

People with disabilities

Contents

| | | |
|---------|--|------|
| 5.1 | Some statistics | 5103 |
| 5.2 | Some information. | 5201 |
| 5.2.1 | Background information. | 5201 |
| 5.2.2 | Descriptions of the main types of disabilities | 5202 |
| 5.2.2.1 | Physical disabilities — excluding deafness, hearing impairments, blindness and visual impairments, | 5202 |
| 5.2.2.2 | Deafness and hearing impairments | 5203 |
| 5.2.2.3 | Blindness and visual impairments | 5203 |
| 5.2.2.4 | Intellectual disabilities | 5204 |
| 5.2.2.5 | Acquired brain injury | 5205 |
| 5.2.2.6 | Psychiatric disabilities | 5205 |
| 5.2.3 | Terminology. | 5206 |
| 5.2.4 | Examples of the barriers for people with disabilities in relation to court proceedings | 5208 |
| 5.2.5 | The impact of these barriers | 5209 |
| 5.3 | Legal capacity | 5301 |
| 5.3.1 | Capacity to give evidence | 5301 |
| 5.3.2 | Criminal responsibility | 5301 |
| 5.4 | Practical considerations | 5401 |
| 5.4.1 | Adjustments that may need to be considered <i>before</i> the proceedings start, or at the time the person <i>first appears</i> in court | 5401 |
| 5.4.2 | Oaths, affirmations and declarations. | 5403 |

| | | |
|---------|---|------|
| 5.4.3 | Language and communication | 5404 |
| 5.4.3.1 | Initial considerations | 5404 |
| 5.4.3.2 | General communication guidance | 5404 |
| 5.4.3.3 | Level and style of language to suit particular needs | 5405 |
| 5.4.3.4 | Communication techniques for people with physical disabilities | 5406 |
| 5.4.3.5 | Communication techniques for people with intellectual disabilities | 5407 |
| 5.4.3.6 | Communication techniques for people with an acquired brain injury | 5409 |
| 5.4.3.7 | Communication techniques for people with psychiatric disabilities or behaviour differences | 5410 |
| 5.4.4 | Breaks and adjournments | 5412 |
| 5.4.5 | The possible impact of a person’s disability or disabilities on any behaviour relevant to the matter(s) before the court | 5412 |
| 5.4.6 | Directions to the jury — points to consider | 5413 |
| 5.4.7 | Sentencing, other decisions and judgment or decision writing — points to consider | 5414 |
| 5.5 | Further information or help | 5501 |
| 5.6 | Further reading | 5601 |
| 5.7 | Your comments | 5701 |

5.1 Some statistics

Statistics reveal the following about people with disabilities who are resident in NSW:¹

- **Numbers of people with disabilities:**
 - Of the 6.32 million residents of NSW, 1.2 million (19%) have a disability — almost one in five.
 - Disability is evenly distributed between men and women.
 - People born overseas in a non-English speaking country have a lower rate of disability — at 18% — compared with 24% for those born overseas in an English speaking country.
 - Older people have a substantially higher rate of disability than younger people.
- **Type of disability:**
 - 85% of people with disabilities have a physical disability. However, only 52% of children with disabilities have a physical disability.
 - 15% of people with disabilities have a mental or behavioural² disability. However, the rate for children is significantly higher — at 48%.
 - Up to 20% of the population (that is, up to 1.26 million NSW residents) will have some form of psychiatric disability at some time in their life.³
 - 1% to 3% of the population (that is, between 63,200 and 189,600 NSW residents) have an intellectual disability.⁴
 - 40,000 Australians are admitted to hospital each year with a brain injury. Severe head injury is the greatest cause of traumatic disability for people under 40.⁵
 - Approximately 15% of the population whose first language *is* English have very poor English literacy skills. They can be expected to experience considerable difficulties in using many of the printed materials that may be encountered in daily life.⁶ (Although not generally counted as a disability by people with disabilities, poor literacy skills are listed in this Section, as they can often be managed using some of the communication skills techniques listed in 5.4.3 below).

1 Unless otherwise indicated, the statistics in 5.1 are drawn from Australian Bureau of Statistics, *Disability, NSW, 2001* (ABS Cat No 4443.1) 2001, Canberra, available at: www.abs.gov.au/Ausstats/abs@.nsf/Latestproducts/Main%20Features12001?opendocument&tabname=Summary&prodno=4443.1&issue=2001&num=&view= (accessed 29 May 2006).

2 “Mental or behavioural” is the term used in the survey from which these statistics are drawn — see n 1.

3 See Department of Health and Ageing, *Mental illness — The facts*, available at: www.health.gov.au/mentalhealth (accessed 2 May 2006).

4 Drawn from *Disability awareness program — Creating access to our courts*, by kind permission of the National Judicial College of Australia and the NSW Attorney General’s Department.

5 See n 3.

6 Australian Bureau of Statistics, *Aspects of Literacy: Assessed Skill Levels, Australia, 1996* (ABS Cat No 4228.0), 1997, Canberra, available at: www.abs.gov.au/Ausstats/abs@.nsf/0/887AE32D628DC922CA2568A900139365?Open (accessed 4 April 2006).

- **Level of disability:**
 - 1.1 million (88% of people with disabilities) have a disability that restricts⁷ them in relation to self care, mobility, communication, schooling and/or employment.
 - 969,800 (81% of people with disabilities) are restricted in relation to self care, mobility and/or communication — of whom 40% have either a severe or profound level of restriction.
 - 806,900 (71% of people with disabilities) have a mobility restriction, of whom 238,700 have either a severe or profound level of restriction.
 - 535,000 (44.5% of people with disabilities) are restricted in relation to schooling or employment.
- **Care and assistance:**
 - 87% of people with disabilities receive any assistance they need from family and friends rather than formal organisations.
 - Women do most of the caring — representing 57% of all carers and 73% of primary carers.
 - 40% of primary carers and 30% of other carers have disabilities themselves, with up to 12% having disabilities involving profound or severe restrictions.
- **Health:**
 - 48% of people with disabilities assess their health status as good or very good.
- **Accommodation:**
 - 92% of people with disabilities live in a private dwelling, with 16% living alone.
 - People with mental or behavioural disabilities are much more likely to live in rental or boarding accommodation than those with physical disabilities, and are much less likely to own their own home.
 - 6% of people with disabilities live in accommodation where care is provided, half of which is government accommodation — with people with mental or behavioural disabilities more likely to do this (17%) than people with physical disabilities (4%).
- **Employment and income:**
 - 50% of people with disabilities are employed, compared with 80% of people without a disability.
 - 28% of working age people with disabilities are permanently unable to work.
 - The median gross weekly income of people with disabilities — at \$190 in 1998 — is less than half that of people without a disability (\$390).

7 “Restrict” is the term used in the survey from which these statistics are drawn — see n 1.

- 58% of people with disabilities are reliant on a government pension or benefit as their main source of income.
 - 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% of income to cover the extra costs associated with their disability.⁸
- **Education:**
- 7% of school students (81,000) are people with disabilities, over 75% of whom are restricted at school in some way or other because of their disability.
 - 34% of these students with disabilities have intellectual or developmental disabilities.
 - 9% of tertiary students (49,000) are people with disabilities.
 - 32% of students with disabilities (42,500) receive at least one type of support to enable them to attend an educational institution.
 - Only 14% of people with disabilities who have completed a post-school qualification have done so since the onset of their disability.
- **Crime:**
- People with intellectual disabilities are approximately 4 times as likely to be in prison as people without intellectual disabilities.⁹
 - 18% of female prison inmates and 27% of male prison inmates scored below the pass rate on the intellectual disability screener used in a 2001 Corrections Health Service survey.¹⁰
 - In the same survey, a staggering 39% of female prison inmates and 45% of male prison inmates reported head injuries resulting in an episode of unconsciousness or “blacking out”.
 - The same survey found that 54% of female prison inmates and 39% of male prison inmates had been diagnosed by a doctor at some time in the past as having a psychiatric problem. Of these, 25% of women and 34% of men had been admitted to a psychiatric unit or hospital.¹¹

8 Drawn from P Saunders, *Disability, poverty and hardship in Australia*, slide show presentation to the SPRC Seminar Program, 11 October 2005.

