



CDPP

Australia's Federal Prosecution Service



Submission by the Office of the Director of Public Prosecutions (Cth)

New South Wales Sentencing Council:
Good Character in Sentencing Review

3 March 2025

A. INTRODUCTION

1. The Office of the Director of Public Prosecutions (Cth) (**CDPP**) welcomes the opportunity to provide a submission with information that might assist the New South Wales Sentencing Council's review of the use of good character in sentencing, and specifically, its review of the operation of s 21A(5A) (the special rule) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the **CSPA**) and common law principles related to the relevance of good character on sentence.
2. This submission will primarily canvas the CDPP's experience with comparable provisions relating to character on sentence pursuant to the *Crimes Act 1914* (Cth) (the **Cth Crimes Act**), including for offences not restricted to child sexual offences. This submission may be of assistance in relation to the following Consultation Questions:
 - 2.1. Question 5.4: Good character as an aggravating factor;
 - 2.2. Question 5.5: Extending the special rule to all child sexual offences;
 - 2.3. Question 5.11: Extending the special rule to all offences; and
 - 2.4. Question 5.14: Adjusting procedures for tendering evidence.
3. The CDPP only prosecutes State and Territory offences in accordance with arrangements between the State and Territory prosecution agencies where there is a mix of Commonwealth and State or Territory offences and, ordinarily, the Commonwealth offence(s) is the more serious disclosed by the evidence. In NSW, the CDPP prosecutes indictable State offences only with the consent of the NSW Director of Public Prosecutions (**ODPP**) granted on a case by case basis.
4. Accordingly, this submission is limited to the extent that the CDPP's experience may assist the Sentencing Council with:
 - 4.1. *First*, understanding comparable federal sentencing provisions;
 - 4.2. *Second*, understanding how the common law regarding "good character" operates and interacts with the federal sentencing provisions in practice; and
 - 4.3. *Third*, considering trauma informed approaches and initiatives that may improve the experience of victims in sentence proceedings.
5. As to the primary Consultation Question 5.1, the CDPP does not seek to make any submission. This is a matter of policy for the Sentencing Council.

B. KEY COMMONWEALTH SENTENCING PROVISIONS RELATING TO CHARACTER

6. In Commonwealth sentencing, when determining the sentence to be passed, or the order to be made in respect of any person for a federal offence, the Court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence: s 16A(1) of the *Cth Crimes Act*. To arrive at such a sentence or order, the Court must take into account the non-exhaustive list of matters outlined in s 16A(2) of the *Cth Crimes Act* as are relevant and known to the Court.
7. The s 16A(2) matters which are relevant to the present submission are:

- 7.1. Section 16A(2)(m): the character, antecedents, age, means and physical or mental condition of the person; and
- 7.2. Section 16A(2)(ma): if the person’s standing in the community was used by the person to aid in the commission of the offence – that fact as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates (the **Commonwealth special rule**).¹
8. The Commonwealth special rule applies to sentences imposed on or after 20 July 2020 following the enactment of the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth) (the **Amending Act**), as part of a suite of other amendments to Commonwealth provisions relating to sexual crimes against children contained within the *Cth Crimes Act* and the *Criminal Code* (Cth).
9. The following passage from the [Explanatory Memorandum](#) to the Bill for the *Amending Act* outlines Parliament’s intention in enacting the Commonwealth special rule (at [253]-[254]):²

Proposed paragraph 16A(2)(ma) introduces a new sentencing consideration regarding whether the person’s standing in the community was used to aid in the commission of the offence. Where this is the case it is to be taken as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates.

It is intended that this will capture scenarios where a person’s professional or community standing is used as an opportunity for the offender to sexually abuse children. For example, this would cover a medical professional using their professional standing as a medical practitioner, or a person using celebrity status, to create opportunities to sexually abuse children.

