ARTICLES

Individualised Justice through Indigenous Community Reports in Sentencing – Thalia Anthony

There is a growing pool of research on court outcomes in sentencing Indigenous people but relatively little research on the information available to sentencing courts to consider Indigenous background. Although Australian courts mostly have discretion to consider Indigenous circumstances, such consideration depends on submissions and reports tendered in court. The High Court in Bugmy v The Queen (2013) stated “it is necessary to point to material tending to establish [the defendant’s deprived] background” if it is to be relevant in sentencing. The main repository of court information on defendant background is counsel submissions and, where the defendant is facing imprisonment, Community Corrections’ Presentence Reports. Based on 18 interviews with judicial officers, lawyers and court staff in New South Wales and Victoria, this article identifies the need for more information on relevant Indigenous background factors in sentencing. The introduction of discrete Indigenous community reports that present Indigenous perspectives on the person’s background and rehabilitation was regarded as important for addressing the Bugmy requirement. This article makes reference to the wide-scale experience in Canada of First Nations presentence reports, known as “Gladue Reports”, and the more small-scale Australian experiences of Indigenous cultural reports, to indicate how this material can enhance individualised justice in sentencing Indigenous peoples ......................................... 121

Haters Gonna Hate: When the Public Uses Social Media to Comment Critically or Maliciously about Judicial Officers – Marilyn Bromberg and Andrew Ekert

It is important that the public has confidence in the judiciary so that it will abide by its decisions. However, there are many ways to undermine the public confidence in the judiciary. A relatively new method of undermining the public confidence in the judiciary can occur when the public writes highly critical or malicious comments about the judiciary on social media. Such comments can spread on social media instantaneously to a huge number of people – this makes it unique in comparison to some of the other methods of undermining confidence in the judiciary. This article examines how the government and business deal with critical or malicious comments on social media and applies this to the judiciary. It argues that it is important that the judiciary take preventive action in this area so that they are in the best position to deal with critical or malicious comments on social media when they are posted................................................................................................... 141

Trial by Judge without Jury – Some Contemporary Reflections – Russ Scott

In all Australian jurisdictions, many serious offences can be tried summarily, and in most jurisdictions, an indictable offence can be tried by a judge without a jury. In Alqudsi v The Queen, the High Court majority held that trial by judge for an offence against Commonwealth counterterrorist legislation would be inconsistent with s 80 of the Constitution. This article examines the reasoning of the decision and compares the different State provisions which
Individualised Justice through Indigenous Community Reports in Sentencing

Thalia Anthony, Elena Marchetti, Larissa Behrendt and Craig Longman

There is a growing pool of research on court outcomes in sentencing Indigenous people but relatively little research on the information available to sentencing courts to consider Indigenous background. Although Australian courts mostly have discretion to consider Indigenous circumstances, such consideration depends on submissions and reports tendered in court. The High Court in Bugmy v The Queen (2013) stated “it is necessary to point to material tending to establish [the defendant’s deprived] background” if it is to be relevant in sentencing. The main repository of court information on defendant background is counsel submissions and, where the defendant is facing imprisonment, Community Corrections’ Presentence Reports. Based on 18 interviews with judicial officers, lawyers and court staff in New South Wales and Victoria, this article identifies the need for more information on relevant Indigenous background factors in sentencing. The introduction of discrete Indigenous community reports that present Indigenous perspectives on the person’s background and rehabilitation was regarded as important for addressing the Bugmy requirement. This article makes reference to the wide-scale experience in Canada of First Nations presentence reports, known as “Gladue Reports”, and the more small-scale Australian experiences of Indigenous cultural reports, to indicate how this material can enhance individualised justice in sentencing Indigenous peoples.

INTRODUCTION: INDIVIDUALISED JUSTICE IN SENTENCING

Sentencing magistrates and judges are “front-line workers” in the criminal justice system and play an important role in mitigating against over-incarceration of Indigenous peoples based on “racial discrimination”. Currently, Indigenous adults are 13 times more likely to be in prison than non-Indigenous adults. They constitute 27% of the adult prison population and, yet comprise 3% of the general adult population. These rates are substantially higher for Indigenous women and young people in custody. To preclude racial discrimination in sentencing, the Indigenous person before the court must receive individualised justice by accounting for his or her circumstances and background,

1 Dr Thalia Anthony, Associate Professor of Law, University of Technology Sydney, is the sole author of this article. She appreciates the input of the project team that comprised Dr Elena Marchetti, Professor of Law, Griffith University, Dr Larissa Behrendt, Professor of Law and Director of Research at the Jumbunna Indigenous House of Learning, University of Technology Sydney (“Jumbunna”) and Mr Craig Longman, Deputy Director of Research at Jumbunna. We express gratitude to the Australian Institute of Judicial Administration and the UTS Faculty of Law for their funding and support of the study. Thanks also to judicial, legal and court services participants in the study; advice by Professor Anne Wallace and Professor Geraldine McKenzie; feedback from delegates to the Australasian Institute of Judicial Administration Aboriginal Justice Conference 2016 (Alice Springs, 25–26 August) and the Judicial Council on Cultural Diversity Conference 2016 (Alice Springs, 22 September); feedback from staff at Corrective Services NSW, Department of Justice ACT and Department of Justice Queensland; and research assistance and interview transcribing by Nicole Wesson, Heidi Kiekembosch-Fitt, Ashleigh Best and Alison Whittaker. Mistakes remain those of the author.

1 Bugmy v The Queen (2013) 249 CLR 571, 594, [41].


1 Australian Bureau of Statistics, “Aboriginal and Torres Strait Islander Prisoner Characteristics”, 4517.0 – Prisoners in Australia (30 June 2016).

1 Australian Bureau of Statistics, n 3.


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including reference to the collective experiences of his or her community and its history of colonial and postcolonial interventions. Gleeson CJ, as he was at the time, stated that individualised justice requires that sentencing purposes are applied to the individual in a way that is proportionate “not only to the harm but to the circumstances of the offender”. Relevant circumstances can include a person’s belonging to a particular community and cultural background. They may shed light on the person’s behaviour or rehabilitation, such as access to culturally appropriate support and services. Commenting on the Bugmy decision, Rothman J stated that to “treat Aborigines differently in Australia by taking account of such factors is an application of equal justice; not a denial of it”.

The first High Court decision to consider the significance of Indigenous circumstances in sentencing was the 1982 case of Neal v The Queen. 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 the 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.

However, it was not until the 2013 decision of R v Bugmy that the High Court gave a majority decision on the significance of Indigenous background to sentencing. The decision referred to the relevance of the person’s membership of an Indigenous community, including that a lengthy term of imprisonment may be especially burdensome for an Indigenous person. But the main focus of the court’s reasoning was on circumstances of childhood deprivation. The High Court stated:

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. ... 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.

The High Court emphasised the need for “individualised justice” in sentencing, which includes taking into account factors “particular” to an Indigenous offender and his or her membership of an “ethnic” group. For Indigenous persons, individual circumstances cannot be separated from the group or community to which the individual belongs, which was recognised in Neal and upheld in Bugmy. Inversely, where community factors are raised in sentencing submissions, they must be linked to individual circumstances.

