THE BUGMY BAR BOOK: PRESENTING EVIDENCE OF DISADVANTAGE AND EVIDENCE CONCERNING THE SIGNIFICANCE OF CULTURE ON SENTENCE

"I am not prepared to accept that an offender who has the start in life that the respondent had bears equal moral responsibility with one who has had what might be termed a "normal" or "advantaged" upbringing. Common sense and common humanity dictate that such a person will have fewer emotional resources to guide his (or her) behavioural decisions."

– *R v Millwood* [2012] NSWCCA 2[1]

"*The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way*."

- *Bugmy v The Queen* (2013) 249 CLR 571 [2]

Criminal defence lawyers tender evidence on sentence concerning the background of disadvantage and deprivation of their clients on a regular basis, knowing instinctively that a background of deprivation and disadvantage has a holistic impact on a person's life narrative and nearly always provides at least a backdrop for criminal conduct. They come to know through experience that the underlying causes of offending are seldom isolated to a single factor, but are more likely to be multi-dimensional and, particularly where a mental health condition co - exist, may be genetic, social and/or environmental. Perhaps less appreciated and understood in the sentencing space is the significance of positive and supportive aspects of an offender's culture or community that may be relevant to the application of principle in the sentencing process.

The law relating to the relevance of an offender's exposure to disadvantage to the sentencing exercise continues to evolve in the case law of New South Wales and other States and Territories in Australia, the consideration of which forms Part 1 of this paper.

How the evidence of disadvantage might be best presented forms the second half of this paper and is the impetus for the multi-agency exercise of collating and distilling authoritative research concerning the potential impact of various forms of disadvantage on persons appearing before the criminal justice system known as the "*Bugmy* Bar Book" which has application to nationally recognised and considered forms of disadvantage.

The paper also refers to the collation of a body of research that establishes how central connections to community and culture are to a person's wellbeing and capacity for rehabilitation which may be relevant to imposing appropriate sentencing outcomes that enhance the prospects of rehabilitation.

[1] Per Simpson J, with whom Bathurst CJ and Adamson J agreed, at [69].

[2] At [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

Finally the paper provides an analysis of the means by which various studies and research may be put before the court.

It ought be noted that this paper does not profess to set out a comprehensive analysis of the development of case law concerning matters related to disadvantage suffered by some members of Indigenous communities. For further consideration of the background on this area of jurisprudence I have had reference the many excellent papers available on this subject that have developed over recent years.[3] This paper ought be read in conjunction with the paper of Rebecca McMahon entitled "The Bar Book Project: Making use of the Bar Book in sentencing and s 32 Proceedings" also available on the *Bugmy* Bar Book webpage.

[3] See Judge Dina Yehia SC, 'Presenting *Bugmy* Disadvantage' (Public Defenders Seminar, 5 September 2018); Judge Stephen Norrish QC, 'Sentencing Aboriginal Offenders – Striving for Equality before the Law' (Conference Paper, Legal Aid Commission Workshop, 1 August 2017) 6; Judge Stephen Norrish QC, 'Sentencing Indigenous Offenders: Not Enough "Judicial Notice"?' (Conference Paper, Judicial Conference of Australia Colloquium Sydney, 13 October 2013); Justice Stephen Rothman AM, 'Disadvantage and Crime: The Impact of *Bugmy* and *Munda* on Sentencing Aboriginal and other Offenders' (Conference Paper, Public Defenders Criminal Law Conference, 18 March 2018); Judge Andrew Haesler SC, 'Applying *Bugmy*: An Address to the NSW Legal Aid Commission's Aboriginal Services Branch (Conference Paper, Legal Aid Aboriginal Cultural Competency Branch Training For Legal Practitioners Day, 31 July 2018).

PART I: THE INTERPLAY BETWEEN A HISTORY OF DISADVANTAGE AND SENTENCING PRINCIPLES

To start from first principles, the relevance of an individual's background of disadvantage does not occur within a vacuum divorced from general sentencing principles. The principles of sentencing are set out in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and in the factors enumerated in s 16A of the *Crimes Act 1914* (Cth):[4]

> 3A The purposes for which a court may impose a sentence on an offender are as follows:
>
> (a) To ensure that the offender is adequately punished for the offence.
>
> (b) To prevent crime by deterring the offender and other persons from committing similar offences,
>
> (c) To protect the community from the offender,
>
> (d) To promote the rehabilitation of the offender,
>
> (e) To make the offender accountable for his or her actions,
>
> (f) To denounce the conduct of the offender,
>
> (g) To recognise the harm done to the victim of the crime and the community.

How a person's background plays into the principles to be considered and discretion exercised by the judicial officer are complex, and the subject of considerable judicial comment. The questions posed by Simpson J in *Millwood* are instructive as a starting point: should a person who has suffered from a deprived background bear equal moral culpability to a person who has not so suffered? By association, should such a person receive a lesser punishment as a result of those same factors? Is such a person a good vehicle for general deterrence and should that person's conduct be denounced in the same way as the conduct of someone who did not have those detrimental aspects to their background? Is not the harm inflicted by a person from such a background the same harm as that inflicted by someone who was not so affected? Countervailing considerations include: the person's capacity for rehabilitation and whether such a person can escape or overcome the social and psychological ramifications that flow from exposure to disadvantage. Where they cannot, does not the protection of the community take precedence over the promotion of rehabilitation?

The conflicting nature of these sentencing principles is what makes the exercise of the sentencing discretion so difficult,[5] recognised at times to pull the sentencing judge in different directions in the exercise of what has been described as the "instinctive synthesis" of the sentencing process: McHugh J in *Markarian v The Queen* [2005] HCA 25 at [51]. The Court in *Muldrock v R* (2011) 244 CLR 120 said in respect of the s 3A principles (at [20]):

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[4] Section 16A of the *Crimes Act 1914* (Cth) sets out the factors to be taken into account by the sentencing court but does not exclude the application of State sentencing or common law sentencing principles: *Wong* (2001) 207 CLR 584; *Bui v DPP* (Cth) [2012] HCA 1; 244 CLR 638 and *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1.

[5] *Ryan v The Queen* (2001) 206 CLR 267 per Hayne J at [133]–[134].

> The purposes there stated are the familiar overlapping and, at times, conflicting, purposes of criminal punishment under the common law. There is no attempt to rank them in order of priority and nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in *Veen v The Queen [No 2]* in applying them.

For example, the plurality in *Veen v The Queen [No 2]* [1988] HCA 14, 164 CLR 465 (at 477–8) held it was open to a sentencing judge to sentence an offender to a maximum sentence despite the presence of brain damage (which diminished his moral culpability) by putting greater weight on the purpose of protection of the community. Similarly, in *Bugmy v The Queen* (2013) 249 CLR 571 ("*Bugmy")* French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ ("the plurality") acknowledge, firstly, that the circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence "may mitigate" the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way (at [40]) and, secondly, that simultaneously where an offender, whose culpability is so reduced has committed similar offences in the past, that inability to avoid offending "may increase the importance of protecting the community from the offender": at [44]. In *Ingrey v R* [2016] NSWCCA 31 at [34]–[35], the Court held that in using the word "may", the plurality in *Bugmy* at [40] were not saying that a consideration of this factor is optional: it was a recognition that there may be countervailing factors, such as the protection of the community, which might reduce or eliminate its effect.

In *Munda v Western Australia* (2013) 249 CLR 600 (at [58]), the High Court adopted the following observation of Gleeson CJ in *R v Engert* (1995) 84 A Crim R 67 at 68:

> The interplay of the considerations relevant to sentencing may be complex … In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance …
>
> It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances.

The High Court, citing *R v Fuller-Cust* (2002) 6 VR 496, emphasised that an offender's Aboriginality was not to be overlooked by a "simplistic assumption that equal treatment of offenders means that their differences in their individual circumstances related to their race should be ignored" (at [52]). The Court noted that it was arguable that, in respect of offences that were not premeditated, widespread social disadvantage may mean that "controlled rational calculation of the consequences of misconduct" may be an unreasonable expectation, giving general deterrence a less significant role to play: at [54].

In *Kiernan v R* [2016] NSWCCA 12 Hoeben CJ at CL noted (at [63]) that the plurality in *Bugmy v The Queen* did not speak in terms of general deterrence having no effect, but referred to that factor being "moderated in favour of other purposes of punishment"

depending upon the particular facts of the case.[6] In *IS v R* [2017] NSWCCA 116, Gleeson JA, considering the "interplay" of sentencing principles in the context of disadvantage, said at [65]:

> …the combined effect of the applicant's background of profound childhood deprivation and youth called for the weight that could ordinarily be given in offending of this serious nature to personal and general deterrence and the protection of society "to be moderated in favour of other purposes of punishment and in particular, his rehabilitation, per *Bugmy".*

The cautionary words that appear in both *Bugmy* and *Munda*, echoed by Simpson in *Millwood* at [69], are worth noting: there are no guarantees that flow from establishing a background of disadvantage that will necessarily result in an overall reduction on sentence.

