

**The Bar Book Project: Making Use of the Bar Book
in Sentence and Section 32 Proceedings**

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I. The Bar Book Project

Application of the *Bugmy* principles is not discretionary. Their Honours said:

44 Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving ‘full weight’ to an offender’s deprived background in every sentencing decision.”

It was, therefore, in my opinion, an error for the sentencing judge to “decline to apply the *Bugmy* principles” ...

[A]pplication of the *Bugmy* principles is not a matter of discretion. It is, of course, a matter of evaluation what impact they should have.

R v Irwin [2019] NSWCCA 133 per Simpson AJA at [3]–[5]

1. As this statement from Justice Simpson in a recently determined case considering the failure to apply the *Bugmy*¹ principles demonstrates, those principles represent a mandatory consideration on sentence, where relevant to a particular offender.
2. A client’s history of disadvantage is relevant to the assessment of the moral culpability in relation to the offence and may moderate the application of specific and general deterrence.² Experiences of disadvantage often underpin the

¹ *Bugmy v The Queen* (2013) 249 CLR 571 (*‘Bugmy’*).

² *Bugmy* at [44]-[45] and see also this reference for “conflicting purposes of punishment” in the context of considering a person’s deprived background.

development of substance use issues or mental health conditions which, in turn may reduce a person's moral culpability so that matters such as general deterrence, retribution and denunciation have less weight.³ However, we as practitioners cannot simply make reference to *Bugmy* in submissions and expect that, without more, a sentencing judge will find that those principles are relevant to the sentencing exercise at hand, and will conclude that, in applying them, the client's deprived background represents a significant factor in mitigation.

3. As the High Court made clear in *Bugmy*, for those principles to apply, it is necessary first to point to material tending to establish a background of disadvantage⁴ and then to determine, as a matter of evaluation, the importance of that background in arriving at an appropriate sentence.⁵ Evidence will be needed for favourable findings to be made in relation to each of these matters. The quality and depth of that evidence will have a direct bearing upon the type of sentence option imposed and/or the length and structure of the sentence. Putting the best case forward at first instance is also important to protecting a client's position on appeal when considering the restrictions to introducing fresh evidence and submissions on appeal [see Part IV below].
4. A comprehensive subjective case will obviously also be more persuasive when inviting a magistrate to exercise their discretion to divert a client from the criminal justice system under s 32 of the *Mental Health (Forensic Provisions) Act 1990 (NSW)*.
5. The Bar Book Project is generating a resource which houses 'chapters' of research relating to topics of social disadvantage and deprivation, including experiences of disadvantage specific to Aboriginal and Torres Strait Islander peoples. The project has developed, in part, to assist practitioners, and experts whom they may brief to prepare reports for sentence, in the preparation and presentation of the evidence which is necessary to establish the application of the *Bugmy* principles for offenders who have backgrounds of disadvantage.
6. The Bar Book remains in development and will, later in 2019, be available on the website of the Public Defenders. Each chapter collates key research relating to a particular topic from leading academics, major reports and inquiries which explore the nature, breadth and potential impacts of that category of disadvantage on individuals. The project's committee include representatives from the Public Defenders, the Aboriginal Legal Service (NSW/ACT), Legal Aid NSW, the private

³ *Muldock v The Queen* (2011) 244 CLR 120 at [53]; *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177].

⁴ *Bugmy* at [41].

⁵ *Bugmy* at [46].

profession, Just Reinvest NSW, students, graduates and academics of the Law Faculty, University of New South Wales, the University of Technology Sydney and The Australian National University. The Committee works in consultation with a multi-disciplinary Indigenous advisory group including a psychologist, criminologist and social worker.

7. There are already a number of excellent papers which provide guidance on presenting evidence of disadvantage. Annexure “A” references some these papers and Annexure “B” sets out ‘layers of evidence’ to consider when preparing cases to which *Bugmy* principles may apply. The Bar Book aims to further enhance clients’ subjective cases by tendering credible research in relation to a particular aspect disadvantage experienced by a client.
8. Courts have relied upon research to inform them in relation to the impacts of particular forms of disadvantage [see Part II below].⁶ The research may shed light upon the possible impacts of that experience and may assist the court to conclude that an offender did suffer particular impacts, where evidence is adduced in the proceedings to allow such findings.
9. The ‘chapters’ of the Bar Book which are currently available or soon to be available include:
 - Childhood exposure to family violence
 - Early exposure to alcohol and substance use
 - Fetal Alcohol Spectrum Disorders
 - Impact of out-of-home care
 - Hearing impairment
 - Child abuse and neglect
 - Incarceration of parents and caregivers
 - Interrupted school attendance and suspensions
 - Racism

⁶ For a detailed discussion in relation to the admission pathway should the laws of evidence apply, including judicial notice, see Sophia Beckett, ‘The Bar Book Project: Presenting Evidence of Disadvantage’ (Conference Paper, Public Defenders Criminal Law Conference, 16 March 2019) available at <https://www.publicdefenders.nsw.gov.au/Documents/The%20Bar%20Book%20Project%20Paper.pdf>.

- Social exclusion
- Intergenerational trauma
- Cultural dispossession
- Childhood sexual abuse
- Homelessness
- Long-term unemployment
- Refugee background and war trauma

10. It is envisaged the Bar Book may also assist legal practitioners (and field officers) by better enabling them to:

- acquire a deeper understanding of the nature of and possible impacts of a client’s early experiences (such as exposure to drug use or FASD) in order to:
 - i. make appropriate early referrals;⁷
 - ii. prepare and adduce evidence which comprehensively explores and presents a client’s experience;
 - iii. request medical or other records to support the client’s history;⁸ and
 - iv. ensure the most suitable experts are engaged to prepare court reports; and
- maximise the depth, quality and relevance of expert reports obtained for clients for sentence proceedings or s 32 applications by providing the expert with:
 - i. comprehensive information about the client’s background and experiences and supporting evidence (as referred to in [10] above);
 - ii. relevant research to consider; and

⁷ which may assist in relation to improving the client’s prospects of rehabilitation and establish therapeutic relationships which may support sentencing options which are alternatives to custody

⁸ For example, treating doctor’s records, justice health records, school suspension records, statements or fact sheets of any matters in which the client was a victim of a crime

