

**The *Bugmy* Bar Book project**

**[bugmybarbook.org.au](http://bugmybarbook.org.au)**



# ***Bugmy v The Queen* (2013) 249 CLR 571**

[43]:....The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.

[44]: Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision.

# ***Bugmy v The Queen (2013) 249 CLR 571***

[44]: ...However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.

## Stakeholders and endorsement

- There is 'whole-of-justice' support with committee representation from the NT, ACT and NSW from every level of the Court system including the Supreme Court, District Court and Local Court.
- There is also representation in NSW from the Public Defenders, the ODPP, ALS, Legal Aid, Judicial Commission, the Bar, the private profession and academics.
- We also have a First Nations sub-committee. The members of this committee provide invaluable guidance in relation to many aspects of our work.
- Links to *Bugmy Bar Book* are on all Australian Judicial Education websites: National Judicial College of Australia, The Australasian Institute of Judicial Administration Inc., NSW Judicial Commission, Judicial College of Victoria, and the Judicial Council on Diversity and Inclusion, and other websites such as the NTSC.

Aboriginal and Torres Strait Islander Stolen Generations and Descendants

Acquired Brain Injury

Childhood Exposure to Domestic & Family Violence

Childhood Sexual Abuse

COVID-19 Risks and Impacts for Prisoners and Communities

Cultural Dispossession Experienced by Aboriginal and Torres Strait Islander Peoples

Early Exposure to Alcohol and Other Drug Abuse

Fetal Alcohol Spectrum Disorders (FASD)

Hearing Impairment

Homelessness

Impacts of Imprisonment and Remand in Custody

Incarceration of a Parent or Caregiver

Interrupted School Attendance and Suspension

Low Socio-Economic Status

Out-of-Home Care

Refugee Background

Social Exclusion

Significance of Funeral Attendance and Sorry Business

Unemployment

## 2024 CLANT Conference

Members of the *Bugmy Bar Book Project* Committee and collaborators will present at the 2024 Criminal Lawyers of the Northern Territory (CLANT) Conference in Bali on 22 June 2024. [Click here](#) to register for the conference.

## Paul Byrne Memorial Lecture 2024

The Honourable Chief Justice Lucy McCallum delivered the 2024 Paul Byrne Memorial Lecture on the topic of 'The Rule of Law in Modern Australia'. [Click to open in new window.](#)



# Civil law published decision

## *FYF v Commissioner of Victims Rights* *[2024] NSWCATAD 4*

1. Provide evidence about relevant background of the experience of disadvantage
2. Link the background to the relevant *Bugmy* Bar Book expert evidence about the impacts of the background
3. Shape submissions built upon this evidence base relevant to the key legal principles

# Judgments and Decisions Referring to the *Bugmy* Bar Book

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The *Bugmy* Bar Book has been cited in numerous published judgments and decisions of courts and tribunals in NSW, ACT, Victoria and Queensland. The table below presents a summary of published judgments and decisions referring to the *Bugmy* Bar Book.

Last update: March 2024

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## NSW Court of Criminal Appeal

### ***Baines* [2023] NSWCCA 302**

(Simpson AJA, McNaughton J agreeing; Dhanji J dissenting on this point in separate judgment)

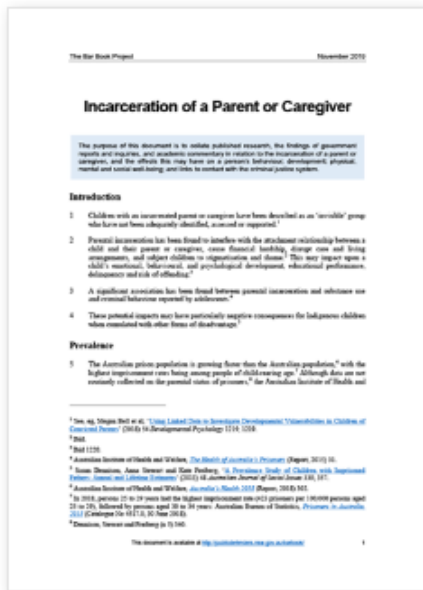
*Appeal against sentence for murder of underworld figure – usefulness of chapters from Bugmy Bar Book in understanding relevance and impact of deprived background – does not substitute for evidence in relation to specific personal*

Appeal against sentence imposed for well-planned murder of underworld figure.

Evidence tendered of offender’s disadvantaged childhood at first instance – indigenous offender – exposed to violence and substance abuse – low socio-economic status and neglect – incarceration of both parents – mother a member of Stolen Generation.

