assessed on its merits, which is designed to enshrine the principle "that for a child, detention is the option of last resort".[807]

13.7.3 Trial of Juvenile Defendants

The overwhelming majority of cases involving juveniles are dealt with by the Magistrates Courts, which handled 7,624 (93.4 per cent) of these cases in 2002-03, while 161 were dealt with by the Children's Court (2 per cent) and 366 by the District Court (4.5 per cent).[808] In contrast, the Supreme Court generally deals with fewer than ten cases involving juvenile defendants each year.[809]

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801 *Juvenile Justice Act* 1992 (Qld), s 48(2). These are the same considerations which a Court must take into account pursuant to s 11(2) of the *Bail Act* 1980 when deciding whether to impose special conditions on an adult bail applicant.

802 Juvenile Justice Act 1992 (Qld), s 52.

803 *Juvenile Justice Act* 1992 (Qld), s 55(1).

804 *Juvenile Justice Act* 1992 (Qld), s 55(2).

805 ALRC, above note 729 at [18.159], recommendation 228.

806 *Juvenile Justice Amendment Act* 2002, s 128; inserting s 16(5) to the *Bail Act* 1980.

807 *Juvenile Justice Amendment Act* 2002, Explanatory Notes at 3,13; this principle appears in Art 37(b) of the *Convention on the Rights of the Child* and rule 13.1 of the *Beijing Rules*.

808 Children's Court of Queensland *Annual Report* 2002-2003 at 14.

809 Children's Court of Queensland *Annual Report* 2002-2003 at 14, 22.

Table 1: Supreme Court juvenile statistics by offender

Financial Year	Juveniles Indicted	Counts Indicted	Juveniles Indicted for Drug Offences	Juveniles Indicted for Violent Offences
1997-1998	2	5	1	1
1998-1999	8	28	6	2
1999-2000	4	10	0	4
2000-2001	7	28	5	2
2001-2002	2	11	2	0
2002-2003	7	41	4	3
2003 +	1	2	0	1
TOTAL	**31**	**125**	**18**	**13**

Table 2: Supreme Court juvenile statistics by offences indicted

Financial Year	Murder Offences Indicted	Attempted Murder Offences Indicted	Manslaughter Offences Indicted	Drug Offences Indicted	District and Magistrates Court Offences	TOTAL
1997-1998	0	1	0	1	3	**5**
1998-1999	1	0	0	14	13	**28**
1999-2000	0	2	3	0	5	**10**
2000-2001	0	2	0	8	18	**28**
2001-2002	0	0	0	7	4	**11**
2002-2003	1	2	0	26	12	**41**
2003 +	1	0	0	0	1	**2**
TOTAL	**3**	**7**	**3**	**56**	**56**	**125**

When a child is charged with a Supreme Court offence, the child must face committal before a Children's Court magistrate.[810] If the child enters a plea of guilty at this stage, the Court must commit the child for sentence before the Supreme Court.[811] If 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.[812] Provision is made to ensure that a parent of the child is present when he or she is being dealt with by a Court,[813] and a Court may order a parent to attend.[814]

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810 Juvenile Justice Act 1992 (Qld), s 64.

811 Juvenile Justice Act 1992 (Qld), s 91.

812 Juvenile Justice Act 1992 (Qld), s 95.

813 *Juvenile Justice Act* 1992 (Qld), s 69 provides:
"**69 Presence of parent required generally**
(1) If a parent of a child is not present when the child appears before a court charged with an offence, the court, after making inquiries of those present as to—
(a) the whereabouts of the child's parents; and
(b) whether a parent of the child has been informed of the proceedings as required under—
(i) section 43; or
(ii) the *Police Powers and Responsibilities Act 2000*, section 223;38
may adjourn the proceeding to enable a parent to be present at the time and place to which the proceeding is adjourned.
(2) The court may recommend that the chief executive provide financial assistance to a parent of the child to ensure that a parent is present at the proceeding."

As Lord Reed, sitting as an *ad hoc* Judge with the European Court of Human Rights, commented in his concurring opinion in *V v United Kingdom, T v United Kingdom*:

> "Children who commit crimes present a problem to any system of criminal justice, because they are less mature than adults. Even children who may appear to be lacking in innocence or vulnerability are nevertheless evolving, psychologically as well as physically, towards the maturity of adulthood. One consequent difficulty lies in deciding whether children are sufficiently mature to be held responsible for their actions under criminal law. If children are held criminally responsible, they have to be tried; but ordinary trial procedure will not be appropriate if a child is too immature for such procedures to provide him with a fair trial. If children are tried and convicted, they then have to be sentenced; but it will not be appropriate to sentence them in the same way as an adult, if their immaturity has the consequence that they were less culpable or that reformative measures are more likely to be effective." [815]

The right to a fair trial exists at common law,[816] and Australia has assumed international responsibilities regarding the right to a fair trial generally[817] and for children in particular.[818] Where a Supreme Court Judge is required to give directions regarding the conduct of a child's trial, he or she will be faced with the need to modify the trial procedure to accommodate the developmental state of the child involved in order to ensure that the child receives a fair trial, one incident of which is the opportunity to fully participate. Section 72 of the *Juvenile Justice* Act provides:

"**72 Explanation of proceeding**

(1) In a proceeding before a court in which a child is charged with an offence, the court must take steps to ensure, as far as practicable, that the child and any parent of the child present has full opportunity to be heard and participate in the proceeding.

(2) Without limiting subsection (1), the court must ensure that the child and parent understand, as far as practicable—

814 Juvenile Justice Act 1992 (Qld), s 70.

815 (2000) 30 EHRR 121 at 190.

816 See *Dietrich v The Queen* (1992) 177 CLR 292: the Court has power to stay an indictment which will result in an unfair trial.

817 International Covenant on Civil and Political Rights, art 14.

818 *Convention on the Rights of the Child*, arts 37 and 40 which provide, inter alia, that State parties should seek to establish separate systems for juvenile justice and juvenile detention. Australia ratified this Convention in 1990. There are also two relevant United Nations General Assembly resolutions, the Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules"), passed in 1985, and the Rules for the Protection of Juveniles Deprived of their Liberty, passed in 1990.

(a) the nature of the alleged offence, including the matters that must be established before the child can be found guilty; and

(b) the court's procedures; and

(c) the consequences of any order that may be made.

(3) Examples of the steps a court may take are—

(a) directly explaining these matters in court to the child and parent; and

(b) having some appropriate person give the explanation; and

(c) having an interpreter or another person able to communicate effectively with the child and parent give the explanation; and

(d) causing an explanatory note in English or another language to be supplied to the child and parent."

When deciding how the trial of a juvenile defendant should be conducted, the "key is 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."[819] The Australian Law Reform Commission identified three factors which can contribute to a juvenile defendant's level of comprehension of the proceedings: "the physical environment of the courtroom, the approach of the prosecutor, defence lawyer and judicial officer, and the effective representation of the child."[820] The ALRC recommended that prosecutors from the relevant Office of the Director of Public Prosecutions who have received specialised training in children's matters, should prosecute juvenile justice matters.[821] The Director of Public Prosecutions established a specialist unit within her Office in 2000 to deal with juvenile justice matters.[822]

The ALRC also noted that the physical environment of adult courtrooms can be "highly intimidating" for juvenile defendants, and referred to a former senior children's magistrate as suggesting that:

> " … ideally a court room used for hearing criminal charges against children should be of a size that enables all persons involved to address each other at a normal conversational level, have a bench that distinguishes the role of the magistrate but that does not dominate the room by its height, size or ornateness and be carefully laid out so there is a clear line of sight between the bench and all others."[823]

Specially designed courtrooms for children were opened in 1999 at the Children's Court premises at 40 Quay St, Brisbane.[824] These

819 Hubble, G "Juvenile defendants: taking the rights of children seriously" June 2000 *Alternative Law Journal* 25(3), 116 at 120.

820 ALRC, above note 729 at [18.178].

821 ALRC, above note 729 at [18.179], recommendations 230 and 231.

822 Children's Court of Queensland *Annual Report* 1999-2000 at 3.

823 ALRC, above note 729 at [18.185]-[18.188].

824 Children's Court of Queensland *Annual Report* 1998-1999 at 5.

courtrooms have no docks, and the dimensions of the courtrooms are much smaller than an adult court. These courtrooms are normally used by Children's Court judges and magistrates but do not have facilities for juries.

Although there is a lack of Australian authority in this regard, the English Crown Court was faced with an extreme case in the trial of V and T, who were tried and convicted of the abduction and murder of James Bulger. The European Court of Human Rights held that these defendants did not receive a fair trial, as due to the circumstances in which their trial was conducted, they had been unable to effectively participate in the proceedings against them.