Where evidence of disadvantage is advanced, the impact this evidence may have upon the court's consideration of community protection requires care and attention to identify and present evidence which demonstrates where possible, an offender's capacity to rehabilitate.

How is a background of deprivation to be taken into account on sentence? The assessment of moral culpability, objective criminality and the significance of individualised justice

To repeat, there is no automatic "mitigation" on sentence by virtue of establishing a background of disadvantage. Although a history of deprivation is often spoken about as having a "mitigating effect" on sentence, it is not one of the mitigating factors enumerated under **s** 21A(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

As the above cases suggest, the pathway to an argument for a lesser sentence must be approached through the gates of the s 3A sentencing principles: firstly, as to an assessment of moral culpability (with associated arguments as to the diminished role of general deterrence, punishment and denunciation) and secondly an assessment of individualised justice (such as framing a sentencing order to allow for rehabilitation). Prior to *Bugmy*, this latter purpose of the sentencing exercise was best expressed by Wood CJ at CL in *R v Morgan* [2003] NSWCCA 230 at [20]–[21] (emphasis added), where his Honour noted with reference to an Indigenous offender [that *Fernando* principles were not]:

> intended as an exhaustive statement of sentencing practice, or as justifying any special leniency in relation to offenders of the class to whom they applied … Rather they were intended to reflect an understanding of some of the factors which can lead a person of this racial background into offending behaviour, and which, <u>in appropriate cases, may have particular relevance for the way in which a sentencing order may suitably be framed</u> …

[6] See also *Drew v R* [2016] NSWCCA 310 per Fagan J at [18] (Gleeson JA agreeing at [1]) where the needs of specific deterrence and community protection were found to "loom large" despite a background of social disadvantage, in a context of a recidivist violent offender with convictions for matters of violence over 35 years, against 13 separate victims, including domestic partners and the offender's son: at [1], [17], [125].

These concepts become more complex when the issue of causal link between the disadvantage and the offending conduct is examined, a matter which I will discuss below with reference to the case of *Perkins* [2018] NSWCCA 62.

The basic premise concerning moral culpability is perhaps best expressed by Simpson J (with whom Bathurst CJ and Adamson J agreed) in the passage from *R v Millwood* [2012] NSWCCA 2 that heads this paper: that "common sense and common decency dictate" that a person who had a disadvantaged and dysfunctional upbringing "will have fewer emotional resources to guide his or her behavioural decisions": at [69]. As was recognised in *Bugmy* at [40], such persons are less blameworthy than someone who did not have those same background experiences, picking up similar sentiments expressed by the Canadian Supreme Court in *Ipeelee* [2012] 1 SCR 433 (at [73]).

More recently there has been some acceptance that diminished moral culpability derived from "factors personal to the offender" that are causally connected to or materially contributed to the commission of the offence, may have relevance to an assessment of objective seriousness specifically.[7] This area of law in NSW however is far from clear in what appears to be a conflation of principles arising from the approach to be taken to an assessment of objective seriousness in standard non parole matters and other matters post-*Muldrock.* In *Yun* [2017] NSWCCA 317 the Court did not preclude this factor in the context of mental illness when assessing where the objective criminality of the offending fell within the range: at [47] (per Latham and Bellew JJ). Whilst exposure to disadvantage was not said to be a factor, it is worth considering whether it would be in circumstances where it impacted upon a mental condition. In *Tepania v R* [2018] NSWCCA 247, Johnson J (with whom Payne JA and Simpson AJA agreed) explained that, in sentencing for an offence (whether or not a standard non-parole period offence), a court should make an assessment of the objective gravity of the offence applying general law principles, so that all factors which bear upon the seriousness of the offence should be taken into account (unless excluded by statute), including factors such as motive, provocation or non-exculpatory. Johnson J stated that regard may be had to factors personal to the offender that are causally connected with or materially contributed to the commission of the offences, including (if it be the case) a mental disorder or mental impairment (at [112]). This passage was cited with approval in *BM v R* [2019] NSWCCA 223 at [15] by the Court (comprising Payne JA; Fullerton and Bellew JJ). In *Corliss v R* [2020] NSWCCA 65 Johnson J referred to "circumstances which account for criminal conduct" as being part of the mix of factors relevant to the assessment of objective seriousness (at [30]). In *R v Primmer* [2020] NSWCCA 50 Hamill J (with whom Leeming JC and Harrison J

[7] See also *Biddle v R* [2017] NSWCCA 128 per Hoeben CJ at CL (Price J agreeing) at [68] and Rothman J in a separate judgment at [121]–[124]; *Shine v R* [2016] NSWCCA 149 per Bathurst CJ (Davies J and Hulme AJ agreeing); *Cowan v R* [2015] NSWCCA 118 per Bellew J (Bathurst CJ and Simpson J agreeing) at [61]–[62]; *Elturk v R* [2014] NSWCCA 61 per Beazley P (R A Hulme and Schmidt JJ agreeing) at [56]–[57]; *McLaren v R* [2012] NSWCCA 284 per McCallum J (McClellan CJ at CL and Bellew J agreeing) at [28]–[29]. Contra *Badans v R* [2012] NSWCCA 97 per Meagher JA (Hoeben and Rothman JJ agreeing) at [53]; *Subramaniam v R* [2013] NSWCCA 159 per Latham J (Emmett JA and Simpson J agreeing) at [56]–[57]; *Stewart v R* [2012] NSWCCA 183 per Button J (McClellan CJ at CL and Price J agreeing) at [34].

agreed), held (at [22] – [24]) that there were features of the offender's personal circumstances that were highly relevant to an assessment of moral culpability whilst acknowledging the possible tension between this line of authority and *Muldrock v The Queen* (2011) 244 CLR 120 at [27] (which referred to the assessment of objective seriousness to be made without reference to matters personal to a particular offender in the context of a standard non-parole period). In *Primmer*, the "personal circumstances" considered relevant to an assessment of moral culpability included a "tragic" childhood and an associated diagnosis of post-traumatic stress disorder which the evidence established contributed to his offending behaviour.

More recently the approach of the Court of Criminal Appeal has been to support the approach that moral culpability informs the assessment of objective seriousness: *Rossall v R* (2021) NSWCCA 200 at [100] (Garling J; Bathurst CJ and Rothman J agreeing); *Kelly v R* (2021) NSWCCA 173 38-39 (per Bell P, Rothman and Bellew JJ agreeing); and *Fisher v R* [2021] NSWCCA 91 at 70 (per Fullerton J).

PART II: WHAT IS DISADVANTAGE? THE WIDER APPLICATION OF THE *BUGMY* PRINCIPLES

The relevance of disadvantage to the sentencing process found its roots in *Neal v The Queen* (1982) 149 CLR 305 (at 326) in the judgment of Brennan J:

> The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account all material facts including those facts which exist only by reason of the offender's membership of an ethnic group or other group …

A decade later in New South Wales, Wood J in *R v Fernando (*1992) 76 A Crim R 58 set down considerations for sentencing Indigenous offenders from disadvantaged communities and how this background (including those factors that exist only by reason of their Aboriginality) may be relevant to mitigation: at 62–3.

Simpson J (with whom Fullerton and RA Hulme JJ agreed) expanded the principles hitherto associated with a race or group to others subject to disadvantage, stating in the case of *Kennedy v The Queen* [2010] NSWCCA 260 ("*Kennedy*") at [53]:

> Properly understood, *Fernando* is a decision not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity of the offender) precedes the commission of crime.

These remarks were endorsed by the plurality in *Bugmy* (at [37]) and the application of *Bugmy* principles have been expanded upon since, so that communities of disadvantage have manifested into other recognised categories of disadvantage calling for a "*Bugmy*" consideration.

The development of this line of authority recognises that not all Indigenous people in Australia have the same background or contemporary experience of disadvantage, discrimination or social exclusion. Not all offending is of the same type or has the same causes. In 2015, for example, the NSW Court of Criminal Appeal considered that the principles of *Bugmy* applied to an Indigenous offender who had a supportive immediate family background but associated with peers and extended family who were part of the criminal milieu: *Ingrey v R* [2016] NSWCCA 31, at [38]–[39].

