LESSONS LOST IN SENTENCING: WELDING INDIVIDUALISED JUSTICE TO INDIGENOUS JUSTICE

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Indigenous offenders are heavily over-represented in the Australian and Canadian criminal justice systems. In the case of R v Gladue*, the Supreme Court of Canada held that sentencing judges are to recognise the adverse systemic and background factors that many Aboriginal Canadians face and consider all reasonable alternatives to imprisonment in light of this. In* R v Ipeelee*, the Court reiterated the need to fully acknowledge the oppressive environment faced by Aboriginal Canadians throughout their lives and the importance of sentencing courts applying appropriate sentencing options. In 2013, the High Court of Australia handed down its decision in* Bugmy v The Queen*. The Court affirmed that deprivation is a relevant consideration and worthy of mitigation in sentencing. However, the Court refused to accept that judicial notice should be taken of the systemic background of deprivation of many Indigenous offenders. The High Court also fell short of applying the Canadian principle that sentencing should promote restorative sentences for Indigenous offenders, given this oft-present deprivation and their over-representation in prison. In this article, we argue that* Bugmy v The Queen *represents a missed opportunity by the High Court to grapple with the complex interrelationship between individualised justice and Indigenous circumstances in the sentencing of Indigenous offenders.*

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I Introduction

The role of the criminal sentencing courts to account for the postcolonial experience of Indigenous peoples is of critical significance, not only for *redressing* the high incarceration rates of Indigenous people but also *reflecting* its incidence as a feature of Indigenous circumstance. In Australia, Indigenous offenders are heavily over-represented.[1] They account for 28 per cent of the prison population,[2] in spite of representing only 3 per cent of the general population.[3] The over-representation of Indigenous juveniles and Indigenous females is even more acute. Indigenous females account for over a third of the female prison population,[4] while Indigenous juveniles in Australia account for approximately 50 per cent of the youth detention population.[5] Over-incarceration is an aspect of systemic Indigenous disadvantage, which also

[1] Various terms are used to refer to the original (ie pre-colonial) people and nations of Canada and Australia. In the Australian context, the term Indigenous will be used to include Aboriginal and Torres Strait Islander peoples. In relation to Canada, Aboriginal is used. The use of these terms is consistent with their use in the decisions of the highest courts in Australia and Canada.

[2] Australian Bureau of Statistics, 'Corrective Services, Australia, June Quarter 2014' (ABS Catalogue No 4512.0, 11 September 2014) table 1.

[3] Australian Bureau of Statistics, 'Aboriginal and Torres Strait Islander Population Nearing 700,000' (Media Release, 154/2013, 30 August 2013).

[4] Australian Bureau of Statistics, above n 2, tables 1 and 13.

[5] See Australian Institute of Health and Welfare, 'Youth Justice in Australia: 2012–13' (Bulletin No 120, April 2014) 12.

includes economic deprivation, social marginalisation and poor health outcomes.[6] The decision to imprison contributes to Indigenous hardship through alienating individuals and fracturing community ties,[7] and increases the prospects of reoffending.[8] The effect is that large sections of the Indigenous population have ongoing contact with the prison system.[9] Sentencing in this context is not only a technical process of applying relevant factors to the offender and the offence but also a social responsibility.

In this article, we argue that sentencing courts can account for Indigenous systemic disadvantage while also promoting individualised justice — approaches that the High Court of Australia has regarded as antithetical. Indeed, recognition of systemic disadvantage provides for a fuller picture of the individual's circumstances. This has been accepted by the Supreme Court of Canada in sentencing Aboriginal offenders in *R v Ipeelee* ('*Ipeelee*').[10] The extent of Aboriginal dispossession, disadvantage and over-incarceration is similar in Canada. For example, in Canada approximately 23 per cent of the prison population is Aboriginal, despite Aboriginal Canadians constituting approximately 4 per cent of the general population.[11] The Supreme Court has noted that for sentences to be condign to the individual there must be

[6] Anthony Hopkins, 'The Relevance of Aboriginality in Sentencing: "Sentencing a Person for Who They Are"' (2012) 16(1) *Australian Indigenous Law Review* 37, 48, citing *R v Gladue* [1999] 1 SCR 688, 719 [58], 724–5 [67]–[68] (Cory and Iacobucci JJ for the Court).

[7] Thalia Anthony, 'Indigenising Sentencing? *Bugmy v The Queen*' (2013) 35 *Sydney Law Review* 451, 453.

[8] See, eg, Don Weatherburn, 'The Effect of Prison on Adult Re-offending' (Crime and Justice Bulletin No 143, NSW Bureau of Crime Statistics and Research, August 2010).

[9] See generally Chris Cunneen et al, *Penal Culture and Hyperincarceration: The Revival of the Prison* (Ashgate, 2013) 112. Prison has also been described as a continuation of the systemic colonial attempt to segregate, institutionalise and subordinate Indigenous peoples: Russell Hogg, 'Penality and Modes of Regulating Indigenous Peoples in Australia' (2001) 3 *Punishment & Society* 355; Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press, 2008).

[10] [2012] 1 SCR 433, 486 [87] (LeBel J for McLachlin CJC, Binnie, LeBel, Deschamps, Fish and Abella JJ).

[11] Howard Sapers, 'Annual Report: 2013–14' (The Correctional Investigator, Canada, 27 June 2014) 2. See also Samantha Jeffries and Philip Stenning, 'Sentencing Aboriginal Offenders: Law, Policy, and Practice in Three Countries' (2014) 56 *Canadian Journal of Criminology and Criminal Justice* 447, 449–50.

recognition of Aboriginal offenders' specific background as well as the broader circumstances of their communities.[12]

The High Court of Australia held in *Bugmy v The Queen* ('*Bugmy*') that it is not for sentencing courts to account for the broader experiences of Indigenous Australians as a feature of their common history and systemic inequality, or to promote non-custodial and rehabilitative sentencing options in recognition of these facts or the ensuing strengths inherent in Indigenous group membership and survival.[13] The Court rejected submissions that the Canadian approach to sentencing Aboriginal offenders should be adopted in Australia.[14] We argue that this represents a missed opportunity by the High Court to grapple with the complex interrelationship between individualised justice and Indigenous circumstances in the sentencing of Indigenous offenders.

II Sentencing Principles and the Relevance of Indigenous Background

Sentencing is a complex task. Sentencing judges and magistrates must take into account all of the circumstances of the offence and of the offender and structure a sentence that achieves a balance of competing purposes (discussed below). The High Court of Australia describes the purposes of sentencing and their application in the following way:

> protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.[15]

Legislation in Australia and Canada stipulates that the core purposes of sentencing are ensuring that an offender is denounced and receives a 'condign' sentence or adequate punishment, and producing good consequences for the offender and society in terms of deterrence, community protection and

[12] See below Part III.

[13] (2013) 249 CLR 571, 594 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[14] Ibid 592 [36].

