

INDIGENOUS EXPERIENCE REPORTS: ADDRESSING SILENCE AND DEFICIT DISCOURSE IN SENTENCING

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The hyper-incarceration of Indigenous Australians urges analysis of unconscious bias, the application of criminogenic risk assumptions, and structural impediments to consideration of Indigenous experience in sentencing. Disrupting deficit-based discourses requires new approaches to sentencing, in which First Nations voices are heard. This article examines all 149 sentences delivered in the Supreme Court of the Australian Capital Territory between 2009 and 2019, in which the defendant's Indigenous status was identifiable. We consider the extent and nature of engagement with Indigenous experience, finding a prevailing silence and limited evidence of strengths-based approaches. We argue that listening to First Nations voices in sentencing can provide a counterpoint to deficit discourses and a holistic understanding of the individual and their background, including the ongoing relevance of colonisation in their lives. The use of Indigenous Experience Reports to enable this listening may also promote strengths-based considerations and challenge the efficacy of carceral options.

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***** Lawyer, North Australian Aboriginal Justice Agency (BDEVS LLB). The authors acknowledge, celebrate and pay our respects to First Nations peoples on whose lands we meet and work, and whose cultures are among the oldest continuing cultures in human history. We acknowledge that sovereignty was never ceded and that this was and always will be Aboriginal land. We further acknowledge that, as non-Indigenous people, we are not of this land and do not speak with the voices of this land. We hope that this article highlights the need for all those who work in the criminal justice system and beyond to listen deeply to those voices. We would also like to extend our thanks to Justin McCaul, a proud Mbarbarum man and Associate Lecturer at the ANU College of Law, for his feedback on this research.

I INTRODUCTION: LISTENING AND HEARING

In 1995, in recognition of the over-representation of Aboriginal¹ people in its prisons, the Canadian Government amended its *Criminal Code* to provide, in section 718.2(e), that ‘all available sanctions other than imprisonment that are reasonable in the circumstances ... should be considered for all offenders, *with particular attention to the circumstances of aboriginal* [sic] offenders’.² In the 1999 case of *R v Gladue* (‘*Gladue*’),³ the Canadian Supreme Court considered the implications of this provision and determined that sentencing courts are required to recognise the adverse systemic and background factors that Aboriginal Canadians have faced and continue to face as a consequence of colonialism and consider all reasonable alternatives to imprisonment in light of this. In the 2012 decision of *R v Ipeelee*,⁴ the Supreme Court reaffirmed the need to fully acknowledge the oppressive environment faced by Aboriginal Canadians throughout their lives, as these ‘[s]ystemic and background factors ... provide the necessary context to enable a judge to determine an appropriate sentence’.⁵ This information is conveyed through ‘*Gladue* reports’, which are written by Aboriginal caseworkers with similar collective experience to the person before the court. They are different from the pre-sentence reports (‘PSRs’) produced by corrective services agencies, as their purpose is to identify material facts which exist as a consequence of the defendant’s Aboriginality. Notably, these reports consider the systemic and background factors relevant to the defendant, as well as the available culturally appropriate sentencing options. In addition, they situate the ‘offending behaviour within the collective history of Aboriginal Canadians, highlighting the link between individual and collective experience’,⁶ and explore options for healing and reform from this collective perspective.⁷ *Gladue* reports have been described as ‘indispensable’ by the Supreme Court of Canada.⁸

In 2013, the High Court of Australia handed down its decision in *Bugmy v The Queen* (‘*Bugmy*’).⁹ Like Jamie Gladue and Manasie Ipeelee in Canada, William Bugmy, a 29-year-old Aboriginal man from a remote town in New South Wales (‘NSW’), had experienced the deleterious effects of colonisation. The High Court held that deprivation is a relevant consideration in sentencing, such that ‘it is right

1 Throughout this article, the term ‘Aboriginal’ is used interchangeably with ‘Indigenous’, ‘Aboriginal and Torres Strait Islander’, and ‘First Nations’, as appropriate, and as it relates to peoples and their experiences, unless more specific identification is necessary.

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

3 [1999] 1 SCR 688 (‘*Gladue*’). For discussion, see Thalia Anthony, Lorana Bartels and Anthony Hopkins, ‘Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice’ (2015) 39(1) *Melbourne University Law Review* 47.

4 [2012] 1 SCR 433 (‘*Ipeelee*’).

5 Ibid 483 [83] (LeBel J for McLachlin CJ, Binnie, LeBel, Deschamps, Fish and Abella JJ).

6 Anthony Hopkins, Submission No 9 to Standing Committee on Justice and Community Safety, Australian Capital Territory Legislative Assembly, *Inquiry into Sentencing* (14 October 2013) 7.

7 See further Anthony, Bartels and Hopkins (n 3) 58–9.

8 *Ipeelee* (n 4) 469 [60] (LeBel J for McLachlin CJ, Binnie, LeBel, Deschamps, Fish and Abella JJ).

9 (2013) 249 CLR 571 (‘*Bugmy*’).

to speak of giving “full weight” to an offender’s deprived background in every sentencing decision’.¹⁰ More broadly, the High Court affirmed the approach taken by Brennan J in *Neal v The Queen* that ‘in imposing sentences courts are bound to take into account ... all material facts including those facts which exist only by reason of the offender’s membership of an ethnic or other group’.¹¹

However, the High Court refused to accept that judicial notice should be taken of the systemic background of deprivation of many Indigenous defendants, holding that to do so would be ‘antithetical to individualised justice’.¹² The Court also declined to apply the Canadian principle that sentencing should promote restorative sentences for Indigenous defendants, given this often-present deprivation and their over-representation in prison on the basis, *inter alia*, that the relevant NSW legislation has no counterpart to section 718.2(e).¹³ Instead, and without recognition of the prevailing silence with respect to Indigenous experience in sentencing, or the absence of a mechanism such as *Gladue* reports for enabling Indigenous voices to be heard and for Indigenous experience to be understood and taken into account, the High Court held that ‘[i]n 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*’.¹⁴ This necessity to point to evidence establishing material facts in the life of a defendant applies both with respect to facts which establish experiences of disadvantage and of advantage, understood as the potential an Indigenous defendant may have to draw upon the collective strength of community, culture and connection to find a path to healing. The High Court’s approach also appears to have emphasised

10 Ibid 595 [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

11 (1982) 149 CLR 305, 326 (Brennan J), quoted in *ibid* 593 [39].

12 *Bugmy* (n 9) 594 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). For criticism of the High Court’s approach, and the failure to recognise that taking judicial notice in this context is only the first step in achieving an individualised sentence that accounts for systemic and background factors existing in the life of a person facing sentence as a consequence of their experience as an Indigenous person, see Anthony, Bartels and Hopkins (n 3) 67–71.

13 See *Bugmy* (n 9) 592 [36] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), where their Honours noted that an ‘evident point of distinction between the legislative principles governing the sentencing of offenders in Canada and those that apply in New South Wales is that [section] 5(1) of the *Sentencing Act* does not direct courts to give particular attention to the circumstances of Aboriginal offenders’.

14 *Bugmy* (n 9) 594 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (emphasis added). In response, the New South Wales (‘NSW’) Public Defenders developed the *Bugmy Bar Book*. It ‘summaris[es] key research about the impacts of experiences of disadvantage and strengths-based rehabilitation ... to assist legal practitioners in the preparation and presentation of evidence to establish the application of the sentencing principles in *Bugmy*’ and currently includes chapters on: acquired brain injury; childhood sexual abuse; COVID-19 risks and impacts for prisoners; cultural dispossession; early exposure to alcohol and other drug abuse; exposure to domestic and family violence; fetal alcohol spectrum disorders; hearing impairment; homelessness; incarceration of a parent or caregiver; interrupted school attendance and suspension; low socio-economic status; out-of-home care; social exclusion; Stolen Generations and descendants; unemployment; impacts of imprisonment and remand in custody; and refugee background. Chapters on child abuse and neglect, and the significance of sorry business and funeral attendance are listed as forthcoming: see *Bugmy Bar Book* Project Committee, *Bugmy Bar Book* (NSW Public Defenders, 28 November 2022) <<https://www.publicdefenders.nsw.gov.au/barbook>>.

formal, rather than substantive, equality, as the Canadian Supreme Court, albeit supported by the *Canadian Charter of Rights and Freedoms*,¹⁵ was prepared to do.

In late 2017, the Australian Law Reform Commission ('ALRC') completed its report, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* ('*Pathways to Justice*').¹⁶ The report made 35 recommendations, including that:

- sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples;¹⁷ and
- state and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.¹⁸

In addition to recommending the reform of sentencing legislation and the introduction of Indigenous Experience Reports, the ALRC called for the expansion of Indigenous sentencing courts, with First Nations Elders overseeing the process.¹⁹ While our article is focused on discourses in sentencing and discusses the use of Indigenous Experience Reports to disrupt racist deficit discourses in sentencing, it is beyond our scope to consider the impacts this will have on reducing incarceration. Although we anticipate that fuller information from First Nations peoples' lived experience will generate better sentencing outcomes for First Nations defendants, institutional racism manifests beyond the sentencing process and will continue to have its pull on carceral levers.

Indigenous Experience Reports seek to offset biases in sentencing, which this article finds in relation to prevailing silence and deficit discourses about First Nations defendants in Australian Capital Territory ('ACT') sentencing remarks. By introducing First Nations perspectives and providing a forum where the person's needs and circumstances are more fully considered and accommodated, Indigenous Experience Reports are capable of offsetting the slanted focus on risk and deficit. The ALRC noted that Indigenous Experience Reports are 'intended to promote a better understanding' of the individual, their background, community and culture,

15 *Canada Act 1982* (UK) c 11, sch B, pt I, s 15 ('*Constitution Act 1982*').

16 Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) ('*Pathways to Justice*').

17 Ibid 14 (Recommendation 6–1).

18 Ibid (Recommendation 6–2). The Australian Law Reform Commission also recommended developing 'options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples in the courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means': at 14 (Recommendation 6–3).

19 Ibid 16 (Recommendation 10–3). Relevant Aboriginal and Torres Strait Islander organisations should play a central role in the design, implementation and evaluation of specialist Aboriginal and Torres Strait Islander sentencing courts.

including historical experiences of colonisation and racism.²⁰ It quoted Jonathan Rudin, Program Director of Aboriginal Legal Services in Toronto, Ontario:

Gladue reports tend to be written in the words of the people we interview ... we are not summarising what someone says, we are using their language. We don't edit it, we don't do anything with it, here is their story [so] what you get are the voices of the individuals who are involved in the person's life. And certainly that's very rare because you can go through the court system in Canada from charge to plea, and if you are an accused person you may never say a word to the court.²¹

Significantly, *Gladue* reports are written to centre the defendant's 'voice' and 'story'. Report-writing practices in Canada, and more recently in Australia, have identified protocols for defendants, their families and communities to share their stories in relation to the defendant and for these accounts to be meaningfully captured in reports.²² Protocols include that:

- the report service is located in a First Nations organisation;
- reports are prepared by First Nations writers with shared lived experience;
- First Nations case workers support the defendant;
- a therapeutic narrative approach enables the story to be guided by the person's life history (rather than fixed questions);²³ and
- meetings occur in culturally safe, private spaces of the First Nations person's choice.²⁴

In recommending Indigenous Experience Reports, the ALRC stated that:

[I]n the courts of superior jurisdiction (District/County and Supreme Courts), taking account of unique systemic and background factors should be done through the submission of 'Indigenous Experience Reports', ideally prepared by independent Aboriginal and Torres Strait Islander organisations. In the courts of summary jurisdiction (Local or Magistrates Courts) where offenders are sentenced for lower level offending, and time and resources are limited, the ALRC recommends that courts accept evidence in support of the provisions through less formal methods.²⁵

The ALRC considered such reports one avenue for 'addressing the over-representation of Aboriginal and Torres Strait Islander peoples in prison'.²⁶ This recognises that hyper-incarceration occurs, inter alia, because courts do not listen, and because there is no space in which the voices and strengths of the person being sentenced, their family and their community can be heard and taken into account. As discussed below, the ways in which the person is construed in sentencing remarks, as well as PSRs and psychiatric or psychological reports, can marginalise their voice and elevate a discourse of deficit. The person is measured against risk

20 Ibid 202 [6.68].

21 Ibid 202 [6.69], quoting 'Canada's Approach to Sentencing Aboriginal Offenders', *The Law Report* (ABC Radio National, 23 August 2016) <<https://www.abc.net.au/radionational/programs/lawreport/canada-gladue/7772298>>.

