Good Character

in Sentencing

Contents

	Page
1. The Author	3
2. Introduction	5
3. The utility of Good Character	7
4. Interaction with other factors	18
5. Enhanced Victim-Survivor considerations	24
6. Conclusions	30
Annexure A:	37

Chronology of recommended amendments to sentencing in Australia

The Author

As a limited insight into the antecedents of the author, the construction of this submission draws upon my experience and knowledge accrued during my careers as a Solicitor, and as a Commissioned Officer within the NSW Police Force. My career as a member of the legal profession was undertaken after retirement from the Force at the rank of Detective Chief Inspector.

I undertook the studies for my legal qualifications at Sydney University through this institution with the Legal Profession Admission Board. I subsequently completed my post-graduate legal practice qualifications with the College of Law. I also hold a post-graduate degree in Management from the University of Wollongong, and completed additional legal studies in jurisprudence with Harvard University Law School in the United States of America.

My policing expertise results from a career spanning 40 years, incorporating my leadership and managerial knowledge and experience from the roles as a Duty Officer, Crime Manager and Local Area Commander. As a Detective with the Homicide Squad my career included numerous successful murder investigations. The collective result of these undertakings was the development of my perspicacious awareness of the dynamics of the criminal justice system. It was enhanced through numerous matters with which I had intricate dealings culminating in criminal trials before the Supreme Court of NSW. That experience extended to matters deliberated upon before the NSW Court of Criminal Appeal[1] and the High Court of Australia[2].

I possess the advantages of an esoteric awareness of Government's interactions in respect to the state's criminal justice processes, accrued as a result of my selection for and the undertaking of a 12-month secondment as the Police Force's representative and advisor to the Department of Premier and Cabinet. The matters with which I was thereby involved were at Cabinet level and it remains suffice therefore to state, those duties required my intellectual input in respect of matters regarding Government Policy initiatives and their development.

[1] Gilroy v Jebara [1992] 29 NSWLR 20.
[2] McAuliffe v R (1995) 183 CLR 108.

This role encompassed my consequent involvement in the structuring of emergent related Government Policy projects, directly affecting the operations of the NSW Police Force as well as impacting upon other stakeholders of the Criminal Justice System more generally.

Mr. F. Gilroy
Dip. Law (University of Sydney / LPAB)
Grad. Dip. Legal Practice (College of Law NSW)
Grad. Cert. Manag. (University of Wollongong).

Introduction

Difficulties have arisen in relation to the maintenance of consistency between the outcomes of the sentencing of offenders with the nominated purposes of that process. The scope of the discussion hereby presented has been deliberately limited to examination of aspects of the law relative to the consideration of good character in mitigation in the sentencing of offenders, however, the pernicious impact upon sentencing outcomes of the inappropriate weight attributed to some factors at the expense of appropriate consideration of others, during the process of sentencing is not limited to merely that feature.

Shortcomings which have been identified in this submission are collectively described as *Emergent Inadequacies* relating to the sentencing of offenders in New South Wales. It is reasonable to accept that such issues exist within other jurisdictions, and some experience a dramatically more significant incongruity in that consistency with the purposes for sentencing than is the present situation in respect to New South Wales.

The genesis of such inadequacies, irrespective of the jurisdiction is, it is contended, to have emerged from the reliance by courts upon utilisation of factors accepted as reliable indicators of sentencing's *'different and conflicting features'*,[3] and considered by the court during determination of a sentence. However, it is an accepted fact which shall be demonstrated, Good Character is derived utilising purported and assumed indicators which are not drawn from any empirical or quantifiable basis. The utility of that feature in sentencing is therefore compromised, since its derivation is subjective and thus attenuated as a form of an effective predictive feature to be relied upon as in any way accurately illustrative of the propensities of an individual relative as to their future conduct.

A compelling example draws upon an absence of a consensus upon factors accepted as appropriate to be utilised as demonstrative of an individual's good character. Accordingly, there is a corresponding absence of consensus as to any purported indicators of an individual's propensity for appropriate conduct. This concern was expressed in the Monash Law Review as,

[3] Markarian v R (2005) 228 CLR 357 at [37].

> *"...Decisions based on ostensible assessments of people's character, which lack rigorous consideration and empirical foundation, are likely to be speculative, misguided and arbitrary. Given that such determinations can profoundly affect people's lives and adversely impinge on their legal rights and interests, they may in fact violate the rule of law."*[4]

This is a difficulty with which the law struggles and has failed to effectively overcome. The variety of purported indicators utilised over time highlights this absence of any succinct basis upon which an evaluation of an individual's character could be established. The variability of such factors previously utilised was illustrated in the Consultation Paper of the Sentencing Council, referencing historical observations of indicators utilised which at a time included,

> *"...the individual's capacity to prove that they lived in a neighbourly, honest and orderly manner, supporting themselves by their own labour."*[5]

Were this still utilised by courts as a determinant of good character, there would be a multitude of present-day offenders who would not have any factors available to submit as indicative of good character.

Therefore, due to this inability to overcome reliance upon anything other than predominantly ideological factors, the utility of such alleged indicators of an existing 'Good Character' in reaching for the desired 'instinctive synthesis'[6] remains dubious. This is a concept recognised by the High Court of Australia when Kirby J stated,

> *"...it must be hypothesised that the 'character' of individual human beings demonstrates qualities which are sufficiently enduring and unvarying to be useful to a court...The previous assumption of lawyers...that individual behaviour was comparatively stable...arose from 'certain attributes or mental structures called "traits"' unique to each individual. That belief is now criticised as lacking empirical support."*[7]

---

[4] Gabrielle Wolf and Mirko Bagaric, *"Nice or Nasty?: Reasons to abolish character as a consideration in Australian sentencing hearings and Professionals' disciplinary proceedings"*, Monash Law Review, (2018),(Vol 44, No.3), 590.
[5] NSW Sentencing Council, Consultation Paper : *Good character at sentencing,* December 2024, 11, [2.15].
[6] Above n 5.
[7] Melbourne v R (1999) 198 CLR 1, 41 [106]-[107].

Potential solutions to address this situation are to be herein discussed. One examines the existing support for the abolition altogether of good character as a consideration in sentencing. Another extrapolates potential amendments to existing legislation to thereby impact upon the scope of the circumstances in which consideration of purported of good character, in mitigation of culpability, would be deemed appropriate to be excluded. In the event the abolition of the utilisation of good character as a consideration was not to occur, this submission also provides additional matters which are recommended in the alternative, to be incorporated into considerations in conjunction with the recommended amendments.

The utility of Good Character

It is appropriate to challenge the validity and hence the utility of good character as a factor in the mitigation of an offender's culpability. This is particularly so as such are the plethora of traits purported to be indicators of the existence of good character that this has been cited as justification for recommendations urging the absolute disregard of the concept in relation to the sentencing of offenders[8]. This is a proposal based upon an assertion,

> *"The concept of character is vague and incoherent, and lacks any settled definition or empirical foundation. Consequently, judicial and tribunal decisions that are based on assessments of individuals' character and impinge on their legal rights and interests may be unjust and violate the rule of law."*[9]

Emergent Inadequacies

Annexure A of this submission provides a *'Chronology of recommended amendments to sentencing in Australia,'* which contains an array of examples of Academic, Statutory, Common Law, and social reviews, commentaries and superior court stipulations spanning from 1967 to 2024 inclusive. Each example illustrates an incidence of a hallmark recommendation made in recognition of the existential necessity for realism to supplant ideology within the processes which the courts undertake in the role of sentencing offenders in

[8] Above n 4.
[9] Ibid, 567.

punishment for crime. Such could not be more of a necessity than it is in relation to considerations of an offender's character during that procedure.

What emerges from examination of the content of that chronological illustration, is the consistent and repeated concern expressed regarding what this submission describes as 'emergent inadequacies.' A succinct description of the source of the emergence of those inadequacies was provided by the Chief Justice of New South Wales, as he was then, the Hon. J.J. Spiegelman in an address by him to the nation's District and County Court Judges in 1999. His Honour raised concern regarding the interaction of punishment and deterrence when discussing the utility to which he afforded Guideline Judgements. He expressed his identification of the source of sentencing concerns in the following terms,

> *"...It is apparent that the publication of maximum sentences does not perform a substantial deterrent function, as the relationship between maximum sentences and actual sentences in not sufficiently clear...That penalties operate as a deterrent is a structural phenomenon of our criminal justice system...However, deterrence only works to the extent to which knowledge is transmitted to potential offenders about actual sentencing practice."*[10]

His Honour's observations provide an evaluation of the relationship between actual sentences imposed as punishment and their effect as a deterrence of crime. It serves as an effective introduction to discussion of the estrangement to have emerged between, the adherence to the purposes of punishment and the factors which are being utilised by courts in deliberations of the culpability of the offender undertaken when sentencing. The incongruence observed to exist is considered significantly due to the inappropriateness for this task of some factors relied upon by the court during those deliberations.

Inadequate attention and weight of influence is being afforded to other pertinent yet less propitious factors in comparison to efforts directed to enhance the mitigation of culpability of offenders. This has resulted in the continued emergence of inadequate sentences and the perception of inconsistencies in the administration of criminal justice.