The offence was committed on 12 February 1993, when V and T were ten years old and their victim only two. The pair were arrested a few days later, and their trial took place over three weeks in November 1993, in the English Crown Court, when both boys were eleven. A number of special measures were taken to accommodate the child defendants, who were represented by highly skilled and experienced counsel at trial: [825]

- social workers took them to see the courtroom in advance, in order to familiarise them with its layout;
- the trial procedure was explained to them in advance, by using a child witness pack which contained books and games;
- the Court's hearing times were shortened to reflect the school day. The Court sat from 10:30am to 3:30pm, with a one hour lunch break and ten minute breaks every hour;
- social workers sat in the dock with the defendants, and their parents and legal representatives were seated nearby;
- the dock was raised to enable the defendants to see properly;
- the trial Judge stated a willingness to adjourn if a social worker or a defence lawyer told him that one of the defendants was showing signs of stress or tiredness. This occurred on one occasion;
- the defendants spent the adjournments in a play area with their parents and social workers.

However, the trial was conducted in an adult court, with its attendant formality. The following factors were also present:

- the Judge and counsel wore formal court dress, i.e. wigs and gowns;
- the trial took place in a large, imposing courtroom, using formal court procedure;

825 As recorded in *V v United Kingdom, T v United Kingdom* (2000) 30 EHRR 121.

- the raised dock had the effect of making the defendants feel elevated and exposed;
- the trial took place in public, with a large press contingent present in court and the public and press galleries full every day. If the trial had taken place in the Youth Court, the general public would have been excluded;
- the trial took place in the midst of extremely high levels of public interest, both nationally and internationally. Hostile crowds gathered outside court, and on one occasion a van carrying the defendants was attacked;
- both defendants were immature for their ages and emotionally disturbed. Both adduced evidence showing that they were suffering from post-traumatic stress disorder at the time of the trial.

In these circumstances, the Court held *inter alia* that the defendants had been denied a fair trial, as they were "unable to participate effectively in the criminal proceedings against [them]".[826] The Court commented that notwithstanding the special measures implemented, "the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of 11,"[827] and that even though they had highly experienced legal representatives, "it is highly unlikely that [the applicant] would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of co-operating with his lawyers and giving them information for the purposes of his defence."[828] Therefore, the defendants had been unable to participate effectively in the criminal proceedings against them, and as a result had been denied a fair hearing.

In response to the issues raised by this case, the Lord Chief Justice published a Practice Direction regarding the *Trial of Children and Young Persons in the Crown Court*, which is attached as Appendix A to this chapter. It states that any steps taken to comply with the Practice Direction must be done by "taking account of the age, maturity and development (intellectual and emotional) of the young defendant on trial and all other circumstances of the case." Among other points, it recommends that:

- young defendants should normally be free to sit with his or her family and be seated close enough to his or her legal representatives to allow informal communication;

826 *V v United Kingdom, T v United Kingdom* (2000) 30 EHRR 121 at 181. Nearly identical judgments in respect of both applicants were delivered on the same day; the only differences reflected the different psychiatric evidence adduced on behalf of each defendant.

827 Above note 826 at 180.

828 Above note 826 at 181.

- the Court should explain the course of proceedings to young defendants, ensure that as far as possible the proceedings are conducted in language which he or she can understand, and remind young defendants' legal representatives of their continuing obligation to explain each step of the trial to their clients;
- frequent and regular breaks will often be appropriate, due to many young defendants' inability to concentrate for long periods;
- wigs and gowns normally should not be worn, and security officers should not wear uniform;
- courts should be prepared to restrict attendance in the courtroom itself to a small number of people, and that audio-visual linking may be used to allow others to view the trial.

It should be noted that a child defendant cannot be an 'affected child' pursuant to Division 4A of the *Evidence Act*, so the only special measures that can be taken in respect of the evidence of a child defendant pursuant to the *Evidence Act* are those contained in s 21A.

13.7.4 Sentencing of Juvenile Defendants

All juvenile defendants must be sentenced pursuant to Part 7 of the *Juvenile Justice Act 1992*.[829] Section 150 of that Part sets out the sentencing principles to which judges must have regard when sentencing children and include the general principles applying to the sentencing of all persons, the juvenile justice principles, the nature and seriousness of the offence, any offending history and any impact of the offence on a victim.

Schedule 1 of the Act establishes a Charter of Juvenile Justice Principles which underlie the operation of the Act,[830] and include the following:

> "**16.** A child should be dealt with under this Act in a way that allows the child to be reintegrated into the community.
>
> **17.** A child should be detained in custody for an offence, whether on arrest or sentence, only as a last resort and for the least time that is justified in the circumstances."[831]

The full text of this Charter is attached to this chapter as Appendix B.

If a child is found guilty of a serious offence which is a 'life offence',[832] 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, if the offence involves the commission of violence against a person and

829 Section 149.

830 Juvenile Justices Act 1992 (Qld), s 3.

831 Principle 17 reflects art 37(b) of the *Convention on the Rights of the Child*.

832 Sch 4: "an offence for which a person sentenced as an adult would be liable to life imprisonment." *Juvenile Justice Act* 1992.

the Court considers the offence to be particularly heinous, having regard to all the circumstances.[833] However, this does not limit the Court's power to make an order under s 175,[834] which provides that a Court may:

- reprimand the child;
- order the payment of a fine;[835]
- make a good behaviour order against the child;[836]
- make a probation order;[837]
- make a community service order;[838]
- make an intensive supervision order;[839]
- make a detention order,[840] which may include a conditional release order.[841]

In addition, a provision inserted by the *Juvenile Justice Amendment Act* 2002 allows orders to be made allowing certain children convicted of offences to be identified. New section 234 provides that a child convicted of a life offence which involves the commission of violence against a person may be identified if the court considers the offence to be a particularly heinous offence having regard to all the circumstances, and that it would be in the interests of justice to allow the publication. Judge Robertson commented that "any impression that [this] change in the law will lead to a significant increase in the publication of names of juvenile offenders is wrong."[842] His Honour gave two reasons for this: firstly, as the section cannot (and expressly does not) apply to a court constituted by a Children's Court Magistrate, roughly 92 per cent of juvenile offenders are already excluded; and secondly, the Court of Appeal has considered the phrase 'heinous', where McPherson JA held that it meant "odious, highly criminal, infamous."[843]

833 *Juvenile Justice Act* 1992 (Qld), s 176(3).
834 *Juvenile Justice Act* 1992 (Qld), s 176(6).
835 *Juvenile Justice Act* 1992 (Qld) Part 7 Div 6.
836 *Juvenile Justice Act* 1992 (Qld) Part 7 Div 5.
837 *Juvenile Justice Act* 1992 (Qld) Part 7 Div 7.
838 *Juvenile Justice Act* 1992 (Qld) Part 7 Div 8.
839 *Juvenile Justice Act* 1992 (Qld) Part 7 Div 9.
840 *Juvenile Justice Act* 1992 (Qld) Part 7 Div 10.
841 *Juvenile Justice Act* 1992 (Qld) Part 7 Div 10 Sub-div 2.
842 Children's Court of Queensland *Annual Report* 2001-2002 at 4.
843 *R v G* [1997] QCA 389 at 7.

13.8 APPENDIX A

13.8.1 "PRACTICE DIRECTION - TRIAL OF CHILDREN AND YOUNG PERSONS IN THE CROWN COURT[844]

1. This Practice Direction applies to trials of children and young persons in the Crown Court. Effect should be given to it forthwith. In it children and young persons are together called "young defendants". The singular includes the plural and the masculine the feminine.

2. The steps which should be taken to comply with this Practice Direction should be judged, in any given case, taking account of the age, maturity and development (intellectual and emotional) of the young defendant on trial and all other circumstances of the case.

13.8.2 The overriding principle

3. Some young defendants accused of committing serious crimes may be very young and very immature when standing trial in the Crown Court. The purpose of such trial is to determine guilt (if that is in issue) and decide the appropriate sentence if the young defendant pleads guilty or is convicted. The trial process should not itself expose the young defendant to avoidable intimidation, humiliation or distress. All possible steps should be taken to assist the young defendant to understand and participate in the proceedings. The ordinary trial process should so far as necessary be adapted to meet those ends. Regard should be had to the welfare of the young defendant as required by Section 44 of the *Children and Young Persons Act* 1933.

