

THE BAR BOOK PROJECT: PRESENTING EVIDENCE OF DISADVANTAGE

Public Defenders Criminal Law Conference 2019

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

– *R v Millwood* [2012] NSWCCA 2¹

We as criminal lawyers deal with evidence concerning our clients’ backgrounds of disadvantage and deprivation on a regular basis. We know instinctively that a background of deprivation and disadvantage has a holistic impact on a person’s life narrative and nearly always provides at least a backdrop for criminal conduct. We come to know through experience that the underlying causes of offending are multi-dimensional and often, in circumstances where a mental health or mental condition exists, are genetic, social or environmental.

How an offender’s background is relevant to the sentencing exercise is an area of continuing development in New South Wales, the consideration of which forms the first half of this paper. How the evidence of disadvantage might be best presented forms the second half of this paper and is the impetus for the multi-agency exercise of collating and distilling authoritative research concerning the potential impact of various forms of disadvantage on persons appearing before the criminal justice system known as the “Bar Book Project: Presenting Evidence on Disadvantage”.

In the present climate, it is not enough as a criminal defence advocate to rely on a history of disadvantage alone and hope that the bench takes pity on the offender and hands down a more lenient sentence than they might otherwise. Whether it is right or wrong at law (and the author contends it is wrong) some sentencing and appeal courts look for a causal link between the disadvantage and the crime, despite the High Court of Australia declining to grant leave to clarify the position in *Perkins v The Queen* [2018] HCATrans 267 (14 December 2018).

The finding of diminished moral culpability may result in the moderation of the weight to be given to the role of general deterrence and determining the weight to be given to specific deterrence and the protection of the community. However, even where the court finds the background of disadvantage diminishes moral culpability, this does not automatically result in a mitigation of sentence. The conflicting purposes of punishment may mean that, in the instinctive synthesis of reaching the appropriate sentence in all the circumstances of the case, a history of deprivation may not result in any reduction on sentence at all.

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

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

This paper does not profess to set out a comprehensive analysis of the development of case law concerning matters related to disadvantage suffered by many members of Indigenous communities. There are many excellent papers available on this subject.² However, for completeness some basic principles must be considered.

Obviously, the sentencing of persons with a background of disadvantage does not occur within a vacuum divorced from general sentencing principles. The principles of sentencing are set out in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and in the factors enumerated in s 16A of the *Crimes Act 1914* (Cth):³

3A The purposes for which a court may impose a sentence on an offender are as follows:

- (a) To ensure that the offender is adequately punished for the offence.
- (b) To prevent crime by deterring the offender and other persons from committing similar offences,
- (c) To protect the community from the offender,
- (d) To promote the rehabilitation of the offender,
- (e) To make the offender accountable for his or her actions,
- (f) To denounce the conduct of the offender,
- (g) To recognise the harm done to the victim of the crime and the community.

How a person's background plays into the principles to be considered and discretion exercised by the judicial officer are complex, and the subject of considerable judicial comment. The questions posed by Simpson J in *Millwood* are instructive: should a person who has suffered from a deprived background bear equal moral culpability to a person who has not so suffered? If so, should such a person receive a lesser punishment or be held as accountable? Is such a person a good vehicle for general deterrence and should that person's conduct be denounced in the same way as the conduct of someone who did not have those detrimental aspects to their background? Is not the recognition of harm the same in respect of

² See Judge Dina Yehia SC, 'Presenting *Bugmy* Disadvantage' (Public Defenders Seminar, 5 September 2018); Judge Stephen Norrish QC, 'Sentencing Aboriginal Offenders – Striving for Equality before the Law' (Conference Paper, Legal Aid Commission Workshop, 1 August 2017) 6; Judge Stephen Norrish QC, 'Sentencing Indigenous Offenders: Not Enough "Judicial Notice"?' (Conference Paper, Judicial Conference of Australia Colloquium Sydney, 13 October 2013); Justice Stephen Rothman AM, 'Disadvantage and Crime: The Impact of *Bugmy* and *Munda* on Sentencing Aboriginal and other Offenders' (Conference Paper, Public Defenders Criminal Law Conference, 18 March 2018); Judge Andrew Haesler SC, 'Applying *Bugmy*: An Address to the NSW Legal Aid Commission's Aboriginal Services Branch (Conference Paper, Legal Aid Aboriginal Cultural Competency Branch Training For Legal Practitioners Day, 31 July 2018).