[15] *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ).

rehabilitation.[16] Ultimately, it is for the sentencing judge or magistrate to weigh up these competing purposes and see that they are reflected in the sentence, whether this be custodial or non-custodial.[17]

The High Court of Australia has referred to the sentencing process as involving an 'instinctive synthesis',[18] which accepts that there is not a decisive sentencing principle or set of factors in every case. Rather, the sentencing court subjectively and intuitively assesses the various sentencing principles and factors to 'take account of all of the relevant factors and to arrive at a single result which takes due account of them all'.[19] This includes relevant mitigating and aggravating circumstances.[20] The methodology of 'instinctive synthesis' has been described in *Markarian v The Queen* in the following way:

> the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.[21]

Except in cases where mandatory minimum sentences are required, the sentencing process is an individualised one, tailored to the particular offence, the particular offender and the particular facts of the case. Individualised justice in sentencing requires proportionality not only to the harm but to the circumstances of the offender.[22] This principle is foundational to sentencing in Australia as well as other common law jurisdictions, including Canada, as

[16] *Crimes Act 1914* (Cth) s 16A(2); *Crimes (Sentencing) Act 2005* (ACT) s 7; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1995* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(1); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5(1); *Criminal Code*, RSC 1985 c C-46, s 718.

[17] *R v Engert* (1995) 84 A Crim R 67, 68 (Gleeson CJ).

[18] *Wong v The Queen* (2001) 207 CLR 584, 611 [75] (Gaudron, Gummow and Hayne JJ), citing *R v Williscroft* [1975] VR 292, 300 (Adam and Crockett JJ).

[19] Ibid 611 [75] (Gaudron, Gummow and Hayne JJ) (emphasis altered). See also Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 20.

[20] *Crimes Act 1914* (Cth) s 16A; *Crimes (Sentencing) Act 2005* (ACT) s 33; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Sentencing Act 1995* (NT) s 6A; *Penalties and Sentences Act 1992* (Qld) s 9(2); *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1997* (Tas) s 9; *Sentencing Act 1991* (Vic) s 5(2); *Sentencing Act 1995* (WA) ss 7, 8.

[21] (2005) 228 CLR 357, 378 [51] (McHugh J).

[22] See Chief Justice Murray Gleeson, 'Individualised Justice — The Holy Grail' (1995) 69 *Australian Law Journal* 421, 424.

discussed below. As a corollary, courts in the United States have noted that 'there is no greater inequality than the equal treatment of unequals'.[23]

In Australia, the principle of 'equal justice' in sentencing hinges on individualised justice because it requires 'that like should be treated alike but that, if there are *relevant differences*, due allowance should be made for them'.[24] Given that every offence and every offender will be different, sentencing courts need to determine the weight to be given to competing purposes of punishment.

Consideration of Indigenous background can comply with these sentencing principles in numerous ways. It may be relevant to culpability. Recognition that rates of Indigenous offending are a consequence of the impact of colonisation, with the socioeconomic disadvantage and psychological trauma that this has wrought,[25] substantiates a claim that an Indigenous offender is less deserving of punishment.[26] In other words, understanding an individual offender's history, and that of the group to which they belong, gives weight to a claim that it is principally the offender's circumstances that have produced the offending, rather than their individual choices. The New Zealand cases of *Nishikata v Police*[27] and *R v Rawiri*[28] established a nexus between individualised justice and recognition of cultural context to reduce moral culpability.

'An offender's Aboriginality might [also] impact on his or her motive to offend, [thereby] providing an explanation' for their conduct.[29] However, these same facts may demonstrate alternative principles, namely, the need for sentences that promote community protection, deterrence and rehabilitation. In relation to deterrence, Indigenous identity might provide insights into the likelihood (or unlikelihood) of future offending and the circumstances that contribute to this potential. It may speak to the appropriateness of certain

[23] *Dennis v United States* 339 US 162, 184 (Frankfurter J) (1950). Also on individualised justice, see generally *United States v Frank* (1998) 8 F Supp 2d 253, 264, 269 (Cote DCJ) (SD NY, 1998).

[24] *Postiglione v The Queen* (1997) 189 CLR 295, 301 (Dawson and Gaudron JJ) (emphasis added), citing *Lowe v The Queen* (1984) 154 CLR 606, 610–11 (Mason J).

[25] Matters pertaining to Indigenous health, life expectancy, mortality, suicide and self-harm, education, home ownership and employment rates are all indicators of this disadvantage.

[26] Richard Edney, 'Just Deserts in Post-colonial Society: Problems in the Punishment of Indigenous Offenders' (2005) 9 *Southern Cross University Law Review* 73.

[27] (Unreported, High Court of New Zealand, Gendall J, 22 July 1999) 8.

[28] (Unreported, High Court of New Zealand, Simon France J, 14 August 2009) [91]–[93].

[29] Hopkins, above n 6, 39.

sentences, presenting options where strength of community, reintegration and pride can be harnessed to achieve individual reform and deterrence.[30] It may also inform the court of how the offender is otherwise being punished by his or her own community. These are but examples. The point is that an offender's Indigenous identity and circumstances might conceivably bear upon the appropriateness of a particular sentence in myriad different ways.

We contend that consideration of systemic and specific Indigenous circumstances is consistent with sentencing principles in Australia, including principles of equal and individualised justice. Justice Rothman has recently stated that every individual being sentenced must be treated equally, including with reference to their peculiar facts, such as suffering borne from a '200 year history of dispossession from their own land; exclusion from society; discrimination; and disempowerment'.[31] He further notes: 'To treat Aborigines differently in Australia by taking account of such factors is an application of equal justice; not a denial of it'.[32] This does not result in a race-based discount, as the suffering will be in different degrees, or, for some, there will be no suffering flowing from this history.[33] It accommodates what Hudson calls 'social culpability' in order to reflect the contextual constraints and influences on the individual's behaviour.[34] However, not accounting for these factors denies Indigenous offenders their unique historical, cultural and politico-economic context.[35] It imposes a race neutrality that results in unequal and prejudicial outcomes.[36] In what follows we consider the Canadian position with respect to taking the circumstances of Aboriginal offenders into account, and then contrast this with the Australian position.

30 Ibid.

31 Justice Stephen Rothman, 'The Impact of *Bugmy & Munda* on Sentencing Aboriginal and Other Offenders' (Speech delivered at the Ngara Yura Committee Twilight Seminar, 25 February 2014) 10.

32 Ibid.

33 Ibid.

34 Barbara Hudson, *Justice through Punishment* (MacMillan Education, 1987) 41–2. Barbara Hudson, 'Punishment, Poverty and Responsibility: The Case for a Hardship Defence' (1998) 8 *Social & Legal Studies* 583, 585.

35 Chris Cunneen, 'Changing the Neo-colonial Impacts of Juvenile Justice' (2008) 20 *Current Issues in Criminal Justice* 43, 53.

36 See Kathleen Daly and Michael Tonry, 'Gender, Race, and Sentencing' (1997) 22 *Crime and Justice: A Review of Research* 201, 243.