13.8.3 Before trial

4. If a young defendant is indicted jointly with an adult defendant, the court should consider at the plea and directions hearing whether the young defendant should be tried on his own and should ordinarily so order unless of opinion that a joint trial would be in the interests of justice and would not be unduly prejudicial to the welfare of the young defendant. If a young defendant is tried jointly with an adult the ordinary procedures will apply subject to such modifications (if any) as the court may see fit to order.

5. At the plea and directions hearing before trial of a young defendant, the court should consider and so far as practicable give directions on the matters covered in paragraphs 9 to 15 below inclusive.

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844 http://www.dca.gov.uk/ypeoplefr.htm.

6. It may be appropriate to arrange that a young defendant should visit, out of court hours and before the trial, the courtroom in which the trial is to be held so that he can familiarise himself with it.

7. If any case against a young defendant has attracted or may attract widespread public or media interest, the assistance of the police should be enlisted to try and ensure that a young defendant is not, when attending for the trial, exposed to intimidation, vilification or abuse.

8. The court should be ready at this stage (if it has not already done so) to give a direction [prohibiting or restricting publication identifying a child] under s 39 of the *Children and Young Persons Act* 1933 or, as the case may be, section 45 of the *Youth Justice and Criminal Evidence Act* 1999. Any such order, once made, should be reduced to writing and copies should on request be made available to anyone affected or potentially affected by it.

13.8.4 The Trial

9. The trial should, if practicable, be held in a courtroom in which all the participants are on the same or almost the same level.

10. A young defendant should normally, if he wishes, be free to sit with members of his family or others in a like relationship and in a place which permits easy, informal communication with his legal representatives and others with whom he wants or needs to communicate.

11. The court should explain the course of proceedings to a young defendant in terms he can understand, should remind those representing a young defendant of their continuing duty to explain each step of the trial to him and should ensure, so far as practicable, that the trial is conducted in language which the young defendant can understand.

12. The trial should be conducted according to a timetable which takes full account of a young defendant's inability to concentrate for long periods. Frequent and regular breaks will often be appropriate.

13. Robes and wigs should not be worn unless the young defendant asks that they should or the court for good reason orders that they should. Any person responsible for the security of a young defendant who is in custody should not be in uniform. There should be no recognisable police presence in the courtroom save for good reason.

14. The court should be prepared to restrict attendance at the trial to a small number, perhaps limited to some of those with an immediate and direct interest in the outcome of the trial. The court should rule on any challenged claim to attend.

15. Facilities for reporting the trial (subject to any direction given under section 39 of the 1933 Act or section 45 of the 1999 Act) must be provided. But the court may restrict the number of those attending in the courtroom to report the trial to such number as is judged practicable and desirable. In ruling on any challenged claim to attend the courtroom for the purpose of reporting the trial the court should be mindful of the public's general right to be informed about the administration of justice in the Crown Court. Where access to the courtroom by reporters is restricted, arrangements should be made for the proceedings to be relayed, audibly and if possible visually, to another room in the same court complex to which the media have free access if it appears that there will be a need for such additional facilities.

16. Where the court is called upon to exercise its discretion in relation to any procedural matter falling within the scope of this Practice Direction but not the subject of specific reference, such discretion should be exercised having regard to the principles in paragraph 3 above.

13.8.5 Appeal and committals for sentence

17. This Practice Direction does not in terms apply to appeals and committals for sentence, but regard should be paid to the effect of it if the arrangements for hearing any appeal or committal might otherwise be prejudicial to the welfare of a young defendant."

The Lord Chief Justice of England and Wales
16 February 2000

13.9 APPENDIX B

13.9.1 "CHARTER OF JUVENILE JUSTICE PRINCIPLES[845]

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.

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845 *Juvenile Justice Act* 1992 (Qld), schedule 1.

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.

17. A child should be detained in custody for an offence, whether on arrest or sentence, only as a last resort and for the least time that is justified in the circumstances.

18. A child detained in custody should only be held in a facility suitable for children.

19. While a child is in detention, contacts should be fostered between the child and the community.

20. 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."

Chapter 14 Gender

14.1 Introduction

There is no singular "female experience" of life or the legal system just as there is no "male experience". However, women's experiences generally may differ from men's experiences in a number of areas including employment, health, education and family.

14.2 Socio-economic Factors

14.2.1 The socio-economic status of men and women

Women are engaged in paid employment less than men[846] and earn less than men.[847] Women are also employed on a part-time or casual basis to a much greater extent than men, meaning that they are frequently employed in areas with low job security, sickness and leave benefits and superannuation entitlements.[848] This has a number of consequences. It means that women are more likely to be financially dependent than men. Women are more likely to experience difficulties in leaving abusive relationships because of financial dependence. Women are less likely to be able to afford access to the legal system.

14.2.2 Unpaid work and family responsibilities

Women provide the majority of unpaid work in Australia, on average spending nearly twice as much time daily on domestic activities and nearly three times the amount of time on childcare than men.[849] Women also shoulder the bulk of responsibilities for caring for children,

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846 In the 2002-03 year, nearly 68 per cent of men were employed, compared to almost 53 per cent of women. For men aged between 25 and 54 in this period, between 83 and 92 per cent were employed, compared to between 66 and 69 per cent of women: Australian Bureau of Statistics (ABS) *Yearbook Australia 2004: Labour – Employed Persons* at http://www.abs.gov.au/Ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/9162e0a518dea3b5ca256dea00053a72!OpenDocument, accessed 11 December 2004.

847 Currently in Queensland, the average total weekly earnings for a woman working full-time are 82 per cent of a man's average total weekly earnings, slightly higher than the national average of 81 per cent: ABS, *6302.0 Average Weekly Earnings*, May 2003 (based on the "Trend" series of figures). This figure remains roughly consistent for 2003, 2002 and 2001.

848 In 1999, 44 per cent of employed women worked part-time compared to 12 per cent of men: Commonwealth Office of the Status of Women *Women in Australia* Canberra, Department of Prime Minister and Cabinet, 2001 at 132.

849 ABS *4153.0 How Australians Use their Time*, 1997 at http://www.abs.gov.au/Ausstats/abs@.nsf/b06660592430724fca2568b5007b8619/de84427efeb3834bca2568a9001393bd!OpenDocument, accessed 11 December 2004. There appears to be no update of this survey.

the elderly and the disabled.[850] This may have a number of consequences for female participants in the court process. Counsel, witnesses and jurors who have the primary responsibility for care of other persons may be assisted by as much notice as possible prior to their appearance in court, and by convening court within regular court hours as much as possible. It may be impossible for some persons to act as jurors without some form of assistance for care of relatives or children.

14.3 Women's Experiences within the Legal System

14.3.1 Access to justice

Most recent available figures from Legal Aid Queensland indicate that women represent approximately 36 per cent of Legal Aid applications and 34 per cent of approved applicants.[851] Approximately 75 per cent of women's legal aid applications are approved, compared to around 83 per cent of men's applications.[852] This is probably due to the fact that men receive aid in criminal matters in numbers more than four times those of female applicants.[853]

The fact that a majority of legal aid approvals are for criminal matters, in which men are heavily over-represented, means that women receive less funding in family and civil law disputes, in which they make up the majority of applicants. Particularly where women are at a disadvantage in terms of bargaining power, it has been suggested that those who do not receive legal aid may be more willing to accept disadvantageous settlements because their costs are paid from the settlement, and they are trying to conserve as much of that as possible.[854] Women in family law or de facto property disputes who have experienced domestic violence and who are not legally represented may be forced to deal personally with the abuser or his solicitor.[855]

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850 In Queensland in 2001, approximately 91 per cent of men with children under the age of 15 were in paid work compared to 61 per cent of women. Caring responsibilities for elderly and disabled persons are more evenly balanced, with 52 per cent of carers being female compared to 48 per cent male carers: Queensland Government Department of Industrial Relations *Review of Work and Family in Queensland* 2002, 11 and 13. In Queensland, approximately one in eight women provides care to an elderly relative, with women aged 45 to 54 disproportionately providers of this type of care: Office of Women's Affairs *Survey of Queensland Women* Brisbane, Queensland Government, 1998 at 91.

851 Women's Legal Aid *Gender Equity Report 2003* Brisbane, Legal Aid Queensland at 2, 8.

852 Above note 851 at 7 & 8.

853 Above note 851 at 7.

854 Australian Law Reform Commission (ALRC) *Equality before the law: justice for women* Report No 69, 1994 at [4.16].

855 Above note 854 at [4.20], citing Batts, J "The poor and the rich: legal aid and the rest" *Challenging the legal system's response to domestic violence* Conference Paper delivered at Hilton Hotel Brisbane, 23-26 March 1994.