- iii. specific questions to address in the instruction letter (informed by the client's personal account of their experiences and issues raised in the research).
11. Enhancing a client's subjective case, where possible, in the ways described above may provide the sentencing court with greater scope to find a relationship between the experience of deprivation and the individual's offending conduct. This may also be important in the context of a number of judgments emerging in the NSW Court of Criminal Appeal as to the necessity of finding a "causal link" between deprivation and the offending to reduce moral culpability.⁹ Whilst the High Court in *Bugmy* did not state that moral culpability will only be reduced if the deprivation was causally linked to the offending¹⁰, judicial officers have taken different approaches to this issue.¹¹
 12. In *R v Irwin* [2019] NSWCCA 133, the respondent argued that the sentencing judge misapplied the "*Bugmy*" principles by requiring a causal link between the offending conduct and the respondent's dysfunctional background,¹² submitting this was inconsistent with the plurality's approach in *Bugmy* at [44] and subsequent authorities in the NSWCCA which do not support the requirement of establishing a causal link. Walton J helpfully set out the authorities relied on by the respondent in the judgement.¹³ Walton J went on to "accept...the observations of White JA in *Perkins* as to the significance of a background of social deprivation to sentencing", including:

"[77]The plurality (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) said that if an offender seeks to rely on his or her background of deprivation in mitigation of sentence, he or she needs to point to material tending to establish that background (at [41]), but did not say that if such background of deprivation is established it will (as distinct from may) be a mitigating factor. Nor did the plurality say that if such a background of deprivation is established it will only be a mitigating factor if a causal link between the background of deprivation and the offence is established. Gageler J said (at [56]) that "The weight to be afforded to the effects of social deprivation in

⁹ For example, see Hoeben CJ at CL in *Yu v R* [2019] NSWCCA 96 at 49 and *Perkins v R* [2018] NSWCCA 62 at [41]-[42]

¹⁰ Relevant to the impact of deprivation, the court stated at [43] that "...the experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience..."

¹¹ *Perkins v R* [2018] NSWCCA 62: See 3 different approaches by Hoeben CJ at [41]-[42], White JA at [72]-[77] & Fullerton J at [100]-[102]

¹² At [106]

¹³ At [106]

an offender's youth and background is in each case a matter for individual assessment....

[80] Establishing a connection between a background of social deprivation or profound social deprivation and the offending is likely to reduce the offender's moral culpability...."¹⁴

13. Whilst this issue is yet to be determined by the High Court,¹⁵ presenting evidence which may allow the sentencing court to establish a causal link (where possible) may help to bypass this debate when submitting moral culpability should be reduced.
14. The Bar Book also aims to achieve a broader educative function through the availability of research about the impacts of disadvantage, particularly for the judiciary, prosecutors, defence practitioners and field officers but also other stakeholders including policy makers in health and justice, other social and health professionals working in the justice sector, students and the wider community.
15. The publication of each chapter involves a rigorous process of review to ensure the credibility and reliability of the research included in each chapter. Each chapter is prepared by a researcher under the supervision of a senior academic or lawyer practising in criminal law from the Bar Book committee. The committee undertakes a review of the chapter before being referred to an expert in the field to ensure the research represents the key, well established research available. Prior to publication, the chapters undergo a final review by a panel consisting of a senior academic and lawyers, independent of the committee.
16. To date while the Bar Book has focused on collating research relating to disadvantage and deprivation, the committee acknowledges the strength and resilience of individuals, communities and culture and will develop material relevant to these important factors in order to support submissions relating to enhancing community protection and rehabilitation.

¹⁴ *R v Irwin* at [116] for full extract of White JA's observations which were accepted by Walton J. Walton J also extracted Fullerton's observations of *Bugmy* at [99]-[100] which included: "the plurality in *Bugmy* did not say that deprivation will only be a mitigating factor lessening the moral culpability of the offender if it is causally linked to the offending".

See also paper by Sophia Beckett at note 6 above for a comprehensive analysis of the 'causal link' issue including a substantial body of authority which have not supported the requirement of a 'causal link'.

II. Presenting research in sentence (and section 32) proceedings

17. One way in which the Bar Book might be used by practitioners is by tendering the evidence and inviting the court to accept the research as evidence of the effects which might be expected to flow from particular categories of disadvantage. New South Wales courts have already relied upon reliable, credible research in sentence proceedings. For example:

Case	Research relied upon	Reference
<i>R v Lewis</i> [2014] NSWSC 1127 Rothman J	Baumeister, <i>“The inner dimensional social exclusion: intelligent thought and self-regulation among rejected persons”</i> , (2005) <i>Journal of Personality and Social Psychology</i> , 888	[39]–[42]
<i>Kentwell v R (No 2)</i> [2015] NSWCCA 96 Justice Rothman (Bathurst CJ and McCallum J agreeing)	Baumeister studies on social exclusion referred to in <i>R v Gareth Mullya Lewis</i>	[94]
<i>R v Rossi-Murray</i> [2019] NSWSC 482 Rothman J	Baumeister studies, but importantly, the psychological report tendered on behalf of the offender included reference and application of the studies to the offender	[60]–[62]
<i>Perkins v R</i> [2018] NSWCCA 62 Fullerton J	“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, <u>are well researched and documented</u> ”	[99]

<p><i>R v Munro</i> [2018] NSWDC 331 Yehia J</p>	<p>The Department of Parliamentary Services 2014 research paper “<i>Domestic, family and sexual violence in Australia: an overview of the issues</i>”, adopting research from: “<i>Children’s exposure to domestic violence in Australia: Trends and issues in crime and criminal justice</i>” (No 419 Canberra: Australian Institute of Criminology)</p> <p>“<i>Children’s exposure to domestic and family violence: key issues and responses</i>”, (CFCA Paper No 36)</p> <p>The 2016 Royal Commission into Family Violence (Victoria)</p>	<p>[41]–[49]</p>
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18. Tendering the research relevant to a client’s experience is only part of the task. For the research to be relied upon, as illustrated in *Kentwell v R (No 2)*, evidence needs to be adduced to support its application to the particular case:

The studies by Professor Baumeister, reference to which is contained in the judgment in *Lewis*, make clear that such extreme social exclusion will likely result in anti-social behaviour and most likely result in criminal offending. However, in each case, there must be evidence to suggest the application of these principles and the effect of the exclusion. In this case, the evidence in relation to the appellant of that factor is substantial.¹⁶ (emphasis added)

19. The uncontested background of the applicant relating to social exclusion in *Kentwell* came from the pre-sentence report:

... having been born in Broken Hill to Aboriginal parents and adopted out to a non-Aboriginal family at 12 months of age. The applicant described himself as “a black fella in a white fella’s world” and had trouble in school due to his Aboriginality ... The Appellant grew up ignorant of his Aboriginal cultural heritage, drank alcohol because he felt out of place at school and has suffered from a drinking problem from the age of 15. He was asked to leave home (being the home of his adoptive parents) when he was 17 years of age due to his drinking and fighting...¹⁷

20. Justice Rothman applied the research as follows:

¹⁶ At [94]

¹⁷ At [73]-[74]

I proceeded in *Lewis* to rely upon studies in the United States of America relating to the effect on behaviour of social exclusion and discrimination. It is unnecessary to reiterate those comments or refer in detail again to the studies.

