

# JUDICIAL OFFICERS' BULLETIN

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## The architects of the *Bugmy Bar Book*: 10 years of change

Sophie Anderson\*

The *Bugmy Bar Book* assists legal practitioners and decision-makers beyond its intended origins. Initially designed to support advocacy in relation to discrete forms of disadvantage impacting defendants in criminal sentencing proceedings, its value in non-sentencing and non-criminal contexts is evidenced by increasing interest and use in other jurisdictions across Australia. I sat down with some of the architects of the project to reflect on the decade since the High Court's decision in *Bugmy v The Queen (Bugmy)*.<sup>1</sup>

As lead counsel appearing in the High Court appeal, now Supreme Court Justice Dina Yehia, remembers the moment 10 years ago when she walked through those hallowed doors having completed her submissions in a case that would go on to challenge the discourse of established legal precedent, for reasons that may not have been immediately apparent.

"I thought the argument had gone quite well. The Crown had conceded the narrower point<sup>2</sup> that error had been established but did not concede the broader ground which was essentially that sentencing courts take into account the systemic disadvantage experienced by Aboriginal and Torres Strait Islander offenders. The broader point was resisted on the basis that, unlike Canada, NSW did not have specific legislation allowing such an approach. That it was somehow contrary to the principle of individualised justice. So, when I left court that day, I felt that we had done all we could to advance our arguments and I really did not know how the Court would decide on the broader ground."

At the time, Justice Yehia was a NSW Deputy Senior Public Defender. Having both personal and professional connections to Western NSW,<sup>3</sup> she appeared on behalf of Mr William Bugmy, juniorled by Gabrielle Bashir.<sup>4</sup> Mr Bugmy, a Barkindji man, had been represented by the Aboriginal Legal Service (NSW/ACT) in his sentencing proceedings and on a Crown inadequacy appeal relating to charges that arose while he was serving a period of custody in Broken Hill.



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William Bugmy grew up in Wilcannia, in far western NSW, in an environment scarce in resources and lacking the basic infrastructure that many of us are privileged enough to expect. In the context of dire poverty, he both witnessed and engaged in alcohol and other drug use from a young age. Aged 29 at sentence, two psychiatric reports tendered on his behalf in his court proceedings evidenced that he experienced disability and significant mental health issues. He had finished his formal schooling at Year 7 and experienced numeracy and literacy challenges. The argument advanced at first instance by his ALS solicitors, Stephen Lawrence<sup>5</sup> and Felicity Graham<sup>6</sup> was that this background fundamentally informed his experiences and underpinned the offending before the sentencing court. In challenging the adequacy of the sentence imposed below, the Crown argued in the NSW Court of Criminal Appeal<sup>7</sup> that these considerations had effectively been extinguished over time by Mr Bugmy's repeated contact with the criminal courts — a position later resiled from in the High Court.

Mr Bugmy sought special leave to appeal the Court of Criminal Appeal outcome to the High Court and, for Justice Yehia, this represented an opportunity for the broader application of those sentencing principles to Aboriginal and Torres Strait Islander defendants to be considered by the highest court in Australia.<sup>8</sup>

"We took the opportunity, given we were before the High Court, to argue that the High Court should endorse an approach that obliges sentencing judges, when sentencing Indigenous offenders, to take into account the systemic disadvantage and deprivation and the disproportionate over representation of Aboriginal and Torres Strait Islander people in custody."

A reflection on developments, or lack thereof, over the past decade illuminates the stark reality of the continuing over-incarceration of Aboriginal and Torres Strait Islander people across Australia. In 2013, 23% of adults in NSW custodial settings were Aboriginal and/or Torres Strait Islander people.<sup>9</sup> Ten years on, the statistic is worse, at 29.5%.<sup>10</sup> The point argued, it appears in hindsight, was well taken.

