Applying Bugmy

An Address to the NSW Legal Aid Commissions Aboriginal Services Branch Aboriginal Cultural Competency Branch, Training for Legal Practitioners Day: 31 July 2018.

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Welcome

Thank you for this opportunity to discuss the topic: "Evidence required to support submissions relevant to *Bugmy."*[2]

Welcome participants.

Two hundred and fifty years ago "every plant, every creature, every landform on this continent had a name" [3] and a place in the law of the land. That law had, for 60,000 years, applied the accumulated knowledge and wisdom of the continent's Indigenous peoples. I acknowledge and pay my respects to the holders of that law, past, present and future. Australians can no longer pretend our sovereignty as a nation solely depended on what happened in 1788 and after. If we are truly to become a nation we must acknowledge the depth and longevity of that accumulated wisdom and build on it.

On 26 May 2017 representatives of Australia's Indigenous peoples gathered at Uluru. What was said there comes from the heart.

> "Our Aboriginal and Torres Strait Islander tribes were the first sovereign nations of the Australian continent and its adjacent lands islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the creation, according to the common law from time immemorial, and according to science more than 60,000 years. This sovereignty is a spiritual notion… It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.
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> Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene

[1] A Judge of the District Court NSW speaking in a private capacity.
[2] *Bugmy v The Queen* (2013) 249 CLR 571
[3] McKenna M, *Moment of truth: History and Australia's future*, Quarterly Essay 69, Black Inc. 2018, p28

numbers. They should be our hope for the future. These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness. We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift their country."

Introduction

The systematic impact of cultural dispossession and colonialism on Indigenous Australians cannot be ignored. This issue was raised in argument in the High Court by counsel for Mr Bugmy, Dina Yehia SC, as she then was. Ms Yehia's point was that while Mr Bugmy's personal history, which included a history of separation from his family, multiple periods in foster care, boys homes and juvenile justice facilities from age 12, would be taken into account by any sentencing court but that history took on quite a different significance or light when viewed in the context of these "systemic" factors. One significant fact that could shed light on Mr Bugmy's moral culpability was: "The use of alcohol in particular as a way of coping with past traumas of colonization and dispossession is a point made by virtually all commentators."[4] The High Court was taken to the *Bringing Them Home* Report[5] and the Report - *Little Children Are Sacred*.[6]

Ms Yehia did not, and given the current state of the law, could not, contend that "systematic factors" lead to some sort of automatic reduction in penalty. Rather, she agreed with a proposition put by Justice Crennan; "… matters of the offender's history or race should not be overlooked because they may illuminate the differences in the individual circumstances of an offender.[7]

The High Court, in its judgment in *Bugmy*, rejected any suggestion the "C" word, "colonialization," was relevant to their criminal and sentencing jurisprudence. Others today will talk about these issues. I recommend going back to the Deaths in Custody Royal Commission report. Have a read. Then ask; "What has truly been implemented?" Further, read the Director of the Bureau of Crime Statistics and Research (BOCSAR) Don Weatherburn's, practical and evidence based criticisms of the Royal Commission Report and his suggestions for changing our approach and focus.

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[4] *Bugmy v The Queen [2013] HCATrans 167 (6 August 2013)*
[5] Human Rights and Equal Opportunity Commission, Commonwealth of Australia, *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 12
[6] Ampe Akelyernemane Meke Mekarle "Little Children are Sacred" Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Northern Territory Government, 2007
[7] *Bugmy v The Queen [2013] HCATrans 167 (6 August 2013)*

My focus today however is on some practical suggestions that may be useful as you attempt to use existing law to maximum advantage and, one client at a time, reduce Indigenous imprisonment rates.

Abject failure to reduce imprisonment rates

Indigenous Australians are not innately criminal. But proportionally they are the most incarcerated people on the planet.[8] In 1988 there were 384 Indigenous prisoners in gaol in New South Wales. In 1998 there were 1,090 Indigenous prisoners in gaol in New South Wales. [9] Last month, at 8 July 2018, 3,414 of 13,798 people in New South Wales gaols were Indigenous; 3,041 men and 341 women.[10] That is, 24.8% of all NSW prisoners. Similar figures are replicated in every State and Territory.[11]

We cannot afford as a nation to continue to incarcerate so many people. Mass incarceration gives rise to many ethical, moral and financial ramifications – as, in short, retributive penal policies don't work and are causing harm.

> "People often misquote Winston Churchill as having said that we can judge the level of civilisation in a society by the way it treats its prisoners. In fact, it was Fyodor Dostoyevsky who said: "The degree of civilisation in a society is revealed by entering its prisons." Winston Churchill actually said that a society's attitude to its prisoners, its "criminals", is the measure of "the stored up strength of a nation".[12]

For the moment, despite all the evidence and alternatives such as the Justice Reinvestment programs, governments in all jurisdictions are committed to funding more and more gaol cells and most are introducing measures that mean those cells are filled to capacity. Three examples:

1. The *Bail Act* 2013 NSW (as amended in 2014) increased the probability that the average defendant is refused bail. This led to an additional 1,500 bail refusals by NSW courts in the 2-year post reform period.[13]

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[8] Social Justice Report 2009, Australian Human Rights Commission, Canberra, 2009, Chapter 2, p30.
[9] Carcach C, Grant A & Conroy R, *Australian Corrections: the imprisonment of indigenous people*, Trends & issues in crime and criminal justice No. 137, Canberra, Australian Institute of Criminology1999. https://aic.gov.au/publications/tandi/tandi137
[10] Offender Population Report, 8 July 2018, Corrective Service NSW
[11] Australian Bureau of Statistics, *4517.0 – Prisoners in Australia, 2016* (8 December 2016) ABS http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics~5
[12] Erwin James, The Guardian 920070: ttps://www.theguardian.com/society/2007/jun/25/1
[13] Did the 2013 Bail Act increase the risk of bail refusal? Evidence from a Quasi-Experiment in New South Wales: Yeong, S. and Poynton, S. Did the 2013 Bail Act increase the risk of bail refusal? (Crime and Justice Bulletin No. 212), Sydney: NSW Bureau of Crime Statistics and Research (2018)

2. In 2017 another BOCSAR report concluded the number of Indigenous Australians imprisoned for stalking/intimidation offences was almost ten times higher in 2016 than it was in 2011: "The absence of any reason for expecting a sudden growth in this sort of offence suggests that it is more likely to reflect changes in policing policy than a change in criminal behaviour." [14]
3. The first legislative response to the *Bugmy* decision was to remove one important protection for Indigenous offenders. By introducing s21A (5AA) *Crimes (Sentencing Procedure) Act 1999* the NSW government removed the exception to the common law rule that intoxication is not a mitigating factor: See below p11.

