

# Aboriginal and Torres Strait Islander Stolen Generations and Descendants

## Case Summaries

### *Sentencing Cases*

[Fuller-Cust \[2002\] VSCA 168](#); (2002) 6 VR 496 (Batt JA, O'Brien AJA, Eames JA in dissent on final sentence)

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

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

[92] When regard is had to the welfare and other expert reports which were tendered before the learned sentencing judge it emerges very clearly that far from his Aboriginality being an irrelevance to the circumstances in which the offending conduct occurred, it is pivotal. Indeed, the history of the applicant has remarkable similarities to many of the cases reported upon by the Royal Commission into Aboriginal Deaths in Custody. The impact of a person being separated from family, endeavouring to regain contacts with that family, being rebuffed in those efforts, and thereupon suffering anxiety about being denied the opportunity to fully embrace his or her Aboriginality, was often addressed in individual reports and in the findings of the final report of the Royal Commission. The Commissioners recognised the impact of a person, in those circumstances, being socialised not into the family and kin network which would otherwise be the experience of an Aboriginal person living in urban circumstances but being socialised, instead, by the need to survive in institutional communities, including juvenile detention facilities and homes.<sup>36</sup> That is not to say that in all cases of such separation the impact on the child in later years must have been adverse: that possibility, however, needs to be recognised.<sup>37</sup>

[36] See for example the report by J.H. Wootton Q.C., (formerly Wootton, J. of the Supreme Court of New South Wales): "Report of the Inquiry into the Death of Malcolm Charles Smith", 11 April 1989, at p.4ff.

[37] In *Cubillo*, supra, at 115, O'Loughlin, J., when discussing the breadth of usage of the term "Stolen Generation", said that the mere fact that a child of part-Aboriginal ancestry was placed in an institution would not justify identification of that person as a member of the "Stolen Generation", it being necessary to go further and in each case to examine why the child was institutionalised, and whether it was necessary for that to have occurred in the

interests of the child. His Honour's comments were made in the context of a claim of breach of duty of care by the State. The adverse impact of separation of Aboriginal children, for whatever reason, has been long recognised, the first academic writing on the topic being at least as early as 1951, by Professor R.M.Berndt (see P.Read, "Bibliographical Review of the Literature of the Stolen Generations", Vol 3, No.73, *Aboriginal Law Bulletin* (1995), at 22).

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

[137] The Royal Commission into Aboriginal Deaths in Custody, in the National Report of the Commissioners, identified the over-representation of Aboriginal people in prisons and the underlying factors which led to such deaths in custody. The Commissioners identified one factor being the impact on Aboriginal people who had been separated from their natural families at an early age and placed under the control of welfare institutions and/or being adopted out. Of the 99 deaths in custody investigated by the Royal Commission, 43 of those who died experienced childhood separation from their natural families, through intervention by State authorities or by missions or other institutions<sup>41</sup>

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

"The consequence of this history is the partial destruction of Aboriginal culture and a large part of the Aboriginal population, and also disadvantage and inequality of Aboriginal people in all the areas of social life where comparison is possible between Aboriginal and non-Aboriginal people. The other consequence is the considerable degree of breakdown of many Aboriginal communities and a consequence of that and of many other factors, the losing of their way by many Aboriginal people and with it the resort to excessive drinking, and with that violence and other evidence of the breakdown of society. As this report shows, this legacy of history goes far to explain the over-representation of Aboriginal people in custody, and thereby the death of some of them."<sup>42</sup>

The Commissioners noted that for Aboriginal people, this history "is burned into their consciousness".<sup>43</sup>

[139] The significance of the work of the Royal Commission and the potential relevance of its findings to cases involving Aboriginal offenders who had experienced separation from their natural families has been well recognised,<sup>44</sup> and the potential for there to be a connection between that experience and later offending behaviour should not be underestimated.<sup>45</sup>

[140] The report of the *National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families*, which was delivered by the President of the Human Rights and Equal Opportunity Commission, Sir Ronald Wilson, in April 1997, investigated the separation of Aboriginal children from their families "by compulsion, duress or undue influence". The report therefore distinguished what it called "forcible removal" from removals "which were truly voluntary, at least on the part of parents who relinquished their children, or where the child was orphaned and there was no alternative indigenous carer to step in."<sup>46</sup> The report, however, made clear that the term of reference was treated as including not merely children who were "removed" from their parents but also those who experienced "separation from their families".<sup>47</sup> The authors of the report noted<sup>48</sup> the results of the National Aboriginal and Torres Strait Islander Survey of 1994, conducted by the Australian Bureau of Statistics,<sup>49</sup> which reported that Aboriginal people surveyed who had been taken away from their natural families as children were twice as likely to have been arrested on more than one occasion than were Aboriginal people who did not have that background.

[41] *Royal Commission into Aboriginal Deaths and Custody, National Report*, Vol. 1 par. 1.2.17, p.5, April 1991.

[42] Paragraph 1.4.19.

[43] Paragraph 1.4.2.

[44] The report of the Royal Commission was described by criminologist Professor Richard Harding as being "a unique inquiry, unparalleled in any other part of the world" which he said "served to raise public consciousness as to distinctive areas of Aboriginal disadvantage and paved the way for such ground-breaking work as the enquiry into the removal of Aboriginal children from their natural parents", See "Prisons are the Problem: A Re-Examination of Aboriginal and Non-Aboriginal Deaths in Custody", R.W. Harding, *Aust & N.Z. Journal of Criminology*, Vol 32, No 2 (1999) 108, at 119.