9 See Law Reform Commission of NSW, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80, 1996, available at: www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC (accessed 1 May 2006). See also W R Lindsay, J L Taylor, P Sturmey (eds), *Offenders with Developmental Disabilities*, 2004, John Wiley & Sons.

10 T Butler and L Milner, *The 2001 New South Wales Inmate Health Survey*, 2003, Corrections Health Service, Sydney, p 8, available at: www.justicehealth.nsw.gov.au/pubs/Inmate_Health_Survey_2001.pdf (accessed 1 May 2006).

11 *ibid* p 94.

- Depression was the most common previous psychiatric diagnosis in both prison inmate sexes surveyed by the Corrections Health Service.¹²

| 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 |

* Respondents could report more than one condition.

■ **Discrimination:**¹³

- During 2004–2005, disability discrimination was the most common type of discrimination claimed at the Human Rights and Equal Opportunity Commission, and the second most common type of discrimination claimed at the Anti-Discrimination Board of NSW.

[The next page is 5201]

¹² *ibid* p 95.

¹³ See Annual Reports of the Human Rights and Equal Opportunity Commission, available at: www.hreoc.gov.au (accessed 1 May 2006); and of the Anti-Discrimination Board of NSW, available at: www.lawlink.nsw.gov.au/adb (accessed 1 May 2006).

5.2 Some information

5.2.1 Background information

There are many different types of disabilities — all of which can be grouped and sub-grouped in any number of ways. We have chosen to group them as follows:

- **Physical disability** — including deafness or hearing impairments, blindness or visual impairments, mobility disabilities, and other forms of physical differences in the body or its functioning.
- **Intellectual disability.**
- **Acquired brain injury** — which may result in physical disabilities and/or cognitive disabilities.
- **Psychiatric disability** — including mental illness, and/or behavioural disorders.
- **Drug or alcohol dependence** — in some cases, this may have led to other types of disabilities — for example, alcohol-related dementia. Korsakoff's syndrome and Wernicke/Korsakoff syndrome are particular forms of alcohol related brain injury which may be related to alcohol related dementia.¹⁴
- **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 listed in this Section, as they can often be managed using some of the communication skills techniques listed at 5.4.3 below).

Each of these disabilities (apart from drug or alcohol dependence, and reading or writing difficulties) is described at 5.2.2 below.

Every person with a disability is different and unique:

- Some people with disabilities have one disability only, some have more than one disability within the same grouping listed above, and others have more than one disability from two or more of the groupings listed above.
- 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, some are episodic.
- Some disabilities are obvious and some are hidden.
- However, many people with disabilities require some form of equipment, procedural considerations and/or communication adjustment(s) to be made if they are to be able to interact effectively in relation to court proceedings.

¹⁴ See information on different forms of dementia listed on Alzheimer's Australia website, available at: www.alzheimers.org.au (accessed 3 May 2006).

It is important to note that, in many cases, the precise name or type of a particular person's disability or disabilities will not be relevant in court. Much more important will be the need to accurately and appropriately determine whether that person requires any form of adjustment to be made, and if so, what type and level of adjustment.

5.2.2 Descriptions of the main types of disabilities¹⁵

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

A physical disability may have existed since birth or it could have resulted from accident, illness, or injury.

A physical disability may be mild, moderate or severe in terms of the way in which it affects the person's life.

A person with a physical disability may need to use some sort of equipment for assistance with mobility. A person with a physical disability may have lost a limb or, because of the shape or size of their body, or because of a disease or illness, require slight adaptations to be made to enable them to participate fully in society.

Some common physical disabilities are:

- **Quadriplegia** — Complete or partial loss of function (movement or sensation) in the trunk, lower limbs and upper limbs. Generally, this has resulted from damage high in the spinal column — for example, the neck.
- **Paraplegia** — Complete or partial loss of function (movement or sensation) in the trunk and lower limbs. Generally, this has resulted from damage lower in the spinal column — for example, below the neck.
- **Cerebral Palsy** — A disorder of movement and posture due to a defect or lesion on the immature brain. Cerebral Palsy can cause stiffness of muscles, erratic movement of muscles or tremors, a loss of balance, and possibly speech impairments. A person with Cerebral Palsy may have other disabilities including sensory impairment, epilepsy, and/or intellectual disability. But do not assume that a person with Cerebral Palsy has another disability. There are many people with Cerebral Palsy who do not have an intellectual disability.
- **Epilepsy** — A person with epilepsy is likely to experience epileptic seizures. Seizures are disturbances within specific areas of the brain that cause loss of control of one or more aspects of bodily activity. Seizures can be provoked by flashing lights, physical activity, stress, low blood sugar, high caffeine intake and lack of sleep.

¹⁵ The information in 5.2.2 is drawn from *Disability awareness program — Creating access to our courts*, by kind permission of the National Judicial College of Australia and the NSW Attorney General's Department.

- **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.
- **There are many other physical disabilities** — including amputations, scarring, asthma, cystic fibrosis, muscular dystrophy, kidney disease, liver disease, cardio-pulmonary disease (heart problems), diabetes, HIV/AIDS, cancer, illnesses and other diseases.

5.2.2.2 Deafness and hearing impairments

- **Deafness** — complete, or almost complete, inability to hear. People who are deaf rely on their vision to assist them to communicate, and use a variety of ways to communicate — including Australian sign language (Auslan), lip reading, writing and expressive speech. Many people who are deaf regard deafness as a culture rather than as a disability. Deaf culture includes areas such as art, language, sport and history.
- **Deafblindness** — a loss of vision *and* hearing. Most people with deafblindness have some residual hearing and/or sight. Deafblindness varies with each person — for example, a person may be hard of hearing and totally blind, or profoundly deaf and partially sighted, or have nearly complete or complete loss of both senses.
- **Hearing Impairment** — A person who has a hearing impairment has a partial hearing loss. The hearing loss may be mild, moderate, or severe. A person who has a hearing impairment will usually prefer to rely as much as possible on their available hearing with the assistance of hearing aids or assistive listening devices. They may use a hearing aid, lip reading and speech to communicate. Note that hearing aids do not necessarily restore a person's hearing to the capacity of a person without a hearing impairment, and for some people hearing aids are not helpful. Many people who have hearing impairments regard their impairment as a disability.

5.2.2.3 Blindness and visual impairments

- **Blindness** — a complete, or almost complete, loss of vision. People who are blind vary in their ability to see. Some may be able to perceive light, shadow and/or shapes; others see nothing at all. People who are blind may use a guide dog, white cane, or a laser sensor or pathfinder. People who are blind may read using Braille, computer assisted technology and/or audio tapes
- **Colour Blindness** — an inability to distinguish between colours. Some people with colour blindness only have difficulty distinguishing between the colours red and green, whereas others see the world in black, white and grey.
- **Deafblindness** — see 5.2.2.2 above.

- **Visual Impairment /Low Vision** — a partial loss of vision that is *not* correctable by wearing glasses and that therefore affects the performance of daily tasks.

5.2.2.4 Intellectual disabilities

Intellectual disability refers to a slowness to learn and process information.

The NSW Law Reform Commission has recommended the adoption of a statutory definition of intellectual disability as follows:

“‘Intellectual disability’ means a significantly below average intellectual functioning existing concurrently with two or more deficits in adaptive behaviour.”¹⁶

Deficits in adaptive behaviour refer to limitations in such areas as communication, social skills and ability to live independently.

