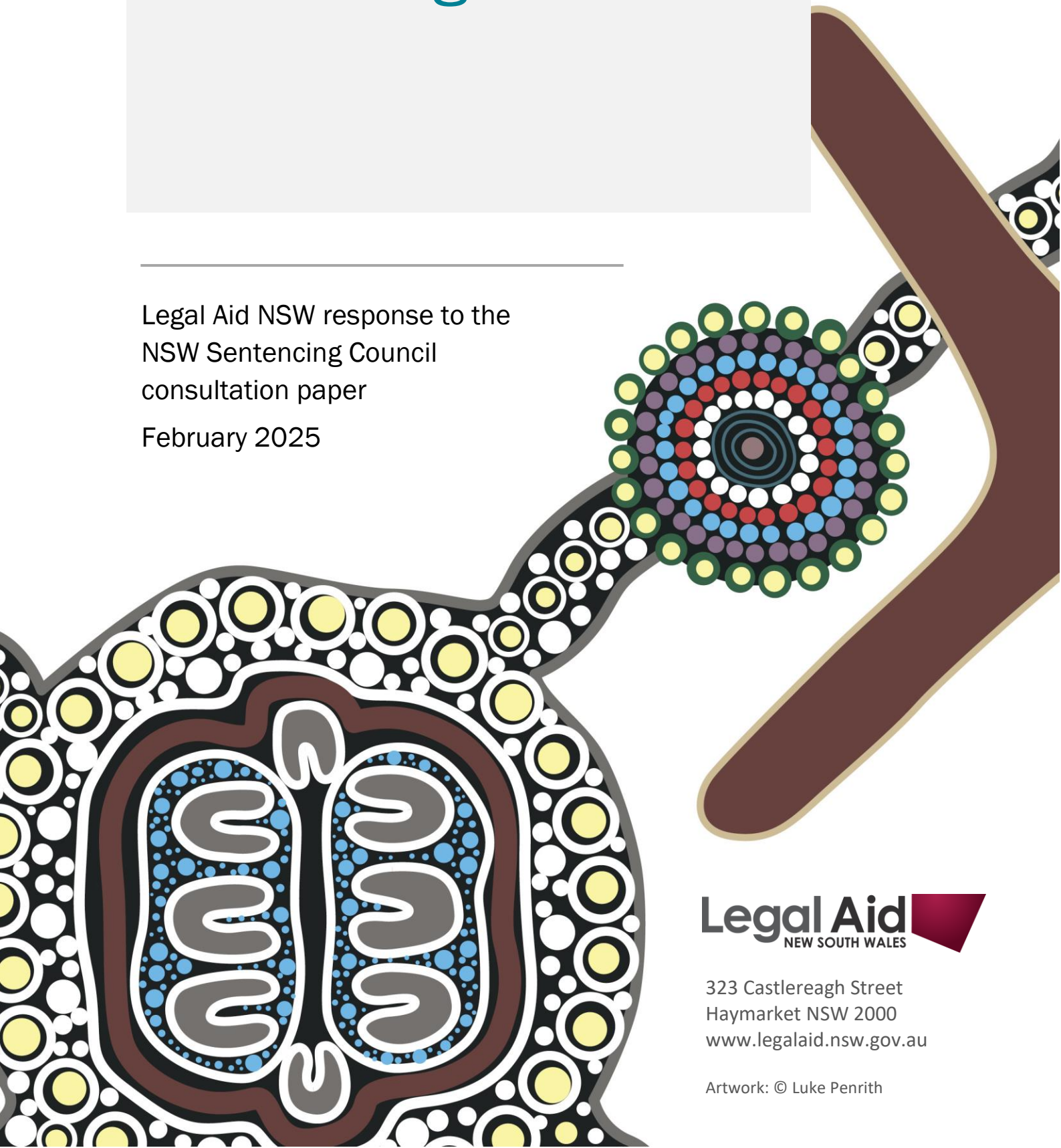


Good character at sentencing

Legal Aid NSW response to the
NSW Sentencing Council
consultation paper
February 2025



Legal Aid
NEW SOUTH WALES

323 Castlereagh Street
Haymarket NSW 2000
www.legalaid.nsw.gov.au

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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of family dispute resolution services, family violence services, services to Aboriginal families and the early triaging of clients with legal problems.