---

[10] The Hon. J.J Spigleman, Chief Justice of NSW, Address to National Conference of District and County Court Judges, Sydney, 24 June 1999, *'Sentencing Guideline Judgements'.* Current Issues in Criminal Justice, Vol. 11 Number 1, July 1999, 11.

This situation is not a recent development as this discussion's annexed chronology demonstrates. If one was to inquire as to why it is that members of the legal profession, upon behalf of their clients, present such matters as can be regularly witnessed to the court as indicators of purported good character, the response to this quandary is axiomatic, it is because the court is prepared to accept and act upon such submissions when presented.

Character v Criminal History

It is contended to be a viable proposition to recognise that the absence of a criminal history should never be equated as being the demonstration of the existence of traits indicative of good character by an offender. The proposition's viability draws upon acceptance of the factual situation that, every first offender at the time of the commission of that initial offence, had no criminal history. Furthermore, as it is recognised by the Sentencing Council when citing Warner[11],

"...there is 'abundant evidence that the most powerful predictor of reconviction is the number of previous convictions'. There is, however, the problem that absence of evidence of prior criminal behaviour is not evidence of absence of such behaviour."

When the latter of these facts is chosen to be refuted, it is generally done so with reference to Ryan's case[12] and particularly so invoking the court's reference to an offender's 'otherwise good character,' being, *"an established mitigating factor in the sentencing process"*[13]. This is subsequently fortified by declaring the law thereby requires an obligatory recognition of this concept. The act of ignorance of or the minimisation of, the significance of the realities illustrated by Warner, also requires an ignorance of, or at least a relegation into insignificance of several related facts. This includes active ignorance of the criminal conduct of which the offender has been convicted, and the consideration of its reflection upon character, adopting instead a preference to recognise their so called 'otherwise good character.' Furthermore, it even becomes necessary in undertaking such denials to be selective in reference to Ryan's case. This is required to ensure to limit that reliance, and thereby avoid recognition of the Court's position regarding an otherwise appropriate utilisation of factors, as illustrated by the Court at [23], [25], [31], and [36],

---

[11] Above n 5, 73 [5.8].
[12] Ryan v R (2001) 206 CLR 267.
[13] Ibid, at [31].

when it determined the weight applicable to any purported, otherwise good character, as being required to be varied in evaluation, *"...according to all of the circumstances."*[14]

What is in reality minimalized is the aptness of a potential outcome, in some cases that consideration of this factor should incur the aggravation rather than mitigation of the offender's culpability. The High Court of Australia recognised this relegation of the significance of certain realities, as this submission has alleged, when it noted,

> *"The belief that individuals are indelibly marked by an identifiable 'character' has value in the law only so far as it is based on an assumption that such 'character' has a predictive value, whether for good or bad. This notion is not only challenged by the fact that every first offender once had a 'good character'..."*[15]

As the Court there implied, and has upon other occasions expressly stated,[16] it is equally rational to opine the commission of an offence as being the demonstration of a propensity towards criminality. However, there exists considerable resistance to any utilisation of such a conclusion as a viable consideration of the offender's character. Yet, if it is appropriate for one to dismiss such a notion, it is arguably therefore appropriate, in the interests of impartiality to require the disregard of that which often is suggested to the court, namely that a first offence be considered an aberration of what is otherwise the good character of the offender.

Impartiality and Consistency

What is proposed by this submission as appropriate encapsulates precisely that conundrum. Either the abovementioned scope of the considerations is inculcated into character evaluations by the court, or any consideration of character is excluded entirely. Information supportive of either proposition shall be forthcoming.

Any proposition which compromises impartiality is entirely inappropriate, since it is the irrefutable duty in the administration of the law to ensure that the impartiality and consistency of the rule of law remain its cornerstones.

---

[14] Ibid.
[15] Above n 3, 40 [105].
[16] See Kelly v The State of Western Australia [2024] WASCA 116; Rowland v The King [2024] NSWCCA 187; DPP v Wolinski (2024) NSWCCA 139; R v Jackson (2024) NSWCCA 156; Bugmy v The Queen (2013) 249 CLR 571 at [44].

This obligation is necessary to continue to preserve the rule of law, its requisite integrity, and its morality. That this preservation is a necessity is recognised as being so since,

> *"It is only when one acts out of duty, and thereby resists inclinations of self-interest that they act morally."*[17]

There exists a multitude of illustrations of the congruence of Statutory and Common Law principles in respect to sentencing. It is recognised as a necessity for there to be an unequivocal consistency in the process of sentencing. It is a bedrock of the rule of law, and recognised as such as demonstrated by a former Chief Justice of NSW as he then was,

> *"...By reason of the public prominence of the issues that arise, consistency in sentencing serves a high constitutional purpose: the maintenance of the rule of law."*[18]

This recognition of the need for consistency is legislatively exemplified by Section 4(2) of the Crimes (Sentencing Procedure) Act, 1999, (NSW), which attributes a maximum penalty to any legislative provision creating an offence without the nomination of a penalty otherwise. Another example is provided by the NSW Court of Criminal Appeal decision in the matter of R v MA[19], in which with significant clarity the Court compared the content of Section 3A of the same Act cited above, to the common law notion of the purposes of sentencing offenders. The Court's explicit reference to that legislation is of it emulating the common law's maintenance of consistency of response to offending, it does this when in reference to comment by the High Court of Australia, it describes the effect of that statutory provision stating it is,

> *"...in substance a codification and elaboration of the purposes of criminal punishment described in Veen v R (No.2)[20]".*

Actual Sentencing Practice

Similarly, to illustrate a frequent example of the considerations of putative Good Character arising in actual sentencing practice, one need not expend a significant period within

---

[17] Kant, Immanual. Essay – *Groundwork for the Metaphysics of Morals, (1785),* Translation by Thomas Kingsmill Abbott.
[18] Above n 10, 8.
[19] (2004) 145 A Crim R 434.
[20] Ibid.

a criminal court before becoming witness to the claim being presented, in mitigation of culpability upon an offender's behalf, which declares that the conduct of a subject offender in commission of the crime with which they are convicted, is reasonable to be considered, *'out of character'* regarding that individual. Such claims are then followed by the attempted verification to the court of the existence of alleged good character traits. That task is undertaken through presentation of information in submissions making references to a varied multitude of nebulous factors, all purported to be indicators of good character.

This process is one which the Sentencing Council recognises[21] and to incorporate a degree of realism into the situation, one is only required to consider the frequency with which such claims are made upon the behalf of convicted offenders. As an equally feasible consideration regarding such claims, it is reasonable to suggest notice should be taken of the fact that since such a number of individual offenders claim, through their legal representative, to be conducting themselves in a manner which is described as, *'out of character'*, a rational conclusion to be construed from that submission is that such claims may arguably be construed to suggest that for all offenders for which such a submission is presented, each individual should be considered by the court therefore as being of the same character. Thus, such conduct should rationally be argued to be a demonstrative characteristic of an individual who is a criminal, and thereby aggravate their culpability.

This is not seen as an unrealistic nexus to be drawn from this ever popular *'out of character'* scenario submission, when noting the subjectivity of estimations of good character, due to the absence of any empirical foundation to the concept.[22] It is open to conclude, the actions alleged to be out of character may be reasonably construed as conduct deemed demonstrative of an individual, who is a person possessing a character flawed by their incapacity to resist criminal tendencies. It is equally reasonable therefore to also construe that such persons may be inclined to act upon those tendencies in the future.

Furthermore, it is also arguable such claims should, as a logical result be therefore considered by the court, as factors of aggravation of an offender's culpability rather than in mitigation. As a natural consequence, it is also therefore reasonable to accept the likelihood that without a tangible deterrence, such an inclination to act upon those criminal tendencies is

[21] Above, n 5, 58, [4.5].
[22] Above n 4.

increasingly viable. It is equally logical that there is an even greater likelihood of being so in a scenario where, an environment providing circumstances emulating those in which the offence for which the offender has been convicted were to again present to that offender.

It would be timely to note the fact such a possibility, and its consequential risk to society, was famously recognised by the High Court of Australia when noting,

> *"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 submission were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender..."*[23].

Consequently, it would be appropriate for the court to consider a submission making claims of conduct being *'out of character'* as indicative of a more significant need for the court to protect the community from such offenders' inclinations. Furthermore, conclusions as to the propensity to undertake criminal conduct can also be argued as being demonstrative of a significantly increased risk to that community when it involves circumstances in which it is not the first offence by the subject offender, since such a tendency in that case has been confirmed through prior conduct. As already recognised in the Sentencing Council's Consultation Paper in citing the High Court in Veen (No.2),

> *"It follows that many prior convictions may suggest that the offence being sentenced was not an 'uncharacteristic aberration.'"*[24]

---

[23] Bugmy v The Queen (2013) 249 CLR 571, at [44].
[24] Above n 5, 58, [4.5], citing Veen v R (No.2) (1988) 164 CLR 465, 477.