Accordingly, the High Court held that a person’s membership of an Indigenous community will only be relevant to individualised justice where there is evidence tendered of the existence of these factors in the individual’s Indigenous community and their relevance to the individual and his or her

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4 Although the legislation in each Australian jurisdiction can vary slightly, the High Court of Australia summarises the general purposes of sentencing in terms of the “protection of society, deterrence of the offender and of others who might be attempted to offend, retribution or reform”: Veen v The Queen [No 2] (1988) 164 CLR 465, 476.
7 S Rothman J, “The Impact of Bugmy & Munda on Sentencing Aboriginal and Other Offenders” (Speech delivered at the Ngara Yura Committee of the Judicial Commission of New South Wales, Twilight Seminar, 25 February 2014) 10.
8 Neal v The Queen (1982) 149 CLR 305.
9 Neal v The Queen (1982) 149 CLR 305, 326.
10 Bugmy v The Queen (2013) 249 CLR 571, [38] affirming this proposition in R v Fernando (1992) 76 A Crim R 58.
11 Bugmy v The Queen (2013) 249 CLR 571, [44].
12 Bugmy v The Queen (2013) 249 CLR 571, [36], [39], [594], [41].
offending. For example, evidence of socioeconomic disadvantage in an Indigenous community has to be linked to the disadvantage of the particular offender for it to reduce moral culpability. The court stated that:

In any case in which it is sought to rely on an offender’s background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background. (emphasis added)

In Canada, the responsibility for establishing the necessary link between the collective experience and the individual circumstances rests with the Aboriginal offender’s legal representative in tandem with an independent Aboriginal case worker who supplies information on the individual’s Aboriginal background. Case-specific, factual information is provided in Gladue Reports, which were named after and introduced following the landmark Indigenous sentencing decision of R v Gladue (1999) that referred to the need for information on an person’s Aboriginal community circumstances. They seek to promote culturally appropriate and meaningful sentencing outcomes that serve the offender, victim and the Aboriginal community. Gladue Reports are distinct from Presentence Reports (PSRs) produced by Corrective Services because their fundamental purpose is to identify facts relevant to the defendant’s Aboriginal background, including systemic factors at play in her or his life. Evaluations have found that bringing such information to the attention of the judicial officer in a comprehensive and timely manner is helpful to all parties at a sentencing hearing.

In light of the High Court’s Bugnay decision and its requirement for information to be tendered if Indigenous backgrounds to be considered in sentencing, there has been growing interest in what may be termed “Bugnay Reports” (to adopt the nomenclature of their Canadian counterpart). This interest has been expressed and pursued by Aboriginal legal services, Indigenous court services and justice departments in various Australian States and Territories. They have sought to identify ways to convey the experiences and stories of the defendant’s Indigenous community, including through in-depth interviews with the defendant and relevant people in his or her family and community and empirical research on the history and conditions of the community. They would also provide a cultural perspective on relevant pathways for the individual to inform sentencing options.

This article presents the findings of 18 semistructured interviews and focus groups conducted with judicial officers from various courts (no. 6), lawyers (solicitors and barristers) (no. 6) and specialist Indigenous court staff (no. 6) in New South Wales and Victoria between 2015 and 2016, in relation to presentence information on Indigenous persons’ circumstances. Interviewees were recruited through responses to a general request within legal and court services for participation in the study and through recommendations from other participants or stakeholders. The interviews sought to ascertain the quality of information on Indigenous background and culturally relevant sentencing options in legal submissions and PSRs. It generally finds, with some exceptions, that these sentencing materials do not adequately address the defendant’s Indigenous community circumstances. While some participants recognised that Aboriginal field officers through in-court submissions may provide this information, these officers are
not usually available to perform this role. This study identifies the need for Bugmy Reports to present Indigenous community information relevant to the offender.

The interviews additionally sought to ascertain participants’ views of the relevant issues for preparing and presenting information on Indigenous community circumstances for sentencing. Participants emphasised that the report-writing process should occur in an independent Indigenous-operated unit staffed by Indigenous report writers who are well supported. The participants’ responses are contextualised within the lessons learnt from the implementation of the Gladiæ Report-writing process in Canada. We acquired information from two Canadian legal services to augment the findings of official evaluations of Gladiæ Reports. The overall finding of this study is that individualised justice requires the introduction of Bugmy Reports, provided safeguards exist to ensure that the information comes from within the Indigenous community and from an Indigenous perspective.

PARTICIPANT PERCEPTIONS OF QUALITY OF PRESENTENCE INFORMATION ON INDIGENOUS COMMUNITY CIRCUMSTANCES

Due to their significant role in informing their sentencing decisions, PSRs (prepared by Community Corrections) were the focus of judicial participants’ response to questions on the quality of information before sentencing courts on Indigenous background. In all Australian jurisdictions, except New South Wales, the commission, preparation, filing and challenging of PSRs are governed by legislation. They tend to take six weeks to prepare and cover a range of issues relating to the defendant’s circumstances and eligibility for sentencing options. PSRs have been explained in the following terms:

A document prepared for the court, usually at its request, to provide background information about an offender and to assist the court in determining the most appropriate manner of dealing with an offender.

Judicial officers noted that the reports can be “very influential” in arriving at their sentencing decisions because they present non-custodial options that are rarely supplemented by the defence lawyer. Judicial Officer 1 explained, “really you’re stuck with what options [you receive]; you can’t pluck an option out of the air unless you’ve got some evidence of it”. Indicating the significant role of PSRs in sentencing, the Australian Capital Territory Court of Appeal has held that a court must provide reasons where it departs from a PSR’s recommendations. PSRs do not always arrive at conclusions that support non-custodial options and can be excessively punitive in their recommendations. The Western Australian Court of Appeal has referred to the risk assumptions embedded in PSRs that can promote punitive outcomes beyond those that the court would otherwise order. It held that a judicial officer should exercise caution when “accepting and acting on such adverse opinions” because they may create “significant detriment” to the offender and possibly result in:

- the imposition of a custodial rather than a non-custodial sentence, or a longer term of imprisonment than would otherwise have been imposed, or a refusal to order eligibility for parole.

In relation to their quality of information on Indigenous background, PSRs were regarded by participants in this study as inadequate. They described the background information as a “snapshot” and presented “in-passing”, if mentioned at all. Where the Indigenous identity of the defendant is noted, it is in general terms – that the person is “of Aboriginal descent” – rather than with specific reference to:


Judicial Officer 1; Similar sentiments were expressed by Judicial Officers 3 and 5.

Judicial Officer 1.


“HAS” v Western Australia [2005] WASCA 29 [62].

Judicial Officers 1 and 5.
the particular Indigenous ration or community in which the person grew up or now resides. This view is supported by earlier research findings on the lack of detail on the Indigenous offender’s community in PSRs. Participants regarded the limitation as a symptom of the formulaic nature and brevity of the PSRs, tending to be structured according to a standard template and approximately three pages in length. One former judicial officer criticised the fact that such templates were not consistent with the sentencing principles that judicial officers must apply. A lawyer interviewed commented that the reports did not reflect the life story of the defendant or their prospects for rehabilitation, instead relying on a narrow actuarial assessment tool, which can constrain the nature of the inquiry and relevant information on community.

There was the additional issue that report writers may have limited time with the defendant in preparing the report, sometimes conducting the interview over the phone. Judicial officers were critical of the fact that report writers seldom made contact with the defendant’s family or relevant people in his or her community. They noted that this undermined an in-depth understanding of the individual and his or her family and Indigenous community. One lawyer commented that the PSR process can be an exercise in “box ticking”. Lawyers surmised that the cursory reports were due to Community Corrections staff being “overtaxed and overworked” and relying mostly on “unsatisfactory” telephone contact with the defendant. Consequently, PSRs were “very bland” and “focused upon the basics”. Judicial officers and lawyers contrasted these reports with the ones provided by Juvenile Justice, which included more detail on family circumstances, although not the cultural aspects of his or her upbringing. Judicial Officer 6, however, perceived that the lack of cultural competence on the part of report writers was the key reason for the lack of appropriate information acquired in PSRs.

Judicial officers commented that they did not routinely have the opportunity to ask PSR writers about their methods for acquiring presentence information because the author “is usually never in court”. This contrasts with past practices where the officer who wrote the report commonly supplied it to the court in-person, and “you got to ask them some questions”. A number of judicial officers noted that Aboriginal field officers tended to be better placed to provide quality information to the court because the field officer was more in touch with the individual, his or her family and the community. Nevertheless, field officers were rarely funded to work in cities or towns, and where they did work, they infrequently provided information to the courts.