In *Kentwell v R (No 2)* [2015] NSWCCA 96, the Indigenous offender was removed from his parents at 12 months of age and adopted by a Caucasian family, where he grew up deprived of knowledge about his family and culture. The court held that the offender's moral culpability was reduced as the social exclusion he experienced was capable of constituting a background of deprivation explaining his recourse to violence at the time of the offending: at [90]–[93]. In so holding, Rothman J relied upon a series of evidence-based studies by Professor Baumeister which found that extreme social exclusion and racial discrimination could cause high levels of aggression and anti-social behaviours: at [92].

The approach of Rothman J in *Kentwell (No 2)* bore some similarities to that taken by Murphy J in *Neal v The Queen*, in which his Honour recognised that the context of dispossession and powerlessness through the exercise of racist policies and practices and the expression of racist ideals contextualised acts of violence and protest in that community: at 318- 319

PART III: POTENTIAL CONSTRAINTS ON *BUGMY*

Not profound disadvantage; not the same kind of offending; evidence of planning

Whilst it is now accepted that the principles articulated in *Bugmy* are not discretionary[8] and can apply generally to offenders brought up in circumstances of social disadvantage,[9] including non-Indigenous offenders,[10] the extension of the *Bugmy* principles beyond Indigenous-specific disadvantage has not been without controversy. Hoeben CJ at CL supported a more curtailed response to disadvantage in *Perkins v R* [2018] NSWCCA 62 ("*Perkins*"), suggesting that the relevance of the background of disadvantage was restricted to cases where a person engaged in offending of "precisely that kind of activity" as arose in their childhood (or similar offending) or where the disadvantage may be inferred by virtue of an upbringing within, or association with, an Aboriginal community (at [41]). Similar sentiments were expressed by his Honour in *R v James* [2017] NSWCCA 287 where the offender's background of deprivation was said to be "nothing like the circumstances described in *Bugmy*" (at [32]). In *Katsis v R* [2018] NSWCCA 9 the offender's childhood background of sexual abuse, neglect by way of physical assault and food deprivation was also held not to be "comparable" to *Bugmy.* See also *Crowley v R* [2017] NSWCCA 99 per Adamson J (Johnson and Campbell JJ agreeing).

In *Kliendienst v R* [2020] NSWCCA 98 N Adams J (with whom Simpson AJA and Rothman J agreed) rejected the Crown submission to the effect that the Bugmy principles were not engaged as the applicant had failed to make out a case of profound disadvantage: at [67]. More recently, Brereton JA held that the evidence does not have to establish that the offender suffered from "profound" childhood disadvantage before the *Bugmy* principles are engaged, stating there was no "magic in the word 'profound'" rather the issue being the consideration of an "offender's deprived background": *Hoskins v R* [2021] NSWCCA 169 ("*Hoskins*") at [57] (with whom Basten JA and Beech-Jones J agreed). This approach was followed by Loukas-Karlsson J in *R v BS-X* [2021] ACTSC 160 at [81] – [85].

The difficulty of approach is evident in the recent case of *Nasrallah v R* [2021] NSWCCA 207 ("*Nasrallah v R*") and the different approaches taken by that bench. Bell P at [8] assumed "without deciding" the correctness of Brereton JA's statement in *Hoskins* as to the import to be given to the word *"profound",* stating that the High Court's use of that word "was to emphasise and describe a very high degree of deprivation". His Honour drew a distinction between deprivation born from sustained and endemic abuse and single acts of abuse or other traumatic events, stating that the issue as to whether the principles enunciated in *Bugmy* had

[8] *R v Irwin* [2019] NSWCCA 133 at [3] (Simpson AJA) ("*Irwin*"); *Hoskins v R* [2021] NSWCCA 169 at [56] (Brereton JA with whom Basten JA and Beech-Jones J agreed).

[9] *Hoskins v R* [2021] NSWCCA 169 ("*Hoskins*") per Basten JA at [1].

[10] *Bugmy* at [18]; *Kennedy v The Queen* [2010] NSWCCA 260 at [53] per Simpson J; and *R v Millwood* [2012] NSWCCA 2 at [69] per Simpson J.

application to single events was still the subject of debate, noting the "boundaries of *Bugmy* have not been clearly or definitively delimited" (at [11], [21]). Price J stated that it was not a "binary question" that evidence which did not reach a threshold of "profound" ought prevent the application of *Bugmy* principles, stating that the application of the principles in such cases may nonetheless remain open to the sentencing judge (at [50]). On this issue in dissent Hamill J endorsed the comments of Brereton JA in *Hoskins* (at [87] and [110]) stating that it was an error to place "undue emphasis on the word 'profound' and in treating the question of whether there was 'profound deprivation' as a kind of threshold test" stating "the High Court did not lay down such a standard in *Bugmy*…"(at [97]). At [114] his Honour referred to such an assessment as an "unnecessary distraction". Hamill J further responded to the approach taken by Bell P and Price J stating that a "history" of deprivation did not require a "sustained" period of abuse or neglect, rather the relevant consideration was "the impact of the trauma on the applicant's development, the course her life took as a result which was relevant to the assessment of moral culpability": at [111]. His Honour endorsed the approach of the Victorian case of *DPP v Hermann* [2021] VSCA 160, noting that the individual circumstances in which an offender's personal history and mental health issues might inform their moral culpability are diverse and sometimes overlapping: at [112].

Other curtailments of the application the *Bugmy* principles include where the offence involved planning and lacked impulsivity, arising in *Crowley v R* ([44]); *Atkinson v R* [2014] NSWCCA 262 (at [74]); *Taysarang v R* [2017] NSWCCA 146 (at [42]–[43]); *Dungay v R* [2020] NSWCCA 209 which involved cultivation and drug supply at [143]-[146] (N Adams J; Bell P and Davies J agreeing). The latter approach had been countered by Yehia J in *R v Nabalarua; R v Quinlan* [2017] NSWDC 328 in the face of a submission by the Crown that a background of deprivation could not impact on an assessment of moral culpability where the offending was planned rather than "born of frustration". Judge Yehia rejected that *Bugmy* could be so limited, noting that taking into account an offender's deprived childhood was not optional, as it may compromise a person's capacity to mature and to learn from experience and that each case was dependent upon the circumstances of the individual case: at [125]–[140].

This issue was most recently referred to by Brereton JA in *Hoskins v R* (at [57]), stating: "[T]he principle is that social disadvantage may reduce an offender's moral culpability, especially where the offending is in the nature of impulsive or learned responses to situations, arising from the circumstances of social disadvantage. Thus the *Bugmy* principles may not operate to reduce moral culpability in a case where careful planning and premeditation is involved, such as cultivation and drug supply matters".

Is it necessary to establish a causal link between the offender's disadvantage in order to diminish moral culpability?

The position in NSW

Despite the absence of any reference in the Bugmy judgment to the necessity to establish a causal link between the offender's disadvantage in order to diminish moral culpability, this

issue has proved to be a vexed issue. Victoria has taken one approach, the Northern Territory the opposite approach and the NSW Court of Criminal Appeal to date appears divided.

Unlike Canada, where the Supreme Court in *Ipeelee* directly faced the issue of whether it was necessary to establish a causal link between a background of deprivation and the offending conduct, the High Court of Australia has to date declined to do so expressly. In *Ipeelee*, the Court considered the practical application of a provision of the Criminal Code (Can)[11] that required a sentencing court give particular attention to the circumstances of Aboriginal offenders. In respect of the issue of causal connection between deprivation and offending the court held (at [81]–[83]):

> … First, some cases erroneously suggest that an offender must establish a causal link between background factors and the commission of the current offence before being entitled to have to matters considered by the sentencing judge …
>
> [*R v Poucette*] displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples. It also imposes an evidentiary burden on offenders that was not intended …
>
> … it would be extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending. The interconnections are simply too complex… Systemic and background factors do not operate as an excuse for justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

A line of authority has developed in the NSW CCA where the application of *Bugmy* principles has been curtailed in the absence of an established causal link between the disadvantage and the offending conduct. In several matters, the lack of a causal connection was cited as the reason why the accepted evidence of disadvantage did not warrant mitigation. In *R v El Sayah; R v Idaayen R v Mansaray* [2018] NSWCCA 64, a case involving an offence of robbery, Hoeben CJ at CL held that Mr Mansaray's traumatic childhood in Sierra Leone during which he was exposed to the killing of his father was not seen to have "any causal link to the offending" (at [63]).[12] His Honour took a not dissimilar line in *Perkins* at [42] and in *Katsis v R* [2018] NSWCCA 9 at [108]. Similar positions were taken by the court in *R v Wong* [2018] NSWCCA 20 at [73]; *Taysarang v R* [2017] NSWCCA 146 at [42]–[43]; and *R v RD* [2014] NSWCCA 103 at [24].