22 Thalia Anthony et al, 'Individualised Justice through Indigenous Community Reports in Sentencing' (2017) 26(3) *Journal of Judicial Administration* 121 ('Individualised Justice').

23 On narrative therapy, see Barbara Wingard and Jane Lester, *Telling Our Stories in Ways That Make Us Stronger* (Dulwich Centre Publications, 2001).

24 Sébastien April and Mylène Magrinelli Orsi, 'Gladue Practices in the Provinces and Territories' (Research Report, Research and Statistics Division, Department of Justice Canada, 2013) 16–19, 23–4.

25 *Pathways to Justice* (n 16) 29.

26 Ibid 202 [6.68].

metrics and their sentence is determined with reference to their limitations, rather than strengths.

In 2017, before the ALRC report was finalised, the ACT Government committed to ‘trial[ling] specialised sentencing reports for Aboriginal and Torres Strait Islander offenders in a bid to reduce incarceration rates and increase rehabilitation prospects’.²⁷ The Government commissioned a consultation report and,²⁸ in 2018, announced that the reports would be called ‘*Ngattai* reports’.²⁹ Significantly, *Ngattai* (pronounced ‘Nartay’) means ‘listen’ in Ngunnawal, the language of some of the traditional owners and custodians of the Canberra region in the ACT. The word *Ngattai* was gifted to the ACT Government for use as the title of proposed Aboriginal and Torres Strait Islander experience court reports. Inspired by and modelled on *Gladue* reports, *Ngattai* reports are intended to assist courts in sentencing for criminal offences, by providing ‘information about the background and experiences of Aboriginal and Torres Strait Islander offenders, and culturally appropriate rehabilitation options’.³⁰ At the time of writing, the *Ngattai* report trial is yet to commence.

The word ‘listen’ speaks of the problem and the remedy: a failure to listen to Indigenous voices and a structural solution that enshrines listening and responding to those voices. This proposition is central to the ‘call for the establishment of a First Nations Voice enshrined in the *Constitution*’, contained in the Uluru Statement from the Heart.³¹ In the constitutional context, this is conceptualised as a Voice to the Federal Parliament. As a principle, it reaches far beyond any one institution. Voice and its correlate, listening, go to the heart of the exercise of power by institutions of the state over Aboriginal and Torres Strait Islander peoples, not least the exercise of power within the criminal justice system. In this context, it is important to recognise that the Uluru Statement challenges the structural problem inherent in the penal system and misrepresentations of Indigenous people as offenders. Poignantly, it states: ‘Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people.’³²

First Nations sentencing reports, by whatever name, enable listening to the individual, their family and community to provide a layered and contextual understanding of the person’s life. They also provide a mechanism for the courts to hear about the institutional harms, discrimination and structural exclusion that have impacted them, as well as the strengths and resources available to them in

27 Michael Inman, ‘ACT Set to Trial Sentencing Reports for Indigenous Offenders, like Canada’s *Gladue* Reports’, *The Canberra Times* (online, 6 August 2017) <<https://www.canberratimes.com.au/story/6029810/act-set-to-trial-sentencing-reports-for-indigenous-offenders-like-canadas-gladue-reports/>>.

28 Legal Aid Australian Capital Territory, *Aboriginal & Torres Strait Islander Experience Court Reports* (Consultation Report, June 2017).

29 Australian Capital Territory Government, *Aboriginal & Torres Strait Islander Experience Court Reports* (Web Page, 26 June 2018) <<https://www.justice.act.gov.au/aboriginal-torres-strait-islander-experience-court-reports>>.

30 Ibid.

31 Referendum Council, ‘Uluru Statement from the Heart’ (Statement, First Nations National Constitutional Convention, 26 May 2017).

32 Ibid.

the face of this harm. In 1991, the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') noted the importance of understanding an Aboriginal person's experiences broadly and how they were failed by penal interventions and other institutions. It identified the limitations of 'official records' to provide 'truth', observing that:

What did emerge was that to understand the last hours of life of each individual and to truly understand the circumstances of their deaths Commissioners had to know the whole life of the individuals and, equally important, had to understand the experience of the whole Aboriginal community through their two hundred years of contact with non-Aboriginal society.³³

Sentencing is a critical juncture in the penal system in which decisions to imprison are made. Approximately two thirds of people in Australian prisons are sentenced to prison, with the remaining third on remand.³⁴ Sentencing courts are the gatekeeper for imprisonment, compounding the decisions of police, prosecutors, bail courts and corrections. They are implicated in the high levels of incarceration and therefore need to be a site for transformation, through new practices, narratives and ways of listening.

Against the background of this call for listening to First Nations' voices and experiences in sentencing, this article explores the *extent* and *nature* of listening in the sentencing judgments of the Supreme Court of the ACT between 2009 and 2019. The ACT was chosen because of the likelihood that a *Ngattai* report trial will commence in Supreme Court in the near future. Should this occur, baseline data drawn from just over a decade of decisions will enable comparison on at least two measures of success, those being the *extent* to which First Nations' voices and experiences are considered in the text of sentencing decisions, and the *nature* of that consideration. The *nature* of consideration is critically important, as a simple increase in the *extent* or volume of consideration will not provide a sufficient picture of whether any increased listening that emerges from the trial is strength-based, rather than deficit-based.

Beyond this, a study of the extent and nature of listening in the sentencing decisions of the Supreme Court of the ACT has the capacity to provide empirical support for the recommendations of the ALRC by establishing a baseline of relative silence that strengthens calls for implementation. It also has the capacity to inform that implementation by drawing attention to the ways in which strengths-based consideration can be enhanced and deficits-based consideration reduced.

In addition to enabling a before and after comparison in the ACT, this article sets out a methodology for undertaking a discourse analysis to establish the extent and nature of listening in sentencing that could be undertaken in any jurisdiction in which sentencing decisions are published in writing. This provides a foundation for cross-jurisdictional comparison within Australia and even internationally – most

33 Royal Commission into Aboriginal Deaths in Custody (Final Report, April 1991) vol 1 [1.2.15].

34 Australian Bureau of Statistics, *Prisoners in Australia, 2021* (Catalogue No 4517.0, 9 December 2021) <<https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2021#media-releases>> ('*Prisoners in Australia*').

particularly, with Canadian jurisdictions in which *Gladue* reports are routinely received in evidence.

This article proceeds in four Parts. In Part II, we consider the features of deficit-based and strengths-based discourse to establish a framework for evaluating the discourse contained in sentencing decisions of the Supreme Court of the ACT. Part III then sets out the methodology for the study, as well as the findings, both with respect to the extent and nature of consideration. Finally, in Part IV, we call for a pivot towards strengths-based approaches based in First Nations self-determination that shift institutional power and promote listening, challenging rather than reinforcing, criminogenic stereotypes that have contributed to hyper-incarceration.

In so doing, we do not assert that such an approach will, in and of itself, result in a reduction in the over-incarceration of Aboriginal and Torres Strait Islander people in the Australian criminal justice system. The reasons for this over-representation are varied and complex, and the solutions lie principally outside the courtroom and should be led by Aboriginal and Torres Strait Islander communities. The scope of this article is more modest, in that it makes an important contribution to our understanding of sentencing jurisprudence through an analysis of all the decisions we were able to identify, over more than a decade, in which an Indigenous defendant appeared before the ACT Supreme Court for sentencing. By examining both the quantum and quality of the Court's consideration in these cases, we demonstrate that there is a prevailing silence and limited evidence of strengths-based approaches.

A A Note on Colonial-Carceral Logics and a More General Failure to Listen

Measures to promote voice and listening in sentencing as a step towards decarceration need to be understood alongside structural issues identified in prison abolitionist debates that identify the colonial-carceral logic that underlies the hyper-incarceration of First Nations people.³⁵ From this perspective, First Nations reports can also be seen to provide resistance through truth-telling.³⁶ They challenge colonial-carceral logics of segregation and containment of First Nations societies.³⁷ Since the colonisation of NSW in 1788 and the British Crown seizing First Nations land, Indigenous peoples have been governed through containment and segregation – on and in ration depots, missions, government settlements, hospital lockups, police paddocks and stations. When the discriminatory Aboriginal Protection Acts and similar legislation were eventually repealed in the 1950s, the police took over from Aboriginal Protectors as the arbiters of Aboriginal movement.³⁸ From

35 See broadly Michael J Coyle and Judah Schept, 'Penal Abolition and the State: Colonial, Racial and Gender Violences' (2017) 20(4) *Contemporary Justice Review* 399 <<https://doi.org/10.1080/10282580.2017.1386065>>.

36 On resistance through truth telling, see Jeff Corntassel, Chaw-win-is and T'lakwadzi, 'Indigenous Storytelling, Truth-Telling, and Community Approaches to Reconciliation' (2009) 35(1) *English Studies in Canada* 137, 147 <<https://doi.org/10.1353/esc.0.0163>>.

37 Sabrina Axster et al, 'Colonial Lives of the Carceral Archipelago: Rethinking the Neoliberal Security State' (2021) 15(3) *International Political Sociology* 415 <<https://doi.org/10.1093/ips/olab013>>.

38 See, eg, *Aborigines Protection Act 1909* (NSW); *Aborigines Act 1969* (NSW).

the 1960s and 1970s, penal carceralism in police watchhouses, youth detention centres and prisons became the mainstay for detaining First Nations peoples.³⁹ The NSW/ACT Aboriginal Legal Service, which was formed in 1970 by Aboriginal activists and their allies, noted how ‘the police and the courts’ are fundamental to ‘the oppression of Aboriginal peoples’.⁴⁰

Hand-in-hand with the rise of First Nations people in penal custody came deaths in custody and, by the 1980s, mass mobilisations for change, accountability and justice. The legal system was accused of not listening, at best, and concealing the truth, at worst. This prompted the announcement of the RCIADIC on 10 August 1987. It investigated 99 deaths and made findings and recommendations on the failures of penalty, including the court system. It pointed to the harms of colonisation and promoted Aboriginal self-determination.

It is now 32 years since the *Royal Commission into Aboriginal Deaths in Custody Final Report* was handed down, and there have been at least 527 more First Nations deaths in custody.⁴¹ The response of successive Australian governments to RCIADIC has been a process of listening without hearing.⁴² Both prison rates and the number of deaths in custody have increased, due to governments’ failure to heed its recommendations.⁴³ RCIADIC found that the major problem underlying deaths in custody was the over-imprisonment of First Nations people. In 1991, First Nations people constituted 14% of the prison population; by 2022, this hyper-incarceration had reached 31%.⁴⁴ Furthermore, Indigenous women represented 39% of the adult female prison population,⁴⁵ while 53% of young people in detention in 2020–21 were Indigenous.⁴⁶ Listening without doing justice entrenches the injustice.

Evidence of governments’ failure to listen has been reinforced following the release of the ALRC’s *Pathways to Justice* report. As set out above, the ALRC report made 35 urgent recommendations, including the importance of the legal system, and the courts in particular, listening to the voices of First Nations people. Five years

39 Harry Blagg and Thalia Anthony, *Decolonising Criminology: Imagining Justice in a Postcolonial World* (Palgrave Macmillan, 2019) 121–2.

40 Aboriginal Legal Service (NSW/ACT), *Our History* (Web Page) <<https://web.archive.org/web/20220301063938/https://www.alsnswact.org.au/about>>.

41 Australian Institute of Criminology, ‘Deaths in Custody Australia’, *Statistics* (Web Page, 29 November 2022) <<https://www.aic.gov.au/statistics/deaths-custody-australia>>.

42 This term was used in relation to government consultation on Indigenous issues in other contexts: Alastair Nicholson et al, *Listening but Not Hearing: A Response to the NTER Stronger Futures Consultations June to August 2011* (Report, Jumbunna Indigenous House of Learning, University of Technology Sydney, March 2012).

43 Thalia Anthony et al, ‘30 Years On: Royal Commission into Aboriginal Deaths in Custody Recommendations Remain Unimplemented’ (Working Paper No 140/2021, Centre for Aboriginal Economic Policy Research, Australian National University, April 2021) 2 <<https://doi.org/10.25911/22AJ-0608>>.

44 Australian Bureau of Statistics, *Corrective Services, Australia, March Quarter 2022* (Catalogue No 4512.0, 9 June 2022) <<https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/mar-quarter-2022>>.

45 Ibid.

46 Australian Institute of Health and Welfare, *Youth Justice in Australia 2020–21* (Report No JUV 138, 31 March 2022) 11 <<https://doi.org/10.25816/53k2-5w18>>.

after the report was tabled, the Federal Government, which instigated the inquiry, and state and territory governments have shamefully failed to respond to the ‘blueprint for addressing disproportionately high Indigenous incarceration rates’.⁴⁷

II HOW EXPERIENCE IS CONSIDERED: DEFICIT- OR STRENGTHS-BASED DISCOURSE

In what follows, we provide a sketch of the features of deficit- and strengths-based discourse. The purpose is to identify and clarify key features of these opposing approaches, thereby enabling features to be recognised in the discourse of the courts and, for that matter, in the language of those who prosecute, defend or write reports in relation to Aboriginal and Torres Strait Islander people. Deficit approaches inhere in concepts of criminogenic risks and needs, and their attendant assessment frameworks and metrics. This is apparent in the pre-sentencing risk assessment framework that Australian jurisdictions,⁴⁸ including the ACT, adopted from Canada.⁴⁹ These frameworks normalise a deficit understanding of people in the criminal justice system and (re)produce bias, especially for First Nations people.⁵⁰

Why does this matter? There is a growing body of work in the fields of health and wellbeing research, establishing the negative impact of deficit discourse on Indigenous people(s).⁵¹ In particular, this article relies on the two-part series of reports examining deficit discourse in the Indigenous health sector, produced by Australia’s National Institute for Aboriginal and Torres Strait Islander Health Research, the Lowitja Institute. The first report, *Deficit Discourse and Indigenous Health*, informed our understanding of the patterning of deficit discourse in academic and policy literature.⁵² The second, *Deficit Discourse and Strengths-based Approaches*, elucidated what constitutes deficit-based discourse and provided examples of strengths-based approaches working to shift the deficit

47 Stephen Fitzpatrick, ‘Government Urged to Act on Indigenous Jail Rates’, *The Australian* (online, 18 September 2018) <<https://www.theaustralian.com.au/national-affairs/indigenous/government-urged-to-act-on-indigenous-jail-rates/news-story/0981da518fd6635bfb219db37b41097f>>.

48 On criticisms of the Australian PSR assessments, see Anthony et al, ‘Individualised Justice’ (n 22) 126–9.

49 The tool is the ‘Utility of Level of Service Inventory – Revised’, an actuarial assessment tool designed to identify the defendants’ risks and needs with regard to recidivism. For comment on the Canadian model, see Kelly Hannah-Moffatt and Paula Maurutto, ‘Re-contextualizing Pre-sentence Reports: Risk and Race’ (2010) 12(3) *Punishment and Society* 262 <<https://doi.org/10.1177/1462474510369442>>.

50 Stephane M Shepherd and Thalia Anthony, ‘Popping the Cultural Bubble of Violence Risk Assessment Tools’ (2018) 29(2) *Journal of Forensic Psychiatry and Psychology* 211, 212–13 <<https://doi.org/10.1080/14789949.2017.1354055>>.

51 See, eg, Yin Paradies, Ricci Harris and Ian Anderson, ‘The Impact of Racism on Indigenous Health in Australia and Aotearoa: Towards a Research Agenda’ (Discussion Paper No 4, Cooperative Research Centre for Aboriginal Health, March 2008) 9–10; Juanita Sherwood, ‘Colonisation – It’s Bad for Your Health: The Context of Aboriginal Health’ (2013) 46(1) *Contemporary Nurse* 28, 37.

52 Will Fogarty et al, *Deficit Discourse and Indigenous Health: How Narrative Framings of Aboriginal and Torres Strait Islander People Are Reproduced in Policy* (Report, Lowitja Institute, May 2018) (*‘Deficit Discourse and Indigenous Health’*).

narrative in the Indigenous health sector.⁵³ Though there is only a small body of research on the negative impact of deficit discourse in sentencing Aboriginal and Torres Strait Islander people, it stands to reason that a similar negative impact is to be expected. Indeed, making the case for the use of strengths-based approaches generally, Ghungalu man Mick Gooda argued that it is ‘almost intuitive that we should be using a strengths-based approach when addressing Aboriginal and Torres Strait Islander disadvantage’.⁵⁴ However, beyond disadvantage, sentencing must encapsulate the person’s contribution to their community, family and culture, meaningful relationships, interests and passions, sense of purpose, achievements, and times when things have worked well in their life. These are all relevant considerations to the future direction in their life. A strengths-based approach to First Nations people before the sentencing courts humanises First Nations people, because it enables judicial officers to see them as whole people, whose identity is not pinned to a sum of flaws. This is not simply aspirational, but also requires courts to draw on First Nations expertise, to guide how the person could be supported by their community and, in turn, contribute to their community.

The term ‘discourse’ extends beyond how perceptions are expressed through language. It refers to ‘systems of thoughts composed of ideas, attitudes, courses of actions, beliefs and practices that shape reality by systemically constructing the subjects and the worlds of which they speak’.⁵⁵ Discourse is shaped and comprehended by frame-based knowledge.⁵⁶ Frames are conceptual representations of experience that define situations, provide an event structure, and enable people to understand how the event fits into a whole, how it is unfolding and predict what will happen next.⁵⁷ In turn, discourse shapes what is considered ‘true’ and influences individual and group relationships.⁵⁸

Critical discourses can be relevant, where they identify how institutions have failed. This includes harmful police and corrections treatment of First Nations communities;⁵⁹ racism in education, healthcare and/or access to housing and social security; child protection interventions; dispossession of land; and cultural practices that result in ‘crimes’.⁶⁰ Cunneen has warned that considerations in sentencing

53 Will Fogarty et al, *Deficit Discourse and Strengths-based Approaches: Changing the Narrative of Aboriginal and Torres Strait Islander Health and Wellbeing* (Report, Lowitja Institute, May 2018) (‘*Deficit Discourse and Strengths-based Approaches*’).

54 Mick Gooda, ‘Navigating Away from the Discourse of Disadvantage’ (Conference Paper, Australian Institute of Aboriginal and Torres Strait Islander Studies, National Indigenous Studies Conference, 2009), cited in *ibid* 4.

55 Seán Kerins, ‘Caring for Country to Working on Country’ in Jon Altman and Seán Kerins (eds), *People on Country: Vital Landscapes, Indigenous Futures* (Federation Press, 2012) 26, 26, quoted in *Deficit Discourse and Strengths-based Approaches* (n 53) 2.

56 Michelle Aldridge and June Luchjenbroers, ‘Constructing Vulnerability: The Experience of Children and Other Groups within Legal Discourse’ in Christopher N Candlin and Jonathan Crichton (eds), *Discourses of Deficit* (Palgrave Macmillan, 2011) 25, 29.

57 *Ibid*.

58 *Deficit Discourse and Strengths-based Approaches* (n 53) 2.

59 Chelsea Bond, David Singh and Helena Kajlich, *Not a One-Way Street: Understanding the Overrepresentation of Aboriginal and Torres Strait Islander Peoples on Charges of Assaults against Public Officers* (Report, July 2020) 15–22.

60 See, eg, *Walden v Hensler* (1987) 163 CLR 561.

relating to the detriment caused by ‘the structural effects of colonialism’ to exclude and marginalise First Nations people should not be treated as a First Nations problem.⁶¹ Rather, they should be viewed as a societal problem that contributes to over-representation.⁶² The response, as recognised by the Canadian Supreme Court in *Gladue*, therefore, is the courts’ responsibility:

Sentencing judges are among those decisionmakers who have the power to influence the treatment of aboriginal [sic] offenders in the justice system. They determine most directly whether an aboriginal [sic] offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.⁶³

A Features of Deficit-based Discourse

Deficit-based discourse ‘is a mode of thinking that frames and represents Aboriginal and Torres Strait Islander people in a narrative of negativity, deficiency and failure’.⁶⁴ Discussions of the socio-economic disadvantage faced by Aboriginal and Torres Strait Islander peoples are not of themselves deficit-based discourse.⁶⁵ Deficit-based discourse occurs when these discussions, which paradoxically are often aimed at alleviating disadvantage, become ‘reductionist narratives of failure and dysfunction’.⁶⁶ In the words of Ambelin Kwaymullina, who belongs to the Palyku people:

To be clear, not every discourse that acknowledges Indigenous disadvantage is one of deficit. A deficit discourse is one that speaks of disadvantage as if that is all Aboriginal people are and which expressly or implicitly regards disadvantage as a function of Aboriginality.⁶⁷

Expressed another way, deficit narratives present disadvantage as an inherent quality of being Indigenous, rather than a consequence of colonial oppression and structural forces bearing upon Indigenous peoples over multiple generations.⁶⁸ Such presentations deny the truth of history, reinforce colonial ideologies and interventions, and can compound intergenerational trauma and socio-economic disadvantage.⁶⁹ Further, they seek to ‘fix’ Indigeneity, rather than identifying the

61 Chris Cunneen, ‘Sentencing, Punishment and Indigenous People in Australia’ (2018) 3(1) *Journal of Global Indigeneity* 4:1–22, 8.

62 Ibid 19.

63 *Gladue* (n 3) 723 [65] (Cory and Iacobucci JJ for the Court).

64 *Deficit Discourse and Indigenous Health* (n 52) 3, citing Cressida Fforde et al, ‘Discourse, Deficit and Identity: Aboriginality, the Race Paradigm and the Language of Representation in Contemporary Australia’ (2013) 149(1) *Media International Australia* 162 <<https://doi.org/10.1177/1329878X1314900117>>; Scott Gorringer, ‘Aboriginal Culture Is Not a Problem. The Way We Talk about It Is’, *The Guardian* (online, 15 May 2015) <<https://www.theguardian.com/commentisfree/2015/may/15/aboriginal-culture-is-not-a-problem-the-way-we-talk-about-it-is>>.

65 *Deficit Discourse and Strengths-based Approaches* (n 53) 2; Cunneen (n 61) 4.

66 *Deficit Discourse and Indigenous Health* (n 52) 5.

67 Ambelin Kwaymullina, ‘Teaching for the 21st Century: Indigenising the Law Curriculum at UWA’ (2019) 29(1) *Legal Education Review* 1, 8 <<https://doi.org/10.53300/001c.12080>>.

68 Cunneen (n 61) 18.

69 See, eg, Paradies, Harris and Anderson (n 51); Joanne N Luke et al, ‘Suicide Ideation and Attempt in a Community Cohort of Urban Aboriginal Youth: A Cross-Sectional Study’ (2013) 34(4) *Crisis* 251 <<https://doi.org/10.1027/0227-5910/a000187>>.

strengths of culture and community, and recognising the myriad unique experiences of Aboriginal and Torres Strait Islander peoples, their resilience and resurgence. Inversely, highlighting the deficiencies of the system that benefits from its power and privilege over First Nations people can contribute to changing the system. This can open up critical discussions on carceralism, as a choice of those in power and prison abolition as a shift in power relations. Returning to the language of courts, the deficits of prisons and their risk of retraumatising First Nations people is largely unaddressed. Instead, the reliance is on the faults of individuals.

A review of the literature, predominantly in the fields of health and education, reveals a number of intersecting and overlapping features, including an emphasis on deficiencies and failures;⁷⁰ ‘problematism’;⁷¹ comparison with a mythological ‘mainstream’ society;⁷² and responsibility being placed on individuals, rather than with systemic and social forces.⁷³ In the sentencing context, which is explored further below, the ALRC quoted the Aboriginal Legal Service of Western Australia’s reference to ‘deficit-focused’ PSRs and psychological reports in sentencing that constantly reference ‘failings’, ‘cognitive deficits’ and ‘poor past compliance with community based dispositions’.⁷⁴ This paints a picture of individual failure, due to personal choices. It deflects from the design of the penal system to incarcerate en masse.

1 *Emphasis on Deficiencies and Failures*

A key feature of deficit-based discourse is the emphasis on the perceived deficiencies and failures of individuals.⁷⁵ Firstly, this feature may arise where descriptors such as ‘disadvantaged’, ‘deficient’ and ‘lacking capacity’ are used when discussing Aboriginal and Torres Strait Islander peoples.⁷⁶ These descriptions

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- 70 See, eg, Kerry McCallum, Tess Ryan and Jo Caffery, ‘Deficit Metrics in Australian Indigenous Education: Through a Media Studies Lens’ (2020) 43(2) *Discourse: Studies in Cultural Politics of Education* 266 <<https://doi.org/10.1080/01596306.2020.1828285>>; Gorringer (n 64); *Deficit Discourse and Strengths-based Approaches* (n 53).
 - 71 See, eg, Bev Rogers, Melinda Thambi and Mariyam Shifana, ‘Unsettling the Familiar: Challenging Discourses of Deficit through the Hesitation and Pause of an Appreciative Lens’ (Conference Paper, Australian Association for Research in Education Conference, 2015); Michael Dodson, ‘The End in the Beginning: Re(de)finding Aboriginality’ [1994] (1) *Australian Aboriginal Studies* 2 (‘The End in the Beginning’).
 - 72 See, eg, Michael Atkinson, ‘Dialogue, Morality and the Deadly Questions Campaign: Reconstructing, Reviewing and Revaluing Victorian Aboriginality’ [2019] (2) *Australian Aboriginal Studies* 112; *Deficit Discourse and Strengths-based Approaches* (n 53); Renée Monchalain et al, ‘Sexy Health Carnival on the Powwow Trail: HIV Prevention by and for Indigenous Youth’ (2016) 11(1) *International Journal of Indigenous Health* 159 <<https://doi.org/10.18357/ijih111201616011>>.
 - 73 See, eg, *Deficit Discourse and Strengths-based Approaches* (n 53); Atkinson (n 72); Shelley Bielefeld and Fleur Beaupert, ‘Income Management and Intersectionality: Analysing Compulsory Income Management through the Lenses of Critical Race Theory and Disability Studies (“Discrit”)’ (2019) 41(3) *Sydney Law Review* 327.
 - 74 *Pathways to Justice* (n 16) 219 [6.135], quoting Aboriginal Legal Service of Western Australia, Submission No 74 to Australian Law Reform Commission, *Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (11 September 2017) 17.
 - 75 Gorringer (n 64); McCallum, Ryan and Caffery (n 70).
 - 76 Fiona Campbell, ‘Deficit Discourse: The “Regime of Truth” Preceding the Cape York Welfare Reform’ (2019) 28(3) *Griffith Law Review* 303, 310 <<https://doi.org/10.1080/10383441.2019.1690739>>.

encompass value and moral judgments and contribute to negative stereotypes.⁷⁷ They are further encouraged through the application of risk-based metrics, such as the ‘Level of Service Inventory – Revised’, which are used for PSRs. Part of this metric, and the sentencing exercise more generally, places significant weight on prior criminal history. Criminal records are part of the deficit discourse that fails to comprehend the complicity of systems and structures in criminalising the individual.

Given that the exercise of sentencing discretion requires a consideration of disadvantage existing in the life of a defendant, the concern here is with the emphasis, balance, nature and context of the consideration. The High Court in *Bugmy* stated that a person’s disadvantaged background must be given ‘full weight’.⁷⁸ But its significance is only apparent when understood as a burden on the person’s choices, rather than arising *from* their choices. When disadvantage is framed in a way that sees disadvantage as a personal problem or choice,⁷⁹ overlooking the larger socio-economic and historical structures in which that experience is embedded,⁸⁰ it contributes to a perspective that the individual has failed.

2 Problematising

Another closely related feature of deficit-based discourse arises where discussions of disadvantage become so mired in narratives of ‘inferiority’ and ‘failure’ that those experiencing the disadvantage are seen and situated as the ‘problem to be solved’.⁸¹ Problems are seen as disruptions to an otherwise ‘smoothly functioning’ society that need to be eliminated.⁸² Any consideration framed in this way, or based on this way of thinking, involves the assertion of a colonial hierarchy and the denial of equality. In so doing, it prevents approaches that seek to promote understanding, rehabilitation and healing through partnership with the person and their community. It also precludes understandings of crime as an artificial construct, created for the purpose of social control. Nowhere is this more evident than in the criminalisation of public order offences and offences against justice procedures, which disproportionately capture First Nations people.⁸³

3 Comparison with Mythological ‘Mainstream’ Society

Deficit-based discourse also positions Aboriginal and Torres Strait Islander people against perceived norms and values of a mythological ‘mainstream’

77 Ibid.

78 *Bugmy* (n 9) 595 [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

79 Gorringe (n 64); McCallum, Ryan and Caffery (n 70).

80 *Deficit Discourse and Strengths-based Approaches* (n 53) vi.

81 Dodson, ‘The End in the Beginning’ (n 71) 3. See also Patrick Dodson, ‘Beyond the Mourning Gate: Dealing with Unfinished Business’ (Wentworth Lecture, Australian Institute of Aboriginal and Torres Strait Islander Studies, 12 May 2000) 9–10 <https://aiatsis.gov.au/sites/default/files/research_pub/2000-wentworth-dodson-patrick-mourning-gate-unfinished-business.pdf>, quoted in Kwaymullina (n 67) 8–9; *Deficit Discourse and Strengths-based Approaches* (n 53).

82 Rogers, Thambi and Shifana (n 71) 3.

83 *Pathways to Justice* (n 16) 114–15. See also New South Wales Bureau of Crime Statistics and Research, *New South Wales Custody Statistics: Quarterly Update June 2020* (Report, August 2020).

society.⁸⁴ Within this schematic, ‘success’ is defined by the characteristics of the non-Indigenous ideal.⁸⁵ There is an inherent tension here. On the one hand, these comparisons enable the identification of inequality.⁸⁶ On the other, such comparisons essentialise diverse populations into a single entity that is defined by a ‘failure’ to achieve ‘normality’.⁸⁷ Fogarty et al have suggested the response should not be to abandon all comparisons of experience, but rather to include discussions of strengths and shift the balance of these comparisons from a focus on disadvantage to *overcoming* disadvantage.⁸⁸ This goes with a recognition that a non-Indigenous frame of comparison – statistical or otherwise – fails to appreciate Aboriginal and Torres Strait Islander people’s concerns, ways of knowing and aspirations.⁸⁹ Moreover, it idealises the standards of the non-Indigenous population, without critically interrogating non-Indigenous access to health, education and jobs, as well as imprisonment and homelessness rates. In other words, it accepts the non-Indigenous status quo, without questioning how society may transform its structures holistically.

4 Responsibility Placed on Individuals

Deficit-based discourse places the responsibility for social disadvantage on the individual, rather than considering the broader social and political context.⁹⁰ Atkinson argued that the neo-conservatism of contemporary politics is quick to blame the disadvantaged person.⁹¹ By shifting the responsibility onto the individual, the discourse fails to consider the role that deeper underlying causes – such as colonialism, dispossession and racism – have on structuring present-day disadvantage.⁹² Cunneen expressed the point as a general charge levelled against mainstream sentencing courts as follows: ‘The way Indigeneity is considered by the mainstream courts remains captured within individualised conceptualisations predicated on various deficit discourses associated with being Indigenous’.⁹³

B Features of Strengths-based Discourse

The foregoing features may be contrasted with the features of a strengths-based approach, which offers a different language and frame for considering Aboriginal

84 Atkinson (n 72); Campbell (n 76).

85 Atkinson (n 72) 118.

86 *Deficit Discourse and Indigenous Health* (n 52) 14.

87 Ibid 17.

88 Ibid 15–16, citing Australian Council for Educational Research, *Review of the Overcoming Indigenous Disadvantage: Key Indicators* (Report, 30 June 2012) 17.

89 Monchalin et al (n 72) 163; Tahu Kukutai and Maggie Walter, ‘Recognition and Indigenizing Official Statistics: Reflections from Aotearoa New Zealand and Australia’ (2015) 31(2) *Statistical Journal of the International Association for Official Statistics* 317, 322 <<https://doi.org/10.3233/SJI-150896>>.

90 *Deficit Discourse and Indigenous Health* (n 52) 20.

91 Atkinson (n 72); Rogers, Thambi and Shifana (n 71) 2. See also *ibid*.

92 *Deficit Discourse and Indigenous Health* (n 52) 16.

93 Cunneen (n 61) 8.

and Torres Strait Islander experiences.⁹⁴ This frame rests on the recognition of colonialism, as well as the historical and present-day structural forces shaping Aboriginal and Torres Strait Islander lives, enabling a contextual strengths-based engagement with experience, including experiences of disadvantage. Features of a strengths-based approach and discourse include a focus on ‘assets’ and protective factors; the power of community, cultural connectedness and healing; and the adoption of decolonising approaches.⁹⁵

1 *Focusing on Assets and Protective Factors*

Within the frame of health discourse, *assets* are defined as ‘resources which individuals and communities have at their disposal, which protect against negative health outcomes and promote health status’.⁹⁶ These are equally important in supporting a person’s pathway from criminalisation. Examples of assets include knowledge, skills, networks and family and cultural identity.⁹⁷ While needs assessments tend to begin with what is missing or needed, an assets-based approach takes the resources of an individual and their community as a starting point.⁹⁸ This is closely allied with a focus on the existence of, or potential reconnection with, protective factors, such as those proposed by Henson et al in relation to Indigenous health: ‘aspirations, personal wellness, positive self-image, self-efficacy, non-familial connectedness, family connectedness, positive opportunities, positive social norms, and cultural connectedness’.⁹⁹ To take an example touching upon positive self-image and cultural connectedness, ‘pride in Aboriginality’ might be considered ‘a protective factor against racism’.¹⁰⁰ In relation to ‘aspirations’, Burns, Young and Nielsen argued that acknowledging ‘aspirations and perspectives as valid and unique’ has the capacity to address problematisation and promote empowerment through the adoption of a collaborative approach.¹⁰¹

94 *Deficit Discourse and Strengths-based Approaches* (n 53). See also Vanessa Edwige and Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation* (Report, June 2021).

95 *Deficit Discourse and Strengths-based Approaches* (n 53) 9.

96 Glasgow Centre for Population Health, ‘Asset Based Approaches for Health Improvement: Redressing the Balance’ (Briefing Paper No 9, Concept Series, October 2011) 2, quoted in *ibid*.

97 Mark Brough, Chelsea Bond and Julian Hunt, ‘Strong in the City: Towards a Strength-based Approach in Indigenous Health Promotion’ (2004) 15(3) *Health Promotion Journal of Australia* 215, cited in *Deficit Discourse and Strengths-based Approaches* (n 53) 9.

98 *Ibid*; Glasgow Centre for Population Health (n 96).

99 Michelle Henson et al, ‘Identifying Protective Factors to Promote Health in American Indian and Alaska Native Adolescents: A Literature Review’ (2017) 38(1–2) *Journal of Primary Prevention* 5, cited in *Deficit Discourse and Strengths-based Approaches* (n 53) 12.

100 *Deficit Discourse and Strengths-based Approaches* (n 53) 12, citing Naomi Priest et al, ‘Aboriginal Perspectives of Child Health and Wellbeing in an Urban Setting: Developing a Conceptual Framework’ (2012) 21(2) *Health Sociology Review* 180, 184 <<https://doi.org/10.5172/hesr.2012.21.2.180>>.

101 Marcelle Burns, Simon Young and Jennifer Nielsen, ‘“The Difficulties of Communication Encountered by Indigenous Peoples”: Moving Beyond Indigenous Deficit in the Model Admission Rules for Legal Practitioners’ (2018) 28(2) *Legal Education Review* 1, 9.

2 Community, Cultural Connectedness and Healing

A central feature of strengths-based approaches is an emphasis on the rehabilitative power of community and connection for First Nations peoples. In an international context, studies on historical loss and trauma have found that a critical factor for healing from colonial violence is reconnection with Indigenous notions of community.¹⁰² Similarly, in the Australian context, Fogarty et al argued that a strengths-based approach should emphasise the power of community.¹⁰³ This acknowledges that Aboriginal and Torres Strait Islander people often conceptualise health as a continuum of relationships ‘between people, the land and environment, tribes, families and ancestors’.¹⁰⁴ Understanding individual health as connected with the collective is central to an Indigenous understanding of healing that sees the process as both an individual and collective experience.¹⁰⁵ Indeed, Cunneen argued that ‘Indigenous healing approaches start with the collective experience and draw strength from Indigenous culture. Inevitably, that involves an understanding of the collective harms and outcomes of colonisation’.¹⁰⁶ Citing Benning, Cunneen continued: ‘[h]ealing is tied to Indigenous views of self-identity that are defined by kinship (including ancestry and communal bonds), spiritual relationships and responsibilities – all of which are inseparable from each other and the land and nature’.¹⁰⁷

3 Decolonising Approaches

In the field of health, a key feature of strengths-based approaches is the use of decolonising methodologies, recognising the colonial worldview and actively shifting discourse and engagement to emphasise Indigenous ways of knowing, thereby disturbing the colonial basis of deficit narratives.¹⁰⁸ As observed by Fogarty et al, Sweet et al suggested that decolonising methodologies engage with Aboriginal and Torres Strait Islander ‘multidimensional concepts of wellbeing, including social and emotional wellbeing’.¹⁰⁹ This involves appreciating ‘connection to land or “Country”, culture, spirituality, ancestry, family and community as central to Aboriginal and Torres Strait Islander Australians’ ways of understanding and conceptualising a sense of self, health and wellbeing’.¹¹⁰ To take an example, telling post-invasion stories,

102 Betty Bastien et al, ‘Healing the Impact of Colonization, Genocide, Missionization, and Racism on Indigenous Populations’ in Stanley Krippner and Teresa McIntyre (eds), *The Psychological Impact of War Trauma on Civilians* (Praeger, 2003) 25, 31–2.

103 *Deficit Discourse and Strengths-based Approaches* (n 53) 10.

104 Ibid 12; Shirley Tagalik, *A Framework for Indigenous School Health: Foundations in Cultural Principles* (Report, National Collaborating Centre for Aboriginal Health, 2010) 8.

105 See Linda Archibald, Aboriginal Healing Foundation, *Decolonisation and Healing: Indigenous Experiences in the United States, New Zealand, Australia and Greenland* (Report, 2006).

106 Cunneen (n 61) 15.

107 Ibid 16, citing Tony B Benning, ‘Western and Indigenous Conceptualizations of Self, Depression and Its Healing’ (2013) 17(2) *International Journal of Psychosocial Rehabilitation* 129, 130.

108 *Deficit Discourse and Strengths-based Approaches* (n 53) 13–14.

109 Ibid 14, citing Melissa A Sweet et al, ‘Decolonising Practices: Can Journalism Learn from Health Care to Improve Indigenous Health Outcomes?’ (2014) 200(11) *Medical Journal of Australia* 626 <<https://doi.org/10.5694/mja14.00528>>.

110 Ibid.

which focus on Indigenous voices and perspectives, can play a significant role in highlighting and challenging the legacy of colonialism.¹¹¹ Irene Watson, who belongs to the Tangane-kald, Meintangk and Boandik Peoples, suggested that making space for these accounts transforms deficit-based colonial narratives from depictions of victimhood to stories of strength, resistance and resurgence.¹¹²

In the context of the sentencing of Indigenous defendants, conducted for the most part by non-Indigenous judicial officers operating within a settler-colonial legal system, adopting or proclaiming to adopt a methodology of decolonisation is deeply problematic. As Harry Blagg and Thalia Anthony made clear, there are real questions about

whether sentencing – as a site of punishment, rehabilitation and integration – can do more than further objectives of state law and order, and instead augment Indigenous social orders? Can *Indigenous innovations* in sentencing embody inter-cultural struggle and negotiation or are they at the mercy of state control?¹¹³

Embedded in these questions is a central point about power, voice, truth and listening.¹¹⁴ Unless there is space in the sentencing process to robustly further ‘Indigenous objectives’ and challenge ‘the whiteness of legal traditions, discourses and processes and provide alternatives to the criminal justice apparatus’, control of the sentencing discourse, and the way in which Indigenous experience is taken into account, remains at the ‘mercy of state control’.¹¹⁵ As Blagg and Anthony argued, this control may be challenged by the existence and operation of ‘Indigenous sentencing courts, Indigenous Law and Justice Groups and Indigenous Justice Reports (eg *Gladue Reports*)’, insofar as they privilege ‘Indigenous perspectives and knowledges’ and ‘create spaces for a negotiation between the laws of the settler state and Indigenous nations’.¹¹⁶

Even where no formal space has been created in the sentencing process for Indigenous voices, there remains the potential for sentencing judges to engage with colonialism and its impacts, and with the strength of survival, resistance and resurgence. As Linda Tuhiwai Smith put it, ‘[d]ecolonization is a process which engages with imperialism and colonialism at multiple levels’.¹¹⁷ Though non-Indigenous actors and institutions cannot do the ‘talking back’,¹¹⁸ this does not mean that they cannot begin to listen to the ‘talking back’ that is taking place and

111 Rhonda Povey and Michelle Trudgett, ‘When Camp Dogs Run Over Maps: “Proper-Way” Research in an Aboriginal Community in the North-East of Western Australia’ [2019] (2) *Australian Aboriginal Studies* 61, 68–9.

112 Irene Watson, ‘Settled and Unsettled: Are We Free to Roam?’ in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007), cited in *ibid* 69.

113 Harry Blagg and Thalia Anthony, *Decolonising Criminology: Imagining Justice in a Postcolonial World* (Palgrave Macmillan, 2019) 245–6 (emphasis added).

114 For discussion about the differences between voice and truth, see Kate Fullagar, ‘Why Does Truth Come Third?’, *Inside Story* (online, 8 June 2021) <<https://insidestory.org.au/why-does-truth-come-third/>>.

115 Blagg and Anthony (n 113) 245–6.

116 *Ibid* 246.

117 Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 2nd ed, 2012) 21.

118 *Ibid* 8.

begin to see, recognise and name colonialism in operation,¹¹⁹ even as its power is exercised, thereby making space for Indigenous voices. This recognition might, for example, include using first-person and second-person relational language in sentencing decisions and engagements with Indigenous defendants, thereby acknowledging agency and position within the colonial exercise of power.¹²⁰

III THE EXTENT AND NATURE OF CONSIDERATION OF INDIGENOUS EXPERIENCE IN SENTENCING IN THE ACT SUPREME COURT

Before turning to our findings, a few points about the ACT context should be noted. Firstly, the ACT only has two court levels, the Magistrates Court and Supreme Court. There are also two Indigenous sentencing courts, which operate as divisions of the Magistrates Court. The Galambany Court ('Galambany') is available to adult defendants who identify as Aboriginal or Torres Strait Islander and have ties to an Aboriginal and Torres Strait Islander community, either in the ACT or elsewhere. In order for a matter to be finalised in Galambany, it must involve a non-sexual offence that can be finalised in the Magistrates Court, the defendant must have pleaded guilty, and the defendant must consent to being assessed as to their suitability for circle sentencing and agree to participate fully in Galambany's processes.¹²¹ A recent cost-benefit analysis of Galambany found that it had had a positive impact on reducing recidivism rates, increasing education rates, and improving the lives of defendants' families. The evaluators determined that Galambany

provides a substantial net benefit to the ACT economy ... The benefit cost ratio of over 3 to 1 is high compared with other investments. The result validates the economic rationale for government funding for Galambany Court and its continuation ... [it] improves the quality of life and output of the ACT community and is an excellent use of ACT resources.¹²²

The ACT also has a specialist Indigenous court for young people, the Warrumbul Circle Sentencing Court, which 'is a type of restorative practice that aims to provide culturally relevant and effective sentencing options for young Aboriginal and Torres Strait Islander people (10–17 years) by incorporating Elders and cultural aspects into the Children's Court'.¹²³

119 Cunneen (n 61) 19.

120 Nerida Spina, 'White Teachers at a Discursive Crossroad' (MEd Thesis, Queensland University of Technology, November 2013) 40; Fiona Nicoll, 'Indigenous Sovereignty and the Violence of Perspective: A White Woman's Coming Out Story' (2000) 15(33) *Australian Feminist Studies* 369, 375 <<https://doi.org/10.1080/713611981>>.

121 'Galambany Court', *ACT Magistrates Courts* (Web Page) <<https://www.courts.act.gov.au/magistrates/about-the-courts/areas-in-the-act-magistrates-court/galambany-court>>. At the time of writing, the first author was the presiding magistrate in the Galambany Court. However, the comments in this article are made in a personal capacity and do not purport to represent the views of the Court.

122 Anne Daly, Greg Barrett and Rhiân Williams, *Cost Benefit Analysis of Galambany Court* (Report, November 2020) 4–5.

123 'Warrumbul Circle Sentencing Court', *ACT Magistrates Court* (Web Page) <<https://www.courts.act.gov.au/magistrates/about-the-courts/areas-in-the-act-magistrates-court/warrumbul-circle-sentencing-court>>.

There are no data available on the number of Indigenous defendants appearing before the ACT courts. However, the imprisonment data reveal that the ACT has the highest relative imprisonment rate in Australia, with Indigenous people around 20 times more likely to be imprisoned than their non-Indigenous counterparts.¹²⁴ The ACT also had the ignominious distinction of having the highest proportion of Indigenous prisoners who had been imprisoned before, at 94%.¹²⁵

To its credit, the ACT Government has acknowledged the scope of the issue, with the Attorney-General aiming to reduce the First Nations incarceration rate to match non-Indigenous incarceration rates by 2030.¹²⁶ It has also made reducing the over-representation of Indigenous people in custody the first pillar of its plan to reduce recidivism by 25% by 2025.¹²⁷ As discussed above, and recognised by the Canadian Supreme Court, sentencing judges have a critical role to play in this regard, as '[t]hey determine most directly whether an aboriginal [sic] offender will go to jail'.¹²⁸

Accordingly, we now turn to the sentencing decisions of the ACT Supreme Court to analyse the extent and nature of consideration of Indigenous experience. We examined all available sentencing judgments contained on the ACT Supreme Court website from 2009–19.¹²⁹ The following search terms were used to identify relevant decisions: 'sentencing' and 'Aboriginal', 'First Nations', 'Torres Strait Islander' and/or 'Indigenous'. These search terms were intended to limit the cases to sentencing decisions involving Aboriginal and/or Torres Strait Islander defendants. Decisions were excluded from the dataset where they related to bail, civil matters, appeals or judicial review, and where the reference did not relate to the identity of the defendant. Decisions meeting the search parameters were then included in a database, with direct links to the decisions, with pinpoint references where the decision involved substantive discussion of the defendant's experience as an Indigenous person. To our knowledge, this database represents the most comprehensive collection of sentencing remarks involving First Nations defendants for any Australian jurisdiction. After duplications were removed, there were 149 cases in the database.

The decisions were then assigned to one of seven categories, depending on how the sentencing judge engaged with the Aboriginal and/or Torres Strait Islander person's experience. Four of these categories capture decisions without

124 *Prisoners in Australia* (n 34) tbl 17. The ratio for the crude imprisonment rate was 21.0, while the age-standardised rate ratio was 19.5. The next highest was Western Australia, at 19.0 and 15.9 respectively, while the national ratios were 15.8 and 13.5 respectively.

125 *Ibid* tbl 29. The next highest jurisdictions were Western Australia and Queensland at 83% and 82% respectively, while the national average was 78%.

126 Jasper Lindell, 'Indigenous Incarceration Needs to Fall Faster than Target to Reach Parity, Directorate Says', *The Canberra Times* (online, 3 January 2021) <<https://www.canberratimes.com.au/story/7072329/indigenous-incarceration-must-fall-faster-than-target-directorate/>>.

127 Justice and Community Safety Directorate, Australian Capital Territory Government, *RR25by25: Reducing Recidivism in the ACT by 25% by 2025* (Report, 2020) 9–10. The third author is the lead evaluator of this plan, on behalf of the Australian Capital Territory Government.

128 *Gladue* (n 3) 723, [65] (Cory and Iacobucci JJ for the Court).

129 'ACT Supreme Court Judgments and Sentences', *ACT Supreme Court* (Web Page) <<https://courts.act.gov.au/supreme/judgment>>. The first sentencing decisions accessible via the website date from 2009.

any substantive engagement with the defendant's experience as an Aboriginal and/or Torres Strait Islander person. Three categories capture decisions that do involve substantive engagement; that is, where the defendant's experience as an Aboriginal and/or Torres Strait Islander person is explicitly linked to their pathway to or from criminalisation.

Table 1 sets out the categories that decisions were assigned to, together with a description of the nature of consideration given to the defendant's experience as an Aboriginal and/or Torres Strait Islander person within that category of decision.

Table 1: Nature of Consideration

Non-substantive Engagement	
Category	Description
Representation Only	Identity was ascertained only by reference to the defendant's representation by the Aboriginal Legal Service.
Services Only	Identity was ascertained only by reference to an Indigenous-specific service or program, for example, the Winnunga Nimmityjah Aboriginal Health Service.
Identity Only	The defendant's identity was referred to in the decision. For example, that the defendant is 'an indigenous [sic] man', ¹³⁰ or 'of Aboriginal heritage'. ¹³¹ There was no attempt to explicitly link this person's identity to their experience.
Reference Limited	The reference to identity extended beyond only representation, services or identity, but there was no meaningful discussion linking the defendant's identity to their experience. This category includes decisions containing a combination of references to representation, services and identity, as well as decisions in which unique experience relating to identity is raised and subsequently dismissed by the judge.
Substantive Engagement	
Category	Description
Pathway to	The decision linked the defendant's experiences as an Aboriginal and/or Torres Strait Islander person to their pathway <i>to</i> criminalisation.
Pathway from	The decision linked the defendant's experiences as an Aboriginal and/or Torres Strait Islander person to their pathway <i>from</i> criminalisation.
Pathway to and Pathway from	The decision linked the defendant's experiences as an Aboriginal and/or Torres Strait Islander person to their pathway <i>to</i> and <i>from</i> criminalisation.

¹³⁰ *R v Monaghan [No 3]* [2012] ACTSC 45, [13] (Refshaug J).

¹³¹ *R v McBride* [2017] ACTSC 102, [12] (Elkaim J).

A Findings: An Absence of Substantive Consideration

The number and frequency of cases falling within each category of decision is recorded in Table 2, as well as the number and percentage of cases involving substantive and non-substantive engagement overall.

Table 2: Quantitative Findings in Relation to Nature of Consideration

Non-substantive Engagement	Number	Percentage
Reference to Representation Only	12	8%
Reference to Services Only	15	10%
Reference to Identity Only	88	59%
Reference Limited	20	13%
<i>Total</i>	135	90%
Substantive Engagement	Number	Percentage
Pathway to	3	2%
Pathway from	3	2%
Pathway to and Pathway from	8	6%
<i>Total</i>	14	10%
<i>Overall Total</i>	149	100%

The first and most striking finding is that, of the 149 cases considered, only 10% (n=14) included substantive engagement with the defendant's experience as an Aboriginal and/or Torres Strait Islander person. That is, in only 10% of cases was explicit consideration given to facts existing in the life of the person by reason of their experience as an Aboriginal and/or Torres Strait Islander person that were relevant to their pathway to or from criminalisation.

The remaining 90% of decisions (n=135) failed to give substantive consideration to the defendant's experience as an Aboriginal and/or Torres Strait Islander person. Indeed, 77% of decisions (n=115) failed to engage with experiences unique to the defendant as an Aboriginal and/or Torres Strait Islander person beyond noting their representation by the Aboriginal Legal Service (ACT/NSW), mentioning their identity, or referring to Indigenous-specific services they may have accessed. A typical example of a decision that refers to identity only is *R v Nelson*, which contains the following statement: 'The offender is aged 28. He is an Aboriginal Australian. He is single. He has no children.'¹³² There is no further reference to Mr

132 [2015] ACTSC 291, [15] (Walmsley AJ). See also *R v Campbell* [2017] ACTSC 386, [17] (Elkaim J) ('*Campbell*'); *R v Lancaster* [2018] ACTSC 285, [21] (Elkaim J) ('*Lancaster*'); *R v Thomas* [2019] ACTSC 306, [6] (Mossop J) ('*Thomas*').

Nelson's Aboriginality or the intersection between his experience as an Aboriginal person and his pathway to or from criminalisation. Where reference was made to services only, it is possible that an unstated connection is being drawn between the defendant's identity and experience as an Aboriginal and/or Torres Strait Islander person and their pathway from criminalisation. However, in the absence of explicit reasoning in the decision to draw this link, such a conclusion can only be tentative.

From this analysis, we cannot gauge the reasons for the significant omission of the defendants' background and experiences. This omission occurred in sentencing remarks both before and after the High Court's 2013 decision in *Bugmy*, which upheld the relevance of background circumstances to culpability, such that courts could consider issues of Aboriginality.¹³³ It is not clear whether it is due to the judicial officer's discretion on relevance, the nature of the PSR and sentencing submissions and/or the client's instructions to lawyers (which may have been affected by the client's relationship with their lawyer, the time with their lawyer and/or the questions the lawyer asked of their client). The sentencing outcome may have been shaped differently, if the court had had information on the defendant's Aboriginal background and chose not to rely on it, compared to cases where the client did not have the opportunity to provide this information. Nonetheless, it indicates the need for change in sentencing practices, to ensure that First Nations experiences are heard through the voices of the individual and their community.

In a further 13% of decisions (n=20), reference to the defendant's experience as an Aboriginal and/or Torres Strait Islander person was limited. This category was intended to capture those cases that went beyond simply referring to the defendant's identity, but failed to engage with their experience as an Aboriginal and/or Torres Strait Islander person as it related to the exercise of the sentencing discretion. This category also included cases in which a defendant's Indigeneity was raised, but then dismissed as irrelevant to the sentencing decision. For example, in *R v Monfries*, Penfold J discussed the defendant's connection to his Aboriginal culture and heritage, his criminal history and substance abuse problems, but then found that there was 'no evidence before me suggesting that Mr Monfries is disadvantaged by reason of his Aboriginality'.¹³⁴ Another example is contained in the decision of *R v Marshall*, in which Burns J stated: 'You are an Indigenous man, but you have suffered no particular hardship connected with that fact.'¹³⁵ These decisions excluding Indigeneity as relevant to sentencing in a particular case, as well as the others in which there is a silence, suggest that there was an insufficiency or absence of evidence before the court regarding relevant unique experiences of the defendant as an Aboriginal and/or Torres Strait Islander person. This conclusion is reinforced by the analysis of the 10% of decisions in which

133 *Bugmy* (n 9) 595 [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). There, it is relevantly 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. However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment'.

134 (Supreme Court of the Australian Capital Territory, Penfold J, 19 November 2013).

135 (Supreme Court of the Australian Capital Territory, Burns J, 2 April 2013).

substantive consideration was given. In contrast, these cases generally disclose a basis for consideration in evidence before the court. Before we turn to an analysis of these cases, it is important to note the prevalence of an implicit linking of identity and deficit in the cases that do not involve substantive consideration of a defendant's experience as an Aboriginal and/or Torres Strait Islander person.

B Non-substantive Engagement: References to Identity and Implicit Links to Deficit

The implicit linking of Aboriginal and/or Torres Strait Islander identity and deficit may arise where a reference to a person's identity is directly followed by a focus on disadvantage in the absence of an explicit connection being made between the two. In these circumstances, the reader is invited, intentionally or unintentionally, to draw a connection. An example of this implicit linking of Indigeneity and deficit arises in *R v Monfries*, in the initial explanation of Mr Monfries' circumstances:

The offender is of Aboriginal descent. He is the second child of his parents [sic] five or six children. He claims that his upbringing was less than adequate or satisfactory. He claims that he was sexually abused when he was aged about 13 years by a next-door neighbour, but he did not tell anyone about the abuse. He left his parents' home when he was aged about 16 years to live independently. He does not have much contact with his parents or his siblings ... He has lived with his girlfriend on and off over the past four years, although their relationship has been marked by his abuse of alcohol and prohibited drugs, and his use of violence towards her.¹³⁶

Here there is a clear emphasis on deficiencies and failures, immediately following the reference to identity.¹³⁷ The tendency to draw a connection with deficit may be particularly strong where the disadvantage referred to accords with a pervasive stereotype of Aboriginal and/or Torres Strait Islander peoples and their communities, or highly derogatory concepts that are and have been used as insults and tools of social exclusion.¹³⁸ This includes, for example, the idea that Aboriginal and Torres Strait Islander people are reliant on welfare and are 'dole bludgers'. This stereotype has unfortunately been frequently repeated in public discourse in recent times,¹³⁹ including by former Prime Minister Tony Abbott and popular media figures.¹⁴⁰ *R v Campbell* is an example of a decision in which the potential for this link to be drawn exists, with Elkaim J stating: 'Ms Campbell is of Aboriginal heritage and has contact with her community. Ms Campbell started receiving Centrelink benefits after completing Year 7. She has had limited employment and

136 (Supreme Court of the Australian Capital Territory, Nield AJ, 18 June 2013) [43]–[44].

137 See generally Gorringer (n 64); McCallum, Ryan and Caffery (n 70).

138 See generally *Deficit Discourse and Strengths-based Approaches* (n 53) 16–17.

139 See, eg, Timothy P Schofield and Peter Butterworth, 'Patterns of Welfare Attitudes in the Australian Population' (2015) 10(11) *PLOS One* e0142792:1–14 <<https://doi.org/10.1371/journal.pone.0142792>>.

140 See Corey Sinclair, 'PM's Thinly-Veiled Racist Comments Fuel Perception that All Aboriginal People Are Unemployed Dole-Bludgers', *NT News* (online, 16 March 2015) <<https://www.ntnews.com.au/news/opinion/pms-thinly-veiled-racist-comments-fuel-perception-that-all-aboriginal-people-are-unemployed-dolebludgers/news-story/3a2754571d845dceee3820ad82d9d6c4>>; 'Sunrise Backtracks on "Dole Bludger" Segment and Issues Apology', *The New Daily* (online, 31 July 2019) <<https://thenewdaily.com.au/news/national/2019/07/31/michaelia-cash-dole-bludger/>>.

has large debts'.¹⁴¹ The concern is not with the statement of facts of disadvantage existing in the life of a defendant.¹⁴² These must be taken into account and given 'full weight'¹⁴³ and will often, though not always, operate to mitigate the harshness of a sentence.¹⁴⁴ Rather, the concern is with locating a bare statement of identity with facts of disadvantage in the absence of an explanation of how the person's experience as an Aboriginal and/or Torres Strait Islander person relates to their experience of disadvantage and in the absence of reference to assets, strengths and community connection that may be associated with their identity.

Indeed, even the bare statement of identity has the potential to frame Indigeneity in ways that are inconsistent with Aboriginal and Torres Strait Islander ways of being and knowing,¹⁴⁵ divorced from the continuing strength inherent in belonging. Many of the decisions analysed stated that the person was of 'Aboriginal heritage',¹⁴⁶ or the person or their parent was of 'Aboriginal descent'.¹⁴⁷ This framing, insofar as it is ascribed by the court, PSR author or legal representative, fails to acknowledge the present nature of the person's identity. The use of 'Aboriginal' may also fail to recognise the person's connection to a particular people, language group, First Nation or Country, where that more specific connection is known.¹⁴⁸ In so doing, such statements may indicate a foreclosure on the particularity of a defendant's experience of Indigeneity. Generalised and historicised statements of Indigeneity can be contrasted with examples such as 'CN and her sister are Kamilaroi women who were born in Sydney'.¹⁴⁹ This concern is not limited to decisions in which there is an absence of substantive engagement with the defendant's experience as an Aboriginal and/or Torres Strait Islander person. However, when coupled with a silence with respect to that experience, Indigeneity may be positioned – by reference and absence of reference – as an inconsequential, though deficit-laden, fact.

C Substantive Engagement: Judicial Consideration of Pathways to and from Indigenous Criminalisation

Of the 149 decisions considered, only 14 engaged explicitly with the defendant's experience as an Aboriginal or Torres Strait Islander person as being relevant to the exercise of the sentencing discretion. Five of these 14 were separate decisions relating to the same two defendants.¹⁵⁰ Of the 14, three considered

141 *Campbell* (n 132) [17]–[18] (Elkaïm J).

142 *Kwaymullina* (n 67) 8.

143 *Bugmy* (n 9) 595 [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

144 *Ibid* 592–5 [37]–[45].

145 See generally Monchalin et al (n 72).

146 See, eg, *Campbell* (n 132) [17] (Elkaïm J); *Lancaster* (n 132) [21] (Elkaïm J).

147 See, eg, *R v Love* (Supreme Court of the Australian Capital Territory, Nield J, 23 June 2011) [2]; *Thomas* (n 132) [6] (Mossop J).

148 We note that, as a consequence of colonialism and particularly dispossession, dispersal and child removal, knowledge of the specifics of connection may not be known to the person facing court.

149 *R v CN* [2019] ACTSC 293, [33] (Murrell CJ).

150 *R v Weldon aka Williams* (Supreme Court of the Australian Capital Territory, Refshauge J, 9 December 2009) ('*Weldon aka Williams*'); *R v Weldon* (Supreme Court of the Australian Capital Territory, Refshauge J, 6 July 2011) ('*Weldon* [2011]'); *R v Weldon* [2013] ACTSC 287 ('*Weldon* [2013]'). The two remaining cases are not identified here, because a suppression order is in effect with respect to one.

the defendant's experience as an Aboriginal or Torres Strait Islander person as relevant to their pathway to criminalisation, namely in terms of the disadvantage they had experienced, contributing to their criminal behaviour. Three decisions considered the defendant's experience as relevant to their potential pathway from criminalisation, meaning that the defendant was found to have unique opportunities supportive of their rehabilitation available to them because of their Indigeneity. The remaining eight decisions explicitly engaged with experience as both a pathway to and a pathway from criminalisation.

'Pathway to' is not synonymous with 'deficit-based discourse'. As argued above, it is possible for consideration of the pathway to criminalisation to avoid being mired in the deficit of the individual, for example, by acknowledging the history of colonial oppression that contributed to the criminalised behaviour. Nonetheless, where a decision focuses on Indigenous experience as a pathway to criminalisation only, there is a clear tendency to emphasise deficiencies and failures, to problematise and locate responsibility with the individual, their immediate family or community without engagement with or acknowledgement of colonial, structural and intergenerational forces at play.