III One Step Forward: Accounting for Aboriginal Circumstances in Canadian Sentencing

In 1996, in recognition of Aboriginal over-representation in prisons, the Canadian government introduced a new provision into the *Criminal Code*, RSC 1985, c C-46 ('*Canadian Criminal Code*'). Section 718.2(*e*) provides that 'all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of aboriginal offenders*'.[37] By explicitly directing attention to the 'circumstances of aboriginal offenders', the legislation acknowledges the unique position of Aboriginal Canadians. This may stem from their systemic disadvantage, their over-representation in prisons or their postcolonial status. Richard Edney has described these factors as relevant to the collective or individual circumstances of the Aboriginal offender.[38]

In 1999, the Supreme Court of Canada handed down its decision in *R v Gladue* ('*Gladue*'),[39] which tested the limits and application of s 718.2(*e*). The offender in this case, Jamie Gladue, was a 19-year-old Aboriginal woman who fatally stabbed her boyfriend in a jealous rage. She pleaded guilty to manslaughter and, at the sentence hearing, the judge took into account a number of mitigating factors, including her youth, her status as a mother and good prior record. However, the sentencing judge found that there were no special circumstances arising from either the offender's or the victim's Aboriginal status, as they were both living in an urban area off reserve and, according to the judge, not 'within the aboriginal community as such'.[40] Accordingly, the judge determined that s 718.2(*e*) did not apply and sentenced her to three years' imprisonment.

Gladue's appeals to both the Court of Appeal for British Columbia and Supreme Court were unsuccessful, but the Supreme Court took the opportunity to explain the scope of s 718.2(*e*) as:

> [R]emedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentenc-

[37] *Criminal Code*, RSC 1985, c C-46, s 718.2(*e*) (emphasis added).

[38] Richard Edney, 'Imprisonment as a Last Resort for Indigenous Offenders: Some Lessons from Canada?' (2005) 6(12) *Indigenous Law Bulletin* 23, 23.

[39] [1999] 1 SCR 688.

[40] Ibid 701 [18] (Cory and Iacobucci JJ for the Court).

> ing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force.[41]

The Court further described the scope of s 718.2(*e*) as: placing 'a new emphasis upon decreasing the use of incarceration' for Aboriginal offenders but providing for prison terms of similar length to non-Aboriginal offenders for more violent and serious offences; requiring judges to consider the 'unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and [t]he types of sentencing procedures and sanctions which may be appropriate' in the particular circumstances of an Aboriginal offender; enabling a sentencing judge to impose a sanction that 'takes into account principles of restorative justice and the needs of the parties involved' even where there is no alternative sentencing program specific to an Aboriginal community; and applying 'to all aboriginal persons', regardless of where they live.[42]

The Supreme Court of Canada was unequivocal that individualised justice is to be maintained within the boundaries of the legislation. It held that the words of s 718.2(*e*) 'do not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender'.[43] Rather, the subsection is a legislative direction 'that sentencing judges should pay particular attention to the circumstances of aboriginal offenders *because those circumstances are unique*, and different from those of non-aboriginal offenders'.[44]

The Court also held that s 718.2(*e*) requires sentencing courts to adopt a different 'process' for the sentencing of Aboriginal offenders in order to achieve a 'truly fit and proper sentence in the particular case'.[45] The sentencing process remains individualised,[46] but the individual offender before the court is understood to exist within the context of the collective experience of Aboriginal Canadians. This requires explicit recognition of 'unique background and systemic factors which may have played a part

41 Ibid 737 [93].

42 Ibid 737–8 [93].

43 Ibid 706 [33].

44 Ibid 708 [37] (emphasis in original).

45 Ibid 706 [33], 736 [92].

46 Ibid 728–9 [76].

in bringing the particular offender before the courts'.[47] These include dislocation, discrimination, child removal, socioeconomic disadvantage, substance abuse and community fragmentation that all too often lead to incarceration at grossly disproportionate rates.[48] The Court recognised that the collective experience may provide an explanation for the individual's offending behaviour. Critically, the Court recognised that the same collective experience offers the potential for innovation in sentencing processes and uniquely Aboriginal pathways for punishment, healing and reform.[49] We explore this point in more detail below.

Ten years later, Roach pointed out that, following *Gladue*, courts tended to privilege factors relating to the seriousness of the crime above the culpability of the offender, having regard to his or her experience as an Aboriginal Canadian.[50] This article was cited by the Supreme Court of Canada in the 2012 decision of *Ipeelee*. This decision sought to clarify that Aboriginal circumstances are to be given full consideration, irrespective of the seriousness of the offence. It also 'goes beyond *Gladue* in its analysis, its acknowledgement of the realities of colonialism and its strong defence of the need to sentence Aboriginal offenders differently'.[51]

Ipeelee, whose case was heard together with another Aboriginal offender, Ladue, was an alcoholic with a history of committing violent offences when intoxicated.[52] He was designated a long-term offender and sentenced to six years' imprisonment, followed by a long-term supervision order ('LTSO'). After his release from prison, he committed an offence while intoxicated, thereby breaching a condition of his LTSO. He was sentenced to three years' imprisonment, less six months of pre-sentence custody. He appealed unsuccessfully to the Court of Appeal.[53] The key issue for the Supreme Court was

47 Ibid 725 [69].

48 Ibid 719 [58], 724–5 [67]–[68].

49 Ibid 725–8 [70]–[74].

50 Kent Roach, 'One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal' (2009) 54 *Criminal Law Quarterly* 470.

51 Jonathan Rudin, 'Looking Backward, Looking Forward: The Supreme Court of Canada's Decision in *R v Ipeelee*' (2012) 57 *Supreme Court Law Review* 375, 375.

52 *Ipeelee* [2012] 1 SCR 433, 443–4 [2], 450 [22] (LeBel J for McLachlin CJC, Binnie, LeBel, Deschamps, Fish and Abella JJ).

53 Ibid 446–9 [10]–[16].

how to determine a fit sentence for a breach of an LTSO in the case of Aboriginal offenders.

In *Ipeelee*, the Supreme Court reaffirmed the need to fully acknowledge the oppressive environment faced by Aboriginal Canadians throughout their lives. The Court acknowledged the need to give full consideration to background and systemic factors, such as the history of colonisation and displacement, and that the import of these factors cannot be reduced with reference to the seriousness of the crime.[54] Furthermore, the Court reiterated that the *Gladue* principles apply in *all* cases involving Aboriginal offenders, and this is a positive duty, rather than a matter for judicial discretion.[55]

The Supreme Court underscored that, in sentencing Aboriginal offenders, judges '*must*' take judicial notice of:

> the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.[56]

The Court determined that there is no need to establish a 'direct causal link' between the offender's background factors and the offence before the court in order to have these factors taken into account and that these 'interconnections are simply too complex'.[57] Although these collective matters 'do not necessarily justify a different sentence for Aboriginal offenders', they provide the 'necessary *context* for understanding and evaluating the case-specific information presented by counsel'.[58] The Court explained this point in detail:

[54] Ibid 469 [60], 484–6 [84]–[87] (LeBel J for McLachlin CJC, Binnie, LeBel, Deschamps, Fish and Abella JJ), [129] (Rothstein J).