[11] Section 718.2(e) *Criminal Code* (Can) RSC 1985, c C-46.

[12] *R v El Sayah; R v Idaayen; R v Mansaray* [2018] NSWCCA 64 preceded *Perkins*. White JA maintained his different position on causal link in *Mansaray* from Hoeben CJ at CL at [72] stating "for the reasons I gave in *Perkins* ... I do not think that Mr Mansaray's experience as a refugee from Sierra Leone is necessarily irrelevant to his sentence because there is no evidence of a causal link between that experience and his offending…"

The cases cited above tend to follow the approach of the NSW CCA pre - *Bugmy* when considering the weight to be given to an offender's exposure as a child to sexual abuse upon their own offending, be it sex offending or other kinds of offending. In *R v AGR* (unreported, NSWCCA, 24 July 1998) James J, with whom Mason P and Grove J agreed, said:

> In my opinion, if it is established that a child sexual assault offender was himself sexually abused as a child and that that history of sexual abuse has *contributed* to the offender's own criminality, that is a matter which *can* be taken into account by a sentencing judge as a factor in mitigation of penalty as reducing the offender's moral culpability for his acts, although the weight which should be given to it will depend very much on the facts of the individual case and will be subject to a wide discretion in the sentencing judge. Evidence that a child sexual assault offender was himself sexually abused as a child can also be relevant to the offender's prospects of rehabilitation, as was recognised by his Honour.

The statement of principle in *AGR* was cited with approval in *R v Rich* [2000] NSWCCA 448, *Cunningham* [2006] NSWCCA 176 at [67] and in *Dousha* [2008] NSWCCA 263 where Fullerton J, with whom Latham and Bell JJ agreed said at [47]:

> The applicant conceded on the appeal that there was no direct evidence that the single incident of abuse he suffered as a child had in any way contributed to his offending as an adult. Although the psychologist's report made reference to a body of research suggesting that a percentage of sex offenders have themselves been sexually assaulted during childhood, and that this in turn has contributed to the development of aberrant sexual behaviour in adult life, she did not consider that the incident reported to her by the applicant had contributed in any way to his offending. In the absence of any causal connection of that kind (or the issue having any bearing upon the applicant's prospects of rehabilitation) I am not satisfied that the incident was relevant to the sentencing discretion (see *R v Cunningham* [2006] NSWCCA 176 at [67]).

In *Henry v R* [2009] NSWCCA 69 Grove J, with whom McColl JA and Howie J agreed, found that there was insufficient evidence to establish that past sexual abuse contributed to the offending such as to reduce the offender's moral culpability, but said that the prior sexual abuse could be taken into account as part of the matrix of subjective features: at [15]. This approach mirrors the approach of White JA in *Perkins* (at [83]) and later in *El Sayah* (at [72]) in a post-*Bugmy* context.

Despite the principles concerning the application of disadvantage to sentencing recognised in *Bugmy*, including that the court give "full weight" to an offender's disadvantaged background in *every* sentencing decision (at [44]), the approach in *AGR* persisted post - *Bugmy* in the context of sexual assault cases: *JL v R* [2014] NSWCCA 130 at [35]–[49] and *KAB v R* [2015] NSWCCA 5 at [61]–[68]. In *KAB*, Wilson J, with whom Ward JA and Simpson J agreed, found that in the absence of proof of a causal connection between childhood sexual abuse and the offending the sentencing judge was entitled to give it little or no weight.

In *Perkins* the necessity of finding a "causal link" between the evidence of disadvantage and the offending conduct was the central focus of the appeal proceedings. In that case, the applicant's lack of criminal record and good character during his teen years, was relied upon

by the court to indicate that his childhood exposure to family violence (in his first 9 years of life) was unrelated to his offending conduct at the age of 18 years (at [41]), disentitling him to leniency on the basis of diminution of moral culpability, or on any other basis (per Hoeben CJ at CL).

As against the position of Hoeben CJ at CL, White JA (at [73]) commented that *Bugmy* did not provide any "clear answer" as to the necessity to establish a causal link between disadvantage and offending, considering it an "open question" for it to be relevant to the sentencing exercise. His Honour questioned what if any weight by way of mitigation a background of disadvantage had if there was no causal link to the offending: at [76]. In the absence of such a connection, the offender's moral culpability was not diminished as a result of his background, and although he found it otherwise relevant and gave it "full weight", it did not result in the imposition of a lesser sentence: at [88].

Fullerton J, allowing the appeal, expressly found that it was an error to treat a background of disadvantage as irrelevant because it was not found to be causally related to the offending: at [102]. Her Honour found that, of itself, it may not have operated to diminish moral culpability in this particular case, but it was otherwise to be taken into account, adopting the *Millwood* reference to diminished emotional resources, and capacity for mature decision making and self-regulation: [135]–[136].

The High Court declined special leave to appeal in *Perkins*: *Perkins v The Queen* [2018] HCATrans 267 (14 December 2018).

Post *Perkins*, the White JA approach in that case largely prevailed, stating that even in the absence of an established causal link, a background of disadvantage remains relevant to the sentencing discretion as a potentially mitigating factor: *Judge v R* [2018] NSWCCA 203 (White JA; Bellew and Wilson JJ agreeing); *R v Irwin* [2019] NSWCCA 133 (Walton JA, Simpson AJA and Adamson J agreeing) at [116]; *R v Hoskins* at [57]. However, the Court in *Dungay v R* [2020] NSWCCA 209 ("*Dungay v R*") (N Adams J, Bell P and Davies J agreeing) attempted to reconcile the ongoing division on the Court as to the approach. Adams J questioning whether there ought be diminution of moral culpability in the absence of an established causal link between deprivation and offending, but repeating that background ought otherwise to be given "full weight in every sentencing discretion".

The tension in the approach of the NSW CCA remains with the Court in *Noonan* [2020] NSWCCA 346 acknowledging the differing views and declining to resolve the issue, stating matters going to disadvantage were "globally relevant" to the offender's subjective case (at [49] – [50], [67]). More recently, Bell P in *Nasralla v R* referred to the need for a "correlation between" the nature, degree and extent of an offender's deprivation as a child and the reduction in the moral culpability that would attach to the offender's conduct (at [8]), whilst Hamill J referred to the approach of the Court in *Dungay v R*, stating (at [88]):

> "…it is not necessary to establish a causative link before the proper application of *Bugmy* requires a sentencing Judge to give full effect to the history of childhood deprivation. Rather, the appropriate focus is the effect such a background may have

on the offender, and its 'ability to compromise the person's capacity to mature and learn from experience'."

A conflict between States and Territories as to causal link

In the Northern Territory, based at least on the approach of the Court in *Kolaka* [2019] NTCCA 16 (Grant CJ, Southwood and Barr JJ), the *Bugmy* principles have application only in circumstances that a nexus has been established between childhood deprivation and offending (at [38] – [39]).

Victoria has adopted the broader view reminiscent of *Millwood* and *Kennedy*. In *Walker, Dargan* [2019] VSCA 137 Whelan J, with whom Kyrou and Kaye JJA agreed, said (at [74]):

> While the judge was not satisfied that Dargan's bipolar disorder was causally connected with his offending in this case, nevertheless his Honour correctly accepted that the principles, stated by the High Court in *Bugmy*, were relevant to the evaluation of Dargan's subjective culpability for the offending in the case. As mentioned, Dargan's traumatic and turbulent upbringing, and his confusion concerning his Koori identity arising from the overt racism of his father, were directly relevant to a proper assessment of his subjective culpability for the offending in the present case. In essence, the offending was not committed by a person who had had the advantage of a stable and secure upbringing guided by proper parenting. Dargan's attitudes to society, and his anti-social conduct, were necessarily the product of the manner in which he had been raised in his formative years. While those considerations do not excuse his offending, nevertheless, as the judge correctly acknowledged, they were relevant to a fair evaluation of Dargan's moral culpability. Necessarily, Dargan's culpability was at a lower level than if he had had the advantage of a proper and stable upbringing, without being subjected to the dysfunction and violence that he had suffered during his formative years.

