

Aboriginal and Torres Strait Islander Stolen Generations and Descendants

Case Summaries

Sentencing Cases

[Backer \[2024\] VCC 1718](#) (Judge Todd)

Home invasion – value of Aboriginal Community Justice Report – intergenerational trauma linked to stolen generation

- Aboriginal male born to Aboriginal mother stolen from mother as newborn in hospital – mother’s life shaped by this fact – adopted by Dutch emigrees - marginalised, struggled to form her own identity and was starved of her connection to country and to her Aboriginal family - struggled with alcoholism and depression – trauma and rupture of family and culture passed on to offender - offender only son of five children who grew up with mother and experienced difficult childhood
- Value of Aboriginal Community Justice report – pilot program providing Gladue style reports – based on 13 conferences and consultation with family:

[53] The report provides a rich and culturally informed perspective on your history. The report’s contents take the contents of the psychological opinion into account, but, crucially, place those perspectives in a historical and cultural context.

[54] The report places your history in the setting of the intergenerational trauma derived from your mother Josephine’s trauma as part of the Stolen Generation, and in the related systemic deprivations affecting Aboriginal people.

[55] Your life has unfolded in the shadow of the disruption of your family’s removal from country and culture, particularly from the theft of your mother from her mother as an infant. You have both received, and borne witness to, your mother’s suffering as the result of that dislocation.

[56] You were also a witness to your mother’s endurance of violent and criminal offending against her of the most personal and serious kind. You still nurse sorrow and guilt at not being able to prevent this crime from happening while in her presence, even though you were only a small child at the time. You have both managed and suffered from her addictions to alcohol and depression. Ms Hamilton reports:

Extensive documentation indicates that individuals who were forcibly removed as part of the stolen generations have frequently encountered heightened risks of substance abuse and mental health challenges. These experiences have had profound intergenerational implications, significantly impacting their children as well.

[57] You, Mr Backer, participated in the process of the creation of the Aboriginal Community Justice Report which in itself was a lengthy and personal experience.

[58] The report gives me a strong evidentiary basis to accept that intergenerational trauma is relevant to your sentence, and I take it into account in moderating my assessment of your moral culpability for your offending, by applying the ‘general’ principle as articulated in the case of *Bugmy v The Queen*.

[59] I have a much better informed appreciation of the matters personal to you and I also have evidence of the profound and structural disadvantages you have endured and which inform your responses to the world around you. These matters have left you vulnerable and I give these matters full weight in my sentencing decision.

[Re McLaughlin \[2024\] VSC 706](#) (Incerti J)

Bail application – requirement to take into account issues related to applicant’s Aboriginality – applicant direct descendant of Stolen Generation

- Application for bail by Aboriginal woman charged with multiple violence offences – considered requirement under s.3A *Bail Act* 1977 (Vic) to take into account issues related to applicant’s Aboriginality.

[43] The consideration of these factors is necessarily an involved process. It requires the decision maker to contemplate what the historic and ongoing overrepresentation of Aboriginal and Torres Strait Islander people in custody means for the individual before them. It also requires the decision maker to contemplate the specific circumstances of the individual within the broader context of their cultural identity and to view their circumstances through that lens. The *Bugmy Bar Book* provides carefully researched materials that speak to the significance of this cultural identity on every aspect of the individual and their application.

- Referred specifically to chapters ‘Impacts of Imprisonment and Remand in Custody’ and ‘Aboriginal and Torres Strait Islander Stolen Generations and Descendants’: **at [49]**