C. COMMONWEALTH VS STATE SENTENCING PROVISIONS RELATING TO “CHARACTER”

10. There are a number of key differences between the Commonwealth and State sentencing provisions relating to the consideration of “character” on sentence.
11. *First*, the “character” provision at s 16A(2)(m) is not expressed as either a mitigating or aggravating factor. Character and antecedents are assessed by reference to all the circumstances and are not limited to previous convictions.
12. *Second*, while character *must* be taken into account, there is no legislative requirement in the *Cth Crimes Act* for the Court to consider whether the offender was a person of “good character” (emphasis added).
13. *Third*, the Commonwealth special rule is not restricted to any particular type of offending but extends to all federal crime types.
14. *Fourth*, the special rule explicitly states that where the Court is satisfied that good character or lack of previous convictions was of assistance to the offender in the commission of the child sexual

¹ Unlike s 21A(5A) of the CSPA, s 16A(2)(ma) is not referred to as a “special rule”. However, for the purpose of these submissions, and for ease of comparison with the State sentencing scheme, we have used the title “Commonwealth special rule”. It should also be noted that s 16A(2A) specifies that when considering the Commonwealth special rule, the Court may take into account any form of customary law or cultural practice as a reason for excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or aggravating the seriousness of the criminal behaviour to which the offence relates.

² Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 (Cth).

offence, it is *not* to be taken into account as a circumstance of mitigation. Under the Commonwealth special rule, use of standing in the community to aid in the commission of the offence is to be taken into account as an *aggravating* feature. The requirement for “Abuse of trust or authority” in the NSW special rule is a higher threshold than that in the Commonwealth special rule.

D. APPLICATION OF COMMONWEALTH SENTENCING PROVISIONS IN PRACTICE

15. A review of the Court’s application of the Commonwealth sentencing provisions – both related to child sex offending and other types of offending – indicates that in NSW courts, sentencing judges generally apply the NSW and Commonwealth sentencing schemes in a similar manner. This appears to be in large part due to two apparent trends:
- 15.1. the application by sentencing judges of appellate principles regarding the mitigatory effect of “prior good character”, as enunciated in appellate principles applicable to both Commonwealth and State sentencing regimes; and
 - 15.2. the inconsistency of application and interpretation by sentencing judges in considering the causal nexus between use of standing in the community and the commission of the offending.

The weight given to “prior good character”

16. As noted above, unlike in the CSPA, s 16A(2)(m) of the *Cth Crimes Act* does not adopt the language of “prior good character”. Nevertheless, sentencing courts have consistently adopted the language of “good character” when considering “character” pursuant to s 16A(2)(m). This is derived from the language of well-established common law principles relating to the use of “prior” or “otherwise” good character – that is, adoption of the specific term of art which may either be reference to the absence of a prior conviction, or positive evidence of actual good deeds.³
17. From a broad review of cases in which NSW courts sentenced offenders for a combination of Commonwealth and State offences, the CDPP makes the following observations:
- 17.1. The consideration of “prior good character” had no material difference between Commonwealth and State offending – both for child sex offending and other classes of offences. Courts were bound by the long-established principle that “if an offender is of otherwise good character, then the sentencing judge is *bound* to take into account in the sentence that he or she imposes”, although the “weight that must be given ... will vary according to all of the circumstances”.⁴
 - 17.2. For child sex offences, it was regularly accepted that less or limited weight is given to an offender’s prior good character.⁵ Despite this acceptance, the offender’s charitable deeds and other matters advanced on the offender’s behalf were referred to in judgments as providing some, albeit limited, mitigation.
 - 17.3. A common trend that emerged was that where sentencing courts noted they were giving weight to good character, they provided little explanation as to what *type* of good character

³ *Ryan v The Queen* (2001) 206 CLR 267, [27] (McHugh J).

⁴ *Ibid* [25] (McHugh J) (emphasis in original).

⁵ *R v Gent* (2005) 162 A Crim R 29, 44, [65]; *DPP v D’Alessandro* (2010) 26 VR 477, 483-4, [21]; *Mouscas v R* [2008] NSWCCA 181, [37].

was being taken into account – that is the absence of convictions, or the performance of charitable deeds in the community.

Difficulty in proving the causal nexus for both special rules in child sex offending