³ Section 16A of the *Crimes Act 1914* (Cth) sets out the factors to be taken into account by the sentencing court but does not exclude the application of State sentencing or common law sentencing principles: *Wong* (2001) 207 CLR 584; *Bui v DPP* (Cth) [2012] HCA 1; 244 CLR 638 and *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1.

harm inflicted by a person from such a background as against harm inflicted by someone who was not so affected? Countervailing considerations might include: the person's capacity for rehabilitation and whether such a person can escape or overcome the social ramifications that flow from exposure to the disadvantage.

The conflicting nature of these sentencing principles is what makes the exercise of the sentencing discretion so difficult,⁴ as recognised by McHugh J in *Markarian v The Queen* [2005] HCA 25 when coining the sentencing process as one of "instinctive" synthesis: at [51]. The Court in *Muldrock v R* (2011) 244 CLR 120 said in respect of the s 3A principles (at [20]):

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

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

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

The interplay of the considerations relevant to sentencing may be complex ... In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance ...

It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances.

The High Court, citing *R v Fuller-Cust* (2002) 6 VR 496, emphasised that an offender's Aboriginality was not to be overlooked by a "simplistic assumption that equal treatment of

⁴ *Ryan v The Queen* (2001) 206 CLR 267 per Hayne J at [133]–[134].

offenders means that their differences in their individual circumstances related to their race should be ignored” (at [52]). The Court noted that it was arguable that, in respect of offences that were not premeditated, widespread social disadvantage may mean that “controlled rational calculation of the consequences of misconduct” may be an unreasonable expectation, giving general deterrence a less significant role to play: at [54].

In *Kiernan v R* [2016] NSWCCA 12 Hoeben CJ at CL noted (at [63]) that the plurality in *Bugmy v The Queen* did not speak in terms of general deterrence having no effect, but referred to that factor being “moderated in favour of other purposes of punishment” depending upon the particular facts of the case.⁵ In *IS v R* [2017] NSWCCA 116, Gleeson JA, considering the “interplay” of sentencing principles in the context of disadvantage, said at [65]:

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

The cautionary words that appear in both *Bugmy* and *Munda* are worth noting: there are no guarantees that flow from establishing a background of disadvantage that will necessarily result in mitigation on sentence.

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

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

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

As the above cases suggest, the pathway to an argument for a lesser sentence must be approached through the gates of the s 3A sentencing principles: firstly, as to an assessment of moral culpability (with associated arguments as to the diminished role of general deterrence, punishment and denunciation), and secondly an assessment of individualised justice (such as framing a sentencing order to allow for rehabilitation). Prior to *Bugmy*, this latter purpose of the sentencing exercise was best expressed by Wood CJ at CL in *R v Morgan* [2003]

⁵ See also *Drew v R* [2016] NSWCCA 310 per Fagan J at [18] (Gleeson JA agreeing at [1]) where the needs of specific deterrence and community protection were found to “loom large” despite a background of social disadvantage, in a context of a recidivist violent offender with convictions for matters of violence over 35 years, against 13 separate victims, including domestic partners and the offender’s son: at [1], [17], [125].

NSWCCA 230 at [20]–[21] (emphasis added), where his Honour noted [that *Fernando* principles were not]:

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

These concepts become more complex when the issue of causal link to offending conduct is examined (see *Perkins* below).