Legal Aid NSW provides duty services at all Family and Federal Circuit Court registries and circuit locations through the Family Advocacy and Support Services, all six specialist Children's Courts, and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation

for children in both the family law and care and protection jurisdiction.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and most regional offices. The purpose of the Civil Law Division is to improve the lives of people experiencing deep and persistent disadvantage or dislocation by using civil law to meet their fundamental needs. Our civil lawyers focus on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

Should you require any further information, please contact:

Ruth Carty
Senior Law Reform Officer, Strategic
Law Reform Unit

[Redacted contact information]

2. Executive summary

Legal Aid NSW welcomes the opportunity to provide a submission to the NSW Sentencing Council as part of its review of good character at sentencing. We note Legal Aid NSW also provided a preliminary submission to the review, which can be found [here](#).

Our submission draws on the experience of our staff in assisting offenders through our Criminal Law Division and supporting victims¹ through our specialist Sexual Assault Communication Privilege team and the Domestic Violence Unit (DVU).² We hope this broad expertise will assist the Sentencing Council in its review.

While we acknowledge the concerns raised by victims of child sexual abuse in the petition that led to this review,³ and their lived experience, Legal Aid NSW does not support extending section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**the special rule**) or introducing other reforms that limit the use of good character evidence at sentencing.

We recognise that presenting character evidence during sentencing can be distressing for victims and do not seek to diminish their experiences. However, we do not consider restricting judicial discretion to be the right approach.

Good character evidence can play an important role in sentencing, particularly in assessing prospects of rehabilitation, risk of reoffending, remorse and community protection. We consider that the common law provides appropriate guidance on what weight (if any) should be given to evidence of good character, while enabling judicial discretion to consider the unique circumstances of each case, and ensure sentences are fair and align with principles of individualised justice. This best serves the objectives of sentencing.

To address victims' concerns, rather than recommending reforms to limit the use of good character evidence at sentencing, we suggest the review explore adopting more appropriate terminology to describe an offender's lack of prior offences or positive community contributions outside of their offending behaviour in child sexual assault cases.

Recommendations

Recommendation 1

- NSW Sentencing Council should not recommend any reforms to limit the use of character evidence at sentencing.

¹ Victim is used in this submission to denote a person who is the victim or complainant or alleged victim of sexual violence. Some people who experience violence prefer the term 'victim' and others prefer the term 'survivor'. In this submission, the term 'victim' is intended to be inclusive of both victims and survivors. This submission acknowledges every person's experience is unique and individual to their circumstances.

² Legal Aid NSW's Domestic Violence Unit supports victims of domestic violence which may include sexual violence

³ Harrison James, *Remove Good Character References For Paedophiles In The Sentencing Procedure Of Child Sexual Abuse Cases*, (NSW Legislative Council ePetition, 3 August 2023).

Recommendation 2

- Further consultation should take place regarding terminology used to describe a lack of prior offending, or an offender’s contributions to community outside of offending, in sentencing proceedings for offences involving child sexual assault.

Recommendation 3

- Specialised training on understanding the nature and dynamics of child sexual abuse, as well as changes in legislation should be rolled out to the police, the judiciary and the legal profession on a regular basis.

Recommendation 4

- The use of good character and lack of previous convictions should remain unchanged at sentencing.
- The defendant’s plea should have no bearing on the use of good character at sentence.

Recommendation 5

- The circumstances in which good character can be treated as aggravating an offence should not be extended.
- Good character should not be added to the list of aggravating factors in section 21A of the *Crimes Sentencing Procedure Act 1999* (NSW).

Recommendation 6

- The definition of “child sexual offences” should not be expanded for the purposes of the special rule in section 21A(5A) of the *Crimes Sentencing Procedure Act 1999* (NSW).

Recommendation 7

- The special rule in section 21A(5A) of the *Criminal Procedure Act* should not be extended beyond the category of offence to which it currently applies.

Recommendation 8

- The special rule in section 21A(5A) of the *Criminal Procedure Act* should not apply to offenders under the age of 18 years.

Recommendation 9

- No changes should be made to procedures surrounding the tendering and use of evidence of good character in sentencing proceedings.

Recommendation 10

- The burden of proof should not be placed on the offender to show that their character did not assist them in committing the offence.