The participants felt that the information in PSRs was constrained by the risk assessment framework in which Community Corrections operated. This eschewed considerations of the influence

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33 Judicial Officer 1; Lawyer 1.
35 Lawyer 2.
36 Lawyer 5.
37 Judicial Officers 1, 3 and 4.
38 Judicial Officers 2 and 6.
39 Lawyer 1.
40 Lawyers 1, 2 and 6.
41 Judicial Officer 2.
42 Judicial Officer 2; Lawyers 1 and 2.
43 Judicial Officer 6. Similar comments made by Lawyers 1 and 2.
44 Judicial Officer 3.
45 Judicial Officer 3.
46 Judicial Officers 1 and 4.
47 Judicial Officer 4.
48 Judicial Officer 6; Lawyer 4.
of community and cultural identity on the individual. More extensive qualitative findings on the role of PSRs in Canada, which rely on the same risk framework as in Australia, suggest that PSRs preclude a holistic understanding of the individual, which can perpetuate systemic bias. According to a study conducted by Hannah-Moffatt and Maurutto, “implicit racial bias” can emerge where the reporting framework is based on “actuarial data and templates” relating to criminal history and risk. This is because race is emphasised in terms of its criminogenic effect. Tata also finds in his analysis of PSRs that they legitimise “routine criminal and penal processes” by validating an actuarial risk profile rather than individualised justice. They preclude an understanding of an Aboriginal defendant’s place in his or her community, the unique racial histories of his or her community and his or her overall needs. In relation to PSRs in the Australian context, the following section discusses some of these identified limitations.

**Issues in PSRs: Coverage and Perceived Limitations**

The judicial officers and lawyers outlined the themes that consistently arise in PSRs, and the limitations of this structure and its embedded content for understanding the background of Indigenous defendants. Overall, the participants conveyed that report writers hardly ever discuss the nature or history of the defendant’s Indigenous community or nation or his or her relationship with that community. The information was generally classified per the following headings: (1) family background, (2) substance abuse, (3) medical or psychological issues, (4) attitude to offending, (5) actuarial risk assessment and (6) sentencing options.

The family background of the defendant included in the PSR identifies whether they were living with or grew up with parents or placed in care, whether his or her parents are divorced, whether as a child the defendant was exposed to domestic violence or substance abuse or whether their parents went to prison. According to Judicial Officer 5, issues of forced child removals were dealt with cursorily. They were not addressed in terms of the effect on the individual (in terms of being removed or having his or her children removed) or whether his or her family and/or community had been affected by State child removals which would make direct removals involving the individual more traumatic. In addition, family circumstances are not distinguished from cultural background. In terms of a discussion about education and employment, judicial officers conveyed that there was little depth or explanation provided, eg reasons for disengagement or experiences of exclusion.

Substance abuse is recorded in terms of when the defendant started using drugs or alcohol and whether they have made any attempts to rehabilitate himself or herself. L1 and L2 noted that the reasons for substance abuse can be complex and often linked to trauma for Indigenous defendants, but these are often overlooked in PSRs. Instead writers tended to explain the abuse in terms of “peer pressure.”

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48 Hannah-Moffatt and Maurutto, ¶ 47, 273.


50 Hannah-Moffatt and Maurutto, ¶ 47, 279.

51 Judicial Officers 1–3 and 6.

52 Legislation can stipulate matters that may be addressed in PSRs, eg Sentencing Act 1991 (Vic) s 8B; Sentencing Act 1997 (Tas) s 83; Sentencing Act (NT) s 106(1); Youth Justice Act (NT) s 70. The only Australian jurisdiction where this legislative provision refers to the offender’s “cultural background” is the Australian Capital Territory: Crimes (Sentencing) Act 2005 (ACT) s 40A, although the other legislative provisions on content refer more broadly to “social history” and “background”.

53 Judicial Officers 1 and 2.

54 Judicial Officer 5.

55 Judicial Officer 2.

56 Judicial Officers 5 and 6.

57 Lawyers 1 and 2
or "self-medicating" when, according to L1, "it's the exact opposite".58 In other words, the individual's mental condition constrains their choices in relation to their use of alcohol. This would promote different types of interventions that are directed to underlying problems rather than socialising with different groups.

The medical or psychological history or ongoing treatment of the defendant is stated in very general terms. It is not an assessment but a coverage of diagnosed conditions and treatments known to the PSR writer, particularly when they are undertaken during the period of Community Corrections supervision. For Indigenous people, there is an absence of recognition of intergenerational Indigenous trauma, which participants noted nonetheless was not the domain of a PSR writer but the expertise of a person, preferably Indigenous, trained in this field.59 Participants also noted that a review of the defendant's health history should be provided by medical, psychiatry or psychology professionals in a forensic report, rather than presented in a cursory summary by a PSR report writer.60 There is also no attention to hearing and sight loss that may cause the person frustration and inhibit their rehabilitation.61

Attitude to offending is examined in terms of whether the defendant expresses contrition or remorse. The report writer makes an assessment as to whether the defendant appears to "understand or have any insight into" the nature and consequences of his or her offending.62 PSRs provide observations on whether the person agrees with the police facts to indicate their attitude to offending and degree of remorse. In published reasons, judges have disputed the expertise of PSR writers to assess attitudes and matters such as "remorse". In the Northern Territory Court of Criminal Appeal case, Green v The Queen, Mildren J held that PSRs are not to be treated as evidence, but only as "opinions and comments":

it is a mistake to treat these opinions and comments as evidence, because they are not evidence; rather, they are the submissions of the relevant officer of a government department whose function it is to assist in the rehabilitation of offenders.63

For Indigenous people, L5 noted, the attitude to offending can be expressed differently. They are more likely to feel "shame", which is a different emotion to remorse and is more powerful because it affects relationships with others in his or her Indigenous community.64 Judicial Officer 5 noted that PSR writers were not well placed to comment on attitudes to offending because they did not necessarily appreciate the nature of mens rea in relation to the particular offence and could overstate the person's responsibility or involvement in the offence. For instance, a writer may presume the person committed the act intentionally when in fact it was found to be committed recklessly or negligently or committed under partial duress.65 Judicial officers pointed out that it appears that the report writer simply asks the defendant, "How do you feel about the offence?",66 rather than exploring the defendant's comprehension of the injury, its effect on his or her anxiety levels, sleeping habits and family or community life.67

The actuarial risk is calculated in the PSR to demonstrate the likelihood of the offender to reoffend. The calculation is reported as "high", "medium-high" or "low risk". The assessment in

58Lawyer 1.
59Judicial Officers 4 and 6; Lawyers 1, 2 and 4.
60Judicial Officers 4 and 6. Forensic reports are, however, uncommon in District or County courts and "extremely rare" in the lower courts: Judicial Officer 4; Lawyer 2.
62Judicial Officer 1.
63Green v The Queen (1999) 9 NTLR 138, [64].
64Lawyer 5.
65Judicial Officer 5. Similar comments expressed by Lawyer 2.
66Judicial Officer 5.
67Judicial Officer 5.

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New South Wales is based on the LSI-R (Level of Service Inventory-Revised) tool, and in Victoria, a PSR is based on either LSI-R:SV (Screening Version) or for more comprehensive PSRs, the LS/RNR (Level of Service/Risk, Need, Responsiveness). These related tools derive from Canada and involve a quantitative survey of offender attributes. It determines the risks and criminogenic needs of the individual, which informs the “service” that she or he will receive through supervision, reporting requirements, programs and treatment. The assessment is not adapted to factors relevant to the person’s cultural background. Judicial Officer 1 commented that PSRs do not routinely give reasons for the risk assessment, but it is “presumably based on factors such as marital status, prior offending [and] health diagnosis”. One former judicial officer noted that the reporting tool does not enable an understanding of how the circumstances of an individual may be redressed through Indigenous-specific programs. For these reasons, Canadian legal practitioners have stated that PSRs provide cursory attention to Indigenous background and reveal more about the assessment tool than the individual being assessed.

The PSR finally outlines sentencing options, including rehabilitative programs, treatment services, work orders, counselling and punitive options including imprisonment. Only very occasionally do they provide options that include specialised Indigenous-run programs, activities that operate in the community, or support and guidance by people who are important to the defendant, including community Elders. Rather, PSRs tend to recommend options that are professionally operated. Aboriginal field officers, on the rare instance they make submissions, are more likely to provide information on Aboriginal programs and activities and to identify significant relatives who can engage the person in these services. One lawyer commented that calling on family members to talk about what the family can do for the offender, and how they need to be supported to do this, can be a useful source of information that will be relevant to the offender’s reintegration. Otherwise, judicial officers commented that they had to rely on self-initiated research on Indigenous programs and rehabilitation centres. Generally, however, the courts are not made aware of specialised Indigenous options, and PSRs perpetuate a flawed idea that Indigenous people require the same rehabilitative and healing options as non-Indigenous people.