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

There is less clarity around whether the assessment of moral culpability derived from a background of disadvantage is relevant to an assessment of objective seriousness when assessing a standard non-parole matter post-*Muldrock*. In *Yun* [2017] NSWCCA 317 the court did not preclude this factor in the context of mental illness when assessing where the objective criminality of the offending fell within the range: at [47] (per Latham and Bellew JJ). Whilst exposure to disadvantage was not said to be a factor, it is worth considering whether it would be in circumstances where it impacted upon a mental condition.⁶

⁶ See also *Tepania v R* [2018] NSWCCA 247 per Johnson J (Payne JA and Simpson AJA agreeing) at [112]; *Biddle v R* [2017] NSWCCA 128 per Hoeben CJ at CL (Price J agreeing) at [68] and Rothman J in a separate judgment at [121]–[124]; *Shine v R* [2016] NSWCCA 149 per Bathurst CJ (Davies J and Hulme AJ agreeing); *Cowan v R* [2015] NSWCCA 118 per Bellew J (Bathurst CJ and Simpson J agreeing) at [61]–[62]; *Elturk v R* [2014] NSWCCA 61 per Beazley P (R A Hulme and Schmidt JJ agreeing) at [56]–[57]; *McLaren v R* [2012] NSWCCA 284 per McCallum J (McClellan CJ at CL and Bellew J agreeing) at [28]–[29]. Contra *Badans v R* [2012] NSWCCA 97 per Meagher JA (Hoeben and Rothman JJ agreeing) at [53]; *Subramaniam v R* [2013] NSWCCA 159 per Latham J (Emmett JA and Simpson J agreeing) at [56]–[57]; *Stewart v R* [2012] NSWCCA 183 per Button J (McClellan CJ at CL and Price J agreeing) at [34].

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

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

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

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

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

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

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

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

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

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

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

- *Linden v R* [2017] NSWCCA 321 (drug supply) where the disadvantage emanated from childhood sexual abuse and was related to use of illicit drugs from that age of 15 years to “cope” (at [62]).
- *Edwards v R* [2017] NSWCCA 160 (robbery) where the disadvantage emanated from exposure to childhood sexual abuse and domestic violence and later drug addiction (at [8]–[10]).
- *Lambert v R* [2015] NSWCCA 22 (drug supply) where the disadvantage emanated from drug abuse in a large part caused by an “abusive childhood” (at [33]).
- *Miller v R* [2015] NSWCCA 86 (break and enter) where a background of homelessness, unemployment, sexual abuse as child, and maternal incarceration extended to offences involving drugs and violence (at [102]–[112]).
- *R v Jennar* [2014] NSWCCA 331(robbery) where a childhood background of incarcerated and drug-addicted caregivers and exposure to drug abuse was followed by drug use and crime (at [37]–[39]).

PART III: POTENTIAL CONSTRAINTS ON *BUGMY*

Not disadvantaged enough; not the same kind of offending; evidence of planning

The application of *Bugmy* considerations beyond Indigenous-specific disadvantage is not without controversy. Hoeben CJ at CL supported a more curtailed response to disadvantage in *Perkins v R* [2018] NSWCCA 62 (*Perkins*), suggesting that the relevance of the background of disadvantage was restricted to cases where a person engaged in offending of “precisely that kind of activity” as arose in their childhood (or similar offending) or where the disadvantage may be inferred by virtue of an upbringing within, or association with, an Aboriginal community (at [41]). Similar sentiments were expressed by his Honour in *R v James* [2017] NSWCCA 287 where the offender’s background of deprivation was said to be “nothing like the circumstances described in *Bugmy*” (at [32]). In *Katsis v R* [2018] NSWCCA 9 the offender’s childhood background of sexual abuse, physical assault and food deprivation was also held not to be comparable to *Bugmy*. See also *Crowley v R* [2017] NSWCCA 99 per Adamson J (Johnson and Campbell JJ agreeing).

Other curtailments may include where the offence involved planning and lack of impulsivity: see *Crowley v R* (at [44]); *Atkinson v R* [2014] NSWCCA 262 (at [74]); and *Taysarang v R* [2017] NSWCCA 146 (at [42]–[43]). The latter approach was countered by Yehia J in *R v Nabalarua; R v Quinlan* [2017] NSWDC 328 in the face of a submission by the Crown that a background of deprivation could not impact on an assessment of moral culpability where the offending was planned rather than “born of frustration”. Judge Yehia rejected that *Bugmy* could be so limited, noting that taking into account an offender’s deprived childhood was not optional, as it may compromise a person’s capacity to mature and to learn from experience and that each case was dependent upon the circumstances of the individual case: at [125]–[140].