As shown, such alternative conclusions are not without support within the law and yet, albeit inexplicably, at present increasingly unheeded, as perusal of the brief chronology of recommended legal reform annexed to this discussion demonstrates. Commentary as to this emergent inadequacy includes,

> *"...There seems to be a fashion, among some in the criminal justice system, for a kind of misplaced altruism that it is somehow a noble thing to assist a criminal evade conviction. But what good does it do a person...to avoid the consequences of a serious crime? There is no remorse, no introspection, no rehabilitation. For some, there may be a feeling of relief and a determination never to find oneself in the same predicament again.*
>
> *What though of the rest, whose respect for the criminal law is now even lower, having seen it fail and who are emboldened by having defeated it? Obviously, the community is in danger from these people. It they offend again, isn't someone accountable, apart from themselves?"*[25]

What has emerged is a refusal to accept criminal conduct as a demonstration of criminal character, yet its absence has been considered an acceptable demonstration of good character. Any denial of the legal recognition for requisite action to overcome this emergent inconsistency becomes incongruous when recognising it as implied by Parliament's acceptance of it as evinced by the enactment of Section 21A(5A). That enactment itself demonstrates the congruence of the legislature on this issue with the pre-existing position of the High Court of Australia in respect to the application of factors of aggravation and mitigation in sentencing, which the Court famously undertook declaring that as a necessity in *Bugmy (No.2)*[26]. Such is the pertinence of this conclusion it was recently confirmed for the continued relevance of its tenor in the Victorian Supreme Court of Appeal, when that Court noted,

> *"An offender whose formative years have not been marred by those deprivations must therefore be considered as more culpable for their offence."*[27]

[25] Margaret Cunneen S.C., University of Newcastle, 2005 Sir Ninian Stephen lecture.
[26] Bugmy v The Queen (2013) 249 CLR 571, at [44].
[27] Hurst v The King (2023) VSCA 286 (28 Nov 2023).

The reality of the unreliability of alleged determinants of character was also succinctly expressed in New South Wales, when regarding an anomaly in the utilisation of character by the court was illustrated, it confirmed the observation that,

> *"Reformations of character...can doubtless occur but their occurrence is not the usual but the exceptional thing. One cannot assume that a change has occurred merely because some years have gone by..."*[28]

The undoubted rationality and validity of that observation has been repeatedly confirmed by NSW superior courts between 1997 and 2007.[29] If the evaluation of claims of good character were to be conducted adopting the context of the law applicable to 'Special Circumstances' then as is the case when considering submissions on that factor, for such submissions to be deemed as appropriate under the law would require, as it does regarding Special Circumstances that,

> *"...it is necessary that the circumstances be sufficiently special to justify a variation..."*[30].

If this context were applied to any notion of good character, hypothetically accepting momentarily such a notion was defined in law, then to be eligible for consideration in mitigation, it would be equally requisite, for such conduct to be 'sufficiently' evident as a variant from that hypothetical norm. As previously discussed however, as no such tangible benchmark has been established pertinent to good character, and hence no such variance could be so identified, leaving those considerations unable to be attributed any empirical value and thereby incapable of facilitation of any logical estimation. This provides additional compelling justification to effectively stultify entirely, any proposition advocating consideration of Good Character in relation to actual sentencing practice.

The necessity for the court to make the abovementioned stipulation as to Special Circumstances provides a factual illustration of an emergent inadequacy in the sentencing process. In 2004 the NSW Court of Criminal Appeal made the above cited comment pertaining to 'Special Circumstances' being taken into the considerations of sentencing courts, after its

---

[28] Tziniolis, Ex Parte; Re the Medical Practitioners Act [1967] 1 NSWLR 357, 366.
[29] Ibid, quoted in Litchfield (1997) 41 NSWLR 630, 637 (Gleeson CJ, Meagher, Handley JJA); Alcorn (2007) NSWCA 288 (29 October 2007) [61] (Beazley and McColl JJA, Hoeben J).
[30] R v Simpson (2001) 53 NSWLR 704, at [68].

concerns were raised following noting that 87% of individuals then serving a sentence, had been the recipients of a finding of 'Special Circumstances'[31]. In its recognition of that fact, and in criticism of the emergence of it as an inadequacy, the Court found itself obliged to declare,

"This research makes it necessary for this Court to state the obvious... "[32], concluding as it did with its stipulation of the *'sufficiently special'* requirement.

It is compelling that examination of the factors of 'Special Circumstances' and 'Good Character' reveals significant differences between them. As recognised in the Monash Law Review[33], unlike the law pertaining to Special Circumstances, any formal or empirical definition facilitating it being legally attributable to indicators of good character do not exist. Hence tainting its incorporation into sentencing considerations as subjective, and potentially inconsistent. This concern is exacerbated by the subsequent concerns created in contemplation of the point that, despite the existence of legal points of reference pertinent to factors utilised for constituting the existence of 'Special Circumstances,' inadequacies with its utilisation were still to emerge. Those were issues of inadequacy of such significance their emergence enlivened the Court, as demonstrated in the matter of Fidow[34], to deem it necessary for action by that superior court by, *'...stating the obvious... '*[35] to address this emergent inadequacy in sentencing.

Consequently, it is proposed this exemplifies the notion as a reasonable contention that considering the demonstrated inherent inadequacies afflicting its legal utility because of the various and nebulous determinations of good character, any notions of it should be prohibited as a consideration in mitigation of an offender's culpability in relation to any offence.

Alternatives to abolition

A less attractive alternative to that proposition exists. Less attractive, as it should be noted this proposal, unlike the proposition of the complete abolition of its utilisation, fails in any way to address the previously demonstrated existing shortcomings pertaining to a reliable definition and indicators of good character. Its adoption entails merely enacting an amendment

[31] R v Fidow (2004) NSWCCA 172 [22].
[32] Ibid.
[33] Above n 4.
[34] Above n 31.
[35] Ibid.

adjusting the provisions of Section 21A(5A) of the *Crimes (Sentencing Procedure) Act, 1999, (NSW)*. Currently, the prohibition of the utilisation of good character in sentencing considerations is restricted by this provision to specifically nominated Child Sexual Offences, and circumstances surrounding their commission[36].

The alternative is, as a corollary of its present application within the law, is for the proposed scope of the prohibition upon the use of good character being expanded to apply to all offences. Its application should remain upon circumstances where it is proven to be a factor which was of assistance to the offender in the commission of the offence, since as Parliament observed when the Legislature enacted the relevant provisions in 2008,

> *"...Any offender who has misused his or her perceived trustworthiness and honesty in this way cannot use his or her good character and clean record as a mitigating factor in sentence..."*[37].

The legislative limitations restricting the operation of the provision to nominated offences, has been, it is considered, a source of impediment to its effectiveness. That has evolved to the degree that the present review is considered necessary and has been instigated by the present Attorney-General of NSW.

For the abovementioned proposition to be implemented, the suggested legislative amendment would simply require the literal adoption of the implications of those cited comments by the then Attorney-General, applying the prohibition to be applicable to ***any*** offence. In reference to the Consultation Paper of the Sentencing Council at paragraph 4.36, it is proposed that if it is re-examined following the deletion of all references to 'sexual,' doing so reveals in essence this submission's alternate proposal. It remains relevant and appropriate, and one that is particularly so when examined within the context of the abovementioned reference to the comment in Parliament in 2008. A further alternative to application of the stipulation to all offences, is for its application in reference to all Sexual offences, all Domestic Violence offences, Fraud and Drug Trafficking offences.

---

[36] Section 21A(5A) Crimes (Sentencing Procedure) Act, 1999, (NSW).

[37] The Hon. John Hatzistergos, Attorney-General of NSW, 2nd Reading Speech, NSW Legislative Council, 28 November 2008.

In the event the abolition of the utilisation of good character as a consideration was not to occur, such a limited utilisation of the herein proposed alternative measures provides what is considered to be a facile approach to the issue and fails to capitalise upon the propitious circumstances presently having been created, since an opportunity exists to otherwise rationalise the utility of the concept through an induction of more appropriate influence across the imposition of sentences regarding all types of offences.

Interaction with other factors

An ostensible selectivity can be observed by those contending, or tacitly accepting the continuance of a dominance of weight as appropriate to be applied regarding considerations relating to rehabilitation in subjugation of the other six purposes for sentencing in New South Wales. This is recognised by the Sentencing Council in its Consultation Paper in which it accurately illustrates when stating,

> *"Rehabilitation, as a purpose of sentencing, concerns the offender's ability to reform their attitudes and behaviour so that they do not reoffend. At a broader level, rehabilitation is also concerned with the offender's renunciation of their wrongdoing..."*[38]

In condemnation of any purported superior significance being attributed to rehabilitation, and a consideration to rationally flow from the above referenced facts, in particular from the broader concept enunciated, is that a plea of Not Guilty may therefore appropriately be determined to be a demonstration, by a subsequently convicted offender of their failure to renounce their wrongdoing.

