

SENTENCING ABORIGINAL OFFENDERS IN QUEENSLAND: TOWARD RECOGNISING DISADVANTAGE AND THE INTERGENERATIONAL IMPACTS OF COLONISATION DURING THE SENTENCING PROCESS

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The ongoing issue of Aboriginal disadvantage, particularly the overrepresentation of Aboriginal people in Queensland prisons warrants a change in sentencing practices and outcomes. There is a current failure by Queensland courts to properly account for the systemic disadvantage suffered by Aboriginal Australians during the sentencing process. Given the intergenerational impacts of colonisation and an arguable new generation of institutionalised Aboriginal children in Queensland, consideration of the effects of colonisation is still largely relevant today. The recent High Court cases of Bugmy v The Queen¹ and Munda v Western Australia² provide little assistance in this area. With the requirement that there be evidence of a link between the offender's disadvantaged background and the offending behaviour, a higher burden is placed upon the offender to have their background of disadvantage considered. The law in Canada is influential and could assist Queensland in recognising the effects of colonisation during the sentencing process, in light of the Bugmy and Munda decisions. Further, a broader range of culturally appropriate sanctions should be made available to Queensland judges in order to effectively address this disadvantage brought about by the process of colonisation.

I INTRODUCTION

Aboriginal members of the community are largely overrepresented in all aspects of the criminal justice system.³ The disadvantage that is experienced by Aboriginal Australians as a result of colonisation remains an overwhelming problem in Australia. At the sentencing level, recognising Aboriginal disadvantage in sentencing is an immensely complex and difficult task. It is perhaps not surprising that Queensland Judges have had difficulties taking Aboriginality into account, having to reconcile the intergenerational impacts of the post-colonial experience with individualised justice. Aboriginal Australians remain a greatly disadvantaged group in Australia.⁴ Indeed, the disparity between non-Aboriginal and Aboriginal Australians is

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¹ *Bugmy v The Queen* (2013) 302 ALR 192.

² *Munda v Western Australia* (2013) 302 ALR 207.

³ See, Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press, 2008), 5.

⁴ Australian Bureau of Statistics, 1301.0 – *Feature Article: Indigenous Disadvantage and Selected Measures of Wellbeing*, 2010, (4 June 2010).

apparent in society and has been highlighted by numerous reports, such as the *Royal Commission into Aboriginal Deaths in Custody* ('RCIADIC')⁵ and importantly, the *Bringing them Home Report*.⁶ One such disparity is the number of Aboriginal Australians in incarceration compared to non-Aboriginal Australians.⁷ The underlying causes of Aboriginal offending and Aboriginal overrepresentation in prison lies in socio-economic disadvantage, which is a consequence related to the experience of colonisation.⁸

The policies and practices associated with the Stolen Generation⁹ are an aspect of colonisation, a process including the appropriation of land, the frequent, forcible removal of children, and active and systemic efforts by governments to suppress Aboriginal culture including language and rituals.¹⁰ Despite the disastrous effects that these policies have had, their impact has rarely been considered when sentencing Aboriginal offenders from the Stolen Generation.¹¹ Indeed Australian courts have been reluctant to accept that Aboriginality *per se* is a mitigating factor,¹² with the High Court of Australia recently losing a rare and important opportunity to reconsider Aboriginal disadvantage and the intergenerational effects of colonisation in sentencing.¹³ While the *Bringing Them Home Report* outlines the devastating consequences of the child removal policies associated with colonisation, to date the findings of the report have not been considered to their full potential as a means of informing courts of the impacts of colonisation when sentencing an Aboriginal offender. Given the intergenerational experience of the Stolen Generation, the effects of those child removal policies remains highly relevant. It has been suggested that the loss of identity experienced by Stolen Generation children continues to be experienced by many Aboriginal children in Queensland who are removed from their families and placed in foster care today.¹⁴ This loss of identity is said to be compounding the intergenerational issues, 'paving the way for yet another generation of institutionalised children'.¹⁵

This paper will consider the intergenerational impact of colonisation and the policies and practices experienced by the Stolen Generation, and alongside a consideration of Aboriginal disadvantage, it will consider how these factors impact on sentencing. While some have argued that the sentencing process is 'not a tool for the attainment of social justice',¹⁶ conversely, it should not be a tool for the attainment of injustice. In considering the intergenerational impacts

<<http://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/1301.0Feature%20Article9012009%E2%80%9310?opendocument&tabname=Summary&prodno=1301.0&issue=2009%9610&num=&view=>>.

⁵ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report*, (1991) vol 1.

⁶ Commonwealth, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing them Home Report* (1997); see also, Steering Committee for the Review of Government Service Provision 'Overcoming Indigenous Disadvantage' (Report, Commonwealth of Australia 2011).

⁷ Commonwealth, Royal Commission, above n 5, 6-7 [1.3].

⁸ New South Wales Law Reform Commission, *Sentencing Aboriginal Offenders*, Report No 96 (2000) 1.52; Commonwealth, *Bringing them Home Report*, above n 6; Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 2014), 450.

⁹ The term 'Stolen Generation' refers to Aboriginal children who were forcibly removed from their families, up until as late as the 1970s, as a result of government policy.

¹⁰ Richard Edney, 'The Stolen Generation and the Sentencing of Indigenous Offenders' (2003) 5(23) *Indigenous Law Bulletin* 10.

¹¹ *Ibid*; *The Queen v Fuller-Cust* (2002) 6 VR 496 (Eames J).

¹² *Neal v The Queen* (1982) 149 CLR 305, 326.

¹³ See *Bugmy v The Queen* (2013) 302 ALR 192; *Munda v Western Australia* (2013) 302 ALR 207.

¹⁴ See Heather Douglas and Tamara Walsh, 'Continuing the Stolen Generations: Child Protection Interventions and Indigenous People' (2013) 21(1) *The International Journal of Children's Rights* 59.

¹⁵ *Ibid* 63.

¹⁶ *B P v R* (2010) 201 A Crim R 379, 402 (Rothman J) quoted in Thalia Anthony 'Is there Social Justice in Sentencing Indigenous Offenders?' (2012) 35(2) *University of New South Wales Law Journal* 563.

of colonisation, patterns of disadvantage experienced by Aboriginal Australians can be recognised and sentences adjusted. In light of the *Bugmy*¹⁷ and *Munda*¹⁸ decisions, this article will consider how Queensland courts can take into account the intergenerational impacts of colonisation, particularly policies of child removal and the ramifications that they have had on the Indigenous community. It will do so by delving into Canadian case law and utilising what the Canadian Supreme Court had to say about considering the context of systemic disadvantage as a background factor. Further, it will analyse how ‘Gladue reports’¹⁹ can be utilised in Queensland in conjunction with Community Justice Groups (‘CJGs’). Lastly, it will consider the need for Queensland to fund culturally appropriate sanctions so as to provide Queensland judges with more sentencing alternatives that are capable of addressing the systemic issues that exist within Aboriginal Australian societies.

II BACKGROUND

Despite only making up 2.5 per cent of the nation’s population, Aboriginal and Torres Strait Islander (‘ATSI’) people now make up approximately 28 per cent of the prison population in Australia.²⁰ In Queensland, the daily average imprisonment rate of ATSI people is 1855 prisoners per 100 000 adult population, with 23 per cent of the Queensland adult prisoner population comprising of ATSI people.²¹ The RCIADIC has underscored the significant incarceration rates of Aboriginal people, stating that the reason for the increased deaths in custody was not because Aboriginal people were simply more prone to dying in custody,²² but rather because ‘too many Aboriginal people are in custody too often’.²³ However, since the RCIADIC report was released in 1991, ATSI incarceration numbers have increased. Between 2000 and 2010, the imprisonment rate increased by 59 per cent for ATSI women and 35 per cent for ATSI men, Australia wide.²⁴ Between June 2013 and June 2014, the imprisonment rate of ATSI males increased by 6 per cent and the number of ATSI females in prison increased by 15 per cent.²⁵ In 2012-13 it was found that the daily average of Aboriginal and Torres Strait Islander juveniles in detention was 454, compared with 329 non-Indigenous youth. The RCIADIC outlined that a significant contributing factor was the social, economic and cultural disadvantage experienced by Aboriginal people in Australian society,²⁶ with Aboriginal offending frequently linked with disadvantage associated with the offender’s Aboriginality.²⁷ Scholars have often identified that one result of this disadvantage is that Aboriginal people remain largely overrepresented in all aspects of the criminal justice system,²⁸ with disadvantage remaining a major cause for this overrepresentation in prison.²⁹ Indeed, in its

¹⁷ *Bugmy v The Queen* (2013) 302 ALR 192.

¹⁸ *Munda v Western Australia* (2013) 302 ALR 207.

¹⁹ Gladue reports are reports adopted by the Canadian Courts, utilised to better understand the effect of Aboriginality on the offender. These reports are discussed in more detail in Part VIII.

²⁰ Australian Bureau of Statistics, *4512.0 - Corrective Services, Australia, June Quarter, 2014* (11 September 2014) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0>>.

²¹ *Ibid.*

²² See Don Weatherburn, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014).

²³ Commonwealth, Royal Commission, above n 5, 6 [1.3.1] – [1.3.3].

²⁴ *Ibid.* 5.

²⁵ Australian Bureau of Statistics, above n 20.