14.3.2 Childcare facilities

Access to justice for both women and men with childcare responsibilities is hindered by the absence of available childcare facilities and children's play areas in most courts.[856] People caring for children may find it difficult to attend court and appointments with legal representatives if they are unable to find suitable childcare. 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 are 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.[857]
The requirements of a woman who may be breastfeeding should be accommodated.[858]

14.3.3 Alternative Dispute Resolution

When referring matters to mediation, judges often consider how power imbalances between parties to a relationship may affect the process and outcome of the mediation. Particularly where there has been violence against one partner in a relationship, that person may be reluctant or unable to represent his or her own best interests in a way that may be envisaged when a mediation direction is made. Problems may be exacerbated by the confidential nature of mediation, meaning 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.[859]

14.3.4 Some issues for women as witnesses

Women will most often experience difficulties as witnesses when giving evidence as complainants in rape or sexual assault cases. The Women Lawyers' Association, in its report to the Queensland Department of Premier and Cabinet, Office for Women, noted that women who are able to detail a history of domestic violence in an interview are often unable to do so in court proceedings.[860] 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), for example by having the accused or members of the public excluded

856 Above note 854 at [7.22]-[7.25].
857 Above note 854 at [7.24].
858 Judicial Studies Board *Equal Treatment Bench Book* London, March 2004 at 6-20 [6.1.11].
859 For a discussion of these issues in relation to family law mediation, see Field, R "Family Law Mediation: Process Imbalances Women Should be Aware of Before They Take Part" (1998) 14 *QUT Law Journal* 23.
860 Office for Women *Report of the Taskforce on Women and the Criminal Code* Brisbane, Department of the Premier and Cabinet, 2000 at Chapter 8, Results of Consultation.

from court, having an approved person present to give support and allowing the witness to give videotaped or closed circuit evidence.

The 2003 *Seeking Justice* report of the Crime and Misconduct Commission also found that "complainants sometimes decide not to proceed with their complaint for a range of reasons, including factors associated with the court process itself, such as the length of time the complainant is likely to be in the witness box during the committal or trial hearings and the likelihood of the complainant having to see the defendant in court. The experience of the committal hearing may also discourage a complainant from proceeding, or the trial date may change many times and this may lead the complainant to feel disillusioned with the process and no longer willing to participate."[861]

14.3.5 The intersection of gender and other factors

Gender intersects with other factors such as race, ethnicity, sexuality and age such that some women are disadvantaged in a combination of ways. Addressing these disadvantages is not simply a matter of adding one to the other. For example, in attempting to understand the experiences of an Indigenous woman, it is not enough to note that she is a woman and an Indigenous person. The two intersect in such a way as to multiply any disadvantage.

Indigenous women and women from non-English speaking backgrounds suffer difficulties in their relations within the legal system both due to their gender and their Aboriginality, ethnicity, cultural or religious background. Some of the problems experienced due to race or ethnicity are dealt with in other chapters of this book. Some of these problems are associated directly with only women of a particular group. For example, Indigenous women may experience problems within the legal system, when issues arise concerning traditional "Women's business", issues which women are forbidden to disclose to men. Because judicial officers and lawyers are predominantly male, women may have to choose between compromising their own laws or their claim within the legal system.[862] Issues of kinship ties may also leave a witness unwilling or reluctant to testifying against an accused, especially in light of the knowledge of the overwhelmingly different rate at which Aboriginal people come into custody, compared with the rate of the general community and suicide in custody concerns.[863]

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861 Crime and Misconduct Commission Seeking Justice: An inquiry into how Sexual Offences are handled by the Queensland Criminal Justice System (2003) at 23.

862 ALRC, above note 854 at [5.29].

863 Royal Commission into Aboriginal Deaths in Custody (1991) National Report, Chapter 11; Communication, Office for Women, Queensland Government, 21 September 2004.

Age, too, may be a relevant factor. It may, for example, be relevant to how people perceive violence; a 2000 study found that people who grew up in the early to mid 1900s had experienced the widespread acceptance of violence by society in those times as an influence on their experience of abuse.[864] By the time that a national policy approach toward domestic violence was developed in the 1990s, many of these women were in their sixties and seventies, had been in violent relationships for long periods, and had little or no experience of paid employment.[865] For these women, leaving an abusive relationship can have quite different consequences to those experienced by younger women.[866]

14.3.6 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 judgment writing. For example, the use of "he or she" or "they", when discussing situations in general terms, is more inclusive than "he" or "she" in the singular. 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.

Recent consideration has also been given to how women are addressed in court. 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 preferable to use the term "Ms" unless a contrary indication is given. It should not be assumed that a married female advocate/solicitor/witness/plaintiff/defendant is automatically referred to as "Mrs". The court appearance slips will show whether an advocate prefers Ms, Mrs or Miss. Nor should there be an assumption that a married couple bear the same surname.

14.4 Domestic violence

"Domestic violence" refers broadly to violence in the home, and may include physical, sexual or emotional abuse of a partner.[867] In March

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864 Morgan Disney & Associates, Leigh Cupitt & Associates & Council on the Ageing *Two Lives, Two Worlds*: *Older people and domestic violence*, Vol 2, Canberra, Office of the Status of Women, 2000 at iii.

865 *Two Lives*, above note 864 at 5.

866 *Two lives*, above note 864 at 5.

867 Ho, R and Venus, M "Domestic Violence and Spousal Homicide: the Admissibility of Expert Witness Testimony in Trials of Battered Women Who Kill their Abusive Spouses" (1995) 1(1) *Journal of Family Studies* 24 at 25.

2003, the definition of domestic violence was further extended to include violence committed by someone in the following relationships :

(a) a spousal relationship;
(b) an intimate personal relationship;
(c) a family relationship; and
(d) an informal care relationship.

In 2002-03 in Queensland there were over 16,000 application for domestic violence orders.[868] It is estimated that approximately one in four women who have ever been in a relationship have experienced violence by a male partner at some time during the relationship.[869] In 1996, it was reported that almost 40 per cent of Queensland women had experienced either physical or sexual violence by a male perpetrator since the age of 15.[870] The 2001-2002 annual report of the National Homicide Monitoring Program found that the alleged motive behind 44.8 per cent of all homicides in Queensland involving women as victims was due to domestic issues.[871]

It is far more common for a woman to be the victim of physical violence at the hands of a partner or person she knows than at the hands of a stranger. This is also consistent with the profile of victims of sexual assault reported to the police. In these circumstances 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.[872]

Women may stay in violent relationships for various reasons: financial dependence, the presence of children in the relationship, the inability to provide for those children outside of the relationship, and the threat of further or worse violence if the relationship is ended. Extended abuse over a period of time may cause women to enter a state of permanent fear or learned helplessness.[873]

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868 Department of Communities, *Information Gateway – Annual Report 2002-2003* at http://www.communities.qld.gov.au/department/ig/annual/2002_03/comsup/documents/excel/dv_1_dva_tapp_qld_var0203.xls, accessed 11 December 2004.

869 Partnerships against Domestic Violence *Attitudes to Domestic and Family Violence in the Diverse Australian Community: Cultural Perspectives* Canberra, Commonwealth of Australia, 2000 at 15 citing Women's Safety Australia.

870 Department of Premier and Cabinet Queensland *Women and Girls in the Smart State: Annual Action Plan 2001-02*, 15, citing ABS (1996) *Women's Safety Survey* (unpublished data).

871 Mouzos J 2003a. *Homicide in Australia: 2001-2002 National homicide monitoring program (NHMP) annual report*. Research and public policy series no 46 Canberra: Australian Institute of Criminology at 16.

872 *Sexual Assault In Australia: A Statistical Overview* (2004) Australian Bureau of Statistics 4523.0 at 13.