Is it necessary to establish a causal link?

Unlike Canada, where the Supreme Court in *Ipeelee* directly faced the issue of whether it was necessary to establish a causal link between a background of deprivation and the offending conduct, the High Court of Australia has to date declined to do so expressly. In *Ipeelee*, the Court considered the practical application of a provision of the Criminal Code (Can)⁷ that required a sentencing court give particular attention to the circumstances of Aboriginal offenders. In respect of the issue of causal connection between deprivation and offending the court held (at [81]–[83]):

... First, some cases erroneously suggest that an offender must establish a causal link between background factors and the commission of the current offence before being entitled to have to matters considered by the sentencing judge ...

⁷ Section 718.2(e) *Criminal Code* (Can) RSC 1985, c C-46.

[*R v Poucette*] displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples. It also imposes an evidentiary burden on offenders that was not intended ...

... it would be extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending. The interconnections are simply too complex... Systemic and background factors do not operate as an excuse for justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

A line of authority has developed in the NSW CCA where the application of *Bugmy* principles have been curtailed in the absence of an established causal link between the disadvantage and the offending conduct. In several matters, the lack of a causal connection was cited as the reason why the accepted evidence of disadvantage did not warrant mitigation. In *R v El Sayah; R v Idaayen R v Mansaray* [2018] NSWCCA 64, a case involving an offence of robbery, Hoeben CJ at CL held that Mr Mansaray's traumatic childhood in Sierra Leone during which he was exposed to the killing of his father was not seen to have "any causal link to the offending" (at [63]).⁸ See also his Honour taking a similar line in *Perkins* at [42] and in *Katsis v R* [2018] NSWCCA 9 at [108]. Similar positions were taken by the court in *R v Wong* [2018] NSWCCA 20 at [73]; *Taysarang v R* [2017] NSWCCA 146 at [42]–[43]; and *R v RD* [2014] NSWCCA 103 at [24].

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

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

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

⁸ *R v El Sayah; R v Idaayen; R v Mansaray* [2018] NSWCCA 64 preceded *Perkins*. White JA maintained his different position on causal link in *Mansaray* from Hoeben CJ at CL at [72] stating "for the reasons I gave in *Perkins* ... I do not think that Mr Mansaray's experience as a refugee from Sierra Leone is necessarily irrelevant to his sentence because there is no evidence of a causal link between that experience and his offending..."

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

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

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

In *Perkins* the necessity of finding a 'causal link' between the evidence of disadvantage and the offending conduct was the central focus of the appeal proceedings. In that case, the applicant's lack of criminal record and good character during his teen years, was relied upon by the court to indicate that his childhood exposure to family violence (in his first 9 years of life) was unrelated to his offending conduct at the age of 18 years (at [41]), disentitling him to leniency on the basis of diminution of moral culpability, or on any other basis (per Hoeben CJ at CL).

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

Fullerton J, allowing the appeal, expressly found that it was an error to treat a background of disadvantage as irrelevant because it was not found to be causally related to the offending: at

[102]. Her Honour found that, of itself, it may not have operated to diminish moral culpability in this particular case, but it was otherwise to be taken into account, adopting the *Millwood* reference to diminished emotional resources, and capacity for mature decision making and self-regulation: [135]–[136].

The High Court declined special leave to appeal in *Perkins*, Gageler J commenting that the case did not involve high principle: *Perkins v The Queen* [2018] HCATrans 267 (14 December 2018), requiring rather the consideration of detail making it an arguably inappropriate vehicle for leave (there being three different approaches by the CCA to the issue of causal link).