[45] In the National Aboriginal and Torres Strait Islander Survey, conducted by the Australian Bureau of Statistics in response to a recommendation of the Royal Commission, more than 10% of Aboriginal persons aged 25 years and over reported being taken away from their natural family by a mission, the government or "welfare": see National Aboriginal and Torres Strait Islander Survey, 1994, Australian Bureau of Statistics, at page 2.

[46] "Bringing Them Home", Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, Wilson, et al, Human Rights and Equal Opportunity Commission (1997), p.5.

[47] *Ibid*, p. 11.

[48] Bringing Them Home Report at p.15.

[49] National Aboriginal and Torres Strait Islander Survey 1994, at p.58, Detailed Findings, Australian Bureau of Statistics, 1995a, ABS Catalogue No. 4190.0, Canberra. (Where only a single arrest had occurred there was no significant reported difference by reference to childhood separation experience).

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

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

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

[50] The overrepresentation of Aboriginal people in prison demonstrates an ongoing need for the criminal justice system to be alert to the factors that create a risk of offending. In 1997, the Human Rights and Equal Opportunity Commission<sup>49</sup> in its National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: Bringing Them Home Report found that "[a]n entrenched pattern of disadvantage and dispossession continues to wreak havoc and destruction in Indigenous families and communities."<sup>50</sup> It noted the ongoing relevance of the removal of Aboriginal people from their family:<sup>51</sup>

Social justice measures taken by governments should have special regard to the inter-generational effects of past removals. Parenting skills and confidence, the capacity to

convey Indigenous culture to children, parental mental health and the capacity to deal with institutions such as schools, police, health departments and welfare departments have all been damaged by earlier policies of removal.

Unless these conditions are altered and living conditions improved, social and familial disruption will continue. Child welfare and juvenile justice law, policy and practice must recognise that structural disadvantage increases the likelihood of Indigenous children and young people having contact with welfare and justice agencies. They must address this situation.

[51] More contemporary evidence also demonstrates that the risk factors which the Royal Commission identified as contributing to interaction with the legal system, such as poor health, limited education and unemployment, continue to be statistically more prevalent in Aboriginal communities.<sup>52</sup> It has been suggested that the risk factors for offending by Aboriginal people are largely similar to those for the wider population, but that the higher incidence of such factors may explain higher rates of offending.

Further, there exist risk factors specific to Aboriginal people, including forced removal, which have an intergenerational effect.<sup>53</sup> It has been suggested that:<sup>54</sup>

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

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

[49] Now known as the Australian Human Rights Commission.

[50] Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: Bringing Them Home Report* (April 1997) 559.

[51] Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: Bringing Them Home Report* (April 1997) 557.

[52] See for example the findings of the Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2011* (25 August 2011) Australian Government Productivity Commission [http://www.pc.gov.au/data/assets/pdf\\_file/0018/111609/key-indicators-2011-report.pdf](http://www.pc.gov.au/data/assets/pdf_file/0018/111609/key-indicators-2011-report.pdf)

[53] Dr Troy Allard, *Understanding and preventing Indigenous offending: Brief 9* (December 2010) Indigenous Justice Clearinghouse <http://www.indigenousjustice.gov.au/briefs/brief009.pdf>

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

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

- Extensive description of background described as ‘marginalisation of rural and outback aboriginal communities’ and ‘a national disgrace’: **at [4]** – offender’s childhood likely impacted by grandparents being part of ‘stolen generation’: **at [15 – para 9]** – early years spent on mission surrounded by widespread alcohol abuse – victim and witness to family violence – left unsupervised – became State Ward at 10 years and endured multiple foster homes in different towns – separated from sisters – sexual abuse – poor education meant

illiterate – early substance abuse as a result of an environment that ‘normalised substance abuse’ – early contact with criminal justice system – deaf in one ear: **at [15]**

- Childhood experiences combined with low intellectual functioning meant poor coping skills and continued substance abuse: **at [15 – para 23-25]** – also easily led by negative peers: **at [15 – para 28]**
- On Crown appeal concluded subjective circumstances justified application of *Bugmy* principles and leniency of individual sentences – sentences ‘tempered with considerable compassion and ... structured in such a way as to foster his rehabilitation’: **at [18]** – total sentence, however, manifestly inadequate and degree of accumulation increased.

### ***Stolen Generation Case***

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

### ***Related Social Exclusion Cases***

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

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

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

- Aboriginal adopted to non-Aboriginal family at 12 months – felt like “a black fella in a white fella’s world” – trouble at school – grew up ignorant of cultural heritage – early alcohol abuse due to school experience – asked to leave home due to drinking problem: **at [73]-[74]**
- On re-sentence accepted that *Fernando* and *Bugmy* considerations could apply to ‘non-traditional’ cases involving social exclusion as experienced by offender: **at [13]** per Bathurst CJ, **at [88]-[94]** per Rothman J
- Reference to studies which establish link between social exclusion and discrimination and aggression and anti-social behaviour: **at [90]-[94]** per Rothman J

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

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

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

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

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

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

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

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

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

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

"It is accepted that the evidentiary material provides the court with some bases to conclude that the offender did suffer social exclusion in his formative years. From the Baumeister Study it would appear that the offender's reaction to social

exclusion by connecting with his cultural peers and resorting to an antisocial lifestyle marked by alcohol and drug abuse, violence and criminality was expected and possibly inevitable."

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

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

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

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

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