[55] Ibid 484–6 [85], [87] (LeBel J for McLachlin CJC, Binnie, LeBel, Deschamps, Fish and Abella JJ). Cf *R v Anderson* [2014] 2 SCR 167, 180 [25] where the Supreme Court noted that the cases of *Gladue* and *Ipeelee* 'speak to the sentencing obligations of *judges* to craft a proportionate sentence for Aboriginal offenders' (emphasis in original). However, the Court accepted the arguments put by the Crown that *prosecutors* are not constitutionally required to consider an accused person's Aboriginal status when deciding whether to seek a mandatory minimum sentence (in this context, for driving offences).

[56] *Ipeelee* [2012] 1 SCR 433, 469 [60] (emphasis added) (LeBel J for McLachlin CJC, Binnie, LeBel, Deschamps, Fish and Abella JJ).

[57] Ibid 483 [83].

[58] Ibid 469 [60] (emphasis in original).

> Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.[59]

The responsibility for establishing the necessary link between the collective experience and the individual circumstances of the offender and their offence rests with the Aboriginal offender's legal representative in tandem with Aboriginal social workers.[60] This information is to be conveyed through context-based case-specific *Gladue* reports:

> In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his [or her] duties under s. 718.2(*e*) of the *Criminal Code*.[61]

Gladue reports are written by Aboriginal caseworkers who share the same collective experience as the offender before the court. They are distinct from pre-sentence reports produced by corrective services in that their fundamental purpose is to identify material facts which exist only by reason of the offender's Aboriginality. The reports consider the systemic and background factors at play in the life of the offender, together with available culturally-relevant sentencing options.[62] They explain offending behaviour within the collective history of Aboriginal Canadians, highlighting the link between the individual and collective experience. Furthermore, they explore options for healing and reform from the vantage point of this collective

[59] Ibid 483–4 [83].

[60] Ibid 469 [60]. As a consequence, identification of the relevance and importance of an offender's Aboriginality is not left solely to the defence lawyer.

[61] Ibid.

[62] Campbell Research Associates, 'Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program' (Submission No 3, March 2008) 2, 10.

experience.[63] Like other pre-sentence reports, *Gladue* reports provide an independent source of evidence from which facts material to sentencing can be established and acted upon.

IV One Step Back: Accounting for Indigenous Circumstances in Australian Sentencing

Unlike in Canada, Australian sentencing legislation does not direct particular attention to the circumstances of Indigenous offenders.[64] However, in a number of Australian jurisdictions, there is legislative reference to allowances for cultural background, community input and the procedures for the admission of cultural evidence,[65] alongside a number of exclusions of cultural evidence in sentencing.[66] Otherwise, sentencing legislation across Australia broadly provides for specified or unspecified aggravating and mitigating circumstances allowing consideration of Indigenous experience in sentencing. By and large, then, in Australia, case law determines the import, scope and nature of consideration of Indigenous background and circumstances in sentencing.

As in Canada, sentencing in Australia is founded on the principle of 'individualised justice';[67] this requires that close consideration be given to the circumstances of the offence and the offender, with those circumstances bearing upon the appropriate sentencing disposition. The first High Court decision to consider the significance of Indigenous context in sentencing was

[63] Kelly Hannah-Moffat and Paula Maurutto, 'Re-contextualizing Pre-sentence Reports: Risk and Race' (2010) 12 *Punishment & Society* 262, 266.

[64] See generally Thalia Anthony, 'Sentencing Indigenous Offenders' (Research Brief No 7, Indigenous Justice Clearinghouse, March 2010).

[65] *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(m); *Criminal Procedure Act 1986* (NSW) s 348; *Sentencing Act 1995* (NT) s 104A; *Penalties and Sentences Act 1992* (Qld) s 9(2)(o).

[66] *Crimes Act 1914* (Cth) ss 16A–16AA. The Supreme Court of the Northern Territory has held that the exclusion of customary law and cultural evidence in sentencing is relevant only to the seriousness of an offence, but may be admissible in relation to the character of the offender, likelihood to reoffend and prospects for rehabilitation: *R v Wunungmurra* (2009) 231 FLR 180. For a general discussion on these exclusions, see Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013) 200.

[67] *Elias v The Queen* (2013) 248 CLR 483, 494–5 [27] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

the 1982 case of *Neal v The Queen* ('*Neal*').[68] Although the Court did not deliver a unified decision on the matter, instead determining the case on other jurisdictional grounds, some useful and oft-cited observations were made by minority judges. In particular, Brennan J noted:

> The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, 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.[69]

This statement stands for the principle that in order to achieve equal justice, sentencing courts must take into account relevant facts that exist by reason only of an offender's membership of an ethnic group. It recognises that individual circumstances cannot be neatly separated from the circumstances of the group or community to which the individual belongs. Brennan J's statement is cited for both the fact that cultural background can be relevant to reducing a sentence *and* that the same sentencing principles are to be applied to all groups such that sentencing courts are not to favour members of distinct cultural groups.[70]

Another important case that has informed the sentencing of Indigenous offenders, especially in the eastern states, is *R v Fernando* ('*Fernando*').[71] In this 1992 case, Wood J developed eight principles to be taken into account when sentencing an Indigenous offender ('the *Fernando* principles'), which his Honour distilled from the earlier relevant case law.[72] These can be summarised as follows:[73]

68 (1982) 149 CLR 305.

69 Ibid 326.

70 See Anthony, *Indigenous People, Crime and Punishment*, above n 66, 9.

71 (1992) 76 A Crim R 58.

72 Ibid 62–3. The case law considered by Wood J included: *Neal* (1982) 149 CLR 305; *R v Davey* (1980) 50 FLR 57; *R v Friday* (1984) 14 A Crim R 471; *R v Yougie* (1987) 33 A Crim R 301; *Rogers v The Queen* (1989) 44 A Crim R 301; *Juli v The Queen* (1990) 50 A Crim R 31.

73 *Fernando* (1992) 76 A Crim R 58, 62–3.

1 The same sentencing principles are to be applied in every case but a court should not ignore facts which exist only by reason of the offender's membership of an ethnic or other group;

2 Aboriginality is relevant in terms of explaining the offence and circumstances of the offender;

3 Alcohol abuse and violence within Indigenous communities may not be solved through imprisonment;

4 Indigenous communities should be protected from serious violence by drunken offenders in their communities (even in the absence of evidence proving the effectiveness of imprisonment);

5 While drunkenness is not normally an excuse or mitigating factor, where the offender's abuse of alcohol reflects their socioeconomic circumstances and background, that can and should be taken into account as a mitigating factor;

6 Sentencing courts must avoid any hint of racism, paternalism or collective guilt when sentencing Indigenous offenders, but must recognise the offender's subjective circumstances;

7 A sentence of imprisonment may be 'unduly harsh' for an Indigenous person who is not familiar with non-Indigenous life or comes from a deprived background; and

8 The need to ensure the punishment fits the crime is to be balanced against the need for rehabilitation.

The principles have, to a greater or lesser extent, been taken to apply generally to Indigenous offenders where understanding their experience as an Indigenous person, within the context of Indigenous collective experience, sheds light on the circumstances of the offence or the offender.[74] Overall, the general principle, which accords with *Neal*, is that '[t]he relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender'.[75]

[74] Hopkins, above n 6, 40–8. See also Jeffries and Stenning, above n 11, 463–8.

[75] *Fernando* (1992) 76 A Crim R 58, 62 (Wood J).