Self-induced intoxication and disadvantage

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

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

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

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

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

The Court explained that even before the introduction of the provision, self-induced intoxication by alcohol or drugs did not usually serve to mitigate a sentence at common law: at [46].⁹ Justice Rothman continued (at [50]):

The effect of *Fernando* and of *Bugmy* is to recognise that, in certain communities to which the circumstances in *Fernando* and *Bugmy* applied, the abuse of alcohol and drugs is so prevalent and accompanied by violence that the intoxication no longer fits

⁹ Citing *Bourke v R* [2010] NSWCCA 22, in which McClellan CJ at CL held (Price J and R A Hulme JA agreeing) that the ordinary rule does not apply in cases where intoxication is the result of an addiction which itself is not the result of “free choice”: at [26]. In that case, the offender had experienced a “traumatic” childhood, marred by alcohol abuse by both parents and violent attacks on his mother by his father; sustained head injuries in two car accidents which were believed to have led to subsequent poor frontal lobe functioning; and displayed depressive symptoms which were linked to excessive alcohol consumption and use of amphetamines: at [12]–[15].

the description of being “self-induced”. In that way, the intoxication fits the description to which McClellan CJ at CL referred in *Bourke*^{10, 11}.

Individualised justice

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

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

¹⁰ *Bourke v R* [2010] NSWCCA 22; 199 A Crim R 38.

¹¹ At the time of writing, the Judicial Commission’s *Sentencing Bench Book* does not make reference to the decision in *Kelly*, and in that respect may not accurately reflect the current position at law : *Judicial Commission, ‘Subjective Matters Taken into Account’, Sentencing Bench Book [10-840]* <https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/subjective_matters.html#p10-480>.

PART IV: PRESENTING EVIDENCE OF DISADVANTAGE

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

Perkins: A cautionary tale

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

As noted by Fullerton J in *Perkins* in dissent (at [99]), and supported by the research and studies cited in Australian sources, exposure to violence at a younger age may in fact have a *greater impact* when experienced at an earlier age. The Australian Human Rights Commission has noted that the effects of exposure to domestic and family violence on children during their formative years "may manifest differently depending on the developmental stages of the child",¹² while the Australian Institute of Family Studies found a strong indication in the research that exposure to family violence in childhood may have a greater impact when experienced at an earlier age,¹³ and that long term exposure to such violence has been found to have lasting effects on children's development, behaviour and wellbeing,¹⁴ including the possibility of developing depression, substance abuse disorders and poor coping mechanisms. None of this evidence was adduced on sentence, a deficiency commented upon by Fullerton J on appeal (at [136]):

¹² Australian Human Rights Commission, *Children's Rights Report 2015* (2015) 103, 125 [4.5.3].

¹³ Australian Institute of Family Studies, 'Children's Exposure to Domestic and Family Violence: Key Issues and Responses' (Report, 2015) 9 citing Kathryn H Howell, 'Resilience and Psychopathology in Children Exposed to Family Violence' (2011) 16 *Aggression and Violent Behaviour* 562.

¹⁴ Ibid 7 citing Peter G Jaffe, David Allen Wolfe and Marcie Campbell, *Growing Up with Domestic Violence: Assessment, Intervention, and Prevention Strategies for Children and Adolescents* (2012, Hogrefe Publishing).

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

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

The judiciary's call for help

For some time, judicial officers have called for an improved standard of evidence in order to support a submission concerning disadvantage.¹⁵ Judge Norrish QC supported the presentation of such evidence in his paper 'Sentencing Aboriginal Offenders – Striving for Equality before the Law', stating:¹⁶

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

Justice Rothman AM called for counsel to ensure that the kind of evidence or material to which the High Court referred in *Bugmy* and *Munda* is put before any judicial officer on sentence, commenting that it is "insufficient for counsel to rely on judicial officers utilising 'general knowledge' or rely on the mere fact of an accused's Aboriginality (if that be the asserted source of 'disadvantage') ... material needs to be deduced on the background of the offender being sentenced."¹⁷ Judge Haesler SC cautioned that whilst judges and magistrates could apply their experience and wisdom they could not operate in a vacuum, requiring evidence to be put before them.¹⁸

¹⁵ Judge Dina Yehia SC (n 2); Judge Stephen Norrish QC, 'Sentencing Aboriginal Offenders – Striving for Equality before the Law' (n 2) 6.

¹⁶ Judge Stephen Norrish QC, 'Sentencing Aboriginal Offenders – Striving for Equality before the Law' (n 2) 13.

¹⁷ Justice Stephen Rothman AM (n 2).

¹⁸ Judge Andrew Haesler SC (n 2) 13.