Victoria, most recently dealt with the issue in a five judge bench in *DPP v Herrmann* [2021] VSCA 160 (Maxwell P; Kaye, Niall, T. Forrest and Emerton JJA) where the Court determined that there were two different ways that childhood deprivation was relevant to the assessment of moral culpability, the first more general way where an offender has been raised in a community surrounded by alcohol and violence; and the more specific way where a recourse to violence might be explained where they have been exposed to extreme violence and alcohol abuse. The Court found that no causal link was required to be established when it came to establishing the general approach, stating (at [45] – [46]):

> The significance of the 'general' approach enunciated in ***Bugmy*** is that the relevance of deprivation to sentencing does not depend on proof of such a nexus. As Victoria Legal Aid pointed out in its helpful submission as amicus curiae, 'the impact of disadvantage is complex, multilayered, non-linear and not easily "diagnosed" or measured'. The High Court's recognition that serious childhood deprivation is likely to make an offender less morally culpable than 'an offender whose formative years

were not marred in that way' reflects the principle of equal justice. As Dawson and Gaudron JJ said in *Postiglione v The Queen*:

> Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them.

It is the mark of a humane society that the moral judgment expressed through sentencing should take account of the lifelong damage that may result from exposure to violence or abuse or parental neglect in an offender's formative years. As the present case graphically illustrates, childhood trauma can permanently damage — and seriously distort — a person's view of the world around them and their understanding of social norms. Thus, in *Freeburn v The Queen [No 2]*, it was accepted that the offender's 'background, of deprivation and abuse, played a material role in shaping his responses, and thus in his offending'. In *Snow*, the Court drew attention to 'the impact on the decision-making of individuals of growing up, and living, in circumstances of prolonged and widespread social disadvantage'. [citations removed]

The Victorian position is reminiscent of the view expressed by Simpson J in *Millwood* that opens the paper, or the position of the Canadian Court in *Ipeelee* stated above, to repeat, (at [83]): "… it would be extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending. The interconnections are simply too complex… Systemic and background factors do not operate as an excuse for justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence."

Self-induced intoxication and disadvantage

In 2014, the *Crimes (Sentencing Procedure) Act 1999* (NSW) was amended to introduce a special rule for self-induced intoxication. Section 21A(5AA) provides:

> In determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor.

Section 21A(5B) provides that subsection (5AA) has effect "despite any Act or rule of law to the contrary".

On face value, the provision may be thought to preclude a submission on behalf of an offender that a background of deprivation leading to drug or alcohol dependency allows the weight that would ordinarily be given to personal and general deterrence to be moderated and moral culpability reduced, as contemplated in *Bugmy* at [46].

Pre s 21A(5AA) the Court in *Brown v R* [2014] NSWCCA 335 adopted the remarks of Simpson J in *R v Henry* [1999] NSWCCA 111 (at [336] and [344]) being that if drug addiction had its origins in circumstances such as social disadvantage; poverty; emotional; financial or social deprivation; sexual assault, it is appropriate for rehabilitative aspects of sentencing assume a more significant role than might otherwise be the case: at [26] – [29].

Post s 21A(5AA), in *Kelly v R* [2016] NSWCCA 246 however, Rothman J (with Hoeben CJ at CL and R A Hulme J agreeing) rejected a Crown submission that s 21(5AA) operates to "abolish that part of *R v Fernando* that the High Court approved in *Bugmy v The Queen*": at [49].

The Court explained that even before the introduction of the provision, self-induced intoxication by alcohol or drugs did not usually serve to mitigate a sentence at common law: at [46]. [13] Justice Rothman continued (at [50]):

> The effect of *Fernando* and of *Bugmy* is to recognise that, in certain communities to which the circumstances in *Fernando* and *Bugmy* applied, the abuse of alcohol and drugs is so prevalent and accompanied by violence that the intoxication no longer fits the description of being "self-induced". In that way, the intoxication fits the description to which McClellan CJ at CL referred in *Bourke*.[14]

The following cases saw *Bugmy* principles applied by courts to non-Indigenous offenders where different forms of deprivation contextualised drug/alcohol addiction that was seen to contribute to the offending:

- *Linden v R* [2017] NSWCCA 321 (drug supply) where the disadvantage emanated from childhood sexual abuse and was related to use of illicit drugs from that age of 15 years to "cope" (at [62]).
- *Edwards v R* [2017] NSWCCA 160 (robbery) where the disadvantage emanated from exposure to childhood sexual abuse and domestic violence and later drug addiction (at [8]–[10]).
- *Lambert v R* [2015] NSWCCA 22 (drug supply) where the disadvantage emanated from drug abuse in a large part caused by an "abusive childhood" (at [33]).
- *Miller v R* [2015] NSWCCA 86 (break and enter) where a background of homelessness, unemployment, sexual abuse as child, and maternal incarceration extended to offences involving drugs and violence (at [102]–[112]).

[13] Citing *Bourke v R* [2010] NSWCCA 22, in which McClellan CJ at CL held (Price J and R A Hulme JA agreeing) that the ordinary rule does not apply in cases where intoxication is the result of an addiction which itself is not the result of "free choice": at [26]. In that case, the offender had experienced a "traumatic" childhood, marred by alcohol abuse by both parents and violent attacks on his mother by his father; sustained head injuries in two car accidents which were believed to have led to subsequent poor frontal lobe functioning; and displayed depressive symptoms which were linked to excessive alcohol consumption and use of amphetamines: at [12]–[15].

[14] At the time of writing, the Judicial Commission's *Sentencing Bench Book* does not make reference to the decision in *Kelly*, and in that respect may not accurately reflect the current position at law: Judicial Commission of New South Wales, 'Subjective Matters Taken into Account', *Sentencing Bench Book* [10-840] <https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/subjective_matters.html#p10-480>.

- *R v Jennar* [2014] NSWCCA 331(robbery) where a childhood background of incarcerated and drug-addicted caregivers and exposure to drug abuse was followed by drug use and crime (at [37]–[39]).

- *R v Irwin* [2019] NSWCCA 133 (firearms, police pursuit and drugs) where it was found that a history of exposure to parental alcoholism and domestic violence as well as physical abuse and victimisation contributed to his emotional disturbance, substance abuse disorder and personality disorder and was a pathway into his addiction and drug related offences (at [121], [136]).

Individualised justice

In response to detractors to the application of the *Bugmy* principles in broader contexts, and in argument against the "causal link" approach, one must come back to the words of the plurality in *Bugmy* and to the significance of the individual. The plurality of the High Court rejected a submission that the courts should take judicial notice of the systemic background of Aboriginal offenders as it was "antithetical to individualised justice": at [41]. The High Court does not use terms like "cause" or "extent" of deprivation, but rather focuses on the individual, with the plurality emphasising that courts should give "full weight to an offender's deprived background in every sentencing decision" (at [44]). The plurality recognised that a background of disadvantage "may leave its mark on a person throughout life" including by compromising "the person's capacity to mature and learn from experience" noting it was a "feature of the person's make-up and remains relevant to the determination of an appropriate sentence…" (at [43]).

These words are echoed in a number of NSW cases where disadvantage was taken into account, in common with the sentiments expressed by the court in *Ipeelee*, rejecting the requirement of causal link and recognising that social deprivation can more broadly compromise an individual's capacity to mature and/or impair social regulation and explain a descent into criminality: see generally *Tsiakis v R* [2015] NSWCCA 187 per Beech-Jones J (Johnson J and Leeming JA agreeing) (at [37], [53] and [74]); see also *Gardener v R* [2015] NSWCCA 170 (at [53]–[56]); *Kentwell v R (No 2)* [2015] NSWCCA 96 (at [86]–[89], [94]); *Bungie v R* [2015] NSWCCA 9 at [48]); and *R v Nabalarua* [2017] NSWDC 328 at [150]–[151].

PART IV: PRESENTING EVIDENCE OF DISADVANTAGE

Careful attention needs to be given to the presentation of evidence in order to avoid potential arguments concerning causal link, or the deficiency of connection between recognised categories of disadvantage and their application to the individual offender.

Perkins: A cautionary tale

The pitfalls of deficient evidence presented on sentence can be seen in *Perkins.* As stated above, this case involved an 18-year-old male charged with murder. Whilst a psychiatric report was tendered setting out details of the offender's childhood exposure to domestic violence in his first 9 years of life (to the extent of seeing his mother almost killed on several occasions), there was no evidence as to the recognised research into the impact of exposure to violence of that sort at that point of the offender's personal development. No evidence was adduced that might have rebutted the assumption made by the sentencing judge that, because the offender had not offended, had attained educational milestones and his life was otherwise "unremarkable", there was nothing to suggest the exposure had done him psychological harm. Similarly, on appeal Hoeben CJ at CL held that it was speculation to assume the exposure had done the applicant harm in the absence of any indication of damage done by the exposure, despite the "out of the blue" offending. His Honour commented that this was particularly the case in circumstances where "for at least part of the nine year period the applicant would have been a child of tender years with little recollection of what was happening": at [41].