71 Judicial Officer 1.

72 Lawyer 2.

73 Legal Services Canada 1 and 2.

74 Judicial Officer 6.

75 Judicial Officers 4 and 5.

76 Judicial Officers 1, 3, 4 and 6.

77 Lawyer 1.


79 Lawyers 5 and 6.
The common perception among judicial officers and lawyers was that PSRs produce inadequate data on the individual’s Indigenous community background, perspectives of people in the individual’s community on the individual, his or her offence and his or her needs and the role of the individual in his or her Indigenous community. Consequently, courts could not fully assess the culpability of the individual or provide culturally appropriate sentencing options, which limited their capacity to hand down condign sentences. The following section addresses observations by judicial officers, Indigenous court staff and lawyers on how the information in PSRs could be supplemented with information on Indigenous community background, and how it may even substitute the information flowing from the LSI-R or LS/RVR risk analysis, by providing a more holistic narrative of the individual’s lived experience.

**Perceived Need for Discrete and Holistic Indigenous Community Reports**

Judicial officers consistently noted that the High Court in *Bugmy* (2013) accepts that information on the individual’s Indigenous background and circumstances should be given full weight in sentencing and this needs to be addressed through the provision of this information to courts. This interpretation was also advanced by the Aboriginal Legal Service (Australian Capital Territory) in its submission to the Parliamentary Inquiry into Sentencing: *Bugmy* confirmed “the obligation of informing a Court as to the unique circumstances of Aboriginal and Torres Strait Islander defendants”. Judicial officers perceived that the lack of information on Indigenous background renders this *Bugmy* principle hollow. This coincided with their interest in having “all the information that’s relevant” to make decisions based on evidence. Judicial Officer 1 perceived that judicial officers would welcome information on Indigenous background “with open arms” in order to make them “better informed about what to do in a particular case”. It would enable judicial officers to “holistically understand a particular individual’s circumstances and what may work and what may not work”. To indicate the paucity of information on the historical, demographic and socioeconomic status of the local community presented to the courts, Judicial Officer 2 stated,

I would say that there wouldn’t be a magistrate who didn’t want to understand [the defendant’s local] community and sometimes the only information they get is through the local golf club.

In the absence of information on the upbringing and circumstances of the individual, his or her living conditions and the positive influences on the individual’s life, the judiciary may be prone to adopting racist stereotypes and promoting unfair sentences. Judicial Officer 2 stated that where judicial officers “flew-in, flew-out” of “country towns” or remote communities (which is particularly common for lower court magistrates on circuit or higher court judges), they did not have the information to comprehend the issues in the community, which meant at times they would rely on stereotypes of Indigenous people. An emphasis was placed on the need for information on the individual’s role in her or his Indigenous community and how they have been affected by historical circumstances (such as the effect of intergenerational State removal of Indigenous children on the particular defendant who has had his or her child placed in State care). Such information could counter prejudicial notions of Indigenous peoples’ hopelessness and risk. It would allow a more holistic comprehension of the

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80 Judicial Officer 6.
81 Judicial Officers 3–6.
83 Judicial Officers 1, 5 and 6.
84 Judicial Officer 1.
85 Judicial Officer 1.
86 Judicial Officer 1.
87 Judicial Officer 2.
88 Lawyers 1 and 2.
89 Judicial Officer 2.
90 Lawyer 2.
91 Lawyer 2.
person’s culpability, the effect of a custodial sentence on an individual (including the distinct effect on Indigenous female defendants with family and kin responsibilities) and suitable programs and places of accommodation for the person’s wellbeing. Community information relating to the individual would ultimately promote more appropriate sentencing orders because it can paint a fuller picture of the person’s circumstances.\textsuperscript{52} This view was supported by a Canadian legal service provider who commented that, “\textit{Gladue} Reports are disruptive of a normative discourse [about risk and criminality] in sentencing. The offender becomes a whole person with a family who speaks”\textsuperscript{53}.

In addition, judicial participants noted that discrete Indigenous community information could help discern when it may not be in the best interests of the community or victim to return the defendant home and of alternative accommodation options in or outside of the community. Judicial Officer 2 provided the example of family violence perpetrators who may otherwise be returned to the community staightaway if there was inadequate information on whether persons in the Indigenous community wanted to have them “banished” for a period (whether that be to a treatment facility, another residence or prison), while it mobilises resources to “handle them in the community”\textsuperscript{.54} Alternatively, Indigenous female defendants may be sent home where they are inflicted with family violence, which would increase their vulnerability, rather than be supported to access alternative accommodation.\textsuperscript{55} Finally, the example was provided of the need for courts to be informed of the availability of “dry houses” in the community to support a defendant who is detoxing and to reduce his or her exposure to substance abuse.\textsuperscript{56}

\textbf{Perception of Types of Information Needed on the Individual’s Indigenous Community Circumstances}

Given that judicial officers identified a lack of information on Indigenous background before courts, they were asked what information would enable them to hand down more appropriate sentences. This included information that may reduce the culpability of the offender, due to community conditions that evidence a deprived upbringing for the Indigenous person, as well as practical information that helps the judicial officer assess sentencing options. Such community background information could help identify persons and activities in the Indigenous community that can support the defendant’s rehabilitation and how those supports utilised to benefit the defendant and his or her community.

Judicial officers, lawyers and Indigenous court staff in the cohort recognised that there is a vast array of information that may be relevant to the individual before a sentencing court to supplement, or replace in some instances, the information currently available. They cautioned against a prescriptive approach for preparing an individual’s community report. Staff from the Aboriginal Legal Services Toronto who prepare \textit{Gladue} Reports for 11 communities across Ontario,\textsuperscript{57} as well as others who conduct training for \textit{Gladue} Report writers elsewhere in Canada,\textsuperscript{58} have strongly cautioned against producing lists of “Aboriginal issues” because it undermines the individuality of the story of the person’s upbringing, circumstances and community conditions. These reports are lengthy; often between 20 and 40 pages and bring into play multiple perspectives in producing an account of the person’s life, which defy structured typologies.\textsuperscript{59} Nonetheless, seven themes on relevant sentencing information on Indigenous background emerged among interview responses. They broadly relate to the need for information on the nature and history of the defendant’s Indigenous community; the defendant’s relationship with his or

\textsuperscript{52}Lawyers 1, 2 and 5.
\textsuperscript{53}Legal Service Canada 1.
\textsuperscript{54}Judicial Officer 2.
\textsuperscript{55}Judicial Officer 2.
\textsuperscript{56}Judicial Officers 2 and 6; Lawyer 2.
\textsuperscript{57}Legal Service Canada 1.
\textsuperscript{58}Legal Service Canada 2.
her community and prospects for rehabilitation within his or her community. These are outlined below, with the following section providing more detail on how these issues may be presented to courts.

**Historical and Contemporary Community Circumstances Affecting the Individual**

Judicial officers noted the importance of gaining an insight into the *history and contemporary socioeconomic circumstances* of the Indigenous person’s Indigenous nation and community in which he or she grew up and lives in and how these circumstances have affected the individual. This is relevant for shedding light on the individual’s culpability. This includes receiving information on the colonial history of the community, eg whether there was violent colonial dispossession of land, whether it was set up as a mission and whether local Indigenous nations were displaced and forced together in the one colonial settlement. The ensuing effects on language, cultural practices and connections to Country on the community and the individual should be detailed. This information needs to be matched with information on historical and contemporary socioeconomic conditions experienced by the relevant Indigenous community (eg access to education, employment and housing, level of poverty); the prevalence of health issues and level of healthcare, morbidity rates, substance abuse, violence and infant and early mortality; and racial attitudes held by the local non-Indigenous community towards Indigenous people (including by non-Indigenous people in positions of authority, such as employers, police and public servants). The cohort was interested in how the systemic issues affected the individuals before them in terms of intergenerational trauma, mental health issues or substance abuse and their resilience in the face of these circumstances.

