

People  
with disabilities

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## 4 PEOPLE WITH DISABILITIES

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Disability affects one third of the Western Australian population.<sup>1</sup> According to the most recent data available, from 2003, more than one in five Western Australians have a disability, more than one in ten Western Australians are carers for people with disabilities, and more than one in every three of those carers themselves have a disability.<sup>2</sup>

In its submission, People with Disabilities (WA) Inc advises that many of the people it represents have very little understanding of the justice and court systems:

*[They] report experiencing marginalization when interacting with these systems. This is especially true for people with intellectual and developmental disabilities as the language used in legal documents and in legal hearings is complex ... many people with disabilities are not implicitly aware of their rights and have no understanding of the legal system ...*<sup>3</sup>

The Disability Services Commission considers that with the assistance of appropriate aids and services, the restrictions experienced by many people with a disability may be overcome.<sup>4</sup>

This chapter provides some statistical data and background information on people with disabilities as well as practical guidance for judicial officers about making appropriate adjustments for, and communicating with, people with disabilities, to reduce the barriers they face when involved in court or tribunal processes.

The material used in this chapter was drawn from the New South Wales Judicial Commission's *Equality before the Law Bench Book*,<sup>5</sup> with modifications that incorporate local legislation, data and reference material. The Steering Committee overseeing the production of this *Bench Book* gratefully acknowledges the submissions and contributions received from the following organisations, many suggestions from which have been incorporated into this chapter:

- Office of the Public Advocate (29 March 2007, 8 October 2008);
- Disabilities Services Commission (19 April 2007, 9 October 2008);
- Ethnic Disability Advocacy Centre (20 April 2007);
- National Disability Services WA (27 April 2007, October 2008);
- People with Disabilities (WA) Inc (3 May 2007, 10 October 2008);
- Mental Health Law Centre WA Inc (28 May 2007);
- Deaf Society of Western Australia (May 2008);
- Mental Health Division, Department of Health (7 October 2008);
- Association for the Blind of WA (Inc) (24 February 2009); and
- Dr Raewyn Mutch, Dr Amanda Wilkins, Dr Anita Banks and Professor Carol Bower (6 August 2009).

<sup>1</sup> Disability Services Commission, *Disability in Western Australia* (2006), available at: [www.disability.wa.gov.au/aboutdisability/disabilityprofile.html](http://www.disability.wa.gov.au/aboutdisability/disabilityprofile.html) (accessed 4 June 2009).

<sup>2</sup> Australian Bureau of Statistics (ABS), *Disability, Ageing and Carers: Summary of Findings, 2003* Cat No 4430.0 (2004) "State Tables for Western Australia", available at: [www.abs.gov.au/ausstats/abs@.nsf/DetailsPage/4430.02003](http://www.abs.gov.au/ausstats/abs@.nsf/DetailsPage/4430.02003) (accessed 4 June 2009).

<sup>3</sup> Submission from People with Disabilities (WA) Inc (3 May 2007).

<sup>4</sup> Disability Services Commission, "What is disability?" (2008), available at: [www.disability.wa.gov.au/aboutdisability/disabilitydefined.html](http://www.disability.wa.gov.au/aboutdisability/disabilitydefined.html) (accessed 4 June 2009).

<sup>5</sup> Judicial Commission of NSW, *Equality before the Law Bench Book* (2006), available at: [www.judcom.nsw.gov.au/publications/benchbks/equality](http://www.judcom.nsw.gov.au/publications/benchbks/equality) (accessed 8 June 2009).



## 4.1 Some statistics<sup>6</sup>

### 4.1.1 Number of people with disabilities

Of the 1.96 million residents of WA in 2003, 405.5 thousand (20.65%) had a disability:

- Disability was evenly distributed between males and females.
- Older people had a substantially higher rate of disability than younger people.

### 4.1.2 Types of disabilities

- The main condition affecting 81% of people with disabilities were physical disabilities.
- The main condition affecting 19% of people with disabilities were mental, intellectual or behavioural disabilities.
- In 2003, 346,900 people (85.5% of people with disabilities) in WA had a disability that limited them in relation to self-care, mobility and communication, or restricted their schooling or employment.
- Approximately 14% of the population of WA in 2006 had very poor English literacy skills — that is, skills assessed as being significantly below the “minimum required for individuals to meet the complex demands of everyday life and work in the emerging knowledge-based economy”.<sup>7</sup>
- Although not generally counted as a disability by people with disabilities, poor literacy skills are included in this chapter, as they can often be managed using some of the communication techniques listed in 4.4.3 below.

### 4.1.3 Care and assistance

- In Western Australia:
  - The Disability Services Commission provides services to people who meet the eligibility criteria for intellectual disability and to those with autism.
  - The Disability Services Commission also funds the non-government community sector to provide services for people with disabilities who meet eligibility requirements.
  - Services for people with disability resulting from mental illness are provided by the Health Department, non-government organisations and charities.<sup>8</sup>
  - National Disability Services WA advises that the majority of support services for people with disabilities are provided by the non-government community sector for which it is a representative body.<sup>9</sup>
- Of those people with disabilities who required assistance, 86.6% received some assistance from family and friends and 59.8% received some assistance from formal organisations; 7.9% did not receive any assistance.

<sup>6</sup> Unless otherwise indicated, the statistics in this section are drawn from ABS, *Disability, Ageing and Carers: Summary of Findings, 2003* Cat No 4430.0 (2004) “State Tables for Western Australia”, available at: [www.abs.gov.au/ausstats/abs@.nsf/DetailsPage/4430.02003](http://www.abs.gov.au/ausstats/abs@.nsf/DetailsPage/4430.02003) (accessed 4 June 2009).

<sup>7</sup> ABS, *Adult Literacy and Life Skills Survey, Summary Results, Australia, 2006* (Reissue) Cat No 4228.0 (2008), available at: [www.abs.gov.au/ausstats/abs@.nsf/allprimarymainfeatures/887AE32D628DC922CA2568A900139365](http://www.abs.gov.au/ausstats/abs@.nsf/allprimarymainfeatures/887AE32D628DC922CA2568A900139365) (accessed 8 October 2009).

<sup>8</sup> Submission from the Mental Health Division, Department of Health (7 October 2008).

<sup>9</sup> Submission from National Disability Services WA (October 2008).

- Women did most of the (informal) caring — representing 54% of all carers and 73% of primary carers (although this changes for the population aged 60 and over — see section 6.1.5).
- The proportion of people who are carers increases with age (see section 2.3).

#### 4.1.4 Health

- It is estimated that approximately half of the people with disabilities in WA would assess their health status as good or very good.<sup>10</sup>
- The Disability Services Commission advises, however, that many people with disabilities do experience health problems related to their disability.<sup>11</sup>
- For instance, over 35% of people with an intellectual disability also have a hearing impairment. People with intellectual disability also have higher rates of mental illness than those without a cognitive disability. Sometimes these conditions go undiagnosed and untreated because of the incapacity of the person to make their problems known.<sup>12</sup>
- Studies have shown that people with mental illness have 2.5 times the mortality rate<sup>13</sup> of the rest of the population, seven times the suicide rate and a life expectancy of 50–59 years.<sup>14</sup>

#### 4.1.5 Accommodation

Although most people with disabilities live at home with family members, some people live in Disability Services Commission accommodation or in accommodation managed and supported by the non-government sector under contract with the Disability Services Commission.<sup>15</sup> People with a disability resulting from mental illness live in Department of Health accommodation or accommodation managed and supported by the non-government sector under contract with the Department of Health.<sup>16</sup> Some people with disabilities live independently:

- In WA in 2003, 95.2% of people with disabilities lived in private dwellings, with 18.4% of these living alone.
- 4.8% of people with a disability lived in non-private dwellings.

<sup>10</sup> As there is no specific data available from WA on this issue, the data is taken from ABS, *Disability, NSW, 2001* Cat No 4443.1 (2001), available at: [www.abs.gov.au/ausstats/abs@.nsf/ProductsbyReleaseDate/F59FA8B95AE20D62CA256AD500063440](http://www.abs.gov.au/ausstats/abs@.nsf/ProductsbyReleaseDate/F59FA8B95AE20D62CA256AD500063440) (accessed 5 June 2009).

<sup>11</sup> Submission from the Disability Services Commission (19 April 2007).

<sup>12</sup> Submission from the Disability Services Commission (19 April 2007).

<sup>13</sup> Mortality rates are calculated using the number of people who die within a specific population (in this instance people with mental illness) during a time period divided by the total number of people in that population.

<sup>14</sup> See Holman D, Jablonsky A, Lawrence D and Coghlan R, *Duty of Care — Physical Illness in People with Mental Illness* (2001).

<sup>15</sup> Submission from the Disability Services Commission (19 April 2007).

<sup>16</sup> Submission from the Mental Health Division, Department of Health (WA) (7 October 2008).

#### 4.1.6 Employment and income<sup>17</sup>

- In 2003, 50.6% of people with disabilities were employed, compared with 75.7% of people without a disability.
- The household income of people with disabilities is likely to be significantly less than that of people without disabilities, with a median gross household income of \$246 compared to \$479 per week in 2003.
- 43.5% of people with disabilities are reliant on a government pension or benefit as their main source of income, compared with 14.4% of those without disabilities.
- People with a medium level of disability require an extra 40% of income to cover the extra costs associated with their disability; people with a severe level of disability require an extra 69.3%.<sup>18</sup>
- People with disabilities are assisted to participate in two areas of employment: supported and open. These two areas are administered by the Commonwealth Departments of Families, Housing, Community Services and Indigenous Affairs and of Education, Employment and Workplace Reform respectively.<sup>19</sup> In 2006/07, Australia-wide, 21,993 people with disabilities were assisted through the supported employment program and 60,774 were assisted through the open employment program.<sup>20</sup>

#### 4.1.7 Education

Since 1986 the same requirements for participation in the education system that apply to other children have applied to children and young people with disabilities.<sup>21</sup> The majority of students with disabilities attend their local mainstream school, supported by a State-wide visiting teacher service from the Centre for Inclusive Schooling:<sup>22</sup>

- In 2002, it was estimated that the percentage of students with disabilities relative to the whole public school population was 3.31%; of this percentage, 1.5–2% of students with disabilities were educated in mainstream schools.<sup>23</sup>
- In WA in 2000, 3,355 TAFE students (3.7% of all TAFE students) reported having a disability.<sup>24</sup>

<sup>17</sup> Data set: only people from 15-64 years living in households.

<sup>18</sup> Drawn from Saunders P, *Disability, Poverty and Hardship in Australia*, slideshow presentation to the SPRC Seminar Program, 11 October 2005 (cited in the *NSW Bench Book*).

<sup>19</sup> Submission from the Disability Services Commission (19 April 2007).

<sup>20</sup> Australian Government Department of Families and Community Services and Indigenous Affairs, *Disability Services Census 2007* (2007), available at: [www.facsia.gov.au/sa/disability/pubs/policy/Documents/services\\_census07/default.htm](http://www.facsia.gov.au/sa/disability/pubs/policy/Documents/services_census07/default.htm) (accessed 5 June 2009).

<sup>21</sup> Submission from the Disability Services Commission (19 April 2007).

<sup>22</sup> Western Australian Government (Department of Education), "Submission (No 244) to the Senate Employment, Workplace Relations and Education References Committee Inquiry into the Education of Students with Disabilities" (2002), available at: [www.aph.gov.au/senate/committee/eet\\_ctte/completed\\_inquiries/2002-04/ed\\_students\\_withdisabilities/](http://www.aph.gov.au/senate/committee/eet_ctte/completed_inquiries/2002-04/ed_students_withdisabilities/) (accessed 5 June 2009).

<sup>23</sup> Western Australian Government (Department of Education), "Submission (No 244) to the Senate Employment, Workplace Relations and Education References Committee Inquiry into the Education of Students with Disabilities" (2002), available at: [www.aph.gov.au/senate/committee/eet\\_ctte/completed\\_inquiries/2002-04/ed\\_students\\_withdisabilities/](http://www.aph.gov.au/senate/committee/eet_ctte/completed_inquiries/2002-04/ed_students_withdisabilities/) (accessed 5 June 2009).

<sup>24</sup> RMIT University, *Statistics on People with a Disability* (2008).

#### 4.1.8 Crime

The Disability Services Commission advises that

*although people with disabilities have a similar first arrest rate to that of the general population, once in the justice system they are disadvantaged and are more likely to receive a custodial sentence, less likely to be granted parole and their re-offence rate is higher than that of the general prison population. They are therefore likely to spend longer in prison and to lose skills in the institutional setting, where they are often at a disadvantage. They may not understand the social rules in prison and may be at risk of exploitation or assault, or they may act out and receive prison charges. While some people with disabilities commit minor and mainly nuisance offences, others commit more serious offences such as assault and sexual assault.*<sup>25</sup>

Although specific data is not available for WA, both mental illness and intellectual disability among offenders and prisoners have been acknowledged as particular issues which need to be addressed.

**National Disability Services WA cautions that prisoners with a psychiatric disability should not be conflated into the one group with those who have intellectual disability — the responses required will be different.<sup>26</sup> See sections 4.2.3.4 and 4.2.3.7.**

- In 2005, the former Attorney General advised that prisoners were five to seven times more likely to have a mental illness than other people, and that in some prisons 25% of the prison population had mental health illness and about half required hospitalisation in a forensic mental facility.<sup>27</sup>
- Statistics available for other jurisdictions are revealing:<sup>28</sup>
  - People with intellectual disabilities were approximately four times as likely to be in prison as people without intellectual disabilities.<sup>29</sup>
  - 18% of female prison inmates and 27% of male inmates scored below the pass rate on the intellectual disability screener used in a 2001 NSW Corrections Health survey.
  - In the same survey, a staggering 39% of female inmates and 45% of male inmates reported head injuries resulting in an episode of unconsciousness or “blacking out”.
  - The same survey found that 54% of female inmates and 41% of male inmates had received some form of treatment or been diagnosed by a psychiatrist or doctor at some time in the past for an emotional or mental problem. Of these, 25% of women and 34% of men had been admitted to a psychiatric unit or hospital.
  - Depression was the most common psychiatric diagnosis for both male and female inmates surveyed by the NSW Corrections Health Service.

<sup>25</sup> Submission from the Disability Services Commission (19 April 2007).

<sup>26</sup> Submission from National Disability Services WA (October 2008).

