A consideration of the sentencing principles in *Bugmy v. The Queen* in the context of Indigenous People

Sir Ronald Wilson Oration 2026

Law Society of Western Australia

The Honourable Justice Michael Lundberg

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Good evening.

Let me commence by echoing the acknowledgement of country which has already been given this evening. I recognise we meet on the lands of the *Wadjuk* people of the *Noongar* nation, and I pay my respects to their elders, past, present and emerging.

At the outset, let me also say what an honour it is to be asked by the Law Society of Western Australia to give tonight's oration, an event which recognises the work of the late Sir Ronald Wilson. Sir Ronald was a distinguished Australian jurist whose legacy is far deeper than his role as a justice of the High Court of Australia during the 1980s. His public service, in many roles, speaks to his deep commitment to issues of social justice and his drive to closely examine the history of the treatment of Indigenous people in this country.

His Honour's work, together with Mick Dodson, in conducting the inquiry which led to the 'Bringing Them Home' report in 1997, is sufficient evidence to make good those propositions.

That seminal report notoriously addresses the policies of forcible removal of Aboriginal children from their families – policies which stretch back many decades into the first half of the 1900s. My mother, a *Wajarri Yamatji* woman from the area near Meekatharra in this State, is one of the many subjects of that inquiry and the report. The report was followed by an oral history project, for

which my mother contributed her story in 1999, speaking of her time at the orphanage in Queen's Park known as Sister Kate's Children's Cottage Home.

The topic I selected for this evening's oration concerns the sentencing principles which fall from the reasons of the plurality in the High Court decision of *Bugmy v The Queen*.[1]

Conveniently, the choice of that topic has provided the hard-working professionals who have developed the *Bugmy Bar Book* with a useful opportunity to publicise within this State the contents of that project and its undoubted benefits.[2] The *Bugmy Bar Book*, first published in 2019, is a free, evidence-based resource for lawyers and legal decision-makers, as well as policymakers and other professionals. The materials are often cited by sentencing courts in this country,[3] but have a broader use beyond the criminal justice sphere.[4]

The committee which sits behind this project is comprised of representatives of key justice agencies and courts in New South Wales, in the Australian Capital Territory, and in the Northern Territory, as well as senior legal academics and members of the legal profession.

My interest in the bar book was heightened by a presentation given by Justice Dina Yehia in April this year. Her Honour is a Judge of the New South Wales Supreme Court and a founder of the Walama Court List in that State. Her Honour spoke at the inaugural Indigenous Justice Program delivered by the National Judicial College of Australia in Alice Springs (or *Mpartntwe*). A number of other judges spoke at the conference on the issues of sentencing, but Justice Yehia had the added advantage of having been senior counsel for Mr Bugmy on his appeal.

Importantly, the sessions presented in Alice Springs also advocated the 'strengths-based approach' to sentencing of Indigenous offenders, in contrast to a focus on a purely deficit-based narrative directed only at the offender's

disadvantages. The presenters highlighted considerations of strengths such as resilience, cultural connection, and community-led rehabilitation.

In due course this evening, you will hear more about the *Bugmy Bar Book* from others more knowledgeable on the subject. In some ways, then, I am merely the opening act for this purpose, and for the panel session to follow.

I am readily and naturally conscious that, in the 13 years since the *Bugmy* decision was delivered, much has been said about the case by judges, practitioners and academics across the country. In addition, the founders and the current custodians of the *Bugmy Bar Book* have assembled much in the way of literature about the case.

One might sensibly ask whether there is much more to contribute to the conversation and, equally, whether a judge with more of a commercial litigation history than a criminal sentencing background, is the person to expose some new vein of analysis to the present, burgeoning dialogue on the subject. More to the point, as a judge in the General Division of the court, I am aware of my place in the court's hierarchical structure.

Happily enough, at least speaking for myself, I have not set any lofty goal this evening to trailblaze on the present subject. If my brief observations are little more than new skin on old bones, I will have achieved more than I intended to.

Before I get too much further, it is proper to ask - what did the plurality hold in *Bugmy*? I will summarise the principles in brief terms. In doing so, I draw from the analysis of this State's Court of Appeal in decisions such as *Peterson v The State of Western Australia,*[5] *SYO v The State of Western Australia*,[6] and *The State of Western Australia v Matanga*.[7]

Before I address these principles, it is at least prudent to emphasise that they are not a form of statutory incantation. Rather, they represent a set of principles to be applied by sentencing judges as part of the instinctive synthesis.

And so to the principles.

First, the plurality recognised that an offender's deprived childhood can impact on the sentencing process in a number of different ways but, importantly, those effects do not diminish with the passage of time or through repeated offending.