3. General comments about good character at sentencing

The interplay of various sentencing considerations, along with the valuable background information provided by good character evidence, makes it difficult to exclude good character from the sentencing process.

Courts are required to determine appropriate sentences by assessing all relevant subjective and objective factors holistically rather than through a rigid formula.⁴ Sentences should be individualised, taking into account “the wide variations of circumstances of the offence and the offender”.⁵ This approach helps to prevent excessively harsh or disproportionate punishment.

Sentencing aims to balance multiple objectives, including punishment, deterrence, and rehabilitation. Considering good character helps ensure a just response that reflects both the severity of the offence and the offender’s personal history. A history of good character can demonstrate prior law-abiding behaviour and a lower criminal propensity, which may indicate a reduced risk of reoffending and stronger prospects for rehabilitation—particularly when the offence appears out of character.

To ensure fairness and balance, courts should retain discretion to weigh all relevant objective and subjective factors and determine the appropriate weight, if any, to be placed on those factors based on the circumstances of each individual case. Strict legislation requiring courts to disregard good character would likely lead to unjust outcomes.

3.1 Guidance provided by the common law

The common law offers considerable guidance on good character and how it interacts with other mitigating facts on sentencing.⁶ A finding of good character does not automatically result in a reduced sentence.⁷ The good character of the offender is only one of a number of matters the court must consider.⁸ Once a person is found to be of “otherwise good character,” the weight given in mitigation depends on all the circumstances,⁹ including the nature and circumstances of the offence committed, the need for general deterrence, any role that the offender’s perceived good character played in allowing them to commit the offence,¹⁰ and whether there was a pattern of repeat offending over a period of time.¹¹ In some cases, courts will find that character evidence should have little or no bearing on the sentence given to the offender.¹²

⁴ *Markarian v The Queen* (2005) 228 CLR 357.

⁵ *R v Whyte* (2002) 55 NSWLR 252, [147].

⁶ See, for example, *R v Smith* (1982) 7 A Crim R 437, *Ryan v The Queen* [2001] HCA 21; (2001) 206 CLR 267, *R v Gent* [2005] NSWCCA 370, *R v Kennedy* [2000] NSWCCA 527, and *R v Jung* [2017] NSWCCA 24.

⁷ *Ryan v The Queen* [2001] HCA 21.

⁸ *R v Gent* [2005] NSWCCA 370, [53].

⁹ *Ryan v The Queen* [2001] HCA 21; (2001) 206 CLR 267, [23], [25], [31], [36].

¹⁰ *Jung v R* [2017] NSWCCA 24, [58].

¹¹ *R v Gent* [2005] NSWCCA 370, [53].

¹² *Ibid*, [53]-[55].

The courts have also recognised classes of offences where good character may carry less weight or have no bearing on the sentence given to the offender.¹³ For example:

- i. In *Ryan v R* [2001] HCA 21, 206 CLR 267 [112] the court held that the weight to be given to good character on sentence depends on the character of the offence committed¹⁴ and in cases where the objective seriousness of the offence increases the need for denunciation or deterrence, good character should be given less weight.¹⁵
- ii. In *R v PGM* [2008] NSWCCA 172 at [43]–[44], and again in *Dousha v R* [2008] NSWCCA 263 at [49], the court held that an offender's prior good character should be given little weight in sentencing for child sexual offences, especially when the offender used their good character to facilitate the commission of the offence.
- iii. The cases of *R v Kennedy* [2000] NSWCCA 527 at [21]–[22] and later, *Jung v R* [2017] NSWCCA 24, establish that little or no weight may be given to an offender's prior good character in sentencing when:
 - a. general deterrence is important – particularly when the offence is serious and frequently committed by individuals of otherwise good character
 - b. good character facilitated the offence – if an offender's prior good character enabled them to attain a position that allowed them to commit the offence, it holds little relevance in sentencing¹⁶
 - c. a pattern of repeat offending exists – if the offender has engaged in repeated offending over a significant period, prior good character is diminished as a mitigating factor.¹⁷
- iv. In *Jackson v R* (1988) 33 A Crim R 413, 436–437 the court held that for offences committed by holders of public office in the course of their duties, their good character is to be given very limited weight given such offences are 'committed frequently by persons of otherwise good character'.¹⁸
- v. In *R v Leroy* (1984) 2 NSWLR 441 at 446–447 the court held that lack of a criminal record may have less significance for a drug trafficking offence than for other types of offences.
- vi. In *R v McIntyre* (1988) 38 A Crim R 135 at 139 the court observed that prior good character is of less relevance in sentencing for dangerous driving offences causing death or serious injury because such offences are often committed by individuals of otherwise good character.

