

The *Bugmy* Bar Book: Assisting lawyers to understand impacts of adverse experiences

CRIMINAL LAW - BY LAUREN STEFANO AND CRYSTAL TRIGGS - AUGUST 2022

SNAPSHOT

- The *Bugmy* Bar Book is a free online resource summarising key research about the impact of experiences of disadvantage and strengths-based rehabilitation. It is designed to assist people who come into contact with the legal system and those who represent them.
- The materials can be used by practitioners across a range of practice areas, including criminal law in sentencing, bail and mental health diversionary applications. The resource has also been relied upon by practitioners in civil jurisdictions, including housing and in coronial inquests.
- The project is undergoing development and expansion to jurisdictions other than NSW. Legal and Program Managers have been appointed to lead the next phase of the project and deliver education and training to the profession.

The commencement of the Walama List at Sydney District Court in January 2022 was welcomed by the profession as a much-needed step towards a culturally safe and holistic First Nations sentencing court for adult offenders in NSW.

A key feature of the Walama sentencing process is the involvement of First Nations community Elders and Respected Persons in courtroom discussions. The model presents an opportunity for the court to form a richer, more holistic understanding of an offender's background and experiences, as well as their strengths, resilience and the significance that their culture and community has on their healing and rehabilitation.

Since the High Court handed down its judgment in *Bugmy v The Queen* (2013) 249 CLR 571 (*'Bugmy'*), a number of judges writing extra-judicially have called for advocates appearing for offenders from disadvantaged backgrounds to place higher quality material before courts to assist with the task of evaluating and applying the *Bugmy* principles.

During a panel presentation at the biennial Criminal Lawyers Association of the Northern Territory (*'CLANT'*) conference in Darwin last month, Justice Dina Yehia – who served as the inaugural Walama List Judge prior to her appointment to the Supreme Court – reiterated the importance of advocates assisting the courts in this way. Justice Yehia also called for greater reliance on research in court proceedings, remarking, 'The research contained in the *Bugmy* Bar Book chapters can help courts to better understand the impacts of an offender's experiences on their behaviour and assist in shaping appropriate orders to give effect to the various purposes of sentencing.'

The *Bugmy* principles

The plurality of the High Court in *Bugmy* held that the effects of childhood deprivation do not diminish with the passage of time and repeated offending, and a background of that kind must be given full weight in determining an appropriate sentence (at [44]).

These principles apply to both First Nations and non-First Nations offenders. In rejecting the appellant's submission that sentencing courts should take judicial notice of the systemic background of disadvantage affecting many First Nations people, the High Court in *Bugmy* emphasised that it is necessary to point to material tending to establish that background in any case in which an offender seeks to rely on such a background in mitigation of sentence (at [41]).

Accordingly, advocates appearing for offenders to whom the *Bugmy* principles apply must place material before the court which establishes their clients' background of disadvantage. The bearing this evidence has on the determination of the appropriate sentence will turn on the quality and depth of that evidence, and the submissions made.

The *Bugmy* Bar Book project

The Court in *Bugmy* acknowledged that, among other things, a childhood marred by deprivation and violence may compromise a person's capacity to mature and to learn from experience (at [43]). The nature of these impacts is better understood by reference to bodies of knowledge beyond the law.

The *Bugmy Bar Book*, so named with the generous permission of the appellant in the High Court case, assists lawyers and judicial officers by providing accessible summaries of key research concerning the nature and potential impacts of experiences of disadvantage.

Topics covered include experiences which are specific to First Nations people, such as *Members and Descendants of the Stolen Generations*, as well as topics which may be applicable to the wider community, such as *Childhood Exposure to Domestic and Family Violence, Social Exclusion, and Out-of-Home Care*, and health conditions such as *Acquired Brain Injury, Hearing Impairment and FASD*. Each 'Chapter' is accompanied by a one-page executive summary and a summary of relevant case law providing precedents for the way in which particular experiences have been taken into account by sentencing courts.

The research collated spans multiple disciplines including psychology, sociology and health, and is largely sourced from key reports commissioned by governments or other bodies, the findings of Royal Commissions and commissions of inquiry, and peer-reviewed academic studies.

The relevance of the resource is not limited to sentencing proceedings or indictable matters. Advocates frequently rely on the resource in bail applications and mental health diversionary applications, and in the Local Court and Children's Court.

The *Bugmy* Bar Book has been cited in numerous published judgments. An expert report commissioned by the project committee, *Significance of Culture to Wellbeing, Healing and Rehabilitation* (2021) by Indigenous psychologists Vanessa Edwidge and Dr Paul Gray, was recently described as follows in *R v BS-X* [2021] ACTSC 160 (Loukas-Karlsson J) at [82]:

'The report examines rehabilitation and wellbeing for Aboriginal and Torres Strait Islander people. Further, the report examines the relationship between Aboriginal culture, healing, rehabilitation, and the impact of imprisonment. The report highlights the importance of culture to Aboriginal and Torres Strait

Islander peoples and therefore, the importance of culturally appropriate treatments to facilitate rehabilitation. The operation of culturally appropriate treatments are explored in relation to the criminal justice system. The report underlines that cultural identity is an important protective factor that promotes self-worth and therefore, rehabilitation.’

Recent and upcoming developments

The project is guided by a committee representing a broad range of stakeholders, including judicial nominees from the Supreme, District and Local Courts; representatives of the Director of Public Prosecutions, the Public Defenders, members of the legal profession including barristers and solicitors, Legal Aid NSW, the Aboriginal Legal Service (NSW/ACT) Limited, and the NSW Judicial Commission; and legal academics from UNSW, UTS and ANU.

The committee was recently awarded funding to develop and expand the resource, and two Legal and Program Managers, Lauren Stefanou and Crystal Triggs, have been appointed to steer the project’s work for the funding period.

Ongoing and future development of the project will include:

- updating existing chapters and publishing new chapters of research;
- commissioning new research from experts;
- designing and rolling out an education program for the legal profession and the judiciary, including in regional and more remote areas;
- consulting with the profession and the judiciary to identify further resources to assist and support practitioners and the courts; and
- expanding awareness and use of the resources in practice areas other than criminal law and beyond NSW.

The Bugmy Bar Book can be found at www.publicdefenders.nsw.gov.au/barbook. Subscribe for notifications about newly published materials, training and events.

Lauren Stefanou and **Crystal Triggs** are the Legal and Program Managers of the Bugmy Bar Book at Aboriginal Legal Service (ALS/NSW) Limited.