<sup>27</sup> Ministerial Media Statement, “Mental Health Plan for WA Prisons” 18 August 2005, available at: [www.mediastatements.wa.gov.au/ArchivedStatements/Pages/CarpenterLaborGovernment.aspx](http://www.mediastatements.wa.gov.au/ArchivedStatements/Pages/CarpenterLaborGovernment.aspx) (accessed 5 June 2009).

<sup>28</sup> Unless otherwise indicated, the data is drawn from Butler T and Milner L, *The 2001 New South Wales Inmate Health Survey* (2003) 8, 94, 97, available at: [www.justicehealth.nsw.gov.au/publications/Inmate\\_Health\\_Survey\\_2001.pdf](http://www.justicehealth.nsw.gov.au/publications/Inmate_Health_Survey_2001.pdf) (accessed 5 June 2009).

<sup>29</sup> Law Reform Commission of NSW, *People with an Intellectual Disability and the Criminal Justice System* (Report No 80) (1996) 2.5, available at: [www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC) (accessed 5 June 2009).

Table 4-1 Inmates — Previous psychiatric diagnoses

Diagnosis*	Men		Women	
	Frequency	% Cases	Frequency	% Cases
Depression	158	22.5	61	40.1
Drug Dependence	85	12.1	37	24.3
Anxiety	80	11.4	22	14.5
Alcohol Dependence	44	6.3	8	5.3
ADD/AHD	33	4.7	3	2.0
Schizophrenia	32	4.6	5	3.3
Personality disorder	30	4.3	17	11.2
Manic Depressive Psychosis	27	3.8	10	6.6

Source: *The 2001 New South Wales Inmate Health Survey*

\* Respondents could report more than one condition

- Aboriginal people comprise over 40% of the adult prison population and approximately 75% of juvenile detainees in WA.<sup>30</sup> They have a very poor health status in comparison to the non-Aboriginal population and therefore are more likely to have disabilities.
- Identifying and addressing Aboriginal people's disabilities may be made more difficult as a result of cultural and language differences.

#### 4.1.8.1 Foetal Alcohol Spectrum Disorders (FASD) and crime<sup>31</sup>

International research over the past decade has highlighted the link between Foetal Alcohol Spectrum Disorders (FASD) and involvement in the criminal justice system.

FASD is an umbrella term describing the continuum of disabilities associated with and attributed to prenatal alcohol exposure. These include:

- (i) physical disabilities — such as heart malformations, cleft palate and the physical presence of a unique cluster of facial anomalies that is essential for the diagnosis of Foetal Alcohol Syndrome (FAS);
  - (ii) intellectual disabilities — such as impaired executive functioning and poor short term memory, and
  - (iii) behavioural disabilities — such as poor impulse control.
- In Australia, FAS is almost certainly under-diagnosed and there is no data on FASD prevalence.
  - The most at-risk populations for FASD are those which experience high degrees of social deprivation and poverty.

<sup>30</sup> See, for example, Department for Corrective Services, *Weekly Offender Statistics: Thursday Prisoner Population as at 04 June 2009* (2009) 1, available at: [www.correctiveservices.wa.gov.au/\\_files/Prison%20Count/cnt090604.pdf](http://www.correctiveservices.wa.gov.au/_files/Prison%20Count/cnt090604.pdf) (accessed 8 June 2009).

<sup>31</sup> Submission from Dr Raewyn Mutch, Dr Amanda Wilkins, Dr Anita Banks and Professor Carol Bower (6 August 2009).

- Current birth prevalence data for FAS ranges from 0.06 to 0.68 per 1,000 live births.
- The known birth prevalence of FAS for Aboriginal children is higher, being 2.76 per 1,000 live births in Western Australia and 4.7 per 1,000 live births in the Northern Territory.
- Current research indicates that a disproportionately large number of youth and adults with FASD are engaged with the legal system.
- The complex learning and behavioural difficulties observed in people with FASD increase their risk of undertaking or being guided into criminal behaviour. For example, all youth remanded to a Canadian forensic psychiatric inpatient assessment unit over a one-year period were evaluated for FASD. Of the 287 youth, 67 (23.3%) had an alcohol-related diagnosis — three (1.0%) had a diagnosis of FAS and 64 (22.3%) had a diagnosis within FASD.<sup>32</sup>

#### 4.1.9 Discrimination

During 2008/09, more complaints received by the Equal Opportunity Commission of WA were about impairment discrimination (107) than any other ground, including race (102), sexual harassment (92) and sex (53).<sup>33</sup>

<sup>32</sup> Fast DK, Conry J and Loock CA, "Identifying fetal alcohol syndrome among youth in the criminal justice system" (1999) 20(5) *Journal of Developmental and Behavioural Paediatrics* 370, available at: [www.asantecentre.org/\\_Library/docs/IdentifyingFASYouth.pdf](http://www.asantecentre.org/_Library/docs/IdentifyingFASYouth.pdf) (accessed 13 August 2009).

<sup>33</sup> Equal Opportunity Commission (WA), *Annual Report to Parliament 2008-2009* (2009), available at: [www.equalopportunity.wa.gov.au/publications.html](http://www.equalopportunity.wa.gov.au/publications.html) (accessed 15 October 2009).

## 4.2. Some information

### 4.2.1 Background information

Section 3 of the *Disability Services Act 1993* (WA) defines “disability” for the purposes of that Act as meaning a disability

- (a) *which is attributable to an intellectual, psychiatric, cognitive, neurological, sensory, or physical impairment or a combination of those impairments;*
- (b) *which is permanent or likely to be permanent;*
- (c) *which may or may not be of a chronic or episodic nature; and*
- (d) *which results in —*
  - (i) *a substantially reduced capacity of the person for communication, social interaction, learning or mobility; and*
  - (ii) *a need for continuing support services.*

As indicated by that definition, there are many different types of disabilities, and these can be grouped and sub-grouped in any number of ways. For the purposes of this *Bench Book* the different types of disabilities are grouped as follows:

- **Physical disability** — including deafness or hardness of hearing, blindness or visual impairments, mobility disability, and other forms of physical differences in the body or its functioning.
- **Intellectual disability.**
- **Foetal Alcohol Spectrum Disorder (FASD)** — FASD is an umbrella term describing the continuum of disabilities associated with and attributed to prenatal alcohol exposure including physical disabilities, intellectual disabilities and behavioural disabilities.
- **Acquired brain injury** — which may result in physical disability and/or cognitive disabilities.
- **Psychiatric disability** — including mental illness and behavioural disorders.
- **Drug or alcohol dependence** — in some cases this may have led to other types of disabilities such as alcohol-related dementia. Korsakoff’s syndrome and Wernicke/Korsakoff syndrome are particular forms of brain injury that may be related to alcohol-related dementia.<sup>34</sup>
- **Reading and/or writing difficulties** — including poor literacy skills and dyslexia. Although not generally counted as a disability by people with disabilities, reading and/or writing difficulties are included in this chapter, as they can often be managed using some of the communication skills techniques listed in 4.4.3 below.

Each of these disabilities (apart from drug or alcohol dependence, and reading or writing difficulties) is described at 4.2.3 below.

**Every person with a disability is different and unique.**

<sup>34</sup> See information on different forms of dementia listed on Alzheimer’s Australia website, available at: [www.alzheimers.org.au](http://www.alzheimers.org.au) (accessed 8 June 2009). Alzheimer’s disease and dementia are discussed in more detail in chapter 6, on older people.

- Some people have one disability only, some have more than one disability within one of the groupings listed above, and others have more than one disability from two or more of the groupings.
- No two people with the same type of disability are alike in relation to their disability or their abilities. Every type of disability affects people in different ways. A disability may range from having a minor impact on how a person conducts their life to having a profound impact.
- Some disabilities are permanent, some are temporary and some are episodic.
- Some disabilities are obvious and some are hidden.
- People with Disabilities (WA) Inc cautions that just because someone may have one disability, for example a physical disability such as cerebral palsy, it should not be assumed they have other disabilities; equally it should not be assumed that people with a disability do not have other disabilities, even if these are not immediately visible.<sup>35</sup>
- The Ethnic Disability Advocacy Centre highlights the kinds of barriers ethnically diverse people with disabilities may face

*People with disabilities from CaLD [Culturally and Linguistically Diverse] backgrounds face additional disadvantages, particularly people with intellectual disabilities. This includes a lack of understanding of court proceedings ... People with disabilities from CaLD backgrounds can be particularly disadvantaged in rural areas ... A particular group to be aware of is refugees and other humanitarian entrants, who arrive in Australia due to a variety of different traumatic experiences, including conflict, famine and environmental disasters. Many of these people suffer from psychiatric disabilities, including Post Traumatic Stress Syndrome ...*<sup>36</sup>

- Many people with disabilities require some form of equipment, procedural considerations and/or communication adjustment(s) to be made if they are to be able to interact effectively in court proceedings.

**The identification of a person's disability is not necessarily irrelevant to the court, but may be of only some assistance.**

**What is important is to determine accurately and appropriately whether a person with a disability requires any form of adjustment to be made, and if so, what type and level of adjustment.**

<sup>35</sup> Submission from People with Disabilities (WA) Inc (10 October 2008).

<sup>36</sup> Submission from the Ethnic Disability Advocacy Centre (20 April 2007).

### 4.2.2 Level of disability

There are many forms and degrees of disability. The Australian Bureau of Statistics (ABS) defines “disability” as a limitation, restriction or impairment that has lasted, or is likely to last, for at least six months and restricts everyday activities. It categorises degrees of disability according to limitations to the core activities of communication, mobility and self-care. The categories are as follows:<sup>37</sup>

- **Mild** — where a person does not need assistance and has no difficulty with core activity tasks, but uses aids or equipment.
- **Moderate** — where a person does not need assistance, but has difficulty with core activity tasks.
- **Severe** — where a person sometimes needs assistance with core activity tasks, has difficulty understanding or being understood by family or friends, or can communicate most easily using sign language or other non-spoken forms of communication.
- **Profound** — where a person is unable to perform self-care, mobility and/or communication tasks, or always needs assistance.

The Disability Services Commission advises that

*Some people with a profound or severe disability, including people with both physical and intellectual disabilities, are unable to learn basic social and living skills. They may need full support in all aspects of their lives, including specialised care in an accommodation facility. Most people with disabilities are able to overcome the restrictions imposed by their disability and with the use of aids and equipment function independently within the community. The majority of people with disabilities live with assistance from family and friends, while others receive specialised services and supports from government and non-government agencies in the community.*<sup>38</sup>

### 4.2.3 Description of the main types of disabilities

#### 4.2.3.1 Physical disability — excluding deafness, hardness of hearing, blindness and visual impairments

A physical disability may have existed since birth or it may have resulted from accident, illness, or injury. It may be mild, moderate, severe or profound in its effect on a person’s life.

The major physical disabilities concern neurological, circulatory, respiratory, renal or musculoskeletal systems and may affect mobility, self-care and recreational and employment opportunities.

A person with a physical disability may need to use some sort of equipment for assistance with mobility. Some persons with a physical disability may have lost a limb or, because of the shape or size of their body, or because of a disease or illness, require slight adaptations to be made to enable them to participate fully in society. Others may require greater assistance. For example, musculoskeletal conditions that include arthritis, paraplegia and quadriplegia may require high levels of support in order to maintain independence within the community.

<sup>37</sup> ABS, *Disability, Ageing and Carers, Australia: Summary of Findings, 2003* Cat No 4430.0 (2004), available at: [www.abs.gov.au/ausstats/abs@.nsf/DetailsPage/4430.02003](http://www.abs.gov.au/ausstats/abs@.nsf/DetailsPage/4430.02003) (accessed 8 June 2009).

<sup>38</sup> Submission from the Disability Services Commission (19 April 2007).

Some common physical disabilities are:

- **Quadriplegia** — Complete or partial loss of function (movement or sensation) in the trunk, lower limbs and upper limbs.
- **Paraplegia** — Complete or partial loss of function (movement or sensation) in the trunk and lower limbs.
- **Cerebral palsy** — A disorder of movement and posture due to a defect or lesion on the immature brain. Cerebral palsy can cause stiffness of muscles, erratic movement of muscles or tremors, a loss of balance, and possibly speech impairment. A person with cerebral palsy may have other disabilities including sensory impairment, epilepsy, and/or intellectual disability; however, many do not.
- **Epilepsy** — A person with epilepsy is likely to experience seizures that cause loss of control of one or more aspects of bodily activity. Seizures can be provoked by flashing lights, physical activity, stress, low blood sugar, high caffeine intake and lack of sleep.
- **Arthritis** — A generic term for 150 different diseases that affect the joints of the body. The main types of arthritis are osteoarthritis, rheumatoid arthritis and gout. Common symptoms include pain and swelling and stiffness in one or more of the joints. Two out of three people with arthritis are under the age of 65.
- **Neurological Disorders** — Neurological disorders affect the central nervous system. Conditions include cerebral palsy and epilepsy (described above) as well as multiple sclerosis, muscular dystrophy, motor neurone disease, dementia, spina bifida, Huntington's disease, Parkinson's disease and polio. Many of these disorders are progressive and result in continuing loss of function and reduced life expectancy. Disorders such as spina bifida are linked to other disorders such as hydrocephalus, which has associated learning difficulties. However, even if someone with spina bifida has hydrocephalus, they may or may not have learning difficulties. People with neurological disorders may require increasing levels of support and eventually full care. Dementia and related conditions are discussed in more detail in chapter 6, on older people.
- **Heart disease and other conditions** — Heart disease, ischemic heart disease, diabetes, kidney disease and respiratory disease are disabling conditions and people with these conditions are generally provided with care through the health system.
- **There are many other physical disabilities** — These include amputations, scarring, asthma, cystic fibrosis, liver disease, HIV/AIDS and cancer.

#### 4.2.3.2 *Deafness, hardness of hearing and related conditions*

- **Deafness** — A complete, or almost complete, inability to hear. People who are deaf rely on their vision to assist them to communicate, and use a variety of ways to communicate, including Australian sign language (Auslan), lip reading, writing and expressive speech. Many people who are deaf regard deafness as a culture rather than as a disability. The WA Deaf Society has advised that Deaf people consider being deaf as part of their identity. Deaf people do not see themselves as “people with impaired hearing” but as “normal Deaf people”.<sup>39</sup> The disability that they experience arises not as a result of their inability to hear, but as a result of the barriers that the hearing society creates:

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<sup>39</sup> Consultation with the Western Australian Deaf Society (May 2008).