As discussed by Lewis, Hopkins and Bartels,[76] there have also been two notable Victorian decisions that have taken a broader approach to offenders' Indigenous background. The first was *R v Fuller-Cust* ('*Fuller-Cust*'),[77] which involved consideration of the relevance of Indigenous experiences when sentencing an offender who was removed from his natural parents as a young child, where such removal and its aftermath resulted in an identity very different from that under consideration in *Fernando* or *Neal*, but an identity that was nevertheless Indigenous. On appeal, Batt JA and O'Bryan AJA found that, in the circumstances, community safety, specific and general deterrence, and denunciation of the offender's conduct, were of greater importance than any mitigation due to the offender's Indigenous status.[78] However, these judges did also recognise the offender's background as a relevant mitigating factor, including the sexual abuse he had suffered, and the fact that he had been placed as an infant into unsatisfactory institutional and foster care.

Eames JA provided a powerful dissent, arguing that

> [t]o ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself.[79]

With explicit reference to the principle in *Neal*, Eames JA acknowledged the need to consider the offender's circumstances through the lens of Indigenous experience, and drew on insights from the findings of the Royal Commission into Aboriginal Deaths in Custody and the Stolen Generations *Bringing Them Home* report.[80] This decision recognised that it is not just social and economic disadvantages which may lead an Indigenous person to commit an offence, but also acknowledged that more complex issues of historical and cultural differences should be taken into account in order to ensure the individual is

[76] Christina Lewis, Anthony Hopkins and Lorana Bartels, 'The Relevance of Aboriginality in Sentencing: Findings from Interviews in the ACT', in Patricia Easteal (ed), *Justice Connections* (Cambridge Scholars Publishing, 2013) 37, 44–7. See also Hopkins, above n 6.

[77] (2002) 6 VR 496.

[78] Ibid 514–15 [60] (Batt JA), 536 [153]–[155] (O'Bryan AJA).

[79] Ibid 520 [79].

[80] Ibid 523–4 [90]–[92], 532 [136]–[137], 533 [140]. See Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1; Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

sentenced appropriately. Crucially, Eames JA was able to understand the defendant as a product of the particular historical and social impacts on Indigenous Australians and perceived him as 'an Aboriginal person severed from and unable to embrace his Aboriginality'.[81]

In the second relevant case, *DPP v Terrick* ('*Terrick*'),[82] the Victorian Court of Appeal approved Eames JA's approach in *Fuller-Cust*. Maxwell P, Redlich JA and Robson AJA set out eight propositions relevant to the sentencing of Indigenous Australians, including that:

> Circumstances of disadvantage, deprivation or (sexual) violence may be explanatory, if not causative, of the offending or (if relevant) of the offender's alcohol or drug addiction. …
>
> The (relative) weight to be given to circumstances of disadvantage or deprivation is a matter for the sentencing judge, and will depend on: (a) the nature and extent of the disadvantage; [and] (b) the nexus (if any) with the offending …
>
> Aboriginal offenders are not to be sentenced more leniently than non-Aboriginal persons on account of their race. …
>
> When applying sentencing principles, which are common to all Victorians, a different outcome may result for an Aboriginal offender if it is shown that 'mitigating factors in the background of the offender, or [in the] circumstances of the offence, occurred or had an impact peculiarly so because of the Aboriginality of the offender'.[83]

It is against this backdrop that the High Court case of *Bugmy* was handed down in 2013. At the time of his offence, William Bugmy, a 29-year-old Indigenous man from the remote town of Wilcannia in New South Wales, was on remand for assaulting police, resisting police, escaping from police custody, intimidating police and causing malicious damage by fire.[84] The agreed facts were that Bugmy was upset that his visitors might not arrive at the prison in time to see him.[85] Bugmy became increasingly agitated and threatened to 'split open' a correctional officer if he did not facilitate his

[81] Hopkins, above n 6, 47.

[82] (2009) 24 VR 457.

[83] Ibid 468–9 [46] (citations omitted), citing *Fuller-Cust* (2002) 6 VR 496, 522 [88] (Eames JA).

[84] *R v Bugmy* [2012] NSWCCA 223 (18 October 2012) [5] (Hoeben JA).

[85] *Bugmy* (2013) 249 CLR 571, 583–4 [6]–[11] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

visitation rights. Bugmy then threatened the other officers and threw pool balls at them. One of these balls hit the first correctional officer, and caused him to lose sight in one eye.

Bugmy's personal circumstances were of extreme disadvantage.[86] His childhood involved exposure to violence and alcohol, including witnessing his father stab his mother 15 times. Bugmy started drinking and using illegal drugs at the age of 13 and was described as an alcoholic. He was unable to read or write and also had a history of head injuries and suffered from auditory hallucinations. He had made repeated suicide attempts and was receiving antipsychotic medication in custody. He had a lengthy criminal history from the age of 12, including violent offences. He had served numerous terms of imprisonment for these offences and had spent much of his adult life in prison. He had never attended a detoxification or rehabilitation facility, despite asking for help with managing his alcohol abuse on numerous occasions. He had a negative attitude towards authority figures, particularly the police, which were attributed to family 'cultural issues'.[87]

At first instance, the District Court judge noted the defence counsel's submissions that Bugmy was 'an Aboriginal man who grew up in a violent, chaotic and dysfunctional environment' and that '*Fernando* type considerations' applied.[88] His Honour imposed a total prison sentence of six years and three months, with a non-parole period of four years and three months. The New South Wales Director of Public Prosecutions ('DPP') appealed against the sentence, arguing that the sentence was manifestly inadequate and the sentencing judge had given too much weight to Bugmy's subjective factors.[89] The DPP submitted that his lengthy criminal history diminished the significance of subjective factors.[90] The New South Wales Court of Criminal Appeal allowed the appeal and increased the total sentence to seven and a half years, with a non-parole period of five years, but did so without actually considering whether the sentence had been manifestly inadequate.

Bugmy appealed to the High Court, which allowed the appeal on the ground that the Court of Criminal Appeal had failed to determine the ground

[86] Ibid 584 [12]–[13].

[87] *R v Bugmy* [2012] NSWCCA 223 (18 October 2012) [23] (Hoeben JA).

[88] *Bugmy* (2013) 249 CLR 571, 585 [17] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[89] Ibid 582 [3].

[90] Ibid 589 [25].

of appeal that had been before it, namely, whether Bugmy's sentence was manifestly inadequate. The High Court remitted the matter to the Court of Criminal Appeal, which dismissed the Crown appeal.[91]

In deciding the appeal, the High Court affirmed both the statement of general principle by Brennan J in *Neal* and the propositions set out in *Fernando* discussed above.[92] The Court recognised the importance of considering subjective factors such as 'profound childhood deprivation', stating:

> 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.[93]

Further, the Court confirmed that such disadvantage is relevant to mitigation and moral culpability:

> The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.[94]

At the same time, the High Court acknowledged that the mitigatory effect may be undercut by competing sentencing purposes:

> 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.[95]

The Court accepted that Indigenous Australians as a group, whether living in urban, rural or remote environments may be subject to 'grave social difficulties' and 'social and economic disadvantage measured across a range of

[91] *R v Bugmy [No 2]* [2014] NSWCCA 322 (19 December 2014).