Justice Yehia recalls the day that judgment was handed down on 2 October 2013. It became apparent quickly that the arguments advanced on Mr Bugmy's behalf had both succeeded and failed:

"I do remember that when we were notified that the judgment was handed down and the appeal upheld, (it was remitted for the Crown Appeal in the CCA),<sup>11</sup> but that the Court had rejected our broader ground, my sense of it was that it was less of a win and more of a loss. I will never forget that moment. That sense of it stayed with me for months.

When I was appointed to the District Court and conducted a high volume of sentencing cases, the importance of the judgment became clear to me.

Practitioners were relying on it in ways I had not anticipated. Progressively, it became a seminal case when sentencing Indigenous and non-Indigenous offenders.

Now I think that although we didn't have the win we had hoped for, the judgment has had a significant impact on sentencing law and on the way practitioners present their case. It is much more impactful than I believed it would be in those first few months."

Justice Yehia was elevated to the bench of the NSW District Court in 2014, where she set to work. Alongside a significant caseload, her Honour resolved to work to address the barriers posed by what the High Court identified as deficits in legislation relating specifically to sentencing Aboriginal and Torres Strait Islander defendants.

As Chair of the Walama Court Working Group, Justice Yehia drove the creation of a specific and culturally-informed court process to hear sentencing cases for Aboriginal and Torres Strait Islander adults before the District Court. A pilot, the Walama List, commenced at Sydney District Court in 2021, and has been in operation for almost two years.

The tendrils of that experience in the High Court extended beyond the judgment itself. Many years later, while a District Court judge, her Honour had been invited to speak at the University of NSW by Jill Hunter, Professor of Law.

As Jill Hunter remembers it, her Honour sat before an audience of students who had the week before heard from Jeremy Styles, then Managing Advocate of the Aboriginal Legal Service (NSW/ACT). Her Honour spoke about advocacy on behalf of Aboriginal and Torres Strait Islander clients, with particular emphasis on the experience of appearing before the High Court in *Bugmy*.

Jill recalls that, during that lecture, the idea of a "Bar Book" was raised, as a resource via which practitioners could access credible research on matters to inform sentencing submissions. This idea took root and, in what Jill recollects as the "magic of that class", one of her students approached her afterwards and offered to assist by drafting a prototype "chapter" under Jill's supervision:

"I think the *Bugmy* Bar Book helps to connect the sort of humanity of sentencing. You know, sentencing could be seen as a very mathematical, counting your criteria kind of exercise, whereas through, I think, the *Bugmy* principles, students see that, you know, justice bites some people much harder than others for a whole lot of different reasons, and that that needs to be accommodated within sentencing principles."<sup>12</sup>

At a similar time, Rebecca McMahon<sup>13</sup> was in Port Macquarie practising as a private solicitor and preparing to appear on sentence for an Aboriginal client. She

knew that she wanted to place material before the court to emphasise particular aspects of her client's lived experiences and how those were relevant to the sentencing exercise. She recalls:

"I was asking the Court to do what Justice Rothman did in *Kentwell (No 2)*,<sup>14</sup> in terms of relying upon research where you demonstrate in your own case that that experience exists."

Although met by objection from the Crown, using research to inform sentencing courts was an issue she was passionate about.<sup>15</sup> Following this appearance, Rebecca recalls being part of the initial conversation about the building blocks of the idea that was taking shape:

"As a vision was created as to how lawyers could be encouraged and feel more comfortable including that sort of material in their sentence bundles, it became a lot easier.

... I was in the room with some pretty amazing women obviously, the judges and Lauren Stefanou was also there ... Professor Jill Hunter, bringing her academic excellence — and what we wanted to start with, was to create some principles around what we were doing and that it had to be extremely high quality in order to work. We had to make sure that whatever we were doing, by way of process and/or content, had to be of the highest standards in terms of reliability and credibility as a starting point."

In another part of the State, Sophia Beckett, at that time a Deputy Senior Public Defender and now a judge of the NSW District Court, was working on developing a compendium of accessible resources for busy practitioners, including those working in resource-poor places.<sup>16</sup>

She too had worked as a Western Aboriginal Legal Service solicitor in the far west of NSW early in her career and, in 2018, was engaged in an appeal on an unsuccessful High Court special leave application<sup>17</sup> led by Gabrielle Bashir SC. Judge Beckett recalls that it was in the preparation for the special leave application that she was really engaged in the complexities of the interpretation of the decision that were being thrown up at that time, such as whether it was necessary to establish a causal link between the form of disadvantage and the crime.

"That whole process of working on *Perkins*, where there was the argument about there being a "causal link" between disadvantage and the nature of the crime, that's what drew me in.

... so that's the space that I entered in and it was only in the deep depth of the preparation of the special leave that it occurred to me that, actually the science, all of the research about exposure to domestic violence ... If you are exposed as a child up to the age of 12, you are far more likely to carry

the damage of that exposure than you are if you're a teenager. This was contrary to the assumption of the sentencing judge at first instance.

That's when I was introduced to it and I was a Public Defender at the time and I said, 'Bring it to the Public Defenders and put it on the website because it will get exposure and aid accessibility'."

Lauren Stefanou<sup>18</sup> was at that time working as a law graduate in Sophia Beckett's chambers. She had come to the law as a second career. As well as a passion for social justice, she brought valuable skills from her previous professional background in the media.

She remembers being invited into that early conversation about the creation of a resource that could aid lawyers and sentencing courts by providing access to non-legal bodies of research:

"The conversation was around this idea of, you know, judicial officers have Bench Books and it's of growing concern to both the bench and to practitioners that high quality information is put before courts in relation to supporting advocacy to establish the application of the principles in *Bugmy v The Queen* on sentence. So why can't we have a "bar book" that does just that and provides an accessible interface to that kind of extra-legal research and social sciences research that can support busy practitioners and courts?"

Together, these remarkable lawyers and academics were the architects of the Bar Book Project. A working group was formed which included representatives of key agencies and organisations, including the Aboriginal Legal Service (NSW/ACT), Legal Aid NSW, and a delegate of the NSW Director of Public Prosecutions. With the permission of Mr Bugmy, the project later took on the name of the High Court decision.<sup>19</sup>

The Project was first designed:

"as a practical way to address extra-judicial calls from the bench to present informed high-quality material to assist courts in applying sentencing principles appropriate to an offender with a history of disadvantage."<sup>20</sup>

After 12 months of development, the first eight chapters were published on the NSW Public Defenders website on 8 November 2019. Included among them was the original prototype chapter developed by Jill and her student, refined by Rebecca, collating research on the impacts of Foetal Alcohol Spectrum Disorders (FASD), conditions disproportionately impacting people in contact with the criminal legal process but expensive and difficult to diagnose, particularly in regional and remote areas, and in Aboriginal and Torres Strait Islander populations due to a lack of validated screening tools. Each chapter was accompanied by a one-page executive summary for ease of reference in court proceedings, and underwent

multiple levels of review by experts in relevant fields prior to publication, following a rigorous process developed and refined during those first 12 months.

From these humble beginnings, the Bar Book has expanded to 19 chapters, and commissioned independent research aimed at addressing identified gaps in the literature, including the influential 2021 expert report by Vanessa Edwige and Dr Paul Gray, *Significance of culture to wellbeing, healing and rehabilitation*. *Bugmy* Bar Book publications have been referred to in 32 published judgments of courts in NSW and in other jurisdictions including the ACT, Victoria and Queensland. The emphasis upon the importance of culture now provides significant structure to therapeutic justice models such as the Youth Koori Court, Walama List and the Penrith *Marrin Weejali* Referral List.

The Project Committee is constituted by representatives of key agencies and organisations in the justice sector, judicial officers, members of the private profession, academics, psychologists, and has a First Nations subcommittee. All members voluntarily contribute their time by developing and overseeing the project.<sup>21</sup>

With a generous grant of philanthropic funding from the Paul Ramsay Foundation in 2022, the project was able to employ a staff member for the first time, and a comprehensive practitioner and judicial education program has been developed and is being delivered in multiple jurisdictions. The *Bugmy* Bar Book is currently auspiced by the Aboriginal Legal Service (NSW/ACT).