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

The Bar Book Project aims to assist practitioners to do two things:

- 1) Present evidence in the form of recognised studies and research concerning particular categories of disadvantage; and
- 2) Present individualised evidence pointing “to material tending to establish that background,” per *Bugmy*: at [41].

In presenting *both forms of evidence* we can all do better: by building our defence case on sentence by seeking out and then effectively presenting material that assists in our submission regarding the application of the law on disadvantage to the individual, including as to an assessment of moral culpability and to the appropriate form of sentence to be imposed. In effectively doing so, arguments as to causal link might be avoided, and there might be an improved understanding that forms of deprivation might have the potential to “play out in unforeseen ways” in a person’s life (to adopt the words of Fullerton J in *Perkins* at [99]). Effective presentation of evidence will hopefully improve sentence outcomes, help shape appropriate forms of sentence, and see sentences held on Crown appeal. Such an approach may help not only the offenders themselves but their communities.

The Bar Book Project committee is in the process of developing resources which will assist lawyers appearing for clients who have experienced disadvantage and deprivation, including experiences of disadvantage specific to Aboriginal and Torres Strait Islander peoples flowing from the effects of colonisation, dispossession and related hardships. Members of the committee include representatives of the Aboriginal Legal Service (NSW/ACT), the Public Defenders, Legal Aid NSW, the Centre for Crime Law and Justice, the Law Faculty of the University of New South Wales, graduates and current students from the Law Faculty, University of Sydney and members of the private profession. The committee works in consultation with a multi-disciplinary Indigenous advisory group that includes the Jumbunna Institute for Indigenous Education and Research at UTS, NAAJA and an Indigenous psychologist, social worker and criminologist, amongst other experts.

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

The Bar Book Project will be made up of three central components:

1. a collection of chapters on identified forms of disadvantage. To date the topics include: foetal alcohol syndrome; the impact of out of home care; racism; intergenerational trauma; childhood exposure to family violence; childhood exposure to drug and alcohol abuse; being a member of or descendent of Stolen

Generations/child removals; racism and social exclusion; institutionalisation; cultural dispossession; exposure to sexual abuse; intergenerational incarceration/impact on children of incarcerating parents and caregivers; refugees/exposure to war; homelessness; the effects of hearing impairment and long-term unemployment.

2. associated case law summaries attaching to the chapters concerning disadvantage where the CCA, or courts in other jurisdictions, have considered the head of disadvantage; and
3. an associated executive summary of each of the respective chapters, proposed for ready use by a judicial officer should they accept the evidence of disadvantage presented on sentence.

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

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

PART VI: PRESENTING STUDIES AND RESEARCH ON DISADVANTAGE ON SENTENCE

The rules of evidence in sentence matters are referred to in s 4 of the *Evidence Act 1995* (NSW)¹⁹ which relevantly provides:

This Act applies to all proceedings in a NSW court, including proceedings that:

- a. Relate to bail; or...
- c. Subject to subsection (2), relate to sentencing.

(2) If such a proceeding relates to sentencing:

- a. This Act applies only if the court directs that the law of evidence applies in the proceeding, and
- b. If the court specifies in the direction that the law of evidence applies only in relation to specified matters – the direction has effect accordingly.

(3) The court must make a direction if:

- a. A party to the proceeding applies for such a direction in relation to the proof of a fact, and
- b. In the court's opinion, the proceeding involves proof of that fact, and that fact is or will be significant in determining the sentence to be imposed in the proceeding.

(4) The court must make a direction if the court considers it appropriate to make such a direction in the interests of justice.

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

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

The common law concept of judicial notice

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

¹⁹ A comparable provision is found in the *Evidence Act 1995* (Cth).