Further, as a result of that absence of any renunciation, such offender should thereby become one evaluated to be an inappropriate candidate for rehabilitation. The logic of that consideration is accurately illustrated within the Sentencing Council's Consultation Paper,[39]

[38] Above n 5, 58, [4.6].
[39] Above n 5, 75, [5.18].

citing the NSW Court of Criminal Appeal decisions in *Thompson v R*[40], and again in *Allen v R*[41], determining such an evaluation an appropriate conclusion since,

> *"It would not be punishment for pleading not guilty...A parallel could be drawn with the unavailability in many cases, of remorse as mitigation for those who plead not guilty."*

There are seven Purposes of Sentencing expressly nominated by the N.S.W. Parliament when it amended the Crimes (Sentencing Procedure) Act, 1999,(NSW) in 2003 with Section 3A(a) – (g). Commencing the same date was Section 21A, through which the Parliament also expressly nominated within sub-sections (2) and (3), the aggravating and mitigating factors respectively which the legislature stipulated were,

> *"...to be taken into account in determining the appropriate sentence for an offence..."*[42]

The emergent inadequacies in relation to sentencing offenders presently in N.S.W. demonstrate the effects of an apparent insouciance of that stipulation and another expressed within that statutory provision. That additional requirement is presented immediately prior to Section 21A(2) and is read as unambiguously directing the courts' adherence during sentencing stating,

> *"The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law."*[43]

It is contended that therein lies the source of those observed emergent inadequacies which operate in contradiction to these statutory requirements. That, it is contended is through inconsistency. As it shall be demonstrated, superior courts recognise that these inadequacies result from the inconsistent attribution of, weight, and of attention, being applied to the entirety of the factors required to be considered during the sentencing process in the formulation of sentences for crimes.

---

[40] [2000] NSWCCA 309.

[41] [2008] NSWCCA 11 at [37]-[41].

[42] Crimes (Sentencing Procedure) Act, 1999, (NSW), Section 21A(2) and (3).

[43] Ibid.

Adequate sentences

The author concurs with the position accepted as a legal maxim that sentences are not to exceed what it is that is considered proportional to the criminality of the offence. Any discussion of this contention however, it is maintained necessitates the consideration of two significant factors to which the instructional edicts of the legislature contained within Section 21A unequivocally apply. Yet this either is not being undertaken, or it is being addressed inconsistently.

The first of these foundational factors is suggested as the implication that the criminality of a crime is reflected by the maximum penalty which the legislature attributes to it. This is a contention confirmed to be accurate by the High Court of Australia when stating in the decision of Markarian,

> *"Legislatures do not enact maximum available sentences as mere formalities. Judges need yardsticks... [It] follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all the other relevant factors, a yardstick."*[44]

Further support exists variously within the law, including through legislation within New South Wales which extends this concept to offences for which no specific penalty is expressed[45].

The second factor necessitates recognition of the legitimacy of the proposition that the proportionality of a sentence imposed must reflect the adequate referral by the court to all licit factors pertinent to the purposes of sentencing. It is a concept considered sufficiently significant by the High Court as being necessary to elucidate this obligation in 2001, by stating,

> *"...the task of the sentencer is to take account of all the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an 'Instinctive Synthesis'..."*[46]

[44] Above n 3, at [30]-[31].
[45] Section 4(2), Crimes (Sentencing Procedure) Act, 1999, (NSW).
[46] Wong v R (2001) 207 CLR 584.

The Court found it was required to iterate this maxim four years later by reference to its edict from *Wong*[47] and continued by declaring,

> *"...the sentencer is called on to reach a single sentence which...balances many different and conflicting features."*[48]

Regrettably and yet demonstrative of the inaction to date in addressing previously identified inadequacies, the High Court of Australia found it to be necessary to re-iterate its position in 2011 stating,

> *"The judge identifies **all** the factors that are relevant to the sentence, discusses their significance and then makes a value judgement as to what is the appropriate sentence given all the factors of the case."*[49]

There exists academic support for such a contention through the position articulated in the Monash Law Review upon this issue proposing,

> *"...there is no need for decision-makers to depend upon character evaluations because the offending behaviour of the subjects of the hearings will provide them with sufficient information to reach decisions...Similarly, in sentencing hearings, courts only need to consider the offender's crime, and not assess his or her character, to determine which penalty will protect the community, deter the individual offender and others from committing crimes, punish and rehabilitate the offender, and denounce his or her crime. Assessments of an offender's character have no role to play in courts' application of the principle of proportionality..."*[50]

Alternative amendments

If utilisation of good character, in some derivative of the concept were to continue, with cognisance of the difficulties causing its utility to be irrevocably flawed, it would remain appropriate for discussion to be undertaken in respect of how such a utilisation should be amended. For reasons previously illustrated the cornerstone of such discussion is acceptance of the necessity for the maintenance of consistency. Guidance in this regard is once more drawn

---

[47] Ibid.
[48] Above n 3, at [37].
[49] Muldrock v R (2011) 244 CLR 120, 131-2 [126], (*emphasis in original)*.
[50] Above n 4, 598.

from the NSW Court of Criminal Appeal. In its decision in the matter of ***R v Wickham***[51] the Court noted at [22],

> *"When a court is about to consider matters of aggravation or mitigation under Section 21A it is important that it recognises the limits upon the use to be made of those factors…The effect and Policy behind such a limitation is self-evident: there should be no double-counting…".*

In its preliminary response The Office of the Director of Public Prosecutions (New South Wales) expressed its position on the matter as one of reluctance to support an absolute prohibition upon taking good character into account. That was despite its recognition of the subjectivity of the nature of the concept. This was stated as being based upon acceptance of the contention that such a prohibition would impede the delivery of 'individualised justice.'[52] This is expressed with the desire to maintain the restrictions within Section 21A(5A) to its use under which it is presently utilised[53]. It would be accurate therefore to paraphrase that position as desirous of the status quo remaining unaltered.

It is considered potentially worthwhile to ascertain clarification of the position of the ODPP in respect of the proposition of the removal of the limitation of the current legislation to application in relation to specific offences only, and the subsequent expanding of its regulatory influence to all offences. As recommended, this should be contemplated where the proviso remains that good character and the absence of prior convictions would only available if it is established on the balance of probabilities such have not assisted the perpetrator's commission of the subject offence.

It is recommended it would also be prudent for this stipulation to include restricting any establishment of the applicability of the legislation to a particular case to occur through referral only to the facts of the matter, rather than reference to the subject offence proven. Doing so would be an effective method in thereby negating opportunities to exclude the scope of the applicability of the provision's restrictions through manipulative plea bargaining to facilitate utilisation of such submissions.

---

[51] (2004) NSWCCA 193 at [22].
[52] ODPP New South Wales, *Preliminary submission, Good character in sentencing*, 19 July 2024, 2.
[53] Ibid.

Cognisant of the court's observations in the matter *Wickham*[54] and the avoidance of double-counting, appropriate stipulations to be considered could relate to the timing of the submission of such matters and hence, the following is raised for contemplation. If evidence suggestive of an accused's alleged good character or the absence of any prior convictions were to be adduced during a trial, it should be subsequently appropriate to avoid 'double-counting' for any reference to such to be prohibited during submissions and deliberations upon sentence.

Consequently, it would fall upon the defence to decide when to introduce any reference to good character and or the absence of prior offences on behalf of their client. The accused's representatives would need to evaluate the strength of such evidence and the likelihood of any potential benefit to accrue and decide accordingly whether to adduce such evidence for a jury, thereby gambling upon it securing an acquittal. If that course of action is undertaken unsuccessfully the law should, as a natural progression of processes upon conviction of the offender, prohibit the sentencing judicial officer utilising the same evidence in mitigation of sentence. Alternatively, the defence may choose to retain the presentation of that evidence, preferring to preserve utilisation of its consideration in the formulation of sentence, in cases in which such action was permissible, and unless it facilitated the offender's conduct.

Procedurally, such evidence should only be acceptable through direct evidence from a witness present at the proceedings. Furthermore, an intention to adduce such evidence, and the stage within proceedings in which this is proposed should be required to continue to be predicated upon requirements imposed through notification obligations similar to those regulating pre-trial disclosures, as described within the Criminal Procedure Act, 1986 (NSW). For example, appropriate amendments to this Act could be enacted introducing provisions similar to Section 143(f), but relevant to proposed witnesses nominated to be called to provide evidence as to good character. Such provisions could therefore stipulate the requirement for the defence to provide a copy of any report, reference, statement, or other form of testimonial by a person the accused intends to call as a character witness. Henceforth requiring enactment of a provision similar to Section 144(a) of that Act, operating in response to utilisation of that corresponding good character amendment.

---

[54] Above n 51.

Doing so would facilitate the prosecution incorporating appropriate time frames to ensure competency in review and possible challenges to such evidence.

It is considered an appropriate juncture to re-iterate the significance of the absence of any empirical reliability for the utilisation of such evidence, and highlight the apparent insouciance of its continued utilisation despite the illustrated attenuating effect upon the consistency of the law regarding sentencing which accompanies that use.