Whatever financial costs are paid for pursuit of retributive penal polices, we, as a community, cannot afford to continue for ethical and moral reasons.

The simple fact is present laws, present law and order policies and policing practices have failed to protect our community in general or prevent the violence that plagues some communities. Further, to imprison such a high percentage of one particular population group is, "a grotesque distortion of the purposes of prison". [15] As a community we must do better: We must think and act outside the usual law n' order square.

In 1996 the recommendations of the Royal Commission into Aboriginal Deaths in Custody were published and accepted by governments across the country.[16] Since that time, while the rate of deaths in custody of all prisoners has reduced, the number of Australians imprisoned has increased exponentially.

There are many reasons for this, not simply absence of empowerment among those most imprisoned: see Weatherburn (2014); Weatherburn, D. & Holmes, J. (2017). Every study indicates that Indigenous prisoners are, to quote Don Weatherburn of BOCSAR, "in a league of their own when it comes to physical mental and social disadvantage".[17] So far as significant proportions of the Indigenous population are concerned gaol is no deterrent. Rather than preventing crime and protecting the community, gaol has led to more crime. [18] This pernicious pattern has continued across generations.

[14] Weatherburn, D. & Holmes, J. (2017) Indigenous imprisonment in NSW: A closer look at the trend (Bureau Brief No. 126). Sydney: NSW Bureau of Crime Statistics and Research
[15] Weatherburn D, *Arresting Incarceration: Pathways out of Indigenous Imprisonment*, Aboriginal Studies Press, 2014. p 7
[16] Royal Commission into Aboriginal Deaths in Custody, Commonwealth of Australia, 1991.
[17] Weatherburn (2014) p6
[18] Does Imprisonment Deter? A Review of the Evidence, Don Ritchie, Victorian Sentencing Advisory Council Report, 2011

High imprisonment rates are also expensive, internationally embarrassing and immoral.[19] It must be recognised that efforts to reduce the rate of Indigenous imprisonment in Australia, however, have so far failed. The prospects for Indigenous youth in NSW appear particularly grim and the trend is not abating. Every study indicates that gaol in fact contributes to economic social disadvantage. [20]

I hope you will forgive an old man a degree of cynicism. I started my legal career working as a law student in Redfern in the mid-1970s. We were appalled by the conditions in gaols and the number of prisoners in NSW, which then were just over a 1,000. [21] We had high hopes for progress after the Nagle Royal Commission. We had high hopes that these numbers would go down. We had high hopes that rational evidence based penal polices could be implemented.[22] We were wrong; very wrong!

Since the 1970's every attempt or measure introduced to reduce Indigenous disadvantage has failed to stem the tide of incarceration. I accept, as we all must, the impact of 200 years plus of colonialism however simply talking about empowering the disadvantaged is not going to of itself reduce gaol numbers nor, with respect to all present, except in individual cases, will better lawyering reduce the over representation of Indigenous Australians in our prisons.

When it comes to measures which attempt to reduce levels of Indigenous imprisonment proposals based simply on what those with power think might work more often than not operate to entrench power imbalances. They also tend to legitimise a system of law enforcement that remains intrinsically discriminating when applied against those who do not have power.[23] This concept has never been better expressed than by Anatole France in 1894:

> "In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread. *La majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain*". [24]

[19] Weatherburn (2014) p8
[20] Weatherburn & Holmes (2017)
[21] Report of the Royal Commission into New South Wales Prisons, NSW government, 1978: a copy can be found at http://justiceaction.org.au/cms/images/stories/CmpgnPDFs/naglerpt301112.pdf
[22] The Nagle Royal Commission 25 years on, Gaining perspective on two and a half decades of NSW prison reform, Brown, D. [2004] Alt L J 37
[23] Disadvantage and Crime: The impact of Bugmy and Munda on Sentencing Aboriginal and other Offenders, Stephen Rothman, Conference paper, Public Defenders Criminal Law Conference, Sydney 18/3/2018; http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Rothman_20180318.pdf
[24] A. France, Le Lys Rouge [The Red Lily] (1894), ch. 7

Some Cautions

If I can start however with some cautions: No doubt issues of social and criminal justice are interlinked. But all communities, to remain communities, need economic, social and physical security. At present crime is a real source of insecurity in all those areas. In Indigenous communities and homes crimes of violence are a particular problem. As many Indigenous leaders have pointed out high levels of violence against Indigenous women and children represent the most dangerous threat to health and well-being of Indigenous Australians. Confronting Aboriginal men in a collective way about their behaviour and ingrained attitudes towards women is not easy but it must happen; and the need for such change is urgent. Change for Aboriginal women and children can only occur when men take responsibility and become part of the solution. Aboriginal women in particular should not be forced to bear an unfair burden. [25]

Further, unless indigenous Australians own the process of reform and are able to facilitate it there is a real danger that, to quote Victorian activist Vicky Roach, "It's putting a blackface on the same old white justice system… They say all these fluffy words about it being inclusive and it's a crock of shit." [26]

No study I have read reveals any evidence that magistrates and judges discriminate systematically against Indigenous Australians. We are not immune from racism; as was demonstrated by the comment attributed to a Magistrate who in 1979 spoke of Aboriginal people in Wilcannia as a "pest race." [27] The Magistrate in question did not stay on the bench although there was a successful appeal against his removal.[28]

Most data suggests that as a class, judicial officers are acutely aware of the problems faced by Indigenous offenders and the reasons that bring them before the court. [29] In general if given information that allows appropriate mitigation of sentences judicial officers comply with their obligations. Judicial officers are however obliged to apply the law. We do recognise the appalling statistics for Indigenous incarcerations, suicide, child removal and violence against fellow Aboriginal people, particularly women. Courts are also obliged in any sentence to consider the objective circumstances of the crime and apply principles relating to deterrence.