The following criminal cases, from over 20 years ago until recently, indicate that courts are willing to take research and studies into consideration in the sentencing exercise. As observed by Judge Norrish QC in his comprehensive paper “Sentencing Indigenous Offenders, Not Enough ‘Judicial Notice?’”²⁰, specialist tribunals are recognised as able to rely upon “general knowledge” acquired in hearing many cases not only “for the purpose of supplying gaps in evidence but also for the purpose of weighing and testing any evidence that might actually be tendered”.²¹ Most sentencing courts in Australia are well entitled, one would think, to regard themselves as specialist tribunals in respect of certain subject matters facing the criminal justice system on regular bases. It noteworthy (as referred to by Judge Norrish QC) that the then Chief Justice French, when officially launching a Queensland Information resource about individual Aboriginal communities for judicial officers, recognised its potential value as material of which judicial notice may be taken “when relevant to the particular case”.²²

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

- In *Neal v The Queen* (1982) 149 CLR 305, as discussed above, Murphy J referred to various monographs and articles concerning Indigenous people and the criminal justice system in taking the view that reserve conditions and race relations at the time were a “special mitigating factor” where the evidence showed that the offender and his community held “a deep sense of grievance at their paternalistic treatment by the white authorities in charge of the Reserve”: at 315, 317–19.
- In *R v Fernando* (1992) 76 A Crim R, Wood J took into account various materials relating to the sentencing of Indigenous offenders referred to in submissions on sentence, including extracts from papers by judges writing extra-curially and a report of the *Royal Commission into Aboriginal Deaths in Custody*: at 62.
- In *R v Russell* (1995) 84 A Crim R 356, Kirby P took in to account various academic publications concerning the high rate of Aboriginal incarceration highlighted by the *Royal Commission into Aboriginal Deaths in Custody*, and in respect of the particular correlation between hearing loss, Aboriginality and the criminal justice system, noting such losses were observed to cause “not only learning deficits but also anti-social behaviour low self-esteem, feelings of paranoia in some cases, social isolation, powerlessness and more ... will also tend to make the offender’s period in prison more difficult and harsh...”: at 361–2.
- In *Farkas v R* [2014] NSWCCA 141, the CCA admitted reports prepared by the Commonwealth’s National Drug Law Enforcement Research Fund and a report

²⁰ Judge Stephen Norrish QC, ‘Sentencing Indigenous Offenders: Not Enough “Judicial Notice?”’ (n 2) 10.

²¹ Ibid citing *Bryer v Metropolitan Water Sewerage & Drainage Board* (1939) 39 SR (NSW) 31 (at 330 per Jordan CJ).

²² Ibid referring to Queensland Courts, ‘Aboriginal and Torres Strait Islander Community Profiles – A Resource for the Courts’ (15 February 2017) <<https://www.courts.qld.gov.au/court-users/practitioners/aboriginal-and-torres-strait-islander-community-profiles>>.

prepared by the National Drug and Alcohol Research Centre at the University of New South Wales to assess the range of normal street purity of a drug: at [15]–[19], [85]–[87].

- In *R v Lewis* [2014] NSWSC 1127, Rothman J cited academic research in the nature of a thesis by Professor Roy Baumeister concerning the impact of “the inner dimension of social exclusion: intelligent thought and self-regulation among rejected persons”: at [39]–[42].
- In *Kentwell v R (No 2)* [2015] NSWCCA 96, Rothman J again referred to the same research in which the court held that the offender’s moral culpability was reduced on the basis of the social exclusion he experienced explaining his recourse to violence at the time of the offending. The evidence was based upon a body of research demonstrating that social exclusion could cause high levels of aggression and anti-social behaviours: at [90]–[93].
- In *LCM v State of Western Australia* [2016] WASCA 164, the Western Australian Court of Appeal included a comprehensive discussion of Australian and overseas cases and literature concerning FASD as a cognitive impairment. The Court allowed the tender of the material but cautioned against the use of generalisations about the condition and required a sentencing court to consider the nature and extent of the specific disabilities and deficits, and how they bear upon the considerations relevant to sentence: Mazza JA and Beech J at [123] (Martin CJ agreeing at [1] with additional observations at [2]–[25]).
- In *Drew v R* [2016] NSWCCA 310, the Court approved of statements contained in the Judicial Commission of NSW’s *Equality before the Law Bench Book* and publications by the Australian Institute of Criminology, to make findings concerning the rates of non-disclosure by Indigenous women of domestic violence (at [87] and [89]) but emphasised that the application of the judicial notice to the individual (so as to allow for an aggravation of the offending conduct) was required to be proved on the evidence in the case: at [84], [90].
- In *Perkins*, Fullerton J commented on the well-researched and documented studies concerning the “insidious effects of exposure to family and domestic violence on children in their formative years, and the potential for that exposure to play out in unforeseen ways as a young child develops from adolescence into adulthood” which had “found expression and application in a range of academic and forensic disciplines”: at [99].