**Perception of Defendant by Relevant Indigenous Community People**

The perception by relevant Indigenous people and organisations of the role of the offender (both positive and negative) in the community was considered an important piece of information to include in a culturally appropriate PSR. As mentioned above, this includes community views on where the person should reside and how people in the community may be properly supported to facilitate the individual. PSRs tended to adopt a deficit approach to the individual and focus on their risk, which potentially overlooked important contributions to family, the community, local organisations and cultural activities. It is the strengths of the individual and community that will enable the promotion of appropriate sentencing options to facilitate the individual and identify how these options should be resourced.

The shift away from solely regarding the offender as associated with an offence was considered to be important. Participants stressed that in order to assess the appropriate sentence, it was important to holistically understand the individual from the standpoint of relevant people in his or her community. Among other things, the individual’s contribution to their Indigenous family, culture and/or community was a relevant consideration for assessing rehabilitation. Where relevant, positive roles in relation to community groups, sports, caring for Country and caring for elderly and children should be brought to life in community reports.

**Holistic Approach to Health of Individual**

There was a common view among participants on the need for more information on the individual’s history of intellectual impairment and mental and physical health issues (including hearing and eyesight). This information needed to grasp the multiple interactions between mental health, disability,

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100 Judicial Officer 1 pointed out that information on access includes taking into account the individual’s location, language skills, mental and physical health and finances and the cultural appropriateness of the service.

101 Judicial Officers 1–3.

102 Indigenous Court Service Focus Group 2; Lawyer 2; Judicial Officer 6.

103 Lawyer 6.

104 Lawyers 2 and 4; Judicial Officers 2 and 3.

105 Judicial Officer 1.
trauma, alcohol or drugs, socioeconomic conditions and access to screening and treatment services,\textsuperscript{106} which were coexisting factors for most Indigenous people in the criminal justice system.\textsuperscript{107} One lawyer pointed out that information presented to courts on the person’s condition tends to be one-dimensional. For example, if the offender was under the influence of alcohol or drugs, this can negate an inquiry into whether the person was also enduring a mental illness or trauma at the time of the offence. This constrained understanding of the person’s culpability or rehabilitation pathway.\textsuperscript{108} Judicial Officer 5 referred to the importance of informing the court of mental health issues and identified a case in which an Indigenous woman whose circumstances would ordinarily attract a prison sentence received a non-custodial sentence because of the relevance of mental health issues.\textsuperscript{109}

Interviewees stressed the need for information on the underlying causes of drug and alcohol and mental health problems. This would enable them to order options to help address the individual’s issues in a culturally appropriate setting.\textsuperscript{110} This required information on the history of the individual and the family to comprehend, inter alia, intergenerational trauma and lack of access to health and other basic services. Judicial officers referred specifically to the need for better information on Indigenous defendants with foetal alcohol spectrum disorder (FASD).\textsuperscript{111} In Canada, \textit{Gladue Reports} link the individual’s diagnosis of FASD with the incidence of FASD in the First Nations’ community, in order to shed light on “systemic matters” and how “those issues might have affected an individual to be sentenced.”\textsuperscript{112}

\textbf{Family/Kinship Relations}

An overview of the individual’s family was regarded as helpful for understanding the upbringing and options for the individual. A useful tool would be a family tree that detailed who the defendant grew up with, kinship relations and the relationship (if any) with the victim’s family.\textsuperscript{113} It should be supplemented with information on the individual’s caring responsibilities for children, siblings or elderly; cultural protocols among relations; connections to place; the role of Elders in the community; and people willing and able to take care of the defendant or provide opportunities. Other relevant material would include the extent of forced Indigenous child removals in the family and the direct or indirect effect it has had on the defendant.\textsuperscript{114}

\textbf{Indigenous Programs}

Participants expressed a desire for greater insight into the range of services or support structures available to Indigenous people, their cultural competence and the individual’s actual access to those services.\textsuperscript{115} Information on Indigenous-specific services and programs that were more likely to engage the defendant\textsuperscript{116} was needed to supplement the coverage of “mainstream” services in PSRs.\textsuperscript{117} It should

\textsuperscript{106}One suggestion was to engage the Aboriginal Medical Service for a more holistic assessment of the individual. Judicial Officers 2 and 4; Lawyers 1, 2 and 6.

\textsuperscript{107}See S Avery, “The Life Trajectory for an Aboriginal and Torres Strait Islander Person with Disability” in \textit{A Submission to the Senate Inquiry on the Indefinite Detention of People with Cognitive and Psychiatric Impairment} (First Peoples Disability Justice Consortium, 2016) 17.

\textsuperscript{108}Lawyer 1.


\textsuperscript{110}Judicial Officer 5; Lawyer 2.

\textsuperscript{111}Judicial Officers 4 and 6.

\textsuperscript{112}Sharp, n 99, 14.

\textsuperscript{113}Judicial Officer 2.

\textsuperscript{114}This is routinely identified in \textit{Gladue Reports}: Legal Service Canada 1.

\textsuperscript{115}Judicial Officers 2 and 3.


\textsuperscript{117}Judicial Officers 4 and 6.
include not only treatment-based services and healing groups, but other Indigenous-focused and controlled activities such as care for Country, ceremony, arts, sports and education. Ideally, those acquiring this information should also make arrangements for the individual to enter the service.

**Impact on Indigenous Community**

Perspectives from relevant people in the local Indigenous community on the impact that the offence has had on the community and the appropriate way of making amends was regarded as important. Participants were cognisant of the fact that Indigenous communities do not necessarily “speak with one voice”. They referred to the importance of acquiring information from the most relevant people in the community to the individual and any victims. One Canadian participant noted that Gladue Reports do not seek to convey “the community feeling about a person”, given that there is “diversity of opinion in a community regarding an offender”. Rather the purpose of the report is to document “whether there is support in the community for the offender in terms of programming etc” to meet his or her needs for rehabilitation. If it is accepted that the community does “not welcome the person because of their offence”, this “means that the search for resources has to expand out of the community to other locations that may be more welcoming, or at least less hostile, for the offender”.

**Indigenous Community Support of Individual’s Rehabilitation**

Finally, information should be provided on whether and how the defendant may be supported by relevant individuals or families in the Indigenous community for her or his rehabilitation. This may be in lieu of corrections playing an oversight role in rehabilitation. The utility of such options was demonstrated in the Northern Territory, where the Supreme Court upheld a sentence that provided for supervision by Yolngu Elders, rather than supervision by Corrections. The Supreme Court remarked that Yolngu Elders, who banished the defendant to a site on-Country, would be best placed to promote the objectives of sentencing.

**THE FORM OF INDIGENOUS COMMUNITY INFORMATION FOR COURTS: SUGGESTIONS FROM PARTICIPANTS AND THE CANADIAN EXPERIENCE**

This section outlines the feedback from participants on the best methods for acquiring and reporting on the individual’s Indigenous community background in sentencing. Judicial officers unanimously agreed that discrete reports on Indigenous background would give effect to the Bugmy (2013) requirement for material attesting to the individual’s background. To provide some evidence of the usefulness of this type of reporting mechanism, we cross-reference evaluations, reports and information provided by staff in Canadian legal services on the experiences of the Canadian Gladue Reports. We also refer to publically available information on the more limited practice of presenting Indigenous community information to Queensland and the Northern Territory courts and a proposal for community reports in the Australian Capital Territory.

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[118](#) For example, *Tribal Warrior* [http://tribalwarrior.org/]; *Young Spirit Mentoring* [https://www.facebook.com/youngspiritmentoring/]

[119](#) Lawyer 5.

[120](#) Judicial Officers 2 and 6.

[121](#) Judicial Officer 2.

[122](#) Judicial Officer 5 and 6.

[123](#) Legal Service Canada 1.

[124](#) Legal Service Canada 1.

[125](#) Judicial Officer 3; Lawyer 1.

[126](#) *R v Yikaysku and Djambuy* (unreported, Supreme Court of Northern Territory, Riley CJ, 17 December 2012).

[127](#) *Gladue Report* writers work in approximately half of Canada’s provinces. However, *Gladue Reports* are not available for the majority of Aboriginal offenders. They tend to be provided for a small minority of Aboriginal defendants facing a prison sentence and in more complex cases. See April and Orsi, n 19, 23.