¹³ *Ibid*, [53]–[55].

¹⁴ *Ryan v The Queen* [2001] HCA 21, [143].

¹⁵ *Ryan v The Queen* [2001] HCA 21, [112], [147]; *Smith v R* (1982) 7 A Crim R 437, 441–442.

¹⁶ *Jung v R* at [57]–[58];

¹⁷ *R v Kennedy* [2000] NSWCCA 527, [21].

¹⁸ *Jackson v R* (1988) 33 A Crim R 413, 436–437, [64].

- vii. In *R v Gent* [2005] NSWCCA 370, the court addressed the sentencing of an offender convicted of possessing child pornography and emphasised that general deterrence is a paramount consideration in such cases, given the secretive nature of the offence and its prevalence among individuals of otherwise good character. Consequently, the court held that an offender's prior good character should be given less weight in mitigation during sentencing.

These categories can be expanded where appropriate.¹⁹ In our experience courts apply these principles well and appropriately scrutinise good character evidence to achieve fair and just outcomes.

Given the importance of judicial discretion in sentencing and the existing guidance provided by common law, we do not support further reforms to restrict the use of good character evidence at sentencing.

Recommendation 1

- NSW Sentencing Council should not recommend any reforms to limit the use of character evidence at sentencing.

¹⁹ *R v Gent* (2005) 162 A Crim R 29 [2005] NSWCCA 370, [61].

4. Improving the experience of victim-survivors of sexual offences

We understand that the impact of offences and consequent legal proceedings on victims of crime are an important consideration in this review, and we acknowledge that the criminal justice system can be both disempowering and retraumatising for victims of crime.

Many of the issues outlined in Part 3 of the consultation paper do not specifically relate to the admission of good character evidence at sentencing and instead, relate to delays, interactions with police, and victims' experiences of cross-examination. We hope the recent reforms²⁰ and reviews²¹ aimed at improving the experience of victims of sexual offences in the criminal justice system will lead to meaningful improvements.

We acknowledge that the use of good character evidence at sentence may present offenders in a way that conflicts with the victim's experience and appear to minimise the offender's responsibility. This concern is particularly significant for victims of child sexual abuse.

However, rather than restricting or eliminating the consideration of good character in sentencing, we support further consultation on adopting more appropriate terminology in child sexual offence proceedings to describe a lack of prior offending or an offender's contributions to the community outside of offending. While this change would introduce two slightly different character-related concepts in child sexual offence cases, we believe the law should evolve to reflect society's growing understanding of these offences. Any confusion arising from this shift could be addressed through education.

Recommendation 2

- Further consultation should take place regarding terminology used to describe a lack of prior offending, or an offender's contributions to community outside of offending, in sentencing proceedings for offences involving child sexual assault.

²⁰ These include the statewide rollout of the Child Sexual Assault Evidence Scheme, the introduction of the NSW affirmative consent laws, the jury directions set out in sections 292A–292E of the Criminal Procedure Act 1986 (NSW), the SACP provisions of the Criminal Procedure Act 1986 (NSW) (see s298), the entitlement of victims to give their evidence by audio-visual link from a place other than the courtroom (see s 294B of the Criminal Procedure Act 1986), the entitlement of victims to have a support person present when giving evidence (see Criminal Procedure Act 1986 (NSW), s294C), Criminal Procedure Act 1986 (NSW), s294CB, which makes any evidence relating to the sexual reputation/experience of the victim inadmissible, Criminal Procedure Act 1986 (NSW), s294B(3)(b)(ii), which allows a court to order that an accused sit out of a victim's line of vision whilst they are giving evidence, the requirement in section 291 for the court to be closed while a victim is giving evidence, and recent developments in the common law which have led to an increase in tendency evidence being admitted against accused persons in sexual assault trials (See, for example, *R v Bauer (a pseudonym)* (2018) 359 ALR 359, *McPhillamy v The Queen* (2018) 351 ALR, *Johnson v The Queen* [2018] HCA 48) to name a few.