873 See 14.6.2 for further discussion of the term "learned helplessness".

The effects of domestic violence are broad-reaching and may be of relevance in cases dealing with equity, succession, social security fraud and personal injury law. For example in the South Australian case of *Farmer's Cooperative Executors & Trustees Ltd v Perks*[874] 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.[875]

14.4.1 Prosecuting cases of domestic violence

Unlike other crimes of violence, domestic violence is rarely prosecuted relative to its occurrence. Reporting domestic violence to the police is generally seen as a last resort.[876] Low reporting levels are largely due to the reluctance of victims to give evidence or press charges; in a 1996 survey, Queensland women who had experienced violence reported less than 23 per cent of physical assaults and 11 per cent of sexual assaults to the police.[877] 42 per cent of women said that they did not contact police because they wanted to deal with the issue themselves and 27 per cent said they did not regard the incident as "serious".[878] This is particularly true for Indigenous women, as cited in the Aboriginal and Torres Strait Islander Women's Task Force on Violence Report, the reasons stated in the report include:

> "fear of the justice system, shame, and difficulty communicating with non-Aboriginal police officers, judges, prosecutors and other legal staff".[879]

14.4.2 Domestic violence and the court process

Women who choose to prosecute perpetrators of domestic violence face several obstacles in bringing the matter before a court. They may have had previous negative experiences in seeking help from police, doctors, or other professionals. They may fear that taking legal action will serve no purpose and may in fact lead to further violence by the perpetrator. They may also have a continuing emotional attachment to the perpetrator as well as having issues relating to children and the children's relationship with the perpetrator.[880] Queensland has a number of initiatives operating which provide emotional and legal

874 (1989) 52 SASR 399.
875 See ALRC, above note 854 at [8.11]-[8.12].
876 Partnerships against Domestic Violence, above note 869 at 21.
877 Department of Premier and Cabinet, above note 870, citing ABS (1996) *Women's Safety Survey* (unpublished data), 15.
878 ABS, Women's Safety Australia 1996, 4128.0.
879 Aboriginal and Torres Strait Islander Women's Task Force on Violence Report 3.4 at 99.
880 ALRC, above note 854 at [6.2].

support to victims of domestic violence who are involved in court proceedings.[881]

The same considerations apply in respect of domestic violence victims giving evidence as they do in respect of rape and sexual assault victims, considered below in more detail. 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.[882] There is scope for the admission of evidence of reported threats of violence, as indicated in *Wilson v R*,[883] where evidence that the deceased female had been heard to say to the accused male that she knew he wanted to kill her was admissible as evidence of the nature of the relationship between accused and victim.

14.5 Rape

The Australian Bureau of Statistics, in the National Crime and Safety Survey (NCSS) of 2002 estimated that 33,000 adults in Australia had been victims of sexual assault in the 12 months prior to the survey.[884]

Making a complaint of rape or sexual assault can be a harrowing experience for the victim. Data from the National Crime and Safety Survey (NCSS) 2002 indicated that approximately one in seven adult female victims of sexual assault (14 per cent) did not disclose the most recent incident to anyone. The NCSS also found that the proportion of female victims of sexual assault who considered the most recent incident to be a crime was 77 per cent. However, four out of five (80 per cent) of adult female victims of sexual assault responded that they had not told police. [885]

A report by the Home Office in England found that a significant number of complainants withdrew their complaints before trial, with an important factor in this decision being aggressive, humiliating and irrelevant questioning.[886] The experience is complicated for Indigenous

881 Women's Legal Aid, above note 851. These include the Domestic Violence Unit, which represents women in domestic violence-related matters and Women's Justice Network, which provides information and education about domestic violence.

882 Office for Women, above note 860.

883 (1970) 123 CLR 334.

884 Australian Bureau of Statistics *Sexual Assault In Australia: A Statistical Overview* (2004) 4523.0 at 13.

885 ABS, National Crime and Safety Survey, 2002 quoted in *Sexual Assault In Australia: A Statistical Overview* (2004) Australian Bureau of Statistics 4523.0 at 55 and 57.

886 Home Office Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System London, Home Office, 1998, 67-8, cited in Office for Women, above note 860 at Ch 8.

women, who may experience special difficulties communicating in a public forum about sexual matters.[887]

Contrary to perceptions historically reflected in the law, women generally do not complain about sexual violence at the "first reasonable opportunity". The CJC found that between 1994 and 1998, less than 8 per cent of offences were reported to police within a week.[888] Victims' reasons for not reporting sexual assault include that they knew the offender, that they feared retaliation, that they did not trust the system, and that they feared court proceedings.[889] The NCSS 2002 survey found that victims are more likely to report sexual assault to police if:

a) the perpetrator was a stranger;
b) the victim was physically injured; or
c) the victim was born in Australia.[890]

14.5.1 Protection from cross-examination on previous sexual history

A survivor's sexual experience usually has no bearing on the way he or she experiences rape – whatever the level of sexual experience, rape is an extreme violation of the person and his or her sexual privacy.[891] 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, there are exceptions to this rule where such activities have "substantial relevance to the facts in issue" or where the evidence would be likely to materially impair confidence in the reliability of the complainant's evidence.[892] For many women, appearing in court during the trial of their attacker exacerbates the ordeal they have been through.[893] It has been recognised that judges play an important role in limiting irrelevant questions that relate to sexual reputation of complainants.[894]

887 NSW Department for Women Heroines of Fortitude: The experiences of women in court as victims of sexual assault Sydney, Department for Women, 1996 at Ch 8.
888 Office for Women, above note 860 at Ch 7.
889 Above note 861 at Ch 7.
890 Above note 884 at 14.
891 The fact that the victim of rape worked as a prostitute was taken into account in sentence in *R v Hakopian* (unreported, Vic Court of Appeal, 11 December 1991). This approach was rejected by the NSW Court of Appeal in *R v Leary* (unreported, 8 October 1993), 6. For a discussion see Scutt, JA "Judicial Vision: Rape, Prostitution and the "Chaste Woman"" (1994) 17(4) *Women's Studies International Forum* 345.
892 Criminal Law (Sexual Offences) Act 1978 (Qld), s 4.
893 Ellison, C "Cross-Examination in Rape Trials" (1998) *Criminal Law Review* 605 at 606.
894 NSW Department for Women, above note 887 at 251-3.

14.6 Gender and Criminal Law

14.6.1 Criminal defences where there is a history of abuse

Traditionally, defences such as self-defence and provocation have developed largely on the basis of male experiences, the kinds of threats that men are subjected to and the ways that men typically respond to these threats.[895] As Chief Justice Gleeson noted, when discussing the defence of provocation, a common criticism is 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."[896]

Where a woman kills a partner who has been repeatedly abusive over a period of time, she may have difficulty relying on self-defence due to the necessity to establish the immediacy of the attack she is defending herself against, and also the reasonableness of her apprehension of death or grievous bodily harm.[897] A difficulty in fitting the experience of abused women within self-defence provisions is that the provisions focus on the single act of violence preceding the self-defence response, to the exclusion of what is often a long and continuing history of violence.[898] Women who kill abusive partners usually 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.[899]

It has been recognised that the threat posed by an abusive partner can be continuing, rather than fleeting and momentary, as indicated by these directions to a Queensland jury:

> "You have to look at the nature of the threat that she was generally under. You would have to see whether or not the Crown has excluded that she had a reasonable and honest belief that her husband not only

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895 Stubbs, J and Tolmie, J "Feminisms, Self-Defence, and Battered Women: A Response to Hubble's 'Straw Feminist'" (1998) 10(1) *Current Issues in Criminal Justice* 73 at 74; Rathus, Z *Rougher than usual handling : women and the criminal justice system : a gender critique of Queensland's Criminal Code 1994*, 2nd ed., rev. and updated, West End, Qld. Women's Legal Service, 1994

896 *Chhay v R* (1994) 72 A Crim R 1 at 11 quoted in Victorian Law Reform Commission (VLRC), *Defences to Homicide: Issues Paper* Melbourne, VLRC, 2002 at 7.

897 Office for Women, above note 860 at Ch 6.

898 Office for Women, above note 860 at Ch 6.

899 Easteal, P *Less than Equal: Women and the Australian Legal System* Chatswood, Butterworths, 2001 at 46.

> had made the threat to kill her but had a continuing present capacity to perform that threat and would continue to have that if she left him."[900]

14.6.2 Battered Woman Syndrome

"Battered Woman Syndrome" (BWS)[901] has been relied upon by women who have killed or injured violent partners to establish the defences of provocation and self defence. It 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 actions of victims of domestic violence.[902] BWS was first considered at appellate level in Australia as evidence supporting self-defence in *R v Kontinnen.*[903] In Queensland, self-defence has been successfully relied upon by women who killed violent partners.[904]

Lenore Walker originally identified three phases of the "cycle of violence" which have subsequently been elaborated on: these are the tension building phase, the acute battering incident and the loving contrition stage.[905] BWS occurs 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.[906]

The potential usefulness of expert evidence of such patterns of behaviour in certain criminal trials was explained by Wilson J of the Canadian Supreme Court in *R v Lavallee*:[907]

> "Expert evidence on the psychological effect of battering on wives and common law partners must … be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring

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900 *R v Stjernqvist* (Unreported, Supreme Court of Queensland, Cairns Circuit Court, 18 June 1996) per Derrington J, cited in Office for Women, above note 860 at Ch 6.

901 For a discussion of criticisms of this term see *Osland v R* (1998) 197 CLR 316 at 367-378 per Kirby J.

902 Stubbs and Tolmie, above note 895 at 77.

903 (Unreported, SC (SA), Legoe J, 30 March 1992, BC9200466).