[49] As noted by both parties, this application is subject to the show compelling reason test. Although it is conceded by the respondent that the applicant has demonstrated a compelling reason justifying her release on bail, I would have considered that this threshold was met in any event. Ms McLaughlin has never served a term of imprisonment and has no recorded convictions. It is therefore very unlikely that she will receive a sentence that exceeds the period on remand and this is a compelling factor. Further, I take into account that discrimination has pervaded the lives of Aboriginal people and that incarceration has a cyclical impact on their social and emotional wellbeing. I have also taken into account the challenging circumstances that Ms McLaughlin has faced in her life, especially an involvement with foster care from a very young age and an upbringing riddled with trauma. Additionally, her offending appears to coincide with a deterioration in her mental health, which provides yet another compelling reason for placing her with supports rather than behind bars. Ms McLaughlin is also a direct descendant of the Stolen Generation and it is important to acknowledge the impact this may have on her. For example, a recent study of the Australian Institute of Health and Welfare has explored the lasting impacts on the descendants of the Stolen Generation as compared to Aboriginal and Torres Strait Islander people without any experience of being removed, which included a finding that descendants are 1.5 times as likely to have been arrested in the last five years and 1.3 times as likely to have poor mental health.

[Atkinson \[2024\] VSC 286](#) (Hollingsworth J)

Manslaughter – background of exposure to extreme violence, substance abuse and deprivation – traumatic impact of stolen generation and intergenerational trauma

- Aboriginal offender exposed to background of extreme family violence, substance abuse and deprivation – incarceration of father – poor educational experience – poverty and child neglect
- Mother a member of Stolen Generations – placed with non-indigenous family when a few months old – came to feel rejected by both Aboriginal and non-Aboriginal cultures: **at [26]**
- Offender came to attention of welfare authorities by age 12 months – welfare reports acknowledge role of intergeneration trauma – effect of later removal from care of mother and separation from family, community and country deeply damaging - sexually assaulted on multiple occasions while in care or juvenile detention; **at [25], [38]**
 - [34] The individual trauma experienced by you, and the intergenerational trauma present throughout your family, led you to have disturbed and insecure attachments, an impaired ability to self-regulate when distressed, low self-esteem, and a perception of the world as a hostile place.
- Serious cognitive issues including FASD - cognitive functioning exacerbated by limited educational attainment, history of trauma, and intergenerational trauma: **at [72]**
- Application of *Bugmy* principles to reduce moral culpability:

[64] There is no dispute that the *Bugmy* principles apply with considerable force in your case. You were raised in a family and community marred by substance abuse and extreme violence. Your values, responses and vulnerabilities were shaped by your childhood experiences. You then developed your own issues with substance abuse and impulsive behaviour.

[65] They are also experiences that sit within the context of your aboriginality, historical disadvantage and intergenerational trauma. Your mother is a member of the Stolen Generations. You were removed from your mother’s custody, and from your country and land. The connection between person and country reinforces Aboriginal and Torres Strait Islander peoples’ identity and sense of belonging. Both your mother’s removal, and your removal, have been deeply traumatic for you and your family.

[66] When applying *Bugmy* and giving “full weight” to “deprivation” it is important to do so from a strengths-based perspective. It is important that courts do not frame deprivation in ways that are divorced from the continuing strength inherent in belonging. You are a proud Yorta Yorta man. It is clear that your connection to your family and your culture is very important to you and that, despite being removed from your mother’s custody and placed in out-of-home care, you never lost your love for culture, your family and your community. You have maintained your connection to culture through engaging with elders, with mentors, and with aboriginal organisations such as the Rumbalara Aboriginal Cooperative. More recently you have engaged with the aboriginal liaison officer in custody, and sought to be transferred to the Koori unit at Ravenshall.

[DPP v Djabmara & Turner \[2023\] VCC 826](#) (Judge Hampel)

Violent home invasion – exceptions to mandatory imprisonment provisions – reference to Attorney General’s comments on intergenerational trauma and disproportionate impact of incarceration on indigenous prisoners

- Sentencing for violent offence – accepted both offenders ‘first nations Australians, indigenous men whose lived experience of childhood trauma has been compounded by the impact of the intergenerational trauma experienced by far too many first nations Australians’: **at [19], [40]**

- Referred to acknowledgment of Attorney-General Jaclyn Symes to Yoorrook Justice Commission of the ‘impact of colonisation and dispossession on Aboriginal peoples, in particular, that the reality of colonisation involved the establishment of laws and policies with the specific intent of excluding and oppressing Aboriginal peoples and their laws, customs, cultures and traditions.’: **at [24]**