Those studies disclose, somewhat counter-intuitively, that social exclusion from the prevailing group has a direct impact and causes high levels of aggression, self-defeating behaviours, and reduced pro-social contributions to society as a whole, poor performance in intellectual spheres and impaired self-regulation. While intuitively, for those who have not themselves suffered such extreme social exclusion, the response to exclusion would be greater efforts to secure acceptance, the above studies make clear that the opposite occurs.

Thus, a person, such as the appellant, who has suffered extreme social exclusion on account of his race, even from the family who had adopted him, is likely to engage in self-defeating behaviours and suffer the effects to which earlier reference has been made. This is how the appellant has been affected.¹⁸
(emphasis added)

21. In *R v Munro*, research relating to exposure to family violence was accepted by the court as relevant and admissible.¹⁹ The studies relied upon are set out in the table above. Evidence relating to the offender's exposure to domestic violence was adduced in the form of a letter by the offender, he did not give evidence. His mother (the victim of the family violence) also prepared a letter and gave evidence. Judge Yehia adopted a similar approach to Justice Rothman in applying the research as follows:

[41] The material [research relating to family violence] relied upon in this respect is relevant to the sentence proceedings in conjunction with the specific evidence adduced in particular from the offender's mother about the violence that he was exposed to and the observations she made as to his changed behaviour at a time proximate to the commission of the violence and proximate to his offending conduct.

[42] The material focuses on the psychological and/or behavioural impacts experienced by children exposed to domestic violence. Those impacts include anxiety; trauma symptoms; antisocial behaviour; low social competence; low self-esteem; mood problems; loneliness and difficulties at school.

...

¹⁸ At [90]-[92]

See also Justice Stephen Rothman, 'Disadvantage and Crime: The Impact of *Bugmy & Munda* on Sentencing Aboriginal and Other Offenders' (Conference Paper, Public Defenders Criminal Law Conference, 18 March 2018) 10 available at: <https://www.publicdefenders.nsw.gov.au/Documents/Disadvantage%20and%20Crime.pdf>.

¹⁹ At [48]

[54] In the present case there is evidence from the offender's mother of the domestic violence she suffered at the hands of her ex-husband and the family violence that existed in the home by way of aggression, hostility and threatening behaviour perpetrated by her ex-husband. She has given evidence that whilst the offender was not always present to witness the physical violence, he was aware of it. He was so hypervigilant about the violence that he refused to take up a scholarship overseas in order to stay and protect her and his siblings. He was present on occasions when his stepfather returned to the premises acting in an aggressive and hostile manner and making threats towards the family.

[55] It was at about the time that this violence was perpetrated that the offender became withdrawn and stopped engaging in the various sporting activities that he had been involved in.

...

[73] ...I am satisfied in this case that his relative youth, immaturity and his exposure to family violence at a time proximate to his changing behaviour and use of drugs are matters that reduce his moral culpability.

22. The research presented in *Munro* not only highlighted the potential impacts but also shed light upon the breadth of the experience of 'family violence':

[46] It is also well-established that children do not have to directly experience family violence, or even witness it, to be negatively affected by it. Examples of behaviour which may constitute family violence are provided in the Victorian Family Violence Protection Act, namely: overhearing threats of physical abuse by one family member towards another; seeing or hearing a family member being assaulted; comforting or providing assistance to a family member who has been physically abused by another family member; being present when police officers attend an incident involving physical abuse of a family member by another family member.

23. Understanding the breadth of a particular experience of disadvantage or deprivation is an important tool when taking instructions/proofs from clients and potential witnesses. It assists to explore and present a client's full experience. For example, if a client was exposed to family violence as a child through witnessing the violence in the home and then moved out but continued to 'comfort and provide assistance to a family member' who was experiencing violence, including all of these details would be important for understanding the full nature and length of exposure to violence. Presenting evidence-based research which informs the court that 'comfort and assistance' is well recognised as having a negative impact upon a person is likely to assist the court when considering the relationship between the offending and exposure (rather than relying assumed knowledge as to what 'level of family violence' is likely to have an impact).

24. When providing the court with research from the Bar Book on s 32 applications, s 32(1)(b) provides a pathway for the consideration of “relevant evidence” in the exercise of the court’s discretion:

... on an outline of the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant, it would be more appropriate to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with law.

25. Finally, when tendering research, it may be persuasive to point out legislation which specifically permits psychological research to be taken into account in relation to the experience of victims. For example, s 25AA(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides as follows:

When sentencing an offender for a child sexual offence, a court must have regard to the trauma of sexual abuse on children as understood at the time of sentencing (which may include recent psychological research or the common experience of courts). (emphasis added)

26. It is hoped that, over time, by introducing the Bar Book research in proceedings, this may have the overarching effect of deepening the understanding and appreciation of the complex issues which our clients face, and which so often underlie offending behaviour.

III. Briefing mental health experts

27. Another way in which the chapters of the Bar Book might be used by practitioners is to better assist them in briefing experts on sentence and s 32 applications and, in particular, psychiatrists or psychologists who may have been retained to provide reports. While such reports are not necessary in every case where a client has a background of disadvantage, they will very often be of great benefit where mental health or impairment issues are alluded to or established in the subjective evidence (or on instructions/concerns raised by family), but a comprehensive assessment is absent.
28. In *DPP v Radulovic* [2019] NSWLC 1 the Chief Magistrate, Judge Henson, recounted the difficulties in the offender’s background including “the failure of his parents’ marriage, and the descent into drug abuse and crime by his mother resulting in her incarceration” as aspects “that in the experience of courts often act to diminish

moral and ethical restraint.”²⁰ Judge Henson went on to note the possible underlying mental health issues in the Sentence Assessment Report and remarked:

...the Court would have been greatly assisted by a psychiatric or psychological report. I understand that the extremely restrictive bail conditions imposed on the offender did not assist with enabling this avenue to be pursued. Without such material both the Court and, as a consequence, the offender are at a disadvantage. Unassisted the Court is left to do the best it can in assessing whether the offender’s history lends itself to the likelihood that his level of moral culpability is reduced.²¹

29. A report in this case, and others like it, would likely assist the court to make favourable findings when considering *Bugmy* and *De La Rosa*²² principles when advancing a submission that an offender’s moral culpability is diminished.