Second, the effects of an offender's deprived childhood are to be given 'full weight' in every sentencing decision relating to the offender.[8]

Third, the effects of an offender's profound childhood deprivation may point in different directions in relation to relevant sentencing factors. The effects may diminish the offender's moral culpability for the offending. In contrast, the effects may also increase the importance of protecting the community from the offender's criminal behaviour. This tension is often described as a double-edged sword. Her Honour Justice Bell in *Munda v Western Australia* remarked:[9]

> *The 'Fernando propositions' do not all favour mitigation of sentence. They contemplate the necessity to ensure that Aboriginal Australians are not deprived of the protection which it is assumed punishment provides and to avoid the perception that serious violence in Aboriginal communities will be treated by the law as a matter of little moment. The propositions have internal tensions which fall to be weighed by the sentencing judge along with all of the other factors that bear on the ultimate discretionary determination.* (footnotes omitted)

Fourth, and picking up this observation of Justice Bell, the conflicting purposes of punishment, in a sentencing context, must be weighed in the balance. As the plurality in *Bugmy* observed, giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult.[10]

Fifth, the court endorsed the further point which appears in Justice Wood's earlier analysis in *R v Fernando*, to which I will return, that an offender's Aboriginality may be relevant to the sentencing determination in another respect. That is, where a lengthy term of imprisonment might be particularly burdensome because of the offender's background or lack of experience of mainstream Australian ways.[11]

One can understand, and I have dealt with persons in this situation, how a lengthy period of imprisonment in Perth or even Geraldton might be harsh and more burdensome for a young Aboriginal man from a remote desert community, through lack of connection to country and extended isolation from relatives.

Sixth, it is well-accepted that the principles enunciated by the High Court in *Bugmy* do not apply solely to an offender whose upbringing has resulted in the offender suffering from alcohol addiction and mental illness. Nor are the principles confined to the sentencing of Indigenous persons. The principles are of broader application. They are relevant to an offender who, for whatever reason or combination of reasons, has experienced very significant childhood deprivation of a kind and to a degree which leaves its mark on the offender throughout their life, such as to impair the offender's capacity to mature and to learn from experience, and to reform.[12]

These principles trace their origins to the decision of the High Court in *Neal v The Queen*[13] which was delivered in 1982, and particularly the reasons of Sir Gerard Brennan in that case, and to the propositions enunciated around a decade thereafter by Justice Wood in *Fernando*.[14]

Justice Wood's decision was delivered in the wake of the publication of the findings and recommendations of the Royal Commission into Aboriginal Deaths in Custody in 1991. As is well known, a tragic catalyst for that Royal Commission was the death in custody of an Aboriginal teenager in Roebourne.

There are several cases between and around these authorities, but the ones I have mentioned stand apart.[15] The development of these principles has occurred within the context of the personal circumstances of the three Indigenous offenders in these cases. Their circumstances have some similarities, but they were not uniform by any means.

Let me say something about the lives of Percy Neal, Stanley Fernando and William Bugmy.

Percy Neal was the chairman of the Yarrabah Council, living on a reserve in Northern Queensland. The sentencing magistrate described him as an aggressive agitator, arising from Percy Neal's deep sense of grievance at the paternalistic treatment by white authorities of those on the reserve. Justice Murphy felt this role as an agitator placed him 'in good company'. Percy Neal was convicted of an unlawful assault, and sentenced to two months' imprisonment with hard labour. The assault consisted of spitting on Mr Collins, the non-Indigenous manager of the local store, which Sir Gerard described as an 'ugly incident'.[16] It occurred in the context of a verbal altercation without violence, which ought neither be underestimated nor overstated, according to Justice Murphy.[17]

The intermediate court of appeal which considered Percy Neal's case increased the original sentence to six months' imprisonment with hard labour. It did so of its own motion, in somewhat unusual and procedurally unfair circumstances.

Next, I move to Stanley Fernando. He was a semi-educated Aboriginal man from a deprived background. His parents drank to excess. At 14, he was sent by

welfare to an isolated property in New South Wales to be trained as a station hand. His life then spiralled for a time, taking him to Queensland, to a life of excessive drinking, and to the spectacle of tent boxing at the age of 18.