*It is now increasingly recognised that signing deaf people constitute a group like any other non-English speaking language group in Australia, with a distinct sub-culture recognised by shared history, social life and sense of identity, united and symbolised by fluency in Auslan, the principal means of communication within the Australian Deaf Community.*<sup>40</sup>

- **Deafblindness** — A loss of vision *and* hearing. Most people with deafblindness have some residual hearing and/or sight. Deafblindness varies with each person — for example, a person may be hard of hearing and totally blind, or profoundly deaf and partially sighted, or have nearly complete or complete loss of both senses.
- **Hardness of hearing** — People who are hard of hearing have varying degrees of partial hearing loss and will usually prefer to rely as much as possible on their available hearing, with the assistance of hearing aids or assistive listening devices. They may use a hearing aid, lip reading and speech to communicate. Note that hearing aids do not necessarily restore a person's hearing to the capacity of a person without hardness of hearing, and for some people hearing aids are not helpful.

#### 4.2.3.3 *Blindness and visual impairments*

- **Blindness** — People who are blind vary in their ability to see. Some may be able to perceive light, shadow and/or shapes; others see nothing at all. People who are blind may use a guide dog, white cane, or a laser sensor or pathfinder. They may read using Braille, computer-assisted technology or audio tapes.
- **Colour blindness** — An inability to distinguish between colours. Some people with colour blindness have difficulty distinguishing between red and green, whereas others see the world in black, white and grey.
- **Deafblindness** — See 4.2.3.2 above.
- **Visual impairment/low vision** — A partial loss of vision that is not correctable by wearing glasses and that affects the performance of daily tasks.

#### 4.2.3.4 *Intellectual disability*

Intellectual disability refers to a slowness to learn and process information. Broadly speaking, people with intellectual disability have difficulties with thought processes, learning, communicating, remembering information and using it appropriately, making judgements and problem solving.

The WA Disability Services Commission advises that it has recently adopted a definition of intellectual disability which applies when a person has scored more than two standard deviations below the mean on a recent (within three years) formal assessment of intellectual functioning:

*The person has scored more than two standard deviations below the mean on a recognised measure of adaptive functioning with demonstrated deficits in two or more of the following skill areas — communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. (These may coexist with strengths in other areas.)*

<sup>40</sup> Dawkins J, *Australia's Language: The Australian Language and Literacy Policy* (1991) 20.

*The person's clinical presentation is consistent with an intellectual disability, conceived as a deficit in global development, and depressed IQ or Adaptive Behaviour scores are not better accounted for by other factors, e.g. Attention Deficit Hyperactive Disorder, emotional or personality disorders, mental illness, ethnic/cultural differences and physical disabilities.*

*Both conditions [must] become manifest prior to the age of 18.<sup>41</sup>*

The Disability Services Commission further advises that although IQ tests have been criticised as having social and cultural bias, there are some tests which seek to address this issue.<sup>42</sup>

The Disability Services Commission states that there are an estimated 50,000 people in WA with intellectual disabilities, but that only about 10,000 people who report intellectual disability as their primary disability have taken up services provided by the Commission.

An intellectual disability is permanent. It is not a sickness, cannot be cured and is not medically treatable. People may be born with an intellectual disability or develop one later in life. According to the definition currently adopted by the Disabilities Services Commission (above) such a disability would need to be manifest before the age of 18 to be classified by it as an intellectual disability, although it may not be detected for many years.

There are a number of known causes of intellectual disability including chromosomal abnormalities such as Down syndrome, birth defects and infections which can affect the central nervous system either before or after birth. The use of toxic substances such as drugs and alcohol may cause intellectual disability. Foetal Alcohol Spectrum Disorders (FASD) occur in some children whose mothers drank heavily during pregnancy; these result in a number of poor outcomes including developmental delay and behavioural problems — see sections 4.1.8.1 and 4.2.3.5. Another known cause of intellectual disability is acquired brain injury — see 4.2.3.6. The Commission states that in approximately half of all instances of intellectual disability the cause is not known.

People with an intellectual disability can, and do, learn a wide range of skills throughout their lives. The effects of an intellectual disability (for example, difficulties in learning and development) can be minimised through appropriate levels of support, early intervention and educational opportunities.

Importantly, and contrary to some of the extreme misconceptions that may be held, people with intellectual disabilities are *not* compulsive liars (see also “Capacity to give evidence” at 4.3.1 below); are neither asexual nor extremely promiscuous (applied particularly to women); and *do* feel emotion and pain.

Depending on the person, a person with an intellectual disability may:

- take longer to absorb information;
- have difficulty understanding questions, abstract concepts or instructions;
- have difficulty with numbers and other measures such as money, time and dates;
- have a short attention span and be easily distracted;
- have difficulty with short and/or long term memory;
- find it difficult to maintain eye contact;

<sup>41</sup> Submission from the Disability Services Commission (13 October 2008).

<sup>42</sup> Submission from the Disability Services Commission (19 April 2007).

- find it difficult to adapt to new environments and situations;
- find it difficult to plan ahead or solve problems;
- find communication over the phone difficult; and
- have difficulty expressing their needs.

#### 4.2.3.5 Foetal Alcohol Spectrum Disorders (FASD)

As indicated at section 4.1.8.1, Foetal Alcohol Spectrum Disorder (FASD) is an umbrella term describing the continuum of developmental, neurocognitive and physical disabilities associated with and attributed to prenatal alcohol exposure. Children with diagnoses included under the general term of FASD often have:<sup>43</sup>

- brain damage;
- birth defects;
- poor growth;
- developmental delay;
- difficulty hearing;
- difficulty sleeping;
- problems with vision;
- high levels of activity;
- difficulty remembering;
- a short attention span;
- language and speech deficits;
- low IQ;
- problems with abstract thinking;
- poor judgement;
- social and behavioural problems; and
- difficulty forming and maintaining relationships.

Individuals with a FASD who become involved with the criminal justice system may not understand the arrest and court process, will have diminished competency and capacity and will not fully grasp the severity of the situation. Individuals with a FASD may make false confessions without understanding the legal consequences of such an act. Individuals with a FASD can also be victimised in custody.

Courts in Canada have identified three areas of difficulty for persons with a FASD-related disability:<sup>44</sup>

- Difficulty translating information from one sense or modality into appropriate behaviour. Translating hearing into doing, thinking into speaking, feeling into words.

<sup>43</sup> Alcohol and Pregnancy Project, *Alcohol and Pregnancy and Fetal Alcohol Spectrum Disorder: a Resource for Health Professionals* (2009), available at: [www.ichr.uwa.edu.au/alcoholandpregnancy](http://www.ichr.uwa.edu.au/alcoholandpregnancy) (accessed 21 October 2009).

<sup>44</sup> Cox LV, Clairmont D and Cox S, "Knowledge and attitudes of criminal justice professionals in relation to Fetal Alcohol Spectrum Disorder" (2008) 15(2) *Canadian Journal of Clinical Pharmacology* e306, available at: [www.cjcp.ca/pubmed.php?issueid=129](http://www.cjcp.ca/pubmed.php?issueid=129) (accessed 14 August 2009).

- Difficulty generalising information. Links are not automatically formed. Learning is not automatically formed. Learning happens in isolated clumps and may be unconnected to experiences, thoughts or emotions.
- Difficulty perceiving similarities and differences. Without the ability to generalise and make associations, a person's capacity to compare and contrast, see whole patterns, sequence and judge is affected.

The findings from the survey of Canadian judges and prosecutors suggest that access to accurate and timely assessment and diagnosis of FASD would be beneficial.<sup>45</sup>

In Western Australia, the following services can assist in the diagnosis of FASD:<sup>46</sup>

- Children with prenatal alcohol exposure under the age of 12 years with a query diagnosis of FASD are best referred to **Child Development Services** for formal assessment.
- **Child and Adolescent Mental Health** and their Complex Behavioural Diagnostic Units would provide the best assessment of adolescents with a query diagnosis of FASD.
- Adult clients would be best served through the neuro-psychiatric services of the **Adult Mental Health Service**.

#### 4.2.3.6 *Acquired brain injury*

Acquired brain injury is an injury to the brain that results in changes or deterioration in a person's cognitive, physical, emotional and/or independent functioning.

People may have acquired brain injury as a consequence of trauma (for example, a car accident), stroke, infection, neurological disease (dementia<sup>47</sup>), tumour, hypoxia and/or substance abuse (including alcohol and solvent use such as petrol sniffing).

Disability resulting from an acquired brain injury can be temporary or permanent and can be mild, moderate, severe or profound. It is rarely assisted by medication.

Every brain injury is different. Two injuries may appear to be similar but the outcomes can be vastly different. Brain injury may result in a physical disability only, or in a personality or thinking process change only, or in a combination of physical and cognitive disabilities.

Acquired brain injury may result in:

- memory loss;
- lack of concentration;
- lack of motivation;
- tiredness;
- difficulty with abstract thinking;
- inappropriate behaviour;
- mood swings;

<sup>45</sup> Cox LV, Clairmont D and Cox S, "Knowledge and attitudes of criminal justice professionals in relation to Fetal Alcohol Spectrum Disorder" (2008) 15(2) *Canadian Journal of Clinical Pharmacology* e306, available at: [www.cjcp.ca/pubmed.php?issueid=129](http://www.cjcp.ca/pubmed.php?issueid=129) (accessed 14 August 2009).

<sup>46</sup> Contact details for these services can be found at the Department of Health's Mental Health Directory at: [www.health.wa.gov.au/mentalhealth/getting\\_help/directory.cfm](http://www.health.wa.gov.au/mentalhealth/getting_help/directory.cfm) (accessed 13 August 2009).

<sup>47</sup> Dementia is discussed in more detail in chapter 6, on older people.

- agitation and frustration; or
- impulsive or disinhibited behaviour (which often accompanies frontal lobe damage).

The Disability Services Commission advises that if a person's cognitive ability (to think, remember and process information) falls below normal limits for a person's age and level of learning and training and this occurs when a person is born or during the developmental period, it is called intellectual disability (see 4.2.3.4).<sup>48</sup> On the Disability Services Commission definition, if a cognitive deficit occurs after the age of 18 it is called a cognitive or learning disability. Cognitive or learning disability therefore may be associated with a brain injury acquired in later life, although it will manifest in the same way as intellectual disability.

#### 4.2.3.7 Psychiatric disability and mental illness

A psychiatric disability is a condition that impairs a person's mental functioning; the term is sometimes used interchangeably with mental illness. Psychiatric disability may be long-term, but is often temporary and/or episodic. It does *not* affect the person's intellect and can sometimes be assisted by medication.

Section 4 of the *Mental Health Act 1996* (WA) defines "mental illness":

- (1) *For the purposes of this Act a person has a mental illness if the person suffers from a disturbance of thought, mood, volition, perception, orientation or memory that impairs judgment or behaviour to a significant extent.*
- (2) *However, a person does not have a mental illness by reason of one or more of the following, that is, that the person —*
  - (a) *holds or refuses to hold, a particular religious, philosophical, or political belief or opinion;*
  - (b) *is sexually promiscuous, or has a particular sexual preference;*
  - (c) *engages in immoral or indecent conduct;*
  - (d) *has an intellectual disability;*
  - (e) *takes drugs or alcohol;*
  - (f) *demonstrates anti-social behaviour.*

As is evident from this definition, 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".

The Disability Services Commission advises that psychiatric disability is associated with mental illness and nervous or emotional disorders that are managed within the health system.<sup>49</sup> Mental illness includes psychotic conditions, including postnatal depression, major depression and schizophrenia; and non-psychotic conditions, such as anxiety disorders and obsessive-compulsive disorder.

Such conditions are generally characterised by the presence of any one or more of the following symptoms:

<sup>48</sup> Submission from the Disability Services Commission (19 April 2007).

<sup>49</sup> Submission from the Disability Services Commission (19 April 2007).

- irrational behaviour that may be sustained or episodic and may indicate that the person is having delusions or hallucinations, including hearing voices;
- serious disorder of thoughts;
- paranoia;
- mood swings of great elation or excitement;
- depression; and
- inappropriate dress, speech, expressed emotions, behaviour and/or ideas.

The Mental Health Law Centre advises that some other signs that may indicate that a person has a mental illness include:<sup>50</sup>

- dissociated sentences — no logical flow to ideas;
- answers that do not match the questions asked;
- beliefs and opinions that are radically inconsistent with known facts;
- very rapid speech;
- very dulled/slow/depressed manner or posture;
- short attention span;
- difficulty understanding questions or instructions;
- inappropriate or fluctuating emotional state; and
- side effects of medication such as slurred speech and/or inability to focus.

Some of the well-known mental illnesses are:

- **Clinical depression** — A group of mood disorders that result in intense unhappiness that can seriously affect a person’s ability to cope with daily life. Clinical depression can last for a few weeks or years. Many people require intensive professional help and treatment to overcome clinical depression.
- **Anxiety Disorder** — A group of mood disorders that result in intense feelings of apprehension, tension or fear without a discernible cause and that seriously affect a person’s ability to cope with daily life. Anxiety can take the form of a phobia (for example, agoraphobia is the fear of wide open spaces); a disorder such as obsessive compulsive disorder, a need to repeat a specific behaviour (for example, washing hands); or “panic disorder”, extreme panic attacks in situations where others would not be afraid.
- **Schizophrenia** — A confusion or disturbance of a person’s thinking processes, including delusions, hallucinations and/or hearing voices. Schizophrenia is *not* a “split personality” or “multiple personality disorder”. Multiple personality disorder is a very rare condition. Importantly, and contrary to popular opinion, people with schizophrenia are *not* generally dangerous or violent when receiving appropriate treatment.
- **Bipolar mood disorder** — This used to be called “manic depressive illness”. A person with bipolar mood disorder generally experiences mania (feelings of elation when they feel invincible or able to do anything), then depression (lows when they feel deeply depressed and sad). Some people experience the manic episodes and not the depressive episodes.

<sup>50</sup> Submission from the Mental Health Law Centre WA Inc (21 May 2007).

The Commonwealth Department of Health and Aging identifies the most common mental illnesses as anxiety, depression and alcohol dependence disorders.<sup>51</sup> Approximately 18% of the Australian population experience symptoms of these illnesses within any 12-month period. A much smaller percentage of the adult population is affected by psychosis, representing between 0.4–0.7% of the population at any given time. Of these, the majority have schizophrenia, with most of the remainder having a severe mood disorder.

The Mental Health Law Centre has raised concern that misconceptions about people with mental illnesses may, and does, lead to inequitable treatment:

*It is often falsely assumed by members of the public that those diagnosed with mental illnesses are uncontrollable or violent ... While crimes may be committed by individuals with a diagnosed or diagnosable mental illness, it must be acknowledged that most people with mental illnesses have no such tendencies.*<sup>52</sup>

#### 4.2.4 Terminology

It is preferable to emphasise the person rather than the disability. People with a disability are people first; they happen to have a disability. Terms such as “suffer”, “stricken with”, “victim” or “challenge” are not generally appreciated.