Enhanced Victim-Survivor considerations

Despite being from a decade ago, an evaluation then of actual sentencing practices in New South Wales continues to serve to illustrate the influence of inherent inadequacies in the related processes, and manifest as sentencing outcomes. The evaluation was in the form of commentary by Professor Emeritus of Law, David Flint, AM, writing in The Spectator Australia in its cover story upon NSW Crown Prosecutor, Margaret Cunneen, S.C., and the ignominious ICAC Operation Hale. In his noting of the Madame Crown's illustration of the same issues, then ten years previous, and now twenty years ago during her Sir Ninian Stephen lecture at Newcastle University, Professor Flint observed,

> *"She put into clear language the question constantly asked in the nation's pubs and living rooms: Whether public confidence in the courts is being eroded by the perception that the pendulum had 'swung too far' in the direction of the protection of the rights of the accused person."*[55]

Priority and Impartiality v Replication of the abuse

When contemplated within the context of the observations of numerous preliminary submissions to the Sentencing Council[56] their underlying theme concurs with the Professor's observations. Their implication is that it is,

> *"...necessary to ensure that victim-survivors are the priority of the system, not offenders."*[57]

---

[55] Margaret Cunneen SC, *The Boxing Butterfly – A Life of Conviction;* (Wilkinson 2022), 119.
[56] Above n 5, 69, [4.54] – [4.55].
[57] Ibid.

To refute this contention is not only contrary to such authoritative commentaries upon the criminal justice system in this state, it is also to propose a position contrary to current Government Policy in New South Wales, as was ostensibly explained when expressed by the present Attorney-General, The Hon. Michael Daly as,

"...the safety of victims is the paramount consideration of the justice system."[58]

To facilitate an opportunity for a comprehension of the experiences endured by victim-survivors through sentencing proceedings, in the context of the impact upon them of the presentation of evidence of good character upon an offender's behalf, the following insight is provided. If one undertakes to envisage the presentation to a court of submissions containing recommendations for the mitigation of an offender's culpability for a crime, and in so imagining, one is to include witnessing the eloquence with which those representations are being made by a member of the legal profession, acting upon the perpetrator's behalf. Having undertaken such an exercise, it is difficult to construct a situation which would be more alien in comparison to the circumstances that perpetrator's victim-survivor was forced, by the said perpetrator, to endure when committing the crime, the subject of those proceedings. Having imagined the aforementioned scenario, one should repeat the activity, however, now placing themselves within it as the relevant victim-survivor, who endured the conduct of that offender.

Further, while within that mindset, attempt to envisage your likely reaction as the victim-survivor being required to silently endure the presentation of those recommendations for mitigation of that offender's culpability for what they, he, or she, did to you. In doing so, it is important to remain cognisant of the variety of nebulous purported indicators likely to be presented supporting an alleged good character of the relevant criminal. Also, within that mindset, value those supposed reasons presented, and subsequently witness the attribution of a disproportionate value being applied by the court in justification of the mitigation of the offender's culpability. Doing so has been described as a confirmation of a validity to the perception that it is the rights of the perpetrator which have become sacrosanct.

[58] The Hon. Michael Daly, NSW Attorney-General, cited by Hoerr, Karl, Law Society Journal online, lsj.com.au/articles/*bail-presumption-reversed-for-serious-domestic-violence-offences-under-sweeping-reforms,* May 14, 2024.

The exercise just undertaken allows one to partially experience a pristine version of a sentencing phase of criminal proceedings from the perspective of a victim-survivor. It is only partial, and pristine since it is only indicative of their reality. This is so because one was not forced to experience the physical, the psychological or even the financial ramifications an actual victim-survivor is required to endure. It must be recognised the victim-survivor is required to endure this because the offender created the circumstances, through their conduct. That is conduct which resulted in those ramifications, and those ramifications for the victim-survivor are subsequently compounded by the impact imposed through the processes involved in criminal proceedings.

This experience has been described within the Sentencing Council's Consultation Paper[59] , as victim-survivors being forced to again experience an imbalance of power. It must be noted that they are required to do so at this stage of proceedings by enduring the presentation of an array of tenuous claims attempting to support a contention that it is acceptable to consider the culpability of the offender to be evaluated as less severe than, rather than as the cause of, the trauma the victim-survivor was forced to experience when they were subjected to the offender's conduct. As was noted by the Royal Commission into Institutional Responses to Child Sexual Abuse, which it is proposed to be equally applicable to the victim-survivors of any crime,

> *"...the power imbalance they experience during court proceedings...mirrors the dynamics of abuse."*[60]

Realism v Ideology

Considering such circumstances almost always occur due to primary or secondary victim-survivors exercising a vigilance in attendance at court proceedings, it is now recommended as the next phase of the sanitised version of experiencing of the victim-survivor perspective of the criminal justice system, one returns to the previously described scenario and witness thereby, the inconsistency between the courts' attribution of significance, that is to say, weight of influence, upon factors in mitigation of the offender's culpability, as having superior

[59] Above n 5, 42, [3.36].
[60] Ibid.

importance to factors in aggravation of it, including the experience suffered by the victim-survivor. What is displayed in this phase of the criminal justice system's functioning, when observed from the perspective of the community, as well as its component victim-survivors, is a tangible demonstration of that system's primary inadequacy. Its source is the result of this subjugation of the rights and expectations, of all who place their trust the criminal justice system to provide protection from the predation of criminals. It occurs due to the lesser priority attributed to the violation of those rights to protection, a violation caused because of the offending perpetrator's criminal acts.

When challenging that subjugation of rights during the processes of sentencing within the present operations of the criminal justice system in New South Wales, it is responded to by claims in justification through an almost censorious contention that it is society which somehow actually owes a responsibility to the criminal. Society, it is alleged by those contending such justification, is to blame for the creation of the criminal.

This proposition however, demonstrates an imperious yet prosaic ignorance as a preference to the recognition that the subject criminal is unequivocally responsible for the creation of the victim-survivor, and hence in reality owes retribution for having done so. It is maintained, in response to such claims of justification, that to refute the realistic alternative outlined requires a particularly craven perspective of reality. Such an insouciant rejection is demonstrative of a neglect towards the appropriate consideration required for available alternative conclusions. It adopts instead an exclusive approach, deliberate or otherwise, to the exercise of impartiality.

This is a situation which could expeditiously and effectively be addressed, being achieved through utilisation of appropriately constructed Guideline Judgements, to realign the sentencing considerations undertaken by the court. Such action in rectification should adopt the position proposed herein, and which the Court of Criminal Appeal could facilitate with the stipulation,

> *"...there is no need for decision-makers to depend upon character evaluations because the offending behaviour of the subjects of the hearings will provide them with sufficient information to reach decisions...Similarly, in sentencing hearings, courts only need to consider the offender's crime, and not assess his or her character,*

to determine which penalty will protect the community, deter the individual offender and others from committing crimes, punish and rehabilitate the offender, and denounce his or her crime. Assessments of an offender's character have no role to play in courts' application of the principle of proportionality..."[61]

Contextualisation of the Offence

Multiple sources however, recommend alternatives to the abolishing of any considerations of good character. As an extrapolation upon the Sentencing Council's illustration of some alternative propositions, and the consequent justifications utilised in support of the use of good character in sentencing[62], comment is provided, which is recommended to be considered within the context of the *'whole person'*[63] concept. Those references reveal propositions within Preliminary Submissions declaring,

> *"...information about a person's character was needed for the proper exercise of the discretion and the achievement of individualised justice, as it assists to contextualise a person's behaviour."*[64]

The extrapolation of the point occurs through transposition of the *'whole person'* justification in reference to the offender, by preferred considerations of a *'whole victim'* instead. A significantly more appropriate methodology for the achievement of a more rational version of *'individualised justice'* is accordingly likely, since it is maintained that it is infinitely more appropriate to *'contextualise'* the offences, rather than the offender, and to do so in terms of the impact of their conduct upon its innocent victim-survivor. This becomes an exercise in the rationalisation of justice subjugating considerations to be afforded to a perpetrator, to those pertinent to the victim-survivor, as well as those of all other stakeholders, with the victim-survivor as paramount.

The necessity to maintain impartiality is unequivocally requisite to the preservation of consistency, and therefore to the perception of integrity and the corresponding confidence of society in the rule of law. In the event of a failure to abolish the consideration of good character from the processes of the criminal justice system, then as an adjunct to the preservation of

---

[61] Above n 4, 598.
[62] Above n 5, 58, [4.2].
[63] Ibid.
[64] Ibid.

impartiality, and effectively also incorporating reality into its preservation and functioning, it is proposed that therefore it would be appropriate for evidence as to the offender's character to be adduced from an offender's previous victim-survivors. To do so, it is argued, would introduce facts for consideration which are highly significant in their relevance to an offender's prior conduct, and furthermore, would be particularly effective in the conceptualisation of a person's conduct towards innocent victim-survivors.

It is therefore a reasonable proposition to make, that it would be appropriate in circumstances where a court was to permit evidence of good character, it consequently becomes equally appropriate to permit evidence of the offender's conduct towards previous victim-survivors. Doing so would be ensuring impartiality, as well as providing a tangible conceptualisation of the impact of the crime upon its victim-survivor. It is contended to be possible since it is arguably capable of being considered by the court to be evidence of historically relevant matters, and as such be introduced and utilised.