²⁶ Commonwealth, Royal Commission, above n 5.

²⁷ See, Elliot Johnston, Martin Hinton and Daryle Rigney *Indigenous Australians and the Law* (Routledge.Cavendish, 2nd ed, 2008) ch 8; Commonwealth, Royal Commission, above n 5.

²⁸ See, Blagg, above n 3, 5.

²⁹ See, eg, New South Wales Law Reform Commission, above n 8; Commonwealth, Royal Commission, above n 5; Bagaric and Edney, above n 8, 450; Weatherburn, above n 22, 36.

2014 report, the Productivity Commission found that justice outcomes were continuing to decline for ATSI, with adult imprisonment rates worsening and no change in the high rates of juvenile detention.³⁰

While Aboriginality does not equate to disadvantage, it is well known that disadvantage is endemic in Aboriginal societies.³¹ The Australian Bureau of Statistics ('ABS') has found that Aboriginal Australians are disadvantaged across more socio-economic areas than non-Aboriginal people.³² For example, a lack of education and employment, high contact with the criminal justice system, alcoholism and alcohol-related offences are common themes surrounding Aboriginal people.³³ In addition, many Aboriginal Australians experience much lower access to basic needs such as food, shelter and medical services.³⁴ According to Don Weatherburn, surveys of the New South Wales prison population show that Aboriginal prisoners are less likely than non-Aboriginal prisoners to have completed year 10, are more likely to have been unemployed in the six months prior to being imprisoned, are more likely to have been sentenced to detention as a juvenile and are also more likely to have been previously incarcerated in adult prisons.³⁵ Scholars have often stated that hardship can increase with criminalisation as the latter results in the offender becoming alienated from the community.³⁶ Imprisonment can also worsen the disadvantage experienced by Indigenous offenders by 'perpetuating their cycle of poverty, subordination and marginalisation'.³⁷

The experience of the Stolen Generation is again unique to Aboriginal Australians,³⁸ and the disadvantage that resulted from the policies has been well known since the findings of the National Inquiry into 'the Separation of Aboriginal and Torres Strait Islander Children from their Families' was published. These findings comprise the *Bringing them Home Report*.³⁹ The *Bringing them Home Report* provides detailed accounts from children removed from their homes and the circumstances under which they were removed as part of government policies that came out of the colonisation process.⁴⁰ The Aboriginal people affected by the child removal policies are commonly known as the 'Stolen Generation'. The objective of such policies was to absorb Aboriginal children into white society.⁴¹ Therefore, not only were the

³⁰ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicator's 2014* (2014) <<http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/key-indicators-2014>>.

³¹ See, eg, Commonwealth, *Bringing them Home Report*, above n 6, see also Johnston, Hinton and Rigney, above n 27, 114; Weatherburn, above n 22.

³² Australian Bureau of Statistics, *1370.0 - Measures of Australia's Progress, 2004* (17 September 2008) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/bb8db737e2af84b8ca2571780015701e/2b2d7742b4059b04ca256e7d00002658!OpenDocument>>.

³³ Commonwealth, *Bringing them Home Report*, above n 6, 5, ch 6-7; New South Wales Law Reform Commission, above n 8.

³⁴ Peter Saunders, Yuvisthi Naidoo and Megan Griffiths 'Towards New Indicators of Disadvantage: Deprivation and Social Exclusion in Australia' (Report, Social Policy Research Centre University of New South Wales, 2007) 53-54.

³⁵ Weatherburn, above n 22, 6; Devon Indig et al, NSW Health, *2009 NSW Inmate Health Survey: Aboriginal Health Report* (2010).

³⁶ See Thalia Anthony 'Before the High Court: Indigenising Sentencing? *Bugmy v The Queen*' (2013) 35 *Sydney Law Review* 451, 453; Michael Tonry, *Malign Neglect: Race, Crime and Punishment in America* (Oxford University Press, 1995) 125; Barbara Hudson 'Punishment, Poverty and Responsibility: The Case for a Hardship Defence' (1999) 8 *Social and Legal Studies* 583, 589-90.

³⁷ Anthony, above n 36, 453.

³⁸ Mick Dodson and Boyd Hunter 'Selected Crime and Justice Issues for Indigenous Families' (2006) 75 *Australian Institute of Family Studies* 34, 38.

³⁹ Commonwealth, *Bringing them Home Report*, above n 6.

⁴⁰ *Ibid.*

⁴¹ *Ibid* 154.

children's Aboriginality not positively affirmed, but they were often punished or vilified because of their race.⁴² Further, because children were often told that their families had rejected them, or had died, they were consequently cut off from their cultural and familial roots and as part of an institutionalised life, were frequently abused.⁴³ The adverse impact of the policies has long been recognised in Australia,⁴⁴ having caused 'intergenerational trauma',⁴⁵ however Queensland courts have not adequately utilised the *Bringing them Home Report* and the evidence it provides of the adverse impacts that colonisation has had.

Dodson and Hunter, looking into the experience of the Stolen Generation, utilised the National Aboriginal and Torres Strait Islander Survey ('NATSIS') and found that being a member of the Stolen Generation, directly or indirectly, was highly linked with frequency and prevalence of arrest.⁴⁶ It is clear that the policy and practices that resulted in the forcible removal of children is a large contributor to Aboriginal disadvantage, with those who had been removed experiencing more disadvantage than those who had not. For example, removal from family has been associated with higher rates of emotional distress, depression, poorer physical health and higher rates of smoking and use of illicit substances.⁴⁷ Removal from family has also been associated with lower education and employment levels, with the effects of removal having a trans-generational impact.⁴⁸ Family disruption has been said to be critical in influencing high rates of arrest among Indigenous Australians.⁴⁹ Edney argues that one consequence of the policy was the subsequent involvement of Indigenous Australians in the criminal justice system.⁵⁰ The forcible removal of children from their homes had damaging effects on those children with the resulting socio-economic disadvantage often leading to offending behaviour.⁵¹ The policies have underpinned an intergenerational cycle of removal,⁵² with the policies and practices of the Stolen Generation mirrored in today's child removal policies and practices.⁵³ Indeed, in 2008, the ABS found that Indigenous Australians who had experienced removal from their family were more likely to have had contact with the criminal justice system and to have been incarcerated compared to those who had not been removed.⁵⁴ Many accounts from such removed children reported physical, sexual and psychological abuse.⁵⁵ Such abuse

⁴² Ibid.

⁴³ Ibid 154.

⁴⁴ *R v Fuller-Cust* (2002) 6 VR 496 [92].

⁴⁵ Edney, above n 10, 10.

⁴⁶ Dodson and Hunter, above n 38, 34–41; see also Anna Ferrante 'Assessing the Influence of "Standard" and "Culturally Specific" Risk Factors on the Prevalence and Frequency of Offending: The Case of Indigenous Australians' (2013) 3(1) *Race and Justice* 58, 77.

⁴⁷ Australian Bureau of Statistics, 4704.0 - *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, 2010* (17 February 2011) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter470Oct+2010#EN>>.

⁴⁸ Ibid.

⁴⁹ Ferrante, above n 46.

⁵⁰ Richard Edney 'The Retreat from Fernando and the Erasure of Indigenous Identity in Sentencing' (2006) 6(17) *Indigenous Law Bulletin* 8, 10.

⁵¹ See, Thalia Anthony, *Indigenous People, Crime and Punishment*, (Routledge, 2013), 63; Lucy Snowball and Don Weatherburn, 'Indigenous Overrepresentation in Prison: The Role of Offender Characteristics' (2006) 99 *Crime and Justice Bulletin* 1; Lucy Snowball and Don Weatherburn, 'Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?' (2007) 40(3) *Australian and New Zealand Journal of Criminology* 272; Don Weatherburn, Lucy Snowball and Boyd Hunter, 'The Economic and Social Factors Underpinning Indigenous Contact with the Justice System: Results from the 2002 NATSISS Survey' (2006) 104 *Crime and Justice Bulletin* 1.

⁵² See Douglas and Walsh, above n 14.

⁵³ Ibid.

⁵⁴ Australian Bureau of Statistics, above n 47.

⁵⁵ Commonwealth, *Bringing them Home Report*, above n 6.

was found to have had consequent impacts on physical and mental health often leading to substance abuse and imprisonment.⁵⁶ Patterns of removal still exist to date and are having a perpetuating impact on Aboriginal Australians that should be considered at sentence. The experience of the Stolen Generation would be able to assist in the task of sentencing Aboriginal offenders today who have been removed from their homes as a result of Child Protection legislation in Queensland.