904 Office for Women, above note 860 at Ch 6, referring to the cases of *Stephenson* (Supreme Court of Queensland, 1992) and *Stjernqvis*t (Supreme Court of Queensland, Cairns Circuit Court, 18 June 1996).

905 Ho and Venus, above note 867 at 26; Walker L, *The Battered Woman Syndrome* New York, Springer, 1984.

906 Ho and Venus, above note 867 at 27; see also the judgment of Wilson J in *R v Lavallee* [1990] 1 SCR 852 at 878-880; 882, 887-888.

907 [1990] 1 SCR 852 at 871-872, quoted with approval by Kirby J in *Osland v R* (1998) 197 CLR 316 at 376.

> hospitalization? We would expect a woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with [BWS]. We need help to understand it, and help is available from trained professionals."

In *Osland v R*[908] the High Court accepted that, prima facie, expert evidence of BWS may be admissible to provide an explanation to the jury as to why a battered person may have acted in the way they did as it relates to a "reliable body of knowledge and experience" outside the experience of ordinary jurors.[909] Justice Kirby stated that:

> "whilst such expert evidence could not be tendered to usurp the decisions reserved by law to the jury, it might be offered as relevant to questions such as (1) why a person subjected to prolonged and repeated abuse would remain in such a relationship; (2) the nature and extent of the violence that may exist in such a relationship before producing a response; (3) the accused's ability, in such a relationship, to perceive danger from the abuser; and (4) whether, in the evidence, the particular accused believed on reasonable grounds that there was no other way to preserve herself or himself from death or grievous bodily harm than by resorting to the conduct giving rise to the charge".[910]

The High Court made it clear that BWS did not in itself provide a new defence, but rather that evidence of BWS may be admitted for the purpose of establishing the defences of provocation and self-defence.[911] Justice Kirby cited with approval the remarks of L'Heureux-Dubé J in the Canadian Supreme Court decision of *Malott*:[912]

> "The legal inquiry into the moral culpability of a woman who is, for instance, claiming self-defence must focus on the *reasonableness* of her actions in the context of her personal experiences, and her experiences as a woman, not on her status as a battered woman and her entitlement to claim that she is suffering from 'battered woman syndrome'."

There are four kinds of evidence that might be presented as part of a BWS defence, including evidence from persons who witnessed the violence, professionals who had knowledge of the violence, expert witnesses called to give evidence about BWS, and documentary evidence of previous criminal proceedings.[913] Judges may consider the admissibility of expert evidence in cases of suspected BWS, in relation to such issues as the general dynamics of abusive relationships, the reasons why people stay in abusive relationships, relevant cultural or racial issues, and to explain aspects of the accused's offending

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908 (1998) 197 CLR 316.

909 See Gaudron and Gummow JJ at 336-337; but cf. Kirby J at 374-376, Callinan J at 408.

910 *Osland v The Queen* (1998) 197 CLR 316 at 378.

911 Gaudron and Gummow JJ at 338, Kirby J at 376-377, Callinan J at 408.

912 [1998] 3 SCR 123 at 143, quoted in *Osland v The Queen* (1998) 197 CLR 316 at 376.

913 Office for Women, above note 860 at Ch 6.

including why the accused may have acted in self-defence despite having planned the attack.[914]

An experience of abuse can also be relevant to the potential application of a defence of duress in relation to other 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.[915] In South Australia, evidence of Battered Woman's Syndrome has been held applicable to a defence of duress in relation to charges of false imprisonment and grievous bodily harm.[916] Evidence of BWS has also been held to be a relevant consideration in sentencing.[917]

14.7 Sentencing

The Queensland Taskforce on Women and the Criminal Code 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.[918]

14.7.1 Female incarceration

A factor that is often considered in relation to imprisonment of female offenders is the care-giving role occupied by many women. 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.[919] Notably, a greater percentage of men than women are convicted of violent offences (57 per cent of male prisoners compared to 38 per cent of female prisoners).[920] Where offenders who are also primary care-givers are not violent offenders, considerations of community protection may be less relevant to the sentence imposed.

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914 Ibid.

915 Brisbane District Court, 1998, Judge Pratt QC, cited in Office for Women, above note 860 at Ch 6.

916 *Runjanjic and Kontinnen v R* (1991) 53 A Crim R 362: note that because of s 31 of the *Criminal Code*, duress is not applicable to a charge of grievous bodily harm in Queensland.

917 *R v Burge* [2004] QCA 161; CA No 63 of 2004, 13 May 2004.

918 Office for Women, above note 860 at Ch 10.

919 Office for Women, above note 860, citing Home Office Research and Statistics Directorate – Research findings No. 38 1997 at 2.

920 Office for Women, above note 860, citing "Prisoners in Queensland" (1999) 5 *Queensland Crime Statistics Bulletin*.

14.7.2 Fines

Women may be disadvantaged in sentencing by the imposition of fines orders which may result in imprisonment when non-payment occurs. This is more likely to affect women because women generally earn less than men and are more likely to be responsible for caring for children, the elderly and the disabled. The problem is marked in relation to Indigenous women, who most frequently commit offences related to poverty, such as non-payment of fines and social security fraud, and are imprisoned at higher rates than non-Indigenous women.[921]

14.7.3 Community service orders

Caring responsibilities are additionally 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 officers.[922] In Queensland, concerns have also been expressed about the absence of appropriate and available community service work for women.[923]

14.8 Conclusion

Gender issues are 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 family, discrimination, personal injury and crime, and also plays a part in understanding the experiences of men and women generally in our community and how these experiences may differ.

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921 Office for Women, above note 860, citing C Quadrelli, "Women in Prison" (1997) 2(2) *Themis* 15.

922 Above note 860, citing Henning, T "Hidden Factors in the Assessment of Offenders for Community Service Orders in Tasmania" (1997) 8 *Current Issues in Criminal Justice* 287, 309.

923 Ibid.

Chapter 15 Sexuality and Gender Identity

15.1 Gay Men and Lesbian Women

15.1.1 Introduction

The terms “gay” and “lesbian” are generally used to describe people who are sexually and emotionally attracted to members of the same sex.[924] It is difficult to calculate the number of gay men and lesbian women in Australia. Few studies have been done on the subject. Additionally, many people do not publicise their sexuality for various reasons. However, it has been estimated that between 8 and 11 per cent of the population are not exclusively heterosexual.[925]

The experience of being gay or lesbian differs from the experiences of other groups who may be the subject of discrimination in that people who are gay or lesbian usually have a choice about publicly identifying themselves as such, unlike, for example, women or people with a mobility impairment. It appears that the harassment and discrimination gay and lesbian persons experience is directly proportional to their openness about their sexuality.[926] This puts many gay men and lesbian women in an everyday dilemma. If they are open about their true sexual orientation, they risk stereotyping, bigotry and discrimination; if they keep their sexuality hidden they may be accused of hiding the truth about their personal lives.

Because of the discrimination that gay and lesbian persons experience on a regular basis, more than 60 per cent of the gay and lesbian community[927] adopt a practice of self-censorship in everyday life, limiting discussion of weekend activities and changing the pronoun when referring to a partner or lover.[928] This phenomenon of self-

924 This book adopts the usage of the words “gay” and “lesbian” as opposed to “homosexual” in reference to people who are attracted to persons of the same sex. Although a discursive analysis of these and other terms is beyond the scope of this book, it has been noted that “homosexual” is a scientific or medical term that focuses on sexual activity as an integral aspect of identity, while “gay” is considered a more positive term by the gay male community, and is therefore preferable to the term “homosexual": Johnston, P “'More than Ordinary Men Gone Wrong': Can the Law Know the Gay Subject?” (1996) 20 *Melbourne University Law Review* 1152 at 1159. Although “gay” is sometimes used in relation to women, the term “lesbian” is generally used to refer to women who are attracted to other women.

925 Hillier, L et al Writing themselves in: a National Report on the sexuality, health and well-being of same-sex attracted young people Melbourne, National Research Centre in Sex, Health and Society, 1998 at 10 (p1).

926 Chapman, A "Sexuality and Workplace Oppression" (1995) 20 *Melbourne University Law Review* 311 at 314.

927 Sandroussi, J and Thompson, S Out of the Blue: Police Survey of Violence and Harassment against Gay Men and Lesbians Sydney, New South Wales Police Service, 1995 at 7.

928 Chapman, above note 926 at 315.

censorship is something that may become relevant when a lesbian woman or a gay man is giving evidence; particularly where the witness has not "come out" as openly gay or lesbian, it may appear that they 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.