From little things, big things grow. The value of the Bar Book is now echoing in corners of the profession previously unimagined by its architects, including in civil proceedings before tribunals and decision-makers outside the criminal law. As Justice Yehia articulated, while the original vision for the Project continues, it remains, as ever, ambitious to achieve continued change.

The decade since the decision in *Bugmy* has seen an evolution in the way that actors in the legal process engage with and advocate around issues relating to disadvantage experienced by people before courts and tribunals. Specialist programs have evolved and are developing to address some of these entrenched issues.<sup>22</sup> Structurally, however, the over-incarceration rates cited above confirm there is still much work to do. And for these architects of the *Bugmy* Bar Book Project, the possibilities of change are drivers of their unwavering vision.

## Endnotes

\* Barrister, Commercial Bank Chambers, Lismore.

1 (2013) 249 CLR 571.

2 That the weight to be afforded that type of background diminishes over time and with repeated offending: at [43].

3 Justice Yehia was employed as a solicitor for the Western Aboriginal Legal Service (WALS) in NSW from December 1989 to 1996.

4 As Ms Bashir SC then was.

5 Now Member of the Legislative Council, NSW Parliament.

6 Barrister at Black Chambers, Sydney.

7 Which was upheld: see *R v Bugmy* [2012] NSWCCA 223 handed down on 18 October 2022, Hoeben JA at [1]; Johnson J at [57]; Schmidt J at [58].

8 A factor taken into account in other jurisdictions around the world like Canada — see *R v Gladue* [1999] 1 SCR 688, a decision on sentencing principles outlined under s 718.2(e) of the Canadian Criminal Code. That provision directs the courts to take into consideration “all available sanctions, other than imprisonment” for all offenders. It adds that the courts are to pay “particular attention to the circumstances of Aboriginal offenders”; and *R v Ipeelee* [2012] 1 SCR 433, a decision further strengthening the principles expounded in *Gladue*.

9 Australian Bureau of Statistics, *Prisoners in Australia*, 2013.

10 Aboriginal and Torres Strait Islander people made up 29.7% of the adult prison population in NSW in February 2023, which is the highest proportion on record. In March 2023, it stood at 29.5%. Meanwhile, 56.7% of children in youth detention in NSW are Aboriginal or Torres Strait Islander: BOCSAR, NSW Custody Statistics, Quarterly Update March 2023; G Torre, “Over-representation of Aboriginal people in New South Wales prisons ‘highest on record’” *National Indigenous Times*, 30 May 2023.

11 *R v Bugmy (No 2)* [2014] NSWCCA 322 with judgment delivered almost a year later on 3 October 2014.

12 Michaela Johnston, and, later, another student, Ryan Barratt.

13 Adjunct Senior Lecturer at University of NSW (UNSW) and now of Forbes Chambers, recipient of the Terry Keaney Award in 2021, and who had studied with Jill Hunter at UNSW.

14 [2015] NSWCCA 96.

15 R McMahon, “The Bar Book project: making use of the Bar Book in sentence and section 32 proceedings”, conference paper, Legal Aid Criminal Law Conference, 2019.

16 S Beckett, “The Bar Book project: presenting evidence of disadvantage”, paper to the Public Defenders Criminal Law Conference, 2019.

17 *Perkins v R* [2018] NSWCCA 62.

18 Now Principal Solicitor (Justice Projects, Policy & Practice) at the Aboriginal Legal Service NSW/ACT and teaching fellow in the Faculty of Law and Justice at UNSW.

19 With permission of William Bugmy.

20 N Cowdery, J Hunter and R McMahon “Sentencing and disadvantage: the use of research to inform the court” (2020) 32 *JOB* 44.

21 A full list of members is on the Public Defenders website.

22 For example the Sydney based program Deadly Connections, the NSW Youth Koori Court, the Walama List at Sydney District Court and *Marrin Weejali* Referral List at Penrith District Court.