An intellectual disability is permanent. It is not a sickness, cannot be cured and is not medically treatable. People are born with an intellectual disability. It may be detected in childhood or it may not be detected until later in life.

There are various types and degrees of intellectual disability. One of the more common causes of intellectual disability is Down syndrome.

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

Importantly, and contrary to some of the extreme misconceptions that may be held about people with intellectual disabilities, they are *not* compulsive liars (see also “Capacity to give evidence” at 5.3.1 below); are not either asexual or extremely promiscuous (applied particularly to women); and *do* feel emotion and pain.

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

- Take longer to absorb information.
- Have difficulty understanding questions, abstract concepts or instructions.
- Have difficulty with reading and writing.
- Have difficulty with numbers and other measures such as money, time and dates.
- Have a short attention span and be easily distracted.
- Have difficulty with short and/or long term memory.
- Find it difficult to maintain eye contact.
- Find it difficult to adapt to new environments and situations.
- Find it difficult to plan ahead or solve problems.

16 Law Reform Commission of NSW, *op cit* n 9.

- Find communication over the phone difficult.
- Have difficulty expressing their needs.

5.2.2.5 Acquired brain injury

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

People may have an acquired brain injury as a consequence of a trauma (for example, a car accident), stroke, infection, neurological disease (dementia), tumour, hypoxia and/or substance abuse.

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

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

Acquired brain injury may result in:

- Memory loss.
- Lack of concentration.
- Lack of motivation.
- Tiredness.
- Difficulty with abstract thinking.
- Inappropriate behaviour.
- Mood swings.
- Agitation and frustration.

5.2.2.6 Psychiatric disabilities

A psychiatric disability is a condition that impairs a person's mental functioning.

Psychiatric disability may be long-term, but is often temporary and/or episodic. It does *not* affect the person's intellect. It can sometimes be assisted by medication.

Psychiatric disability is generally characterised by the presence of any one or more of the following symptoms or signs:

- Irrational behaviour 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.
- Inappropriate dress, speech, expressed emotions, behaviour and/or ideas.

Some of the most common psychiatric disorders are:

- **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 where they feel invincible or able to do anything), then depression (lows where they feel deeply depressed and sad). Some people experience the manic episodes only and not the depressive episodes.
- **Clinical depression** — is 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** — is a group of mood disorders that result in intense feelings of apprehension, tension and/or fear without a discernible cause and that seriously affect a person’s ability to cope with daily life. Anxiety can take the form of a phobia — for example, “agoraphobia” — the fear of wide open spaces, or 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.

5.2.3 Terminology¹⁷

Within the disability movement, there have been several changes over the years to the terms people with disabilities prefer to be used to describe people with disabilities.

It is preferable to emphasise the person rather than the disability. People with a disability are people first who happen to have a disability. Terms such as “suffer”, “stricken with”, “victim” or “challenged” are also *not* generally appreciated. Most people with disabilities prefer to talk about what they *can* do, not what they may be unable to do, and indeed, to talk about the additional activities many of them might be able to do if we as a community made some (often simple) adjustments.

The way language is used can have a profound impact on people with disabilities. Language can have the effect of stereotyping, depersonalising, humiliating or discriminating against people with disabilities. Language can result in a person with a disability feeling respected and worthwhile or disregarded and marginalised. People with

¹⁷ The information in 5.2.3 is drawn from *Disability awareness program — Creating access to our courts*, by kind permission of the National Judicial College of Australia and the NSW Attorney General’s Department.

disabilities, like everyone else, want to be treated as valued members of society. Terms such as “crazy”, “mental”, “retard(ed)”, “slow” or “defective” are not accurate terms for people with disabilities and are no longer used — except in a derogatory way.

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

When referring to a person with a disability, always remember that people with disabilities are **people first**. The fact that a person has a disability is secondary to the fact that they are a person. Also note that to keep referring to a person's disability has the effect of giving the disability greater importance than the person.

Some examples of appropriate and inappropriate terminology

| 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 person who is deaf, or a person who has a hearing impairment | Deaf person, hearing impaired |
| 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 disability) | Stricken, suffers from, challenged, victim |

5.2.4 Examples of the barriers for people with disabilities in relation to court proceedings

The barriers for people with disabilities in relation to court proceedings — whether as a juror, support person, witness or accused — obviously depend on the type and severity of the particular person's disabilities.

There are numerous barriers to the full participation of people with disabilities — unless some appropriate adjustment or adjustments are made. A few examples follow.

- **For people with physical disabilities:**
 - Inaccessible venue or courtroom facilities (for example, stairs not lifts, narrow doors, high buttons/handles/counters, an inaccessible witness box, slippery floors, no nearby parking, steep inclines, heavy doors, round or hard to grip door knobs).
 - Inability to sit or stand in the same position either at all or beyond a particular time and/or fatigue.
 - Communication barriers related to deafness or hearing impairment, blindness or visual impairment, or a speech impairment.
- **For people with intellectual disabilities:**
 - Communication barriers — the language used is too complex, fast or abstract, and/or the proceedings are too lengthy.
 - Fatigue.
 - Difficulty understanding or recalling dates, such as when events occurred or appointments, such as court dates.
- **For people with an acquired brain injury:**
 - Any one or more of the barriers listed in the preceding two points, plus their communication barriers may be exacerbated by, for example, being unable to concentrate and/or process information easily, memory difficulties, and/or by having disinhibited behaviour.
- **For people with psychiatric disabilities or behaviour differences:**
 - Communication barriers — for example, they may be easily distracted, very jumbled, severely distressed/anxious/frightened, manic, delusory and/or aggressive or angry.
- **All people with disabilities may face additional barriers** — due to being female, Indigenous, from an ethnic or migrant background, lesbian, gay or bisexual, transgender(ed), a child or young person, or if they practice a particular religion or are representing themselves — see the relevant other Section(s).

5.2.5 The impact of these barriers

Many of the barriers listed in 5.2.4 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:

- Not be able 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 able to get their point of view across and be adequately understood.
- Feel that an injustice has occurred.
- In some cases be treated with less respect, unfairly and/or unjustly when compared with other people.

These problems are likely to be compounded if the person also happens to be Indigenous, from an ethnic or migrant background, female, a child or young person, lesbian, gay or bisexual, transgender(ed), or if they practise a particular religion or are representing themselves — see the relevant other Section(s).

Section 5.4, below, provides additional information and practical guidance about ways of making appropriate adjustments for and treating people with disabilities so as to reduce the likelihood of these problems occurring and help ensure that a just outcome is achieved.

The boxed areas provide the practical guidance.

[The next page is 5301]

5.3 Legal capacity

5.3.1 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 else¹⁸ — as long as, in some cases, the appropriate adjustments are made so that they can successfully communicate their evidence.¹⁹ For the types of adjustments that may need to be made, see 5.4.1 below.

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

It may be necessary for some people with disabilities (in particular those with severe intellectual disabilities) to give unsworn evidence — as long as they can tell the difference between telling the truth and lying.²⁰

Research suggests that, contrary to public perception, most people with intellectual disabilities are no different from the general population in their ability to give *reliable* evidence — *as long as* communication techniques are used that are appropriate for the particular person²¹ — see 5.4.3.4 below. In some cases, however, a psychologist's assessment may be required in order to adequately assess a particular person's ability to give evidence, help the court to understand the person's characteristics and demeanour and/or how best to communicate with them in court.