People with Disabilities (WA) Inc advises that it is important to be aware of the appropriate terms to use when addressing people with a disability.<sup>53</sup> Language can have the effect of stereotyping, depersonalising, humiliating or discriminating against people with disabilities. People with disabilities, like everyone, want to be treated as valued members of society. Terms such as “crazy”, “mental”, “retard(ed)”, “slow”, or “defective” are not accurate terms for people with disabilities and are no longer used, except in a derogatory way.

The terms people with disabilities prefer to be used to describe them have changed several times over the years. According to People with Disabilities (WA) Inc:

*Terms such as “disabled”, “mentally retarded” [or] “spastic” are offensive to many people with a disability. It is offensive to call someone an invalid as this literally means they are “not valid”. It is appropriate to say that a person has a disability or has disabilities and to state the disability that they have and not to label them purely by their disability or suggest that they “suffer” from a particular disability.*<sup>54</sup>

The term “disabled” is disliked because it has negative connotations, in that it reflects a sense of being “not able”, “not working” or “broken down”. It is also untrue, as most people with disabilities are able to do a range of things. Many people with disabilities have full lives, including working, having a family, playing sport and becoming involved in the community.

<sup>51</sup> Department of Health and Aging, *National Mental Health Report 2007: Summary of Twelve Years of Reform of Australia's Mental Health Services under the Mental Health Strategy 1993-2005* (2007) 15, available at: [www.health.gov.au/internet/main/publishing.nsf/Content/mental-pubs-n-report07](http://www.health.gov.au/internet/main/publishing.nsf/Content/mental-pubs-n-report07) (accessed 16 September 2009).

<sup>52</sup> Submission from the Mental Health Law Centre WA Inc (21 May 2007).

<sup>53</sup> Submission from People with Disabilities (WA) Inc (4 May 2007).

<sup>54</sup> Submission from People with Disabilities (WA) Inc (4 May 2007).

**It is critical that people with disabilities are treated with the same respect as anyone else: the appropriateness of the language used in communication is central to ensuring that this respect is demonstrated.**

Some examples of appropriate and inappropriate terminology follow:

Use	Do Not Use
A person with a disability	Disabled/handicapped person, invalid
People with disabilities	The disabled, the handicapped, invalids
A person with a psychiatric disability, or a person with a mental illness	Mad, crazy, mental
A person with Down syndrome	Mongol, mongoloid
A person with cerebral palsy	Spastic, sufferer of/someone who suffers from cerebral palsy
A person with an intellectual disability	Mental retard, mentally retarded, retard
A person who has epilepsy	Epileptic
A person of short stature	Dwarf
A person who has ... (that is, specify the actual deformity)	A deformed person
A person in a coma/who is unconscious	A vegetable/in a vegetative state
A Deaf person (with the capitalised “D” — this indicates the existence of a Deaf Culture), or a person who is hard of hearing	Person who is deaf, hearing impaired person
A person who is blind	A blind person
A person with a vision impairment or low vision	Visually impaired person, can't see well, bad or poor eyesight, has trouble seeing
A person who uses a wheelchair	A person confined to a wheelchair
Seizure	Fit, spell, attack
Accessible toilet/entry/parking	Disabled toilet/entry/parking (because disabled as an adjective is seen as meaning that it's not working)
A person who has ... (that is, specify the actual disability)	Stricken, suffers from, challenged, is a victim of ...

#### 4.2.5 Barriers for people with disabilities in relation to court proceedings

The barriers for a person with disabilities in relation to court proceedings — whether as juror, support person, witness or accused — depend on the type and level or severity of the particular person’s disabilities. The barriers faced by people with disabilities are exacerbated by the marginalisation that they experience as a result of their different physical appearance or different behaviour, or because of their lack of understanding of the court processes.

People with Disabilities (WA) Inc advise that:

*People with disabilities are often stereotyped based on their physical appearance and behaviour. It is easy for this discrimination to be transposed into the court setting leading to potential inaccurate judgements and assumptions to be made about the individual by lawyers, the judge and the jury.<sup>55</sup>*

Some examples of the barriers experienced by people with disabilities, unless appropriate adjustments are made, include:

- For people with physical disabilities:
  - Inaccessible venue or courtroom facilities (for example, stairs not lifts, narrow doors, high buttons/handles/counters, an inaccessible witness box, slippery floors, no nearby parking, steep inclines, heavy doors, round or hard-to-grip doorknobs).
  - Inability to sit or stand in one position, either at all or beyond a particular time; and/or fatigue.
  - Communication barriers related to deafness or hardness of hearing, blindness or visual impairment, or speech impairment.
- For people with intellectual disabilities:
  - A lack of awareness of their disability. For example, people with an intellectual disability may not always inform their legal representative about their disability. They may also disguise their disability by keeping silent, agreeing to what is asked, answering briefly or becoming hostile if they feel confused or cannot answer.
  - Particular difficulties when they are in a stressful situation such as the court system.
  - Limited capacity to participate in the court or tribunal process as a result of the particular characteristics of each individual with an intellectual disability. For example:
    - limited reading and writing skills;
    - difficulty understanding complex information and processes, including directions, procedures, forms, and keeping appointments in new places;
    - a short attention span and being easily distracted, making a long trial or wait difficult;
    - difficulty understanding questions — although this varies depending on how a question is asked: for example, a “what” question is easier to answer than a “why” question;
    - requiring a long time to think through a question and make a response;
    - answering questions inconsistently or inappropriately;

<sup>55</sup> Submission from People with Disabilities (WA) Inc (4 May 2007).

- experiencing memory difficulties, especially for detail in such things as remembering to bring documents to court;
  - difficulty in thinking abstractly;
  - difficulty in following long, complex sentences;
  - difficulty in understanding or recalling dates, such as when events occurred; or appointments, such as court dates;
  - difficulty in organising, structuring and expressing information in an orderly way. For example, they may start a story at the end; and
  - difficulty in managing themselves and their stress levels in a formal environment. For example, they may behave in a way that is inappropriate such as laughing in court or talking in a very loud voice, or act without thinking, such as calling out to people they know in court.
- For people with a Foetal Alcohol Spectrum Disorder (FASD):
    - Any one or more of the difficulties experienced by people with physical, intellectual or behavioural disabilities.
    - Difficulty in understanding the court process.
    - Diminished competency and capacity to fully grasp the severity of the situation.
    - A potential to make false confessions without understanding the legal consequences of such an act.
  - For people with an acquired brain injury:
    - Any one or more of the difficulties experienced by people with physical or intellectual disabilities.
    - In addition their communication difficulties may be exacerbated by, for example, being unable to concentrate and/or process information easily, having memory difficulties and/or by having disinhibited behaviour.
  - For people with psychiatric disabilities/mental illness or behaviour differences:
    - A low level of understanding of the legal system, particularly if they are not supported by family or friends. People with a mental illness may lack support from family members or friends, sometimes as a result of alienation because of illness-induced actions. The Mental Health Law Centre emphasises the importance of there being adequate support for a person with a mental illness, where appropriate.<sup>56</sup>
    - Communication barriers — for example, they may be easily distracted, very jumbled, severely distressed/anxious/frightened, manic, delusory and/or aggressive or angry.

<sup>56</sup> Submission from the Mental Health Law Centre WA Inc (21 May 2007).

#### 4.2.6 Impact of these barriers

Many of the barriers listed in 4.2.5 above can be substantially mitigated (and in some cases completely mitigated) if appropriate adjustments are made by the court.

If such adjustments are not made, people with disabilities and/or any carers are likely to:

- be unable to participate fully, adequately, or at all in court proceedings;
- feel uncomfortable, fearful or overwhelmed;
- feel resentful or offended by what occurs in court;
- not understand what is happening and/or be unable to get their point of view across and be adequately understood;
- feel that an injustice has occurred; and/or
- believe they have been treated with less respect, unfairly or unjustly when compared with other people.

If such adjustments are not made people with disabilities are also liable, in some cases, to be treated unfairly or unjustly.

For some offenders with intellectual disabilities, there is the option of a diversion program operated through the Central Law Courts in Perth, as outlined at section 4.2.7. For offenders with a general decision-making disability, it may be possible to secure assistance through the appointment of a guardian or administrator as outlined in 4.2.8.

More generally, section 4.4, below, provides additional information and practical guidance about ways of making appropriate adjustments for and treating people with disabilities to reduce the likelihood of these problems occurring and to help ensure that a just outcome is achieved.

**All people with disabilities may face additional barriers — due to being female, Aboriginal, from another culturally or linguistically diverse background, an older person, lesbian, gay, bisexual or transgender(ed), a child or young person, practising a minority religion or representing themselves — see the relevant chapter(s).**

#### 4.2.7 Intellectual Disability Diversion Program (IDDP)

The Intellectual Disability Diversion Program (IDDP) was established in the Perth Magistrates Court in July 2003 as a joint initiative by the Department of Corrective Services and the Disability Services Commission. The specific objectives of the program are to reduce recidivism among people with intellectual disability, to reduce the rate of imprisonment by diversion and appropriate dispositions and generally to improve the ways in which the justice system deals with people with an intellectual disability:<sup>57</sup>

- The Intellectual Disability Diversion Program Court sits one afternoon a week at the Perth Magistrates Court. It has a dedicated magistrate and is staffed by a coordinator and a support officer.
- The program's "target group" was originally adults with an intellectual disability who were eligible for "level 3" services with the Disability Services Commission. These offenders had to meet the diagnostic criteria for intellectual disability adopted by the Disability Services Commission. However, the strict definition of intellectual disability recently adopted by the Commission (see section 4.2.3.4), has not been adopted by the IDPP and it retains a broader and more flexible assessment for eligibility. For example, those who acquire a brain injury in adulthood may still be eligible to participate in the program — although priority will generally be given to those whose disability is manifest prior to the age of 18.
- The legal criteria for eligibility generally require that the charges be of a nature that can be dealt with in the Magistrates Court. The offender must be willing to plead guilty (or indicate no contest to the charges), and must voluntarily consent to participation in the program and to sharing information with service providers.
- Referral to the IDDP may be made by anyone, including family members and the offender; however, most referrals come from the Disability Services Commission, community corrections and defence lawyers. The program does accept referrals from outer metropolitan courts, but the offender must be able to appear in the Central Law Courts.
- Once a person is referred, he or she is assessed by the IDDP coordinator. If the offender is accepted onto the program the coordinator devises a program plan in collaboration with the offender, his or her family and relevant service providers. The program specifically addresses the problem or problems that underpinned the offending behaviour. The program is presented to the court in an initial report and the offender is bailed with a condition that they comply with all lawful directions of the IDDP coordinator.
- The coordinator generally meets with an offender on a regular basis to monitor their progress and is in contact with community service providers who are also dealing with the offender.
- The offender is brought back before court for judicial monitoring when required, usually every two months.
- Finalisation of the matter usually occurs approximately six months after the offender commences the program. Offenders can expect a discount on the sentence they would have received had they not participated in the program.

<sup>57</sup> Information in this section has been drawn from the Law Reform Commission of Western Australia, *Court Intervention Programs: Consultation Paper* (2008) 105–107, available at: [www.lrc.justice.wa.gov.au/096-CP.html](http://www.lrc.justice.wa.gov.au/096-CP.html) (accessed 8 June 2009); and the submission to the Commission by Mr Damian Inwood (IDDP Coordinator) February 2009.

- Where the court believes the offender would benefit from further supervision, support or a longer-term intervention, a Conditional Release Order or Community Based Order may be made with conditions that the offender continue working with the service providers he or she has been introduced to via the program.

#### 4.2.8 Guardianship and Administration

The guardianship and administration system enables a substitute decision-maker to be legally appointed to make decisions on behalf of a person who has lost the capacity to do so.

There are three government agencies which play a key role in guardianship and administration in Western Australia:

- The State Administrative Tribunal (SAT);
- The Public Advocate; and
- The Public Trustee.

The **State Administrative Tribunal** is an independent statutory tribunal established under the *State Administrative Tribunal Act 2004* (WA). The *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004* (WA) amended the *Guardianship and Administration Act 1990* (WA) to confer on the Tribunal the function of determining at hearings whether, and under what conditions, a guardian or administrator will be appointed.

A person with a decision-making disability may need assistance in relation to legal proceedings such as instructing a solicitor or applying for criminal injuries compensation. It may be necessary to make an application to the State Administrative Tribunal for the appointment of a guardian or administrator. Information on making an application is available from the SAT.<sup>58</sup>

**See section 4.3.3 of this *Bench Book* for more information on the requirements relating to the initiation, defence, or participation in legal proceedings as a party by those subject to a guardianship or administration order.**

The **Public Advocate** is an independent statutory officer appointed under the *Guardianship and Administration Act 1990* (WA) to protect the human rights of people who are not able to make reasoned decisions because of a decision-making disability as a result of dementia, intellectual disability, mental illness or acquired brain injury. There were about 65,000 Western Australians with such decision-making disabilities in 2003.

<sup>58</sup> See in particular the *State Administrative Tribunal Practice Note 9 Proceedings under the Guardianship and Administration Act 1990* (2008) for information on making an application for guardianship or administration. The State Administrative Tribunal website is available at: [www.sat.justice.wa.gov.au/](http://www.sat.justice.wa.gov.au/) (accessed 10 June 2009); for other contact details see section 4.5.2.1.

The Public Advocate also acts as guardian of last resort when appointed by the SAT where there is no one else suitable or willing to take on this role. As of 30 June 2008, the Public Advocate was guardian of last resort for 380 individuals: 36% had dementia, 32% had an intellectual disability, 16% had a psychiatric condition and 14% had an acquired brain injury.<sup>59</sup> This was the first time dementia became the primary decision-making disability for people under the Public Advocate's guardianship, reflecting the ageing nature of the population.

The Office of the Public Advocate provides a range of other services to ensure the protection of vulnerable Western Australians with a decision-making disability. These services include:

- investigation of concerns about the well-being of a person with a decision-making disability, and whether a guardian or an administrator is required;
- investigation of specific applications made to the State Administrative Tribunal to assist it to determine whether a guardian or administrator is required; and
- provision of information, advice and training on how to protect the rights of people with decision-making disabilities.

**The Public Trustee** can be appointed by the State Administrative Tribunal to make financial and property decisions on behalf of a person with a decision-making disability, if no one else suitable is available.