III OPENING THE DOORS TO RECOGNISING ABORIGINALITY IN SENTENCING: *NEAL V THE QUEEN*

*Neal v The Queen*⁵⁷ (*Neal*) was the first Australian landmark case in terms of sentencing Aboriginal offenders. It opened the doors for the consideration of Aboriginality in sentencing, but also placed emphasis on the importance of individualised justice without taking into account the collective Aboriginal experience when sentencing an Aboriginal offender. The court considered that such an approach would appear racist and that also the process would not remain individualised. Since *Neal*, the courts have recognised that sentencing Aboriginal Australians should avoid racism and unequal treatment.⁵⁸ In *Rogers v R*,⁵⁹ Malcolm CJ affirmed the sentencing principles formulated by Justice Brennan in *Neal*. He stated that differential approaches to sentencing in the case of Aboriginal Australians would be discriminatory.⁶⁰

In *Neal*, an Aboriginal man, was convicted of one charge of unlawful assault by a Cairns magistrate who sentenced him to two months imprisonment with hard labour.⁶¹ Neal appealed to the Criminal Court of Appeal which imposed a higher sentence. The appeal then came before the High Court of Australia. The High Court focused on equality in sentencing with Brennan J stating that '[t]he same 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.'⁶² Brennan J also went on to say that '[b]ut in imposing sentences courts are bound to take into account in accordance with those principles, all material facts, including those facts which exist only by reason of the offender's membership of an ethnic or other group.'⁶³ Accordingly, offenders are sentenced on an individualised basis where all factors relevant to the individual are taken into account.⁶⁴ Brennan J considered whether the explanation for Neal's conduct could be attributed to 'emotional stress'.⁶⁵ He went on to say that 'emotional stress, which accounts for criminal conduct, is always material to the consideration of an appropriate sentence'.⁶⁶ He referred to the sentencing remarks of Dunn J of the Supreme Court of Queensland who had made allowances for the fact that 'special problems exist in Aboriginal communities'.⁶⁷ Brennan J considered emotional stress to be a mitigating factor, although he noted it did not excuse the

⁵⁶ Ibid.

⁵⁷ (1982) 149 CLR 305.

⁵⁸ See, eg, *Rogers & Murray v The Queen* (1989) 44 A Crim R 301, 307; *R v Minor* (1992) 79 NTR 1, 12; *DPP v Terrick* (2009) 24 VR 457.

⁵⁹ (1989) 44 A Crim R 301.

⁶⁰ Ibid 307.

⁶¹ Ibid 306.

⁶² *Neal v The Queen* (1982) 149 CLR 305, 326.

⁶³ Ibid.

⁶⁴ As stated in *Wong v The Queen* (2001) 207 CLR 584, 611. However that case was not about the sentencing of Aboriginal offenders, with the principle being one of general application.

⁶⁵ *Neal v The Queen* (1982) 149 CLR 305, 324.

⁶⁶ Ibid.

⁶⁷ Ibid.

conduct of the offender altogether.⁶⁸ Murphy J in *Neal* referred to the racial relations underpinning the case. He observed that Neal was placed in an inferior position because of his race and considered that the courts should have taken this into account as a mitigating factor.⁶⁹ He discussed Aboriginal grievances observing that Aborigines were treated with ‘arrogant superiority’ and ‘considerable brutality’.⁷⁰ It should be noted, however, that *Neal* emphasised that Aboriginal status on its own does not warrant any reduction in sentence,⁷¹ and further, courts have stated that an application of the principles in *Neal* do not require there to be a reduced sentence.⁷² Hopkins has argued that while a reduced sentence is not required, the decision can be understood as requiring consideration of an offender’s Aboriginality and how it may impact upon the sentence to be given.⁷³ He argues that while the considerations in *Neal*’s case related to historical, socio-economic and psychological disadvantage, the case also applies to *all* Aboriginal Australians who are entitled to have their Aboriginality considered.⁷⁴

IV THE *FERNANDO* PRINCIPLES AND APPLICATION IN SUBSEQUENT CASE LAW

Since *Neal*, courts have often taken Aboriginal disadvantage into account in sentencing, specifically identifying mitigating factors of socio-economic circumstances and alcohol abuse.⁷⁵ In 1992 the Supreme Court of NSW in *R v Fernando* (*‘Fernando’*),⁷⁶ sought to clarify the law and address the issue of how Aboriginal offenders ought to be sentenced. The case was greatly influenced by the findings of the RCIADIC⁷⁷ and set out various principles that were applicable to sentencing an Aboriginal person. In that case, the offender, Fernando, had stabbed his previous de-facto partner causing serious wounding. Fernando had a limited education and had been removed from his family to live in a racially divided community where he experienced socio-economic hardship. The offending was linked with alcohol abuse, as were his numerous prior offences. The court emphasised that sentences for violent crimes should reflect the seriousness of the crime,⁷⁸ however it also considered the circumstances of the offender. *Fernando* considers various precedential cases including *R v Yougi*,⁷⁹ in which it was said that failing to acknowledge the social difficulties faced by Aboriginal Australians would be ‘wrong’, as they have had heavy stresses placed upon them, which has consequentially lead to alcohol abuse and violence.⁸⁰ It also considered *R v Friday*⁸¹ where the defendant was held to be a ‘victim of the circumstances in which life had placed her’.⁸² In recognising Aboriginal

⁶⁸ Ibid 325.

⁶⁹ Ibid 319

⁷⁰ Ibid 317.

⁷¹ Ibid 326.

⁷² See, eg, *R v Wurrumara* (1999) 105 A Crim R 512, 522.

⁷³ Anthony Hopkins, ‘The Relevance of Aboriginality in Sentencing: Sentencing a Person for Who They Are’, (2012) 16(1) *Australian Indigenous Law Reporter* 37, 39; see also Richard Edney, ‘Just Deserts in Post-Colonial Society: Problems in the Punishment of Indigenous Offenders’ (2005) 9 *Southern Cross University Law Review* 73.

⁷⁴ Ibid.

⁷⁵ *Juli v The Queen* (1990) 50 A Crim R 31; *Rogers & Murray v The Queen* (1989) 44 A Crim R 301; *R v Friday* (1984) 14 A Crim R 471; *R v Bulmer* (1986) 25 A Crim R 155.

⁷⁶ (1992) 76 A Crim R 58.

⁷⁷ Anthony, above n 36, 456-7.

⁷⁸ *R v Fernando* (1992) 76 A Crim R 58, 64.

⁷⁹ *Regina v Yougi* (1987) 33 A Crim R 301.

⁸⁰ Ibid 304.

⁸¹ (1985) 14 A Crim R 471.

⁸² (1985) 14 A Crim R 471, 472.

disadvantage in the sentencing process, Wood J in *Fernando* outlined various principles, including the following:⁸³

- (a) that the same sentencing principles apply in every case, however courts should not ignore facts which exist only by reason of the offender's membership of an ethnic or other group;
- (b) Aboriginality is not necessarily relevant to mitigating punishment, but rather it explains the offence or the circumstances of the offender;
- (c) issues of alcohol abuse and violence go 'hand in hand with aboriginal communities';
- (d) where alcohol abuse reflects the socio-economic circumstances of the offender's background it should be taken into account as a mitigating factor as it involves recognition by the courts of the 'grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their report to alcohol';
- (e) in sentencing Aboriginal offenders courts must avoid racism, paternalism or collective guilt;
- (f) a lengthy term of imprisonment may be particularly harsh on an Aboriginal offender who has come from a deprived background or is disadvantaged by reason of socio-economic factors of who has little experience of European ways; and
- (g) full weight should be given to the public interest in rehabilitation and thus the avoidance of recidivism.

From the above principles, several things become apparent. One is that Aboriginality per se is not a mitigating factor, nor is it necessarily relevant to mitigation, and like all offenders, Aboriginal offenders are to be sentenced on an individual basis. However, notwithstanding that, Aboriginality is a significant consideration and can assist in explaining the offender's culpability and the subjective circumstances of the offender. Furthermore, the *Fernando* principles recognise that alternative sanctions are required so as to avoid lengthy terms of imprisonment, which may be unduly harsh upon an Aboriginal offender, as well as to uphold the public interest in rehabilitation. This latter point will be discussed in detail below.

Other state courts in Australia have subsequently adopted the *Fernando* principles.⁸⁴ However, many have argued that *Fernando* has been misunderstood or misapplied.⁸⁵ For example, it has been stated that *Fernando* does not apply in cases where the offender does not come from a remote Aboriginal community.⁸⁶ Some have argued that this is a misapplication of the case,⁸⁷ yet this assumption has influenced some subsequent jurisprudence.⁸⁸ One oft cited case on the matter is the case of *R v Ceissman*,⁸⁹ in which the New South Wales Court of Criminal Appeal considered the fact that the defendant was not from a remote community, and therefore prison

⁸³ *R v Fernando* (1992) 76 A Crim R 58, 63-4.

⁸⁴ *R v Stone* (1995) 84 A Crim R 218, 224; *R v Bashford* [2007] NSWSC 1380, [45]-[46]; *R v F.A.P.* [2007] NSWSC 905, [39]; *Waters v The Queen* [2007] NSWCCA 219, [39].

⁸⁵ See, eg, Hopkins, above n 73.

⁸⁶ *R v Ceissman* (2001) 119 A Crim R 535, *R v Morgan* (2003) 57 NSWLR 533, 539; *R v Newman* (2004) 145 A Crim R 361; *R v Simpson* (2004) 145 A Crim R 361, 376 and 378, See also *R v Fernando* (1992) 76 A Crim R 58 (Batt J); cf *R v Smith* [2003] SASC 263, [62]; *Waters v The Queen* [2007] NSWCCA 219 [39], *Police (SA) v Abdulla* (1999) 106 A Crim R 466, 472; see generally Anthony, above n 51, ch 6.

⁸⁷ See, eg, Martin Flynn 'Fernando and the Sentencing of Indigenous Offenders' (2004) 16(9) *Judicial Officers Bulletin* 67; Edney, above n 10; Hopkins, above n 73; John Nicholson 'The Sentencing of Aboriginal Offenders' (1999) 23 *Criminal Law Journal* 85.