18. A review of the consideration of the Commonwealth special rule by the NSW District Court suggests that in assessing whether or not the offender used their standing in the community to aid in their commission of the offence, sentencing courts have exhibited a similar degree of inconsistency as to the approach taken in applying the State special rule, particularly in relation to child sex offending.⁶ The following two first instance decisions related to Commonwealth child sex offending highlight the discrepancy in judicial consideration.
19. In *R v Daniel Mark Knowles*,⁷ the offender was sentenced for the use of a carriage service to solicit child abuse material and transmission of indecent material to two child victims, being students he had previously taught when he was living overseas and working as a teacher. The sentencing court accepted that the offender was in a position of trust, having previously taught both victims, and that they knew him at the time of the offending to have been a person occupying a position of good standing in the community. As such, the causal nexus was established on the basis of the offender essentially having used his position to have access to, and gain the trust of, the victims.
20. By way of contrast, in *R v Huw Fisher*,⁸ the offender was sentenced for both Commonwealth and State child sex offences related to his engagement online with a number of male child victims, during the course of which he solicited, obtained, produced and possessed child abuse material. A large number of the victims were known to and accessed by the offender through his role as a sports coach, including his role as a coach at the same club as a number of those victims. The offender had a particularly close relationship with two victims, who were brothers, because he worked with their mother at the same sports club and was trusted by the victims' parents to be a babysitter to the victims from time to time. The sentencing court accepted that his criminality for most of the victims involved a breach of trust, for both the victims and their families, and that the offender's prior good character may have assisted him in being in the position he was – including, for example, being able to obtain the necessary Working with Children Check to be able to work as a sports coach. However, the sentencing court was ultimately not satisfied of the causal nexus for either the State or Commonwealth special rules, as the offender's prior good character was not considered an important feature in how he obtained access to the child victims.
21. The CDPP has experienced fewer challenges in establishing the causal nexus in fraud related offending with sentencing courts more readily making findings that tax agents, accountants, solicitors and company directors used their standing in the community to aid their fraud.

E. TRAUMA INFORMED APPROACH AND VICTIM PARTICIPATION IN SENTENCE PROCEEDINGS

22. The way in which good character evidence is tendered, used, and referred to during sentencing proceedings may be distressing and re-traumatising for victims and their families. The CDPP's Witness Assistance Service reports (anecdotally) that victims may be re-traumatised in sentence

⁶ This was one of the key issues identified by the ODPP in relation to the special rule as outlined in its Preliminary Submission of 19 July 2024, and the CDPP has been assisted by the detailed and careful examination given by the ODPP to the same. See [Preliminary Submission](#) by the ODPP dated 19 July 2024, 2.

⁷ *R v Daniel Mark Knowles*, (District Court of New South Wales, Culver DCJ, 24 September 2020).

⁸ *R v Huw FISHER*, (District Court of New South Wales, Pickering DCJ, 16 November 2022).

proceedings as a consequence of “prior good character” findings. This is consistent with the experiences of victims shared in the submissions to the Sentencing Council.

23. Good character evidence is often tendered in the form of subjective opinion evidence from lay persons known to the offender. This includes testimonials and character references from the offender’s family, friends and colleagues, attesting to the offender’s positive qualities and personal traits. While some judicial officers may make clear that those positive qualities and personal traits were not exhibited by the offender to the victim during the offending,⁹ as outlined above under Part D, evidence of good character is often uncritically referred to by sentencing courts, even in matters where the good character evidence is ultimately given little weight.¹⁰
24. The CDPP supports the use of trauma-informed language by judges when referring to character evidence and the following initiatives to improve the experience of victims in sentencing proceedings:
 - 24.1. Provision of increased access to information for victim so that they may be properly informed about the sentencing factors the Court must take into account and to ensure their expectations are effectively managed in advance of the sentence proceedings. Practice notes requiring character references to be provided to the Prosecution at least one week before the sentence hearing may also provide adequate time for victims to be informed that they will be tendered and they can prepare themselves in advance of the hearing.
 - 24.2. Education of prosecutors and defence legal practitioners regarding trauma-informed advocacy.
 - 24.3. Enhancing the ability of victims to observe proceedings via audio-visual link¹¹ which would be consistent with s 6.7 of the *Victims Rights and Support Act 2013* (NSW) which provides that “a victim will be protected from unnecessary contact with the accused and defence witnesses during the course of court proceedings”.

F. CONCLUSION

25. The CDPP provides the above observations primarily from its experience in dealing with Commonwealth provisions related to the character of an offender, to inform your review of the NSW provisions.
26. The CDPP is available to provide further information or comment should that assist the Sentencing Council.

Dated: 3 March 2025

⁹ *R v Tan (No 3)* [2023] NSWDC 298.

¹⁰ *R v Bredal* [2023] NSWDC 656; *R v Jones* [2023] NSWDC 657; *R v Hadden* (District Court of New South Wales, Harris DCJ, 7 March 2023); *R v Clerkin* (District Court of New South Wales, David DCJ, 9 March 2024); *R v Meers* [2023] NSWDC 148.

¹¹ While there are protections in both Commonwealth and State regimes enabling complaints and vulnerable witnesses to give evidence remotely in contested hearings, the same protections are not available for participation as observers in sentence proceedings (unless leave is granted).