

#YourReference AintRelevant

Question 1: Should s 21A(5A) of the Crimes (Sentencing Procedure) Act 1999 (NSW) be broadened to encompass all child sexual offences?

Section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* currently limits the use of good character as a mitigating factor where the offender's perceived respectability facilitated the commission of child sexual offences. This provision rightly acknowledges that offenders often use their reputation and trustworthiness to gain access to victims. However, the narrow application of this section leaves significant gaps in protecting victims and ensuring that sentencing adequately reflects the gravity of these crimes.

Broadening s 21A(5A) to apply to all child sexual offences would address this inconsistency and ensure that sentencing decisions prioritise the harm caused to victims over the offender's social standing. Advocacy campaigns, such as "Your Reference Ain't Relevant," have highlighted the retraumatising impact of good character references on survivors, particularly when they feel that their suffering is minimised or overshadowed by the offender's reputation. This is consistent with findings from the *Royal Commission into Institutional Responses to Child Sexual Abuse*, which detailed how perpetrators frequently exploited their good character to commit crimes.

Broadening s 21A(5A) would align with the principle of proportionality, as affirmed in *Veen v The Queen (No 2) (1988)*, which requires sentences to reflect the seriousness of the offence and the harm caused to victims. Internationally, while explicit prohibitions on good character references are rare, jurisdictions such as the UK demonstrate a trend toward minimising their relevance in cases of serious offences. For example, the Sentencing Council guidelines for sexual offences emphasise that the gravity of harm caused by the offence often outweighs any mitigating impact of good character.

In summary, expanding s 21A(5A) to encompass all child sexual offences would ensure consistency in sentencing, reduce the retraumatisation of victims, and align the law with evolving community standards and international best practices.

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Question 2: Should there be restrictions on the use of good character as a mitigating factor for other types of offences? If so, what offences and why?

The use of good character as a mitigating factor should be restricted for offences involving breaches of trust, power imbalances, or significant harm to victims. These offences include domestic violence, sexual assault, and financial crimes targeting vulnerable individuals. In such cases, good character is often a tool that offenders exploit to gain trust and commit their crimes, making its use as a mitigating factor both inappropriate and unjust.

The 2022 Newcastle trial exemplifies this issue. Three men convicted of gang-raping teenage girls during a buck's party presented numerous character references, including statements from religious leaders describing them as "dedicated churchgoers." These references diverted attention from the gravity of their crimes and retraumatised the victims by portraying the offenders as individuals of moral standing. (abc.com.au)

Legal scholars Gabrielle Wolf and Mirko Bagaric have critiqued the use of good character references, arguing that it introduces systemic bias into sentencing by disproportionately benefiting offenders with privileged social networks. This undermines the principle of equality before the law and creates disparities in sentencing outcomes.

Expanding restrictions on good character references to these offences would ensure that sentencing reflects the seriousness of the crime and the harm caused to victims. It would also align with the principles of harm minimisation and proportionality under the *Sentencing Act 1991 (VIC)*, promoting public confidence in the justice system.

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Question 3: Should good character continue to be a mitigating factor in sentencing at all? Why or why not?

The continued use of good character as a mitigating factor is increasingly incompatible with principles of fairness, justice, and community expectations, particularly in serious offences. While traditionally viewed as an indicator of rehabilitation potential, good character should be considered a baseline expectation for all citizens, not an extraordinary quality deserving of leniency.

The High Court in *Ryan v The Queen (2001)* cautioned against allowing good character evidence to overshadow the seriousness of an offence. This perspective is reinforced by research, including the Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report (2017)*, which highlights the inequities in sentencing outcomes caused by reliance on good character references. Marginalised individuals often lack access to the social networks needed to provide persuasive references, creating systemic bias and undermining the principle of equality before the law.

Furthermore, the use of good character references can retraumatise victims by diminishing the perceived harm caused by the offender's actions. Advocacy campaigns such as "Your Reference Ain't Relevant" have highlighted the need for sentencing to focus on the offence itself and its impact on victims, rather than the offender's reputation or standing in the community.

In light of these concerns, the removal of good character as a mitigating factor would promote consistency and fairness in sentencing, aligning judicial outcomes with contemporary community expectations and principles of justice.

The profound severity, widespread prevalence, and distinct complexities of child sexual abuse necessitate that "good character" or the absence of prior convictions should never be considered a mitigating factor in sentencing. We firmly uphold the principle that the gravity of these offences overrides any claims of prior good conduct.

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Question 4: What are the benefits or disadvantages of retaining good character as a mitigating factor in sentencing?

Benefits:

Good character references provide courts with additional context about an offender's background, which can support rehabilitation-focused sentencing. For instance, an offender with no prior convictions and a history of community contributions may be deemed less likely to reoffend. This aligns with the sentencing objectives of rehabilitation and individualised justice.

Disadvantages:

However, the disadvantages of retaining good character as a mitigating factor far outweigh its benefits. Highlighting an offender's good character risks undermining the severity of the offence, retraumatising victims, and perpetuating systemic inequities in sentencing. Legal scholars Gabrielle Wolf and Mirko Bagaric have argued that good character references disproportionately favour offenders with privileged social standing, exacerbating disparities in judicial outcomes. Victim-survivor accounts, such as those from the Newcastle trial, underscore the harm caused by focusing on an offender's perceived respectability rather than the impact of their actions.

Balancing these considerations, the disadvantages of retaining good character as a mitigating factor strongly support its exclusion, particularly for serious offences.

Question 5: What changes, if any, should be made to the way good character is dealt with at sentencing?

Good character should be excluded or significantly restricted as a mitigating factor, particularly in cases involving serious offences or breaches of trust. Legislative reforms should build on the principles established in s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*, expanding its application to offences such as domestic violence and financial crimes targeting vulnerable individuals.

Procedural reforms are also necessary. Courts should require character referees to attest to their awareness of the offence and its circumstances, ensuring that references are both relevant and credible. Subjecting such evidence to cross-examination would further enhance the integrity of the sentencing process, aligning it with the principles of transparency and fairness.

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Question 6: Are there procedural or practical issues with how good character is presented and assessed that should be addressed?

Character references often lack rigorous scrutiny and are accepted without sufficient verification. This introduces subjectivity and bias into sentencing decisions, undermining the principle of equality before the law. Furthermore, references are frequently irrelevant to the offence or the offender's likelihood of rehabilitation.

To address these issues, stricter evidentiary standards should be applied under the *Evidence Act 1995 (NSW)*. Referees should be required to provide affidavits attesting to their knowledge of the offence, and character evidence should be directly linked to the offender's rehabilitation or risk of reoffending. These reforms would ensure that good character is assessed fairly and consistently, without undermining the integrity of the judicial process.

These elaborated responses incorporate all previous analysis and additional insights, presenting a comprehensive argument for reforming or removing the use of good character references in sentencing.

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