15.1.2 Prejudice suffered by Lesbian Women and Gay Men

A 1990s Victorian survey found that 45 per cent of lesbian women and gay men reported discrimination (including harassment) in employment, one third of lesbian women and gay men reported discrimination in education and 41 per cent of lesbian women and 25 per cent of gay men reported discrimination in the provision of services.[929] Although the percentage of the population who regard homosexuality as "always wrong" declined from 64 per cent in 1984-85 to 48 per cent in 1999-2000, a significant percentage of people still oppose homosexual behaviour and orientation.[930]

A 1990s Sydney study found that lesbian women were six times more likely than other Sydney women to experience an assault in a 12 month period, while gay men were four times more likely than other Sydney men to experience assault.[931] In the same survey, 57 per cent of gay and lesbian respondents had experienced either personal or property crime or harassment in the past 12 months.[932] A third of gay and lesbian respondents had experienced three or more incidents of victimisation within a 12 month period.[933]

Lesbian women and gay men may experience discrimination in the workplace, particularly in positions involving care and instruction of children. They risk being affected by stereotypical assumptions.

15.1.3 Legal recognition of same sex relationships

Following the *Marriage Amendment Act* 2004 (Cth)[934] gay and lesbian marriage is specifically excluded from the definition of "marriage" in Australia. Marriage is defined as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life".[935]

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929 Gay Men and Lesbians Against Discrimination (GLAD) *Not a Day Goes By: Report on the GLAD Survey into Discrimination and Violence Against Lesbians and Gay Men in Victoria*, Melbourne, GLAD, 1994, reported in Chapman, above note 926 at 311.

930 Healey, J (ed), "Sexuality and Discrimination" (2002) 162 *Issues in Society* 32.

931 *Out of the Blue*, above note 927 at 8.

932 *Out of the Blue*, above note 927 at 8.

933 *Out of the Blue*, above note 927 at 9.

934 Act No 126 of 2004, commenced 16 August 2004.

935 *Marriage Act* 1961 (Cth) s 5(1).

Recognition in Australia of overseas same-sex marriages has also been explicitly prohibited by the amendments to the Act.[936]

The *Discrimination Law Amendment Act* 2002 (Qld), however, allows for the recognition of the rights and responsibilities of same-sex partners in a number of different areas. Most significantly, the *Acts Interpretation Act* 1954 (Qld) has been amended so that the terms "de facto partner" and "spouse" include couples who satisfy certain criteria regardless of gender.[937] A reference to "spouse" in legislation enacted prior to 2002 also includes same-sex partners, unless the contrary intention appears.[938] The amendments provide entitlements for same-sex couples in the areas of bereavement and carers' leave,[939] worker's compensation,[940] property division,[941] land transactions,[942] succession law,[943] and civil actions.[944] Domestic violence law has been amended to expressly provide for the protection of partners in abusive same-sex relationships.[945] "Sexuality" and "gender identity" are now prohibited grounds of discrimination under the *Anti-Discrimination Act*.[946]

Same-sex partners have rights to make decisions about organ donation, post-mortem examinations and to request that an inquest be held into the death of a partner.[947] A same-sex partner can be appointed as an enduring power of attorney or an enduring guardian.[948]

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936 Above, s 88EA ("A union solemnised in a foreign country between: (a) a man and another man; or (b) a woman and another woman; must not be recognised as a marriage in Australia.")

937 *Acts Interpretation Act* 1954 (Qld), s 32DA, s 36, inserted by *Discrimination Law Amendment Act* 2002 (Qld), s 4, s 5.

938 *Acts Interpretation Act* 1954 (Qld), s 32DA(6).

939 *Industrial Relations Act* 1999 (Qld), s 39, s 40.

940 Discrimination Law Amendment Act (Qld) (2002), s 87 and s 88. See now Workers Compensation and Rehabilitation Act 2003 (Qld), s 28 and s 29.

941 *Property Law Act* 1974 (Qld), s 260; *Discrimination Law Amendment Act* 2002 (Qld), s 59; Millbank, J "Legal recognition of gay and lesbian families" (2000) 55 *Family Matters* 59 at 61.

942 *Land Tax Act* 1915 (Qld), s 3BA, ss 11-11C; *Discrimination Law Amendment Act* 2002 (Qld), ss 53-57.

943 *Succession Act* 1981 (Qld), s 5AA, but see s 74; *Public Trustee Act* 1978 (Qld), s 54, s 88, s 94, s 107; *Discrimination Law Amendment Act* 2002 (Qld), s 62-66, s 78-81.

944 Supreme Court Act 1995 (Qld), s 18, 81; Discrimination Law Amendment Act 2002 (Qld), s 82-85.

945 *Domestic and Family Violence Protection Act* 1989 (Qld), s 12A (an "intimate personal relationship" may exist whether the two persons are members of the same or opposite sex).

946 Anti-Discrimination Act 1991 (Qld), s 7(m), (n); Discrimination Law Amendment Act 2002 (Qld), s 14(3).

947 Women's Legal Resource Centre, *Lesbians and the Law*, 2nd ed, 2000 at 24.

948 Women's Legal Resource Centre, above note 947 at 26.

15.1.4 Domestic Violence in Gay and Lesbian Relationships

Little data exists on the rate of domestic violence occurring within same-sex relationships. It has been reported that lesbian women find it difficult to discuss these experiences within the broader community, and indeed, within the lesbian community.[949] A 1994 survey conducted by NSW Police at the Gay and Lesbian Mardi Gras found that 5 per cent of same-sex partners had experienced domestic violence within the previous 12 months, and many reported that they felt there was little police could do about violence within the gay community.[950]

The problem of domestic violence within same-sex relationships is exacerbated by the lack of understanding of the problem within both the wider community and in particular by services set up to help female victims of domestic violence. For example, battered men may find it difficult to access shelters or support services because staff may automatically categorise a male as a perpetrator of violence rather than a victim.[951]

There is legislation in place in Queensland to help victims of same-sex domestic violence. For example, partners who suffer same-sex domestic violence can apply for a Domestic Violence Protection Order. A victim of sexual abuse in a same-sex relationship where the home is a rental property can also apply to have the lease terminated.[952]

15.2 Bisexuality

People who are bisexual are attracted to members of both sexes. Bisexual persons live their lives in a diverse range of ways, including remaining single, marrying, and having a same-sex partner.[953] They may engage in sexual activity with partners of the same sex, the opposite sex or partners of both sexes. Bisexual persons are reported to have a higher level of mental health problems than both gay and straight people, due to more adverse life events and a lack of positive support from family and friends.[954]

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949 Mulroney, J *Australian Statistics on Domestic Violence* Australian Domestic & Family Violence Clearinghouse, 2003 at 12.

950 *Out of the Blue*, above note 927 at 8.

951 Simone, CJ "'Kill(er) Man was a Battered Wife': the application of Battered Woman Syndrome to Homosexual Defendants: *The Queen v McEwen*" (1997) 19 *Sydney Law Review* 230 at 235.

952 Residential Tenancies Act 1994 (Qld), s 188.

953 Tan, A "Bisexual Bashing" *Fridae*, 25 March 2002, www.fridae.com, accessed 5 August 2004.

954 Australian Medical Association *AMA Position Statement: Sexual Diversity and Gender Identity* 2002 citing Jorm, AF, Korten, AE et al "Sexual Orientation and Mental health: results from a community survey of young and middle-aged adults" (2002) 180 *British Journal of Psychiatry* at 423-427.

15.3 Transgenderism/Transsexuality

15.3.1 Transgenderism Generally

The term "transgender" refers to those "whose biological birth sex is at variance with their preferred gender identity and who adopt or seek to adopt the social, behavioural, psychological and/or physiological characteristics of that preferred gender identity and who live or seek to live in conformity with that preferred gender identity."[955] Some transgender persons undergo gender reassignment surgery; others cannot or choose not to undergo surgical intervention. The term "transgender" is preferred to "transsexual"; the former is a broader term encompassing all persons who identify as being of a sex other than their biological sex regardless of whether they have had surgery or not.[956] The term "transgender" also encompasses transvestites (see below).

Transgender persons live their lives in a variety of ways. A male-to-female transgender person may identify as female, while not dressing in what some would consider to be a "feminine" style. Additionally, transgender persons have a diverse range of sexual experiences;[957] for example, a male-to-female transgender person may have a male partner and live in a heterosexual relationship or have a female partner and identify as lesbian.