[25] She also said:

I acknowledge the fact that the justice system has both recently and historically been a site of exclusion and oppression, whether through laws that were specifically targeted at Aboriginal peoples, laws that were unequally applied to them, or through the refusal to enact specific laws for the advancement of Aboriginal peoples or engage Aboriginal peoples in the design of laws that affect them. I acknowledge that this has resulted in entrenched systemic and structural racism within the justice system and broader institutions of government. I acknowledge also that the impact and structures of colonisation are far-reaching and intergenerational and are continuing to affect Aboriginal peoples' interactions with the criminal justice system.

[26] It is clear, therefore, that the impact of childhood deprivation and disadvantage, overlaid on the intergenerational trauma experienced by so many first nations Australians as a result of the continued impact of colonisation and dispossession, is relevant to the assessment of moral culpability, and generally would operate to reduce the weight which would ordinarily be given to denunciation and deterrence and increase the weight to be given to encouraging rehabilitation, and in determining what is, in all of the circumstances just punishment, when sentencing an offender, compared to one who has not suffered such compounding disadvantages.

- Satisfied offenders has established exception to mandatory imprisonment on basis that impaired mental functioning which would result in offenders being subject to substantially and materially greater than the ordinary burden or risks of imprisonment: **at [69]**

[66] In assessing the impaired mental functioning exception, the materials I have already referred to must be viewed in the context of the Attorney-General's acknowledgement in her evidence to the Yoorrook Justice Commission, of the disproportionate impact of imprisonment on indigenous prisoners, the acknowledged systemic racism, which has and continues to lead to such differential outcomes, between indigenous and non-indigenous prisoners, and the direct personal application here for you, by reason of the direct connection with the appalling circumstances of the death of Veronica Nelson.

[DPP v Jones \[2022\] VCC 1939](#) (Judge Todd)

Aggravated burglary and reckless infliction of injury – importance of Aboriginal Communities Justice Report to provide context and understanding of impact of history of deprivation - intergenerational trauma

- At sentence proceedings for indigenous offender relied on Aboriginal Community Justice Report to ‘authoritatively analyse an Aboriginal person’s circumstances of deprivation and place this into a broader community, cultural and historical context’: **at [49]**

[51] The history of your background of deprivation begins with a review of Barkindji history, to provide an understanding of the enduring and inherited trauma in Barkindji descendants today.

...

[55] The result is a detailed account of how your personal history, and the systemic racism imposed upon Barkindji people over the last five generations, merge. Just one example is how your whole life has been framed by housing insecurity and homelessness. While you have often had places to sleep, your presence in other people’s homes often causes conflict, and has left you feeling unwelcome and unwanted. The report writers observe that displacement is a recurring

theme in your life and a distressing parallel to your Barkindji ancestors, who were subjected to direct and indirect dispersal due to colonial policies and violence.

[56] There is a rigour and solidity to this report; it gives me the evidentiary basis to accept that intergenerational trauma is relevant to both your circumstances and to the content of your offending now before me, and I take it into account in moderating my assessment of your moral culpability for your offending, and in applying more generally the Bugmy principles. I also take into account your willing and courageous participation in the report's construction.

[57] Having regard to the content of the report, I have a much more informed appreciation of the matters personal to you, and I also have evidence of the profound and structural disadvantages you have endured, and which inform your responses to the world around you. I give these matters full weight in my sentencing decision.

[DPP v Rotumah \[2022\] VCC 1532](#) (Judge Johns)

Home invasion – Aboriginal Communities Justice Report as evidence of disadvantaged background – impact of stolen generation and intergenerational trauma

- At sentence proceedings for indigenous offender sentencing judge accepted Aboriginal Communities Justice Report – part of pilot scheme in Victoria to provide ‘holistic account of individual circumstances, including as they relate to a person’s community, culture and strengths, as well as making recommendations regarding community-based options’: at [30]-[38]
- Accepted from Report evidence of impact of Stolen Generation and Intergenerational Trauma on offender’s personal circumstances.