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[25] M Langton, J Price, J Cashman, Address to the National Press Club, Centre for Independent Studies, CIS Occasional paper 152, November 2016, http://www.cis.org.au/app/uploads/2016/12/op152.pdf
[26] The Saturday Paper, June 9 – 18, 2018
[27] Judicial Racism, Cunneen C, Aboriginal Justice Issues, Australian Institute of Criminology, AIC conference proceedings, 1992
[28] *Macrae v. Attorney-General for N.S.W. (*1987) 9 NSWLR 268*. Attorney General (NSW) V Quin* (1990) 170 CLR 1
[29] Weatherburn (2014) p 52

Although it is not set out in the *Crimes (Sentencing Procedure) Act* 1999 NSW, sentencing also involves retributive punishment. A proper sentence illustrates the Court's view of the seriousness of the crime and should let other wrongdoers know the retribution which will fall upon them if they commit similar crimes.[30] Often when a court speaks of deterrence this is what they really mean. Retribution encompasses the notion that reflects the community's expectation that the offender will suffer punishment and that particular offences will merit severe punishment.[31]

Importantly, *Bugmy* was immediately followed by the decision in *Munda v Western Australia*.[32] There the majority joint judgment held, citing *Veen v The Queen [No 2]* [33] that:

> "Mitigating factors must be given appropriate weight, but they must not be allowed "to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence." … Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide."[34]

The joint judgment in *Munda* also noted the argument that general deterrence has little rational claim upon the sentencing discretion for crimes that are not premeditated. Their Honours made the now uncontroversial point that in such cases it may be said that heavy sentences are likely to be of little utility in reducing the general incidence of crimes. But, as they went on to say, sentences have other purposes; purposes that recognise the legitimate interest of the general community in the denunciation and punishment of a brutal, alcohol-fuelled violence. Those purposes include:

1. Vindication of the dignity of each victim of violence,
2. The need to express the community's disapproval of the type of offending, and
3. The need to afford such protection as can be afforded by the state to the vulnerable against repetition of violence.

[30] *R v Herring* (1956) 73 WN (NSW) 203 at 205
[31] *Ryan v The Queen* (2001) 206 CLR 267
[32] *Munda v Western Australia* (2013) 249 CLR 600
[33] *Veen v The Queen [No 2]* [(1988) 164 CLR 465 at 477
[34] Munda at [52] to [58]

Purposes of sentencing

There are now many, too many, legislative and judicial precedents or guides to the exercise of a judges sentencing discretion. I will not set them out. Such an abundance of strictures reduces discretion and increases the risk of "judicial error" but it also means that focus can be lost:

> "Too many prescriptions, rules or legislative or other guidelines can leave a judge not with choice between better or best but between bad and worse."[35].

So many strictures mean judicial officers have reduced opportunities to make wise and considered individualised determinations about appropriate punishment. I suspect that is what Parliament intended. The implication is judges cannot be trusted. Accordingly, when addressing issues about what is an adequate sentence or what sentence will protect the community, sentencing practice too often degenerates into a box ticking exercise.

All competent practitioners must read and be aware of sections 3A and 21A *Crimes (Sentencing Procedure) Act* 1999 and s 16A and 17A *Crimes Act 1914* Cth. All competent practitioners must keep up to date with what the NSW Court of Criminal Appeal, and if possible Victorian Court of Appeal, say about sentencing but don't get too hung up on the minutia. You should ensure that a sentencing judge correctly applies relevant principles but also take advantage of the flexibility given a judge in determining the appropriate sentence.[36]

Some simple advice when it comes to applying principle and deciding what principle to apply is to; go first to the High Court and then Jordan CJ in *Geddes* before picking up individual statements of principle from the Court of Criminal Appeal. Can I take you back to 1936:

> "The function of the criminal law being the protection of the community from crime, the judge should impose such punishment as, <u>having regard to all the proved circumstances of the particular case,</u> seems, at the same time, to accord with the general moral sense of the community in relation to such a crime committed in such circumstances, and to be likely to be a sufficient deterrent both to the prisoner and to others. When the facts are such as to incline the judge to leniency, the prisoner's record may be a strong factor in inducing him to act, or not to act, upon this inclination. Considerations as broad as these are, however, of little or no value in any given case. It is obviously a class of problem in solving which it is easier to see

[35] Schwartz B & Sharpe K, Practical Wisdom: The right way to do the right thing, Riverhead books, NY, 2010.
[36] *Markarian v The Queen* (2005) 228 CLR 357, at 371 at [27]; *Nguyen v The Queen* (2016) 256 CLR 656 at [37]

when a wrong principle has been applied than to lay down rules for solving particular cases*, and in which the only golden rule is that there is no golden rule".* [37]

Bugmy v The Queen

Mr Bugmy was a prisoner at Broken Hill gaol. In response to a perceived injustice he started throwing billiard balls at prison officers. As a consequence Prison Officer Gould was severely injured. He lost the sight in his left eye. He suffered a great deal of physical pain. He could no longer work as a prison officer. The attack had a continuing and profound psychological impact on him.

On 16 February 2012, Judge Lerve sentenced Mr Bugmy to six years and three months imprisonment with a non-parole period of four years and three months. On 18 October 2012 the Court of Criminal Appeal upheld a Crown appeal against the apparent inadequacy of that sentence and re-sentenced Bugmy to seven years six months imprisonment with a non-parole period of five years. [38] Bugmy appealed to the High Court. On 2 October 2013 the High Court of Australia held that the Court of Criminal Appeal had erred and remitted the matter to the CCA for resentencing.[39] After remitter the CCA dismissed the Crown appeal.[40] The majority found the original sentence was manifestly inadequate but exercised the Court's discretion not to intervene. The High Court made a number of significant findings:

1. There is no warrant in sentencing proceedings to take into account the high levels of Aboriginal incarceration as judicial notice of this fact is antithetical to individualised justice required in every sentencing proceedings. At [28] & [36].
2. A court cannot in any general way take into account the systemic background of deprivation of Aboriginal offenders: At [41].
3. A person's background of social disadvantage may mitigate sentence. At [44].
4. The effect of a person's background of social disadvantage may vary but it does not diminish over time. At [42].

[37] *Geddes* (1936) 36 SR (NSW) 554 at 555-556, per Jordon CJ, my emphasis. Cited with approval by McHugh J in *Markarian v the Queen*
[38] *Bugmy* [2012] NSW C CA 223
[39] Bugmy v The Queen (2013) 249 CLR 571
[40] *Bugmy (No 2)* [2014] NSWCCA 322

5. The impact on an individual sentence of a person's history of social disadvantage can and should vary as the weight to be afforded social disadvantaged requires individual assessment, applying *Veen (No 2)* and *Engert*. [41]
6. Most importantly for the purpose of this paper, "…in any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence it is necessary to point to material tending to establish that background." At [41].

This passage at [41] uses careful language "material tending to establish." It does not mention the word "evidence." This clear distinction is consistent with other important sentencing decisions of the High Court, including *Olbrich v The Queen*,[42] *Weininger v The Queen* [43] and *Markarian v The Queen*.[44]

This paper's aim is to assist defence advocates to assist sentencing courts in putting before courts "material tending to establish" *Bugmy* principles. Can I introduce however another caution: The ultimate difference in Mr Bugmy's sentence was one year three months and in his non-parole period, nine months. While every day not in custody is important *Bugmy* principles form only a relatively small part of any sentencing equation.