Stanley Fernando fought in tents, around Australia, during what I have estimated to be the last years of the era of Jimmy Sharman's boxing troupe.[18] The record does not reveal if he ever fought under that troupe's name, but the reasons of the court do record that Stanley Fernando would have had several fights each day, in poorly supervised conditions in the tents, being knocked out several times.[19]

For my part, and equally for those here tonight with even a passing interest in the works of Garrett, Hirst, Moginie, Rotsey and Gifford (as the Midnight Oil line-up then was), sadly I can visualise Stanley Fernando, as a young man, '*fighting in the spotlight*' while people paid to see him '*fall like shrapnel to the floor*'.[20]

His life was difficult, involving chronic alcohol abuse, '*at the first and last hotel*',[21] and with his fighting background, he showed signs of cerebral damage. The instant offence considered by Justice Wood was an impulsive and unpremeditated offence of malicious wounding with a knife, inflicted on a long-term friend and sometime partner during a heavy drinking session.

Lastly, I should mention William Bugmy.

He was an Indigenous man raised in Wilcannia, a town in far-western New South Wales, on an Aboriginal community, with a background characterised by alcohol abuse and violence.[22] He had little formal education, and was unable to read or write. He started a life of alcohol and drug abuse at the age of 13. He witnessed his father stabbing his mother fifteen times.[23] His biography reads no better from that point onwards, noting that he later suffered a head injury and reported auditory hallucinations. In 2011, he was charged with three serious offences of causing grievous bodily harm with intent, the victim being a correctional officer.

By dwelling on the offenders as I have for the purposes of tonight's discussion, I do not mean to marginalise these victims. I pause to record that the second and third of these cases, that is *Fernando* and *Bugmy*, involved victims of violent offences who sustained serious injuries. I would put Mr Collins, the victim of the spitting in *Neal*, in a somewhat different category though.

The focus of the present discussion, concerning *Bugmy*, is necessarily on the personal lives and circumstances of the offenders. It is instructive to recall these matters bearing in mind the importance of the notion of 'individualised justice'. That is a principle affirmed by the plurality in *Bugmy*,[24] in the context of the court's emphasis of the distinctions between the applicable Canadian framework and that in New South Wales. The court, immediately after discussing the personal circumstances of Stanley Fernando, made the following observation:[25]

> *... the appellant's submission that courts should take judicial notice of the systemic background of deprivation of Aboriginal offenders cannot be accepted. It, too, is antithetical to individualised justice. Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, but to recognise this is to say nothing about a particular Aboriginal offender.* (footnotes omitted)

There are two further points which are connected to what I have just said, one of which I have already touched on.

The first point is that the principles recognised in *Bugmy* are not confined to the sentencing of Indigenous persons. The plurality held as follows:[26]

> *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, the plurality endorsed the characterisation of the analysis in *R v Fernando* as being referable to the social disadvantage that frequently precedes the commission of crime, regardless of the ethnicity of the offender.[27] The plurality recognised this as being wholly consistent with the words of Sir Gerard Brennan in 1982, namely that:[28]

> *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. So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal.*

I said there were two points arising.

The second point arising is the matter concerning judicial notice. I have mentioned the approach taken by the High Court to reject the submission that courts should take judicial notice of the 'systemic background of deprivation of Aboriginal offenders'. The plurality held 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'.[29]

There remains, then, a need at sentencing for counsel to consider the evidentiary requirements which are applicable in the sentencing process, and to recall that the onus of proof falls upon the offender in matters of mitigation, on the balance of probabilities. Where matters of mitigation are to be developed in sentencing, the sentencing court will need proper materials to be adduced in support, although in some courts this can be achieved in a less formal manner.[30]

It is in this respect where the *Bugmy Bar Book* is capable, in an appropriate case, of providing practitioners and the court with assistance.

As I have said, the plurality in *Bugmy* regarded the submission advocating judicial notice as antithetical to 'individualised justice'. The arguments before the High Court are replete with references by members of the court to the importance of the 'individualised sentencing discretion'.[31] It is difficult to overstate the importance of that proposition as part of the framework of sentencing, with respect. Those advocating for Mr Bugmy in his appeal are recorded as having advanced the submission that a statement of general principle would ensure equal justice by taking into account those matters of deprivation *unique* to an Aboriginal offender.[32] While that comes close to the individualised sentencing principle, it was ultimately not accepted by the High Court, as the court was comprised in 2013.

That said, some commentators have forcefully argued that the decision in *Bugmy* represents a 'missed opportunity' on the part of the High Court to grapple with 'the complex interrelationship between individualised justice and Indigenous circumstances in the sentencing of Indigenous offenders'.[33]

Staying with the idea of 'individualised justice' for a moment, I pause to reflect on the lives of members of my own family, on my mother's side. My late grandmother had 12 children, so it is something of a large sample size.

Many of my uncles spent their early years as cattle stockmen on remote pastoral stations in the mid-west, scattered from Carnarvon, to Meekatharra, to Leonora.