5.3.2 Criminal responsibility

Some people with intellectual disabilities and/or psychiatric disabilities may (because of the level and nature of their disability) be unfit to plead and/or be unfit to be tried, or be found not guilty by reason of mental illness. For the procedures to be used in such cases including the orders that can be made and how to refer such matters to the Mental Health Review Tribunal, see the *Criminal Trial Courts Bench Book*²² under “4. Trial instructions R–Z — Unfitness”. At the local court level, a magistrate may need to hold an inquiry to determine whether the person is mentally ill and/or

18 *Evidence Act* 1995 (NSW), s 13.

19 See for example, s 31 of the *Evidence Act* 1995 (NSW), in relation to deaf and/or mute witnesses and s 562ND of the *Crimes Act* 1900 (NSW), in relation to the right of a person with a disability to have a supportive person present, including a person who can assist with interpreting their evidence.

20 *Evidence Act* 1995 (NSW), s 13.

21 MR Kebbell, C Hatton and SD Johnson, “Witnesses with intellectual disabilities in court: What questions are asked and what influence do they have?” (2004) 9 *Legal and Criminological Psychology* 23 at 24.

22 Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, 2002, Sydney, at [4–300], available at: <http://jirs.jc.nsw.gov.au/benchbks/criminal/ch04s05.html> (accessed 8 May 2006).

developmentally disabled, and if determined as such, make an appropriate order for assessment, treatment, or discharge — for the procedures to be used in such cases, see the *Local Courts Bench Book*,²³ under “Mental Health”.

Given the number of people in prison with intellectual and psychiatric disabilities (see statistics at 5.1 above), it is important that these provisions are used, where appropriate, because in some cases the stigma of raising the existence of a mental illness or a developmental disability may mean that, unless the court intervenes at an earlier stage, a person may end up unjustly convicted and/or sentenced. On the other hand, it is also important to ensure that they are not used when they should not be.

Some people with intellectual disabilities are not capable of forming an intention. This means they may have a defence of “diminished responsibility” or “substantial impairment by abnormality of mind” as it is now legally termed, enabling a murder charge to be reduced to a manslaughter charge.²⁴

Some people may also have a similar defence for a range of criminal allegations in that they were temporarily incapable of forming an intention at the particular time — due for example, to intoxication — see the *Criminal Trial Courts Bench Book*, under “4. Trial instructions H–Q — Intoxication”²⁵, “4. Trial instructions H–Q — Intention”,²⁶ and “6. Defences”.²⁷

[The next page is 5401]

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- 23 Judicial Commission of New South Wales, *Local Courts Bench Book*, 1988, Sydney, under “Mental Health”, commencing at [4000], and particularly at “Mental Health (Criminal Procedure) Act 1990 — Inquiries under Pt 3 (Persons before the court apparently suffering mental (illness))”, commencing at [4100].
- 24 *Crimes Act 1900* (NSW), s 23A. See also Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, 2002, Sydney, under “6. Defences — Diminished responsibility”.
- 25 Judicial Commission of New South Wales, op cit n 22 at [3–250], available at: <http://jirs.jc.nsw.gov.au/benchbks/criminal/ch03s05.html> (accessed 8 May 2006).
- 26 Judicial Commission of New South Wales, op cit n 22 at [3–200], available at: <http://jirs.jc.nsw.gov.au/benchbks/criminal/ch03s04.html> (accessed 8 May 2006).
- 27 Judicial Commission of New South Wales, op cit n 22 at [6–000], available at: <http://jirs.jc.nsw.gov.au/benchbks/criminal/ch06.html> (accessed 8 May 2006).

5.4 Practical considerations

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

Many people with disabilities need adjustments to be made in order for them to be able to give evidence effectively. Some of these may take some discussion to work out exactly what is required, and then some time to organise.

Hopefully, the court will have advance notice of any such possible needs from the person themselves, their support person or carer, or their legal representative. At other times, the court may not find out a person's needs until they appear.

The main considerations to take into account are:

- ▣ **In general, court and judicial officers should be flexible**, and sometimes think “outside the square”, in order 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, the court should first investigate the option(s) *closest* to providing the usual court experience.** But, sometimes, due to the nature of the particular person's needs, the court may need to make more significant adjustments that will result in providing a court experience that is different from usual, while still ensuring that all the necessary legal conditions are met.
- ▣ **In all cases, it is critical that the court finds out precisely what barriers (if any) the particular person with a disability faces in attending court and/or giving their evidence, and then discusses with them** (either directly, or via their support person or carer, or their legal representative) **what needs they have and how these could best be met. However, note that some people** (and particularly people from some ethnic and Indigenous backgrounds) **may be reluctant to identify as having a disability, and/or find direct questions related to any disability intrusive**, in which case the court may need to take a more confidential or discreet approach to finding out that person's needs (if any).
- ▣ **Never make assumptions** about what a particular person with a disability's needs may or may not be.
- ▣ **Some examples of adjustments that may need to be made and that are within the court's power to make are listed below.**
- ▣ **While in some cases, providing these adjustments might delay the start or continuation of proceedings, and/or cost money to provide, this needs to be balanced against the particular person's right to be able to give their evidence effectively and/or act as a juror.**
- ▣ **Some examples of adjustments that may need to be made are:**
 - **Moving the court** — to a more accessible courtroom or venue — including, for example, a particular person's home or hospital room.
 - **Changing the physical layout of the court** — for example, allowing a witness to present their evidence from the bar table, or from a stretcher.
 - **Providing assistance with physical entry to the court.**
 - **Allowing a person to have prior access to the court** — in order to familiarise themselves with it.

- Providing an “infra-red assistive hearing device” (a “hearing loop”).²⁸
- Allowing evidence to be received by phone, and maybe using a telephone typewriter (TTY) in place of a normal phone.²⁹
- Making sure an Auslan (Australian Sign Language) interpreter³⁰ is available, and/or that a person can use their support person effectively as an interpreter — that is, to help them give their evidence.³¹
- 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.
- Allowing someone to have a support person with them at all times — close by and within their sight.³²
- Making use of the Mental Health Liaison Officer — if there is one attached to your court.
- Providing a computer/technology assisted communication device, or allowing someone to use their own — for example, a lightwriter to type in their evidence and have it relayed to the court in speech form, or real-time closed captioning for a person who is deaf. It is often best if the person can bring their own device and work with the court’s technology staff to make it work in the courtroom, as this will ensure for example that any synthesised voice is appropriate to their gender, and that the person is familiar with the technology.
- Allowing people to use symbol boards or other such communication aids.
- Allowing closed-circuit television (CCTV) or similar technology, and/or screens to be used, and/or closing the court (as often used for receiving a child or young person’s evidence) for those for whom it is too overwhelming or frightening to appear openly in court — see Section 6.3.3 for further information about CCTV and similar technology, screens, etc. and for the directions you may need to give to juries early on in the proceedings about their use.

28 See the NSW Attorney General Department’s internal “infolink” website — and the “accesslink” menu for more information about this and how to get one.

29 See the NSW Attorney General Department’s internal “infolink” website — and the “accesslink” menu for more information about this and how to use one.

30 Auslan interpreters can be booked via the Deaf Education Network, the Deaf Society of NSW or the Community Relations Commission For a Multicultural NSW (CRC) — see 5.5 for contact details. For criminal matters, courts have a contract with the CRC to provide Auslan interpreters free of charge.

31 Section 562ND of the *Crimes Act* 1900 (NSW) provides that a person has a right to choose a support person of their own choice, and that that person may act as an interpreter by assisting them to give their evidence.

32 For information provided by the NSW Attorney General’s Department for people with cognitive disabilities who have to go to court, and for people who may support them through the court process, see: www.lawlink.nsw.gov.au/Lawlink/Corporate/ll_corporate.nsf/pages/attorney_generals_department_going_to_court (accessed 25 May 2006). Note that the Criminal Justice Support Network of the Intellectual Disability Rights Service (IDRS) provides and advises support people for people with an intellectual disability who are witnesses or defendants in a criminal matter — see 5.5 below.