Legal responses to Bugmy

There is a paper or thesis in what has happened legislatively and in the Courts after *Bugmy.* I do not touch how the decision interacts with *Muldrock v The Queen*[45]and standard non-parole period offences. In short, some courts have sought to place more emphasis on *Veen (No2)* issues than recognition of disadvantage.[46]

Some judges of appeal have demanded, wrongly in my opinion,[47] proof of a causal link between a background of deprivation and the offending behaviour.[48] That debate is ongoing.[49]

If faced with a submission that a causal link is required my simple advice is to say that the High Court did not say there must be a causative link. Even if a causative link cannot be proved it does not necessarily exclude use of *Bugmy* material in mitigation. *Bugmy* material can never be irrelevant. The High Court in *Bugmy* was doing its best to avoid laying any prescriptive rules to govern the exercise of

[41] *Engert* (1995) 84 A Crim R 67. At [44]
[42] *Olbrich v The Queen* (1999) 199CLR 270
[43] *Weininger v The Queen* (2003) 212 CLR 629
[44] *Markarian v The Queen* (2005) 225 CLR 357
[45] Muldrock v The Queen (2011) 244 CLR 120
[46] Ingrey [2016] NSWCCA 31 at [35] & [35]; *Taysavang & Lee* [2017] NSWCCA 146
[47] See *Bugmy* at [16] & [34]
[48] *Perkins* [2018] NSWCCA 62; El Sayah; Idaayan & Mansaray [2018] NSWCCA 64 at [63]
[49] Hoeben CJCL and White JA took different positions in both *Perkins* and *El Sayah*.

the sentencing discretion. *Engert* is authority for the proposition that no such link must be established in mental health cases.

Other judgments have reinforced the *Bugmy* principle that the effects of profound deprivation do not diminish over time and are to be given full weight in the determination of the appropriate sentence in every case. [50]

Justice Rothman has sought to advance the notion of what "disadvantage" can be taken into account.[51] Judge Yehia SC, as she now is, conducted a model *Bugmy* hearing in *Shipley* [2015] NSWDC 253. In *Parsons* [2016] NSWDC 49, I used available resources and judicial notice to gather material enabling a conclusion about conditions in the Wallaga Lake Community.

In January 2004 s 21A (5AA) was introduced into the *Crimes (Sentencing Procedure) Act 1999* NSW. It confirms the common law position that self-induced intoxication is not to be taken into account on sentencing. It has effect "despite any Act or rule of law to the contrary:" s21A (5B). It thus explicitly overturns Justice Woods "point E" in *Fernando* (1992) 76 A Crim R 58, p 62, approved in *Bugmy* at [38]. "Point E" allowed for an exception to the general rule alcohol abuse is not a mitigating factor where "an offender's abuse of alcohol is a reflection of the environment in which he or she was raised it should be taken into account as a mitigating factor."

Fact finding on sentence

The phrase from *Bugmy* "material tending to establish," is consistent with both section 21A *Crimes (Sentencing Procedure) Act 1999* NSW and s 16A *Crimes Act 1914* Cth. which both speak of a sentencing court "taking into account matters that are relevant and known to the court."

Sentencing hearings follow a guilty plea or trial verdict. Whatever the route to conviction after the conviction is recorded sentence hearings are criminal proceedings and remain accusatorial. That said; calling and testing material or evidence is only required if an asserted matter is controverted or if the judge is not prepared to act on the assertion. Most often this comes up in two areas:

1. When a matter not on oath and repeated second hand is put forward as evidence going to an assessment of the objective circumstances of the offence.

[50] *Ohanian* [2017] NSWCCA 268 and *Nabalarua & Quinlan* [2017] NSWDC 328
[51] *Lewis* [2014] NSWSC 1127 & *Kentwell (no 2)* [2015] NSWCCA 96

2. So-called expert (psychological) reports which are contradicted by other material before the court and/or uncritically parrot claims by an offender who does not give evidence. In such circumstances expression of good intentions, by an offender who is not willing to be tested in the witness box, carries little weight. [52]

Where there is a real dispute that will have a significant impact on sentence the party seeking to have the matter taken into account must bring that matter to the attention of the judge and, if necessary, call evidence about it: *Olbrich* at [25]. In such matters a sentencing judge, may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt. If a judge proposes to take matters into account in favour of the accused, it is enough if those circumstances are proved on the balance of probabilities. [53]

It is important to note and draw to the attention of sentencing courts that while the terms 'fact finding' and 'onus of proof' are often used, in the context of sentencing these references can be misleading, "if it were they were understood as suggesting some general issue is joined between prosecution and offender in sentencing proceedings"[54]

The *Evidence Act* does not apply to sentencing proceedings unless a specific direction is made: s 4 *Evidence Act 1995*. It is not "customary" to make such a direction.[55] This does not mean that the general rules of evidence are ignored but in practice sentencing proceedings are conducted with a degree of informality.

A sentencing court is entitled to have regard to any relevant material put before it. How that material is put before the court and the level of detail required depends on the Court, the seriousness of matter and the outcome sought. Where a fact in that material is contested, the proof of such a fact must occur in the context of the proceeding concerned. A judge or Magistrate is obliged to make their own assessment of the evidence as part of their overall synthesis of relevant factors.

As I will discuss later this general informality allows defence advocates to put material tending to establish *Bugmy* factors without the need to obtain and fund a Canadian Gladue type Report. It's a lesser option but in the current climate a necessary one.

[52] *Qutami* [2001] NSWCCA 353 and *JDX* [2017] NSWCCA 9
[53] *Storey* [1998] 1 VR 359 at 369
[54] *Olbrich* at [25] and *Weininger* at [18] - [26]
[55] *Bourchas* [2002] NSWCCA 373 at [41]

A judge or magistrate can and must apply their experience and wisdom to the sentencing exercise but they cannot operate in a vacuum. Some material must be put before them. It must be enough to allow for a considered judgment. Often the material will not be contested. If it is, a witness can be called, sworn and cross-examined. It is rare even then for an Evidence Act direction to be made.

In *Bourchas*, after a review of authorities, Gyles JA, for the Court, said, "… the effect of the cases is that in the event of dispute the proof is to be by the normal legal means, including subject to the rules of evidence." At [55]. His Honour was speaking of common law rules of evidence. He also cited cases where different views were expressed. In particular he noted that the vigour with which the evidence rules were applied varied and that a judge should not be denied an opportunity to obtain relevant information.