One of my great uncles, who worked as a stockman, was made subject to the *Natives (Citizenship Rights) Act 1944* (WA). That was the legislation which allowed Aboriginal people to have some basic rights, including voting and being allowed to send their children to school. That great uncle held a certificate of citizenship under the legislation. In 1947, he applied to have my mother returned by the government, saying he would 'put her straight to school' when she was of school age. That application was rejected even though he was subject to the legislation I have just mentioned and had a certificate, which meant he was a 'fit and proper person' under the Act. The full title of that legislation is a bit of a mouthful. It was colloquially known as the *Dog Act* or the *Dog Collar Act*, for obvious reasons.

Many of my aunties worked on remote stations as well, as did my grandmother. They typically worked in the station kitchen and as midwives. Some of the women also did the mustering, I am told, although that was rare and likely only during the second world war.

For all of them, their education was limited and opportunities for advancement in life few.

Of those aunts and uncles, some had lives which began to mirror the lives of many Australians living in regional towns at the time, having productive jobs, playing sport, bringing up families, encouraging their children to pursue educational opportunities they had been denied, while also practising their cultural activities. However, some of them had much harder lives, involving cycles of partner violence and alcohol abuse. Some of them lived on designated reserves, some in towns, some on stations.

Each of them commenced life with the racial, economic and structural systems in place in the 1930s and 1940s which established significant obstacles for all Aboriginal people. All of them were born 'estranged from this nation's citizenship',[34] unless of course they applied for and obtained the exemption and a certificate of the kind which my great uncle was 'fortunate' to obtain.

In my family, on my mother's side, the generations which followed include tradespeople, production supervisors at mining companies, teachers, truck drivers, council workers, owners of construction companies, employees within oil companies, and more. Some have not fared as well, and some have borne the scars of intergenerational trauma more than others. The explanations for the differences in outcome are many and varied.

Like all families, across all ethnicities, they have not had uniform lives.

Like all families, some of them have overcome the adversity with which they have been confronted as Aboriginal people. My mother provides a useful example. Her journey from a Stolen Generation girl, to ward of the State, and to a long career in the Children's Court as a magistrate, no doubt influenced the approach she adopted when addressing young offenders whilst she was sitting on the bench. That approach, so she tells me, was to encourage personal responsibility on the part of offenders, regardless of ethnicity, and to provide them with exhortations to improve, in the spirit of rehabilitative justice.

I suspect she put it rather more bluntly to the offender than I have just explained.

My mother retired from the bench pre-*Bugmy*, but I would like to think that the approach she adopted, as I have just outlined, is not precluded in the post-*Bugmy* era. That is, an approach by which a sentencing judge or magistrate can remain faithful to the principles expressed by the plurality while allowing leeway for the

court to direct remarks to the offender so as to impress upon him or her the need to accept personal responsibility for their actions.

In saying this, I do not think I am going out on a limb and, if I am, there are at least two of us on that limb. The present Chief Justice of the Supreme Court of Western Australia made the following comments in *Peterson v The State of Western Australia*:[35]

> *... Nevertheless, it would be most regrettable if the recognition, in **Bugmy**, that the effects of profound deprivation do not diminish over time, was thought to require a form of fatalism in which efforts toward reduction in offending behaviour in such cases are to be regarded as futile. Nor do I understand the Court in **Bugmy** to have required, or suggested, such a fatalistic view.*

Let me now move to my closing comments.

The idea of 'individualised justice', on current orthodox principles and until the High Court decides otherwise, ultimately reminds us that it is not 'aboriginality' which is relevant to sentencing as a mitigating factor, but what is fundamentally relevant are the personal circumstances of the person,[36] and that person's Aboriginal ancestry (and the concomitant effects on their life as a result) may be relevant in the sentencing process.

Categorisation of particular cases can be helpful, but care must be taken not to obscure the essential task in sentencing, namely, to balance the competing objectives of punishment so as to arrive at a just outcome in the particular case.

In *Veen v The Queen [No 2]*, the High Court explained the purposes of sentencing as follows:[37]

> *However, sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: 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.*

That brings to a close my observations which have hopefully contributed to the conversation.

Thank you for your attention.

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[1] *Bugmy v The Queen* [2013] HCA 37; (2013) 249 CLR 571 (French CJ and Hayne, Crennan, Kiefel (as her Honour then was), Bell and Keane JJ). Gageler J (as his Honour then was) agreed in the result at [55]. I should at the outset also mention *Munda v Western Australia* [2013] HCA 38; (2013) 249 CLR 600 (French CJ, Hayne, Crennan, Kiefel (as her Honour then was), Gageler (as his Honour then was) and Keane JJ, with Bell J dissenting), which addresses similar principles, although the broader propositions addressed in *Bugmy* were not raised in *Munda*. That case was argued on the afternoon of the day on which the court heard argument in *Bugmy*, and was delivered on the same day as *Bugmy*. It was a decision on appeal from this State. Time will not permit an analysis of that decision in this address, but I will return to it briefly below.