Evidentiary processes

The proposed process effectively addresses the considerations raised in preliminary submissions to the Sentencing Council in relation to procedures for tendering of such evidence[65]concerning scrutiny, reliability, and of a necessity for appropriate parameters. Doing so could potentially occur through stipulations to be enacted effectively mirroring those applicable to notice and probative value, in accordance with Section 97 and Section 98 regarding Tendency and Coincidence evidence respectively[66]. Impartiality would be ensured through the application of such stipulations to all matters purported to be evidence indicative of all character, be that good or bad.

Such a procedural function is not unknown to the law, following as it could processes already deemed by the High Court of Australia to be appropriate regarding issues involving similar circumstances,

"...the courts are not free to make their own historical inquiries without giving the parties notice, and an opportunity to deal with what the court regards as material... Compliance with those duties would remove many of the difficulties in judicial reliance on

[65] Above n 5, 85.
[66] Evidence Act, 1995 (NSW).

unproved material. It would expose whether the parties agree on the facts, and if they do not agree, it enables each party to criticise or compensate for the useless, incomplete, or erroneous character of the other's appeal to the facts. So far as the parties agree, the points of agreement are receivable as being in substance agreed facts. So far as they disagree, the nature of the disagreement may be useful to the court."[67]

It is proposed if no alteration is forthcoming in respect to the present circumstances regarding character evidence, impartiality would correctly dictate the necessary adoption of the proposal herein relating to Historically Relevant Matters of character, and of the imposition of the relevant proposed procedures for its tendering into evidence.

The incorporation of such a proposal would likely generate as a result, the situation where efforts to resort to the use of evidence of good character, in the absence of its abolition, would be likely to become an undertaking only rationally available to those for whom it would be truly capable of proving themselves to be ostensibly such an individual. This would be contrary to that which is generally the present circumstances, involving offenders merely inferring to be so, through oblique references to tenuous facts, as a means of deflection of their culpability, in attempts to mitigate the ramifications due for their conduct. However, it is of concern that without tangible enhancement current processes shall continue, and hence the law shall continue to fail in alleviation of the trauma identified as that which victim-survivors experience as a result of present deliberations of offenders' culpability.

Conclusions

It is contended, what it is that has been established as constituting a significant inadequacy afflicting the process of sentencing offenders in New South Wales, is the continued inconsistencies in the degree of significance attributed to matters, and the nature of the actual matters, which are afforded consideration during that process. The most significant source of this inconsistency is ostensibly demonstrated by the utilisation of the nebulous factors purported to be illustrative of the existence of good character. Flowing from this is the subsequent inappropriate mitigation of an offender's culpability for their criminal conduct.

[67] Woods v Multi-Sports Holdings Pty. Ltd., (2002) 208 CLR 460, at [165]-[168].

It is with enthusiasm that an epiphany is awaited. Its arrival shall be as the revelation it is the result of the failure to impose appropriate punishment for criminal conduct, that there subsequently emerged a tangible absence of an effective deterrence to the committing of crime. This submission contends the origin of this fact as being the exacerbation of the consequences generated by continued mollycoddling of perpetrators, through pusillanimous and idealistic attempts to establish a utopia, in which unrealistic expectations of rehabilitation continued to be attributed a superior significance to all other recognised purposes of sentencing. It is contended this was at the expense of the effective deterrence of crime through failure to impose any adequate censure upon such conduct.

It is considered appropriate to provide a response to propositions within particular preliminary submissions to the Sentencing Council[68], which declared the abolition of the ability for judicial officers to consider good character evidence would compromise the purposes of sentencing. It is suggested it would be appropriate for advice to be sought from the relevant sources as to how it is envisaged, as alleged, that such an abolition would actually compromise, the protection of the community from the offender, or compromise the denunciation of the perpetrator's conduct, or compromise the recognition of the harm that conduct had done to the victim-survivor and the community. Even to imply, as was done, that a compromise of the rehabilitative purpose of sentencing from such an abolition, is considered to be dubious. That is particularly so when it is recognised as axiomatic that deterrence itself constitutes an apotheosis of the manifestation of rehabilitation.

Such an epiphany as that which has been herein prophesised, if it is to occur, cannot be considered as any form of prescient conclusion, since a precise example of that fact was noted as being compelling in 1999. It occurred when His Honour, the then Chief Justice of New South Wales, Spigleman C.J., observed,

"...the publication of maximum penalties does not perform a substantial deterrent function...deterrence only works to the extent to which knowledge is transmitted to potential offenders about actual sentencing practice."[69]

[68] Above n 5, 84, [5.59].
[69] Above n 10.

One is not required to be particularly adroit, merely realistic to comprehend the impact upon deterrence of the knowledge 'transmitted to potential offenders' of an 'actual sentencing practice' which imposes an inconsequential degree of detriment upon offenders. In concurrence with the position expressed by the High Court of Australia in ***Ryan***[70], a factor expressed as relevant to rehabilitation was recognised as being an offender's capacity to, *"'appreciate the censure' of a criminal penalty,"* and furthermore, expressing recognition as a fact that such an appreciation is instrumental to the suggestion that, *"reoffending is unlikely."*[71]

Yet it is contended, as an additional example of the emergent inadequacy of weight of influence being attributed to a factor during sentencing practices, that a belief the statutory maximum penalty for an offence presently serves as a deterrence is illusory. As demonstrated, evidence supporting this contention was drawn from the comments of the Chief Justice of New South Wales, as he was then, the Hon. J.J. Spigleman when His Honour succinctly illustrated the interaction of punishment and deterrence in observing,

> *"...deterrence only works to the extent to which knowledge is transmitted to potential offenders about actual sentencing practice."*[72].

Logically therefore, in circumstances in which a sentence imposed does not censure, the consequent corollary to be established is that it shall not therefore deter, and hence reoffending would rationally be likely as a result. Opposition to this contention is without credit through an astute reference to the recent unacceptably severe number of incidences of crime, and particularly of youth crime within Queensland and the Northern Territory, accompanied by its social criticism of the relevant Governments in response. This becomes increasingly poignant when examined in reference to current sentencing practices within those jurisdictions. This nexus is supportive of the contentions of this submission in respect to the necessity of consistency and deterrence in sentencing. There also exists a political significance to be drawn from these facts by the Governments of the other Australian jurisdictions. That is from the awareness this was an issue which was instrumental in affecting a change of government in both those jurisdictions in 2024. Such political ramifications should be unsurprising to those with an awareness that a society in general, its component victim-survivors of crime, and

[70] Ryan v R (2001) 206 CLR 267 at [68].
[71] Ibid.
[72] Above, n 10, 11.

especially observers who become personally fearful of becoming victim-survivors, all shall reliably react against a government which they decide is failing to protect them from crime. Within this context, the observation by the present Chief Justice of New South Wales, His Honour, Chief Justice Bell, is extremely relevant. The Chief Justice stated,

> *"The rule of law does not exist in a vacuum...and is intimately interwoven with, the social, economic and political story...of New South Wales."*[73]

Potential Rectification

As perusal of the chronology provided as Annexure A reflects, the emergent inconsistencies identified in the administration of law are a matter which has been a concern for decades, and when the recency of some examples provided is considered, ostensibly remains yet to be adequately addressed. The effectiveness of any remedies will be estimated through reference to the degree of consistency it introduces into actual sentencing, considering, as was recognised by His Honour, the then Chief Justice Spigleman C.J.,

> *"...consistency in sentencing serves a high constitutional purpose: the maintenance of the rule of law."*[74]

The chronology is also a vignette of a functioning criminal justice system which is successfully achieving that requisite consistency. This occurs when as noted in the matter of ***Wong***,

> *"...the sentencer is to take account of all the relevant factors and to arrive at a single result which takes due account of them all..."*[75]

The crucial point to be gleaned from that observation by the High Court is that the paramount task for the judicial official is to take an impartial account of all relevant factors in a given case, affording each relevant factor due account, and not those without empirical justification dubiously relied upon in purporting representations of good character. The same requirements were stipulated two decades prior,

> *"...a decision-maker must give due and proper consideration to all relevant matters."*[76]

---

[73] Law Society of NSW; Law Society Journal: *200 years of the Supreme Court of NSW;* (March, 2024), 62.
[74] Above n 10, 8.
[75] Wong v R (2001) 207 CLR 584.
[76] Sean Investments Pty Ltd v McKellar (1981) 38 ALR 363.

In August 2024, the New South Wales Court of Criminal Appeal twice cited an inappropriate attribution by a court, of weight upon such factors taken into account in a sentencing process, as being the causal effect for a sentence evaluated by that Court as manifestly inadequate in its severity. In those two matters[77] the Court cited the same stipulation, often referred to as components of the 'Bugmy considerations' of the High Court decision as to the cause of inadequacy in sentencing,

"...Judge Lerve gave too little weight to some factors, and too much weight to other factors."[78]

This superior NSW Court again demonstrated in October 2024 that it remains indefatigable in its recognition of this emergent inadequacy as a source of the inconsistency in sentencing which afflicts the law as illustrated,

...Whilst they have been set out many times before, the High Court's observations in Bugmy at [44] bares repeating..."[79]

It has been demonstrated that action is yet to be implemented, despite the repeated declarations by superior courts of what it is they have found necessary for adequate rectification in effectively undertaking sentencing of offenders. It should provide no astonishment to recognise, as also demonstrated, successive Governments in New South Wales have repeatedly expressed policy in concurrence with those sentiments of the courts, illustrated by reference to former Attorney-General of New South Wales, The Hon. John Hatzistergos [80], and the present Attorney-General, The Hon. Michael Daly.[81] The fact policy was expressed in these terms including the use of the collective, 'any offender', constitutes significant justification for the proposed courses of action recommended within this submission.