Ground 4 – per Simpson AJA (Dhanji and McNaughton JJ agreeing)

Unanimously allowed appeal on ground Sentencing Judge erred in not applying principles in ***Bugmy*** to reduce appellant’s moral culpability – psychologist report clearly identified causal connection



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EXECUTIVE SUMMARY



CASE SUMMARIES



# Incarceration of a Parent or Caregiver

## Executive Summary

*Note: Citations have been omitted from the text below. Click to access the PDF version of this Executive Summary at left to view a fully referenced version.*

Parental incarceration may interfere with the attachment relationship between a child and their parent or caregiver, cause financial hardship, disrupt care and living arrangements, and subject children to stigmatisation and shame. This may impact upon a child's emotional, behavioural and psychological development and educational performance. These potential impacts may have more severe consequences for Aboriginal and Torres Strait Islander children when cumulated with other forms of disadvantage.

The 2022 Victorian Inquiry into Children Affected by Parental Incarceration found that '[b]eing pregnant while incarcerated risks various poor maternal and neonatal outcomes'. The Inquiry received cross-jurisdictional evidence that the negative outcomes of incarceration for mothers during pregnancy and childbirth include anxiety in addition to the stressors of the prison environment, and separation from baby immediately after birth and the anticipated grief associated with separation, as well as 'increased risk of "poor maternal and neonatal outcomes" ... "including through an increased risk of maternal and infant mortality, gestational complications, traumatic births, premature births, low birth weight babies, and low APGAR scores at birth".'

The Inquiry also received evidence that:

- maternal separation due to incarceration is severely traumatic for infants and young children and usually results in the termination of breastfeeding;
- maternal caregiving capacity is undermined by maternal separation; and
- the long-term health, development and wellbeing of infants and young children is negatively impacted by maternal separation due to incarceration.

## Incarceration of a Parent or Caregiver

The purpose of this document is to collate published research, the findings of government reports and inquiries, and academic commentary in relation to the incarceration of a parent or caregiver, and the effects this may have on a person's behaviour, development, wellbeing (physical, mental and social) and links to contact with the criminal justice system.

### Introduction

- The children of incarcerated parents have been referred to as 'invisible victims' of the criminal justice system.<sup>1</sup> They can endure a punitive impact from the imprisonment of their parents that can have severe and lasting effects when one or both of their parents are taken into custody.<sup>2</sup>
- A 2022 parliamentary report of the Committee on Children and Young People *Support for Children of Imprisoned Parents in New South Wales* described this as follows:
 

Children of imprisoned parents are effectively serving a 'hidden sentence', in that they face a broad range of negative outcomes 'without having committed any crime themselves'.<sup>3</sup>

The Committee found that parental incarceration has a profoundly negative effect on children, and should be avoided where possible. We heard that children of imprisoned parents often experience difficulties with their physical and mental health, education and ability to have relationships with their parents, in addition to having a greater likelihood of having contact with child protection and/or justice systems.<sup>4</sup>
- Parental incarceration has been found to interfere with the attachment relationship between a child and their parent or caregiver, cause financial hardship, disrupt care and living arrangements, and subject children to stigmatisation and shame. This may impact upon a child's emotional, behavioural and psychological development and educational performance.<sup>5</sup>

<sup>1</sup> Joanni Cui, Carolyn Doyle and Lukas Currey, "Rethinking Prison Visitation for Children with Incarcerated Parents: Lessons from the Australian Capital Territory" (2023) 48(2) *Alternative Law Journal* 97; Vicki Saunders and Morag McArthur, "Representing Children of Prisoners in the Public Domain: Comparing Children's Views and Policy Documents" (2020) 73(1) *Australian Social Work* 118; Christopher Trotter et al. *The Impact of Incarceration on Children's Care: A Strategic Framework for Child Care Planning* (Report, Monash Criminal Justice Research Consortium, 2015) 40-50. See also Committee on Children and Young People, Parliament of New South Wales, *Support for Children of Imprisoned Parents in New South Wales* (Report No 4-57, June 2022) iv, 21 [24] ("Support for Children of Imprisoned Parents in NSW"); Legal and Social Issues Committee, Legislative Council, Parliament of Victoria, *Impact on Children Affected by Parental Incarceration* (Report, August 2022) xi, xii, 50, 73 ("Victorian Inquiry into Children Affected by Parental Incarceration"); Helen Connolly, Commissioner for Children and Young People (SA), *Join the Dots: Considering the Impact of Parental Incarceration on Children and Young People* (Project Report No 29, April 2022) 10, 39.