As noted by Fullerton J in *Perkins* in dissent (at [99]), and supported by the research and studies cited in Australian sources, exposure to violence at a younger age may in fact have a *greater impact* when experienced at an earlier age. The Australian Human Rights Commission has noted that the effects of exposure to domestic and family violence on children during their formative years "may manifest differently depending on the developmental stages of the child",[15] while the Australian Institute of Family Studies found a strong indication in the research that exposure to family violence in childhood may have a greater impact when experienced at an earlier age,[16] and that long term exposure to such violence has been found to have lasting effects on children's development, behaviour and wellbeing,[17] including the possibility of developing depression, substance abuse disorders and poor coping mechanisms. None of this evidence was adduced on sentence, a deficiency commented upon by Fullerton J on appeal (at [136]):

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[15] Australian Human Rights Commission, *Children's Rights Report 2015* (2015) 103, 125 [4.5.3].

[16] Australian Institute of Family Studies, 'Children's Exposure to Domestic and Family Violence: Key Issues and Responses' (Report, 2015) 9 citing Kathryn H Howell, 'Resilience and Psychopathology in Children Exposed to Family Violence' (2011) 16 *Aggression and Violent Behaviour* 562.

[17] Ibid 7 citing Peter G Jaffe, David Allen Wolfe and Marcie Campbell, *Growing Up with Domestic Violence: Assessment, Intervention, and Prevention Strategies for Children and Adolescents* (2012, Hogrefe Publishing).

> The evidence does not allow for a finding that the applicant's childhood trauma, inclusive of his exposure to family and domestic violence, resulted in any retardation of his emotional or psychological development. This is in large part because Dr Gilligan's report simply does not address that issue and no further evidence directed to it was adduced …

Giving careful consideration to the framing of psychologists' or other expert reports, ensuring that letters specifically address the impact of disadvantage to the particular case, ought strengthen the evidence, and what can be made of it, in the ultimate sentencing outcome.

The judiciary's call for help

For some time, judicial officers have called for an improved standard of evidence in order to support a submission concerning disadvantage.[18] Judge Norrish QC supported the presentation of such evidence in his paper 'Sentencing Aboriginal Offenders – Striving for Equality before the Law', stating:[19]

> Accepting the general proposition that judicial notice cannot be taken of matters historical, social etc. without regard to the facts of the individual case for resolution, judicial officers should be encouraged to make intelligent, constructive use of judicial notice of what has gone before, whether it be of the findings and evidence of previous inquiries or the factual conclusions in decisions of prior cases, whether at first instance or on appeal … in my view, there would be more effective sentence orders for addressing the various purposes of sentencing, better long term outcomes for offenders, victims, affected third parties (usually families of offenders and victims) and their communities with more effective consideration of some of the causes of offending. In respect of these matters the parties have the most important role in the absence of legislative direction. This brings the matter of achieving 'equal treatment' not just within the responsibility of judicial officers, but more also within that of lawyers, particularly those representing accused persons.

Justice Rothman AM called for counsel to ensure that the kind of evidence or material to which the High Court referred in *Bugmy* and *Munda* is put before any judicial officer on sentence, commenting that it is "insufficient for counsel to rely on judicial officers utilising 'general knowledge' or rely on the mere fact of an accused's Aboriginality (if that be the asserted source of 'disadvantage') … material needs to be deduced on the background of the offender being sentenced."[20] Judge Haesler SC cautioned that whilst judges and magistrates could apply their experience and wisdom they could not operate in a vacuum, requiring evidence to be put before them.[21]

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[18] Judge Dina Yehia SC (n 2); Judge Stephen Norrish QC, 'Sentencing Aboriginal Offenders – Striving for Equality before the Law' (n 2) 6.

[19] Judge Stephen Norrish QC, 'Sentencing Aboriginal Offenders – Striving for Equality before the Law' (n 2) 13.

[20] Justice Stephen Rothman AM (n 2).

[21] Judge Andrew Haesler SC (n 2) 13.

PART V: THE BUGMY BAR BOOK: THE COLLATION OF RESEARCH CONCERNING FORMS OF DISADVANTAGE

The *Bugmy* Bar Book[22] aims to assist practitioners to do two things:

1) Present evidence in the form of recognised studies and research concerning particular categories of disadvantage; and

2) Present individualised evidence pointing "to material tending to establish that background," per *Bugmy*: at [41].

In presenting *both forms of evidence* the subjective case can be better positioned to address the application of the law on disadvantage to the individual, including as to an assessment of moral culpability and to the appropriate form of sentence to be imposed. In effectively doing so, arguments as to causal link might be avoided, and there might be an improved understanding that forms of deprivation might have the potential to "play out in unforeseen ways" in a person's life (to adopt the words of Fullerton J in *Perkins* at [99]). Effective presentation of evidence may improve sentence outcomes and help the court to shape appropriate and more effective forms of sentence. Such an approach may help not only the offenders themselves but also by extension the community.

The *Bugmy* Bar Book committee continues to develop resources which will assist lawyers appearing for clients who have experienced disadvantage and deprivation, including experiences of disadvantage specific to Aboriginal and Torres Strait Islander peoples flowing from the effects of colonisation, dispossession and related trauma. Members of the committee include representatives of the Aboriginal Legal Service (NSW/ACT), the Public Defenders, Legal Aid NSW, the Centre for Crime Law and Justice, the Law faculties of the UNSW,UTS and ANU, graduates and current students from the Law Faculty, USYD and members of the private profession. The committee works in consultation with a multi-disciplinary group of experts that includes the Jumbunna Institute for Indigenous Education and Research at UTS, NAAJA and Indigenous experts from psychology, social work and criminology, amongst other experts.

The *Bugmy* Bar Book aims to collate and distil into an accessible format authoritative research concerning the impact of various forms of social disadvantage on persons appearing before the criminal justice system, saving busy practitioners the time and effort required to collate and present available (but not perhaps easily accessible) relevant material for sentence. The material is accessible on the Public Defenders website.

The *Bugmy* Bar Book is currently made up of five central components:

1. A collection of chapters on identified forms of disadvantage. To date the topics include: foetal alcohol syndrome; childhood exposure to family violence; early

[22] https://www.publicdefenders.nsw.gov.au/barbook

exposure to drug and alcohol abuse; incarceration of parents and caregivers; interrupted school attendances and suspensions; out of home care; childhood sexual abuse; stolen generations and descendants; acquired brain injury; hearing impairment; homelessness; unemployment; cultural dispossession; social exclusion; low socio-economic status; refugee background.

2. A chapter updated regularly on COVID-19 Risks and Impacts for Prisoners.

3. The publication of the expert report of Vanessa Edwige and Dr Paul Gray entitled "Significance of Culture to Wellbeing, Healing and Rehabilitation" (2021).

4. Associated case law summaries attaching to the chapters concerning disadvantage where the CCA, or courts in other jurisdictions, have considered the head of disadvantage; and

5. An associated executive summary of each of the respective chapters, proposed for ready use by a judicial officer should they accept the evidence of disadvantage presented on sentence.

The chapters and/or executive summaries can assist in guiding professionals such as psychologists in the preparation of their reports, to ensure particular forms of disadvantage and their potential impacts (as set out in the key research) are considered.

Ultimately, the chapters have an important function in educating the legal profession and the judiciary on the psychological and other disciplinary literature of the nature and potential impacts of different forms of social disadvantage based on accepted, reputable research. It is expected that, ultimately, courts and offenders will benefit from consistent access to high quality information and insight from leading research, including research that has been previously accepted by courts, or prepared or relied upon in government reports as sufficiently sound to inform Government in formulating policy.

PART VI: EVIDENCE OF THE SIGNIFICANCE OF CULTURE AND COMMUNITY

In September 2021 the *Bugmy* Bar Book published *Significance of Culture to Wellbeing, Healing and Rehabilitation*, a report by Vanessa Edwige, registered psychologist, and Dr Paul Gray, Associate Professor, UTS Jumbunna Institute of Indigenous Education and Research. The report incorporates the writers' expert opinions and a review of a significant body of research and studies which establish that, for Indigenous offenders, rehabilitation approaches (including rehabilitation programs) which are culturally appropriate and connected to community are more effective in building both individual and community resilience, which over time, can reduce recidivism.