> "Unnecessary insistence on the strict rules of evidence is in no-one's interests in sentencing proceedings, and the customary co-operation between the Crown and the offender and making of admissions by the offender should so far as possible be insisted upon. But if there is good reason for objection to evidence in sentencing proceedings the objection when taken must be resolved and, apart from statute, must be resolved by application of the rules of evidence. In the absence of a direction pursuant to s 4 of the *Evidence Act,* the law of evidence unaffected by that Act applies." At [61].

Can a judge take judicial notice of Indigenous disadvantage?

In *Farkas* [2014] NSWCCA 141**,** Basten JA and Campell J considered the issue of "judicial notice" of matters in non-Evidence Act proceedings. The matter in issue was the impact of a drug's purity in assessing the seriousness of a drug supply offence but it also applies to notice of Indigenous disadvantage.

Justice Basten noted that no simple statement of principle can cover the circumstances in which it is appropriate for a court to rely upon "facts" which are not the subject of evidence. He recognised that the reasoning process by which judges reach findings of fact is often replete with assumptions and inferences based on what may be described as common experience, particularly "notorious facts judicially noticed without inquiry:"[56] His Honour cautioned that, "… unless the fact that the information is uncontestable is itself a fact of which judicial notice can be taken, it is necessary in

[56] At [15]; citing J D Heydon, *Cross on Evidence*, Butterworths (Australian edition, loose leaf) at [3020] and [3025]

accordance with the basic principles of procedural fairness underlying the adversary system that notice of the intention to rely upon such information is given to the parties." [57]

Sentencing, particularly in busy lists, such as most Local and District Courts, is rarely capable of subtlety and refinement. Nor is it necessary in most cases. As Allsop P, noted in *Devaney* [2012] NSWCCA 285, care needs to be taken not effectively to exclude admissible evidence by a process going beyond an assessment of weight. His Honour was referring to statements made to a psychiatrist or psychologist but his comments have general application:

> "It is one thing to discount admissible statements made to a psychiatrist or psychologist if the offender is not prepared to give evidence to the same effect… it is quite another to lessen the effect of the opinion of a professional psychiatrist, without cross-examination, when that opinion is based on history." At [88].

Further, as Hamill J, also speaking about a diagnosis made by a psychologist, has observed; it is not appropriate for the Court to gainsay opinion of an expert admitted without objection, who was not required for cross examination.[58]

In summary: Although the *Evidence Act* does generally not apply, a judge does not ignore the rules the policy and rationale underlying those rules.[59] The fundamental principles of the common law designed to ensure fairness to all parties apply to all sentencing proceedings. Unsubstantiated or fanciful matters do not have to be accepted. Judicial officers are entitled to be sceptical. In particular they are entitled to be sceptical of conclusions unsupported by any factual detail.[60]

Most matters in sentencing proceedings don't have to be proved to the standards expected in civil or criminal trials. Judicial officers can act on and take into account any relevant material put before them. It is rare indeed that any relevant material is excluded but (and it's an important but) any contested material must be have some solid basis if it is to carry any weight.

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[57] *Cavanett v Chambers* [1968] SASR 97 at 101; *Gordon M Jenkins & Associates Pty Ltd v Coleman* (1989) 23 FCR 38 at 46-48
[58] *Ryan* [2017] NSWCCA 209, at [9] and [10]
[59] *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228 at 256 per Evatt J
[60] *Director of Public Prosecutions (NSW) v Tony Mawad* [2015] NSWCCA 227, at [39].

Misapplication of Qatami

All too often when defence material, particularly letters from an offender or matters attributed to an offender in a report or reference, are presented on sentence, objection to the admissibility is taken by the prosecution. *Qatami* is often cited as authority for the objection. There is no basis for a court to refuse to receive any thing produced bona fide in order to determine whether it has some relevance to any aspect of sentencing and if it has relevance act on it, giving such weight as it deserves. It may deserve none.

If the objection is taken on the basis it cannot be tested then the remedy in most case is to adjourn so it can be tested. This is particularly so if a party has failed to comply with the most recent District Court Criminal Practice, Note 15. It is important to note that where the *Evidence Act* is applied, hearsay statements set out in a tendered report are admissible as truth.[61]

Can I take you back to *Qatami*? What Justice Smart said there was:

> "There is one further general observation. In this case reliance appears to have been placed on statements made by the prisoner to psychiatrists and the psychologist. While those statements are admissible in evidence, very considerable caution should be exercised in relying upon them when there is no evidence given by the prisoner. In many cases only very limited weight can be given to such statements.
>
> There has been a noticeable and disturbing tendency of more recent years for prisoners on a sentence hearing not to give evidence and to rely on statements made to experts. Prisoners should realise that if this course is taken great caution will be exercised in respect of the weight, if any, given to those statements." at [58]-[59].

This was neither controversial nor innovative. The Court did not say the evidence was inadmissible. The Court did not say that the material must be disregarded.

This is how I commonly respond to such matters:

> " I do caution myself that the history given to XXX was not supported by evidence on oath from the offender however the focus of the report was on uncontroversial subjective matters and on matters that enabled a proper expert opinion on the impact of profound

[61] s 60 Evidence Act 1995; Wright (1997) 93 A Crim R 48

disadvantage/childhood trauma etc…The disputed material did not go to the objective seriousness of the crime. It was also in accord with other material before me. Primarily it was relevant to my assessment of the offender's moral culpability, prospects and future risk. The material also allows for some understanding of how the offender came to commit these crimes and her prospects of rehabilitation. It must be taken into account."

Gladue Reports

In 1996, as a result of concerns about overrepresentation of Aboriginal people in Canadian gaols, s718.2(e) was introduced into the *Criminal Code Canada*. Section 718.2(e) requires judges to consider all reasonable options available other than gaol when sentencing all offenders but particularly when sentencing Aboriginal persons. The section was considered in *Gladue* [1999] 1SCR 688 and later in *Ipeelee* [2003] 1 SCR 433, where the Supreme Court of Canada observed the section had not been applied as expected.

Aboriginal Legal Services in Canada does not represent alleged offenders; they are assisted by duty lawyers funded through their generic legal aid system. Canadian Aboriginal Legal Services provides other resources, including the preparation of what are now known as Gladue reports.[62]

The preparation of Gladue Reports is meant to be the default option when sentencing Aboriginal offenders in Canada. Gladue reports are not meant to be part of an adversarial process but to inform the court. Short or long reports can be prepared. An offender can agree to waive the preparation of a report and presentation. Generally the offender's consent is required. The Report is prepared for the court not for a party. They are not intended to be partisan. They are not prepared as advocacy tools.[63]

Simply put, a Gladue report is designed to tell the offender's story to the sentencing judge. The aim of the report, going back to section 718.2(e) is: To provide the sentencing judge with options other than full-time imprisonment and some understanding of the individual offender from as many perspectives as possible.