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<sup>59</sup> Office of the Public Advocate, *Annual Report 2007-08* (2008), available at: [www.publicadvocate.wa.gov.au/\\_files/Public\\_Advocate\\_Annual\\_Report\\_2007-08.pdf](http://www.publicadvocate.wa.gov.au/_files/Public_Advocate_Annual_Report_2007-08.pdf) (accessed 5 June 2009).

## 4.3 Legal capacity

### 4.3.1 Capacity to give evidence

In most cases, people with disabilities will have the legal capacity to give sworn evidence in the same way as anyone else,<sup>60</sup> as long as appropriate adjustments are made so that they can successfully communicate their evidence<sup>61</sup> — see 4.4.1 to 4.4.4 below.

There is a general perception within the criminal justice system and by care providers that people with intellectual disabilities are not competent eyewitnesses.<sup>62</sup> Many cases that rely on witnesses with these disabilities are not prosecuted because it is believed that they will not be able to withstand the rigours of giving evidence in court, particularly cross-examination.<sup>63</sup>

As a result, people with intellectual disabilities are vulnerable to prejudicial assessments of their competence, reliability and credibility because judicial officers and juries may have preconceived views. For example, they may doubt that a person with an intellectual disability fully understands the obligation to tell the truth. In addition, people with an intellectual disability are vulnerable to having their evidence discredited in court because of behaviour and communication issues associated with their disability.

Research suggests that an intellectual disability does not necessarily prevent a person from being a reliable witness. One crucial factor affecting the accuracy and completeness of the eyewitness testimony is the type of question that is asked.<sup>64</sup> Research suggests that people with intellectual disabilities may have difficulty with leading or closed questioning. They may be more likely to agree with a proposition, particularly if they do not understand the question:

*The questions to which individuals with intellectual disabilities provide the most accurate answers (i.e. where the proportion of correct to incorrect information is greatest) are open, free recall questions (e.g. “what happened?”). For these questions eyewitnesses with intellectual disabilities provide accounts with accuracy rates broadly similar to those of the general population. Although people with intellectual disabilities provide less information overall, they do appear to include the most important details.*

*While responses to open questions tend to have a high accuracy rate, other questioning strategies can have an adverse effect on the accuracy of responses given by people with learning disabilities. Broadly speaking, as questions become more specific (e.g. from “describe him” to “describe his clothes” to “describe his shirt” to “was his shirt red?”) responses become less accurate. Closed questions tend to elicit more information concerning details that might not be mentioned with more open questions, although this information is less accurate.<sup>65</sup>*

<sup>60</sup> See *Evidence Act 1906* (WA) s 97(1).

<sup>61</sup> See for example *Evidence Act 1906* (WA) ss 106HB, 106R, 106RA.

<sup>62</sup> Kebbell M, Hatton C and Johnson S, *Witnesses with Learning Disabilities in Court: Full Report of Research Activities and Results* (2001) 1, available at: [www.lancs.ac.uk/shm/dhr/publications/witnesses\\_report.pdf](http://www.lancs.ac.uk/shm/dhr/publications/witnesses_report.pdf) (accessed 15 October 2009).

<sup>63</sup> Kebbell M, Hatton C and Johnson S, *Witnesses with Learning Disabilities in Court: Full Report of Research Activities and Results* (2001) 1, available at: [www.lancs.ac.uk/shm/dhr/publications/witnesses\\_report.pdf](http://www.lancs.ac.uk/shm/dhr/publications/witnesses_report.pdf) (accessed 15 October 2009).

<sup>64</sup> Kebbell M, Hatton C and Johnson S, *Witnesses with Learning Disabilities in Court: Full Report of Research Activities and Results* (2001) 1, available at: [www.lancs.ac.uk/shm/dhr/publications/witnesses\\_report.pdf](http://www.lancs.ac.uk/shm/dhr/publications/witnesses_report.pdf) (accessed 15 October 2009).

<sup>65</sup> Kebbell M, Hatton C and Johnson S, *Witnesses with Learning Disabilities in Court: Full Report of Research Activities and Results* (2001) 1, 2, available at: [www.lancs.ac.uk/shm/dhr/publications/witnesses\\_report.pdf](http://www.lancs.ac.uk/shm/dhr/publications/witnesses_report.pdf) (accessed 15 October 2009).

The accuracy and completeness of the evidence people with learning disabilities provide can be significantly improved if suitable questioning strategies are adopted, depending on the nature of the evidence in question.<sup>66</sup> The above information suggests that using open questions when seeking evidence of a broad nature will provide reliable responses, while responses to closed questions may elicit more detailed evidence but be less reliable.

In some cases, a psychologist's assessment may be required in order to adequately assess a particular person's ability to give evidence, and to help the court understand the person's characteristics and demeanour and/or how to best communicate with them in court.

It may be necessary in some cases for a witness with a mental impairment to give unsworn evidence — so long as they are able to give an intelligible account of the events which they have experienced.<sup>67</sup> Note that for these purposes, mental impairment is defined to include intellectual disability, mental illness, brain damage or senility.<sup>68</sup>

In relation to people with a mental illness, the Mental Health Law Centre advises<sup>69</sup> that it is important not to assume that a statement made by a person with a mental illness is delusional because it sounds extreme or bizarre. On occasion, strange scenarios described by people with mental illnesses have proven to be factually correct once tested against other evidence. On the other hand, statements which seem plausible may be delusional.

**You can find further guidance about how to deal with such matters; see for example, the *Supreme Court Crime Book*, section 8.1 “Fitness to Plead” and section 9 “Insanity/Automatism”; the *Aboriginal Benchbook for Western Australian Courts*, section 6.2.1 “Fitness to Plead — Physical Impairment” and section 7.3.1 “Pleading to a Charge”.**

#### 4.3.2 Criminal responsibility

Some people with some intellectual disabilities or psychiatric disabilities may be unfit to plead or to be tried, or may be found not guilty by reason of mental illness.

Under s 130 of the *Criminal Procedure Act 2004* (WA), any question about an accused's mental fitness to stand trial must be dealt with under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).

Given the number of people in prison with intellectual and psychiatric disabilities (see statistics at 4.1.8 above) it is important that these provisions are used where appropriate, because in some cases the stigma of raising the existence of mental illness, an intellectual disability, brain damage or senility may mean that, unless the court intervenes at an early stage, a person may not raise these issues and end up unjustly convicted and/or sentenced. On the other hand, it is also important to ensure that these provisions are not used when they should not be.

<sup>66</sup> Kebbelle M, Hatton C and Johnson S, *Witnesses with Learning Disabilities in Court: Full Report of Research Activities and Results* (2001) 1, available at: [www.lancs.ac.uk/shm/dhr/publications/witnesses\\_report.pdf](http://www.lancs.ac.uk/shm/dhr/publications/witnesses_report.pdf) (accessed 15 October 2009).

<sup>67</sup> See *Evidence Act 1906* (WA) s 106C.

<sup>68</sup> *Evidence Act 1906* (WA) s 106A, *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 8.

<sup>69</sup> Submission from the Mental Health Law Centre WA Inc (21 May 2007).

### 4.3.3 Capacity to initiate, defend or participate as a party in other legal proceedings

In addition to issues about an accused's mental fitness to stand trial, dealt with at 4.3.2, a person's capacity to initiate, defend or participate in legal proceedings as a party may be restricted if they are not of full legal capacity.

In these instances a person may need to be represented by a "litigation guardian", "next friend" or "guardian ad litem" in legal proceedings. Generally this requirement will apply to persons who are the subject of a guardianship or administration order made by the State Administrative Tribunal (see 4.2.8), and generally the litigation guardian will be the guardian or administrator appointed by the State Administrative Tribunal.<sup>70</sup> Note, however, that the *Rules of the Supreme Court 1971* (WA) provide for a next friend or guardian ad litem to be appointed to represent not only persons who are the subject of guardianship or administration orders, but also those who "by reason of mental illness, defect or infirmity, however occasioned" are declared by the Court to be incapable of managing their affairs. Also in the Supreme Court, the next friend or guardian ad litem must act by a solicitor<sup>71</sup>

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<sup>70</sup> See for example, *Guardianship and Administration Act 1990* (WA) s 45; *State Administrative Tribunal Act 2004* (WA) s 40; *State Administrative Tribunal Rules 2004* (WA) r 39; *Magistrates Court (Civil Proceedings) Act 2004* (WA) ss 3, 21; *Magistrates Court (Civil Proceedings) Rules 2005* (WA) rr 116, 118.

<sup>71</sup> *Rules of the Supreme Court 1971* (WA) r 70.



## 4.4 Practical considerations

### 4.4.1 Adjustments that may need to be considered before the proceedings start or at the time a person with a disability first appears in court

People with disabilities have the right to be able to give evidence and to act as jurors, although this may require adjustments to the usual court processes and procedures. It may take some discussion to work out exactly what is required, and time to organise.

The court may have advance notice of any such needs from the person themselves, their support person or carer, or their legal representative (a list of the court officers to contact in relation to each jurisdiction is included at 4.5.1). At other times, the court may not find out a person's needs until they appear.

#### Points to consider

- In general, you (and court officials) should be flexible, and think “outside the square” to ensure that as many people with disabilities as possible are able to give their evidence or act as jurors.
- In general, and particularly for people with physical disabilities, you should first investigate the option(s) closest to providing the usual court experience. Sometimes, due to the nature of the particular person's needs, the court may need to make more significant adjustments while ensuring that all necessary legal conditions are met.
- In all cases, it is critical that you find out precisely what barriers (if any) the particular person with a disability faces in attending court and/or giving their evidence, and then discuss with them (either directly, or via their support person, carer, or legal representative) what needs they have and how these can best be met.
- Some people (particularly people from Aboriginal or other culturally or linguistically diverse backgrounds) may be reluctant to identify as having a disability, or find direct questions related to any disability intrusive, in which case you may need to take a more discreet approach to finding out that person's needs (if any).
- Never make assumptions about the individual needs of a person with a disability.
- While in some cases, providing these adjustments might delay the start or continuation of proceedings or cost money to provide, this needs to be balanced against the particular person's right to give their evidence effectively or to act as a juror.
- Examples of adjustments that may need to be implemented include:
  - Moving the court to a more accessible courtroom or venue.
  - Changing the physical layout of the court; for example, allowing a witness to present evidence from the bar table or from a stretcher.
  - Providing assistance with physical entry to the court.
  - Allowing a person prior access to the court in order to familiarise themselves with it.

- Allowing people to use symbol boards or other such communication aids.
- Making sure an Auslan (Australian Sign Language) interpreter is available or that a person can use their support person as an interpreter to help them give their evidence.
- Making sure that any guide, hearing or other dog used to assist a person with a disability is allowed into the court and allowed to remain with the person.
- Considering, for those people with disabilities who have reduced decision-making capacity, whether arrangements should to be put in place for substitute decision-making for the legal proceedings (see sections 4.2.8 and 4.3.3).
- Considering whether you should declare a witness with a disability to be a “special witness” enabling certain measures to be put in place including, for criminal proceedings, allowing certain visually recorded investigative interviews to be used as evidence-in-chief and/or allowing the witness to give evidence using closed circuit television (CCTV) or similar technology, and/or screens, and/or the pre-recording of their evidence, and/or closing the court (as often used for receiving a child or young person’s evidence) for those for whom it is too overwhelming or frightening.<sup>72</sup>
- Allowing someone to have a support person with them at all times, close by and within sight.<sup>73</sup>
- Allowing someone to have a “communicator” with them while giving evidence, to assist communicate and explain the questions put to the witness and to communicate and explain the evidence given by the witness.<sup>74</sup>
- Note that if a person is likely to need to be declared a special witness and have the special measures referred to above put in place, the party who is to call the person must apply for a hearing to have these matters dealt with before the proceeding commences.<sup>75</sup>
- Being flexible and/or more precise with the timing of listings, of starting and finishing receiving a particular person’s evidence, to fit with a particular person’s requirements in relation to eating, medication, treatment, transport and other such needs.
- Having frequent breaks.
- Prior to the court appearance of a person with a disability, ensuring all critical documents have been provided to them in advance in an appropriate format, and/or that they have been read to them, and/or signed by them.

<sup>72</sup> Section 106R of the *Evidence Act 1906* (WA) provides for a witness to be treated as a special witness if, in the court’s opinion, by reason of physical disability or mental impairment (as defined in the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA)), or for other relevant reasons, the witness would otherwise be unlikely to be able to give evidence, or to give evidence satisfactorily; or the witness would be likely to suffer severe emotional trauma; or to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily for any other relevant reason. See also ss 106HB, 106I and 106RA of the *Evidence Act 1906* (WA) — discussed in more detail in section 4.4.4 of this *Bench Book*.

<sup>73</sup> A person declared to be a special witness may have a support person in any proceedings — *Evidence Act 1906* (WA) s 106R(4)(a).

<sup>74</sup> A person declared to be a special witness may have a “communicator” in any proceedings — *Evidence Act 1906* (WA) ss 106F, 106R(4)(b), 106R(4b).

<sup>75</sup> *Evidence Act 1906* (WA) s 106S.

## 4.4.2 Oaths, affirmations and declarations

### Points to consider

- In most cases, people with disabilities will be able to take an oath or affirmation like anyone else, so long as appropriate adjustments are made so that they can successfully communicate their evidence — see 4.4.1 above and 4.4.3 below.
- Whether a person with a disability takes an oath or an affirmation and the type of oath taken will depend on their religious affiliation or lack of religious affiliation — see chapter 3 of this *Bench Book*.
- It may be necessary for some people with disabilities (those with severe mental impairment) to give unsworn evidence — as long as they are able to give an intelligible account of events which they have observed or experienced.<sup>76</sup> If this seems necessary you should follow the guidance given in the “Points to consider” in section 5.5.3 of this *Bench Book*.
- Make sure you do not talk down to people with a disability — they are *not* children. For more information about how to communicate with a person with a mental impairment (which is defined as an intellectual disability, mental illness, brain damage or senility) see 4.4.3.3.2–4.4.3.3.5 below.
- If you are unsure about the capacity of a particular person with a disability to give even unsworn evidence, consider requesting a psychologist’s assessment.

## 4.4.3 Language and communication

### 4.4.3.1 Initial considerations

Procedural justice and the integrity of the court process demand that all witnesses understand what is going on, the meaning of any questions they are asked and that their evidence and replies are adequately understood by the court.

It is critical that people with disabilities are treated with the same respect as anyone else.