⁸⁸ Anthony, above n 51, ch 6.

⁸⁹ (2001) 119 A Crim R 535.

could not be seen as being unduly harsh, and further that the defendant was only of part-Aboriginal descent. In taking those factors into account, the court held that *Fernando* did not apply.⁹⁰ In *R v Newman, R v Simpson*⁹¹ the court also found that *Fernando* applied only where defendants were from a remote community, with the defendant *Fernando* coming from Namoi Reserve at Walgett.⁹² In both *Ceissman* and *Newman and Simpson*, the courts placed more weight on the seriousness of the offence.⁹³ In *R v Morgan*,⁹⁴ the court again accepted that because the defendant was not from a remote community *Fernando* did not apply.⁹⁵ In the South Australian case of *R v Smith*,⁹⁶ it was stated that *Fernando* is not restricted to ‘traditional’ Aboriginals.⁹⁷ In other South Australian cases, it has been held that *Fernando* has a broader application, and applies not only to Aboriginal Australians living in remote communities, but also to urban communities also.⁹⁸ Nicholson has argued that remoteness is irrelevant to mitigation on the basis of Aboriginal disadvantage because of post-colonial post-traumatic stress experienced by all Aboriginal Australians.⁹⁹ These cases illustrate differences in the application of *Fernando* between States and Territories.

The fact that courts have more recently started placing more emphasis upon the seriousness of the offence and considerations of deterrence, particularly in relation to violent offences, is illustrative of the move away from the *Fernando* principles.¹⁰⁰ This has caused courts to look away from considerations of culpability and alternative sanctions.¹⁰¹ Further, courts have also found that *Fernando* principles are of little application when the offender has a serious prior criminal history with similar offences.¹⁰² In the ACT, the Supreme Court held that *Fernando* was not relevant to property offences, only offences of violence involving alcohol use.¹⁰³ More onerously, the NSW Supreme Court has held that to apply, Aboriginal disadvantage must be exceptional.¹⁰⁴ With each jurisdiction applying *Fernando* differently, the application of *Fernando* and *Neal*, and the relevance of Aboriginality in sentencing had become exceptionally unclear. The recent cases of *Bugmy v The Queen (Bugmy)*¹⁰⁵ and *Munda v Western Australia (Munda)*,¹⁰⁶ have clarified this issue.

V *BUGMY V THE QUEEN AND MUNDA V WESTERN AUSTRALIA* – WHAT THE HIGH COURT HAD TO SAY

In *Bugmy*¹⁰⁷ and *Munda*¹⁰⁸ the High Court was given an opportunity to clarify the relevance of

⁹⁰ Ibid 540.

⁹¹ (2004) 145 A Crim R 361.

⁹² Ibid 376, 378.

⁹³ *R v Ceissman* (2001) 119 A Crim R 535, 541; *R v Newman, R v Simpson* (2004) 145 A Crim R 361, 379.

⁹⁴ (2003) 57 NSWLR 533.

⁹⁵ Ibid 539.

⁹⁶ *R v Smith* [2003] SASC 263, [53]-[54].

⁹⁷ Ibid [60].

⁹⁸ *Police (SA) v Abdulla* (1999) (1999) 106 A Crim R 466, 472; see also *Ingomar v Police* (1998) 72 SASR 232; *R v Tjami* (2000) 77 SASR 514.

⁹⁹ Nicholson, above n 87.

¹⁰⁰ See, eg, *R v Wurraramara* (1999) 105 A Crim R 512.

¹⁰¹ Anthony, above n 36, 453, 462.

¹⁰² *R v Stone* (1995) 84 A Crim R 218, 224.

¹⁰³ *Crawford v Laverty* [2008] ACTSC 107.

¹⁰⁴ *R v Pitt* [2001] NSWCCA 156; *R v Walter & Thompson* [2004] NSWCCA 304; *Anderson v R* [2008] NSWCCA 211 [24]-[25]; *Croaker v R* [2008] NSWCCA 232 [6]-[7]; *R v Knight* [2004] NSWSC 498 [14].

¹⁰⁵ *Bugmy v The Queen* (2013) 302 ALR 192.

¹⁰⁶ *Munda v Western Australia* (2013) 302 ALR 207.

¹⁰⁷ *Bugmy v The Queen* (2013) 302 ALR 192.

¹⁰⁸ *Munda v Western Australia* (2013) 302 ALR 207.

the disadvantaged background of an Aboriginal offender and the effect of the policies and practices of the Stolen Generation to the sentencing task. Both cases involved prosecutorial appeals against the original sentences on grounds of manifest inadequacy. In both cases, the respective Courts of Appeal upheld the appeals by the Crown and thus the appellants subsequently appealed to the High Court of Australia. The *Bugmy* and *Munda* cases emphasise the importance of individualised justice, rejecting the application of different approaches to sentencing for Aboriginal offenders.¹⁰⁹ Both *Munda* and *Bugmy* had experienced social deprivation and great disadvantage in their lives. The cases do not state whether *Munda* or *Bugmy* are from the Stolen Generation, or whether they had parents that had been removed. Despite their clearly disadvantaged and troubled backgrounds however, it has been argued that the cases provide little guidance for sentencing Aboriginal offenders.¹¹⁰ Indeed, the cases do not address the issue of Aboriginality of itself, nor do they address the effects of colonisation, including the policies and practices of the Stolen Generation.

William Bugmy pleaded guilty to assaulting a correctional officer and grievous bodily harm with intent after he threw a billiard ball, hitting the correctional officer's eye. Bugmy grew up in an Aboriginal household wrought with violence and abuse. He received little education, was unable to read or write and began to consume alcohol and illicit drugs at the age of 13. He had witnessed his father stab his mother 15 times, had a juvenile criminal record from the age of 12 and was regularly detained in detention centres. Bugmy spent most of his life in correctional institutions and had a history of attempting suicide. He also had a history of head injury and auditory illness, related to either alcohol abuse or schizophrenia.¹¹¹

In *Bugmy*, the High Court looked at whether the NSW Criminal Court of Appeal ('NSWCCA') was correct in resentencing the defendant, despite not finding any manifest inadequacy. Further, the Court looked at the relevance of an offender's background of social deprivation. While the majority of the High Court¹¹² in *Bugmy* held that a background of social deprivation was a relevant factor to be taken into account in sentencing, they stated that in accordance with *Neal*, the 'weight to be afforded to the effects of social deprivation in an offender's youth and background is in each case for individual assessment'.¹¹³ The High Court ultimately found that the NSWCCA failed to determine that the sentence was manifestly inadequate.¹¹⁴ The authority to substitute a sentence is only engaged when the court is satisfied that the sentencing judgment miscarried by imposing a sentence that was manifestly excessive or inadequate.¹¹⁵

The Court in *Bugmy* importantly found that the effects of a deprived background do not diminish over time or with a lengthy criminal history.¹¹⁶ This statement could be applied to the stolen children effect, with child removal policies today mirroring the Stolen Generation.¹¹⁷ The lingering intergenerational impact of colonisation and child removal policies that came with it can thereby be seen to not diminish over time. The majority of the High Court found that such a deprived background should be given full weight in the consideration of a

¹⁰⁹ Ibid 201.

¹¹⁰ See, eg, Ian Freckleton, 'Imprisonment of Australia's Indigenous Offenders' (2013) 20(6) *Psychiatry, Psychology and the Law* 799.

¹¹¹ *Bugmy v The Queen* (2013) 302 ALR 192, 195.

¹¹² French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

¹¹³ *Bugmy v The Queen* (2013) 302 ALR 192, 206.

¹¹⁴ Ibid 198-9.

¹¹⁵ Ibid.

¹¹⁶ *Bugmy v The Queen* (2013) 302 ALR 192, 193, 199, 203.

¹¹⁷ See Douglas and Walsh, above n 14.

sentence.¹¹⁸ The High Court also stated that subjective factors are to be applied no matter the race of the offender, again reiterating the importance of individualised justice and equal justice.¹¹⁹ The majority stated that in sentencing an Aboriginal offender there is no warrant to apply a method of analysis different to that which is applied when sentencing a non-Aboriginal offender.¹²⁰ They went on to say that no account should be given to the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender, as taking such a factor into account would go against the notion of individualised justice.¹²¹ Further, the applicable legislation, section 5(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), does not direct a judge to give any special allowances to Aboriginal offenders.¹²² The High Court then stated that an offender's background does not always give rise to mitigation of a sentence, especially where the disadvantaged background has led to violent behaviour which in turn warrants more account to be given to community protection.¹²³

The majority in *Bugmy* considered two Canadian Supreme Court cases, *R v Gladue*¹²⁴ ('*Gladue*') and *R v Ipeelee*¹²⁵ ('*Ipeelee*'), but distinguished them from the present case. In the case of *Gladue* the Supreme Court stipulated that it would be necessary for a judge to take judicial notice of systemic factors when sentencing an Aboriginal offender.¹²⁶ The Court in *Ipeelee*¹²⁷ then stated that *Gladue* principles applied to all offences, including violent ones and that systemic factors relating to Aboriginal offenders must be taken into account in every case.¹²⁸ However the High Court in *Bugmy* made the distinction that the Criminal Code of Canada¹²⁹ instructed sentencing judges to take into particular account the circumstances of Aboriginal offenders, something that no sentencing legislation in Australia does.¹³⁰ The High Court rejected defence counsel's submission that judicial notice be taken of the systemic deprivation suffered by Aboriginal offenders, as doing so would, again, go against individual justice.¹³¹ In addition, the High Court stated that it would be necessary to point to material that would establish that the Aboriginal offender has a disadvantaged background.¹³²

As a result of the judgment in *Bugmy* a number of conclusions can be drawn. Firstly, *Bugmy* clarifies that there is no distinction between Aboriginal Australians living in urban societies and those living in rural or remote places, as both are the subject of 'grave social difficulties'.¹³³ Thus, the *Fernando* principles can be said to apply to all Aboriginal offenders, no matter their location. Secondly, issues of disadvantage are to be given full weight, however the principles of *Neal* stand; that the individual offender is to be sentenced on an individual basis. Thirdly, the High Court has importantly found that social deprivation does not diminish over time, nor does it diminish with the commission of other offences. The High Court has also stated that evidence is necessary to prove that the offender has a disadvantaged background. Furthermore,

¹¹⁸ *Bugmy v The Queen* (2013) 302 ALR 192, 193, 199, 203.