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Need for Local Engagement

A key finding from the interviews was that the report writing needed to have buy-in from the local Indigenous communities and organisations, the courts and court participants. Examples from Canada, Queensland and the Northern Territory demonstrate the diversity of approaches, with varying levels of responsiveness to the community and the courts. The model developed by the Aboriginal Legal Service Toronto, which is an independent Aboriginal-controlled organisation that employs First Nations caseworkers to write reports and support the defendant, is regarded as providing a “deeper sense” of the “lived experience” of the Indigenous person. When the Gladue Reports were initially introduced in Toronto, the legal service was working on the basis that there was a need in the Indigenous community for this information and once their utility was demonstrated in courts, they would gain support in the profession. The idea was, “if we build it, they will come”. Other Gladue Report models in Canada, including those located in generic legal services, have also been effective in identifying relevant insights into the person’s Indigenous background and support networks, provided the report writers are trained to make the links between the systemic issues (such as government policies) to the individual’s community and life story. The organisation and report writers also required the Indigenous community’s trust to identify culturally relevant sentencing options for the individual and support people that would best promote the defendant’s healing and reform. Evaluations of Gladue Reports in Canada have found that defendants who received a report were less likely to reoffend and less likely to be imprisoned. Where they were imprisoned, they were incarcerated an average of 18 days compared to 45 days for those who did not have the benefit of such a report.

In Queensland, Aboriginal and Torres Strait Islander Community Justice Groups can make oral or written sentencing submissions under the s 9(2)(p) of the Penalties and Sentences Act 1992 (Qld) and the s 150(1)(g) of the Youth Justice Act 1992. These submissions address the offender’s relationship to the community, cultural background and programs and services for offenders. However, preparation of these submissions is uncommon because group members are not usually trained in making sentencing submissions and are not active in all communities. To supplement these submissions, judicial officers can also rely on community profiles prepared by the Department of Aboriginal and Torres Strait Islander Partnerships to paint a picture of the community conditions, although this information is variable. In the 13 Murri (Indigenous Sentencing) Courts in Queensland, pre-sentencing reports are prepared by an Elder, Respected Person or Community Justice Group member based on a questionnaire interview with the defendant. It addresses personal circumstances relating to their background, upbringing and cultural and community connections.

In a small number of remote Northern Territory Indigenous communities over the past decade, Indigenous Law and Justice groups work with North Australian Aboriginal Justice Agency staff to write a letter to the local sentencing court outlining the group’s knowledge of the defendant’s background (including behaviour in community), views about the offending, the defendant’s character and ideas

128 Lawyer 1; Judicial Officer 2.  
129 Sharp, n 99, 14.  
130 Legal Service Canada 1.  
131 Legal Service Canada 2; April and Orsi, n 19, 11. For example, Gladue Reports need to be able to detail how policies of forced removal of Aboriginal children affected the defendant’s family and his or her educational and employment opportunities, mental health and connection to community. Hannah-Moffatt and Maurutto, n 47, 276.  
132 Hannah-Moffatt and Maurutto, n 47, 266; April and Orsi, n 19, 12.  
133 April and Orsi, n 19.  
135 MacLennan and Shields, n 134.  
137 See the State of Queensland, Department of Aboriginal and Torres Strait Islander Partnerships, Know Your Community Profile Builder (2017) <http://statistics.qgso.qld.gov.au/datsip/profiles>.  
138 (2017) 26 JJA 121
for the defendant’s supervision (including by a person in the community), rehabilitation (including by undergoing ceremony) or community punishment. Individuals for whom a letter is written are selected by the Law and Justice Group and are well known to the group. This process has emerged, like the other report-writing processes in Canada and Queensland, from a mix of local conditions, including Indigenous community engagement, resources for report writing and judicial reception.

**Control by Indigenous Services and Indigenous Staff**

Participants commented that report-writing processes should be administered in a place or organisation that is culturally safe for Indigenous defendants, their families, relevant people in the Indigenous community and Indigenous report writers. A critical aspect of the reporting was that Indigenous community members could talk and that they would be listened to, which is often lacking in the sentencing process. A lawyer from a remote town stated that in remote and regional areas the local Indigenous community should determine whether, how and where the reports are produced. Suggestions included that reports be produced by Indigenous staff in Indigenous court services (including Indigenous project officers), in newly created units within Aboriginal Legal Services, in community legal centres or Legal Aid organisations.

While some judicial officers believed that existing PSR infrastructure in Community Corrections were best resourced to write community reports, they also expressed concern that Community Corrections’ officers did not have the trust of the local Indigenous community or the cultural competence to ask appropriate questions and to elicit frank responses. These concerns were reiterated by a regional lawyer who stated that Indigenous people regarded Community Corrections as part of the punitive system and therefore Indigenous people are not always willing to provide them with the full story. In the Northern Territory, preparation of community letters depended on the Law and Justice Groups having a positive and understanding relationship with the outreach lawyer who prepares the community letter.

Indigenous court services or legal services were regarded as best positioned to do this work because of their experience in giving a voice to or advocating for Indigenous people, their capacity to draw on Indigenous people with expertise in community matters and their established relationships within local Indigenous communities with community members. The Aboriginal Legal Service in its evidence to the parliamentary inquiry on sentencing in the Australian Capital Territory stated that the High Court in *Bugmy* placed the onus on the defence to provide information on community background, and therefore “the responsibility for the preparation, and reception by the Court, of the proposed [Indigenous community] reports would exist alongside this continued Defence obligation”. In Canada, *Gladue* Report writers are commonly located in non-government First Nations organisations, and more infrequently in generic legal services, private consultancies or government departments. However, the latter government-based writers have been found to lack the level of “cultural awareness and understanding” that make the reports useful to courts. Evaluations of *Gladue* Reports have found that the best outcomes arise when the reports are prepared by an Aboriginal person and organisation connected to the defendant’s community.

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139 Lawyer 1.

140 Lawyers 3, 4 and 6; Judicial Officers 1, 4, 5 and 6. Also see: Aboriginal Legal Service NSW/ACT, n 82, xi.

141 Judicial Officers 1 and 3.

142 Lawyers 2.

143 Anthony and Crawford, n 138.

144 Lawyers 4–6; Judicial Officers 4 and 6.

145 Aboriginal Legal Service NSW/ACT, n 82, xi.

146 Ontario Federation of Indian Friendship Centres, n 146; MacLennan and Shields, n 134, 3.

147 April and Orsi, n 19, 8, 10. Due to their benefit, a unit is dedicated to assisting the preparation of *Gladue* Reports. The evaluation noted the importance for judicial officers to be trained and provided with guides on how to incorporate *Gladue* Reports in sentencing. Such guides should also inform reports prepared by Probation Officers.

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Judicial officers and lawyers stressed that there would need to be a clear demarcation of Indigenous community report writers within a legal organisation that also represents Aboriginal defendants to uphold their independence and prevent the appearance of partiality.\textsuperscript{148} This perception existed in British Columbia where \textit{Gladue} Reports were prepared by the Legal Services Society, which advocates for defendants. Occasional judicial remarks criticised the prejudice of the Law Services Society’s report writers.\textsuperscript{149} The society sought to address the concerns through training, supervision and ethical frameworks and procedures.\textsuperscript{150} Its evaluation revealed that overall, there were positive outcomes from its \textit{Gladue} Reports, which judges regarded as objective and valuable.\textsuperscript{151} In 2014, the Australian Capital Territory Aboriginal Legal Service was mindful of maintaining a perception of objectivity when it called for a “discrete service” within its organisation to produce Indigenous community reports.\textsuperscript{152} To protect against conflict of interest and maintain the “impartiality and expertise of the report writers and the confidentiality of the material”, it proposed that “information barriers [be] constructed”.\textsuperscript{153} This would include “a distinct office space and staff, separate electronic record keeping and database, with restricted access to those records, with responsibility for compliance and monitoring of those information barriers by the managing solicitor”.\textsuperscript{154} One \textit{Gladue} Report trainer, who has worked in a number of provinces, stated that the nature of the legal organisation is not crucial because “there is no place for opinion” in the reports.\textsuperscript{155} Provided there is appropriate training and support for writers, \textit{Gladue} Reports are a neutral document that narrates an individual’s “life story” and describes “alternative[s] to jail” to help the accused “deal with issues that first bought him/her in front of the court”. They do not advocate for a particular outcome.\textsuperscript{156} This contrasts with Corrective Services’ reports that draw conclusions in their risk assessment, which render them partial to one side.\textsuperscript{157}