It remains to be seen how the Report will be used by sentencing courts. In combination with the presentation of evidence as to available rehabilitation services that are culturally appropriate to the individual Indigenous offender, and/or evidence from community members that are prepared to assist in the supervision/rehabilitation of an individual, then it is foreseeable that the Report could assist a court to determine appropriate orders when considering the prospects of rehabilitation, assessing the likelihood of re-offending in addition to the shaping of effective conditions to optimise prospects of rehabilitation.

In the ACT Supreme Court decision of *R v BS-X* [2021] ATSC 160, Justice Loukas-Karlsson had reference to the Report as presented in evidence in sentencing proceedings concerning a 15y old Wiradjuri man with complex developmental trauma. Evidence had been presented which included a psychological report together with evidence from the offender's family and progress made with the circle sentence court where community elders worked with the offender to shape a rehabilitation program to meet his needs. With reference to the Report her Honour summarised a number of key aspects of the report relevant to sentencing determinations (at [82]):

> The report examines rehabilitation and wellbeing for Aboriginal and Torres Strait Islander people. Further, the report examines the relationship between Aboriginal culture, healing, rehabilitation, and the impact of imprisonment. The report highlights the importance of culture to Aboriginal and Torres Strait Islander peoples and therefore, the importance of culturally appropriate treatments to facilitate rehabilitation. The operation of culturally appropriate treatments are explored in relation to the criminal justice system. The report underlines that cultural identity is an important protective factor that promotes self-worth and therefore, rehabilitation.

Her Honour noted at [83] that individual rehabilitation is in the public interest, citing French CJ in *Hogan v Hinch* (2011) 243 CLR 506: 'Rehabilitation, if it can be achieved, is likely to be the most durable guarantor of community protection and is clearly in the public interest.'

Research of this type was referred to in *R v Kirk* [2021] NSWDC 389 at [49]:

> I accept that recent research and expert opinion indicates that rehabilitation services provided by Indigenous and culturally appropriate organisations, who understand and acknowledge the trauma suffered by Indigenous communities as a result of general removal, segregation and discrimination, together with the support of her close family and community, provide the offender with the best chance of being rehabilitated. These facilities, with oversight by

Community Corrections offer a protective measure both for the individual but also the community.

PART VII: PRESENTING STUDIES AND RESEARCH ON SENTENCE

The rules of evidence in sentence matters are referred to in s 4 of the *Evidence Act 1995* (NSW)[23] which relevantly provides:

> This Act applies to all proceedings in a NSW court, including proceedings that:
>
> a. Relate to bail; or…
>
> c. Subject to subsection (2), relate to sentencing.
>
> (2) If such a proceeding relates to sentencing:
>
> a. This Act applies only if the court directs that the law of evidence applies in the proceeding, and
>
> b. If the court specifies in the direction that the law of evidence applies only in relation to specified matters – the direction has effect accordingly.
>
> (3) The court must make a direction if:
>
> a. A party to the proceeding applies for such a direction in relation to the proof of a fact, and
>
> b. In the court's opinion, the proceeding involves proof of that fact, and that fact is or will be significant in determining the sentence to be imposed in the proceeding.
>
> (4) The court must make a direction if the court considers it appropriate to make such a direction in the interests of justice.

The Evidence Act only applies in sentencing proceedings to the extent that the sentencing court directs. Sections 4(3) and 4(4) provide for the circumstances in which such a direction should be made and considerable discretion is conferred on the sentencing court.

The court in *R v Bourchas* (2002) 133 A Crim R 413 held that if no direction is made, the common law rules of evidence apply. It is not customary for such a direction to be made and sentencing proceedings in general are conducted with a degree of informality: *Bourchas* at [41] and [61]. It is important that a sentencing judge should not be denied an opportunity to obtain relevant information.

The common law concept of judicial notice

What is apparent is that criminal courts have historically taken judicial notice of facts ascertained from sources external to the proceedings. The common law principle of judicial notice, not unlike s 144 of the *Evidence Act*, operates to ensure that in such circumstances the respective parties should be so advised and given the opportunity to respond: *R v JRB* [2006] NSWCCA 371 at [42]; *Farkas v R*: at [85]–[87].

The following criminal cases, from over 20 years ago until recently, indicate that courts are willing to take research and studies into consideration in the sentencing exercise. As observed

[23] A comparable provision is found in the *Evidence Act 1995* (Cth).

by Judge Norrish QC in his comprehensive paper "Sentencing Indigenous Offenders, Not Enough 'Judicial Notice?"[24], specialist tribunals are recognised as able to rely upon "general knowledge" acquired in hearing many cases not only "for the purpose of supplying gaps in evidence but also for the purpose of weighing and testing any evidence that might actually be tendered".[25] Most sentencing courts in Australia are well entitled, one would think, to regard themselves as specialist tribunals in respect of certain subject matters facing the criminal justice system on regular bases. It noteworthy (as referred to by Judge Norrish QC) that the then Chief Justice French, when officially launching a Queensland Information resource about individual Aboriginal communities for judicial officers, recognised its potential value as material of which judicial notice may be taken "when relevant to the particular case".[26]

The following cases are examples of the court taking judicial notice of matters in non-*Evidence Act* proceedings:

- In *Neal v The Queen* (1982) 149 CLR 305, as discussed above, Murphy J referred to various monographs and articles concerning Indigenous people and the criminal justice system in taking the view that reserve conditions and race relations at the time were a "special mitigating factor" where the evidence showed that the offender and his community held "a deep sense of grievance at their paternalistic treatment by the white authorities in charge of the Reserve": at 315, 317–19.

- In *R v Fernando* (1992) 76 A Crim R, Wood J took into account various materials relating to the sentencing of Indigenous offenders referred to in submissions on sentence, including extracts from papers by judges writing extra - curially and a report of the *Royal Commission into Aboriginal Deaths in Custody*: at 62.

- In *R v Russell* (1995) 84 A Crim R 356, Kirby P took in to account various academic publications concerning the high rate of Aboriginal incarceration highlighted by the *Royal Commission into Aboriginal Deaths in Custody*, and in respect of the particular correlation between hearing loss, Aboriginality and the criminal justice system, noting such losses were observed to cause "not only learning deficits but also anti-social behaviour low self-esteem, feelings of paranoia in some cases, social isolation, powerlessness and more … will also tend to make the offender's period in prison more difficult and harsh…": at 361–2.

- In *Farkas v R* [2014] NSWCCA 141, the CCA admitted reports prepared by the Commonwealth's National Drug Law Enforcement Research Fund and a report prepared by the National Drug and Alcohol Research Centre at the University of New

[24] Judge Stephen Norrish QC, 'Sentencing Indigenous Offenders: Not Enough "Judicial Notice"?' (n 2) 10.

[25] Ibid citing *Bryer v Metropolitan Water Sewerage & Drainage Board* (1939) 39 SR (NSW) 31 (at 330 per Jordan CJ).

[26] Ibid referring to Queensland Courts, 'Aboriginal and Torres Strait Islander Community Profiles – A Resource for the Courts' (15 February 2017) <https://www.courts.qld.gov.au/court-users/practitioners/aboriginal-and-torres-strait-islander-community-profiles>.

South Wales to assess the range of normal street purity of a drug: at [15]–[19], [85]–[87].

- In *R v Lewis* [2014] NSWSC 1127, Rothman J cited academic research in the nature of a thesis by Professor Roy Baumeister concerning the impact of "the inner dimension of social exclusion: intelligent thought and self-regulation among rejected persons": at [39]–[42].

- In *Kentwell v R (No 2)* [2015] NSWCCA 96, Rothman J again referred to the same research in which the court held that the offender's moral culpability was reduced on the basis of the social exclusion he experienced explaining his recourse to violence at the time of the offending. The evidence was based upon a body of research demonstrating that social exclusion could cause high levels of aggression and anti-social behaviours: at [90]–[93].

- In *LCM v State of Western Australia* [2016] WASCA 164, the Western Australian Court of Appeal included a comprehensive discussion of Australian and overseas cases and literature concerning FASD as a cognitive impairment. The Court allowed the tender of the material but cautioned against the use of generalisations about the condition and required a sentencing court to consider the nature and extent of the specific disabilities and deficits, and how they bear upon the considerations relevant to sentence: Mazza JA and Beech J at [123] (Martin CJ agreeing at [1] with additional observations at [2]–[25]).

- In *Drew v R* [2016] NSWCCA 310, the Court approved of statements contained in the Judicial Commission of NSW's *Equality before the Law Bench Book* and publications by the Australian Institute of Criminology, to make findings concerning the rates of non-disclosure by Indigenous women of domestic violence (at [87] and [89]) but emphasised that the application of the judicial notice to the individual (so as to allow for an aggravation of the offending conduct) was required to be proved on the evidence in the case: at [84], [90].