<sup>2</sup> *Support for Children of Imprisoned Parents in NSW* (n 1) 1; *Victorian Inquiry into Children Affected by Parental Incarceration* (n 1) ch 2.

<sup>3</sup> *Support for Children of Imprisoned Parents in NSW* (n 1) 1.

<sup>4</sup> *Ibid* v.

<sup>5</sup> See, eg. *Ibid* 1-3; Megan Bell et al., "Using Linked Data to Investigate Developmental Vulnerabilities in Children of Convicted Parents" (2018) 54(7) *Developmental Psychology* 1219, 1220; Stacy Tsamakidis et al., *The Inter-generational Transmission of Criminal Behaviours* (Report to the Criminology Research Council, March 2019) 24; Marc Remond et al., "Intergenerational Incarceration in New South Wales: Characteristics of People in Prison Experiencing Parental Imprisonment" (Australian Institute of Criminology, Trends & Issues in Crime and Criminal Justice No 663, February 2023) 9-11, 13.

Chapter  
(16 pages)

## Incarceration of a Parent or Caregiver

### Executive Summary

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The 2022 Victorian Inquiry into Children Affected by Parental Incarceration found that '[b]eing pregnant while incarcerated risks various poor maternal and neonatal outcomes'.<sup>4</sup> The Inquiry received cross-jurisdictional evidence that the negative outcomes of incarceration for mothers during pregnancy and childbirth include anxiety in addition to the stressors of the prison environment, and separation from baby immediately after birth and the anticipated grief associated with separation, as well as 'increased risk of "poor maternal and neonatal outcomes" ... "including through an increased risk of maternal and infant mortality, gestational complications, traumatic births, premature births, low birth weight babies, and low APGAR scores at birth"'.<sup>5</sup>

The Inquiry also received evidence that:

- maternal separation due to incarceration is severely traumatic for infants and young children and usually results in the termination of breastfeeding;
- maternal caregiving capacity is undermined by maternal separation; and
- the long-term health, development and wellbeing of infants and young children is negatively impacted by maternal separation due to incarceration.<sup>6</sup>

A range of negative impacts for children of incarcerated parents and caregivers has been acknowledged by Australian governments and research bodies. The NSW Committee on Children and Young People 'heard that children can be severely impacted when one or both of their parents are taken into custody', experiencing a broad range of negative outcomes, including:

- poorer physical and mental health;
- developmental delay;
- financial and housing stress;
- poorer educational and employment outcomes; and
- an increased risk of being placed in the child protection system or having adverse contact with the justice system themselves.<sup>7</sup>

In 2021, the NSW Justice Health & Forensic Mental Health Network found:

Parental Incarceration (PI) has an enormous impact on affected children, and a negative ripple effect on families and communities. Children and young people bear the greatest

Executive Summary  
(3 pages)

## Incarceration of Parent or Caregiver; Exposure to Criminal Activity

### Case Summaries

[BS-X|2021|ACTSC 160](#) (Loukas-Karlsson J)

*Motor vehicle and burglary offences – juvenile Aboriginal offender with severe childhood trauma – individual report supported by references to Bugmy Bar Book chapters and Significance of Culture to Wellbeing, Healing and Rehabilitation Report – application of Bugmy principles*

- Psychological report described 15y old Wiradjuri man with complex developmental trauma – born to drug addicted 15y mother and removed into non-indigenous foster care at 12 months – exposed to mother's drug use throughout life – experienced younger brother's removal from mother's care and placement with different carer due to mother's drug use – early substance abuse – difficult schooling period – disconnection with cultural identity – multiple significant losses and grief – externalised grief, loss and anger through maladaptive techniques – profound trauma resulting in mental health and behavioural issues
- Psychological report supported by references to multiple *Bugmy Bar Book* chapters: at [56], [58], [62], [63]
- Further reference to *Significance of Culture to Wellbeing, Healing and Rehabilitation Report* with emphasis on importance of culturally appropriate treatment to facilitate rehabilitation – importance of individual rehabilitation to both individual and community protection: at [81]–[85]
- Reference to comment in *Hoskins [2021] NSWCCA 165* that childhood deprivation does not need to be profound: at [91]
- Application of *Bugmy* principles

[Hoskins \[2021\] NSWCCA 169](#) (Brereton JA, Basten JA and Beech-Jones J agreeing)

*Violence offences – no need to find profound deprivation – causative link not required – impact of change from stable to unstable family environment and exposure to criminal milieu and alcohol use during formative adolescent period – continued dislocation exhibited in Indigenous communities resulting from foreign invasion, disruption of culture and minority racial status.*

- Indigenous offender raised by aunt in stable environment until returned to biological mother's care at 13y – unaware aunt was not real mother and no understanding why not raised by biological parents – struggled with feelings of abandonment – life became destabilised and chaotic in permissive environment under mother – biological family relationships characterised by violence, exposure to alcohol and criminal conduct normalised

Case Summaries  
(all jurisdictions)

# Chapter Review and Publication Process

The *Bugmy Bar Book* chapters are summaries of key research, reports and expert opinion relating primarily to the impacts of particular experiences often faced by people who came before the courts.