Mental conditions and sentencing – principles

30. A person’s mental condition may be relevant to a number of sentencing considerations including moral culpability, deterrence, the impact of a custodial sentence, community protection and the need for rehabilitation, the finding of special circumstances.

31. In *Yun v R* [2017] NSWCCA 317, Latham and Bellew JJ said at [47]:

It is apparent that this Court has invariably determined since *Muldrock* (with the possible exception of *Badans* and *Subramaniam*) that an offender’s mental condition at the time of the commission of the offence is a critical component of “moral culpability” which in turn affects the assessment of “objective seriousness”.

32. In *Singh v R* [2019] NSWCCA 110, Payne JA at [43] set out the well-known principles in *De La Rosa*:

- Where the state of a person’s mental health contributes to the commission of the offence in a material way; the offender’s moral culpability may be reduced. Consequently the need to denounce the crime may be reduced with a reduction in the sentence.
- It may also have the consequence that an offender is an inappropriate vehicle for general deterrence resulting in a reduction in the sentence which would otherwise have been imposed.

²⁰ at [18]

²¹ At [18]

²² [2010] NSWCCA 194

- It may mean that a custodial sentence may weigh more heavily on the person. Because the sentence will be more onerous for that person the length of the prison term or the conditions under which it is served may be reduced.
- It may reduce or eliminate the significance of specific deterrence.
- Conversely, it may be that because of a person's mental illness, they present more of a danger to the community. In those circumstances, considerations of specific deterrence may result in an increased sentence.²³ (emphasis added, citations omitted)

33. Payne JA in *Singh* also cited Simpson J (with whom Adams and McCallum JJ agreed) in *Aslan v R*,²⁴ emphasising the need to examine the facts of the particular case to determine the role the condition had to play and consequently, the impact on sentencing considerations:

[34] It will be observed that none of these principles is stated as absolute. What is recognised is the potential effect, in any given case, of a mental disability. It does not follow that, because an offender suffers from some mental impairment or disability, his or her moral culpability is reduced (principle 1); nor that he or she is an inappropriate vehicle for general deterrence (principle 2); nor that a custodial sentence will weigh more heavily upon him or her (principle 3); nor that the significance of specific deterrence is reduced or eliminated (principle 4). Nor, on the other hand, does it follow that a person with mental impairment is a danger to the community, indicating a need for community protection (principle 5). Too often, the mere fact of mental illness is advanced to this Court as necessarily calling for a more lenient sentence. What the principles spelled out by McClellan CJ at CL do is direct attention to considerations that experience has shown commonly arise in such cases. There is, however, no presumption. It remains necessary for the sentencing court to examine the relevant facts in order to determine whether, in the specific case, the mental condition has the consequence contended for.

[35] A central question (but not the only question) is whether the mental illness or other condition had a causative role to play in the commission of the offence or offences for which the offender is to be sentenced. Counsel who appeared for the applicant accepted that this was the principal issue in this case. If it is concluded that there was a causal connection, then the offender's moral culpability **may be** reduced (see principle 1). That connection **may** also warrant lesser attention being paid to the need for the sentence to reflect considerations of general deterrence (principle 2)." (Emphasis by underlining added)

²³ at [177]

²⁴ [2014] NSWCCA 114

34. It should be noted that in relation to a s 32 application, a causal link is not required to be established for the exercise of the court's discretion. However, where there is a link or relationship between the condition and the offending, this may be a persuasive in the exercise of the court's discretion.
35. The quality and depth of the expert reports we obtain for our clients is therefore critical to providing evidence that goes beyond mere advancement of a mental illness. Where possible, by choosing an appropriate expert, providing additional evidence to the expert and requesting specific issues be addressed, expert opinions are better placed to find (if possible) a causal link or relationships between the mental condition and the commission of the offence. The expert opinion, if well-reasoned and unchallenged, is more likely²⁵ to assist the court to make favourable findings.

Choosing an appropriate expert

36. Whilst the *Evidence Act* generally does not apply in sentence proceedings,²⁶ the court will have regard to the specialised knowledge (based on training, knowledge and experience) of the expert in assessing their opinions and deciding whether or not they should be accepted.²⁷

Psychologist or Psychiatrist

37. Consideration should be given as to whether a psychologist or psychiatrist is engaged to avoid the opinion being rejected.²⁸ In *Jung v R* [2017], a psychologist made a diagnosis of a mental illness with reference to the DSM-5, Johnson J remarked, at [41]:

[T]his Court has expressed concern where a psychologist, and not a psychiatrist, purports to diagnose the existence of a mental illness: *WW v R* [2012] NSWCCA 165; *Lam v R* [2015] NSWCCA 143.

²⁵ "likely" because it may still be open to the court to reject the conclusions of expert where there is a legitimate basis to do so: *Toman v R* [2018] NSWCCA 51 at [30].

²⁶ *Evidence Act 1995* (NSW) s 4.

²⁷ See *Lam v R* [2015] NSW CCA 143 at [75]–[90].

²⁸ See presentation from the 2018 NSW LAC conference by Dr Adam Martin (psychiatrist) and Dr Katie Seilder (psychologist) available on the NSW LAC website for guidance in relation to the conditions which psychologists and psychiatrists are best placed to diagnose

38. In *Lam v R* [2015] NSWCCA 143, Hoeben CJ applied s 79 and *Dasreef Pty Ltd v Hawchar*²⁹ in analysing the ‘specialised knowledge’ of the psychologist in that case, rejecting the opinions for want of expertise.³⁰ Beech-Jones J agreed:

In this case, [the expert] was a psychologist. He was not a medical practitioner. As Hoeben CJ at CL has explained, in terms of a diagnosis of various mental illnesses and their effect upon an offender's “capacity for judgment” they stand in a different position to psychiatrists.³¹

39. Johnson J noted, however, in *Jones and Anor v Booth and Anor*³² that “the undue rejection of a psychologist’s report has been criticised in other decisions, where the report was capable of bearing upon the issues arising for determination: *R v Whitbread* (1995) 78 A Crim R 452 at 460-461; *R v Arnold* [2004] NSWCCA 294 at [63]-[64]”.³³ In relation to section 32 applications specifically, the court went on to comment that when receiving expert reports, whilst section 79 of the *Evidence Act* does not apply:

The Local Court should consider the qualifications and expertise of the author of any report which is sought to be tendered at the hearing of an application under s.32 MHFP Act, together with the contents of the report, to determine whether the report should be admitted at the inquiry and what weight should be given to it...there are areas where a psychologist may report and conduct testing which bear upon these issues [issues to be determined in a section 32 application]. In reality, there is no bright line test which delineates, for the purpose of s.32 MHFP Act, areas where a psychological report can or cannot be received.... Any attempt to generalise as to which cases may be appropriate for a psychologist to report on under s.32 MHFP Act, or cases where a psychiatric report may also assist the Court (in addition to or in place of a psychological report) is not helpful. It is, of course, not possible to articulate all the permutations and combinations of factors which may arise with respect to a particular defendant and it would be pointless to seek to undertake that exercise³⁴

40. Drawing your expert’s attention to the Expert Witness Code of Conduct and asking the expert to attach a detailed curriculum vitae will assist to ensure that the expert (whether they are a psychiatrist, psychologist or other mental health professional)

²⁹ [2011] HCA 21

³⁰ at [75]–[84].

³¹ at [90]

³² [2019] NSWSC 1066

³³ at [66]

³⁴ at [51], [59] and [61]

are providing opinions within their area of expertise to avoid the report being rejected or little weight being placed upon the opinions.

41. There is much to be gained by taking a further step and choosing an expert who has specific training or knowledge in the area relevant to our client's history. For example, if a client discloses a history of exposure to family violence, a psychiatrist or psychologist who has specialised training or is published in this field is more likely to be across the research and well placed to comment on the research provided from the Bar Book on this topic.

Cultural expertise and competence

42. Vanessa Edwige,³⁵ an Indigenous psychologist and researcher with particular interest and experience relating to complex trauma, grief and loss (and delivering cultural competence training) was consulted in the process of preparing this paper and provided the following comment in relation to the importance of cultural expertise and competence when assessing Indigenous clients:

I believe that it is crucial for a person assessing an Indigenous person to be culturally competent, aware and provide cultural safety. I believe that Aboriginal Psychologists should be the first option to assess Indigenous clients. We have an understanding of culture, intergenerational trauma, adverse life events and the history that continues to impact on our people. Through our own lived experience we are able to empathise and have an understanding of that client's journey. Assessing an Indigenous person in preparation for a court report can be extremely triggering and re-traumatising. It is with this understanding, we are able to create safety through our cultural knowledge and lived experience. I have had many Aboriginal clients express that they have never told anyone this before as they have never felt safe. As an Aboriginal Psychologist I am acutely aware of the cultural bias in clinical and psychometric assessments. I am able to represent this bias in reports.

Working with Aboriginal people requires sensitivity, cultural understanding, trauma informed practices and cultural knowledge. If an Aboriginal Psychologist is not available to provide a report, then it is morally and ethically imperative to ensure that the non-Indigenous Psychologist has completed cultural awareness training and has successfully worked with Aboriginal people and Aboriginal people can testify to that.

³⁵ Vanessa Edwige is a Senior Psychologist currently working with the Department of Education. Ms Edwige has significant experience in researching and providing treatment in relation to complex trauma, grief and loss, behavioural and substance abuse difficulties. Ms Edwige has delivered training in relation to cultural competence and Indigenous specific mental health issues, including intergenerational trauma. She has undertaken research resulting in a government report on Aboriginal child sexual abuse as well as working in private practice.

43. Indigenous research suggests that non-Indigenous psychologists who are not culturally competent risk reporting compromised personal histories and diagnoses. Taking a comprehensive history is essential to the accuracy and quality of an opinion. Cultural competence training provides the foundation for cultural safety³⁶ and fostering “constructive interactions” between people of different cultures.³⁷ Cultural competence in health recognises the importance of acknowledging the influences of culture, ethnicity, racism, histories of oppression and other contextual factors in the experiences of individuals and communities.³⁸
44. Walker et al identify cultural competence is essential for mental health professionals to identify and address mental illnesses and associated substance use issues and to recognise the distinctive and pervasive trauma, grief and loss experienced by Aboriginal people.³⁹
45. The ‘National Strategic Framework for Aboriginal and Torres Strait Islander Peoples’ Mental Health and Social and Emotional Wellbeing’ includes in its guiding principles that culturally valid understandings must shape the provision of services and must guide assessment.⁴⁰ This principle is fundamental to assessments given concerns which continue to be raised in relation to culturally biased assessment tools.⁴¹ In relation to criminal justice issues specifically:

...It was also considered likely that Aboriginal and Torres Strait Islander prisoners experienced higher rates of subjective distress, not adequately picked up by current systems of assessment and diagnosis, relating to loss of identity, acculturation stress and/or ‘spiritual sickness’...

³⁶ Pat Dudgeon, Helen Milroy and Roz Walker (eds) (2014) *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (Commonwealth of Australia, 2nd ed) at 200. Available at: <https://www.telethonkids.org.au/globalassets/media/documents/aboriginal-health/working-together-second-edition/working-together-aboriginal-and-wellbeing-2014.pdf>

³⁷ *ibid* at 200

³⁸ *Ibid* at 200

³⁹ *ibid* at 196

⁴⁰ [2017] to [2023], at page 3, available at: https://www.pmc.gov.au/sites/default/files/publications/mhsewb-framework_0.pdf

⁴¹ Dudgeon et al (2014) at 296, reference at note 33 & Westerman & Wettinger (1997): ‘almost all IQ tests are culturally biased against minority groups including Australian Aboriginal populations....’ ‘personality tests are mostly to be considered inappropriate for use with Aboriginal people...’: <https://Indigenoupsychservices.com.au/wp-content/uploads/2018/10/Psychological-Assessment-of-Aboriginal-People-Assessment.pdf>

Overall, the findings in the report by Jones and Day pointed to the need for more culturally attuned mental health assessments and responses for Aboriginal and Torres Strait Islander peoples involved in the criminal justice system...⁴²

46. Cultural expertise or at least, cultural competence should be a pre-requisite to engaging an expert for a court report for Indigenous clients.
47. The Bar Book chapters which are specific to Indigenous clients (e.g. the impacts of cultural dispossession, intergenerational trauma) will assist experts to consider the potential impacts identified in the research (including psychological impacts) in the context of the client's history and experience.