Proponents of considerations which are contrary to or would act to attenuate these expressed objectives of Government policy are invariably revealed as being those who are intent upon the subjugation of the rights and needs of the victim-survivor to those of the

[77] Director of Public Prosecutions (NSW) v Wolinski (2024) NSWCCA 139, ((2 August 2024), Adamson J.A., Price A.J.A., and Garling J.) ; and R v Jackson (2024) NSWCCA 156, ((21 August 2024), Kirk J.A., Campbell and McNaughton J.J.).
[78] Bugmy v The Queen (2013) 249 CLR 571 at [24].
[79] Rowland v The King (2024) NSWCCA 187, ((16 October 2024), Davies, Garling and Chen J.J.).
[80] Above n 37.
[81] Above n 58.

offender. That they do so is without any responsibility being accepted towards the exacerbation of the suffering and injustices experienced by those victim-survivors to be caused by that position. They prefer to continue in ignorance, or denial, of such an outcome. It is done so under some oblique proposition, contrary to illustrated existing policy, and legal and academic factual positions, preferring to conclude that society is somehow to blame for the creation of the offender's circumstances. The resultant indignation in response to expression of this as the fallacy it is, exemplifies similar conduct in response to efforts which ironically were also attempting to misdirect criminal culpability. That conduct was at that time sarcastically illustrated in the terms,

"It's quite gratifying to feel guilty if you haven't done anything wrong: How noble !"[82]

While the administration of the law at present continues to suffer operating with obsequious adherence to flawed sentencing theories and beliefs, the chronology of legal, political, and academic, reasoning for its cessation shall continue to expand. Of greater concern, should be the recognition that as a result so shall the presently experienced inadequacies follow the same course. The following actions are recommended for implementation, not in the pursuit of any perceived or actual Machiavellian objectives. They are altruistically proposed as means through which to achieve effective rectification of those inadequacies seen to have infiltrated actual sentencing practices within New South Wales.

It is why it is the primary recommendation of this submission that any consideration of good character is abolished entirely in relation to sentencing of offenders. However, if this is not to be undertaken, then in the manner proposed herein, considerations of such should relate to sentencing deliberations from the perspective of being a factor which is an aggravation of culpability, as being a demonstration of conduct deliberately contrary to what the offender knows to be appropriate. This approach to such evidence would preserve impartiality by considering issues of adducing evidence which incorporate utilisation of processes akin to Notice, and Probative Value under Section 97 and Section 98, of the Evidence Act, 1995 (NSW) regarding evidence of Tendency and Coincidence respectively, as well as, where relevant to a trial, the pre-trial stipulations within Section 143 and Section 144 of the Criminal Procedure Act, 1986 (NSW) for example. It is recommended to be so in contemplating matters in respect

[82] Arendt, Hannah; *Eichmann in Jerusalem – A report upon the banality of evil,* 1963, 251.

to facilitation of the adducing of evidence from previous victim-survivors, and thereby to effectively 'conceptualise' the offender's conduct.

It is additionally recommended, as appropriate in circumstances in which an abolition of consideration of good character is not forthcoming, that the limitations imposed through Section 21A(5A), Crimes (Sentencing Procedure) Act, 1999 (NSW) should, through appropriate enactment of amendments accordingly, be extended to become applicable to all criminal offences. It is in this way, were that to be the case, and ignoring the failures identified herein, through this there may at the least develop, an appropriate recognition that culpability for criminal conduct is something to be impartially attributed, rather than demurred in some specious act of self-serving deflection, at the expense of the deterrence of further crime.

-///-

Annexure A

Chronology of recommended amendments to sentencing in Australia

1967

Tziniolis, Ex Parte; the Medical Practitioners Act [1967] 1 NSWLR 357, 366.

"Reformations of character…can doubtless occur but their occurrence is not the usual but the exceptional thing. One cannot assume that a change has occurred merely because some years have gone by".

1980

R v Oliver (1980) 7 A Crim R 174 at 177

"The first initial consideration is the statutory maximum prescribed by the legislature for the offence in question. The legislature manifests its policy in the enactment of the maximum penalty which may be imposed."

R v H (1980) 3 A Crim R 53 at 65

"The maximum penalty reflects the seriousness of the crime as perceived by the public."

1981

Sean Investments Pty Ltd v McKellar (1981) 38 ALR 363

"…a decision-maker must give due and proper consideration to all relevant matters."

1988

Veen v R (No.2) (1988) 164 CLR 465 at [15]

"…the maximum penalty prescribed for an offence…does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case. Ingenuity can always conjure up a case of greater heinousness."

1995

R v Stone (1995) 85 A Crim R 436

Applying R v Moffat (NSWCCA, Blanch J, 21 June 1994, unreported.)

> "Notwithstanding that the court may find there are Special Circumstances, the court is not required to reduce the non-parole period where the importance of general deterrence requires that the non-parole period not be reduced."

1998

R v McDonald (1998) 28 MVR 432

> "The non-parole period must reflect the criminality involved in the offence."

1999

The Hon. J.J.Spigleman, Chief Justice of N.S.W.

Current Issues in Criminal Justice, Vol.11, Number 1, July 1999, 11.

Address to the National Conference of District and County Court Judges, Sydney, 24 June 1999.

'Sentencing Guideline Judgements'

"...It is apparent that the publication of maximum sentences does not perform a substantial deterrent function, as the relationship between maximum sentences and actual sentences is not sufficiently clear."

"That penalties operate as a deterrent is a structural phenomenon of our criminal justice system...However, deterrence only works to the extent to which knowledge is transmitted to potential offenders about actual sentencing practice."

"...By reason of the public prominence of the issues that arise, consistency in sentencing serves a high constitutional purpose: the maintenance of the rule of law."

Melbourne v R (1999) 198 CLR 1, 41 [106][-107]

"...it must be hypothesised that the 'character' of individual human beings demonstrates qualities which are sufficiently enduring and unvarying to be useful to a court...The previous assumption of lawyers...that individual behaviour was comparatively stable...rose from 'certain attributes or mental structures called "traits"' unique to each individual. That belief is now criticised as lacking empirical support."

2001

Wong v R (2001) 207 CLR 584

"...the task of the sentencer is to take account of ***all the relevant factors*** and to arrive at a single result which takes due account of them ***all***. That is what is meant by saying that the task is to arrive at an '*instinctive synthesis*'." *(emphasis added).*

"...the sentencer is called on to reach a single sentence which...balances many different and conflicting features."

R v Simpson (2001) 53 NSWLR 704

at [68]: *In order for circumstances to be incorporated into sentencing deliberations as Special Circumstances,* "...it is necessary that the circumstances be sufficiently special to justify a variation *(to a non-parole period).*"

2002

The Attorney-General's Application under Section 37 Crimes (Sentencing Procedure) Act, 1999, (No.2 of 2002), (2002) 137 A Crim R 196

"(a) with respect to Sec 3A(c), now suggests this should be regarded as a separate purpose...;

(b) with respect to Sec 3A(e), making the offender 'accountable' introduces a new element into the sentencing task;

(c) the same may be true of the references to 'harm to the community' in Sec 3A(g) of the Act."

2002 cont'd

Woods v Multi-Sport Holdings Pty Ltd
(2002) 208 CLR 460
At [165] – [168]:

"…the courts are not free to make their own historical inquiries without giving the parties notice, and an opportunity to deal with what the court regards as material."

"Compliance with those duties would remove many of the difficulties in judicial reliance on unproved material. It would expose whether the parties agree on the facts, and if they do not agree, it enables each party to criticise or compensate for the useless, incomplete or erroneous character of the other's appeal to the facts. So far as the parties agree, the points of agreement are receivable as being in substance agreed facts. So far as they disagree, the nature of the disagreement may be useful to the court."

2003

Legislative amendments to Crimes (Sentencing Procedure) Act 1999:

Section 3A;

Section 21A;

Section 54B regarding Sentencing Procedure pertinent to non-parole periods.

2004

R v MA (2004) 145 A Crim R 434

The NSW Court of Criminal Appeal evaluated Section 3A Crimes (Sentencing Procedure) Act, 1999, nominating the Purposes of Sentencing, to be,

"…in substance a codification and elaboration of the purposes of criminal punishment described in Veen v R (No.2)."

R v Wickham (2004) NSWCCA 193

at [22]: "When a court is about to consider matters of aggravation or mitigation under Section 21A it is important that it recognises the limits upon the use to be made of those factors. The effect and policy behind such a limitation is self-evident: There should be no double counting…"

R v Fidow (2004) NSWCCA 172

Special Circumstances: After referring to a report advising that 87% of prisoners had a finding of Special Circumstances, the Court stated at [22]:

"This research makes it necessary for this Court to state the obvious. Simply because there is present in a case a circumstance which is capable of constituting a 'Special Circumstance', does not mean that a sentencing judge is obliged to vary the statutory proportion *(ie of the requisite non-parole period).* To repeat what was said in R v Simpson (2001) 53 NSWLR 704 at [68], it is necessary that the circumstances be sufficiently special to justify a variation."