The authors and full references for each primary source extracted in the chapters are clearly cited (and where possible hyperlinked) to enable those using chapters are able to readily access the source documents.

The chapters are subject to a rigorous review process prior to publication. Our processes are in place to ensure that people using the resources, including advocates, forensic experts, and decision makers, including the judiciary, can be confident to rely upon them.

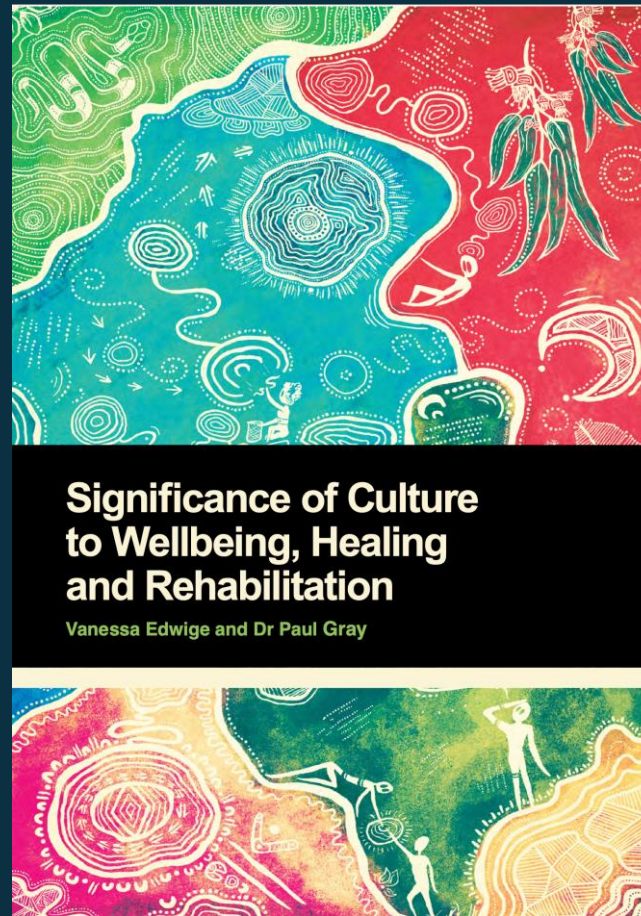
# Chapter Review and Publication Process

Steps in the process include:

- The chapters are first drafted by a researcher under the supervision of a Project Committee member or other senior member of the legal profession.
- They are then reviewed by at least one expert in the field, followed by review by Project Committee members, which is comprised of representatives from academia, key justice agencies, the judiciary and the private legal profession.
- There is a final review by an Independent Advisory Panel, including an independent First Nations review.
- Each chapter is reviewed and updated and has a date indicating the currency of its research

The researchers, experts, Project Committee members, and Independent Advisory Panel members are all acknowledged on our website.

# The importance of strength-based evidence during the proceedings

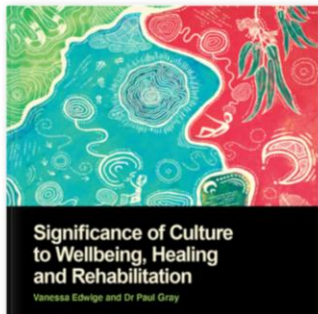


## Significance of Culture to Wellbeing, Healing and Rehabilitation

Vanessa Edwige and Dr Paul Gray

**Vanessa Edwige and Dr Paul Gray**

***Significance of Culture to Wellbeing, Healing and Rehabilitation*** (Report, 2021)



## Significance of Culture to Wellbeing, Healing and Rehabilitation (2021)

*Significance of Culture to Wellbeing, Healing and Rehabilitation* is a report by Vanessa Edwige, registered psychologist, and Dr Paul Gray, Associate Professor, UTS Jumbunna Institute of Indigenous Education and Research. Both of the authors are Directors of the [Australian Indigenous Psychologists Association \(AIPA\)](#).