- In *Perkins*, Fullerton J commented on the well-researched and documented studies concerning the "insidious effects of exposure to family and domestic violence on children in their formative years, and the potential for that exposure to play out in unforeseen ways as a young child develops from adolescence into adulthood" which had "found expression and application in a range of academic and forensic disciplines": at [99].

In *R v Munro* [2018] NSWDC 331 Judge Yehia SC dealt with this issue directly in respect of the admission of research and academic literature concerning the impact of domestic and family violence on criminal proceedings. Her Honour admitted the material over Crown objection, noting its relevance in conjunction with the specific evidence adduced in respect of the individual's experience of exposure to such violence (at [41]–[47]), and finding such evidence relevant to the shaping of appropriate treatment orders: at [48]. Her Honour cited some of the cases above (at [50]–[53]) supporting the tender of the material, particularly in

the absence of any challenge to the credibility and reliability of the stated research: [49]. A similar situation arose in *Parsons* [2016] NSWDC 49 where Judge Haesler SC used available resources and took judicial notice to gather material enabling a conclusion about conditions in the Wallaga Lake Community.

It is noteworthy that the written submissions in the High Court application of *Bugmy* included voluminous references to studies and research concerning Indigenous communities. No objection was taken in those proceedings to that material, by the Crown or the Court. The observations made by the plurality in *Bugmy* (at [41]) that it was "antithetical to individualised justice" for courts to take judicial notice of the systemic background of deprivation of Aboriginal offenders should not be understood to preclude the general application of the principles relating to the taking of judicial notice – only that any fact judicially noticed must be contextualised as relevant to the individual offender. The comment was made in response to a submission that judicial notice should be taken of a broad principle as to disadvantage and that group. The plurality in *Bugmy* approved of observations made in cases, such as *Fernando* and *Neal*, where judicial notice was taken of facts relevant to the matters to be decided. The same could be said for the observations of the High Court in *Munda*.

The application of the Evidence Act

Should the rules of evidence be found to apply, s 144 of the Act provides that "proof is not required about knowledge that is not reasonably open to question and is … common knowledge in the locality in which the proceedings is being held or generally, or … capable of verification by reference to a document the authority of which cannot be reasonably questioned." Section 144(2) provides that a judge may acquire knowledge of that kind in any way the judge thinks fit, subject to the qualification of s 4(4) that the judge is to ensure a party is not unfairly prejudiced by providing the parties with the opportunity to make submissions and refer to relevant information.

It has been suggested that s 144 in fact enlarges the scope for permissible judicial notice of well-known facts and (relevant to the particular case) a wider range of medical facts than are judicially noticeable at common law: *Norrie v NSW Registrar of Births Deaths and Marriages* [2013] NSWC145 per Beazley ACJ at [104]. It is arguable that well-accepted research in particular fields of study comprises knowledge "not reasonably open to question" or is capable of verification from the authoritative reports cited "which cannot be reasonably questioned".

PART VIII: INDIVIDUALISED JUSTICE: PRESENTING EVIDENCE CONCERNING THE INDIVIDUAL

Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, but to recognise this is to say nothing about a particular Aboriginal offender. In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background.

– *Bugmy* at [41]

In the Supreme Court of Canada decision of *Ipeelee*, the court considered the statutory obligation on Canadian courts to take into account the circumstances of Aboriginal offenders, and held that (at [59]–[60]) [emphasis added]:

> Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report…
>
> To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential school and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered …

As noted above, the plurality in *Bugmy* held that in any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background: at [41]. Judicial notice of material carries no weight unless there is a proper basis upon which it can be applied to the individual facing sentence.

As Judge Haesler SC stated in his paper 'Applying *Bugmy*: An Address to the NSW Legal Aid Commission's Aboriginal Services Branch': "We cannot wait. We do not need to reinvent the *Gladue* process but we can reimagine the process and apply it within the parameters set by local conditions and the restrictions on current sentencing law recognised in both *Bugmy* and *Munda*."[27] His Honour commented that material tending to establish matters relevant to an offender and their background should be part of the "ordinary preparation expected of an advocate".

New South Wales does not have the equivalent of the Canadian *Gladue* Report, which is a report provided for by s 718.2(e) of the Criminal Code of Canada to provide a sentencing judge with options other than full-time imprisonment for an Indigenous offender, and some

[27] Judge Andrew Haesler SC (n 2) 18.

understanding of the individual offender by a writer intimate with the Aboriginal culture and beliefs and their community. The report covers an extensive number of topics including an offender's history; family relationships; educational background; past psychological assessments; substance abuse history, history of abuse or neglect; history of abuse or exposure to sexual or domestic violence; institutional history and participation in rehabilitation programs; current circumstances and health and well-being amongst other subjects.

In *Bugmy*, the matters relied upon on appeal were those that had been adduced on sentence: including the offender's history of separation from his family; exposure to domestic violence as a child; a long history of substance abuse from the age of 12; multiple periods in juvenile detention; multiple attempts at self-harm; illiteracy; unemployment; significant loss of members of his immediate family and grief; being placed in segregation.

Whilst there is no imminent likelihood that New South Wales will adopt the process of obtaining comprehensive *Gladue*-style reports,[28] there is no reason that the defence cannot put this material to the court in the form of oral or affidavit evidence, or other written material, to found the substance of any submission as to individualised justice. It is noted that separate steps are being taken by the ALS NSW/ACT in the development of the "Bugmy Evidence Library" – a body of material containing information about the social disadvantage of certain Indigenous communities for use in sentencing matters. This project is still in development.

As noted by Haesler J,[29] many topics may be covered in a standard well-prepared Pre-Sentence Report, or psychological report, but it is rare that the author would have community knowledge relevant to that individual. Such evidence, if not adduced through the offender themselves, might be obtained from a relative, a doctor, school teacher or field officer or, alternatively (or better still, additionally), from secondary sources, such as hospital or medical records, Justice Health files, school reports and other records. In Local Courts, information in the form of letters addressed to the Presiding Magistrate, or the tender of school reports or medical reports might be adduced.

An expert report is not always necessary, nor should it be required by a sentencing court as might be inferred by the remarks in *Tsiakas v R* [2015] NSWCCA 187 at [74]. However, as Rothman J commented in his paper 'Disadvantage and Crime: The Impact of *Bugmy* and *Munda* on Sentencing Aboriginal and Other Offenders', it may be necessary in some cases to put the propositions contained in studies concerning disadvantage to psychologists or other experts in order that they might expressly consider whether the factors concerning a

[28] It is worth noting that the Australian Law Reform Commission has recommended that all jurisdictions should "develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples", and that this information be submitted in the form of 'Indigenous Experience Reports' in superior courts: see Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, March 2018) 214.

[29] Judge Andrew Haesler SC (n 2) 18.

particular head of disadvantage affected the offender's conduct (and thereby arguably their moral culpability):[30] see also *Cunningham* [2006] NSWCCA 176 and *Dousha* [2008] NSWCCA 263.

CONCLUSION

Individualised evidence and judicial notice of the impact of certain forms of disadvantage may improve judicial understanding of the background and context in which an offender participates in criminal activity. It may create a better understanding of how the purposes of sentencing may be more appropriately met, including that an emphasis on punishment may not in fact deter crime personally or generally, or even in fact punish the offender. Rather, punishment may in some circumstances do little more than perpetuate recidivism, contributing to ongoing trauma and damage to family and communities. An improved understanding of causes of offending behaviour might just allow us all to better understand an offender's behaviour, and in that way assist in appropriate cases in attempting to frame sentencing outcomes to rehabilitate offenders, reduce recidivism and thereby protect the community.

Perhaps these aspirations are more modestly put by Judge Haesler SC with reference to the profound deprivation experienced by some Indigenous communities:

> *Punishment is a means of social control. Gaol is a means of social control. Taking into account matters in mitigation of sentence softens but does not reduce the controls placed on offenders. Of itself mitigation of sentence to recognise profound deprivation does not reduce risk of violence in Indigenous communities or address the causes of crime. It does however allow for the truth about offenders and their communities to be spoken and acknowledged; it's a small but important step on a very long road.*[31]

Judge Sophia Beckett with the assistance of Jennifer Wheeler, researcher, Public Defenders Office, and Lauren Stefanou, solicitor, Aboriginal Legal Service (NSW/ACT)

[30] Justice Stephen Rothman AM (n 2) 12.

[31] Judge Andrew Haesler SC (n 2) 25.