Briefing the expert: providing material and instructions

Providing relevant evidence

48. It is often the case that psychological reports are requested before subjective material is obtained. There are, of course, practical reasons for this including the pressure of workloads, delays in service providers or support persons responding to requests, time constraints between plea (or verdict) and sentence. In the absence of this, the expert will commonly base their assessment on the client's history at the appointment, the facts and the criminal history (if there is one). Consideration should also be given to providing relevant collateral information from the prosecution brief, if available, which may shed light on the person's mental state, for example, the ERISP (particularly if close in time to the offence), witness statements which give important detail beyond the facts or footage (CCTV of the offence, body worn video).
49. There are also significant advantages to collating the subjective evidence (e.g. client's letter/affidavit, support letters/affidavits from family, letters of reports from current treating health care professionals, health records, past reports)⁴³ and providing this to the expert before they undertake their assessment.
50. Firstly, and obviously, the quality of the assessment will be higher. The expert can spend their limited assessment time going beyond scratching the surface in taking a basic history. The material (e.g. Justice Health records close in time to the offence) may assist in formulating opinions relevant to finding a 'causal link' and may prompt the expert to ask deeper questions based on the evidence provided.

⁴² Dudgeon et al (2014), at 120, reference at note 33

⁴³ See Annexure A.

51. Secondly, by referencing the evidence as ‘source material’ in the report, the basis of the opinion is less likely to be questioned where the subjective material is additional to or inconsistent with the history provided to the expert by the client. It is a legitimate basis for rejection of the opinion of an expert where the court rejects the history upon which that opinion was based.⁴⁴ Of course, forensic decisions need to be made as to whether to tender a report which is based on a history which is at odds (or not as full) as other subjective material, but this situation is likely to be avoided, as it relates to additional matters at least, where the expert is provided with the subjective evidence which is proposed to be tendered. The contents of the support letters/affidavits can be addressed with the client and (hopefully) confirmed in the history.
52. Thirdly, providing corroborating evidence of the client’s history may assist to deal with the court placing ‘little or no weight’ upon statements to ‘doctors, psychologists, psychiatrists’ where this evidence is untested: *Imbornone v R* [2017] NSWCCA 144.⁴⁵ It is noted that Wilson J in *R v Petryk* [2018] NSWSC 119, having regard to *Imbornone*, accepted the opinion based on an untested history provided to the psychologist:

Since Ms Lucas’ opinion is dependent to a considerable extent upon the untested self-report of the offender a degree of circumspection concerning it is necessary: *R v Qutami* (2001)127 A Crim R 369; [2001] NSWCCA 353 at [58] – [59]; *Imbornone v R* [2017] NSWCCA 144 at [57]. However, there is nothing particularly controversial in what the offender told Ms Lucas; indeed, it is much as might be expected for an individual with a criminal record like that of the offender. In the circumstances here, there is no real reason not to accept Ms Lucas’ opinion.⁴⁶ (emphasis added)

53. If the client is not to be called, the court may be persuaded to place more weight on those aspects of the history which are corroborated by evidence from family or community members,⁴⁷ or other records which confirm particular aspects of the client’s account.⁴⁸

⁴⁴ *Lam v R* [2015] NSWCCA at [58] citing *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305.

⁴⁵ At [57].

⁴⁶ At [107].

⁴⁷ Who may also have their evidence tested at sentence.

⁴⁸ It is noted in *DPP v Radulovic* [2019] NSWLC 1 that Judge Henson refers to “uncorroborated claims of the person with the most to gain” when applying *Imbornone v R* [2017] NSWCCA 144 at [18].

Providing relevant research – the Bar Book

54. The case of *R v Rossi-Murray* [2019] NSWSC 482 is a helpful example to illustrate how the Bar Book chapters may be used when briefing experts. In this sentence proceeding, subjective evidence of social exclusion was adduced as follows:

[48] At school, the offender and his siblings were the only Indigenous children and they were often isolated and felt isolated.

...

[50] ... it is clear from the evidence before the Court that the offender saw the punishment meted out to him as being unequal treatment on the basis of his race.

55. A psychological report was tendered on behalf of the offender. Rothman J commented that the psychologist's conclusion (of which the following extract formed a part) was "most helpful" and "extremely useful":

[60] ... His history of responding with aggression to perceptions of marginalisation extends from his experiences of social exclusion at school due to his Aboriginal heritage. Studies by Baumeister et al. have demonstrated in laboratory experiments that social exclusion decreases pro-social behaviour and is correlated with reduced experience of social acceptance led on behalf of the offender...

56. Rothman J found that the offences were influenced by the predictions of the Baumeister studies:

[66] Nevertheless, his earlier offending, this offence for which I must pass sentence, and the subsequent offence for violence in gaol, all evidence the accuracy of the Baumeister studies and reflect the kind of reaction that Professor Baumeister suggested would, almost inevitably, flow from the kind of social exclusion that the offender has suffered.

57. *R v Ryan* [2019] NSWDC 195 is a further case demonstrating the use of research in a psychological report. Specific reference was made in the remarks on sentence to the research which suggested that adult offenders who sexually abuse children are most likely to have been exposed to domestic violence and most likely to have been sexually abused as a child,⁴⁹ and how negative psychological effects of exposure to domestic violence may be expressed.⁵⁰ That background placed the "offending

⁴⁹ research of Rich (2003) at [61].

⁵⁰ At [58].

conduct in its proper context particularly having regard to the psychological evidence.”⁵¹

58. Providing the subjective material and referring the expert to relevant parts of the Bar Book chapters to consider in the process of preparing their report has the effect of consolidating the evidence and strengthening the presentation of the client’s subjective case.
59. Some of the Bar Book chapters which are specifically relevant to Indigenous clients will also include reference to research from Indigenous sources (reviewed by Indigenous experts) relating to treatment/healing. Whilst this research may not be relevant to every case, it is hoped this research:
 - a. prompts practitioners to engage with Indigenous organisations in their client’s community to provide advice on culturally appropriate treatment and healing; and
 - b. better directs the psychologist or psychiatrist who has been retained to provide a report (where the expert is non-Indigenous) to consider cultural expertise on these issues (perhaps by providing the advice referred to in (a)) so that treatment plans may include broader considerations about the client’s wellbeing from a cultural perspective.

The instruction letter

60. In addition to providing the expert with:
 - a summary of the client’s background, contacts for support persons you wish the expert to speak to, current treatment or support networks; and
 - any evidence and material such as outlined above

giving careful consideration to the specific questions to address in the instruction letter is important to ensure specific opinions are obtained to (hopefully) support submissions which one hopes to make. These questions are likely to be informed by, for example, the nature of the proceedings, the client’s history, issues raised in the research and the findings which appear likely to be made from an appraisal of the subjective material. The Bar Book project will have sample instruction letters which may be useful.