This report builds upon the work of the *Bugmy Bar Book* to date concerning establishing the link between experiences of disadvantage and contact with the criminal process, and citing recognised roads to rehabilitation and healing. The authors express their expert opinions and present a significant body of evidence which establishes that, for Aboriginal and Torres Strait Islander people, rehabilitation approaches which are culturally appropriate and connected to community are more effective in building both individual and community resilience, which, over time, can reduce repeated contact with the criminal process.

The evidence cited indicates that rehabilitation programs delivered by those that understand and acknowledge the experiences of First Nations communities – in particular, Indigenous-led and -delivered initiatives, consistent with the principle of self-determination – are best suited for this purpose.

The authors discuss the importance of culturally appropriate and responsive services and programs in addressing social and emotional wellbeing for Aboriginal and Torres Strait Islander people, and allowing individuals to build core capabilities within a culturally safe environment, including learning to recognise destructive behaviours, building coping skills, and forming supportive and pro-social relationships, all of

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## Summary of Judgments Referring to the Significance of Culture to Wellbeing, Healing and Rehabilitation Report (2021)

Last updated: August 2024

NSW Supreme Court	
<a href="#">R v GW [2023] NSWSC 664</a> (Yehia J) <i>Application for bail – juvenile offender – importance of comprehensive bail support plan to address multiple and complex needs in community – policy of Youth Justice where no guilty plea – reference to research and reports including Wellbeing, Healing and Rehabilitation Report from Bugmy Bar Book</i>	<ul style="list-style-type: none"><li>• Application for bail by 11 year old Aboriginal male with 59 outstanding charges – multiple and complex needs – previously declined to engage with support programs – remanded to Youth Justice Centre when previously refused bail</li><li>• Consideration of Youth Justice policy to provide voluntary bail support not mandatory bail supervision where no guilty plea – policy designed to reduce criminalisation of non-compliance with supervision – importance of ensuring bail support still comprehensive and coordinated: <b>at [30]–[42]</b></li><li>• Emphasis on importance of providing children who have multiplicity of complex needs with support, supervision, and guidance in the community as opposed to detaining them in custody – referred to supporting research material</li></ul> <p>[43] Ensuring that the community is protected against antisocial and criminal behaviour requires more than simply locking up an 11-year-old. What is required is an intensive and coordinated approach. In the case of an Indigenous child, it requires referral to culturally appropriate programs, ideally managed and staffed by Indigenous caseworkers. The significance of culture to well-being, healing and rehabilitation, has been recognised and there is little doubt that “conceptualisations of wellbeing, and therefore efforts for healing and rehabilitation, are intrinsically tied to culture, with Indigenous perspectives of well-being and healing reflecting holistic worldviews that consider connections between physical, social and emotional well-being, individual and collective wellbeing, and the impact of social political and historical factors”. [1]</p> <p>[44] The findings of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory [2] indicted that incarcerated children and young people are more likely to have experienced poor physical and mental health and disproportionately higher levels of disadvantage than the general population. Accordingly, their health needs may be greater than those of children and young people in noncustodial settings. The report also noted that children and young people in detention are a particularly vulnerable group. They have varying and complex needs and behaviours. Many have come from crisis situations or a background of disadvantage, have experienced trauma or have a range of health issues. Detention itself may give rise to trauma, which may compound already highly complex behaviours and needs. To address the needs of these children and young people effectively, underlying issues need to be recognised and properly addressed and treated. Research shows that threatening and punitive interactions,</p>

## ***Bugmy v The Queen* (2013) 249 CLR 571**

[41]: ....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.

# ***DPP (Cth) v De La Rosa (2010) 79 NSWLR 1 at [177]***

- Where the state of a person's **mental health contributes to the commission of the offence in a material way**, the offender's moral culpability may be reduced with a reduction in the sentence.
- It may also have the consequence that an offender is an **inappropriate vehicle for general deterrence** resulting in a reduction in the sentence which would otherwise have been imposed.
- It may mean that a **custodial sentence may weigh more heavily on the person**. Because the sentence will be more onerous for that person, the length of the prison term or the conditions under which it is served may be reduced.
- It may reduce or **eliminate the significance of specific deterrence**.
- Conversely, it may be that because of a person's mental illness, **they present more of a danger to the community**. In those circumstances, considerations of specific deterrence may result in an increased sentence... Where a person has been diagnosed with an Antisocial Personality Disorder there may be a particular need to give consideration to the protection of the public.

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