[62] see Bear Paw Legal Education and Resource Centre, Writing a Gladue Report: https://d10k7k7mywg42z.cloudfront.net/assets/5a8516c940780805c43bbc4a/Writing_a_Gladue_Report___March_2017.pdf

[63] The Legal Services Society of British Columbia, *Gladue Myths and Facts: Information for Lawyers* (February 2013) The Legal Services Society of British Columbia < http://lgdata.s3-website-us-east-1.amazonaws.com/docs/3978/735804/gladueMythsFactsInformationSheet.pdf> 2. Accessed 20/7/2018

The reporter must have an intimate working knowledge of Aboriginal culture and beliefs and importantly, the realities of life for Aboriginal people in that community. There must be trust between them and the offender. They must know that community and be aware of such things as intergenerational trauma and the involvement of Aboriginal people in justice system. They must be capable of writing an accurate and readable report. The report must remain neutral and not include personal opinions. It must capture all relevant information. A Gladue reporter must have the trust of all those interviewed, including the offender family friends and the community. The aim is to present a "true" story. Reporters must be prepared to take time.[64]

A Gladue report generally addresses an extensive number of topics. These include: The Offender's history; Family information; Relationships; Any past psychological assessment; Any substance abuse history; Any history of abuse or neglect with the family home, including abuse physical emotional level or sexual and any exposure to domestic violence; Any institutional history; Any rehabilitation programs attempted and completed.[65]

The Report should address the current charges and any remorse and acceptance of responsibility. It should note the offender's criminal record and set details of past criminal behaviour or any time in gaol and other institutions. Other topics can include: Educational history; Employment history; Health and well-being; Any suicide or self-harm history; Other major life experiences; Spirituality and culture; Hobbies and interests.[66]

A Gladue report should address the offender's current circumstances: The offender's residential, family and financial situation; And their dreams and goals. Recommendations set out any barriers to successful completion. They must be realistic about what the offender is willing to, and can, do to address those barriers. Recommendations should be culturally appropriate and relevant. They must be manageable.[67]

Adapting Gladue reports to Australian conditions

Realistically it is highly unlikely that anyone will fund an independently resourced centre to provide background reports as comprehensive as those in the ideal Gladue report. One ray of hope is the ACT. Legal Aid ACT have put a proposal to their Attorney General for a trial funded from the Confiscated

[64] Ibid.
[65] ibid
[66] ibid
[67] Bear Paw Legal Education and Resource Centre, Writing a Gladue Report

Assets Trust to pay for Gladue type reports - Ngattai reports. It is anticipated that such reports will cost about $4,000 and be prepared by Indigenous authors. The reports will involve interviews with the offender, family and community members. They will focus on rehabilitation programs tailored to the offender's needs.[68]

There is very little chance that Australian courts will, at least in the new future, have the benefit of comprehensive Gladue Reports. What then can be done to ensure that a sentencing court can assess an offender and give full effect to their background where it has been blighted by, often, profound deprivation? We cannot wait. We do not need to reinvent the Gladue process but we can reimagine the process and apply it within the parameters set by local conditions and the restrictions on current sentencing law recognised in both *Bugmy* and *Munda*.

Many of the topics considered in Canada are contained in your standard (well-prepared) Pre-Sentence Report (PSR), psychological or psychiatric report. However, it is rare indeed that the author of such a report will have the knowledge of community necessary for the in-depth analysis required for a Gladue type report. The same applies to the background reports prepared by the Legal Aid Commission NSW; if one is lucky enough to have that resource made available.

Most sentencing proceedings do not require a comprehensive analysis of cultural dispossession nor a full psychological examination of every aspect of a person's life. Courts have to focus on that purpose of sentencing aimed at protection of the community. This focus must involve asking; what steps can be done to rehabilitate an offender and restore them to ordinary community life, including life in their own communities?

As the High Court made clear in *Bugmy*, no Australian jurisdiction has as a purpose of sentencing, reducing rates of Aboriginal incarceration. Let us be clear every government with the possible exception of the ACT has clearly signalled that they are prepared to pay for more gaol cells given the perceived political advantages of being seen to be tough on crime. To put that in neutral terms the legislatures presently give precedence, and therefor priority funding, to the deterrent and retributive role of gaol. Deterrence and retribution, despite evidence to the contrary, are still considered to be significant sentencing purposes.

[68] Consultation Report to the ACT Justice and Community Safety Directorate prepared by Legal Aid ACT Aboriginal and Torres Strait Islander Court Experience Reports (Ngattai reports) June 2017 due for release shortly on, http://legalaidact.org.au

Ultimately our duty as practitioners in the justice system is to ensure an offender does not reoffend. There is however, real benefit to all courts in receiving as much information as can be presented about an offender. From the judicial perspective and from both prosecution and defence perspectives as well, there is desire to structure every sentence as far as possible to ensure that gaol is a last resort.

Courts would be assisted by any culturally appropriate material relevant to the offender and their offending, that, using the terms set out in *Bugmy* at [41], points to material tending to establish an offender's background of deprivation in mitigation of sentence.

A Bugmy report

In the short term in New South Wales we cannot expect Gladue style reports. Nor can we expect a specialised Indigenous sentencing court - funding for the proposed Walama Court has not been forthcoming.

The Aboriginal Legal Service NSW/ACT is currently undertaking a project to prepare background reports setting out narrative and statistical accounts of Aboriginal Communities. These Bugmy Evidence Library reports will enable advocates to draw links from the particular data to the personal circumstances of the offender.

The reports aim to accumulate and keep up to date evidence and data to enable material about communities to be provided to Courts in sentence proceedings. They will be historical and fixed in time (1991, 2001, 2011) to coincide with census data and be relevant to the period in which a person is growing up. It is anticipated the reports will be long (4-5 pages of narrative; 25 pages of data) with a one page summary. The reports will not be Gladue type reports. They will not refer to current conditions or services available. That evidence will need to be provided in other ways. The ALS have some funding, including from Norton Rose Fullbright Australia. Data collection is still ongoing; and consultations are underway with initial communities. Realistically, a launch of the project will not occur until next year.[69]

In serious matters some judges of appeal place an obligation on the defence to provide psychological material: *Tsaikas* [2015] NSWCCA 187. Ian Freckleton SC has said of *Bugmy* that:

> "It imposes upon those representing Aboriginal defendants the same difficult obligation borne by those representing defendants of other ethnic backgrounds – to establish, often by way of

[69] Private correspondence, Jeremy Styles, Senior Solicitor, ALS NSW/ACT Ltd, 17/07/2108

> expert evidence, that issues arising from deprivation and a familial experience of alcohol-associated violence, played a role in reducing an offender's moral culpability, or bear upon matters such as the appropriateness of a particular form of sentence or the accomplishment of sentencing objectives."[70]

While obviously guidance can be sought from such decisions as *Tsaikas,* in most sentencing proceedings the difficulties spoken of by Mr Freckleton may be exaggerated. Material tending to establish matters relevant to an offender and their background should be part of the ordinary preparation expected of an advocate. As I hope to make clear an expert report is not always necessary nor should it always be required by a sentencing court.