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

some of the cases above (at [50]–[53]) supporting the tender of the material, particularly in the absence of any challenge to the credibility and reliability of the stated research: [49]. A similar situation arose in *Parsons* [2016] NSWDC 49 where Judge Haesler SC used available resources and took judicial notice to gather material enabling a conclusion about conditions in the Wallaga Lake Community.

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

The application of the Evidence Act

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

It has been suggested that s 144 in fact enlarges the scope for permissible judicial notice of well-known facts and (relevant to the particular case) a wider range of medical facts than are judicially noticeable at common law: *Norrie v NSW Registrar of Births Deaths and Marriages* [2013] NSW145 per Beazley ACJ at [104]. It is arguable that well-accepted research in particular fields of study comprises knowledge “not reasonably open to question” or is capable of verification from the authoritative reports cited “which cannot be reasonably questioned”.

PART VII: INDIVIDUALISED JUSTICE: PRESENTING EVIDENCE CONCERNING THE INDIVIDUAL

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

– *Bugmy* at [41]

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

Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report...

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

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

As Judge Haesler SC stated in his paper 'Applying *Bugmy*: An Address to the NSW Legal Aid Commission's Aboriginal Services Branch': "We cannot wait. We do not need to reinvent the *Gladue* process but we can reimagine the process and apply it within the parameters set by local conditions and the restrictions on current sentencing law recognised in both *Bugmy* and *Munda*."²³ His Honour commented that material tending to establish matters relevant to an offender and their background should be part of the "ordinary preparation expected of an advocate".

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

²³ Judge Andrew Haesler SC (n 2) 18.

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

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

Whilst there is no imminent likelihood that New South Wales will adopt the process of obtaining comprehensive *Gladue*-style reports,²⁴ there is no reason that the defence cannot put this material to the court in the form of oral or affidavit evidence, or other written material, to found the substance of any submission as to individualised justice. It is noted that separate steps are being taken by the ALS NSW/ACT in the development of the "Bugmy Evidence Library" – a body of material containing information about the social disadvantage of certain Indigenous communities for use in sentencing matters. This project is still in development.

As noted by Haesler J,²⁵ many topics may be covered in a standard well-prepared Pre-Sentence Report, or psychological report, but it is rare that the author would have community knowledge relevant to that individual. Such evidence, if not adduced through the offender themselves, might be obtained from a relative, a doctor, school teacher or field officer or, alternatively (or better still, additionally), from secondary sources, such as hospital or medical records, Justice Health files, school reports and other records. In Local Courts, information in the form of letters addressed to the Presiding Magistrate, or the tender of school reports or medical reports might be adduced.

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

²⁴ It is worth noting that the Australian Law Reform Commission has recommended that all jurisdictions should "develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples", and that this information be submitted in the form of 'Indigenous Experience Reports' in superior courts: see Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, March 2018) 214.

²⁵ Judge Andrew Haesler SC (n 2) 18.

particular head of disadvantage affected the offender's conduct (and thereby arguably their moral culpability):²⁶ see also *Cunningham* [2006] NSWCCA 176 and *Dousha* [2008] NSWCCA 263.

CONCLUSION

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

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

*Punishment is a means of social control. Gaol is a means of social control. Taking into account matters in mitigation of sentence softens but does not reduce the controls placed on offenders. Of itself mitigation of sentence to recognise profound deprivation does not reduce risk of violence in Indigenous communities or address the causes of crime. It does however allow for the truth about offenders and their communities to be spoken and acknowledged; it's a small but important step on a very long road.*²⁷

Sophia Beckett

²⁶ Justice Stephen Rothman AM (n 2) 12.

²⁷ Judge Andrew Haesler SC (n 2) 25.