Judicial participants pointed to the importance of Indigenous staff producing the \textit{Burgess} Reports.\textsuperscript{158} This would enliven an Indigenous standpoint and narrative approach that would provide a unique insight into the person’s story in the context of his or her community and its colonial history.\textsuperscript{159} A significant portion of the \textit{Gladue} Report writers in Canada are First Nations case workers.\textsuperscript{160} Their shared collective experience with the defendant places them in a unique position to understand and convey the Indigenous person’s community background and circumstances. In addition, Judicial Officer 1 pointed out that Indigenous report writers would be best placed to know “who to speak to in the community” and the appropriate questions to ask.\textsuperscript{161} The model envisaged by the Australian Capital Territory Aboriginal Legal Service included Indigenous report writers who would be supervised by an Indigenous project.

\textsuperscript{148}Lawyers 4 and 5; Judicial Officers 1, 5 and 6.
\textsuperscript{150}Legal Service Canada 2.
\textsuperscript{151}MacLennan and Shields, n 134. On judicial remarks, see \textit{R v Wesley}, 2014 BCCA 321, [9]; \textit{R v Alec}, 2016 BCCA 347.
\textsuperscript{152}The general proposal for Indigenous community reports was endorsed in March 2015 by the Standing Committee on Justice and Community Safety. Recommendation 20 supported the creation of a “specific mechanism” for producing “reports similar to \textit{Gladue} reports in Canada, informing courts of any relationship between an accused’s offending and his or her Indigenous status”: Standing Committee on Justice and Community Safety, \textit{Inquiry into Sentencing} (2015) 223 <http://www.parliament.act.gov.au/data/assets/pdf_file/0001/707212/JACS-Clee-report-for-Inquiry-into-Sentencing-FINAL.pdf>. The ACT Government supported this recommendation and a budget was set aside for its implementation, but the model is yet to be finalised as of early 2017.
\textsuperscript{153}Aboriginal Legal Service NSW/ACT, n 82.
\textsuperscript{154}Aboriginal Legal Service NSW/ACT, n 82.
\textsuperscript{155}Legal Service Canada 2.
\textsuperscript{156}Legal Service Canada 2.
\textsuperscript{157}Legal Service Canada 2.
\textsuperscript{158}Judicial Officers 1–6.
\textsuperscript{159}Judicial Officer 6. Similar comments made by Lawyer 5.
\textsuperscript{160}Legal Service Canada 1.
\textsuperscript{161}Judicial Officer 1.
officer. The project officer would be responsible for preparing research materials, overseeing reports and selecting report writers for specific cases “from a panel”.

**Community Reports Need to Provide Narratives Personal to the Defendant**

For reports to give effect to *Bugmy* (2013), they need to provide in-depth information that is personal to the defendant and conveys the relationship between systemic factors and the individual’s experiences. Personal stories should be acquired through loosely structured discussions with the defendant and relevant people to the defendant rather than prescriptive questions. The Canadian participants emphasised that “you have to let people talk” to acquire meaningful information about the individual,

whereas placing them in a line of direct questioning constrained the individual’s story and is antithetical to Aboriginal ways of sharing knowledge.

Local Indigenous community issues conveyed in *Bugmy* Reports on, inter alia, the history of colonisation, ongoing manifestations of racial discrimination, lateral violence, drug and alcohol issues, availability of services and resources and the community’s socioeconomic status need to be matched with a discussion of how they have impacted the individual defendant. For example, whether the defendant has actual access to community services, given the cultural and gender appropriateness of the service and the individual’s communication skills, financial capacity and mental and physical condition. There needs to be consideration of the effects of intergenerational Indigenous trauma on the individual in terms of his or her attitudes, vulnerabilities and resilience. Judicial Officer 1 provided the following example in relation to Indigenous offences against law enforcement officers and the usefulness of knowing the history of violence by police against Indigenous people in a particular community:

> Where you get a very serious assault upon a police officer or another authority figure, I would like to have a report that talks about if that person has come from a community where traditionally or historically police officers or authority figures have been associated with removing children or forcing people into missions. Then that would be relevant because even though it may not have happened in this 18-year old’s lifetime, what he’s been told about authority figures I think would have an impact upon, potentially, that offender’s attitude towards authority figures.

Due to their personal nature, the report should remain the property of the defendant. It should not be made available to parole or prison staff without the explicit and informed permission of the defendant. Judicial Officer 4 suggested that the reports should be kept on file, along with other expert reports, within the administering organisation and updated to enable any court, with the defendant’s permission, to acquire a longitudinal understanding of the defendant’s circumstances. In Ontario, *Gladue* Reports are prepared as “friends of the court” and simultaneously provided to the judicial officer, the crown and the defence. The report is not submitted to anyone else unless there is explicit written or verbal consent. This also enables frank disclosure from the defendant during the interview for the *Gladue* Report.

**Community Reports Supplement Indigenous Sentencing Information**

The research cohort, including Indigenous court staff, expressed the view that *Bugmy* Reports should generally be an additional source of information before the courts, coexisting with PSRs and expert reports,

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163 Aboriginal Legal Service NSW/ACT, n 82. Generally, the proposal for community reports was endorsed by the Australian Capital Territory Parliamentary Standing Committee on Justice and Community Safety. Recommendation 21 proposed that Indigenous case workers create these reports. Standing Committee on Justice and Community Safety, n 152, xi.

164 Legal Service Canada 1.

165 Legal Service Canada 1 and 2.

166 Judicial Officer 1.

167 Indigenous Court Service Focus Group 2.

168 Judicial Officer 1.

169 Judicial Officer 4.

170 Judicial Officer 4.
rather than displacing them\textsuperscript{170} or the role of Indigenous sentencing courts.\textsuperscript{171} They should be tendered independently and provided in triplicate: to the court, prosecution and defence.\textsuperscript{172} They should be prepared either at the discretion of the defendant or by virtue of a court order.\textsuperscript{173} In Canada, there is no statutory provision for \textit{Gladue} Reports, so the service provider can refrain from producing a report if there is a lack of capacity or for another reason, even where it is court ordered.\textsuperscript{174} While courts can order both PSRs and \textit{Gladue} Reports, which usually occurs, in some instances, judicial officers have regarded the quality of \textit{Gladue} Reports as sufficiently superior to PSRs that they have ceased ordering the latter.\textsuperscript{175} Judicial support for tendering \textit{Gladue} Reports is acquired once judicial officers see the reports, rather than through any prescriptive guideline, and accordingly, their expansion in courts could be described as organic.\textsuperscript{176}

The Aboriginal Legal Service (Australian Capital Territory) articulated how reports would provide complementary material and their preparation and presentation would run in tandem with the PSRs:

Preparation of pre-sentence reports typically take between 4–6 weeks. It is suggested that a similar time frame would be appropriate for the preparation of the specialist [Indigenous community] reports, which would be ordered at the same time as the existing pre-sentence reports. It is envisaged that there would be a significant degree of consultation between the two report writers both to avoid “overlap” of information but also to facilitate possible 
\textit{diversionary or other sentencing recommendations}. The preparation of both reports within a set time frame would therefore be of utility. The order for a specialist pre-sentence report would be made by a presiding judicial officer after hearing submissions from both Defence and Prosecution and any other relevant party.\textsuperscript{177}