Recent legislative amendments in Queensland allow transgender persons who have undergone gender reassignment surgery to reregister their birth to show the sex of the person following surgery and to be considered as of the new gender for legal purposes.[958]

Given the extent to which transgender persons suffer from adverse public reactions and discrimination with regard to their appearance, it is important that transgender witnesses be treated with sensitivity. In particular, 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. Biological sexual identity should only be revealed or discussed where relevant to proceedings; unless absolutely necessary, a person's gender should be based on self-identification for the purposes of court proceedings.

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955 Human Rights and Equal Opportunity Commission *Human Rights for Australia's Gays and Lesbians,* Sydney, Commonwealth of Australia, 1997 at 12 (is being updated).

956 Mountbatten, J "Priscilla's Revenge: or the Strange Case of Transsexual Law Reform in Victoria" (1996) 20 *Melbourne University Law Review* 871 at 879-80.

957 Hooley, J "Transgender politics, medicine and representation: off our backs, off our bodies" (1997) 16(1) *Social Alternatives* 31.

958 Discrimination Law Amendment Act 2002 (Qld), ss 67-78. See now Births, Deaths and Marriages Registration Act 2003, ss 22-24.

15.3.2 Violence against Transgender people

Like gay men and lesbian women, transgender persons are disproportionately victims of discrimination and violence. Transgender persons are also often reluctant to report violence directed against them due to a number of factors including low expectations of arrest, the trauma of reporting, and a widespread, shared experience of negative police attitudes.[959]

15.4 Cross-Dressing

"Transvestite" is a term used by some to describe a person who cross-dresses, as opposed to someone who believes his or her psychological and gender identity is different to his or her biological sex.[960]

Some transvestite persons cross-dress only in private, however some may do so publicly and indeed may appear in court in cross-dress. Cross-dressing for many transvestites is the consequence of an emotional need to dress in a particular way. It is important to treat witnesses who cross-dress with the appropriate sensitivity, for example, by asking how he or she would prefer to be addressed, rather than automatically using "Ms" or "Mr".

15.5 Intersex Persons

Intersex persons, sometimes known as hermaphrodites, are born with sexual characteristics of both males and females, for example their external genitalia may have the appearance of being female while their reproductive organs are male. Traditionally, it has been common for parents to be encouraged to "choose" a sex for their baby at birth, with the result that many intersex persons later identify with a gender different to the one they were assigned.[961]

15.6 Sexuality and Gender Identity and Crime

15.6.1 Crime Generally

Sexuality has particular significance in the context of rape and sexual assault laws. In Queensland, it is possible for a perpetrator of rape against a transgender person to be convicted of vaginal rape (s 349 *Criminal Code*) because of the inclusion in s 1 of the Code of the following definition of "vagina":

> "includes a surgically constructed vagina, whether provided for a male or female".

A person's status as homosexual or transgender may be wrongly perceived by some as relevant when that person is a victim of a sexual crime. It has been noted that a direction is often made by judges in

959 Moran, LJ & Sharpe, AN "Policing the Transgender/Violence Relation" (2002) 13(3) *Current Issues in Criminal Justice* 269 at 278.

960 McColl, GC, "Posing" (1995) 54(1) *Meanjin (Melbourne)* 44 at 47.

961 Healey, above note 930.

circumstances where the sexuality of the victim has been raised as an issue before the jury, and recommended that a similar direction be given in all such circumstances:[962]

> "You may conclude that the deceased's (or alleged victim's) behaviour and sexual orientation do not accord with those which you regard as morally acceptable. It is therefore important that you remember that this is a Court of Law and not a court of morals. Prejudice and emotion must have no place in a court of law. Everyone is equal before the law. So, on the question of sexuality, I direct you that a person's background is not of the slightest relevance. There should be no prejudice against the deceased (or alleged victim) or the accused on the basis of sexual orientation. You should decide the matters on the issues without prejudice and without empathy to the deceased (or alleged victim) or the accused."

The Judicial Studies Board noted stereotypes which should be countered:

> "There is no evidence that being gay implies a propensity to commit any particular type of crime. A common, and extremely offensive, stereotype links homosexuality with a paedophile orientation. Most sexual abuse of children happens in the home, is committed by someone the child knows well, and is not gender specific. There is absolutely no evidence that gay men are more likely to abuse children than heterosexual men."[963]

15.6.2 "Battered Spouse Syndrome"

Gay men and lesbian women can be the victims of domestic violence (see above). In light of this fact, Battered Spouse Syndrome (see Gender Chapter) has successfully been relied upon by a gay man who killed his partner of 14 years to reduce a charge of murder to manslaughter, and as a mitigating factor in sentencing.[964]

15.6.3 The "Homosexual Advance Defence"

The "Homosexual Advance Defence" (HAD) has raised significant controversy.[965] The defence is used to demonstrate that the actions of an accused, which might otherwise be unlawful, were the result of a

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962 Criminal Law Review Division *Homosexual Advance Defence: Final Report of the Working Party* at http://www.lawlink.nsw.gov.au/clrd1.nsf/pages/had, accessed 8 August 2004 at 19.

963 Judicial Studies Board *Equal Treatment Bench Book* London, March 2004 at [7.1.9].

964 *R v McEwen* (Supreme Court of WA, 18-25/4/95 and 18/3/96). The case is not reported, but was discussed extensively in Simone, above note 951.

965 For examples see *Stiles v R* (1990) 50 A Crim R 13; *R v Londema and Verco* (Supreme Court of SA, Bollen J, 7 December 1992); *R v McGregor* (Supreme Court of NSW, Newman J, 9 October 1993); *R v O'Connor* (Supreme Court of Western Australia, 17 February 1994); *R v Turner* (Supreme Court of NSW, Grove J, 14 July 1994); *R v Dunn* (Supreme Court of NSW, Grove J, 14 July 1994); *R v Bonner* (Supreme Court of NSW, Dowd J, 19 May 1995) cited in Johnston, above note 924 at 1153.

reaction to an unwanted sexual proposition from a person of the same sex.[966] It usually operates as self-defence or provocation (the accused was forced to use violence to repel the advance or lost control and used violence in the heat of the moment).[967] A variant, "homosexual panic defence", operates as a type of diminished responsibility (the sexual advance caused "acute homosexual panic" meaning the accused was unable to control his or her actions).

The High Court has upheld the view that the defence of provocation may be available to a person who kills in response to a non-violent homosexual advance.[968] In that case, Kirby J in dissent noted:[969]

> "In my view, the 'ordinary person' in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill or to inflict grievous bodily harm. He or she might, depending on the circumstances, be embarrassed; treat it at first as a bad joke; be hurt; insulted. He or she might react with the strong language of protest; might use as much physical force as was necessary to effect an escape; and where absolutely necessary assault the persistent perpetrator to secure escape. But the notion that the ordinary 22 year-old-male … in Australia today would so lose his self-control as to form an intent to kill or grievously injure the deceased because of a non-violent sexual advance by a homosexual person is unconvincing." [footnotes omitted]

Similar comments have been made by the Queensland Court of Appeal in *R v Irving*:[970]

> "This essentially inoffensive man [the second complainant] was attacked for no better reason than that [Irving] believed him to be a homosexual. [Irving] apparently thought he had detected one of the two men giving him an inappropriate smile of some kind. Of course, that motive for what he did can only aggravate the offence, which the Crown Prosecutor described in the complainant's words as a "hate" crime.
>
> The notion that certain vulnerable classes of people maybe physically attacked because of their colour, race, religion, gender preferences or otherwise is one that society, or the courts that serve it, cannot possibly afford to tolerate. It savours of a form of vigilante mentality, which it is our duty to suppress, so far as that can be done by appropriate punishment."

966 Johnston, above note 924 at 1168.

967 Bendall, A and Leach, T *Homosexual Panic Defence' and Other Family Values* Sydney, Lesbian and Gay Anti-Violence Project, 1995 at 1.

968 *R v Green* (1997) 191 CLR 334.

969 *R v Green* (1997) 191 CLR 334, per Kirby J at 408-409.

970 *R v Irving* [2004] QCA 305 per McPherson JA.

15.7 Useful Resources

Apart from the resources cited in footnotes to this chapter, the following websites provide useful information relating to gay, bisexual and transgender issues.

AIS Support Group Australia Inc
http://home.vicnet.net.au/~aissg**/**
(Contains factual and legal information of relevance to those with the condition Androgen Insensitivity Syndrome)

Australian Lesbian and Gay Archives
http://home.vicnet.net.au/~alga/
(Information on how to access historical materials relating to gay and lesbian issues)

Gay Law Net
http://www.gaylawnet.com/
(Contains useful 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
(Useful and up-to-date guide of US laws in relation to transgender and gay and lesbian issues)

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