[92] *Bugmy* (2013) 249 CLR 571, 593–4 [39] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[93] Ibid 595 [44].

[94] Ibid 594 [40].

[95] Ibid 595 [44].

indices'.[96] However, the High Court pointed out that 'tak[ing] judicial notice of the systemic background of deprivation of Aboriginal offenders cannot be accepted'.[97] It regarded such notice as 'antithetical to individualised justice'.[98] This meant that the over-incarceration of Indigenous Australians as a whole was not relevant to the individual offender's background or circumstances of deprivation. Rather, the Court held that proof of an 'offender's background of deprivation' requires particular 'material tending to establish that background'.[99]

Bugmy's counsel had submitted that the statements in *Gladue* and *Ipeelee* in respect of the 'unique systemic factors applying to the sentencing of Aboriginal offenders [in Canada should] have equal application to the sentencing of Aboriginal offenders in New South Wales' (and, by implication, elsewhere in Australia).[100] This submission was not accepted by the High Court, which held that the Canadian jurisprudence needed to be read in the context of the *Canadian Criminal Code* s 718.2(*e*), which does not have any counterpart in the New South Wales legislation applicable to Bugmy.[101] Indeed, the High Court raised the spectre that an equivalent provision in Australia might be racially discriminatory,[102] because it might be thought to contravene the principle of individualised justice by establishing a sentencing consideration based purely upon race, rather than, for example, life experience resulting from membership of a particular racial group. In this regard, it would seem the High Court indicated a concern for what is often termed, dismissively, a 'race-based discount'.[103]

96 Ibid 594 [41].

97 Ibid.

98 Ibid.

99 Ibid.

100 Ibid 592 [35].

101 Ibid 592 [36].

102 Ibid. It should be noted that the Supreme Court of Canada noted in *Ipeelee* that 'there is nothing in the *Gladue* decision which would indicate that background and systemic factors should not also be taken into account for other, non-Aboriginal offenders': [2012] 1 SCR 433, 480 [77] (LeBel J for McLachlin CJC, Binnie, LeBel, Deschamps, Fish and Abella JJ).

103 Concerns regarding a race-based discount were voiced by Lloyd Babb SC, the current New South Wales DPP, in *Bugmy*: Transcript of Proceedings, *Bugmy v The Queen* [2013] HCATrans 167 (6 August 2013) 1385. Similar concerns have also been raised in Canada by Pierrette Venne of the Bloc Quebecois party: Canada, *Parliamentary Debates*, House of Commons, 20 September 1994, 1235. See also Philip Stenning and Julian V Roberts, 'Empty

In the following Part, we analyse the decision in *Bugmy* and suggest that the High Court of Australia missed an opportunity to adopt the approach taken by the Supreme Court of Canada, an approach that embraces the full complexity of postcolonial Indigenous experience in sentencing to promote individualised justice.

V Analysis of *Bugmy* in the Context of Individualised Justice

The High Court of Australia's position that consideration of Indigenous background as a relevant factor for all Indigenous defendants would undermine individualised justice runs against the reasoning of the Supreme Court of Canada. In *Gladue* and *Ipeelee*, s 718.2(*e*) of the *Canadian Criminal Code* was not construed so as to interfere with the principle of individualised justice or equality before the law, or operate as a race-based discount. To the contrary, the provision was designed to remedy a systemic judicial failure to take proper account of the unique circumstances of *individual* Aboriginal offenders coming before the court. As the Supreme Court of Canada held in *Ipeelee*:

> Just sanctions are those that do not operate in a discriminatory manner. Parliament, in enacting s. 718.2(*e*), evidently concluded that nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly.[104]

It follows that the legislative intention was to remedy a judicial failure and discrimination in the sentencing process, rather than to introduce it. Accordingly, it is the fact of the judicial failure to provide substantive equality to Aboriginal offenders as defendants that is critical, not the fact that failure was first recognised by the legislature in Canada and that a remedial provision was enacted. The High Court did not consider whether an equivalent systemic judicial failure exists in Australia.[105] If it does, then it is appro-

Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders' (2001) 64 *Saskatchewan Law Review* 137, 162; Dale E Ives, 'Inequality, Crime and Sentencing: *Borde*, *Hamilton* and the Relevance of Social Disadvantage in Canadian Sentencing Law' (2004) 30 *Queen's Law Journal* 114.

[104] [2012] 1 SCR 433, 474 [68] (LeBel J for McLachlin CJC, Binnie, LeBel, Deschamps, Fish and Abella JJ).

[105] Discrimination in sentencing is discussed in Anthony, *Indigenous People, Crime and Punishment*, above n 66, 59–60, 65.

priate to consider whether the Canadian approach should be adopted as promoting equality before the law, rather than undermining it. Moreover, the judicial failure to take proper account of the circumstances of Indigenous offenders must be understood in the context of a broader failure of the criminal justice system to engage with these circumstances. As the Supreme Court of Canada counselled in *Gladue*, 'it must in every case be recalled that the direction to consider these unique circumstances flows from the staggering injustice currently experienced by aboriginal peoples with the criminal justice system'.[106]

In relation to the causal nexus between group experience and individual offending, the High Court in *Bugmy* regarded the proposition that 'judicial notice [be taken] of the systemic background of deprivation of Aboriginal offenders' was 'antithetical to individualised justice'.[107] The High Court sought to preclude racially discriminatory assumptions about Indigenous disadvantage that are not particular to the individual offender.[108] This arguably conflates the Supreme Court of Canada's approach in *Ipeelee* with respect to judicial notice. Properly understood, the Canadian approach involves two steps: first, the taking of judicial notice with respect to the experience of Aboriginal Canadians as a group, including the experience of over-incarceration; and second, consideration of the extent to which the offender's individual circumstances can be understood by reference to this group experience. As discussed below, evidence of these factors is provided through pre-sentence reports written by Aboriginal caseworkers on the individual offender and his or her community circumstances.

The Supreme Court of Canada in *Ipeelee* stated that courts *must* take judicial notice of such issues as colonisation, poorer school attainment

106 [1999] 1 SCR 688, 734 [88] (Cory and Iacobucci JJ for the Court).

107 (2013) 249 CLR 571, 594 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

108 Ibid. In this context, the recent New Zealand decision of *Mika v The Queen* [2013] NZCA 648 (12 December 2013) should be noted, as it adopts a similar approach to the High Court in *Bugmy*. In that case, the Court of Appeal of New Zealand stated that an absolute requirement for a court to allow an offender 'a fixed discount against an otherwise appropriate starting point [in sentencing] solely on account of his or her ethnicity' could only be 'sanctioned by Parliament', as it would otherwise undermine fundamental principles in sentencing: at [9] (Harrison J for the Court). Accordingly, 'Māori heritage' can only be considered where it is specific to the disadvantage of the particular offender and contributes to the particular offence, rather than merely reflecting the general 'economic, social and cultural disadvantages suffered by many Māori': at [12].

and higher suicide rates (all of which apply equally in the Australian context), but that this would not necessarily justify a different sentence. Rather, such information provides the 'necessary context for understanding and evaluating the case-specific information presented by counsel [in relation to the specific offender]'.[109] Notably, it recognises that the individual Aboriginal offender has a group identity and collective institutional experience flowing from colonisation.