¹¹⁹ *Ibid* 202.

¹²⁰ *Ibid* 193, 200-1.

¹²¹ *Ibid* 201-2.

¹²² *Ibid* 193.

¹²³ *Ibid* 203.

¹²⁴ [1999] 1 SCR 688.

¹²⁵ *R v Gladue* [1999] 1 SCR 688; *R v Ipeelee* [2012] 1 SCR 433.

¹²⁶ *R v Gladue* [1999] 1 SCR 688, 690; 738.

¹²⁷ McLachlin CJ and Binnie, LeBel, Deschamps, Fish, Abella and Rothstein JJ.

¹²⁸ *Bugmy v The Queen* (2013) 302 ALR 192, 203.

¹²⁹ *Criminal Code* RSC, 1985, c C-46.

¹³⁰ *Ibid* 201 [35]-[36]; *Canadian Criminal Code*, s 718.2(e).

¹³¹ *Bugmy v The Queen* (2013) 302 ALR 192, 203.

¹³² *Ibid* 203 [41].

¹³³ *Ibid*.

while the court did state that incarceration rates are not a factor to be taken into account, giving full weight to backgrounds of social deprivation could decrease the number of Aboriginal Australians in prison.¹³⁴ One further important fact that emerged from the judgment of the High Court was that judicial notice of systemic disadvantage cannot be taken.

The case of *Munda*,¹³⁵ while less helpful than *Bugmy*,¹³⁶ was somewhat informative. Ernest Munda, a ‘traditional Aboriginal man’,¹³⁷ was convicted of the manslaughter of his de facto partner. At the time, he was the subject of a lifetime violence restraining order and had a long criminal history. As a child, Munda was exposed to the negative influences of alcohol and family violence. He had a history of alcohol and cannabis use and only attended school until year ten. He had been unemployed for four years at the time of the offence.¹³⁸

The majority of the High Court in *Munda*¹³⁹ focused on issues relating to principles of sentencing, placing emphasis on the need to balance subjective circumstances relevant to moral culpability with seriousness of the offence.¹⁴⁰ *Munda* also turned upon technical sentencing issues and found that there was no error in the Western Australian Court of Appeal’s (‘WACA’) decision.¹⁴¹ The WACA performed the relevant task of balancing the subjective circumstances with the seriousness of the offence and as such, the High Court did not allow the appeal.¹⁴² They stated that given the maximum penalty of 20 years and the brutality of the offence, the original sentence was manifestly inadequate.¹⁴³ The majority judgments in *Munda*¹⁴⁴ were of little assistance when it came to the issue of the relevance of Aboriginality in sentencing, however the dissenting judgment by Bell J was helpful.¹⁴⁵ Numerous comparable past cases were presented to the High Court by the appellant, which indicated a range for appropriate sentences previously given for the offence. Bell J examined this case law in great detail and considered that in light of these past cases, the WACA failed to find an error in consideration of background factors or a departure from the range of sentences for the offence.¹⁴⁶ Indeed, she stated that the original sentence was consistent with the cases presented to the court.¹⁴⁷ The majority however, stated that mitigating factors should not lead to the imposition of a penalty out of proportion to the seriousness of the offence.¹⁴⁸ They went on to say that it would be contrary to *Neal* to view Aboriginal offending as systemically less serious and that to accept that Aboriginal offenders are less responsible would be to ‘deny Aboriginal people their full measure of human dignity’.¹⁴⁹ Further, they said that a victim of an Aboriginal offender should not be less deserving of the protection of the criminal law.¹⁵⁰

Neither case considers the effects that colonisation or policies that lead to the Stolen

¹³⁴ Lucy Jackson ‘Casenote: *Bugmy v R* (2013) 302 ALR 193’ (2014) 8(10) *Indigenous Law Bulletin* 27, 29.

¹³⁵ *Munda v Western Australia* (2013) 302 ALR 207.

¹³⁶ *Bugmy v The Queen* (2013) 302 ALR 192.

¹³⁷ *Munda v Western Australia* (2013) 302 ALR 207, 211.

¹³⁸ *Ibid.*

¹³⁹ French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ

¹⁴⁰ *Ibid* 215, 221.

¹⁴¹ *Ibid* 232.

¹⁴² *Ibid* 215, 221.

¹⁴³ *Ibid* 234.

¹⁴⁴ *Ibid* (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

¹⁴⁵ *Ibid* 222.

¹⁴⁶ *Ibid* 225-8.

¹⁴⁷ *Ibid* 236.

¹⁴⁸ *Ibid* 218.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

Generations, had on Aboriginal people. Colonisation and, with it, dispossession have caused Aboriginal people to lose their identity and culture, regardless of whether they come from a deprived background of alcoholism and violence.¹⁵¹ While it is disappointing that the High Court has not taken the opportunity to properly consider the issue of Aboriginality in sentencing, there has been some useful clarification on the existing case law. There remains however, no clarification on how courts should sentence Aboriginal offenders who have been affected by the colonisation process and removed from their home, either as a direct result of Stolen Generation policies or as a result of Child Protection policies today.

VI RECOGNISING THE INTERGENERATIONAL IMPACTS OF COLONISATION DURING THE SENTENCING PROCESS

The High Court has already noted that evidence is necessary to draw a link between the offender's disadvantaged background and the offending behavior, with judicial notice of systemic disadvantage not to be taken.¹⁵² How then, can the effects of colonisation be recognised during the sentencing process given the judgments of *Bugmy* and *Munda*? It has already been established that the policies leading to the Stolen Generation had grave consequences for Aboriginal Australians, causing intergenerational trauma and disadvantage. Jurisprudence on the relevance of such factors is limited, and given the ramifications that *Munda* and *Bugmy* pose in terms of a judicial recognition of the effects of colonisation, it remains unclear as to how disadvantage resulting from colonisation policies, in particular child removal policies, would be considered during the sentencing process. It may be the case that Aboriginal offenders who identify as being affected by colonisation be treated no differently to those who do not, and therefore the existing sentencing principles relevant to sentencing Aboriginal offenders may apply no differently. As such, it would appear that those affected by colonisation, such as members of the Stolen Generation would be sentenced on an individual basis only, without consideration of the intergenerational impacts of the Stolen Generation policies and other practices that resulted from colonisation. Given the evidence that has been presented about the correlative link between disadvantage and Aboriginal offending, this would result in a stalemate in terms of addressing that link and the subsequent incarceration rates of Aboriginal Australians. Progress in this area requires a consideration during the sentencing process of the issues presented, particularly in light of the fact that removal of Aboriginal Australian children as a result of Child Protection policies today is mirroring those policies during colonisation that lead to the Stolen Generation.

To date Eames J in *R v Fuller-Cust*,¹⁵³ while dissenting, is the only judge to consider the effects of separation in sentencing.¹⁵⁴ Eames J stated that treating the experience of the applicant as the same as anybody else ignored the question of 'whether the Aboriginality of the applicant was a factor both in the circumstance that he came to be separated from his natural parents and in his own response to that event in his later life'.¹⁵⁵ He went on to say that the fact would be relevant in understanding the offending as well as addressing the issue.¹⁵⁶ He accepted the validity of the term 'Stolen Generation' and considered the factor to be highly relevant to the sentence imposed.¹⁵⁷ Richard Edney argues that one consequence of being a member of the

¹⁵¹ Kate Warner 'Sentencing Review 2012-2013' (2013) 37 *Criminal Law Journal* 390, 396.

¹⁵² See *Bugmy v The Queen* (2013) 302 ALR 192, 203.

¹⁵³ (2002) 6 VR 496.

¹⁵⁴ *Ibid* (Eames J).

¹⁵⁵ *The Queen v Fuller-Cust* (2002) 6 VR 496, [74].

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid* [79].

Stolen Generation is the involvement in the criminal justice system through offending behaviour.¹⁵⁸ He argues that the narrow concept of individual responsibility, or individualised justice, is problematic for Aboriginal offenders, with the criminal law downplaying historic events and individual circumstances that arise from such events.¹⁵⁹ Such an approach, he argues, ignores the social context of the individual.¹⁶⁰ The circumstances surrounding an individual who identifies as part of the Stolen Generation should be taken into account per se as a key factor, rather than one factor among many.¹⁶¹ It appears that Edney is arguing that specific disadvantage need not be demonstrated; rather judicial notice should be taken of effects of being part of the Stolen Generation. Edney argues that Justice Eames' judgment was an attempt to ensure that the history surrounding Aboriginal Australians is properly considered as a mitigating factor.¹⁶²

Edney argues that the dissenting judgment of Eames J is somewhat instructive on the matter, as it attempts to go beyond social and economic disadvantage to consider the effect of colonisation and the Stolen Generation policy on childhood development.¹⁶³ On this point, he considers that the backgrounds of the 99 Indigenous people who died in custody, triggering the RCIADIC, are a matter of importance.¹⁶⁴ Most of those who died in custody had themes of child removal in their lives, and Edney argues that it is because of this that sentencing jurisprudence should take into account the 'widespread separation of Indigenous children from their families and the culpability of the state for those acts'.¹⁶⁵ The present paper accepts that it is highly unlikely that a sentencing court would consider the culpability of Australia for the acts undertaken under the policies leading to the Stolen Generation, however it argues that the grave disadvantage experienced through policies arising from colonisation like child removal is a crucial factor to be taken into account when exercising sentencing discretion, which should incorporate considerations of separation and its effects.¹⁶⁶ In addressing such concerns Part VII of this paper will look into the need to present evidence of a link between disadvantage and the subsequent offending behaviour. The requirement of that evidence presents issues for the ability of a court to consider the effects of colonisation and the findings of the *Bringing them Home Report* without having judicial notice of the fact. Part VIII of this paper will examine Canadian case law and consider what lessons Queensland courts can take away, concluding that in order to be able to consider the effects of colonisation on an individual basis, reports similar to *Gladue* reports ought to be adopted, whereby the offender's personal background and offending behavior is considered in the context of colonisation, with particular information on how that context has specifically affected the offender presented to the court in the report. The prospect of more culturally appropriate sanctions in Queensland will be considered in Part IX. As touched on by Wood J in *Fernando*, sentencing alternatives are required to promote rehabilitation.¹⁶⁷ Given the abolition of the *Murri Courts*¹⁶⁸ in Queensland, such alternatives would greatly assist toward recognising the negative consequences that colonisation had on

¹⁵⁸ Edney, above n 10, 10.

¹⁵⁹ Ibid 12.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid; see also Anthony, above n 51, 65.

¹⁶⁴ Edney above n 10, 10.

¹⁶⁵ Ibid.

¹⁶⁶ See *The Queen v Fuller-Cust* (2002) 6 VR 496; Edney, above n 10.

¹⁶⁷ *R v Fernando* (1992) 76 A Crim R 58, 63-4.

¹⁶⁸ The Queensland *Murri Court* was a Magistrates Court for the sentencing of Indigenous Australia offenders who had pleaded guilty. The court was a forum for members of the Indigenous community to participate in the sentencing process and have cultural issues taken into account.

Aboriginal members of the society and the disadvantage that it caused. The existence of culturally appropriate sanctions would aim toward reducing the number of Aboriginal Australians in Queensland prisons and reducing disadvantage experienced by Aboriginal members in our communities.

VII EVIDENCE OF DISADVANTAGE

Since *Bugmy*, it is clear that courts can only take an Aboriginal offender's disadvantaged background into account where there is evidence of disadvantage. The current state of the law indicates that a defendant's Aboriginality alone, even if one is a member of the Stolen Generation, does not warrant leniency.¹⁶⁹ Thus, current sentencing submissions must point to evidence of how the defendant's Aboriginality is linked to the disadvantages experienced by the offender and the offending,¹⁷⁰ and how the deprivation bears on the appropriate sentence to be given.¹⁷¹ If the court is not presented with the evidence, then they cannot consider Aboriginality when sentencing Aboriginal offenders.¹⁷² Given the plethora of evidence of the negative consequences that colonisation and its child removal policies had on the Indigenous Australian community, particularly in light of the *Bring them Home Report*, judicial notice should be taken of that fact, of which Queensland courts could then consider during the sentencing process. This would be particularly useful when sentencing offenders who have been removed from their homes as part of today's Child Protection policies. However, given the judgments of *Bugmy* and *Munda*, this is not feasible.

In *Fuller-Cust*, Eames J considered that the offender's Aboriginality and separation was highly relevant to the sentencing discretion.¹⁷³ Eames J then stated that having regard to Aboriginality, proper consideration would be given to antecedents meaning that any relevant factor arising by virtue of an offender's Aboriginality would be identified and not overlooked by 'the simplistic assumption that equal treatment of offenders means that differences in their individual circumstances related to their race should be ignored'.¹⁷⁴ Eames J recognised through the RCIADIC the impact of being socialised in institutions, and stated that the possibility of adverse effects from separation should be recognised.¹⁷⁵ Furthermore, Edney argues that Eames J's judgment utilised the findings of the *Bringing them Home Report* and looked into the complex aspects of childhood development and the adverse impact colonisation has had on that, as well as the resulting dispossession and loss of culture.¹⁷⁶ It is therefore argued that the *Bringing them Home Report* should be considered in depth and applied by sentencing courts when faced with the challenging task of sentencing a member of the Stolen Generation. The report is a valuable source of information, highlighting the effects of separation on those directly affected as well as on succeeding generations. In considering the *Bringing them Home Report*, the NSW Law Reform Commission noted that removal policies impacted generations in terms of mental health, parenting skills, loss of family and identity, residual anger and grief and stated that as such, 'courts should be aware of its relevance in the lives of Aboriginal people being sentenced'.¹⁷⁷

¹⁶⁹ *R v Fernando* (1992) 76 A Crim R 58, 63; *R v Minor* (1992) 105 FLR 180, 190; see also Anthony, above n 36.

¹⁷⁰ *Ibid* 454-5.

¹⁷¹ Freckleton, above n 110, 809.

¹⁷² Hopkins, above n 73, 48.

¹⁷³ *The Queen v Fuller-Cust* (2002) 6 VR 496, [77].

¹⁷⁴ *Ibid* [80].

¹⁷⁵ *Ibid*.

¹⁷⁶ Edney, above n 10, 10.

¹⁷⁷ New South Wales Law Reform Commission, *Sentencing Aboriginal Offenders*, Report No 96 (2000) 1.52, 16.

While the Canadian approach is to take special consideration of the negative impacts colonisation and the intergenerational impact that colonisation and policies like the Stolen Generation had on the Aboriginal community, and continues to have on the Aboriginal community, this is provided for in Canadian legislation. Queensland has no such legislated provision. Therefore, in light of *Bugmy* and *Munda*, in order to take special consideration in Queensland of such facts, it is up to parliament to provide for the ability of courts to do so in the *Penalties and Sentences Act 1992* (Qld) ('PSA'). There has been no prospect of such a provision to be inserted into the PSA. Therefore, in order to consider the context of colonisation during the sentencing process, courts must look to do so on an individual basis. Once it becomes apparent that an Aboriginal offender in Queensland has been removed from their family, this article argues that courts ought to consider that personal background in the *context* of the evidence of the effects of colonisation on the Indigenous community. Judges could utilise this information, and that presented by the *Bringing them Home Report*, to identify how the offender might have been specifically effected so as to contribute to their offending behaviour.

VIII THE CANADIAN APPROACH – IS THERE A LESSON TO BE LEARNED?

A *Considerations of Circumstances of Aboriginality*

Section 718.2(e) of the Canadian Criminal Code stipulates that all available sanctions other than imprisonment should be considered 'with particular attention to the circumstances of Aboriginal offenders'. The aim of the section was to reduce the overrepresentation of Aboriginal people in prisons.¹⁷⁸ In *Gladue*¹⁷⁹ the Supreme Court was able to consider the sentencing of Indigenous offenders under section 718.2(e), and looked to the broad systemic background factors that affect Indigenous people.¹⁸⁰ While the court in *Gladue* held that the words do not alter the duty of the judge to impose and fit a proportionate sentence,¹⁸¹ they stated that legislation provides that judges should pay particular attention to Aboriginality and the circumstances relating to that because 'those circumstances are unique, and different from those of non-Aboriginal offenders'.¹⁸² As discussed earlier, perhaps the first step toward addressing the broad systemic issues suffered by Aboriginal Australians is to provide a similar legislative provision in the PSA whereby Queensland courts are able to give special consideration to Aboriginal offenders looking to the effects of colonisation, and in particular, considering the effects of policies that resulted in child removal and the consequent disadvantage suffered.

Gladue also discussed the issue of equality before the law and stated that it is not unfair to non-Indigenous people to consider their circumstances as section 718.2(e) treats Aboriginal offenders fairly by taking into account their difference.¹⁸³ The Canadian Supreme Court then stipulated that it would be necessary for a judge to take judicial notice of systemic factors that surround the Aboriginal population in Canada.¹⁸⁴ While the High Court of Australia has rejected that approach,¹⁸⁵ it is disappointing that it did so, because, as the Court in *Gladue* argues, having regard to the collective experience of Aboriginal people allows courts to treat

¹⁷⁸ *R v Gladue* [1999] 1 SCR 688, 690.

¹⁷⁹ [1999] 1 SCR 688.

¹⁸⁰ *Ibid* 690.

¹⁸¹ Hopkins, above n 73, 48; *R v Gladue* [1999] 1 SCR 688, 706 [33].

¹⁸² Hopkins, above n 73, 48; *R v Gladue* [1999] 1 SCR 688 708.

¹⁸³ *R v Gladue* [1999] 1 SCR 688, 733.

¹⁸⁴ *Ibid* 690, 738.

¹⁸⁵ *Bugmy v The Queen* (2013) 302 ALR 192, 203.

them fairly, by taking into account their differences, including their background of systemic deprivation. Such an approach would be better aimed at achieving equal justice and addressing Aboriginal disadvantage. In contrast to *Gladue*, the High Court in *Bugmy* and *Munda* did not make any particular reference to the consequences of colonisation and Aboriginal Australians who were removed from their homes as a result of colonisation. Indeed, in *Bugmy*, the majority stated that to recognise the social and economic disadvantage says nothing about a particular Aboriginal offender¹⁸⁶ and ultimately held that sentencing an Aboriginal offender differently would offend expectations of individualised justice.¹⁸⁷

The *Gladue* Court recognised the years of dislocation and unequal economic development that has resulted in low incomes, unemployment, lack of opportunities and education, substance abuse and community fragmentation and attributed such factors to high incidences of crime and incarceration.¹⁸⁸ Finally, the Court in *Gladue* found that it is necessary to recognise that the circumstances of Aboriginal offenders differ to the majority due to the fact that they are the victims of systemic discrimination, with many suffering the legacy of dislocation.¹⁸⁹ To recognise that an individual is part of a context and background of social deprivation and disadvantage is fundamentally relevant to the sentencing task. The court in *Gladue* has also said that with the sentencing process remaining individualised¹⁹⁰ a truly fit and proper sentence requires the court to undertake a different process when sentencing Aboriginal offenders.¹⁹¹ Thus, while the sentencing process is individualised, the individual offender is sentenced in the context of the collective experience of Aboriginal Canadians.¹⁹² On this point, the court recognised the ‘unique background and systemic factors, which may have played a part in bringing the particular offender before the courts’,¹⁹³ including dislocation, child removal, socio-economic disadvantage, substance abuse and high incarceration rates.¹⁹⁴ This is an approach that Queensland courts ought to take when sentencing an Aboriginal offender, with the context of the systemic factors running through Aboriginal communities necessarily including the intergenerational impact of colonisation and child removal policies that ensued.

B *The Utilisation of Gladue Reports*

In Canada, *Gladue* reports have been utilised to provide evidence of material facts existing by reason of an offender’s Aboriginality.¹⁹⁵ The reports are similar to pre-sentence custody reports utilised by Queensland Courts, however they address the offender’s Aboriginality directly. *Gladue* reports are written by Aboriginal Canadians who have the same collective experience as the defendants they assist.¹⁹⁶ The reports assist in explaining offending behaviour within the context of the collective history of Aboriginal Canadians, highlighting the link between that experience and the individual offender.¹⁹⁷ As Anthony Hopkins argues, the requirement to consider *Gladue* reports means that identifying an offender’s Aboriginality and establishing its

¹⁸⁶ *Bugmy v The Queen* (2013) 302 ALR 192, 203 [41].

¹⁸⁷ *Ibid* 202-3.

¹⁸⁸ *R v Gladue* [1999] 1 SCR 688, 724.

¹⁸⁹ *Ibid* 724-5.

¹⁹⁰ *Ibid* 728.

¹⁹¹ *Ibid* 706.

¹⁹² *Ibid* [70] – [74].

¹⁹³ *Ibid* 725.

¹⁹⁴ *Ibid* 719, 724-5 [58], [67] – [68].

¹⁹⁵ Hopkins, above n 73, 48-9.

¹⁹⁶ *Ibid* 49.

¹⁹⁷ Kelly-Hannah Moffat and Paula Maurutto, ‘Re-Contextualising Pre-sentence Reports: Risk and Race’ (2010) 12 *Punishment and Society* 262, 266; Hopkins, above n 73, 46.

relevance is not left to defence lawyers and the limited resources available to them or their client.¹⁹⁸ He argues that reports akin to *Gladue* reports should be adopted in Australia, as the reports could then appropriately consider the complexity of the ‘postcolonial Indigenous experience’.¹⁹⁹

The requirement for offenders to provide evidence of a link between systemic disadvantage associated with Aboriginality and the individual offender, and the potential intergenerational impacts of colonisation of that offender provides another hurdle for usually vulnerable and disadvantaged defendants with limited resources.²⁰⁰ In particular, the expenditure of resources to gain the necessary evidence is a large burden.²⁰¹ Without taking judicial notice of these facts, providing evidence of a link between the systemic factors surrounding Aboriginality and the individual offender will remain an immensely difficult task for underfunded Aboriginal offenders. Such information could be presented through the utilisation of a court report, similar to the *Gladue* report, which could deal specifically with Aboriginal offenders. Submissions made by Community Justice Groups (‘CJGs’) may also be useful in assisting offenders establish this link, and could be presented in such a court report. For example, CJGs may be of assistance when establishing Aboriginality and how it has impacted upon moral culpability and may also assist in suggesting an appropriate sentence. The submissions and recommendations made by CJGs could aid in establishing the link between membership of an Aboriginal community and disadvantage, looking at the offender’s background in the wider context of a background of colonisation and the effects that it has had on the Indigenous population. This would require a significant legislative change to allow CJGs to incorporate such submissions into a court report as well as an increase in funding so as to increase the CJGs ability to make relevant findings and submissions. As they stand, CJGs currently do not have the ability to make a huge difference to the sentencing process and outcome.

Following *Fernando* and the findings of the RCIADIC, CJGs were established in 1993 and the submissions of representatives from CJGs became a relevant sentencing consideration under the *PSA*.²⁰² Section 9(2)(o) of the *PSA* provides that when the offender is an ATSI person the court must have regard to any submissions made by a CJG, which may include submissions on the offender’s relationship to the offender’s community, any cultural considerations or other considerations relating to programs and services established for offenders in which the CJG participates.²⁰³ The role of CJGs includes ensuring ‘that issues impacting on Indigenous communities are addressed’.²⁰⁴ Section 150(1)(g) of the *Youth Justice Act 1992 (Qld)* is a similar provision allowing for submissions from a representative of a CJG. Similar provisions exist at the Magistrate level through the use of Indigenous Sentencing List, which aims to allow families, CJGs and Elders to participate in the sentencing process at the Magistrate level.²⁰⁵

It has been argued that ‘simply having an Aboriginal voice in the court does not necessarily

¹⁹⁸ Hopkins, above n 73, 48, 49.

¹⁹⁹ *Ibid.*

²⁰⁰ Johnston, Hinton and Rigney, above n 27, 118, ch 8; *R v Fernando* (1992) 76 A Crim R 58, 63; see also *R v Minor* (1992) 105 FLR 180, 190.

²⁰¹ Freckleton, above n 110, 809.

²⁰² *Penalties and Sentence Act 1992 (Qld)*, s 9(2)(O).

²⁰³ *Ibid* s 9(2)(o)(i)-(iii).

²⁰⁴ Department of Justice and Attorney General, *Community Justice Groups* (April 2008)

<http://www.justice.qld.gov.au/__data/assets/pdf_file/0006/18528/Community_justice_groups.pdf>.

²⁰⁵ Department of Justice and Attorney General, *Indigenous Sentencing List* (2012) <http://www.courts.qld.gov.au/__data/assets/pdf_file/0008/205586/cip-fs-indigenous-sentencing-list-isl.pdf>.

change the dynamic of the sentencing process'.²⁰⁶ The actual value of the current CJG program in addressing Aboriginal disadvantage in sentencing is unclear. The involvement of the Aboriginal community into the sentencing process remains a discretionary factor meaning that the influence of CJGs is not consistent.²⁰⁷ Indeed, in *R v Roberts*²⁰⁸ Byrne J stated that while judges are bound under section 9(2)(o) of the *Penalties and Sentences Act* to have regards to the reports produced by the CJG, they are not bound to ultimately accept the recommendations of the group.²⁰⁹ While it brings an Aboriginal voice to the process, Marchetti and Ransley argue that the program remains too mainstream as there is no 'requirement for adaptation for cultural appropriateness'.²¹⁰ Furthermore, the 'quality and effectiveness of the CJG Program is severely constrained by poor program resourcing and governance arrangements'.²¹¹ With *Munda* and *Bugmy* reiterating the importance of providing material capable of establishing a background of deprivation, a similar report to that of the *Gladue* reports should be adopted in Australian jurisdictions to meet that challenge.

Currently, CJGs assist by making submissions on the offender's involvement with the community, either in writing or in person, but do not contribute to pre-sentence reports or conduct reports of their own. While their submissions are a consideration under section 9 of the *PSA*, their effectiveness is questionable, especially given the fact that section 15 of the *PSA* states that a court *may* receive information on sentence. Pre-sentence reports are taken to be evidence of the matters contained within it.²¹² It would therefore be useful to adopt *Gladue* reports, and have specific sentencing reports for all Aboriginal offenders, with a similar provision taking the matters provided in the reports as evidence of those matters. CJGs could then be utilised in that respect, if given the necessary legislated power, to assist with the reports and make more effective submissions.

IX SENTENCING ALTERNATIVES

While some states have sentencing legislation that provides for custodial sentences to be a last resort,²¹³ the current position in Queensland is that courts can no longer have any regard at all to the principle that a sentence of imprisonment should be imposed as a last resort.²¹⁴ The change in legislation to not consider imprisonment as a last resort came after the abolition of the *Murri* Court, which was a court specific to the sentencing of Indigenous offenders. With the repeal of that provision, the availability of more culturally appropriate sentencing

²⁰⁶ Elena Marchetti and Janet Ransley 'Applying the Critical Lens to Judicial Officers and Legal Practitioners Involved in Sentencing Indigenous Offenders: Will Anyone or Anything Do?' (2014) 37(1) *University of New South Wales Law Journal* 16.

²⁰⁷ Paul Chantrill, 'Community Justice in Indigenous Communities in Queensland: Prospects for Keeping Young People Out of Detention' (Paper presented at the Conference on Crime in Rural Australia, Australian Institute of Criminology and the Rural Development Centre, The University of New England, Armidale, 1 March 2009).

²⁰⁸ [2002] QCA 105

²⁰⁹ *Ibid* 6.

²¹⁰ Marchetti and Ransley, above n 206.

²¹¹ Department of Justice and Attorney General, *Evaluation of the Community Justice Group: Final Report* (November 2010) <http://www.justice.qld.gov.au/__data/assets/pdf_file/0003/88905/evaluation-of-the-community-justice-group-program.pdf> 4.

²¹² *Corrective Services Act 2006* (Qld) s 344(9).

²¹³ See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1); *Crimes (Sentencing) Act 2005* (ACT) s 10; *Sentencing Act 1991* (Vic) s 5(4); *Children, Youth and Families Act 2005* (Vic) ss 360 and 361; *Criminal Law (Sentencing) Act 1988* (SA) s 11; *Sentencing Act 1995* (WA) ss 6(4) and 86; *Young Offender's Act 1994* (WA) s 7(h); *Crimes Act 1914* (Cth) s 17A.

²¹⁴ *Penalties and Sentences Act 1992* (Qld) s 12; *Youth Justice and Other Legislation Amendment Act 2014* (Qld) ss 9, 34(13).

alternatives is critical. As touched on by Justice Wood in *Fernando*, sentencing alternatives are required to promote rehabilitation.²¹⁵ There are a number of sentencing alternatives that have not been fully considered by Australian governments. This article endorses the implementation of alternatives such as culturally specific prisons, rehabilitation methods, probation that is tailored to meet the needs of the Aboriginal offender and that is capable of addressing the intergenerational impact colonisation has had on that offender, and other culturally specific alternatives that involve the Aboriginal community at large, as a means of addressing disadvantage. Recognising Aboriginal disadvantage in sentencing will increase the potential to seriously address the offending behaviour and the underlying disadvantage. It offers the ‘collective potential for positive change and uplifting the lives of Indigenous offenders’.²¹⁶ Don Weatherburn argues that imprisonment is criminogenic in itself and reduces employment opportunities post-release,²¹⁷ and that disadvantage cannot be addressed by sending an Aboriginal offender to a mainstream prison.²¹⁸ *Gladue* recognised that Aboriginal offenders are not best served by incarceration, especially in the case of non-violent or less serious offences.²¹⁹

Mitigation of prison sentences will not achieve a reduction in incarceration rates, nor will it be capable of effectively addressing disadvantage without the availability of programs aimed at rehabilitating the offender. Such programs, if effective, could reduce the likelihood of reoffending.²²⁰ Weatherburn has argued that the imperative ‘prison as a last resort’ is ineffective, as it is unclear as to what ‘last resort’ means.²²¹ In choosing a sentence of last resort, courts often order suspended sentences, which, as Weatherburn states, are ineffective at curbing incarceration rates or reducing offending.²²² Further, Weatherburn has pointed out that suspended sentences only reduce the imposition of fines that would have otherwise been imposed.²²³ He also argues that there is no evidence that community based sanctions such as community service orders are effective at reducing incarceration rates as they are imposed on offenders who would not have gone to prison anyway.²²⁴ This article argues that prison as last resort for Aboriginal Australians is necessary, however for any such legislative provision to work it must be coupled with adequate alternatives to custody so that an appropriate sanction is available that does not require a term of imprisonment, or for the avoidance of a lengthy term of imprisonment depending on the offence. Alternatives to custody are underfunded and are particularly so in more remote or rural places.²²⁵ If resources were expended on more Aboriginal-specific sanctions, perhaps sentencing efforts could be more effective at addressing disadvantage and reducing Aboriginal incarceration rates.

In Western Australia, the government has expended \$150 million on a new Aboriginal-specific prison (the West Kimberly Regional Prison) tailored to meet Aboriginal needs and address

²¹⁵ *R v Fernando* (1992) 76 A Crim R 58, 63-4.

²¹⁶ Hopkins, above n 73, 48, 50.

²¹⁷ Weatherburn, above n 22, 8.

²¹⁸ *Ibid.*

²¹⁹ *R v Gladue* [1999] 1 SCR 688, 728.

²²⁰ Hopkins, above n 74, 48, 50; see also Anthony, above n 16, 563, 570.

²²¹ Weatherburn, above n 22, 35-6.

²²² *Ibid* 36-37.

²²³ *Ibid* 36.

²²⁴ *Ibid.*

²²⁵ *Ibid.*

Aboriginal disadvantage, aimed at reducing offending behaviour.²²⁶ The West Kimberly Regional Prison has an Aboriginal administrator, and is run on a “self care” model. Inmates are taught skills such as how to cook and look after the prison generally. The new initiative allows inmates to gain life skills as well as qualifications. With lack of education and employment linked with crime rates,²²⁷ an initiative such as this one, which employs the inmates around the prison and provides education and training, could assist in curbing recidivism. Changing the conditions which give rise to Aboriginal offending could break the cycle of disadvantage that is passed on from one generation to the next.²²⁸ Weatherburn argues that rehabilitation should also be provided to Indigenous offenders upon release, as well as while in prison.²²⁹ Doing so would reduce the influence of factors like alcohol, which increases offending behaviour.²³⁰ While prison is often utilised and resourced for political reasons, this paper argues that Queensland funding should be given to more culturally appropriate sanctions, which could in some cases include forms of imprisonment as discussed. Other sanctions that could be made available include reconnection programs, mentoring programs and programs such as probation involving supervised sessions with a probations officer, preferably from the Aboriginal community, specifically tailored to meet Aboriginal needs. In doing so, the sentencing process can be more effective at mitigating that disadvantage.

X CONCLUDING REMARKS

To date, considerations of the intergenerational effects that colonisation has had on Aboriginal Australians during the sentencing process in Queensland has been limited, if not non-existent. One particularly detrimental policy that came with colonisation was the child removal policies that lead to the Stolen Generation. Such policies are being mirrored in today’s child protection laws in Queensland. The evidence of the disadvantage suffered by Aboriginal children who were removed from their homes is plentiful, and especially in light of the findings of the *Bringing them Home Report*, such information should be utilised when during the sentencing process, particularly in relation to Aboriginal Australians who have been removed from their homes. Considerations of this systemic disadvantage that has resulted from colonisation is difficult however, given that the High Court of Australia has maintained a focus on individualised sentences without having regard to any collective or intergenerational experience of Aboriginal people, stating that taking judicial notice of the systemic disadvantage experienced by Aboriginal Australians would detract from individualised justice.

In order to address the disadvantage that Aboriginal Australians face and reduce Indigenous incarceration rates in Queensland, a number of things should happen. First, Queensland courts need to have consideration of the background of disadvantage that resulted from colonisation during the sentencing process. This should be done by considering the individual offender in the *context* of this background of disadvantage. While the sentence would remain individualised, the background knowledge could inform the court of the key effects felt by Indigenous Australians because of the trauma suffered from colonisation. Secondly, a provision should be enacted in the *PSA* to allow Queensland judges to give special considerations to issues surrounding Aboriginality, as has been done in Canada. Further,

²²⁶ ABC Radio National, ‘New Style Prison Designed for Indigenous Offenders’, *The Law Report*, 20 May 2014 (Damien Carrick) <<http://www.abc.net.au/radionational/programs/lawreport/new-style-prison-designed-for-indigenous-offenders/5461854#transcript>>.

²²⁷ Weatherburn, above n 22, 78-9.

²²⁸ *Ibid* 87.

²²⁹ *Ibid* 106.

²³⁰ *Ibid*.

reports akin to *Gladue* reports are needed to assist Aboriginal offenders in overcoming the hurdle of having to provide evidence of a link between disadvantage that they may have suffered and the offending behaviour. CJGs could assist in contributing to these reports if they had more power under the *PSA* to do so, as well as more funding to allow them to undertake that task. Lastly, as there is currently limited forum in Queensland for the proper consideration of Aboriginal cultural factors in sentencing, especially since the closure of the *Murri Court*, in order to really address the problem Aboriginal disadvantage, culturally appropriate sentencing options should be made available. Such sanctions can in part address the root of Aboriginal disadvantage and the cause of the offender's criminality, caused largely by colonisation and the negative, intergenerational consequences of the policies surrounding the colonisation process. Such options should be focused on addressing the underlying disadvantage associated with colonisation. As Weatherburn has observed, 'engaging with the unique experiences of Indigenous Australians can both shed light on the reasons for an offence, and on pathways to end offending'.²³¹

²³¹ *Ibid.*