In the initial phase, \textit{Bugmy} Reports may be prepared for offenders facing a prison sentence, more complex cases or minor offenders before Indigenous sentencing courts.\textsuperscript{178} Where \textit{Bugmy} Reports are presented to Indigenous sentencing courts (eg Circle Courts, Koori Courts), they should not replace the unique role of Elders and Respected Persons in the sentencing process.\textsuperscript{179} Where Elders or Respected Persons in these courts have capacity, it may be appropriate to engage them as report writers given their familiarity with sentencing process and expertise on community matters.\textsuperscript{180} It is also a model that has been developed in Queensland with the reinstatement of Murri Courts, although the model errs towards a short one-hour structured interview rather than the longer free-flowing discussion that has been adopted in Canada.\textsuperscript{181} Ultimately, individualised justice should be the right of all defendants who may have reports prepared and kept on file.\textsuperscript{182}

**Sufficient Resources for Report Writing Processes and Post-court Support**

Whether provided by Indigenous court services or legal services, participants stressed the need for an ongoing injection of resources to sustain a report-writing infrastructure and for it to be supported at the front-end and back-end.\textsuperscript{183} At the front-end, Indigenous staff needed to be trained in report research and

\textsuperscript{170} Judicial Officer 3.
\textsuperscript{171} Indigenous Court Service Focus Group 2.
\textsuperscript{172} Judicial Officer 4.
\textsuperscript{173} Judicial Officer 4; Indigenous Court Service Focus Groups 1 and 3.
\textsuperscript{174} Legal Service Canada 1.
\textsuperscript{175} Legal Service Canada 1.
\textsuperscript{176} Aboriginal Legal Service NSW/ACT, n 82.
\textsuperscript{177} Judicial Officer 4; Indigenous Court Service Focus Groups 1–3.
\textsuperscript{178} Judicial Officer 4; Lawyers 5 and 6.
\textsuperscript{179} Judicial Officer 4.
\textsuperscript{180} Legal Service Canada 1 and 2.
\textsuperscript{181} Judicial Officer 4.
\textsuperscript{182} Judicial Officers 1, 3 and 4; Lawyers 1–6; Indigenous Court Service Focus Groups 1 and 2.

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writing. Indigenous psychosocial interventions, Indigenous trauma and relevant health issues (such as sight, hearing and FASD) and sentencing principles that would make the report “comprehensible to a magistrate”. Equally, judicial officers would require training on how to understand and use Bugmy Reports, which may occur through two-way facilitated learning between the report-writing service and judicial officers. It would involve extending a judicial officer’s recognition of authoritative knowledge, not only coming from institutional sources but also from the expertise that Indigenous people have on their community’s history, circumstances and strengths.

There had to be sufficient report-writing staff employed to enable them to allocate time to perform several face-to-face, in-depth interviews with defendants, their families and other relevant persons in the Indigenous community. In Canada, the allowance for up to four meetings with defendants, both in community and in custody, enabled the report writer and defendant to develop rapport and trust. Lawyers interviewed suggested that report writers also had to be supported by an Indigenous project officer who could review the work of the report writers. This is the practice at the Aboriginal Legal Service Toronto where the project officer is a source of support (including in relation to vicarious trauma experienced by the report writer in acquiring the information) and a conduit with the courts. In its proposal to the Australian Capital Territory Parliamentary Inquiry on Sentencing, the Aboriginal Legal Service outlined the resources in the initial year for the production of 36 reports (based on the number of people facing imprisonment in this relatively small jurisdiction). This included in the first year before it expanded into a panel of report writers who would prepare reports for those less likely to receive a prison sentence:

the employment of a full-time project officer (with on-costs plus a travel budget) to develop and establish the program, together with equipping him or her with a computer, mobile telephone and peripherals. This officer would also require administrative support and motor vehicle and expenses.

At the back-end, judicial officers emphasised the need for properly resourced Indigenous programs and support networks that could assist the Indigenous defendant and foster his or her strengths. Initially, support would be provided by the report writer, with referrals to Indigenous support services and link-ups with appropriate Indigenous people. The Gladue aftercare workers in Ontario provide ongoing support for the defendant after the sentencing process in order to address the defendant’s circumstances and build on their strengths. Staff recognised that this was time intensive but also that it was an invaluable function of the service. Ultimately, the success of the adoption of diversionary

14 Lawyers 1 and 2; Legal Service Canada 2. They would need to be versed on accessing information on Indigenous communities from oral sources, archives, Australian Bureau of Statistics data and information or reports by Indigenous organisations and services such as Jumbunna Indigenous House of Learning Research Unit, the Australian Institute of Aboriginal and Torres Strait Islander Studies and Indigenous court services or judicial committees. Judicial Officers 2-4.

15 Judicial Officers 1 and 5. In Canada, approximately half of the judicial officers in jurisdictions with community reports received “Gladue training and awareness activities” to enable them to effectively interpret and apply the findings of the report in sentencing. This includes two-way training in Canada based on a partnership between the courts and First Nations organisations. Apriln and Orsi, n 19, 1; 7; Legal Service Canada 2.

16 Indigenous Court Service Focus Groups 1–3; Judicial Officer 4.

17 Indigenous Court Service Focus Group 1; Legal Service Canada 1. Some judicial officers felt that it would be helpful for the report writer to attend court to tender the report, provide a short oral report and respond to any questions from the judicial officer (similar to the role of a field officer): Judicial Officers 2 and 3. This would require further resources. In Ontario, however, First Nations report writers did not want to be called, examined and cross-examined during the sentencing hearing. Staff believed that the reports speak for themselves and the writers should not be scrutinised.

18 Legal Service Canada 1 and 2. Consequently, Aboriginal offenders felt safer and conveyed a higher level of trust in Gladue Report writers compared to Probation Officers who prepared PSRs in Canada: Ontario Federation of Indian Friendship Centres, n 146; MacLennan and Shields, n 134, 3.

19 Lawyers 4 and 5.

20 Legal Service Canada 1 and 2.

21 Aboriginal Legal Service NSW/ACT, n 82, 5.

22 Judicial Officers 1-4 and 6.
options in rehabilitating individuals depended on the capacity of Indigenous-controlled organisations to provide services for Indigenous people. Several judicial officers stressed that it was not enough to rely on a report-writing process if the Indigenous community infrastructure was already sorely tested and unable to assist in the offender’s healing, rehabilitation or desistance from offending.

CONCLUSION

The Bugmy decision has brought into sharp relief the need for discrete information on the impact of postcolonial intergenerational trauma, institutionalisation and systemic bias on the defendant if it is to be considered in relation to sentencing. The failure to take the cultural and social background of an Indigenous offender into account during sentencing may serve to perpetuate their disadvantage and overimprisonment relative to culpability. This study demonstrates that current PSRs are not regarded as capable of providing relevant facts pertaining to the defendant’s Indigenous community, cultural background, socioeconomic disadvantage, trauma from institutionalisation and his or her individual roles or strengths in their Indigenous community. Interviews with judicial officers in New South Wales and Victoria found a willingness to have this information presented to them.

This article explored several sentencing models implemented in Canada (Gladue Reports) and elsewhere in Australia that demonstrate the importance of establishing community report-writing infrastructure that is responsive to local Indigenous community needs and skills and adapts to the local curial environment. It also demonstrates some of the strengths of particular models, particularly those that have a therapeutic role, such as the in-depth narrative approach adopted by the Aboriginal Legal Service Toronto and other Canadian organisations that provides the time for individuals to tell their story, a holistic engagement with their circumstances and through care support. They reveal what is possible for Bugmy Reports. On the premise that, "you don’t know, what you don’t know", it would seem prudent to explore further avenues for receiving reports on Indigenous community background in Australian sentencing courts. Canadian Judge Knazan makes the point that “paying attention to the circumstances of Aboriginal offenders necessitates knowing what those circumstances are”. Providing information on these circumstances from an Indigenous perspective enhances individualised justice by painting a fuller picture of the individual, and destabilising institutional assumptions around risk.

193 Judicial Officer 2.
194 Judicial Officers 2, 3 and 6.
195 Judicial Officer 4.
196 Jackson, n 5, 174.
197 This approach draws on therapeutic jurisprudence that recognises the potential that procedures and administrators of the criminal justice system have to produce therapeutic outcomes. David Wexler and Bruce Winick, Essays in Therapeutic Jurisprudence (Carolina Academic Press, 1991) IX; Isabel Roper and Vivian Holmes, “Therapeutic in the Coronial Jurisdiction” (2016) 25 JJA 134.
198 Legal Service Canada 1.