Some people with disabilities will need a communication aid or interpreter to communicate their evidence and/or hear what is being said by others. They may also need some adjustments to be made in the level or style of language used, or the manner in which they are given information about what is going on.

The level and style of language, any explanations about what is going on, and any cross-examination must be appropriate to the capacity and needs of the particular individual.

<sup>76</sup> *Evidence Act 1906* (WA) s 106C.

#### 4.4.3.2 General communication guidance

##### Points to consider

- Use the appropriate disability language and terminology — see 4.2.4 above.
- Use an appropriate communication aid or interpreter and explain to any jury the reason for its use, and that they must not discount the person’s evidence because of the manner in which it is communicated.
- Consider allowing someone who you have declared to be a special witness to have a “communicator” with them while giving evidence — to assist communicate and explain the questions put to the witness and to communicate and explain the evidence given by the witness.
- Do not use any language that is discriminatory or sounds discriminatory — for example “Could you explain to the court what you did step by step ...” is better than “How could anyone with your disability ...?”
- Do not talk down to a person with a disability as though they are a child.
- Talk to the person directly, not their support person or interpreter — for guidance on working with an interpreter see chapter 7.
- Do not assume (or appear to assume) that a person with a disability who has some communication adjustment need is intellectually any less capable than someone with no such need.
- Do not refer to a person’s disability unless this is relevant to assessing their communication (or other accessibility) needs or to the matters before the court.
- Whenever a person with a disability appears to be having difficulty in communicating their evidence or in understanding what is required of them, double-check directly with them (or their support person or legal representative, if appropriate) whether there is anything that could be provided to assist them — for example, a higher volume or a reader.
- Check whether the person is experiencing any discomfort or difficulty in delivering their evidence that the court might be able to help alleviate in any way at all.
- Use a level of language and style of communication appropriate to the needs of the particular person with a disability — see 4.4.3.3 below.
- As prescribed by law,<sup>77</sup> intervene if, for example, cross-examination appears to be inconsistent with any of the above considerations.
- Give consideration to the points set out below as relevant.

<sup>77</sup> See *Evidence Act 1906* (WA) s 26.

### 4.4.3.3 Level and style of language to suit particular needs

#### 4.4.3.3.1 Communication techniques for people with physical disabilities

##### Points to consider

- For a Deaf person or person who is hearing impaired, you (and others in court) may need to simply make sure that your mouth is uncovered, or your volume is high enough. Do not speak too quickly, especially when using the assistance of an Auslan interpreter.
- Although most Deaf people use both English and Auslan, some may not be fluent in spoken English — it may be necessary to engage an Auslan interpreter because speech and lip-reading may be unreliable.<sup>78</sup>
- Any interpreter should be qualified and competent — for more information see the *Policy on Interpreters* of Deaf Australia Inc.<sup>79</sup>
- People who have severe vision impairment and hardness of hearing often adopt a “hands-on” signing method:<sup>80</sup> 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.
- For people with a visual impairment, the Association for the Blind WA suggests that it is advisable to ask each individual of their needs, even to the detail of specifying a particular font style and size for printed material.<sup>81</sup>
- For a person with a speech impediment you (and others in court) may simply need to be patient and listen carefully. The adjustment isn’t usually for the listener to alter their speech, but rather, a willingness to listen to “different types” of speech and be patient.
- For a person using communication equipment you (and others in court) may need to adjust how you speak to suit the technology being used. Any person using such equipment should be able to tell you what you can do to make communication work better.
- It is always best to ask if you think there might be any special communication style needs, in case the person does not think they need to tell you, or does not want to volunteer the information.
- You may need to intervene if others in court are not directing their questions in an appropriate manner, as prescribed under s 26 of the *Evidence Act 1906* (WA). In deciding whether to disallow a question, among other things, you can take into account any physical disability of the witness.

<sup>78</sup> Supreme Court of Queensland, *Equal Treatment Benchbook* (2005) 161, available at: [www.courts.qld.gov.au/The\\_Equal\\_Treatment\\_Bench\\_Book/S-ETBB.pdf](http://www.courts.qld.gov.au/The_Equal_Treatment_Bench_Book/S-ETBB.pdf) (accessed 19 October 2009).

<sup>79</sup> Deaf Australia Inc, *Policy on Interpreting* (2006), available at: [www.deafau.org.au/info/policy\\_auslan.php](http://www.deafau.org.au/info/policy_auslan.php) (accessed 19 October 2009).

<sup>80</sup> Supreme Court of Queensland, *Equal Treatment Benchbook* (2005) 162, available at: [www.courts.qld.gov.au/The\\_Equal\\_Treatment\\_Bench\\_Book/S-ETBB.pdf](http://www.courts.qld.gov.au/The_Equal_Treatment_Bench_Book/S-ETBB.pdf) (accessed 19 October 2009).

<sup>81</sup> Submission from the Association for the Blind of WA (Inc) (24 February 2009).

### **Points to consider**

- Many people do not want to acknowledge they have an intellectual disability, so they may feign understanding.
- Always talk directly to the person, not to a friend or family member, a carer or support person — the support person will tell you if they think the person does not understand.
- In appropriate cases, if an accused person has an intellectual disability, ask whether they have considered their eligibility for diversion through the Intellectual Disability Diversion Program (see section 4.2.7).
- Slow down your speech.
- Use language that is as simple and direct as possible, but do not talk down to a person with an intellectual disability. For example:
  - Use the words or phrases we tend to learn first — for example “about” not “regarding” or “concerning”; “start” not “commence”; “go” not “proceed”; “to” not “towards”; “I think you said/did ....” not “I put it to you that ...”; “It’s true isn’t it” not “Is that not true?”
  - Give preference to short, one- or two-syllable words.
  - Avoid words with more than one meaning.
  - Use active, not passive, speech (subject, verb and then object, not object, verb and then subject) — for example, “The dog bit you”, not “You were bitten by the dog”.
  - Use short sentences containing one concept only.
  - Avoid double negatives. Use single negatives instead — for example, “Did he tell you not to do this?” not “Didn’t he tell you not to do this?”
  - Use simple verb tenses — the simplest, most definite or concrete verb tense possible with as few extra words as possible — for example, “you say” not “you are saying”, “she had” not “she had had”.
  - Avoid hypothetical questions. Be direct: “Do you want a break?” not “If you think that you might like a break, let me know”.
  - Use concrete, not abstract, concepts.
  - Use legal jargon only when necessary, and if you do need to use it explain it in plain English. For example, provide plain English explanations of words and phrases such as affidavit, affirmation, arbitration, bail, bond, cross-examination, evidence, legislation, probationary period, writ of execution, seizure and rescission. Never use Latin words or phrases. Use words and phrases like “law” not “statute” or “legislation”; or “X will now ask you some questions” not “X will now cross-examine you”; or “What can you tell us about ...” not “your evidence”; and “against” not “versus”.

- Explain what they must do and why, and what is happening, carefully and patiently, in short amounts, using simple, direct, non-legal language. Then ask them to tell it back to you to ensure they understand. If necessary, give the explanation in a different way.
- Consider allowing the evidence to be given in narrative form, to avoid the person getting muddled and distracted by a series of questions.
- Ask questions one at a time.
- Use open-ended questions — avoid leading questions, and avoid questions soliciting a “yes/no” answer.
- Watch for “pleasing” behaviour — the person may try to give you the answers they think you want.
- Do not rush them or appear impatient, and try not to interrupt. Allow extra time for answers.
- Try not to direct or pressure them or they may change their answer to “please” you or to enable a quick exit.
- Keep questioning as short as possible; watch for emotional or information overload and take breaks if necessary.
- Make sure they can understand any written material — it may need to be in large print, or in simple direct language; or it may need to be read out to them. Be aware that some people with an intellectual disability may pretend to read.
- Allow additional time for the person’s legal representative to explain the proceedings to them.
- As prescribed by law, intervene whenever others (for example, during cross examination) do not give proper consideration to these points — establish these points as the “ground rules” for cross-examination, if necessary.<sup>82</sup>
- Check the language of any prior confession against the language used by the particular person (and assess any confession against the intellectual ability of the particular person).

#### 4.4.3.3 *Communication techniques for people with FASD*

##### **Points to consider**

- People with Foetal Alcohol Spectrum Disorders (FASD) may be affected by physical, intellectual and/or behavioural disabilities.
- You should refer to sections 4.4.3.3.1, 4.4.3.3.2 and 4.4.3.3.5 for communication techniques for a person with FASD depending on the nature and combination of disabilities affecting them.

<sup>82</sup> Note that s 26 of the *Evidence Act 1906* (WA) enables you to disallow improper questions.

### Points to consider

- Each person with an acquired brain injury is different and will have their own set of communication needs depending on how seriously the injury has affected their ability to process information or communicate it.
- Some may need a support person to interpret for them. Others may need to be listened to for a while until you understand what they are saying; you may have to ask them to repeat anything you do not understand.
- Always be calm, patient and respectful no matter how unexpectedly the person behaves. Ignore any disinhibited behaviour if possible, or ask them to stop it and explain why you are doing this.
- If they appear confused, or appear to be having difficulties with concentration, remembering or processing information, speak more slowly; explain what you intend to do so there are no surprises; to make sure they have understood what you are asking them to do, get them to repeat it in their own words; use simple, direct non-legal language.
- If their words or thoughts are jumbled: be patient — they may be trying very hard to be understood. Assist them by picking out key words that are relevant to your purpose, one at a time — for example, “money” and then ask them what they remember about the money. Keep doing this, key word by key word.
- If necessary, allow additional time for the person’s legal representative to explain proceedings to them.
- Make sure they can understand any written material they need to understand — it may need to be in large print or read out to them or translated into simple, direct language.
- As prescribed by law,<sup>83</sup> intervene if others (for example, during cross-examination) are not following these points — establish these points as the “ground rules” for cross-examination, if necessary.

<sup>83</sup> Evidence Act 1906 (WA) s 26.

### Points to consider

- What you need to do — if anything — will depend on the behaviour the person is presenting. For example, their words or thoughts may be jumbled, they may be finding it hard to concentrate or appear disinterested, or they may be angry, aggressive, highly anxious, paranoid and/or delusional.
- One example of behaviour that may be exhibited by people with a mental illness is avoidance of eye contact: the Mental Health Law Centre advises that this should not be interpreted as indicating dishonesty, but is usually associated with anxiety.<sup>84</sup>
- The Mental Health Law Centre also highlights the importance of using “plain English” when speaking with people diagnosed with mental illnesses.<sup>85</sup>
- Unless it is germane to the matter(s) before you, the disability is or its cause is irrelevant.
- Many people do not want to acknowledge that they have memory or cognitive disabilities, so they will feign understanding.
- Ask the person the best way to assist them in understanding and remembering.
- For accused persons, consider if it would be useful to make use of the Court Liaison Service.<sup>86</sup>
- If they are angry, try to get them to calm down as follows:
  - Stay calm.
  - Speak more slowly and more softly than them.
  - Acknowledge their feelings and emotions to help promote rapport.
  - Listen, and do not rush them.
  - Empathise and reassure.
  - Be patient; but try to keep the focus on the information you require.
  - Ask them simple questions to ground them and help bring them back to dealing with the situation.
  - Make sure you understand what they are saying and let them know — do not just say “I understand” or “I see”. Instead, paraphrase what they are saying.
  - Deal only with the facts related to why they are in court — if necessary, set ground rules to keep them focused.

<sup>84</sup> Submission from the Mental Health Law Centre WA Inc (21 May 2007).

<sup>85</sup> Submission from the Mental Health Law Centre WA Inc (21 May 2007).

<sup>86</sup> The Court Liaison Service is part of the State Forensic Mental Health Service of Western Australia. It is described as follows:

*Team practitioners attend the metropolitan courts on a daily basis, assessing defendants brought to the attention of the visiting practitioner. The service also provides a practitioner to the Court held at the East Perth Lock-up on Saturdays and public holidays as well as being available, on call, during working day mornings to the police lock-up for assessment of suspected, acutely mentally ill persons arrested by the police.*

Available at: [www.nmahsmh.health.wa.gov.au/services/statewide\\_sfmhs.cfm](http://www.nmahsmh.health.wa.gov.au/services/statewide_sfmhs.cfm) (accessed 9 June 2009).

- If they are aggressive (that is directing their anger at you or others personally, making abusive statements, or threatening violence or self harm):
  - Remain calm.
  - Summarise the problem.
  - Set ground rules: “I will listen to your concerns but I need you to ...”
  - Focus on why they are there.
  - Explain the reasons behind your actions or decisions.
  - Call security if anyone is threatened.
- If they are highly anxious or paranoid:
  - Allow them to attend court prior to the proceedings to familiarise themselves with it.
  - If available consider holding the hearing in a less threatening environment, such as a conference room.
  - Explain the purposes of microphones, recorders, video cameras etc at the beginning of the hearing.
  - Explain the roles of everyone in the courtroom.
  - Speak calmly and slowly.
- If they are delusional:
  - Do not argue with them about the delusion, as this could inflame them — and the delusions are very real to them.
  - Acknowledge their stated delusion but make your reality clear: for example, “I understand you believe you are X ... but it is not real to me”.
  - Gently focus them on their reason for attendance.
  - Explain the reasons behind your actions.
  - If necessary, call a break.
- The Mental Health Law Centre advises that “it is important to not assume that a statement made by a person with a mental illness is delusional because it sounds extreme or bizarre”. The Centre also advises that judicial officers should “be aware that statements which may seem plausible can be delusional”.<sup>87</sup>
- As prescribed by law,<sup>88</sup> intervene if others (for example, during cross-examination) are not following these points — establish these points as the “ground rules” for cross-examination if necessary.

<sup>87</sup> Submission from the Mental Health Law Centre WA Inc (21 May 2007).

<sup>88</sup> *Evidence Act 1906* (WA) s 26.

#### 4.4.4 Special measures for obtaining evidence from witnesses with disabilities

The *Evidence Act 1906* (WA) prescribes several alternative ways of obtaining evidence from witnesses with particular needs, including those witnesses with a disability who have been declared a “special witness”.

Some of these provisions apply on grounds other than disability, but might be applicable to witnesses who are disabled. For example, see the restrictions on unrepresented persons cross-examining certain witnesses in sections 5.4.2.1 and 13.3 of this *Bench Book*.<sup>89</sup> Judicial officers also have the discretion to allow any witness in proceedings in which the accused is self-represented to be cross-examined by video-link, while screened, or without being directly questioning by the accused — having regard to the nature of the charge, the wishes of the witness, and the availability of any necessary facilities or equipment.<sup>90</sup>

Other than in relation to certain child witnesses,<sup>91</sup> the court can also order that a person be treated as a “special witness” if:<sup>92</sup>

- by reason of physical disability or mental impairment, the person would be unlikely to be able to give evidence, or to give evidence satisfactorily; or
- the person would be likely
  - to experience severe emotional trauma; or
  - to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily,by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the court considers relevant.