[2] www.bugmybarbook.org.au

[3] See, for example, *Donovan v R* [2021] NSWCCA 323.

[4] See, for example, *Mather & Vincent* [2025] FedCFamC2F 425 [78] – [79] (Taglieri J), in the context of a parenting application, receiving evidence as to cultural norms, kinship ties, as well as relying on published statistics demonstrating that comparatively poorer outcomes in health,

education and involvement in the justice system for Aboriginal people are widely accepted to be connected to their displacement and intergenerational trauma due to attempts to assimilate and destroy their culture.

[5] *Peterson v The State of Western Australia* [2019] WASCA 207 [54] (Buss P and Mazza JA) and [4] (Quinlan CJ agreeing).

[6] *SYO v The State of Western Australia* [2024] WASCA 31 [65] – [73] (Mazza, Mitchell and Vandongen JJA).

[7] *The State of Western Australia v Matanga* [2026] WASCA 121 [59] – [62] (Mitchell, Sweeney and Seaward JJA).

[8] *Bugmy v The Queen* [42] – [44].

[9] *Munda v Western Australia* [134] (Bell J).

[10] *Bugmy v The Queen* [44], referring to *Veen v The Queen [No 2]* [1988] HCA 14; (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ).

[11] *Bugmy v The Queen* [39], replacing the term 'European ways'. See also Bell J in *Munda v Western Australia* [133].

[12] *Peterson v The State of Western Australia* [55] (Buss P and Mazza JA).

[13] *Neal v The Queen* [1982] HCA 55; (1982) 149 CLR 305, 321 – 326 (Brennan J, as his Honour then was).

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

[15] I had intended to say something in more detail about the decision of the High Court in *Munda v Western Australia*, as earlier noted. The appeal was against a decision of the Court of Appeal that the sentence imposed on Mr Munda, for the manslaughter of his *de facto* wife, was manifestly inadequate. Mr Munda was from the area near Fitzroy Crossing. A plurality of the High Court affirmed the Court of Appeal's decision, the Court of Appeal having concluded the initial sentence was so unreasonable and plainly unjust as to manifest an error of inadequacy. Justice Bell, who was a member of the plurality in *Bugmy*, spoke strongly in dissent in *Munda*, at least as to the result.

[16] *Neal v The Queen* (321) (Brennan J).

[17] *Neal v The Queen* (312) (Murphy J).

[18] The troupe operated between around 1911 and 1971, in Queensland, New South Wales and Victoria. Stanley Fernando was born in 1944 and began boxing in tents in 1962.

[19] *R v Fernando* (60) (Wood J).

[20] R Hirst & J Moginie, *Jimmy Sharman's Boxers*, Red Sails in the Sunset (Midnight Oil, 1984).

[21] R Hirst & J Moginie, *Jimmy Sharman's Boxers*, Red Sails in the Sunset (Midnight Oil, 1984).

[22] *Bugmy v The Queen* [12].

[23] *Bugmy v The Queen* [12].

[24] *Bugmy v The Queen* [36] and [41].

[25] *Bugmy v The Queen* [41].

[26] *Bugmy v The Queen* [37].

[27] *Bugmy v The Queen* [37], referring with approval to *Kennedy v R* [2010] NSWCCA 260 [53] (Simpson J).

[28] *Neal v The Queen* (326).

[29] *Bugmy v The Queen* [41].

[30] Noting that the terms of s 15 of the *Sentencing Act 1995* (WA) provide as follows: 'To decide on the proper sentence to be imposed, or on imposing an order in addition to sentence, a court sentencing an offender may inform itself in any way it thinks fit.' The operation and limits of s 15 were explained in *RMM v The State of Western Australia* [2018] WASCA 183 [197] – [205] (Mazza and Mitchell JJA, Hall J).

[31] *Bugmy v The Queen* (571 – 575).

[32] *Bugmy v The Queen* (577).

[33] Thalia Anthony, Lorana Bartels and Anthony Hopkins, *Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice* (2015) Melbourne University Law Review 47.
[34] Adapting the phrase employed by Noel Pearson in the course of the eulogy he gave for former Prime Minister the Honourable E.G. Whitlam AC QC.
[35] *Peterson v The State of Western Australia* [13] (Quinlan CJ).
[36] *R v Fernando* (62), proposition B.
[37] *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ).