

## NSWPF Response

### Review of legislation and common law behind the use of good character to mitigate sentences

#### Question 1: Use of good character generally

- (1) Should consideration of good character as a mitigating factor be abolished in all cases? Why or why not?
- (2) How could consideration of evidence of good character be limited?

1)

The NSWPF supports further consideration being given to removing good character evidence as a mitigating factor in all sentencing matters. The NSWPF Police Prosecution experience is that good character evidence is particularly problematic in sentencing matters which are finalised in the Local Court. This is due to the reality that there is virtually no time for references to be examined and/or scrutinised by prosecutors and magistrates here. As a result, good character references are often tendered in the Local Court which are of an extremely low quality and never expected to be tested.

For example, character references are often tendered that have not been signed, or the signatory has not been made aware of the offending the person is being sentenced for. Moreover, even in circumstances where an issue is identified by the prosecution or a magistrate, the authors of character references are often not made available for cross-examination. The NSWPF believes that the unavailability of authors can be largely attributed to the time fact that it is not currently expected that they will be required.

Additionally, character references which do not benefit an accused are not tendered, as they are filtered out by Defence lawyers prior to sentencing hearings. It is understood that this practice is not inconsistent with the roles and responsibilities of Defence lawyers, however it exacerbates the fact that good character references are fundamentally self-serving statements.

Although these issues can be noted by the prosecution with a submission that a good character reference should be given little or no weight, the NSWPF is of the view that this is unsatisfactory and results in an inefficient use of the time of the court and prosecutors.

2)

In light of the above the NSWPF is of the view that there are considerable grounds for abolishing 'good character' in all matters, particularly those which are finalised in the Local Court. In the alternative, consideration could potentially be given to limiting the use of character references to sentencing hearings for less serious offences, perhaps summary offences, because these offences are usually the least impactful on victims and the community.

#### Question 2: Use of lack of previous convictions generally

- (1) Should consideration of a lack of previous convictions also be abolished as a mitigating factor in all cases? Why or why not?
- (2) In what circumstances should the fact that the offender does not have a record of previous convictions not be used in mitigation?

1)

The NSWPF does not consider that a lack of previous convictions should be abolished as a mitigating factor in all cases as it does have relevance in the sentencing process, however NSWPF consider that the weight placed on this should be minimal. This is especially where the defendant has also received the benefit of mitigation on account of being a person of good character as per section 21A(3)(f). The NSWPF is concerned about the undesirable duplicity between this and s21A(3)(e).

2)

The NSWPF is of the view that the fact that the offender does not have a record of previous convictions should not be used in mitigation in relation the following offences:

1. Violent offending
2. Sexual offending
3. Table 1 and strictly indictable offences
4. Domestic violence offending (noting in particular here that research demonstrates that there is often a history of unreported offending in the context of a domestic violence charge).

**Question 3: Use of good character for offenders who plead not guilty**

Under what conditions could good character not be available as a mitigating factor for offenders who plead not guilty?

The NSWPF is of the view that disallowing good character evidence *only* because a person entered a plea of not guilty would undermine the fundamental principle that an accused person is innocent until proven guilty. The inability to rely on good character evidence following a hearing or trial could disincentivise individuals to defend their innocence.

In light of the above, the NSWPF is of the view that if further consideration is given to only removing good character in limited circumstances, pleading not guilty should not be such a circumstance.

**Question 4: Good character as an aggravating factor**

Under what conditions could the use of good character in the commission of an offence be treated as an aggravating factor?

The NSWPF is of the view that the use of good character or lack of previous convictions should be considered as an aggravating factor in circumstances where it is used to assist in the commission of an offence.

**Question 5: Extending the special rule to all child sexual offences**

(1) Should the special rule be extended to all child sexual offences? Why or why not?

(2) What offences, if any, should be added to the definition of “child sexual offences” for the purposes of the special rule?

1)

In accordance with the NSWPF feedback above, consideration should at least be given to extending the special rule to all child sexual offences. This position aligns with recent broader developments in the views of the community and legislation which seek to ensure that child sex offenders are appropriately held accountable for offending that victimises the most vulnerable members of society. A recent NSW example in this regard is s 97A of the *Evidence Act 1995*, which took effect on 1 July 2020. The effect of s 97A is to alter the operation of s 97(1)(b) in relation to child sexual abuse prosecutions, in order to facilitate greater admissibility of tendency evidence.

2)

All the offences contained within the current definition of ‘child sexual offences’ should remain, and consideration should be given to also including the offences contained under Division 15B (Voyeurism and related offences) and Division 15C (recording and distributing intimate images) of the *Crimes Act 1900*.

#### **Question 6: Extending the special rule to sexual offences against other vulnerable groups**

(1) What other vulnerable groups or offences against vulnerable groups could be subject to the special rule?

(2) How could they be identified?

(3) Should any of these offences be subject to the condition that the offender’s good character or lack of previous convictions was of assistance in the commission of the offence?

1) / 2)

Consideration could be given to the special rule applying to those set out in the definition under section 306M of the *Criminal Procedure Act 1986* (NSW) which provides:

**vulnerable person** means a child or a cognitively impaired person.

(2) For the purposes of this Part, a **cognitive impairment** includes any of the following—

- (a) an intellectual disability,
- (b) a developmental disorder (including an autistic spectrum disorder),
- (c) a neurological disorder,
- (d) dementia,
- (e) a severe mental illness,
- (f) a brain injury.

Overall NSWPF supports consideration being given to the special rule applying to offences against individuals with any disability, people from culturally and linguistically diverse backgrounds, people with a refugee and asylum background, First Nations persons and LGBTQIA+ community members.

3)

The NSWPF is of the view that offences committed against this cohort should be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence, noting that such people can and do use their good character or lack of prior convictions to commit crimes against vulnerable members of the community.

**Question 7: Extending the special rule to adult sexual offences**

(1) What adult sexual offences, if any, should be subject to the special rule?

(2) Should any of these offences be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence?

1) / 2)

In accordance with the NSWPF feedback above, consideration should at least be given to extending the special rule to other types of sexual and violent offending against adults, recognising the seriousness of such offences.

**Question 8: Extending the special rule to domestic violence offences**

(1) Should domestic violence offences be subject to the special rule? Why or why not?

(2) Should these offences be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence?

1) / 2)

In accordance with the NSWPF feedback above, consideration should at least be given to extending the special rule to domestic violence offences. This is particularly because there is usually an unreported history of domestic violence between a couple. That may well be why the offender has no prior criminal history and is able to claim good character, and the offender should not be able to benefit from this at sentencing.

**Question 9: Extending the special rule to other serious offences**

(1) What other serious offences, if any, should be subject to the special rule?

(2) Should any of these offences be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence?

The NSWPF suggests that it may be appropriate to extend the special rule to murder.

**Question 10: Extending the special rule where there is a breach of trust or authority**

(1) What offences, if any, involving breach of trust or authority should be subject to the special rule?

(2) Should any of these offences be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence?

(3) Should a finding that an offender abused a position of trust or authority in relation to the victim of the offence make the offender subject to the special rule? Why or why not?

1) / 2)

The NSWPF submits that consideration should be given to extending the special rule to offending against victims who meet the definition of vulnerable outlined above. These cases often involve persons in caretaking lines of employment, such as: teachers, aged care workers, disability care workers, etc. who are able to get their positions because they have no prior reported criminal history and can therefore pass criminal history checks. It follows that consideration should be given to extending the special rule to such people to redress the benefit they get to in gaining access to their victims because of this.

3) A finding that an offender abused a position of trust or authority in relation to the victim of the offence should make the offender subject to the special rule for the foregoing reasons.

**Question 11: Extending the special rule to all offences**

(1) Should all offences be subject to the special rule? Why or why not?

(2) If yes, should the special rule be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of any or all offences?

1) / 2)

In accordance with the NSWPF feedback above, to the extent that there are limitations in the application of the special rule, consideration should at least be given to extending the special rule so that it is applied as generously as possible.

**Question 12: Exempting under 18-year-olds from the special rule**

Under what conditions should offenders who are under 18 be exempt from the application of the special rule?

1)

The NSWPF considers that offenders under 18 should be subject to the special rule. This position is grounded in the reality that persons under 18 can attain positions of trust (e.g. sporting coaches and workplaces supervisory roles) through the assistance of good character or a lack of previous convictions.

**Question 13: No change to the current law**

- (1) What justification is there for courts continuing to take good character into account in sentencing for:
- (a) sexual offences against children, and
  - (b) other offences?
- (2) How should courts inform themselves of good character in these cases?
- (3) Why should courts not take good character into account in sentencing for:
- (a) sexual offences against children, and
  - (b) other offences?

1) / 2)

As noted above the NSWPF is of the view that there are considerable grounds for abolishing 'good character' in all matters, particularly those which are finalised in the Local Court. However to the extent that courts continue to take good character into account at sentencing, consideration should be given to ensuring appropriate safeguards are in place with regards to how courts inform themselves of good character. The NSWPF suggests that this include stricter prohibitions surrounding unsigned references, requirements for authors to be aware of exactly the offence the person is being sentenced for and authors being available for cross-examination when a reference is called into question.

3)

There are considerable grounds for courts not taking good character into account in sentencing for all offences as it gives an unfair benefit to defendants during sentencing who may already rely on the fact they have no prior criminal history in mitigation. The unfairness is highlighted by the contrast with Victim Impact Statements which are strictly governed by the relevant legislation and are only able to be handed up to a sentencing court in minimal circumstances. This leaves the sentencing judge with an imbalanced view of all the relevant circumstances.

**Question 14: Adjusting procedures for tendering evidence**

What changes could be made to the procedures surrounding the tendering and use of evidence of good character in sentencing proceedings?

The NSWPF submits that it should be a requirement for character references to be served on the prosecution (including via email) 48 hours prior to sentencing and that if the defence is unable to prove this has been done it should be inadmissible. This would give prosecutors sufficient time to read the references before they are tendered and determine whether they are going to object to any of the contents. Similarly, this time would allow prosecutors to determine whether they require the author for cross-examination and would allow for those arrangements to be put into place. Further, the NSWPF also submits that stricter rules should be put into place to prevent the admission of unsigned references.

**Question 15: Placing the evidential burden on offenders**

In relation to what offences, if any, should the burden be placed on an offender in a sentencing hearing, to establish that their good character did not assist in committing the offence?

The NSWPF submit that consideration should be given to this burden being placed on offenders at least in relation to serious indictable offences such as coercive control, choking, strangulation and other crimes that frequently occur in private yet indicate a significantly increased risk of escalation toward sexual assault, sexual violence and homicide.