The Canadian approach does *not* involve discriminatory assumptions, and retains the focus on individualised justice. What it also does is focus attention on the link between the group and individual experiences. In addition, it enables a facilitative approach, so although a link must be established, it does not place a burden on an Aboriginal offender to prove that this link is 'causal'.[110] The Canadian approach recognises that it is difficult to provide strict proof of how systemic and background factors play out in the lives of the individual, but the Canadian courts are ready to infer this.[111] The High Court of Australia seems to ignore this reality. Krasnostein has argued that the High Court's position fails to remedy Indigenous over-incarceration and reinforces a notion of individualised justice that denies equal justice.[112] However, individualised justice need not preclude equal justice if an individual is to be understood within the fullness of their community circumstances, which the Canadian law addresses. Indeed, as the Supreme Court of Canada was at great pains to explain in *Gladue* and *Ipeelee*, considering the experience of Aboriginal offenders, within the context of postcolonial Aboriginal experience, does not amount to an abrogation of the principle of equality before the law or a disregard for the principle of individualised justice. It is quite the reverse.

[109] *Ipeelee* [2012] 1 SCR 433, 469 [60] (LeBel J for McLachlin CJC, Binnie, LeBel, Deschamps, Fish and Abella JJ) (emphasis altered).

[110] Ibid 482–4 [82]–[83].

[111] See generally Kate Warner, 'Equality before the Law: Racial and Social Background Factors as Sources of Mitigation at Sentencing' in Julian V Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 124, 140.

[112] Sarah Krasnostein, 'Too Much Individualisation, Not Enough Justice: *Bugmy v The Queen*' (2014) 39 *Alternative Law Journal* 12, 14.

A *Establishing the Link between Group and Individual Experience*

We have argued that the High Court of Australia misunderstood the approach adopted by the Supreme Court of Canada in *Gladue* and *Ipeelee* in relation to sentencing Aboriginal offenders as being contingent on s 718.2(*e*) of the *Canadian Criminal Code* and thus denying individualised justice. We contend that both Courts actually accept that individualised justice and equality in sentencing require the linking of group experience to the individual offender. For the Supreme Court of Canada, systemic and background factors need to 'be tied in some way to the particular offender and offence', to 'bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized'.[113] For the High Court of Australia, sentencing submissions that 'rely on an offender's background of deprivation in mitigation' must 'point to material tending to establish that background'.[114]

But this shared understanding raises a fundamental difference between the two courts. The Supreme Court of Canada acknowledged that 'Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process'.[115] This recognition grounds the application of sentencing principles to overcome this failure. The High Court of Australia was not prepared to acknowledge a like failure and thereby account for the experience of Indigenous offenders within the context of their experience as Indigenous people. What the Supreme Court of Canada also acknowledged was the need for information to be provided to sentencing courts to facilitate their understanding of Aboriginal experience, including through what it referred to as 'indispensable' *Gladue* reports.[116] These provide information that establishes the link between individual and group experience, with this link being essential to individualised justice and equality. With minor exceptions,[117] there does not exist a practice of submitting reports

[113] *Ipeelee* [2012] 1 SCR 433, 483–4 [83] (LeBel J for McLachlin CJC, Binnie, LeBel, Deschamps, Fish and Abella JJ).

[114] *Bugmy* (2013) 249 CLR 571, 594 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[115] *Ipeelee* [2012] 1 SCR 433, 479 [75] (LeBel J for McLachlin CJC, Binnie, LeBel, Deschamps, Fish and Abella JJ).

[116] Ibid 469 [60].

[117] In Australia's Northern Territory, some Indigenous communities submit pre-sentencing reports on Indigenous offenders, which discuss the offender's prospects for rehabilitation and an appropriate sentence that serves the interests of the offender, victim and community: Thalia Anthony and Will Crawford, 'Northern Territory Indigenous Community Sentencing

prepared by Indigenous caseworkers who have intimate awareness of community conditions, to Australian courts.

In the absence of recognition that courts in Australia may have failed to properly consider and understand the unique systemic circumstances of Indigenous offenders, and without an acknowledgement that relevant information is not being made available to courts, the pursuit of equality and individualised justice is thwarted. Courts in Australia are, in accordance with the principle in *Neal*, 'bound to take into account … all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group'.[118] However, unless those material facts are placed before the court, the principle itself does not translate into individualised justice. As a consequence of its dismissal of the Canadian approach, the High Court of Australia failed to recognise the extent to which the Canadian approach furthers the interests of equality and individualised justice. Such recognition may well have provided impetus for the enactment of legislation, which has been recommended by various Australian parliamentary and law reform committees,[119] to ensure that Indigenous community experts provide information to sentencers that establishes the relevance of an offender's Indigenous community circumstances. This information would have particular resonance where it comes from within the offender's Indigenous community. In each country, proof of the link between group and individual experience remains key to realising the principle of individualised justice.

B *Considering Indigenous Status: Not Just a Principle of Disadvantage*

Finally, there is the issue of how the High Court of Australia characterised Indigenous status. Although it endorsed the earlier decision of *Neal*, which regarded Indigenous status as relevant to postcolonial racial attitudes, reserve conditions and contested governance, in *Bugmy* it appears to have confined the issue of Indigenous background in sentencing by referring to it as

Mechanisms: An Order for Substantive Equality' (2014) 17(2) *Australian Indigenous Law Review* 79. See also Kurdiji (Lajamanu Law and Justice Group), *Lajamanu Visitor Guide* (March 2014) 6.

118 (1982) 149 CLR 305, 326 (Brennan J).

119 See, eg, Legislative Assembly Standing Committee on Justice and Community Safety, Parliament of the Australian Capital Territory, *Inquiry into Sentencing* (2015) xi [6.178]; Northern Territory Law Reform Committee, *Report on Aboriginal Customary Law* (2003) 4.

simply an example of taking disadvantage into account.[120] In *Bugmy*, the High Court stated:

> An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the *deprived background of a non-Aboriginal offender* may mitigate that offender's sentence. In this respect, Simpson J has correctly explained the significance of the statements in *R v Fernando*:
>
> > Properly understood, *Fernando* is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of *social disadvantage* that frequently (no matter what the ethnicity of the offender) precedes the commission of crime.[121]

In our view, focusing exclusively on Indigenous status as a disadvantage obscures the fact that there is strength in a shared history of survival and continuing connection to Indigenous land, cultural relationships and laws. Indeed, it is this strength that offers the potential for Indigenous-developed programs of rehabilitation and healing which 'seek individual change within a collective context'.[122] According to Cunneen, such programs start with 'an understanding of the collective harms and outcomes of colonization' and pursue healing as 'quintessentially and simultaneously an individual and collective experience'.[123] Whilst some pre-*Bugmy* Australian decisions recognised that collective experience is reflected in the offending of the individual,[124] such as the experience of Indigenous children being removed from their parents,[125] they do not acknowledge the opposite; that is, there is scant recognition of the potential inherent in collective experience to uplift

[120] *Bugmy* (2013) 249 CLR 571, 593–4 [39], [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[121] Ibid 592–3 [37] (emphasis added) (citations omitted), quoting *Kennedy v The Queen* [2010] NSWCCA 260 (17 November 2010) [53] (emphasis added).