2004 cont'd

R v Way (2004) 60 NSWLR 168

"Notwithstanding that there may be special circumstances, the court is not permitted to reduce the non-parole period below what is necessary to punish the offender and act as a deterrence to the offender or others…"

2005

Markarian v R (2005) 228 CLR 357 *General Sentencing Principles*

at [30]: "Legislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks."

at [31]: "It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all the other relevant factors, a yardstick."

2005 cont'd

Markarian v R cont'd:

at [37]: *citing Wong v R (2001) 207 CLR 584*

"…the task of the sentencer is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an 'Instinctive Synthesis'…the sentencer is called on to reach a single sentence which…balances many different and conflicting features."

at [39]: "Accessible reasoning is necessary in the interests of victims, of the parties, of appeal courts, and the public."

2005 cont'd

The Sir Ninian Stephen Lecture – University of Newcastle

: NSW Senior Crown Prosecutor – Margaret Cunneen S.C.

"…There seems to be a fashion, among some in the criminal justice system, for a kind of misplaced altruism that it is somehow a noble thing to assist a criminal evade conviction. But what good does it do a person, in 2005, to avoid the consequences of a serious crime? There is no remorse, no introspection, no rehabilitation. For some, there may be a feeling of relief and a determination never to find oneself in the same predicament again. What though of the rest, whose respect for the criminal law is now even lower, having seen it fail and who are emboldened by having defeated it? Obviously the community is in danger from these people. It they offend again, isn't someone accountable, apart from themselves?"

2008

2nd Reading Speech
NSW Legislative Council, 28 November 2008,

: The Hon. John Hatzistergos
Attorney-General of NSW

"…Any offender who has misused his or her perceived trustworthiness and honesty in this way cannot use his or her good character and clean record as a mitigating factor in sentence…"

2011

Muldrock v R (2011) 244 CLR 120

at [26]: "The judge identifies ***all the factors*** that are relevant to the sentence, discusses their significance, and then makes a value judgement as to what is the appropriate sentence given ***all the factors*** of the case." *(emphasis added).*

at [27]: "The offence's maximum penalty is an important guidepost that the courts consider in the sentencing process."

2012

R v Bugmy (2012) NSWCCA 223

at [40]: "…Judge Lerve had failed to take into account the appellant's lack of remorse and failure to take responsibility for his conduct."

at [42]: "…Judge Lerve should have given greater weight to the appellant's criminal record."

2013

Bugmy v The Queen (2013) 249 CLR 571

at [44]: "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. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender."

2015

Professor David Flint AM

Professor Emeritus at Law

Writing cover story of The Spectator Australia, 2 May 2015, upon ICAC Operation Hale

"...[The] unsuccessful inquiry by the NSW Independent Commission Against Corruption into Margaret Cunneen S.C., was not only a spectacular own goal, ...To many, she is a courageous fighter for the victims of crime against a stultified and uncaring establishment.

...Ms.Cunneen's lecture was a bombshell. She put into clear language the question constantly asked in the nation's pubs and living rooms: Whether public confidence in the courts is being eroded by the perception that the pendulum had 'swung too far' in the protection of the rights of the accused person?"

2018

Monash Law Review (Vol. 44, No. 3)

Gabrielle Wolf, Associate Professor, Business & Law, Deakin Law School, Deakin University;

Mirko Bagaric, Professor of Law, Swinburne University of Technology

> *'Nice or Nasty? Reasons to abolish character as a consideration in Australian sentencing hearings and professional's disciplinary proceedings.'*

at p 567: "...it is unfair and unnecessary for purported evaluations of the character of the subject of a sentencing or disciplinary hearing to influence the decisions made in these matters about penalties and determinations respectively."

2018 cont'd

Monash Law Review cont'd:

at p 567 "The concept of character is vague and incoherent, and lacks any definition or empirical foundation… We therefore propose that the law be reformed to abolish character as a consideration in sentencing hearings and professional's disciplinary proceedings."

at p 568-9 "…It is therefore unreasonable for courts and tribunals to reach decisions about which penalties and determinations should be imposed by reference to assessments of individual's character."

at p 584 "…The defining characteristic of the instinctive synthesis is that it neither requires nor permits judges to set out with any particularity, the weight (in mathematical or proportional terms) that they attach to any consideration."

at p 590 "…Decisions based on ostensible assessments of people's character, which lack rigorous consideration and empirical foundation, are likely to be speculative, misguided and arbitrary. Given such determinations can profoundly affect people's lives and adversely impinge on their legal rights and interests, they may in fact violate the rule of law."

2018 cont'd

Monash Law Review cont'd:

at p 593: "…as Gummow J, highlights[1], no criteria have been empirically proven as capable of confirming individual's dispositions. In the absence of such measures, courts and tribunals have formed judgements about people's moral character based upon unreliable information, without reference to an accepted standard, and not always in the same ways as one another…"

at p [596]: "In Melbourne (v R), McHugh J. recognised that 'empirical psychological studies' now deny that character is as accurate a predictive tool as earlier generations so confidently believed."

at p [598]: "…there is no need for decision-makers to depend on character evaluations because the offending behaviour of the subjects of the hearings will provide them with sufficient information to reach decisions…"

[1] Melbourne v The Queen (1999) 198 CLR 1, 23-4 [63].

2018 cont'd

Monash Law Review cont'd:

"…in sentencing hearings courts only need to consider the offender's crime, and not assess his or her character to determine which penalty will protect the community, deter the individual offender and others from committing crimes, punish and rehabilitate the offender, and denounce his or her crime. Assessments of an offender's character have no role to play in court's application of the principle of proportionality, which requires them to evaluate only the seriousness of the offender's crime and ensure that the severity of the sanction corresponds to it."

at p [599]: "…character should be completely abolished as a consideration of decision-makers in sentencing hearings…"

at p [601]: "In a system governed by the rule of law, individuals should be punished for their misconduct, and not on the basis of arbitrary, highly subjective and opaque evaluations of their character…"

"Further, there is no need for decision-makers to resort to categorising individuals as being either of good of bad character to justify imposing a particular sanction…proof of a breach of the law…constitutes sufficient evidence to substantiate such decisions."

2023

ODPP New South Wales – 31 Oct 2023

Annexure A to July 2024 Preliminary Submission to NSW Sentencing Council,
Good Character in Sentencing:

"Given the nature of child sexual offending, it is not uncommon for these offences to be committed by individuals who have no prior record of convictions or who, except for the offences for which they are being sentenced, may be said to be people of 'good character'."

"…It can readily be accepted that in the vast majority of cases, a parent or guardian would not allow an offender to have access to their child if they did not believe that the person was of good character…"

"…It should therefore not be necessary for the Crown to take the additional step of adducing evidence to establish what should not be a controversial position."

2023 cont'd

ODPP New South Wales cont'd:

"b. Imposing a burden on offenders who are to be sentenced for child sexual offences to establish that their good character did not assist them to commit the offence.

'The ODPP considers that this is the most appropriate option for reform. It would provide a fair and pragmatic solution to the current difficulties with s 21A(5A) and would reflect the reality that in the vast majority of cases, an offender's good character materially contributes to their ability to sexually offend against children'."

Hurst v The King [2023] VSCA 286
(28 November 2023)

"The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way."

2024

The Hon. Michael Daly M.P.

Attorney-General of New South Wales,

"…the safety of victims is the paramount consideration of the justice system."

Director of Public Prosecutions (NSW) v Wolinski (2024) NSWCCA 139

(2 August 2024 – Adamson JA, Price AJA and Garling J)

AND

R v Jackson (2024) NSWCCA 156

(21 August 2024 – Kirk JA, Campbell and McNaughton JJ)

BOTH judgements citing Bugmy v The Queen (2013) 249 CLR 571 at [24]:

"…it is implicit in the reasons of the Court of Criminal Appeal that the Court concluded that the sentence…was manifestly inadequate…Plainly enough the Court of Criminal Appeal disagreed with the sentence imposed by Judge Lerve and favoured a more severe sentence. The difference…may be explained by saying that Judge Lerve gave too little weight to some factors, and too much weight to other factors."

2024 cont'd

Kelly v The State of Western Australia
[2024] WASCA 116 (30 September 2024)

> "As the High Court recognised in *Bugmy*, the effects of an offender's profound childhood deprivation may point in different directions in relation to relevant sentencing considerations. For example, on the one hand, those effects may be mitigating, at least to some extent, in that the effects may diminish the offender's moral culpability for the offending. However, on the other hand, those effects may not be mitigating, at least to some extent, in that they may increase the importance of protecting the community from the offender's criminal behaviour."

Rowland v The King
[2024] NSWCCA 187 (16 October 2024, - Davies, Garling and Chen J.J.)

> "…Whilst they have been set out many times before, the High Court's observations in *Bugmy* at [44] bare repeating…"