If information is credible and can be made available by other means why get a report? A report is not always the only appropriate way of putting sentencing material before a court.[71] Sometimes we have to make do. A PSR from Probation and Parole can provide family background and a review of medication taken and psychological diagnoses as well as available rehabilitation programs. Justice Health can provide reports to the Court or their files can be subpoenaed.

What judicial officers miss is material that enables some understanding of specific indices of disadvantage: Those details about the person's personal history that allow proper consideration be given to a "background of deprivation."

How then is such material to be made available to be presented given the current resource constraints? As I have noted above a court can inform itself of any material placed before it but the more credible the material the more weight that can be given to it. What comes next comes with another caution: Judicial minds do differ on what is or is not credible! Judges are however encouraged to limit their reliance on the appearances of witnesses and assessments about credibility of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events.[72]

Suggestions for Bugmy evidence.

In a real sense the decision in *Tsaikas*, which by inference compels the production of an expert report, has set the bar too high. A Gladue type report, while desirable, remains a dream. Even a "Bugmy

[70] Freckleton I, "Imprisonment of Australia's Indigenous offenders", Psychiatry, Psychology and Law, Vol.20(6) (2013), p.799-811
[71] *Davis* [2018] NSWCCA 67
[72] *Fox v Percy* (2003) 214 CLR 118 at [31]. Admittedly this was a civil appeal matter

report," a "Ngattai Report" or a "Bugmy Evidence Report", while desirable, will be not be able to be obtained.

We must make do with what we can get. There are financial constraints. There will time constraints. Advocates must ask: Is it worth adjourning? The remand population is now at 4,680! Far too often by the time an offender is sentenced they're eligible for release! Remand prisoners are held in maximum security without access to the many programmes or the benefits of a classification to medium or minimum security gaols or wings in gaols.[73] Delay produces anxiety and breaks pro-social ties and other links in the community particularly through the loss of secure accommodation.

So some suggestions:

Take instructions from the client. And take them as early as possible. Often, if uncontroversial or consistent with the material in the police or Prosecution brief, they may be all you need. It may seem obvious but from the bench it is not always apparent that an offender has been spoken to or given realistic advice let alone that a full proof of evidence was taken.

Consider alternatives such as; Academic material; broader statistical material; Evidence from other cases; old PSR reports. Better still hunt out old Juvenile Justice Reports or Koori Childrens' Court reports. They may still be on court or ALS or Legal Aid files.

Use subpoena's to get access to medical and hospital records, Family and Community Services and Justice Health files.

Compile your own background material based on instructions and DPP documents, such as the criminal history and custodial records.

Prepare a chronology setting out where and when an offender lived or was incarcerated or detained. A chronology is an invaluable tool and always welcome by the bench.

The author has to be reputable. But, and this is important, it does not need to be as comprehensive as the Canadians expect. The author could be the offender themselves, although obviously if they cannot give evidence self-serving statements will often be discounted.

[73] Call me old fashioned but I think we should use the term gaol not correctional centre, as, with a few notable exceptions, they are not correctional.

The best reporter: The best reporter will be someone who has the trust of the offender, family, friends and the community. They must know that community and be aware of such things as intergenerational trauma and the involvement of Aboriginal people in justice system. They must be capable of writing something that's accurate and readable - it need not be a report as such. The material must remain neutral and not include personal opinions but must try to capture all relevant information. They must be prepared to be tested at court.

The next best reporter may be a family member or a respected member of or elder from the community.

Serve this material on the prosecution well in advance to forestall possible objections and avoid further delay. Often it will be accepted.

As with a Gladue Report the aim is to present a "true" story. The focus must be on what the sentencing judge can use in assessing the particular offence and individual offender - not what you or they think the Court of Criminal Appeal might say.

What a judicial officer needs will obviously depend on the jurisdiction but more importantly the seriousness of the matters for sentence and the likely and desired outcome. What a judicial officer needs is material that can give them some understanding of the offender's personal background and the realities of life for them in their community they live. The material must be consistent with other material. It cannot simply spout unrealistic and self-serving comments by an offender. But, and this is important, it does not need to be as comprehensive as the Canadians seem to expect. Time must be taken and the author must be prepared to be tested in court.

Bugmy matters are only one part of the sentencing synthesis required. They will rarely determine the sentence. Courts need succinct and objectively verifiable material and not a thesis nor an exegesis on colonialism. The material need not duplicate other material such as a Pre-sentence, Drug and Alcohol, Justice Health or a psychological or psychiatric report. It can however and should if necessary challenge and/or contradict such reports if they fail to recognise matters of importance. At least for the moment the "Bugmy" Evidence or Report should attempt to fill the gaps.

What the Court needs to know

A sentencing court needs to have some idea about the offender's subjective circumstances. If it is to be submitted that their moral culpability is to be diminished that submission must be given content in

the material before the court. As I trust I've made clear this material does not need to be compendiously presented in one report. It can come from many sources.

The material should be credible. It is there to provide the basis for you submissions and recommendations. You must accept that they only go to one part of the sentencing equation. As the High Court has made clear that not every matter urged on the judge has to be, or can be, fitted into categories as human behaviour and characteristics are too varied. The sentencing exercise involves:

> "…a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment usually expressed in time or money."[74]

Your focus as defence advocates must be on what the Court needs to know about your client. Be realistic. Personal background material can make a real difference to an outcome both in time in custody or alternatives to custody but subjective material can only go so far if the offence for sentence is objectively very serious. For example the ultimate difference to Mr Bugmy was 9 months on his non-parole period.

Topics to be addressed can include:

Community information: Such as the material compiled by the Bugmy Evidence Library or included in Human Rights Commission Reports and BOCSAR reports. Evidence in other cases is also useful. Use *Sharpley* if applicable. In *Parsons* I used earlier CCA decisions.

Family information: Where the offender grew up: Who grew them up and the circumstances of the home or homes in which they grew up in and lived up to the present. What were the particular problems in the homes where the offender grew up?