Once a witness has been declared a special witness there are a number of additional measures that can be put in place which are intended to make the process less stressful for the witness and therefore to improve the quality of their evidence.

Note that if the proceedings are before a jury and you restrict the means of cross-examination by a self-represented accused and/or you declare a person to be a special witness, you should instruct the jury that implementing these procedures or making a declaration is a routine practice of the court and that they should not draw any inference as to the accused’s guilt from it.<sup>93</sup>

<sup>89</sup> *Evidence Act 1906* (WA) s 106G; *Restraining Orders Act 1997* (WA) ss 44C, 53D.

<sup>90</sup> *Evidence Act 1906* (WA) s 25A.

<sup>91</sup> See chapter 5 for detail on the special arrangements in place for child witnesses.

<sup>92</sup> *Evidence Act 1906* (WA) s 106R(3).

<sup>93</sup> *Evidence Act 1906* (WA) ss 25A(4), 106R(7).

#### 4.4.4.1 Visually recorded interviews with “special witnesses” with mental impairment in any proceeding for an offence

##### Points to consider

- You can admit the visual recording of a witness’s investigative interview as all or part of their evidence-in-chief in any proceeding for an offence, if:<sup>94</sup>
  - the witness has a mental impairment;<sup>95</sup>
  - you have declared the witness to be a “special witness” under s 106R of the *Evidence Act 1906* (WA);
  - the interview is conducted by a person of a prescribed class who has reason to believe that the person with a mental impairment had, or may have suffered, physical or sexual abuse, and the conduct of the interview meets the prescribed standards;<sup>96</sup> and
  - the accused or their legal representative has been given an opportunity to view the visually recorded interview and has been provided with a transcript.
- You must instruct a jury that this procedure is a routine practice of the court and that they should not draw any inference as to the accused’s guilt from the use of the procedure.<sup>97</sup>

#### 4.4.4.2 Video-links or screening arrangements for “special witnesses” in any proceeding for an offence

##### Points to consider

- If, in any proceeding for an offence, you have declared a person with a disability to be a special witness, you may arrange for that person to give evidence by video-link<sup>98</sup> or, if those facilities are not available, with screens in place.<sup>99</sup>
- Note that if the witness is the complainant in a serious sexual offence, you must declare that person to be a special witness unless you are satisfied the witness would otherwise be able to give evidence satisfactorily and that person does not wish to be a special witness.<sup>100</sup> For more information on evidentiary issues associated with sexual assault, see section 13.3.5.
- If the special witness’s evidence is given by video-link, it is to be visually recorded; a similar requirement applies when those facilities are not available and the special witness is screened while giving evidence.<sup>101</sup>

<sup>94</sup> *Evidence Act 1906* (WA) ss 106HA, 106HB. See further background of the admissibility of recorded investigative interviews at section 5.4.2.2 of this *Bench Book*.

<sup>95</sup> *Evidence Act 1906* (WA) ss 106A — mental impairment is defined to include intellectual disability, mental illness, brain damage or senility.

<sup>96</sup> These standards are prescribed in the *Evidence (Visual Recording of Interviews with Children) Regulations 2004* (WA).

<sup>97</sup> *Evidence Act 1906* (WA) s 106HB(7)(a).

<sup>98</sup> Defined in s 120 of the *Evidence Act 1906* (WA) to include closed circuit television (CCTV).

<sup>99</sup> *Evidence Act 1906* (WA) ss 106N(2), 106N(4), 106R(4)(c).

<sup>100</sup> *Evidence Act 1906* (WA) s 106R(3a).

<sup>101</sup> *Evidence Act 1906* (WA) ss 106N(3a), 106N(5).

- In the event that video-link equipment or remote witness facilities are not available, a screen is to be placed while the special witness is giving evidence to ensure that the special witness cannot see the accused, but the judge, jury, accused and counsel can see the special witness.<sup>102</sup>
- Instruct the jury that declaring a witness to be a special witness is a routine practice of the court and this should not affect how they consider the evidence.
- Note certain child witnesses in proceedings defined in Schedule 7 of the *Evidence Act 1906* (WA) cannot be declared to be special witnesses. In these matters you must make arrangements for the child to give evidence by video-link or with screening unless you have granted the prosecutor’s application that these arrangements not apply.<sup>103</sup> See section 5.4 for more information on special arrangements for child witnesses.

#### 4.4.4.3 Visually recording evidence of “special witnesses” at a special hearing in any proceeding for an offence

##### Points to consider

- If, in any proceeding for an offence, you have declared a person with a disability to be a special witness, you can allow, on your own motion or upon application by any party, for the whole of that person’s evidence to be given at a special hearing and visually recorded.<sup>104</sup>
- Instruct the jury that declaring a witness to be a special witness is a routine practice of the court and this should not affect how they consider the evidence.
- Note that these arrangements cannot be made in relation to certain child witnesses in proceedings defined in Schedule 7 of the *Evidence Act 1906* (WA).<sup>105</sup> (But see the alternative arrangements available under s 106I to record the child’s evidence at a special hearing.)

<sup>102</sup> *Evidence Act 1906* (WA) s 106N(4).

<sup>103</sup> *Evidence Act 1906* (WA) ss 106N, 106O .

<sup>104</sup> *Evidence Act 1906* (WA) s 106RA.

<sup>105</sup> *Evidence Act 1906* (WA) s 106RA(2).

#### 4.4.4.4 Additional arrangements available in any proceedings

##### Points to consider

- If you have declared a person with a disability to be a special witness, you can allow that person to have a support person of their choice present while they give evidence, but the support person must be approved by the court and must not be a person who is a witness in or party to the proceedings.<sup>106</sup>
- If you have declared a person with a disability to be a special witness, you can allow that person to have a communicator while they are giving evidence.<sup>107</sup> The function of the communicator is, where requested to do so by the court, to communicate and explain to the witness the questions put to them, and to explain to the court the evidence given by the witness.<sup>108</sup>
- Note that there is provision under s 121 of the *Evidence Act 1906* (WA) for you, on your own initiative or on the application of any party to the proceedings, to allow evidence to be taken by video-link from outside the place where the court is sitting — although you should not do so if satisfied that this is not in the interests of justice.
- In addition to the restrictions on unrepresented persons directly cross-examining witnesses who are children, complainants in serious sexual assault proceedings or certain witnesses in restraining order matters,<sup>109</sup> you have discretion to allow the cross-examination by an unrepresented accused of any witness to be by video-link, while screened, or without questions being put directly — having regard to the nature of the charge, the wishes of the witness, and the availability of any necessary facilities or equipment.<sup>110</sup>
- You should consider discussing with the parties and/or their legal representatives in any proceedings the use of any special measures referred to in section 4.4.4 — irrespective of whether the person has been declared a special witness — if to do so would be in the interests of justice.
- Instruct the jury that declaring a witness to be a special witness, or using alternative means for a witness to present evidence, are routine practices of the court and these measures should not affect how they consider the evidence.

<sup>106</sup>*Evidence Act 1906* (WA) s 106R(4)(a).

<sup>107</sup>*Evidence Act 1906* (WA) s 106R(4)(b).

<sup>108</sup>*Evidence Act 1906* (WA) s 106F.

<sup>109</sup>*Evidence Act 1906* (WA) s 106G; *Restraining Orders Act 1997* (WA) ss 44C, 53D.

<sup>110</sup>*Evidence Act 1906* (WA) s 25A.

#### 4.4.5 Breaks and adjournments

##### Points to consider

- Some people with disabilities (and their carers, support people, interpreters, and guide dogs) may need frequent breaks — for example, to be able to eat/drink, go to the toilet, take medication, get back their concentration, become less anxious, and/or move from the one position.
- While it is critical to minimise delays, it is also critical to ensure adequate and sufficient breaks for these purposes, or the particular person may not be able to give their evidence (or act as a juror) effectively.
- Specifically give a person with a disability, and any support person, interpreter or carer, permission to ask for a break if they need one — and then give them the break when they ask.
- As they will not always ask, watch for signs that a break might be needed — for example, wandering concentration, stress and/or discomfort.
- Use breaks to make sure there is sufficient water available on the witness stand and elsewhere — many people who are taking medications need to drink water frequently.
- You may need to adjourn proceedings in order to move to another court room, take evidence elsewhere, get an interpreter or support person, get particular technological equipment and/or allow for someone's transport, illness or disability needs.

#### 4.4.6 The possible impact of a person's disability or disabilities on any behaviour relevant to the matter(s) before the court

##### Points to consider

- Has the nature of a particular person's disability had any influence on the matter(s) before the court? If so, where possible, take appropriate account of any such influence.
- You may need to decide whether the law allows you to take account of any such influence, and, then, as appropriate and at the appropriate time in the proceedings — to ensure that justice is done and seen to be done — explain why any such influence can or cannot be taken into account. You may need to explain this in any direction you make to the jury during the proceedings or before they retire, and in your decision-making or sentencing — see 4.4.7 and 4.4.8 below.
- Ensure that the person with a disability is treated as an individual and with respect — for example, as prescribed by law, you may need to intervene if any stereotyped views or assumptions about people with disabilities, or people with particular types of disabilities, appear to be unfairly behind any questioning.<sup>111</sup>

<sup>111</sup> Note that s 26 of the *Evidence Act 1906* (WA) enables the court to disallow a question put to witness in cross-examination, or inform the witness that it need not be answered, if the question is misleading or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. The court may take into account any mental, intellectual or physical disability to which the witness is or appears to be subject.

#### 4.4.7 Directions to the jury

It is important that you ensure that the jury does not allow any stereotyped or false assumptions about people with disabilities, or the manner in which a particular person's evidence is presented, to unfairly influence their judgement.

##### **You may need to provide specific guidance as follows:**

- Caution the jurors against making false assumptions about the evidence of people with disabilities or particular types of disabilities.
- If you have declared any witness in the proceedings to be a special witness, remind jurors that the making of a declaration is a routine practice of the court and that they should not draw any inference as to the accused's guilt from it.<sup>112</sup>
- Remind them of any directions you made earlier in the proceedings in relation to how they must treat evidence presented as a result of restricting direct cross-examination by a self-represented accused, using a communication aid, interpreter, or as a pre-recorded interview, etc — see 4.4.4 above.
- Draw their attention to any evidence presented in court about the particular person's capacities — for example, in relation to interpreting their conduct or intent, any defences they may have, the actual evidence presented by the person, any conflicting evidence presented by others, and how they should relate these matters to the points they need to decide.

<sup>112</sup>*Evidence Act 1906* (WA) s 106R(7).

#### 4.4.8 Sentencing, other decisions and judgment or decision writing

Your sentencing, decision(s) and/or written judgment or decision must be fair and non-discriminatory and preferably seen to be so by all those involved; for example, to any person with a disability and any carer(s).

##### Points to consider

- In order to ensure that any person with a disability referred to or specifically affected by your sentencing, decision(s) and/or written judgment or decision considers it/them to be fair and non-discriminatory, you may need to pay due consideration to (and indeed specifically allude to) some of the points raised in the rest of section 4.4 (including the points made in 4.4.7 immediately above) and in section 4.3 that are relevant to the particular case.
- If a victim is not personally capable of giving a victim impact statement, because of disability or for any other reason, consider whether it is appropriate for someone else to do so on the victim's behalf.<sup>113</sup>
- Consider whether to allow a victim impact statement to be read out in court.<sup>114</sup>
- Note that many people with disabilities struggle financially because of the barriers against full or adequate remunerated employment and the financial costs associated with their disability. A specific level of fine for them will often mean considerably more than the same level of fine for others.<sup>115</sup> See section 2.6.3 for more information on sentencing options.
- Ensure you do not undervalue the financial costs associated with any person's disability in relation to such matters as compensation, property diversion and inheritance — see 4.1.6 under “Employment and Income”.
- Ensure that any person with a disability who has particular communication needs and is affected by your sentencing, decision or judgment is told of the outcome in a manner appropriate to their communication needs — see 4.4.3 above.
- For example, it may be appropriate for the decision to be written down at the time of sentencing (in as simple and direct English as possible), and then given to the person or their legal representative to help ensure understanding and compliance.
- In particular, when you are sentencing an offender, if the offender is present in court or appearing by video-link, you must explain, in language likely to be understood, the effect of the sentence, the obligations of the offender and the consequences of not complying.<sup>116</sup>

<sup>113</sup> *Sentencing Act 1995* (WA) s 24(2).

<sup>114</sup> See Part 3, Division 4 of the *Sentencing Act 1995* (WA). Note that to ensure procedural fairness, it is practice for victim impact statements to be made available to defence counsel, but defence counsel are not able to retain them.

<sup>115</sup> The Mental Health Law Centre WA Inc raised specific concern about the financial difficulties for people with mental illnesses because of the limited pension they often receive (submission from the Mental Health Law Centre WA Inc (21 May 2007)).

<sup>116</sup> *Sentencing Act 1995* (WA) s 34.



## **4.5 Further information or help**

### **4.5.1 Court and tribunal contacts for accommodating the needs of people with disabilities**

#### **Supreme Court of WA**

The associate liaises with the Listings section of the Court which in turn lists the matter in a suitable court room.

Contact details for associates can be found at the Supreme Court website at:

[www.supremecourt.wa.gov.au/content/contact.aspx#link8](http://www.supremecourt.wa.gov.au/content/contact.aspx#link8)

#### **Family Court of WA**

The Business Services Section, Business Support and Administration Officer should be contacted:

Level 2, 150 Terrace Rd

Perth WA 6000

**Phone:** (08) 9224 8351

**Fax:** (08) 9224 8329

#### **District Court of WA**

Contact the Manager Customer Support.

**Phone:** (08) 9425 2151

#### **State Administrative Tribunal WA (SAT)**

The “notice of hearing” advises SAT users of the facilities that are available; the Tribunal has a number of access measures in place. These include, but are not limited to, the ability to hold offsite hearings, the allocation of ACROD parking, and an “Access and Facilities” brochure. Should you become aware of access needs, contact the team leader from the relevant stream.

#### **Magistrates Court of WA**

The registrar at the relevant location should be contacted. Refer to [www.magistratescourt.wa.gov.au/content/locations.aspx](http://www.magistratescourt.wa.gov.au/content/locations.aspx) for a list of contact details for the various courts.

#### 4.5.2 Information and advice about accommodating the needs of people with a particular disability

##### **Disability Services Commission**

146-160 Colin Street

West Perth WA 6005

**Phone:** (08) 9426 9200

**TTY:** (08) 9426 9315

**Freecall Country:**

1800 988 214

**Fax:** (08) 9226 2306

**Email:** [dcs@dcs.wa.gov.au](mailto:dcs@dcs.wa.gov.au)

**Web:** [www.disability.wa.gov.au](http://www.disability.wa.gov.au)

##### **Intellectual Disability Diversion Program, Department of Corrective Services (WA)**

Level 7, 32 St Georges Terrace

Perth WA 6000

**Phone:** (08) 9425 2140

**Mobile:** 0438954533

##### **Western Australian Deaf Society**

*Head Office*

Suit 46, 5 Aberdeen St

East Perth WA 6004

**Phone:** (08) 9441 2677

**Email:** [wadeaf@wadeaf.org.au](mailto:wadeaf@wadeaf.org.au)

**Web:** [www.wadeaf.org.au/](http://www.wadeaf.org.au/)

*Auslan Interpreting Services Bookings*

**Phone:** (08) 9441 2623

**Fax:** (08) 9441 2600

**TTY:** (08) 9441 2655

**Mobile:** 0433 144 288

**Email:** [bookings@wadeaf.org.au](mailto:bookings@wadeaf.org.au)

**After hours emergency:**

0410 017 540

**Web:** <http://interpreting.wadeaf.org.au>

#### 4.5.2.1 General information and advice about people with disabilities

##### **Ethnic Disability Advocacy Centre**

320 Rokeby Road

Subiaco WA 6008

**Phone:** (08) 9388 7455

**Email:** [admin@edac.org.au](mailto:admin@edac.org.au)

**Web:** [www.edac.org.au](http://www.edac.org.au)

##### **People with Disabilities (WA) Inc**

Oasis Lotteries House

2/37 Hampden Rd

Nedlands WA 6009

**Phone:** (08) 9386 6477

**Email:** [info@pwdwa.org](mailto:info@pwdwa.org)

**Web:** [www.pwdwa.org](http://www.pwdwa.org)

##### **Public Advocate**

Level 1, 30 Terrace Road

East Perth WA 6004

**Freecall:** 1300 858 455 (Advisory Service)

**Fax:** (08) 9278 7333

**TTY:** 1300 859 955

**Interpreter:** 13 14 50

**Web:** [www.publicadvocate.wa.gov.au](http://www.publicadvocate.wa.gov.au)

##### **Southern Communities Advocacy Legal & Education Services Inc (SCALES)**

Priority client groups include people with disabilities including mental health issues.

Suite 3, 14 Council Avenue

Rockingham WA 6168

**Phone:** (08) 9550 0400

**Web:** [www.law.murdoch.edu.au/scales](http://www.law.murdoch.edu.au/scales)

##### **State Administrative Tribunal**

In relation to applications for guardianship or administration for those with decision-making disabilities

Ground Floor

12 St Georges Terrace

Perth WA 6000

**Phone:** (08) 9219 3111

1300 306 017

**Fax:** (08) 9325 5099

**Web:** [www.sat.justice.wa.gov.au](http://www.sat.justice.wa.gov.au)

### **Sussex Street Community Law Service Inc**

**Disability Discrimination Unit** - servicing both the metropolitan and country areas

29 Sussex Street

East Victoria Park WA 6101

**Phone:** (08) 9470 2676

**Email:** [sscls@sscls.asn.au](mailto:sscls@sscls.asn.au)

**Web:** [www.sscls.asn.au](http://www.sscls.asn.au)

### **4.5.3 Information and advice about people with particular types of disabilities**

#### **4.5.3.1 Brain injury**

##### **Headwest**

Headwest provides individual, system, peer and self advocacy services for people dealing with Acquired Brain Injury - including people with an ABI, their carers and their families.

645 Canning Highway

Alfred Cove WA 6154

**Phone:** (08) 9330 6370

**Email:** [info@headwest.asn.au](mailto:info@headwest.asn.au)

**Web:** [www.headwest.asn.au](http://www.headwest.asn.au)

#### **4.5.3.2 Psychiatric disability or behaviour disorder**

##### **Department of Health**

For a directory of mental health services across the State refer to:

**Web:** [www.health.wa.gov.au/mentalhealth/getting\\_help/directory.cfm](http://www.health.wa.gov.au/mentalhealth/getting_help/directory.cfm)

##### **Alzheimer's Australia WA Ltd**

PO Box 1509

Subiaco WA 6904

**Phone:** (08) 9388 2800 (Dementia Helpline)

**Email:** [alzwa@alshemiers.asn.au](mailto:alzwa@alshemiers.asn.au)

**Web:** [www.alzheimers.asn.au](http://www.alzheimers.asn.au)

### **Mental Health Law Centre (WA) Inc**

The primary service of the Mental Health Law Centre is the provision of legal advice and representation to people who are involuntary consumers of mental health services. Among other things, it provides legal advice and representation in criminal law, guardianship and administration and criminal injuries compensation, freedom of information, employment and discrimination and family law matters which are directly connected to a consumer's mental health problems.

33 Brisbane St

Perth WA 6000

**Phone:** (08) 9328 8266

**Email:** [office@mhlcwa.org.au](mailto:office@mhlcwa.org.au)

**Web:** [www.mhlcwa.org.au](http://www.mhlcwa.org.au)

### **State Forensic Medical Health Service**

The service assesses and cares for people who come from the courts and prisons. The service comprises a maximum-secured inpatient psychiatric hospital (Frankland Centre), a community program and a prison outreach service.

Corporate Office

Frankland Centre

Brockway Rd

Mount Claremont WA 6010

**Phone:** (08) 9347 6500

**Email:** [StateForensicSecretary@health.wa.gov.au](mailto:StateForensicSecretary@health.wa.gov.au)

**Web:** [www.nmahsmh.health.wa.gov.au/services/statewide\\_sfmhs.cfm](http://www.nmahsmh.health.wa.gov.au/services/statewide_sfmhs.cfm)

### **West Australian Transcultural Mental Health Centre**

The Centre has a statewide function and aims to bring about a culturally-sensitive response to migrant mental health needs.

50 Murray St

Perth WA 6000

**Phone:** (08) 9224 1760

**Email:** [Valza.Thomas@health.wa.gov.au](mailto:Valza.Thomas@health.wa.gov.au)

**Web:** [www.mmha.org.au/watmhc/index.html](http://www.mmha.org.au/watmhc/index.html)

### **Western Australian Association for Mental Health (WAAMH)**

2 Delhi St

West Perth WA 6005

**Phone:** (08) 9420 7277

**Email:** [waamh@waamh.org.au](mailto:waamh@waamh.org.au)

**Web:** [www.waamh.org.au](http://www.waamh.org.au)

#### *4.5.3.3 Intellectual disability*

##### **Autism Association of Western Australia Inc**

37 Hay St

Subiaco WA 6008

**Phone:** (08) 9489 8900

**Fax :** 9489 8999

**Email:** [autismwa@autism.org.au](mailto:autismwa@autism.org.au)

**Web:** [www.autism.org.au](http://www.autism.org.au)

##### **Citizen Advocacy Perth West**

20 Plaistowe Mews, City West

West Perth WA 6005

**Phone:** (08) 9322 5999

**Web:** [www.capw.org.au](http://www.capw.org.au)

##### **Developmental Disability Council of WA (Inc)**

City West Lotteries House

2 Delhi St

West Perth WA 6005

**Phone:** (08) 9420 7203

**Email:** [ddcwa@ddcwa.org.au](mailto:ddcwa@ddcwa.org.au)

**Web:** [www.ddc.org.au](http://www.ddc.org.au)

#### *4.5.3.4 Physical disability*

##### **Association for the Blind of WA**

Among other services, offers a Braille and audio production service and provides guidelines on the best presentation of information in large print.

61 Kitchener Ave

Victoria Park WA 6100

**Phone:** (08) 9311 8202

**Email:** [mailbox@guidedogswa.com.au](mailto:mailbox@guidedogswa.com.au)

**Web:** [www.guidedogswa.com.au](http://www.guidedogswa.com.au)

##### **The Centre for Cerebral Palsy**

106 Bradford Street

Coolbinia WA

**Phone:** (08) 9443 0211

**Fax:** (08) 9444 7299

**Email:** [info@tccp.com.au](mailto:info@tccp.com.au)

**Web:** [www.tccp.com.au](http://www.tccp.com.au)

### **Deaf Society of WA**

Suite 46/5 Aberdeen St  
East Perth WA 6004

**Phone:** (08) 9441 2677

**Email:** [wadeaf@wadeaf.org.au](mailto:wadeaf@wadeaf.org.au)

**Web:** [www.wadeaf.org.au](http://www.wadeaf.org.au)

### **Multiple Sclerosis Society of Western Australia (Inc)**

29 Parkhill Way  
Wilson WA 6107

**Phone:** (08) 9365 4888

**Fax:** Fax: (08) 9451 4453

**Email:** [enquiries@mswa.org.au](mailto:enquiries@mswa.org.au)

### **National Disability Services WA**

Unit 1/59 Walters Drive  
Osborne Park WA 6071

**Phone:** (08) 9242 5544

**Web:** [www.nds.org.au](http://www.nds.org.au)

### **Paraplegic-Quadriplegic Association Western Australia**

10 Selby St  
Shenton Park WA 6008

**Phone:** (08) 9381 0111

**Fax:** (08) 9382 3687

**Email:** [pqa@paraquadwa.asn.au](mailto:pqa@paraquadwa.asn.au)

### **WA AIDS Council**

664 Murray St  
West Perth WA 6005

**Phone:** (08) 9482 000

**Email:** [waac@waaims.com](mailto:waac@waaims.com)

**Web:** [www.waaims.com](http://www.waaims.com)

#### 4.5.3.5 Foetal Alcohol Spectrum Disorder (FASD)

For services which can assist in the diagnosis of FASD refer to section 4.5.3 of this *Bench Book* and to the Department of Health's Mental Health Directory at:

[www.health.wa.gov.au/mentalhealth/getting\\_help/directory.cfm](http://www.health.wa.gov.au/mentalhealth/getting_help/directory.cfm)

#### **Alcohol and Pregnancy Research Group**

Telethon Institute for Child Health Research

100 Roberts Road

Subiaco, WA 6008

**Phone:** (08) 9489 7777

**Email:** [janp@ichr.uwa.edu.au](mailto:janp@ichr.uwa.edu.au)

**Web:** [www.ichr.uwa.edu.au/alcoholandpregnancy](http://www.ichr.uwa.edu.au/alcoholandpregnancy)

#### **WA Country Health Service**

Alcohol and Pregnancy — Resources

**Web:** [www.wacountry.health.wa.gov.au/default.asp?documentid=536](http://www.wacountry.health.wa.gov.au/default.asp?documentid=536)

#### **National Organisation for Fetal Alcohol Syndrome and Related Disorders (NOFASARD)**

Head Office

PO Box 206

Normanville SA 5204

**Mobile:** 0418 854 947

**Email :** [sue@nofasard](mailto:sue@nofasard)

**Web :** [www.nofasard.org/](http://www.nofasard.org/)

## 4.6 Further reading

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- Cockram J, *Equal Justice? The Experiences and Needs of Repeat Offenders with Intellectual Disability in Western Australia* (2005), available at:  
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[www.cjcp.ca/pubmed.php?issueid=129](http://www.cjcp.ca/pubmed.php?issueid=129) (accessed 14 August 2009).
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- Disability Services Commission and Ministry of Justice, *People with an Intellectual Disability: Issues for Consideration of the Courts* (2001), available at:  
[www.disability.wa.gov.au/advocacy/legalissues/legalissues\\_support.html](http://www.disability.wa.gov.au/advocacy/legalissues/legalissues_support.html) (accessed 10 June 2009)
- Fast DK, Conry J and Loock CA, “Identifying fetal alcohol syndrome among youth in the criminal justice system” (1999) 20(5) *Journal of Developmental and Behavioral Pediatrics* 370, available at: [www.asantecentre.org/\\_Library/docs/IdentifyingFASYouth.pdf](http://www.asantecentre.org/_Library/docs/IdentifyingFASYouth.pdf) (accessed 13 August 2009)
- Fazel S and Danesh J, “Serious mental disorder in 23,000 prisoners: A systematic review of 62 surveys” (2002) 359 *The Lancet* 545, available at:  
[http://eprints.ouls.ox.ac.uk/archive/00001002/01/prisoners\\_Lancet.pdf](http://eprints.ouls.ox.ac.uk/archive/00001002/01/prisoners_Lancet.pdf) (accessed 10 June 2009)
- Hunter Institute of Mental Health, *Mental Illness and Suicide in the Media: A Mindframe Resource for Courts* (2008), available at:  
[www.mindframe-media.info/client\\_images/572519.pdf](http://www.mindframe-media.info/client_images/572519.pdf) (accessed 10 June 2009)
- Intellectual Disability Rights Service, *Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System* (2008), available at: [www.idrs.org.au/pdf/enabling\\_justice.pdf](http://www.idrs.org.au/pdf/enabling_justice.pdf) (accessed 10 June 2009)
- Kebbell M, Hatton C and Johnson S, *Witnesses with Learning Disabilities in Court: Full Report of Research Activities and Results* (2001), available at:  
[www.lancs.ac.uk/shm/dhr/publications/witnesses\\_report.pdf](http://www.lancs.ac.uk/shm/dhr/publications/witnesses_report.pdf) (accessed 15 October 2009)
- Lee S, *Report on Justice and People with Disabilities in Western Australia* (2001), available at:  
[http://pwdwa.org/?page\\_id=28](http://pwdwa.org/?page_id=28) (accessed 10 June 2009)
- Ogloff JRP, Davis MR, Rivers G and Ross S, “The identification of mental disorders in the criminal justice system” *Trends and Issues in Crime and Criminal Justice* no 334 (2007), available at: [www.aic.gov.au/publications/current%20series/tandi/361-380.aspx](http://www.aic.gov.au/publications/current%20series/tandi/361-380.aspx) (accessed 13 August 2009)



## 4.7 Your comments

Feedback on how this *Equality before the Law Bench Book* can be improved is welcomed.

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

Additionally, you may discover an error, or wish to advise further references to legislation, case law, specific sections of other bench books, discussion or research material.

Please refer to chapter 14, which contains information about how to send us your comments and/or feedback.