[122] Chris Cunneen, 'Postcolonial Perspectives for Criminology' in Mary Bosworth and Carolyn Hoyle (eds), *What Is Criminology?* (Oxford University Press, 2011) 249, 263. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 2007*, Report No 1/2008 (2008) 52–63.

[123] Cunneen, 'Postcolonial Perspectives for Criminology', above n 122, 262–3.

[124] See, eg, *Terrick* (2009) 24 VR 457. See generally Hopkins, above n 6, 47–8; Lewis, Hopkins and Bartels, above n 76, 46–8.

[125] *Fuller-Cust* (2002) 6 VR 496, 523–4 [89], [91]–[92] (Eames JA).

and reform the individual. The Canadian position is more akin to the principle in the earlier case of *Neal* that 'all material facts' relevant to sentencing that arise out of group membership are to be taken into account — whether this be a particular disadvantage, difference, or even advantage.[126] In addition, to the extent that sentencing judges and magistrates are in a position to fashion sentences that enable realisation of the positive potential inherent in an offender's Indigenous background, this should be done. Indeed, so far as a rehabilitative pathway is available for an Indigenous offender by virtue of their Indigenous background, this too is a fact that exists 'only by reason of the offender's membership of an ethnic or other group'.[127] Accordingly, the potential offered by such a pathway is a material fact the sentencing court is bound to take into account. Although it is beyond the scope of this article to explore such pathways in detail,[128] we see the development of Indigenous-specific rehabilitative pathways as essential. We would also like to see Australia embrace the positive potential of group membership and the need for Indigenous-specific, Indigenous-controlled and Indigenous-driven rehabilitation options, which are designed to address the systemic and background factors.[129] The principle in *Neal*, as discussed above and formally endorsed in *Bugmy* and *Munda v Western Australia*,[130] embraces this positive potential.

VI Conclusion

In this article, we have sought to contrast the approach taken in relation to sentencing Aboriginal offenders in Canada, compared with Australia. We have argued that the High Court's decision in *Bugmy* represents a missed opportunity. Its narrow interpretation of the Canadian case law and constrained interpretation of the sentencing principle of individualised justice mitigated against recognition that 'hyperincarceration'[131] is a feature of Indigenous disadvantage that is part of the collective experience of Indigenous

126 *Neal* (1982) 149 CLR 305, 326 (Brennan J).

127 Ibid.

128 For a recent discussion, see 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 *University of New South Wales Law Journal* 1.

129 See generally Hopkins, above n 6.

130 (2013) 249 CLR 600, 618 [50] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

131 See Cunneen et al, above n 9.

Australians before the criminal courts. It also diminished the significance of collective Indigenous experiences of colonisation, discrimination and social exclusion, as well as the strength of group identity, for individual Indigenous offenders. As the Canadian approach comprehends, individualised justice requires recognition of these relevant facts. In making this argument, we have endeavoured to frame an approach to sentencing Indigenous offenders that would give rise to fairness in sentencing to promote individualised justice and to resist assumptions of racial neutrality that undermine substantive equality.

We do not suggest that shifting Australian sentencing principles in accordance with those in Canada will wholly redress Indigenous over-representation in prisons. This was recognised by the Supreme Court of Canada: 'sentencing will not be the sole — or even the primary — means of addressing Aboriginal over-representation in penal institutions'.[132] Principles that provide for the sentencing of Indigenous offenders in a manner that is fair and substantively equal to non-Indigenous offenders can nonetheless have a strong influence on sentencing decisions in relation to Indigenous offenders. This is critical in a context of rising Indigenous imprisonment alongside policy changes that place increased pressure on courts to hand down prison sentences. These policy reforms include increasing maximum penalties, broadening the application of mandatory and guideline prison sentences and removing provisions that uphold imprisonment as a penalty of last resort. Sentencing that appropriately accommodates Indigenous mitigating circumstances, including relevant facts of disadvantage facing communities, can help stem the tide of hyperincarceration. The Supreme Court of Canada referred to the important role of judges in affecting outcomes for Indigenous people in the criminal justice system:

> Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.[133]

[132] *Ipeelee* [2012] 1 SCR 433, 474 [69] (LeBel J for McLachlin CJC, Binnie, LeBel, Deschamps, Fish and Abella JJ). See also Warner, above n 111.

[133] *Gladue* [1999] 1 SCR 688, 723 [65] (Cory and Iacobucci JJ for the Court).

In Australia, research on sentencing outcomes before the decision of *Bugmy* found that Indigenous status does not attract mitigation as an independent consideration.[134] Rather, Indigenous defendants are as likely as or more likely than non-Indigenous offenders to be incarcerated for similar offences. This judicial blindness may point to a critical need in Australian sentencing to consider Indigenous background, including systemic factors that point to both reduced culpability and the need for rehabilitative and healing interventions or diversions, as relevant factors. Writing before the decision in *Bugmy* was handed down, Warner noted that:

> sentencing should … strive not to exacerbate inequalities or contribute to the problems of over-representation of disadvantaged groups such as indigenous minorities. Taking into account social and economic disadvantage and other indigenous factors can be done in a way that is consistent with fundamental principles of fairness, proportionality and equality before the law.[135]

The High Court in *Bugmy* importantly restated the need to consider Indigenous background as a factor relevant to moral culpability and mitigation, but fell short of regarding Indigenous background as a feature of a broader postcolonial context. The Supreme Court of Victoria and the Court of Appeal have demonstrated in a number of cases how this context, including the enduring trauma by survivors of the Stolen Generations, can be relevant to mitigation. The High Court, however, has distanced itself unnecessarily from systemic factors by projecting an atomised notion of individualised justice. It remains to be seen whether the courts will continue to ascribe broader Indigenous contexts such as the Stolen Generations to sentencing mitigation.

Finally, the focus of the High Court in *Bugmy* on disadvantage and the negative impacts of group membership fails to recognise the contribution of the criminal justice system to Indigenous rates of offending and the need for it to provide some redress of incarceration rates, including through lesser sentences and greater rehabilitation or community-based sentencing or diversion options. By contrast, the Supreme Court of Canada has identified that over-representation in prisons is an innate part of the Aboriginal

[134] See Samantha Jeffries and Christine Bond, 'Indigenous Disparity in Lower Court Imprisonment Decisions: A Study of Two Australian Jurisdictions, 1998 to 2008' (Trends & Issues in Crime and Criminal Justice Research Paper No 447, Australian Institute of Criminology, December 2012).

[135] Warner, above n 111, 142.

experience of disadvantage and the criminal justice system needs to be part of rectifying this disadvantage. This represents an important normative shift. We believe it is long overdue for the Australian sentencing courts to recognise this systemic problem of over-incarceration as linked to the individual experiences of Indigenous defendants, and to take some responsibility for reducing the disproportionate impact of imprisonment on Indigenous Australians.