Two of the defendants were of considerable public stature, namely Dennis Michael Nona, an acclaimed Torres Strait Islander artist, and Ian Harold King, a well-known Aboriginal cricketer.¹⁵¹ Both were charged with serious offences. Decisions relating to both men make explicit reference to extensive expert evidence in the form of reports.¹⁵² It is possible to speculate that because of their public stature, combined with the seriousness of the offences, more evidence was put before the court to establish the relevance of their experiences as Aboriginal or Torres Strait Islander people. It is also possible that the emphasis given to their Indigeneity was in part a consequence of explicit submissions being made by counsel based upon this evidence.¹⁵³ Regardless of the reasons why the court had access to this evidence and engaged explicitly with it, it is important to note the critical link between the availability of evidence and the extent and manner of consideration given to Indigenous experience.

A common way in which judges considered relevance of a defendant's experience as an Aboriginal and/or Torres Strait Islander person to their pathways to criminalisation was to discuss their experiences of disadvantage, whilst acknowledging and linking this to the prevalence of this disadvantage within the Aboriginal and Torres Strait Islander community more generally. The decision in *R v Weldon* provides a good example.¹⁵⁴ It was one of four in the database concerning Mr Weldon, with three of these involving Refshauge J considering Mr Weldon's experience as an Aboriginal person as being relevant to his culpability.¹⁵⁵ The

151 *R v Nona* [2015] ACTSC 136 ('Nona'); *R v King* (Supreme Court of the Australian Capital Territory, Refshauge J, 29 June 2012) ('King').

152 *Nona* (n 151) [32], [37] (Murrell CJ); *King* (n 151).

153 Personal communication between the first author and counsel for Nona and King.

154 *Weldon* [2011] (n 150).

155 *Ibid*; *Weldon aka Williams* (n 150); *R v Weldon* (Supreme Court of the Australian Capital Territory, Refshauge J, 8 December 2010); *Weldon* [2013] (n 150).

Court characterised Mr Weldon's background in terms of disadvantage: he had grown up in a violent home, where he had been the victim of physical and sexual abuse, and had ongoing problems with alcohol and drugs. He had a long history of criminalisation and had spent significant time in custody. In his judgment, Refshauge J considered the circumstances of his upbringing:

Thus, it is clear that the circumstances of Mr Weldon's upbringing were ones of disadvantage and deprivation which are clearly explanatory, if not causative, of his present offending through the addictions he then acquired. These circumstances, while not completely unknown in non-Aboriginal families, are more frequent and more severe in Aboriginal families. I have, in this context, carefully considered the contents of the pre-sentence report and indeed the earlier reports for the earlier sentencing for this purpose.¹⁵⁶

Similarly, in a subsequent 2013 sentencing decision involving Mr Weldon, delivered after the High Court decision of *Bugmy*, Refshauge J gave significant weight to the disadvantage in Mr Weldon's life, by reason of his experience as an Aboriginal person. In considering the relevance and weight to be given to disadvantage existing as a consequence of this experience, Refshauge J gave close consideration to *Bugmy* and other authorities.¹⁵⁷ Importantly, it is also apparent that the Court had the benefit of a 'helpful Pre-Sentence Report',¹⁵⁸ past decisions establishing Mr Weldon's experience,¹⁵⁹ and direct submissions on the point from Mr Weldon's counsel.¹⁶⁰ In these decisions, there can be little doubt that Refshauge J gave significant weight to disadvantage existing in the life of Mr Weldon by reason of his experience as an Aboriginal person. However, the causes of this disadvantage are located with Mr Weldon's upbringing. There is no, or at least no explicit, acknowledgement of the structural and intergenerational forces of colonialism bearing upon Mr Weldon. The deficit tendency of this discourse is apparent, though, as will be discussed below, Refshauge J also considered Mr Weldon's experience as an Aboriginal person as relevant to his pathway from criminalisation, engaging aspects of a strengths-based approach.

Another approach was to consider the influence that engagement with family and community may have had on the person's decision to engage in criminal behaviour. In sentencing a young person for an aggravated robbery and the related offence of riding in a stolen motor vehicle in *R v GD*, Penfold J made the following observation:

AK did not grow up with a recognition of his Aboriginal heritage, but he has now enthusiastically embraced it. Unfortunately, this seems to have taken the form of feeling a connection with other indigenous [sic] offenders, including his mother's brothers, who are in prison in Sydney and whom AK thinks are 'really cool' (it is not clear whether he has ever even met them), and expressing racist, anti-white

156 *Weldon* [2011] (n 150).

157 *Weldon* [2013] (n 150) [13]–[16] (Refshauge J), citing *Bugmy* (n 9); *TM v Karapanos* [2011] ACTSC 74; *DPP (Vic) v Terrick* (2009) 24 VR 457; *R v Youngie* (1989) 33 A Crim R 301.

158 *Weldon* [2013] (n 150) [11] (Refshauge J).

159 *Ibid* [10].

160 *Ibid* [13].

sentiments on various occasions, including as graffiti. Unsurprisingly, this behaviour upsets his father, whose family apparently came from England.¹⁶¹

Here, the emphasis on deficiencies and failures is clear.¹⁶² AK's enthusiastic embrace of family, community and culture offered the potential for strengths-based consideration. This included a recognition of colonial, structural and intergenerational forces at play in the lives of AK and his uncles, imprisoned in Sydney. A strengths-based framing of AK's expression of 'racist anti-white sentiments' might have recognised the history of colonial oppression that contributed to his desire to engage in such behaviour, and understood his expression as an act of resistance, strength and survival.¹⁶³

The decision in *R v GD* can be contrasted with Penfold J's approach in the 2011 case of *R v Chatfield*.¹⁶⁴ This was the only decision in the database to explicitly link a defendant's experience of disadvantage with colonisation and its impact, albeit that the language of 'settlement' is used rather than colonisation.

It is appropriate to note that much of what has brought Mr Chatfield to his current state (being his dysfunctional childhood, his extended periods of institutionalisation, his inability to participate properly in either education or the workforce, and his struggles with alcohol and drug abuse) is probably indirectly or even directly traceable to the disadvantaged position of indigenous [sic] people in Australian society, which is in turn traceable to events since non-indigenous [sic] people first settled this country.¹⁶⁵

In this passage, Indigenous experiences of disadvantage are understood within the context of underlying systemic and intergenerational forces bearing uniquely on Indigenous defendants. This supports a strengths-based engagement with Indigenous disadvantage which recognises the underlying problem is colonialism, counteracting the tendency to see responsibility for Mr Chatfield's 'current state' as resting solely with Mr Chatfield, or his immediate family or community.¹⁶⁶ Moreover, seeing the problem in this way opens the door for a strengths-based response that engages directly with colonialism and its impacts.

R v King provides another example of both an engagement with experience as a pathway to criminalisation and a tendency to adopt a deficit-based approach. Mr King had grown up in Brisbane in a household where he was witness to and the subject of significant physical and emotional abuse at the hands of his stepfather and his siblings, who often referred to him as the 'little black bastard', because his skin was darker than theirs.¹⁶⁷ Refshauge J noted: 'When he was 11 he started "taking off" from home, which brought him into contact with fellow indigenous [sic] people in bush camps where he witnessed significant alcohol abuse, violence

161 (Supreme Court of the Australian Capital Territory, Penfold J, 20 June 2012).

162 See generally Gorringer (n 64); McCallum, Ryan and Caffery (n 70).

163 Steve Pile, 'Opposition, Political Identities and Spaces of Resistance' in Steve Pile and Michael Keith (eds), *Geographies of Resistance* (Routledge, 1997) 1, 14.

164 *R v Chatfield* (Supreme Court of the Australian Capital Territory, Penfold J, 22 June 2011).

165 Ibid.

166 Ibid.

167 Mr King's skin was darker than his siblings when he was a child because his father was an unknown African American sailor.

and promiscuity and had his first experience of sexual activity.¹⁶⁸ Consideration of Mr King's experience of disadvantage as an Aboriginal person resulted in Refshauge J giving '[s]ome moderation' to the sentence.¹⁶⁹ However, there was again an absence of explicit engagement with the structural forces of colonialism bearing upon Mr King and on the community in which he sought refuge.

This may be contrasted with the decision in *PM*, where Refshauge J linked PM's early experiences of racism at school to disengagement from education, expulsion and limited literacy and numeracy skills.¹⁷⁰ Specifically, his Honour noted:

The accused strongly identifies as Aboriginal and embraces his heritage having spent considerable time at Wallaga Lake on the New South Wales South Coast where he has family. Much of the fights at school were a reaction to what he saw as racist remarks made to him.¹⁷¹

Here, racism experienced by PM is situated as the problem, with strength of identification positioned as a positive protective feature. Though it is not explicitly stated, 'fights at school' can be understood, within the broader systemic and colonial context as acts of resistance. Further, while the decision does not involve direct engagement with colonialism, the 'embrace of heritage' is followed by strengths-based consideration of assets, protective factors, community and cultural connectedness, which was seen to stand against criminalisation and offer hope for rehabilitation. In two separate passages Refshauge J directly, and relationally, acknowledges his own 'distress' and later his 'hope' for PM: 'It is distressing that a young man with no criminal history and clearly some artistic talent and commitment to his culture and heritage should be the cause of such trauma and harm.'¹⁷²

His Honour then noted:

This is a severe sentence but they were terrible crimes that you committed and it is necessary and appropriate that this be clearly recognised. I hope that you continue working at your rehabilitation, especially your art, music and celebrating your aboriginal [sic] heritage. These should provide you with opportunities when you are released to show that you can be a good citizen and that these appalling, vicious and despicable crimes are not a sign of your true nature and can be put well behind you.¹⁷³

Returning to the decision of *R v Weldon*,¹⁷⁴ we find another example of Refshauge J switching from third-person to second-person relational language to engage directly with a strengths-based focus on assets and protective features, community connectedness and healing. Starting in third-person language, Refshauge J made the following remarks:

I take into account that he has a long and sad criminal history but the nature of the offences are such that it is possible for him to recover from that history and to be a useful member of this community and also his own community, the Aboriginal

168 *King* (n 151).

169 *Ibid.*

170 *R v PM* [2009] ACTSC 24, [18], [19], [36].

171 *Ibid* [18].

172 *Ibid* [32].

173 *Ibid* [98].

174 *Weldon aka Williams* (n 150).

community. I note that he has a potential career as a singer which obviously will bring him into a useful role both within the community generally and his own Aboriginal community.¹⁷⁵

He later switched to second-person language:

I have given very little by way of rule and regulation around you because this is your opportunity ... Think of your child, think of your daughter. That is very important. Think of your career and what you can do for your community. The Aboriginal community unfortunately has a very sad history of incarceration. I do not want to be part of that but if you will not be a partner with me in stopping that then you will just be another statistic with those. You have an opportunity to do something really good for your family and for your Aboriginal community and for the community more widely. I hope you take the opportunity.¹⁷⁶

Notably, in his direct engagement with the ‘very sad history of incarceration’ and the acknowledgement of his position as a judge who does ‘not want to be part of that’, Refshauge J may be seen to reflexively acknowledge his position in the exercise of judicial – and therefore colonial – power. Though colonialism remains unnamed as the cause of the ‘very sad history of incarceration’ which entwines Mr Weldon’s life, Refshauge J’s direct and personal remarks indicate a desire to leverage his position for the benefit of Mr Weldon, the Aboriginal community to which he belongs and the community more widely. Taken as a whole, these remarks can be seen as an engagement with colonialism,¹⁷⁷ offering a toehold for more thoroughgoing decolonising approaches.

One of the more encouraging findings to emerge from consideration of the decisions in the database was the manner in which some judges in the ACT Supreme Court engaged with the experiences of Aboriginal and Torres Strait Islander defendants, as they related to their pathway *from* criminalisation, displaying recognisable features of a strengths-based approach. If decisions involving consideration of the relationship between Indigeneity and pathways from criminalisation (n=3) and decisions involving consideration of Indigeneity as a pathway to and from criminalisation (n=8) are taken together, there were 11 in total. Commonly, these cases included explicit acknowledgement or discussion of the defendant’s respected position within the Aboriginal and/or Torres Strait Islander community,¹⁷⁸ their connection to their culture or the support they had from other members of that community,¹⁷⁹ and their achievements in providing, or aspirations and potential to provide, leadership within their community.¹⁸⁰ These decisions engage with the rehabilitative potential of connecting with, drawing strength from and contributing to Aboriginal and/or Torres Strait Islander communities.

175 Ibid.

176 Ibid.

177 See Tuhiwai Smith (n 117) 21.

178 *Nona* (n 151) [25]–[27] (Murrell CJ).