Any abuse history: Any history of neglect or other physical, emotional or sexual abuse and any exposure to domestic violence.

Any institutional history: Any history of removal from family, foster care and or adoption.

Relationships: A history of partners and children and their relationships with family and the community or communities and non-Aboriginal people.

[74] *Weininger v The Queen* at [24].

Psychological assessments: A review or reference to any past psychological and or psychiatric assessment, counselling and treatment.

Substance abuse history: All details going to struggles with drugs and/or alcohol, including old reports such as MERIT. And any other rehabilitation programs attempted and completed.

Current charges: Any material going to remorse and acceptance of responsibility and ownership of offence and offending behaviour?

Criminal record: Details of the impact of any time in gaol and other institutions. A review taken from Custodial records of time spent in and out of custody can be helpful.

Health and well-being: Any suicide or self-harm history;

Current circumstances: The offender's residential, family and financial situation. What are their dreams and goals for the future?

Other matters of importance; include the offender's educational and employment history and any other major life experiences and interest.

Recommendations: The recommendations must be realistic and acknowledge any barriers to successful completion. Don't simply spout what the offender would like to happen. Rather the submissions should focus on what the offender is willing to, and can, do to address the identified issues and any barriers to their doing so. Any recommendation should be culturally appropriate and relevant. They must be realistic and manageable.

Synthesis

Courts in Australia have for many years been required to apply the principle first set out in *Neal v The Queen* (1982) 149 CLR 305 at 326. That is; courts are, "… bound to take into account… all material facts, including those facts which exist only by reason of the offender's membership of an ethnic or other group."

Bugmy reinforced this principle in the context of delivering individualised justice but in doing so allowed for material relating to the communities from which an individual comes to be used in determining an appropriate and just sentencing outcome. These decisions of the High Court in *Neal* and now *Bugmy* allow for the reality of life in Indigenous communities to be recognised in the

sentencing proceedings. With the possible exception of the ACT's proposed Ngattai Reports, it is unlikely that we will see independently funded and non-partisan Gladue style reports. That does not mean we give up. There are ways courts can be informed now about the communities from which Indigenous offenders come and importantly must return.

We gaol too many people in this country. The numbers of Indigenous Australians gaoled indicate our system is inherently flawed. Judicial Officers take no pride in being an instrument of injustice but judges operate in a system that says adequate punishment for crimes particularly against people, involves retribution and community protection. This in turn means that offenders must at times be removed from communities and from relationships where they continue to do harm. The consequence of these and many other legislative, policing and judicial decisions has led to the incarceration of Indigenous offenders. That level of incarceration is increasing across generations.

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

Andrew Haesler SC

July 2018

Appendix

Draft Submissions: Assessing the offender's moral culpability and giving full effect to Bugmy v The Queen.

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Draft Submissions:

Assessing the Offender's moral culpability and giving full effect to Bugmy v The Queen

The High Court in *Bugmy v The Queen* (2013) 249 CLR 571, made a number of significant findings:

1. There is no warrant in sentencing proceedings to take into account the high levels of Aboriginal incarceration as judicial notice of this fact is antithetical to individualised justice required in every sentencing proceedings. At [28] & [36].
2. A court cannot in any general way take into account the systemic background of deprivation of Aboriginal offenders: at [41].
3. A person's background of social disadvantage may mitigate sentence. At [44].
4. The effect of a person's background of social disadvantage may vary but it does not diminish over time. At [42].
5. The impact on an individual sentence of a person's history of social disadvantage can and should vary as the weight to be afforded social disadvantaged requires individual assessment, applying *Veen (No 2)* and *Engert* (1995) 84 A Crim R 67. At [44].
6. Most importantly, "…in any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence it is necessary to point to material tending to establish that background." At [41].

This is careful language. The passage at [41] says, "material tending to establish," it does not mention the word "evidence." This clear distinction is consistent with other important sentencing decisions of the High Court, including *Olbrich v The Queen* (1999) 199CLR 270, *Weininger v The Queen* (2003) 212 CLR 629 and *Markarian v The Queen* (2005) 225 CLR 357.

Other sentence and sentence appeal judgments since have reinforced the *Bugmy* principle that the effects of profound deprivation do not diminish over time and are to be given full weight in the determination of the appropriate sentence in every case: *Ohanian* [2017] NSWCCA 268; *Lewis* [2014] NSWSC 1127; *Kentwell (No 2)* [2015] NSWCCA 96; *Shipley* [2015] NSWDC 253; *Parsons* [2016] NSWDC 49; *Nabalarua & Quinlan* [2017] NSWDC 328

The phrase from *Bugmy* "material tending to establish," is consistent with both section 21A *Crimes (Sentencing Procedure) Act 1999* NSW and s 16A *Crimes Act 1914* Comm. which both speak of a sentencing court "taking into account matters that are relevant and known to the court."

It is important to note that while the terms 'fact finding' and 'onus of proof' are often used, in the context of sentencing these references can be misleading, "if it were they were understood as suggesting some general issue is joined between prosecution and offender in sentencing proceedings: *Olbrich* at [25] and *Weininger* at [18] - [26].

The *Evidence Act* does not apply to sentencing proceedings unless a specific direction is made: s 4 *Evidence Act 1995*. It is not "customary" to make such a direction: *Bourchas* [2002] NSWCCA 373 at [41]. This does not mean that the general rules of evidence are ignored. In practice sentencing proceedings are conducted with a degree of informality.

Although the *Evidence Act* does generally not apply a judge does not ignore the rules the policy and rationale underlying those rules. The fundamental principles of the common law designed to ensure fairness to all parties apply to all sentencing proceedings. Unsubstantiated or fanciful matters do not have to be accepted. Judicial officers are entitled to be sceptical. In particular they are entitled to be sceptical of conclusions unsupported by any factual detail *Director of Public Prosecutions (NSW) v Mawad* [2015] NSWCCA 227, at [39].

Most matters in sentencing proceedings don't have to be proved to the standards expected in civil or criminal trials. Judicial officers can act on and take into account any relevant material put before them but any contested material must be have some solid basis if it is to carry any weight.

It is submitted here that the offender's moral culpability is to be diminished. That submission is given content by what can be derived from the attached material.

Attached:

A: A chronology

B. Bugmy Issues Document/s –

Topics addressed include:

Community information

Family information

Abuse history

Institutional history

Relationships

Psychological assessments

Substance abuse history

Current charges

Criminal record

Health and well-being

Current circumstances

Other matters of importance; include the offender's educational and employment history and any other major life experiences and interest.

Recommendations