[44] I accept the fact that inherited traumas endure amongst the Gunditjmara descendants today due to the history. Not just the early history but the continuing history which spans early contact, dispossession, massacres, the Eumerella wars, the legacy of trauma stemming from places such as Lake Condah Mission, Framlingham Mission and the instruments that underpinned those missions and subjugated Aboriginal people. The tragedy which was a daily tragedy for those affected and their families decade after decade of the Stolen Generations is also a matter that sits in that history and has continuing repercussions up to the present.

...

[47] I just raise that as one example, amongst the many, of the continuing impacts of dispossession, segregation, subjugation, assimilation policies, systemic racism and discrimination that Aboriginal communities have suffered and that have led to disadvantage and further trauma. Alongside that history, of course, sits the amazing resilience, leadership and strength shown by many of your community and family and that your Elders have set as examples and urge you to look towards for inspiration in the future.

[48] Other examples or reference points of that history that I have spoken about and are touched on in the ACJR is the personal story to you in relation to your great grandmother and hiding young Peter Rotumah. ...

[50] It is significant that the prosecution make the following concessions based upon the report. The prosecution accepts that intergenerational trauma impacted your childhood with specific reference to the report's commentary on children being raised by Stolen Generation members. The prosecution submission also states and I quote.

The prosecution acknowledges the contents of the ACJR and accepts that structural and systemic racism and colonisation influenced Mr Rotumah's personal circumstances and outcomes in life thus far.

...

[52] I too accept that structural and systemic racism and the continuing impacts of colonisation have shaped you and your life circumstances thus far. The ACJR helps demonstrate how your life circumstances sits in that continuum and trauma that I have touched upon and is connected to it.

See also:

[*DPP v Tirris* \[2022\] VCC 1575](#) (Judge Johns)

[*DPP v Poole \(a pseudonym\)* \[2020\] VCC 340](#) (Judge Johns)

[*Maher; Maher* \[2021\] NSWDC 80](#) (Yehia SC DCJ)

Inflict GBH – causal link between disadvantaged background and offending – reference to Bugmy Bar Book chapters on stolen generations and exposure to family and domestic violence

- Evidence established offenders Aboriginal brothers with deprived and disadvantaged childhood – intergeneration trauma resulting from mother’s removal from family as a child – exposure to family and domestic violence and alcohol abuse – introduction to substance abuse at early age - unstable educational history resulting in learning and behavioural difficulties: **at [54]-[67]**
- Mother removed from family as a child and suffered abuse in out of home care – alcoholic by nineteen with ongoing alcohol addiction problems – impact of trauma of this removal on childhood of offenders - described *Aboriginal and Torres Strait Islander Stolen Generations and Descendants* chapter in ***Bugmy Bar Book*** as research summary that ‘helpfully collates recent findings from numerous sources documenting the adverse consequences experienced by both members of Stolen Generations and their descendants’:

[61] ...compared with Aboriginal and Torres Strait Islander people who were not removed or who did not have family members removed, descendants of members of Stolen Generations have been found to experience higher rates of incarceration, interaction with police and arrest; poorer physical and mental health outcomes; higher rates of violence; and have a lower level of trust in the general community.

- Background of disadvantage and deprivation reduced moral culpability but balanced with protection of the community: **at [74]**

[*DPP v Harrison* \[2021\] VSC 601](#) (Jane Dixon J)

Manslaughter stabbing – effect of removal of indigenous children – importance of relevant evidence of impact of life history

- Offender of Aboriginal descent - grandmother, mother and uncle all removed as children

[42] The community research report points out, that it has been well documented, that the removal of Indigenous children from their families has devastating, life-long and intergenerational consequences. (citing ‘Bringing Them Home’ report of the *National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* in April 1997 and dissenting judgment of Eames J in *Fuller-Cust* [2002] VSCA 168 at [91])

...

[77] I take account of the fact that both your mother and grandmother could be described as having suffered the experience of the Stolen Generations, with the impacts of intergenerational trauma impacting the way you were brought up.