²¹ Including many reforms considered by the Australian Law Reform Commissions *Justice Responses to sexual violence inquiry*.

4.1 A comment on the application of special rule in section 21A(5A) of *Crimes Sentencing Procedure Act 1999* (NSW)

In our experience supporting victims of crime, we have recognised instances where the police and prosecution may have been able to raise an objection to the admission of good character evidence pursuant to section 21(5A) of the *Crimes Sentencing Procedure Act 1999* (NSW) but did not. This particularly arises where an offender has entered into an intimate relationship with a parent of the child and has used that to gain, and subsequently abuse, their trust. We support specialised sexual assault training for all criminal justice participants working in this area, including the police, prosecutors, legal practitioners and the judiciary. Legal Aid NSW recommends that the NSW Government support and encourage the police, the judiciary, public prosecutors, and law societies to develop and implement training in relation to understanding sexual offending and the changing legislation.

Recommendation 3

- Specialised training on understanding the nature and dynamics of child sexual abuse, as well as changes in legislation should be rolled out to the police, the judiciary and the legal profession on a regular basis.

5. Specific questions posed by the review

5.1 Use of good character generally

5.1.1 Should consideration of good character as a mitigating factor be abolished in all cases?

We strongly oppose abolishing good character as a mitigating factor in all cases, as discussed in Part 3 above.

Judicial discretion, guided by statutory principles, is crucial for tailoring sentences appropriately rather than imposing a one-size-fits-all approach. In many cases, good character is a relevant and context-specific factor that contributes to a fair sentencing outcome. Ignoring it entirely would undermine individualised justice and risk unfair results by disregarding an important aspect of the offender's circumstances. The common law reflects the common-sense approach of accounting for these factors, but confirms that the weight given to it should depend on the circumstances of the case. In our view, courts generally strike the right balance in applying this principle.

5.1.2 How could consideration of evidence of good character be limited?

For reasons outlined at Part 3, we do not support further legislative reforms to limit the use consideration of good character beyond those which have already been implemented in section 21A(5A).

5.2 Use of lack of previous convictions generally

5.2.1 Should consideration of lack of previous convictions also be abolished as a mitigating factor in all cases?

5.2.2 In what circumstances should the fact that the offender does not have a record of previous convictions not be used in mitigation?

Legal Aid NSW strongly opposes the abolition of consideration of lack of previous convictions as a mitigating factor.

A lack of previous convictions, while distinct from good character, is a related concept that can be an important factor in determining appropriate sentences. Courts often find that first-time offenders are more likely to be rehabilitated, which may reduce the need for a punitive sentence focused on deterrence. Disregarding an offender's lack of prior convictions undermines this principle and can lead to unjust outcomes. For instance, a first-time offender convicted of a minor offence should not be punished as harshly as someone with a long history of similar offences.

A nuanced approach is necessary and is best achieved through the application of common law principles. As discussed above, the common law in NSW recognises when a clean

criminal record has limited mitigating effect, particularly in cases involving breaches of trust,²² inherently serious offences, or where general deterrence is paramount.²³ We believe it is essential for courts to retain discretion in evaluating the relevance of prior convictions based on the circumstances of each case.

5.3 Use of good character for offenders who plead not guilty

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

Legal Aid NSW does not support reform to prevent the use of good character evidence when an offender has pled not guilty. A fundamental principle of our criminal justice system is that the burden of proof rests with the prosecution. Penalising offenders for asserting their legal rights would contradict the core principles of fairness and the presumption of innocence.

A plea of not guilty does not automatically suggest a lack of remorse; it can simply mean an offender disputes the prosecution case against them. An accused may in fact be willing to admit engaging in criminal conduct through admissions to police or a plea offer, but dispute an element of the particular offence charged. Ignoring good character simply because the offender exercises their right to put the prosecution to proof would undermine the integrity of our criminal justice system.

Even when an offender disputes the allegations, their character may be one of many factors that indicate a lower level of culpability, and this should influence sentencing. Further, regardless of the plea, the offender may still be a low-risk individual with strong potential for rehabilitation. Recognising good character as a mitigating factor in these cases acknowledges the likelihood of the offender's successful reintegration into society, which aligns with the broader goal of reducing recidivism.

While it is conceivable that some circumstances mean that good character is not relevant when pleas of not guilty are entered, the common law is alive to this. We therefore do not believe any legal change is necessary, as it has not been demonstrated that judicial discretion has failed in these situations.