⁵¹ At [62].

IV. Presenting the best case at first instance: barriers to admission of new evidence and receiving submissions on appeal

61. The Bar Book will play a particularly important role in sentence proceedings in the District Court, given the restrictions which apply to the tender of fresh evidence on appeal from that jurisdiction. Further, given that an appeal to the Court of Criminal Appeal must assert error, it is, obviously, far easier and far preferable to obtain a favourable result at first instance.

Refusing to permit fresh evidence on appeal

62. *Mousavi v R* [2019] NSWCCA 121 is a reminder of the importance of presenting a comprehensive subjective case at first instance because of the restrictions on tendering evidence on appeal. In this case, the appellant's upbringing was characterised as "dysfunctional". He had a history of illicit substance use having been introduced to cocaine by his father. The psychological report referred to a diagnosis of schizophrenia. In the District Court, the appellant's legal representative relied upon a psychological report and a Pre-Sentence Report. While the sentencing judge accepted that the appellant had a "mental health issue and had received medication from Justice Health, with which he had been compliant", he nevertheless, as indicated in the judgment of the Court of Criminal Appeal:

- a. expressed the view that "some of the observations therein were generous", and did not agree entirely with what the psychologist had to say;⁵² and
- b. noted that there was nothing before him from Justice Health giving definitive information about diagnoses "in that environment", that is, while the applicant was in custody.⁵³

63. On appeal, defence counsel sought to tender a fresh report by a psychiatrist, Justice Health notes and records from Headspace. In referring to *Betts v The Queen* (2016) 258 CLR 420; [2016] HCA 25 at [10], Wright J cited the test for receiving new evidence on appeal:

... the Court of Criminal Appeal has recognised that there are bases upon which error at first instance may be disclosed by new or fresh evidence. Generally, the Court of Criminal Appeal insists upon proper grounds being established as a foundation for the exercise of its discretion to receive fresh evidence. Evidence qualifies as fresh evidence if it could not have been obtained at the time of the

⁵² At [37].

⁵³ At [38].

sentence hearing by the exercise of reasonable diligence. None of this is to deny that the Court of Criminal Appeal has the flexibility to receive new evidence where it is necessary to do so in order to avoid a miscarriage of justice.

64. His Honour then looked carefully at the conduct of the matter at first instance:

There was no evidence that a report from a psychiatrist could not be obtained in time. Nor was there any evidence that relevant records from Justice Health or Headspace could not be obtained by the usual processes. There was also no evidence explaining why these records were not, or could not be, obtained between March and June 2017. In these circumstances, and absent some other injustice, there is no reason to depart from the general position that the applicant is bound by the manner in which his case was presented at first instance, and he should not be permitted to attempt to enhance his case on appeal by adducing new evidence.⁵⁴

65. It was ultimately held that admission of the new evidence would not have been likely to have led to materially different sentences being imposed⁵⁵ and ultimately, there was no miscarriage of justice as a consequence of that evidence not being before the District Court in the sentence proceedings.⁵⁶

Restrictions on receiving submissions and resiling from concessions

66. In *Simmons v R* [2019] NSWCCA 20, the court rejected a submission on appeal that the offences were impulsive by virtue of the offender's immaturity on the grounds that there was a lack of evidence to substantiate this submission at first instance and also because this submission was not put by the appellant's representative in the court below. In doing so, the Court referred to the principles set out in *Zreika v R* [2012] NSWCCA 44:⁵⁷

[81] ...The Court will not lightly entertain arguments that could have been put, but were not advanced on the plea, and will have an even greater reluctance to entertain arguments that seek to resile from concessions made below or are a contradiction of submissions previously made. The Court spoke of the need for exceptional circumstances before this can be done, where it can be shown that there was most compelling material available on the plea that was not used or understood, and which demonstrates that there has been a miscarriage of justice arising from the plea and sentence.

⁵⁴ At [63].

⁵⁵ At [84].

⁵⁶ At [87].

⁵⁷ At [27].

[82] In rare circumstances, a factor which may operate in mitigation of penalty (and which appears clearly from the material before the sentencing Judge) may have been overlooked by defence counsel and the sentencing Judge. In such a case, this Court may be invited to have regard to it, often in circumstances where the Crown will accept that the relevant material raised a factor which should unequivocally operate in the offender's favour on sentence. As Warren CJ said in *Bayram v R* at [29], it may “render a serious injustice” if an offender was not able to correct the error in such a case. This approach reflects the primacy of the rule that appeal grounds should relate to arguments put, and decisions made, at first instance. At the same time, criminal appellate courts should be able to correct a miscarriage of justice, or serious injustice, in the clear and rare cases where the relevant matter has not been relied upon at first instance. (emphasis added).

67. *Burns v R* [2019] NSWCCA 24 restated and applied the above principles from *Zreika* in circumstances where counsel at first instance made a concession that there was not a causal connection between applicant’s depression and the offending.⁵⁸
68. In *Griffin v R* [2018] NSWCCA 259, McCallum J (with whom Beazley P and Davies J agreed) proceeded to hear a ground of appeal relating to the sentencing court failing to consider the significance of applicant’s mental condition on moral culpability where the issue was inadequately developed in submissions at first instance. In considering *Zreika*, the court determined not to refuse to entertain the issue “on that basis would perpetuate a serious injustice in the circumstances of this case.”⁵⁹ It is noted in that case, that the evidence was “cogent and uncontradicted” in relation to a dysfunctional background, PTSD and intellectual and emotional functioning. McCallum J noted the “written submissions for the applicant [at first instance] were brief and confusing”⁶⁰ and no oral submissions were made.
69. These cases demonstrating the strict approach to allowing new evidence and submissions on appeal emphasise the responsibility of carefully curating and advancing the client’s case at first instance.

Crown appeals and residual discretion

70. Before moving on from this topic, it is also important to note briefly the particular considerations that apply to Crown appeals from District Court sentences. Even where a sentence at first instance is found to be manifestly inadequate or affected in some other way by appellable error, it falls upon the Crown to negate any reason

⁵⁸ At [24] and [26].

⁵⁹ At [38].

⁶⁰ At [32].

why the residual discretion not to interfere should not be exercised.⁶¹ For this reason also it is far preferable to obtain a favourable result and try to hold it on appeal than to secure such an outcome on appeal. Further, the Court of Criminal Appeal has noted the relevance of questions of deterrence to whether the residual discretion should be exercised.⁶² While the mere fact that the *Bugmy* principles have application will of course not necessarily protect against a successful Crown appeal, the stronger the evidence supporting their application, the stronger an argument can be made that considerations of deterrence may be moderated so as to secure the favourable exercise of the residual discretion.

71. In *R v Cahill*,⁶³ after finding manifest inadequacy in relation to an ICO imposed for a series of drug supply charges, the CCA dismissed the appeal on the basis of the respondent's "remarkable progress" in relation to his rehabilitation post sentence (having completed a lengthy drug rehabilitation program and going on to become a mentor of that program). In dismissing the Crown's appeal, Johnson J referred to *R v Speechley* [2012] NSWCCA 130 at [146] as follows:

From time to time, this Court has declined to resentence an offender on a Crown appeal, despite error having been established, because of solid and substantial evidence of rehabilitative steps taken by the offender between the time of sentence and the hearing of the appeal...In such circumstances, it may be seen that the offender has taken full advantage of opportunities for rehabilitation which have presented themselves as a result of an erroneous and unduly lenient sentence. Depending upon the circumstances of the case, the residual discretion may be exercised in favour of the offender with the Court dismissing the Crown appeal. (citations omitted)

72. Assisting clients to focus on their rehabilitation needs early on, through connecting to appropriate services and thoroughly briefing experts to assist in formulating effective treatment plans, may not only have a positive impact on the client's sentence at first instance and their health and wellbeing post sentence, but may also influence the outcome of a Crown appeal.

⁶¹ *CMB v Attorney-General* (NSW) (2015) 256 CLR 346; [2015] HCA 9.

⁶² *R v O'Connor* (2014) 239 A Crim R 487; [2014] NSWCCA 53 at [88]–[89].

⁶³ *R v Cahill* [2015] NSWCCA 53.

V. Conclusion

73. When the Bar Book becomes available later this year, it will represent an important resource for the use of practitioners, experts and, most importantly, the courts, so as to further the understanding of the particular types of disadvantage and their specific effects upon those coming before the courts for sentence. Doubtless the Bar Book will evolve and grow over time. So will its use by the courts. Crucial to each of these things is the use of this resource by those who represent clients who come from backgrounds of disadvantage. Often these will be practitioners from Legal Aid or the Aboriginal Legal Service. The Project welcomes your engagement and your feedback with a view to maximising the effectiveness of a tool designed to make it easier for you to achieve the best and most appropriate results for clients to whom the *Bugmy* principles apply, so that sentencing courts truly give them “full weight”.

Rebecca McMahon

31 July 2019

***updated on 19 November 2019**

Annexure A: Useful papers relating to *R v Bugmy* and presenting evidence

- Sophia Beckett, Deputy Senior Public Defender (2019) “The Bar Book Project, presenting evidence of disadvantage”
<https://www.publicdefenders.nsw.gov.au/Documents/The%20Bar%20Book%20Project%20Paper.pdf>
- Justice Rothman AM (2018) “Disadvantage and Crime: The Impact of *Bugmy* & *Munda* on Sentencing Aboriginal and Other Offenders”
<https://www.publicdefenders.nsw.gov.au/Documents/Disadvantage%20and%20Crime.pdf>
- Judge Norrish QC (2017) “Sentencing Aboriginal Offenders – “Striving for equality before the law”
<https://criminalcpd.net.au/wp-content/uploads/2018/02/Sentencing-Aboriginal-Offenders-Judge-Norrish.pdf>
- Judge Yehia SC (2019) “Sentencing Checklist”
<https://www.publicdefenders.nsw.gov.au/Documents/SENTENCING-CHECKLIST-January-2019-Judge-Dina-Yehia-.pdf>

Annexure B: Layers of evidence to consider when presenting evidence of disadvantage

1. Client's personal story

Sources may include:

- client's narrative: oral evidence, affidavit, statement, letter or a history in a psychological/SAR/expert report;
- family members or other community members who knew your client growing up: teachers, carers, doctors, counsellors etc and from time to time, field officers people who are closely connected: oral evidence, affidavits, statements, letters; and/or
- personal records: e.g. counsellor notes, medical documents, FACS or relevant school records

2. Evidence about the deprivation in the community where the client grew up

Prolonged and widespread social disadvantage has produced a community so demoralised and alienated that many within it, like this offender have succumbed to alcohol abuse, criminal misbehaviour and a sense of hopelessness ... it is relevant to the consideration of the relationship of these background matters to the assessment of the particular offender's moral culpability and proper consideration of the principles of proportionality and equal justice.

R v Sharpley [2014] NSWDC 166 at at [46]–[48], Yehia J

Sources of evidence may include:

- client's narrative;
- client's family members or other community members who knew your client growing up (will likely cross over with personal story) but may extend to people in the community who did not know your client as closely but may have known their family or the nature of the community at the relevant time: e.g. elders, field officers, extended family, people who provided services and support (e.g. teachers, counsellors).

*R v Sharpley*⁶⁴ is a good example of adducing evidence of deprivation experienced by the broader community. In this case, evidence was adduced in two ways:

- Walgett Gamilaraay Community Working Party in 2005 (see judgment at [5] for a description of the evidence by the working party)

⁶⁴ Link to case: <https://www.caselaw.nsw.gov.au/decision/54a63ff73004de94513dc6f8>

- Field officer, Mr Gary Trindall (description of evidence adduced from [9] in the judgment)

3. Broader, statistical data or other descriptive reports of disadvantaged communities

Sources may include:

- Statistics
- Credible historical documents
- Submissions by community or other groups⁶⁵
- ALS Bugmy library⁶⁶

4. Credible and Reliable research

Sources may include:

- The Bar Book Project
- Research from government reports & leading researchers and academics

5. Evidence of rehabilitation and resilience

Sources may include:

- Evidence from client, family or community members
- Cultural experts or community leaders (eg in relation to the importance of culture and culturally appropriate healing to rehabilitation)
- Research and resources by Indigenous organisations eg the Healing Foundation⁶⁷
- The Bar Book chapters

⁶⁵ Eg: Jumbunna Wilcannia community report (2009) cited in appellant's submissions in Bugmy http://www.hcourt.gov.au/assets/cases/s99-2013/Bugmy_App.pdf

⁶⁶ See also And the Jumbunna (UTS) community reports 2009–2012: <https://www.uts.edu.au/research-and-teaching/our-research/jumbunna-institute-indigenous-education-and-research/our-3/rates>

⁶⁷ <https://healingfoundation.org.au>