179 See, eg, *R v Visser* [2016] ACTSC 261, [31] (McLeish, Emerton and Osborn JJA).

180 *Weldon* [2011] (n 150); *Nona* (n 151) [25]–[29] (Murrell CJ); *King* (n 151); *R v Ferguson* [2015] ACTSC 363, [29] (Murrell CJ).

D Absence of Substantive Engagement and Evidence

Though these examples of cases in which Indigenous experience is given substantive consideration provide cause for hope, their limited number (14 out of 149) requires explanation. Explanation comes in the form of the relative presence or absence of evidence of that experience. *R v DD* ('DD') provides an example of a case in which there is both a presence and absence of evidence to establish the defendant's unique experience as an Aboriginal person.¹⁸¹ DD was the first sentence to involve substantive engagement with a defendant's experience as an Aboriginal person after the High Court handed down its decision in *Bugmy*. In considering argument to the effect that DD's experience as an Aboriginal person was both relevant to his pathway to and from criminalisation, Penfold J addressed the application of *Bugmy* in considerable depth. With respect to the pathway from criminalisation and DD's prospects of rehabilitation, there was evidence from an Aboriginal Justice Centre employee about the rehabilitative support and connection it could provide, evidence of DD's engagement with an Aboriginal counsellor, his identification by an 'Indigenous Athlete Talent Program' and his work with a local Aboriginal artist. However, though noting that DD had been 'subject to Care and Protection attention from age 5 ... reflecting that proper care was not able to be provided for [him] within a family unit', Penfold J dismissed, for want of evidence, an argument that account be taken of intergenerational trauma that had impacted on the defendant as a result of his grandmother being a member of the Stolen Generations.¹⁸² Her Honour stated:

Counsel submitted that the existence of such difficulties was consistent with the recognised risk of inter-generational trauma resulting from the removal of a child from its parents and siblings. That is, the removal of DD's maternal grandmother affected her capacity to care for DD's mother and in turn his mother's capacity to care for him.

Counsel sought to rely on the experiences of DD's mother and grandmother by reference to the recent decision in *Bugmy*. However, counsel conceded, there was no evidence before me of either the circumstances of DD's grandmother's removal from her family or its effect on her, on DD's mother or on DD himself.¹⁸³

The decision highlights the importance of, and challenge involved in, providing evidence of the impact of colonialism, intergenerational or otherwise, on the particular defendant before the court. It also points to the importance of adopting a structural, systemic solution to address the silence.

The absence of sufficient evidence in *DD* to support findings with respect to the ways in which DD's experience as an Aboriginal person, and that of his family, community and Aboriginal forebears, had shaped his present-day experience of disadvantage, stands in contrast to the relative abundance of evidence available in *Nona*.¹⁸⁴

181 *R v DD* (Supreme Court of the Australian Capital Territory, Penfold J, 12 November 2013); *Bugmy* (n 9). The first author appeared as counsel for DD.

182 The term 'Stolen Generations' is used to refer to the those affected by Australian governments' policies of forced removal and assimilation.

183 *R v DD* (n 181).

184 *Nona* (n 151).

Dennis Nona was a prominent Torres Strait Islander artist. His case presents as one of the most comprehensive and detailed engagements with the defendant's experience as an Indigenous person. The judgment refers to his childhood experiences of abuse and neglect within an adoptive family, as 1 of 11 children, and the impact of this on moral maturation.¹⁸⁵ It refers to the dislocation and displacement he experienced as a person whose first language was an Indigenous language of the Torres Strait, Kala Lagau Ya, moving first to Thursday Island, then to Cairns, and eventually on to Canberra, in order to pursue education.¹⁸⁶ This sense of 'displacement' is linked to 'depression' and to early and ongoing alcohol dependence and misuse, which saw him drinking 'to the point of blackout'.¹⁸⁷ Murrell CJ considered the cultural context of Nona's upbringing as being relevant to the offences for which he was being sentenced, including evidence of 'the fact that in Melanesian cultures, adult males often have young wives'.¹⁸⁸ She considered his artistic talent, achievement and passion for his culture,¹⁸⁹ as well as the impact of incarceration in the ACT on his 'creativity', 'spiritual connection' to the Torres Strait and to the sea and his capacity to attend funerals, understood as a 'strong cultural requirement'.¹⁹⁰ Critically, as indicated above, this extensive engagement with Mr Nona's experience as a Torres Strait Islander person was enabled by comprehensive expert reports, as well as a detailed PSR. As expressed by Murrell CJ, this report material enabled the court to determine an appropriately individualised sentence:

I have been referred to and I have read a great deal of material about the sentencing of Indigenous offenders. I am acutely aware of the decision in *Bugmy* ... One of the key matters highlighted by that decision is that sentencing is individualised in our system and individualised justice requires an evidence-based approach to sentencing. In this case, the Court has the benefit of extensive evidence upon which to determine appropriately individualised sentences.¹⁹¹

Finally, in support of the argument that reports focusing on Indigenous experience, written by Indigenous authors, have the potential to change the narrative and focus attention on strengths inherent in identity and connection, we note the more recent decision of the ACT Supreme Court in *R v BS-X*,¹⁹² even though it

185 Ibid [14]–[18], [36] (Murrell CJ).

186 Ibid [20]–[21].

187 Ibid [23].

188 Ibid [30].

189 Ibid [25]–[27].

190 Ibid [29], [32]. The harshness of the experience of imprisonment for Indigenous people was a consideration explicitly referred to by Wood J in *Fernando v The Queen* (1992) 76 A Crim R 58, 63, cited in *Bugmy* (n 9) [39] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Though this consideration is not easily categorised as being relevant to a pathway to or from criminalisation, in a particular case, experience of imprisonment and institutionalisation can be understood as criminogenic of future criminalisation and/or as negatively impacting on prospects of rehabilitation. In other words, a particular experience of imprisonment, involving separation from Country, kin and community may negatively impact the pathway from criminalisation. It may also be understood simply as the imposition of a disproportionate penalty, being one that is harsher than that imposed for similar criminalisation by a non-Indigenous defendant because it imposes an additional measure of deprivation.

191 *Nona* (n 151) [52] (Murrell CJ).

192 *R v BS-X* [2021] ACTSC 160.

falls outside the temporal limit of the dataset. In that case, Loukas-Karlsson J had before her a psychological report, in relation to the young person being sentenced, prepared by Indigenous Ngarabal psychologist Vanessa Edwige. The decision refers extensively to that report,¹⁹³ as well as drawing upon the *Significance of Culture to Wellbeing, Healing and Rehabilitation* report,¹⁹⁴ co-authored by Edwige and Wiradjuri scholar Paul Gray, and multiple chapters of the *Bugmy Bar Book*.¹⁹⁵ Notably, the decision also refers to the young person's engagement with the Elders in a Circle Sentencing Court process prior to sentencing.¹⁹⁶

IV CONCLUSION: UNDOING RACISM IN SENTENCING THROUGH SHIFTING INSTITUTIONAL POWER

This article has presented a comprehensive analysis of all relevant sentencing decisions delivered by the ACT Supreme Court between 2009 and 2019. From our analysis, it emerges there is strong evidence that the Court gives unsatisfactory attention to the experiences of First Nations people in sentencing; indeed, there was no substantive attention given to the person's Indigeneity in 90% of the cases examined. When there is attention given, it tends towards a deficit narrative that intensifies the ideologies contributing to the criminalisation and incarceration of First Nations people. PSRs feed into these discourses, prompting the need for new narratives in sentencing courts. Notably, the methodology we adopted provides a replicable approach for comparative analysis to determine if similar results would be obtained in other Australian jurisdictions.

More broadly, we suggest that the pivot towards strengths-based approaches should stem from First Nations self-determination, rather than relying on the institutions that have reinforced criminogenic stereotypes and contributed to hyper-incarceration. Looking to the Canadian experience, this was the impetus for the Aboriginal Legal Service in Toronto to introduce *Gladue* reports, namely, to push back on the racism in sentencing courts that justifies prison sentences, and instead provide a holistic account of the person's life, the impact of colonial interventions, and the need for non-custodial sentences that align with the strengths of the individual, their family and community.

In the context of these challenges, Indigenous organisations in various parts of Australia have taken the lead in introducing First Nations Justice Reports. These initiatives have been led by organisations such as Deadly Connections Community Justice Services in Sydney, Five Bridges Aboriginal and Torres Strait Islander Community Justice Group in Queensland, and the Victorian Aboriginal Legal Service. It was also proposed by the ACT office of the NSW/ACT Aboriginal Legal

193 Ibid [39]–[71] (Loukas-Karlsson J).

194 Edwige and Gray (n 94), cited in *ibid* [81]–[84].

195 *R v BS-X* (n 192) [39]–[71] (Loukas-Karlsson J); *Bugmy Bar Book* (n 12).

196 *R v BS-X* (n 192) [79]–[80] (Loukas-Karlsson J).

Service in 2014.¹⁹⁷ The second author has worked closely with these organisations in supporting their attempts to reduce Indigenous incarceration, including through changing sentencing processes and outcomes, and elevating the narratives of First Nations people. Deadly Connections describe its ‘Bugmy Justice Project’ as seeking:

to improve the sentencing processes and outcomes for Aboriginal people identified as defendants by providing courts with additional information that addresses the personal and community circumstances of the individual Aboriginal person and relevant sentencing options.¹⁹⁸

The Deadly Connections project began in recognition of the ‘narrow snapshot and risk assessment of the individual’ that emanates in Sentence Assessment Reports (‘SARs’; formerly PSRs).¹⁹⁹ The SARs are described by Deadly Connections as ‘inaccurate and potentially culturally biased against Aboriginal people’.²⁰⁰ Part of the objective of the Bugmy Justice Project is to ‘identify the unique systematic racial, cultural and historical factors specific to Aboriginal people’ for judicial officers to consider in sentencing.²⁰¹

The Victorian Aboriginal Legal Service is piloting the Aboriginal Community Justice Report program, which has been incorporated in Goal 2.1 of the Victorian Aboriginal Justice Agreement.²⁰² Its express objectives are to reduce First Nations incarceration and ‘improve sentencing processes and outcomes’, by providing:

- a more holistic account of individual circumstances, including as they relate to a person’s community, culture and strengths;
- community-based options.²⁰³

First Nations Justice Reports need to be introduced, coupled with judicial education and ultimately legislative prescription, to ensure they are heard and contribute to the increased use of non-custodial alternatives.²⁰⁴ There need to be protocols in place to ensure that reports that outline the person’s life story are treated with respect by judicial officers. Finally, the person being sentenced needs to maintain sovereignty over their story, so that the information is not disclosed for any other purpose. The person should have the right for matters not to be read out in open court. These are matters which emerging First Nations Justice Reports

197 See Aboriginal Legal Service NSW/ACT, Submission No 15 to the Standing Committee on Justice and Community Safety, Australian Capital Territory Legislative Assembly, *Inquiry into Sentencing* (30 October 2013).

198 See ‘Bugmy Justice Project’, *Deadly Connections* (Web Page) <<https://deadlyconnections.org.au/bugmy-justice-project/>>.

199 Ibid.

200 Ibid.

201 Ibid.

202 Victorian Aboriginal Justice Agreement, ‘Aboriginal Community Justice Reports’, *Aboriginal Justice Outcomes Framework* (Web Page, 5 February 2022) <<https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-justice-outcomes-framework/goal-21-aboriginal-people-are-not-7>>.

203 ‘Aboriginal Community Justice Reports’, *Victorian Aboriginal Legal Service* (Web Page) <<https://www.vals.org.au/aboriginal-community-justice-reports/>>.

204 See Lorana Bartels, ‘Indigenous-specific Court Initiatives to Support Indigenous Defendants, Victims and Witnesses’ (Research Brief No 17, Indigenous Justice Clearinghouse, April 2015); *Pathways to Justice* (n 16) 226–7.

programs are working through, to ensure that the person maintains their self-determination in the process.

This article has highlighted the damaging impact of deficit-based discourses in sentencing on First Nations people. It perpetuates systemic racism in the penal system and undermines the capacity of the individual being sentenced to have their background story documented on their own terms. As expressed simply and powerfully in *Passing the Message Stick: A Guide for Changing the Story on Self-determination and Justice*, '[d]eficit language reinforces white supremacy'.²⁰⁵ Here, we have argued for a strengths-based approach to be heard within courts and the carceral system, but also to drive the shift away from the carceral system. First Nations Justice Reports that are designed and delivered by First Nations organisations provide new opportunities to push back on the carceral system. This is one part of a broader struggle, in which First Nations people and organisations are working to challenge carceral logics and achieve self-determination.

205 Passing the Message Stick Steering Committee, *Passing the Message Stick: A Guide for Changing the Story on Self-determination and Justice* (Report, 2021) 35.