- Being flexible and/or more precise with the timing of listings, and/or the timing of starting and/or finishing receiving a particular person’s evidence — for example, in order to fit with a particular person’s requirements in relation to eating, medication, treatment, transport and other such needs.
 - Having more frequent breaks — see 5.4.4 below.
 - Making sure that any documents critical to a person with a disability’s court appearance needs are provided in advance in a format that is appropriate for them, and/or that they can be read to them and signed.³³
- Diversity Services within the Attorney General’s Department of NSW can provide further information or advice about how to meet the needs of a particular person with a disability — Ph: (02) 9228 8460, email: diversity_services@agd.nsw.gov.au.

5.4.2 Oaths, affirmations and declarations

Points to consider:

- In most cases, people with disabilities will be able to take an oath or affirmation in the same way as anyone else - as long as, in some cases, the appropriate adjustments are made so that they can successfully communicate their evidence — see 5.4.1 above and 5.4.3 below.
- Whether a person with a disability takes an oath or an affirmation and the type of oath or affirmation they should take will largely depend on their religious affiliation or lack of religious affiliation — see Section 4.4.2.
- It may be necessary for some people with disabilities (in particular those with severe intellectual disabilities) to give unsworn evidence — as long as they can tell the difference between telling the truth and lying. If this seems necessary, you should follow the boxed guidance given in Section 6.3.2, but make sure that you do not “talk down” to the person — they are *not* a child. For more information about how to communicate with a person with an intellectual disability, see 5.4.3.4 below.
- If you are unsure about the capacity of a particular person with a disability to give even unsworn evidence you may need to consider requesting an educational psychologist’s assessment.

³³ For more information about different formats that may be needed see Judicial Commission of New South Wales, *Disabilities information*, 2001; or the NSW Attorney General’s Department’s internal “infolink” website — and the “accesslink” menu.

5.4.3 Language and communication³⁴

5.4.3.1 Initial considerations

Just the same as anyone else who appears in court, a person with a disability needs to understand what is going on, the meaning of any questions asked of them, and to be sure that their evidence and replies to questions are adequately understood by the court.

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

As indicated in 5.4.1, above, some people with disabilities will need some form of communication aid or interpreter to be made available for them to be able 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, and/or the manner in which they are given information about what is going on.

Some people who do not need a communication aid or interpreter may also need adjustments to be made in the level or style of language used and/or the manner in which they are given information about what is going on.

5.4.3.2 General communication guidance

Points to consider:

- ▣ Use the appropriate disability language and terminology — see 5.2.3 above.
- ▣ Use an appropriate communication aid or interpreter (see 5.4.1 above) and explain to any jury the reason for its/their use, and that they must not discount the person's evidence because of the manner in which it is communicated.³⁵
- ▣ Do not use any language that is discriminatory or sounds discriminatory — for example — “Could you explain to the court what you did step by step...” is better than “How could anyone with your disability...?”
- ▣ Do not “talk down” to a person with a disability as though they are a child.
- ▣ Talk to the person themselves, not their support person³⁶ or interpreter — for guidance on working with an interpreter, see Section 3.3.1.5.
- ▣ Do not assume (or in any way appear to assume) that a person with a disability who has some communication adjustment need is intellectually any less capable than someone who has no such need.

34 Much of the information in 5.4.3 is drawn from *Disability awareness program — Creating access to our courts*, by kind permission of the National Judicial College of Australia and the NSW Attorney General's Department; and Judicial Commission of NSW, *Disabilities information*, 2001, Sydney.

35 In relation to witnesses who are deaf or mute, see also s 31 of the *Evidence Act 1995* (NSW).

36 For information provided by the NSW Attorney General's Department for people with cognitive disabilities who have to go to court, and for people who may support them through the court process, see: www.lawlink.nsw.gov.au/Lawlink/Corporate/ll_corporate.nsf/pages/attorney_generals_department_going_to_court (accessed 25 May 2006). Note that the Criminal Justice Support Network of the Intellectual Disability Rights Service (IDRS) provides and advises support people for people with an intellectual disability who are witnesses or defendants in a criminal matter — see 5.5 below.

- Do not refer to a person’s disability unless this is relevant to assessing their communication (or other accessibility) needs, and/or to the matters before the court.
- Whenever a person with a disability appears to be having difficulty in communicating their evidence or in understanding what is required of them, double-check directly with them (or 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 5.4.3.3 below.
- As prescribed by law, intervene if, for example, cross-examination appears to be breaking any of the above points.³⁷
- Follow the points given in 5.4.3.3 to 5.4.3.6 below as relevant.

5.4.3.3 Level and style of language to suit particular needs

- **People with physical disabilities** — you may need to adjust your style of language (that is, the way you speak, as opposed to the level of your language) in order to communicate effectively with some people with physical disabilities — see 5.4.3.4 below.
- **People with intellectual disabilities** — you will almost always need to adjust both the level *and* the style of your language in order to be able to communicate effectively with a person with an intellectual disability. For some techniques, see 5.4.3.5 below.
- **People with an acquired brain injury** — you may need to adjust the style *and/or* the level of your language in order to be able to communicate effectively with most people with an acquired brain injury. For some techniques, see 5.4.3.6 below.
- **People with psychiatric disabilities or behaviour differences** — you may need to adjust the style *and/or* the level of your language to be able to communicate effectively with some people with psychiatric disabilities or behaviour differences. For some techniques see 5.4.3.7 below.

³⁷ Note that s 41 of the *Evidence Act 1995* (NSW) and s 275A of the *Criminal Procedure Act 1986* (NSW), enable you to disallow improper questions (for example, misleading, or unduly annoying, harassing, intimidating, offensive or repetitive) questions. Section 275A of the *Criminal Procedure Act 1986* states that you *must* disallow such questions, and also provides that questions must not be put to a witness in a “manner or tone that is belittling, insulting or otherwise inappropriate”. Both sections specifically refer to the need to take account of the witness’s “mental, intellectual or physical disability”. Sections 26 and 29(1) of the *Evidence Act 1995* also enable you to control the manner and form of questioning of witnesses, and s 135(b) of the *Evidence Act 1995* allows you to exclude any evidence that is misleading or confusing.

5.4.3.4 Communication techniques for people with physical disabilities

Points to consider:

- ▣ **For a person who is deaf or hearing impaired** — you (and others in court) may need to simply make sure that your mouth is uncovered, or your volume is high enough.
- ▣ **For a person who is blind or has a visual impairment** — you (and others in court) may need to specifically identify items you are talking about, rather than pointing at them, or referring to them as “this” or “that” item.
- ▣ **For a person with a speech impairment** — you (and others in court) may simply need to be patient, and listen carefully until you are able to more easily understand them. The adjustment isn’t usually for the listener to alter their speech, but rather, a willingness to listen to “different types” of speech and be patient.
- ▣ **For a person using communication equipment** — you (and others in court) may need to adjust how you speak to suit the technology needs of the equipment being used to facilitate communication with, for example, a person with a speech impairment. The person using any such equipment should be able to tell you if there is anything you need to do to make communication work better.
- ▣ **But note that it is always best to ask if you think there might be any special communication style needs for a person with a physical disability** — in case they think they do not need to tell you, or for some reason do not want to volunteer the information.
- ▣ **You may also need to intervene if others in court are not directing their questions in an appropriate manner³⁸** — as prescribed under s 41 of the *Evidence Act 1995* (NSW).

38 Note that s 41 of the *Evidence Act 1995* (NSW) and s 275A of the *Criminal Procedure Act 1986* (NSW), enable you to disallow improper questions (for example, misleading, or unduly annoying, harassing, intimidating, offensive or repetitive) questions. Section 275A of the *Criminal Procedure Act 1986* states that you *must* disallow such questions, and also provides that questions must not be put to a witness in a “manner or tone that is belittling, insulting or otherwise inappropriate”. Both sections specifically refer to the need to take account of the witness’s “mental, intellectual or physical disability”. Sections 26 and 29(1) of the *Evidence Act 1995* also enable you to control the manner and form of questioning of witnesses, and s 135(b) of the *Evidence Act 1995* allows you to exclude any evidence that is misleading or confusing.

5.4.3.5 Communication techniques for people with intellectual disabilities

Points to consider:

- ▣ Note that many people do not want to acknowledge or admit 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 person³⁹ — the support person will tell you if they think the person does not understand.
- ▣ Slow down your speech to a pace that is easy to follow.
- ▣ Use language that is as simple and direct as possible. But, do not “talk down” to a person with an intellectual disability — they are not a child. 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 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 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 instead — “Do you want a break?”, not “If you think that you might like a break, let me know”.
 - Use concrete, not abstract, concepts.
 - Use legal jargon only when necessary, and if you do need to use it explain it in plain English. For example, provide plain English explanations of words and phrases such as affidavit, affirmation, arbitration, bail, bond, cross-examination, evidence, legislation, probationary period, cross-examination, writ of execution, seizure, PSO, statute, rescission. Never use Latin words or phrases. Use words and phrases like “law”, not “statute” or “legislation”; or “X will now ask you some questions”, not “X will now cross-examine you”; or “What you can tell us about ...”, not “your evidence”; and “against”, not “versus”.

39 For information provided by the NSW Attorney General’s Department for people with cognitive disabilities who have to go to court, and for people who may support them through the court process, see: www.lawlink.nsw.gov.au/Lawlink/Corporate/ll_corporate.nsf/pages/attorney_generals_department_going_to_court (accessed 25 May 2006). Note that the Criminal Justice Support Network of the Intellectual Disability Rights Service (IDRS) provides and advises support people for people with an intellectual disability who are witnesses or defendants in a criminal matter — see 5.5 below.

- Explain what they must do and why, and what is happening carefully and patiently, in short amounts, using simple, direct, non-legal language. Then ask them to tell you what they must do, or what is happening in their own words — so that you can ensure they understand. If necessary, give the explanation in a different way.
- Consider allowing the evidence to be given in narrative form — so as to avoid the person getting muddled and distracted by a series of questions.⁴⁰
- Ask questions one at a time.
- Use open-ended questions — avoid leading questions, and avoid questions soliciting a “yes/no” answer.
- Watch for “pleasing” behaviour — the person may try to give you the answers he/she thinks you want.
- Do not rush them, or appear impatient, and try not to interrupt — allow extra time for answers.
- Try not to direct or pressure them — or, they may change their answer to “please” you or to enable a quick exit.
- Keep questioning as short as possible — watch for emotional or information overload — take breaks if necessary.
- Make sure they can understand any written material they need to understand — it may need to be in large print, in simple direct language, and/or read out to them and/or translated into simple, direct language. 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 follow these points — establish these points as the “ground rules” for cross-examination, if necessary.⁴¹
- Check the language of any prior confession against the language used by the particular person (and indeed assess any such confession more generally against the intellectual ability of the particular person).

40 See *Evidence Act 1995* (NSW), s 29 and Law Reform Commission of NSW, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80, 1996, p 258, available at: www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC (accessed 2 May 2006).

41 Note that s 41 of the *Evidence Act 1995* (NSW) and s 275A of the *Criminal Procedure Act 1986* (NSW), enable you to disallow improper questions (for example, misleading, or unduly annoying, harassing, intimidating, offensive or repetitive) questions. Section 275A of the *Criminal Procedure Act 1986* states that you *must* disallow such questions, and also provides that questions must not be put to a witness in a “manner or tone that is belittling, insulting or otherwise inappropriate”. Both sections specifically refer to the need to take account of the witness’s “mental, intellectual or physical disability”. Sections 26 and 29(1) of the *Evidence Act 1995* also enable you to control the manner and form of questioning of witnesses, and s 135(b) of the *Evidence Act 1995* allows you to exclude any evidence that is misleading or confusing.

5.4.3.6 Communication techniques for people with an acquired brain injury

Points to consider:

- **Each person with an acquired brain injury is different and is therefore likely to have their own set of communication needs** — depending, on how, and how seriously, the injury has affected their ability to process information and/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, and then asked to repeat anything you do not understand.
- **Always be calm, patient and respectful** — no matter how unexpectedly the person behaves. Ignore any disinhibited behaviour if possible. Otherwise ask them to stop it and explain why you are doing this.
- **If they appear confused, or appear to be having difficulties with concentration, remembering or processing information:**
 - Speak more slowly.
 - Explain what you intend to do so there are no surprises.
 - Make sure they have understood what you are asking them to do — get them to repeat this in their own words.
 - Use simple, direct non-legal language — as explained above at 5.4.3.4.
 - Use some or all of the other techniques listed at 5.4.3.4 above, as necessary.
- **If their words or thoughts are jumbled:**
 - Be patient — they may believe they are speaking normally and may be trying very hard to be understood.
 - Assist them by picking out key words that are relevant to your purpose, one at a time — for example, “money” and then ask them what they remember about the money. Keep doing this key word by key word.
- **If necessary, allow additional time for the person’s legal representative to explain proceedings to them.**
- **Make sure they can understand any written material they need to understand** — it may need to be in large print, in simple direct language, and/or read out to them and/or translated into simple, direct language.
- **As prescribed by law, intervene if others (for example, during cross-examination) are not following these points** — establish these points as the “ground rules” for cross-examination, if necessary.⁴²

42 Note that s 41 of the *Evidence Act 1995* (NSW) and s 275A of the *Criminal Procedure Act 1986* (NSW), enable you to disallow improper questions (for example, misleading, or unduly annoying, harassing, intimidating, offensive or repetitive) questions. Section 275A of the *Criminal Procedure Act 1986* states that you *must* disallow such questions, and also provides that questions must not be put to a witness in a “manner or tone that is belittling, insulting or otherwise inappropriate”. Both sections specifically refer to the need to take account of the witness’s “mental, intellectual or physical disability”. Sections 26 and 29(1) of the *Evidence Act 1995* also enable you to control the manner and form of questioning of witnesses, and s 135(b) of the *Evidence Act 1995* allows you to exclude any evidence that is misleading or confusing.

5.4.3.7 Communication techniques for people with psychiatric disabilities or behaviour differences

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. The behaviour may be temporary, episodic or relatively regular. It may be due to a diagnosed psychiatric disability or dementia, an undisclosed acquired brain injury, an undisclosed intellectual disability, and/or they may be affected by alcohol or drugs (either prescribed or illicit).
- ▣ **Unless it's relevant to the matter(s) before you, it really does not matter what the disability is or its aetiology.** Note also that many people do not want to acknowledge or admit they have any memory or cognitive disabilities, so they will feign understanding.
- ▣ **Ask the person the best way to assist them in understanding and remembering.**
- ▣ **For accused persons in summary matters, consider if it would be useful to make use of the court Mental Health Liaison Officer** — if there is one attached to your court, **or alternatively the Statewide Community Court Liaison Service** — see 5.5.
- ▣ **You may also need to ask questions to try to find out if it would be better to delay taking their evidence** until, for example, the behavioural effect of any medication or drug or alcohol use has worn off or kicked in (as appropriate). The following techniques may help.
- ▣ **If their words or thoughts are jumbled, or they appear confused, or appear to be having difficulties with concentration, remembering or processing information** — follow the relevant points in 5.4.3.5 above.
- ▣ **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 in order to help promote greater 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 do understand what they are saying and let them know that — do not just say “I understand” or “I see” as this may well inflame them. Instead paraphrase what they are saying back to them.
 - Deal only with the facts related to why they are in court — if necessary, set ground rules to keep them focused.

- **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 your reasons behind your actions or decisions.
 - Call security if anyone is threatened.
- **If they are highly anxious or paranoid:**
 - Allow them to attend the court prior to the proceedings to familiarise themselves with it, and check every part of it.
 - If available, consider holding the hearing in a less threatening environment, such as a conference room.
 - Explain the purpose of any microphones, tape recording and video cameras etc at the beginning of the hearing.
 - Explain the roles of everyone in the courtroom.
 - Speak calmly and slowly.
- **If they are delusional:**
 - Do not argue with them about the delusion, as this could only inflame the situation — the delusions are very real to them.
 - Acknowledge their stated delusion but make your reality clear — for example, “I understand you believe you are X...but it is not real to me”.
 - Gently focus them on their reason for attendance.
 - Explain the reasons behind your actions.
 - If necessary, call a break.
- **As prescribed by law, intervene if others (for example, during cross-examination) are not following these points** — establish these points as the “ground rules” for cross-examination, if necessary.⁴³

43 Note that s 41 of the *Evidence Act 1995* (NSW) and s 275A of the *Criminal Procedure Act 1986* (NSW), enable you to disallow improper questions (for example, misleading, or unduly annoying, harassing, intimidating, offensive or repetitive) questions. Section 275A of the *Criminal Procedure Act 1986* states that you *must* disallow such questions, and also provides that questions must not be put to a witness in a “manner or tone that is belittling, insulting or otherwise inappropriate”. Both sections specifically refer to the need to take account of the witness’s “mental, intellectual or physical disability”. Sections 26 and 29(1) of the *Evidence Act 1995* also enable you to control the manner and form of questioning of witnesses, and s 135(b) of the *Evidence Act 1995* allows you to exclude any evidence that is misleading or confusing.

5.4.4 Breaks and adjournments

Points to consider:

- **Some people with disabilities (and/or their carers, support people or interpreters, or guide dogs), may need more frequent breaks** — for example, to be able to eat/drink, go to the toilet, take medication, get back their concentration, become less anxious, and/or move from the one position.
- **You may also need to adjourn proceedings** — in order to move to another 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.
- **While it is critical to minimise delays, it is also critical to ensure adequate and sufficient breaks for these purposes** — otherwise, the particular person may not be able to give their evidence (or act as a juror) effectively.
- **It is a good idea to specifically give a person with a disability, and any support person, interpreter or carer, permission to ask for a break** if they need one, and then to give them a break when they do ask.
- **But, as they will not always ask, you also need to watch for signs that a break might be needed** — for example, wandering concentration, stress and/or discomfort and insert a break wherever appropriate.
- **It is also a good idea to use any breaks to make sure there is sufficient water available on the witness stand, and elsewhere** — many people who are taking medications need to drink water frequently.

5.4.5 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 or disabilities had any influence on the matter(s) before the court? If so, where possible, take appropriate account of any such influence.** For example, you may need to decide whether the law allows you to take account of any such influence and, then, as appropriate and at the appropriate time in the proceedings, so as to ensure that justice is done and seen to be done, explain why any such influence can/should be taken into account, or cannot/should not be taken into account. For example, you may need to explain this in any direction you make to the jury during the proceedings or before they retire, and in your decision-making or sentencing — see 5.4.6 and 5.4.7 below.

- Ensure that the person with a disability is, however, being treated as an individual and with respect — for example, as prescribed by law, you may need to intervene if any stereotyped views or assumptions about people with disabilities, or people with particular types of disabilities, appear to be unfairly behind any questioning.⁴⁴

5.4.6 Directions to the jury — points to consider

As indicated at various points in 5.4, it is important that you ensure that the jury does not allow any ignorance of people with disabilities, or any stereotyped or false assumptions about people with disabilities or the manner by which a particular person’s evidence was presented to unfairly influence their judgment.

This should be done in line with the *Criminal Trial Courts Bench Book*⁴⁵ or *Local Courts Bench Book*⁴⁶ (as appropriate), and you should raise any such points with the parties’ legal representatives first.

For example, you may need to provide specific guidance as follows:

- Caution them against making any false assumptions about the evidence of people with disabilities, or particular types of disabilities.
- Remind them of any directions you made earlier in the proceedings in relation to how they must treat evidence that was presented using a communication aid, interpreter/support person, or via CCTV/behind a screen, etc — see 5.4.3.2 above.
- Draw their attention to any evidence presented in court about the **particular person’s capacities** — for example, in relation to intention or intent, and any defences they may have), the actual evidence presented by the person, any conflicting evidence presented by others, and how they should relate these matters to the points they need to decide.

44 Note that s 41 of the *Evidence Act 1995* (NSW) and s 275A of the *Criminal Procedure Act 1986* (NSW), enable you to disallow improper questions (for example, misleading, or unduly annoying, harassing, intimidating, offensive or repetitive) questions. Section 275A of the *Criminal Procedure Act 1986* states that you *must* disallow such questions, and also provides that questions must not be put to a witness in a “manner or tone that is belittling, insulting or otherwise inappropriate”. Both sections specifically refer to the need to take account of the witness’s “mental, intellectual or physical disability”. Sections 26 and 29(1) of the *Evidence Act 1995* also enable you to control the manner and form of questioning of witnesses, and s 135(b) of the *Evidence Act 1995* allows you to exclude any evidence that is misleading or confusing.

45 Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, 2002, Sydney, available at: copy url from 7.3.6, note 31, p 7308.

46 Judicial Commission of New South Wales, *Local Courts Bench Book*, 1988, Sydney.

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

Your sentencing, decision(s) and/or written judgment or decision must be fair and non-discriminatory and preferably be seen to be so by all those it involves — for example, any person with a disability and any carer(s).⁴⁷

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 also considers it/them to be fair and non-discriminatory, you may need to pay due consideration to (and indeed specifically allude to) some of the points raised in the rest of Section 5.4 (including the points made in 5.4.6 immediately above) and in Section 5.3 that are relevant to the particular case.
- Whether to allow a victim impact statement to be read out in court.⁴⁸
- Note that many people with disabilities struggle financially because of the barriers against full or adequately remunerated employment and/or the financial costs associated with their disability — so a specific level of fine for them will often mean considerably more than the same level of fine for others.
- Ensure you do not under-value the financial costs associated with any particular person's disability in relation to such matters as compensation, property division and inheritance — see 5.1 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 need — see 5.4.3 above. For example, it may be appropriate for it to be written down at the time of sentencing (in as simple and direct English as possible), and then given to the person and/or their legal representative — so as to help ensure understanding and compliance.

[The next page is 5501]

47 See also Judicial Commission of New South Wales, *Sentencing Bench Book*, 2006, Sydney; I Potas, *Sentencing Manual: Law, Principles and Practice in New South Wales*, 2001, Judicial Commission of New South Wales and Lawbook Co, Sydney, Chapter 6, under "Intellectual, physical condition", pp 284–287; and *R v Henry* (1999) NSWLR 346 at [10]–[11]. Further, in relation to people with psychiatric and/or intellectual disabilities, see S Traynor, "Sentencing Mentally Disordered Offenders: The Causal Link" (2002) 23 *Sentencing Trends and Issues*, Judicial Commission of NSW, Sydney; *Veen (No 2) v The Queen* (1988) 164 CLR 465; *R v Engert* (1995) 84 A Crim R 67 at 69; *R v Israil* [2002] (NSW) CCA 255 at [18]–[27].

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

5.5 Further information or help

- **Information and advice about accommodating the needs of a particular person with a disability:**
 - **The NSW Attorney General Department’s internal “infolink” website** — under the “accesslink” menu.
 - **Diversity Services within the NSW Attorney General’s Department** — Ph: (02) 9228 8460, email: diversity_services@agd.nsw.gov.au
- **Auslan interpreter:**
 - **The Community Relations Commission For a Multicultural NSW (CRC)** — note that for criminal matters, courts have a contract with the CRC to provide Auslan interpreters free of charge — Ph: (02) 8255 6767
 - **The Deaf Education Network** — Ph: (02) 8845 9444
 - **The Deaf Society of NSW** — Ph: (02) 9893 8555
- **General information and advice about people with disabilities:**
 - **Justice Health**
PO Box 150
Matraville NSW 2036
Ph: (02) 9289 2977
Fax: (02) 9311 3005
www.justicehealth.nsw.gov.au
 - **NSW Disability Discrimination Legal Centre**
52 Pitt Street
Redfern NSW 2016
PO Box 989
Strawberry Hills NSW 2012
Ph: (02) 9310 7722
Fax: (02) 9310 7788
TTY: (02) 9310 4320
General email: info@ddlcnsw.org.au
www.ddlcnsw.org.au
 - **Disability Council of NSW**
Level 19, 323 Castlereagh Street
Sydney NSW 2000
Phone/TTY: (02)9211 2866
Fax: (02) 9211 2271
 - **People With Disabilities Australia**
PO Box 666
Strawberry Hills NSW 2012
Ph: (02) 9319 6622
Freecall: 1800 422 015
TTY: (02) 9318 2138
Fax: (02) 9318 1372

- **Multicultural Disability Advocacy Association of NSW**
PO Box 381
Parramatta NSW 2150
Ph: (02) 9891 6400
Freecall: 1800 629 072
Fax: (02) 9635 5355

- **More specific information and advice about people with particular types of disabilities:**

Brain injury

- **Brain Injury Association of New South Wales**
17 Macquarie Road
Auburn NSW 2144
Ph: (02) 9749 5366
Freecall: 1800 802 840
Fax: (02) 9749 5608

Psychiatric disability or behaviour disorder

- **Alzheimer's Association NSW**
PO Box 6042
North Ryde Private Boxes
NSW 1670
Ph: (02) 9805 0100
- **The Mental Health Liaison Officer** – if there is one attached to your court, or alternatively:
Statewide Community Court Liaison Service
Suite 20, Level 7
491 Kent Street
Sydney NSW 2000
Ph: (02) 8295 7004
- **Mental Health Coordinating Council**
PO Box 668
Rozelle 2039
Ph: (02) 9555 8388
Fax: (02) 9810 8145
- **Mental Health Advocacy Service**
Level 4, 74–76 Burwood Road
Burwood NSW 2134
Ph: (02) 9745 4277
TTY: (02) 9745 4277
Fax: (02) 9744 6936

- **NSW Association for Mental Health**
62 Victoria Road
Gladesville NSW 2111
Ph: (02) 9816 5688
Freecall: 1800 674 200
Fax: (02) 9816 4056

- **Transcultural Mental Health Centre**
Cumberland Hospital
5 Fleet Street
Parramatta NSW 2151
Ph: (02) 9840 3800
Freecall: 1800 648 911
Fax: (02) 9840 3755

- **Mental Health Information for Rural and Remote Australia**
62 Victoria Road
Gladesville NSW 2111
Ph: (02) 9879 5341 (9.00am – 4.30pm)
Freecall: 1300 785005 (1.30pm – 4.30pm)

- **ACON (AIDS Council of NSW)**
9 Commonwealth Street
Surry Hills NSW 2010
PO Box 350
Darlinghurst NSW 1300
Ph: (02) 9206 2000
Fax: (02) 9206 2069
Freecall: 1800 063 060
Email: acon@acon.org.au

Intellectual disability

- **NSW Council for Intellectual Disability**
Level 1, 418a Elizabeth Street
Surry Hills 2019
Ph: (02) 9211 1611
Freecall: 1800 424 065
Fax: (02) 9211 2606

- **Intellectual Disability Rights Service Inc.**
Suite 2c, 199 Regent Street
Redfern NSW 2016
Ph: (02) 9318 0144
Freecall: 1800 666 611 (NSW areas outside Sydney)
Fax: (02) 9318 2887
Email: info@idrs.org.au
www.idrs.org.au

- **Criminal Justice Support Network** (operated by the Intellectual Disability Rights Service) — provides trained court support people for people with an intellectual disability who are defendants or witnesses in criminal matters — in Sydney, Southern NSW and the Hunter region. Also provides advice for others acting as such support people
Ph: 1300 665 908 (24 hours–7 days per week)

- **Self Advocacy Sydney Inc**
Suite 4, 2a Newton Road
Cnr Newton & Flushcombe Roads
Blacktown NSW 2148
Ph: (02) 9622 3005
Fax: (02) 9622 6030
www.sasinc.com.au

Physical disability

- **Deaf Society of NSW**
Suite 401, 169 Macquarie Street
Parramatta NSW 2150
Ph: (02) 9893 8555
TTY: (02) 9893 8858
Fax: (02) 9893 8333

- **Self Help for Hard of Hearing (SHHH) Australia**
1334 Pacific Highway
Turrumurra NSW 2074
Ph: (02) 9144 7586
TTY: (02) 9144 7586
Fax: (02) 9449 2381

- **Royal Blind Society of NSW**
4 Mitchell Street
Enfield NSW 2136
Ph: (02) 9334 3333
Freecall: 1800 424 359
TTY: (02) 9334 3260
Telebraille: (02) 9334 3466
Fax: (02) 9747 5993

- **Guide Dog Association of NSW & ACT**
2–4 Thomas Street
Chatswood NSW 2057
Ph: (02) 9412 9300
Fax: (02) 9412 9388
www.guidedogs.com.au

- **Blind Citizens Australia, NSW Branch**
Ph: (02) 97447366

- **Physical Disability Council of NSW**
184 Glebe Point Road
Glebe NSW 2037
Ph: (02) 9552 1606
Freecall: 1800 688 831
Fax: (02) 9552 4644

- **Spinal Cord Injuries Australia Ltd**
Level 1, 184 Bourke Road
Alexandria NSW 2015
Ph: (02) 9693 1666

- **Northcott**
1 Fennell Street
North Parramatta NSW 2151
Ph: (02) 9890 0100
Freecall: 1800 506 071
Fax: (02) 9683 2827
www.northcott.com.au

- **Paraquad**
6 Holker Street
Newington NSW 2127
Ph: (02) 8741 5600
Freecall: 1800 424 096
Fax: (02) 8741 5650

- **Multiple Sclerosis (MS) Society of NSW**
11th Floor, 477 Kent Street
Ph: (02) 9287 2929
Freecall: 1800 042 138
Fax: (02) 9287 2987

- **ACON (AIDS Council of NSW)**
9 Commonwealth Street
Surry Hills NSW 2010
Ph: (02) 9206 2000
Fax: (02) 9206 2069
Freecall: 1800 063 060
Email: acon@acon.org.au

5.6 Further reading

L Babb, “New Mental Health Criminal Procedures” (2006) 18(1) *Judicial Officers’ Bulletin* 1.

L Byrnes, “Justice and intellectual disability” (1997) 22 *Alternative Law Journal* 243.

Committee on Intellectual Disability and the Criminal Justice System, “People with an Intellectual Disability — Giving Evidence in Court”, 2000, available at: www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/CLRD_intell_disab (accessed 2 May 2006).

S Fazel and J Danesh, “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 (accessed 2 May 2006).

Judicial Commission of New South Wales, *Disabilities Information*, 2001, Sydney.

Law Reform Commission of NSW, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80, 1996, available at: www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC (accessed 2 May 2006).

[The next page is 5701]

5.7 Your comments

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

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

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

Section 11 contains information about how to send us your feedback.

[The next page is 6101]