- Importance of evidence establishing history and impact of childhood deprivation

[84] Your case highlights importance of proper material being put before the Court before *Bugmy* principles can be properly enlivened. The Court was assisted by the detailed information *provided* in the community research report, and the information contained in the psychological reports about your life history and how it has affected you

Fn [56] There were many unanswered questions when counsel first filed their submissions, but by the end of the plea hearing, the Court had received more detailed information relevant to *Bugmy* principles in the present case

- Accepted evidence establishing offender’s childhood and adolescence marred by significant instability and deprivation – reduced moral culpability although remained moderately high: **at [55], [81]**

Grose [2014] SASFCFC 42; (2014) 240 A Crim R 409 (Gray J, Sulan and Nicholson JJ agreeing)

Criminal trespass and dishonesty offences – validity and purpose of Aboriginal Sentencing Conferences - importance of identifying and exploring impact of offender’s background – findings and recommendations of Royal Commission and other studies

- Sentencing judge declined to order Aboriginal sentencing conference under s.9C (SA) *Criminal Law (Sentencing) Act* 1988 – on appeal Court found refusal an error in exercise of sentencing discretion and sentence manifestly excessive – matter remitted for sentencing conference
- In considering validity and purpose of sentencing conference Gray J referred to importance of using conference to identify and understand risk factors associated with criminal offending – referred to findings of Royal Commission into Aboriginal Deaths in Custody and other studies which showed such factors more prevalent in Aboriginal populations – importance of Courts being alert to possible relevance of factors including childhood separation from families, social marginalisation, intergenerational cycle of abuse and violence, lack of education and unemployment, poor health and alcohol abuse in relation to Aboriginal offenders: **at [41]-[51]**

[50] The overrepresentation of Aboriginal people in prison demonstrates an ongoing need for the criminal justice system to be alert to the factors that create a risk of offending. In 1997, the Human Rights and Equal Opportunity Commission in its National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: Bringing Them Home Report found that “[a]n entrenched pattern of disadvantage and dispossession continues to wreak havoc and destruction in Indigenous families and communities.” It noted the ongoing relevance of the removal of Aboriginal people from their family:

Social justice measures taken by governments should have special regard to the inter-generational effects of past removals. Parenting skills and confidence, the capacity to convey Indigenous culture to children, parental mental health and the capacity to deal with institutions such as schools, police, health departments and welfare departments have all been damaged by earlier policies of removal.

Unless these conditions are altered and living conditions improved, social and familial disruption will continue. Child welfare and juvenile justice law, policy and practice must

recognise that structural disadvantage increases the likelihood of Indigenous children and young people having contact with welfare and justice agencies. They must address this situation.

[51] More contemporary evidence also demonstrates that the risk factors which the Royal Commission identified as contributing to interaction with the legal system, such as poor health, limited education and unemployment, continue to be statistically more prevalent in Aboriginal communities. It has been suggested that the risk factors for offending by Aboriginal people are largely similar to those for the wider population, but that the higher incidence of such factors may explain higher rates of offending.

Further, there exist risk factors specific to Aboriginal people, including forced removal, which have an intergenerational effect. It has been suggested that:⁵⁴

... Policies of child removal and institutionalisation have severely damaged the parenting capacity of many Indigenous people. Many parents are further incapacitated by their poor health, substance abuse and by imprisonment. Poor parenting is a very significant risk factor for offending ...

Of great concern is the identification of an intergenerational cycle of abuse and violence. Indigenous children frequently witness or experience violence, which is normalised and increases the risk that they themselves will use violence ...

***R v Booth* [2014] NSWCCA 156** (Hamill J, Hoeben CJ at CL and Beech-Jones J agreeing)

Aggravated break and enter offences and robbery – paternal grandparents part of ‘stolen generation’ – likely impact on upbringing of offender’s father and offender – deprived background combined with low intellectual functioning justified leniency in individual sentences

- Extensive description of background described as ‘marginalisation of rural and outback aboriginal communities’ and ‘a national disgrace’: **at [4]** – offender’s childhood likely impacted by grandparents being part of ‘stolen generation’: **at [15 – para 9]** – early years spent on mission surrounded by widespread alcohol abuse – victim and witness to family violence – left unsupervised – became State Ward at 10 years and endured multiple foster homes in different towns – separated from sisters – sexual abuse – poor education meant illiterate – early substance abuse as a result of an environment that ‘normalised substance abuse’ – early contact with criminal justice system – deaf in one ear: **at [15]**
- Childhood experiences combined with low intellectual functioning meant poor coping skills and continued substance abuse: **at [15 – para 23-25]** – also easily led by negative peers: **at [15 – para 28]**
- On Crown appeal concluded subjective circumstances justified application of *Bugmy* principles and leniency of individual sentences – sentences ‘tempered with considerable compassion and ... structured in such a way as to foster his rehabilitation’: **at [18]** – total sentence, however, manifestly inadequate and degree of accumulation increased.
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***Fuller-Cust* [2002] VSCA 168; (2002) 6 VR 496** (Batt JA, O’Brien AJA, Eames JA in dissent on final sentence)

Serious sexual offences with history of similar offences – impact of childhood removal from parents and out of home care on Aboriginal offender considered by Eames JA in dissent

- Aboriginal offender and his sister removed from parents and made wards of state at early age – natural parents refused access - placed into foster care with non-aboriginal family – strained relationship with foster mother – sexually abused – failed attempt to reunite with natural mother – placed in institutional care: at [94]-[104]
- Appeal against lengthy sentence allowed in view of error made in relation to rule of accumulation
- On re-sentence Batt JA and O’Bryan AJA both acknowledged the offender’s dysfunctional and disadvantaged childhood but found it carried little mitigating weight in view of nature and gravity of offences and offender’s criminal history: at [60]; [154]-[155]
- Dissenting as to the appropriate length of re-sentence Eames JA discussed at length the relevance of the offender’s Aboriginality, experience of childhood separation from his parents and subsequent foster care with his offending : at [74]-[92]

[92] When regard is had to the welfare and other expert reports which were tendered before the learned sentencing judge it emerges very clearly that far from his Aboriginality being an irrelevance to the circumstances in which the offending conduct occurred, it is pivotal. Indeed, the history of the applicant has remarkable similarities to many of the cases reported upon by the Royal Commission into Aboriginal Deaths in Custody. The impact of a person being separated from family, endeavouring to regain contacts with that family, being rebuffed in those efforts, and thereupon suffering anxiety about being denied the opportunity to fully embrace his or her Aboriginality, was often addressed in individual reports and in the findings of the final report of the Royal Commission. The Commissioners recognised the impact of a person, in those circumstances, being socialised not into the family and kin network which would otherwise be the experience of an Aboriginal person living in urban circumstances but being socialised, instead, by the need to survive in institutional communities, including juvenile detention facilities and homes. That is not to say that in all cases of such separation the impact on the child in later years must have been adverse: that possibility, however, needs to be recognised.

- Eames JA further considered findings of the Royal Commission into Aboriginal Deaths in Custody in relation to the offender’s history of out of home care: at [137]-[140]

[137] The Royal Commission into Aboriginal Deaths in Custody, in the National Report of the Commissioners, identified the over-representation of Aboriginal people in prisons and the underlying factors which led to such deaths in custody. The Commissioners identified one factor being the impact on Aboriginal people who had been separated from their natural families at an early age and placed under the control of welfare institutions and/or being adopted out. Of the 99 deaths in custody investigated by the Royal Commission, 43 of those who died experienced childhood separation from their natural families, through intervention by State authorities or by missions or other institutions

[138] The Royal Commissioners acknowledged that many non-Aboriginal people who participated in the removal of children from their parents in such circumstances did so for the best of motives, and that in some cases opportunities were offered to the children concerned which might otherwise not have been obtained. The Commissioners noted, however, that for most the consequences were negative. The Commissioners observed:

"The consequence of this history is the partial destruction of Aboriginal culture and a large part of the Aboriginal population, and also disadvantage and inequality of Aboriginal people in all the areas of social life where comparison is possible between Aboriginal and non-Aboriginal people. The other consequence is the considerable degree of breakdown of many Aboriginal communities and a consequence of that and of many other factors, the losing of their way by many Aboriginal people and with it the resort to excessive drinking, and with that violence and other evidence of the breakdown of society. As this report shows, this legacy of history goes far to explain the over-representation of Aboriginal people in custody, and thereby the death of some of them."

The Commissioners noted that for Aboriginal people, this history "is burned into their consciousness".

[139] The significance of the work of the Royal Commission and the potential relevance of its findings to cases involving Aboriginal offenders who had experienced separation from their natural families has been well recognised, and the potential for there to be a connection between that experience and later offending behaviour should not be underestimated.

[140] The report of the *National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families*, which was delivered by the President of the Human Rights and Equal Opportunity Commission, Sir Ronald Wilson, in April 1997, investigated the separation of Aboriginal children from their families "by compulsion, duress or undue influence". The report therefore distinguished what it called "forcible removal" from removals "which were truly voluntary, at least on the part of parents who relinquished their children, or where the child was orphaned and there was no alternative indigenous carer to step in." The report, however, made clear that the term of reference was treated as including not merely children who were "removed" from their parents but also those who experienced "separation from their families". The authors of the report noted the results of the National Aboriginal and Torres Strait Islander Survey of 1994, conducted by the Australian Bureau of Statistics, which reported that Aboriginal people surveyed who had been taken away from their natural families as children were twice as likely to have been arrested on more than one occasion than were Aboriginal people who did not have that background.

Stolen Generation Case

Several unsuccessful attempts have been made to obtain compensation through the Courts for damage caused by the forced removal of members of the Stolen Generation. The only successful case to this date is [*State of South Australia v Lampard-Trevorrow* \[2010\] SASC 56](#); (2010) 106 SASR 331 (Doyle CJ, Duggan and White JJ) where the plaintiff succeeded on the basis of negligence and misfeasance in public office. The case contains a detailed picture of the long-term damage caused to Mr Lampard-Trevorrow as a result of being removed from his indigenous family as a child.

Related Social Exclusion Cases

Although not categorised as part of the stolen generation the indigenous offenders in each of the following cases suffered social exclusion in the context of their adoption to a non-indigenous family.

[*Kentwell v R \(No.2\)* \[2015\] NSWCCA 96](#) (Bathurst CJ, Rothman J in separate judgment, McCallum J agreeing)

Sexual offences – relevance of background of social exclusion and racism – Aboriginal offender adopted by white family – felt like “a black fella in a white fella’s world” - reference to Baumeister studies on social exclusion – application of [Bugmy](#) and [Fernando](#) to ‘non-traditional’ case

- Aboriginal adopted to non-Aboriginal family at 12 months – felt like “a black fella in a white fella’s world” – trouble at school – grew up ignorant of cultural heritage – early alcohol abuse due to school experience – asked to leave home due to drinking problem: at [73]-[74]

- On re-sentence accepted that *Fernando* and *Bugmy* considerations could apply to ‘non-traditional’ cases involving social exclusion as experienced by offender: **at [13]** per Bathurst CJ, **at [88]-[94]** per Rothman J
- Reference to studies which establish link between social exclusion and discrimination and aggression and anti-social behaviour: **at [90]-[94]** per Rothman J

[90] 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.

[91] 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.

[92] 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.

[93] Circumstances such as that are akin to a systemic background of deprivation and are a background of a kind that may compromise the person’s capacity to mature and to learn from experience: *Bugmy* at [41] and [43]. As a consequence, this background of social exclusion will, on the studies to which detailed reference has been made in *Lewis*, explain an “offender’s recourse to violence...such that the offender’s moral culpability for the inability to control that impulse may be substantially reduced”: *Bugmy* at [44].

[94] 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.

- Accepted evidence of impact of social exclusion on offender, with evidence of prospects of rehabilitation justify lesser sentence - balanced against seriousness of offending: **at [98]-[99]**

[*R v Lewis* \[2014\] NSWSC 1127](#) (Rothman J)

*Murder – Aboriginal adopted by Caucasian parents - background of social exclusion – consideration of Baumeister studies on effect of social exclusion during childhood – application of *Bugmy* and *Fernando* to ‘non-traditional’ case*

- Aboriginal adopted by Caucasian parents at 6 weeks – informed of adoption at age nine after comment at school – became rebellious – subjected to racist comments impacting schooling – sought and became easily influenced by other Aboriginal youth and commenced antisocial behaviour – became involved in drugs, alcohol, violence, abuse and criminal activity: **at [26]-[31]**
- Applied *Fernando* and *Bugmy* to ‘non-traditional’ case – offender relying upon social exclusion not exposure to physical and alcohol abuse in home environment: **at [37]-[38], [43]**
- Considered academic writing on effect of social exclusion during childhood as suffered by offender

[40] In a most helpful submission, aided by an equally helpful Crown submission, Mr Bruce SC cited some passages from the Baumeister studies. The Crown acknowledged its possible application, at page 7 of its supplementary Crown submissions, in the following terms:

"It is accepted that the evidentiary material provides the court with some bases to conclude that the offender did suffer social exclusion in his formative years. From the Baumeister Study it would appear that the offender's reaction to social exclusion by connecting with his cultural peers and resorting to an antisocial lifestyle marked by alcohol and drug abuse, violence and criminality was expected and possibly inevitable."

[41] The thesis of Professor Baumeister can be summarised in the following passage and I apologise for citing it at length. In R.F. Baumeister & C.N DeWall, "The Inner Dimension of Social Exclusion: Intelligent Thought and Self-Regulation Among Rejected Persons" (2005) *Journal of Personality and Social Psychology*, 888, 589-504, the authors remarked:

"It is easy to propose how people ideally or optimally would respond to social exclusion. They ought to redouble their efforts to secure acceptance. Toward that end, they should reduce their aggressive and antisocial tendencies and increase prosocial behaviour. They should improve at self-regulation so as to perform more socially desirable actions. And even if improved social acceptance is not a promising option, they ought at least to become more thoughtful and intelligent and should avoid self-defeating behaviours, so as to fare better on their own if necessary. Yet our laboratory studies have found the opposite of all of these to be closer to the truth.

Initially we thought that emotional distress would be the central feature of the impact of social rejection, and all behavioural consequences would flow from this distress. This too has been disconfirmed. Across many studies we have found large behavioural effects but small and inconsistent emotional effects, and even when we did find significant differences in emotion these have failed to mediate the behaviours. Indeed, the sweeping failure of our emotion mediation theories has led us to question the role of emotion in causing behaviour generally (but that is another story).

Self-regulation and cognition, instead of emotion, have emerged from our most recent data as the most important inner processes to change in response to social exclusion. Rejected or excluded people exhibit poorer self-regulation in many spheres. They also show impairments in intelligent thought, though these are limited to forms of thought that are linked to self-regulation (that is, thinking processes that depend on effortful control by the self's executive functioning).

Nonetheless, the findings from this work have helped shed light on both the inner and outer responses to exclusion. They help illuminate why many troubled individuals may engage in maladaptive or seemingly self-destructive behaviours. They may also have relevance to the responses of groups to perceived exclusion from society as a whole. Although there are some exceptions, such as the intellectually vigorous culture maintained by Jews during the centuries of discrimination and ghettoization, many groups who felt excluded or rejected by society have shown patterns similar to those we find in our laboratory studies: High aggression, self-defeating behaviours, reduced prosocial contributions to society as a whole, poor performance in intellectual spheres, and impaired self-regulation. Our findings suggest that if modern societies can become more inclusive and tolerant, so that all groups feel they are welcome to belong, many broad social patterns of pathological and unhealthy behaviour could be reduced."