Recommendation 4

- The use of good character and lack of previous convictions should remain unchanged at sentencing.
- The defendant's plea should have no bearing on the use of good character at sentence.

5.4 Good character as an aggravating factor

²² See, for example, *Ryan v The Queen* (2001) 206 CLR 267 and *R v Millwood* (2012) NSWCCA 2.

²³ See, for example, *Veen v The Queen* (No 2) (1988) 164 CLR 465.

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

We do not support reforms in this area. Legislation already lists breaches of trust or abuse of authority as an aggravating factor.²⁴ The common law goes further, stating that when good character enables an offender to gain trust or authority, which is then abused, it can be an aggravating factor.²⁵ In *R v Jung* [2017] NSWCCA 24 court stated at [58]-[59]:

...The Applicant's prior good character enabled him to be in a position where he could offend against his patients... The fact that, under the guise of treatment, the Applicant abused the trust of his patients in committing these offences was a significant aggravating factor on sentence...²⁶

While this is appropriate in some cases, judicial discretion is important to ensure all surrounding circumstances are considered before making such a finding. We are concerned that an attempt to legislate this principle could lead to unjust outcomes.

We also note the Royal Commission into Institutional Responses to Child Sexual Abuse closely considered these issues and did not recommend legislative reform to treat good character as an aggravating factor in these circumstances.²⁷

Recommendation 5

- The circumstances in which good character can be treated as aggravating an offence should not be extended.
- Good character should not be added to the list of aggravating factors in section 21A of the *Crimes Sentencing Procedure Act 1999* (NSW).

5.5 Extending the special rule to all child sexual offences

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

Legal Aid NSW does not support expanding the special rule to cover all child sexual offences.

Section 21A(5A) of the *Crimes Sentencing Procedure Act 1999* (NSW) (**the special rule**) was introduced to recognise the role that good character may play in facilitating some instances of sexual offending against children, and rightly deny those offenders any benefit of their prior good character on sentence. While this approach is justified in certain cases, expanding its application to all child sexual offences could have negative consequences and would risk treating all such crimes as equally severe, irrespective of the context, which is neither fair nor just. It also risks diluting its intended focus.

Further, the common law recognises that child sexual offences are frequently committed by people who appeared to otherwise be of good character and gives less weight to good

²⁴ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(k).

²⁵ *R v Jung* [2017] NSWCCA 24, [59].

²⁶ *R v Jung* [2017] NSWCCA 24, [58]-[59].

²⁷ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII-X (2017)* 299.

character evidence on sentencing.²⁸ In our experience, the law generally prioritises general and specific deterrence in sentencing for these matters, and in cases where the special rule does not apply, and where the court does take into account good character evidence, that evidence has limited impact.

While we acknowledge the limited role of good character evidence in these cases, we believe it should not be entirely removed as a mitigating factor. Judicial discretion in sentencing for child sexual offences is important, as the spectrum of offending varies widely in terms of severity and the offender's circumstances.²⁹ Restricting judicial discretion further could result in unjust sentences that fail to consider individual circumstances. Courts should retain the flexibility to determine the weight of good character evidence based on the facts of each case.

5.5.2 What offences, if any, should be added to the definition of "child sexual offences" for the purposes of the special rule?

Legal Aid NSW does not support any additional child sexual offences being added to the definition of "child sexual offences" for the purposes of the special rule.

Recommendation 6

- The definition of "child sexual offences" should not be expanded for the purposes of the special rule in section 21A(5A) of the *Crimes Sentencing Procedure Act 1999* (NSW).

5.6 Extending the special rule to sexual offences against other vulnerable groups

5.6.1 What other vulnerable groups or offences against vulnerable groups could be subject to the special rule?

Legal Aid NSW does not support the expansion of the special rule to offences against other vulnerable groups. The special rule was introduced after a 2008 Sentencing Council review, which found the argument for excluding good character as a mitigating factor on sentence was particularly strong where good character had been relied on to assist the offender to commit the offence and that the seriousness and prevalence of *child sexual offences* justified a special approach.³⁰ When it comes to sexual offending against other vulnerable groups the victim's vulnerability is taken into account as an aggravating factor at sentence.³¹ We therefore do not consider there to be the need to extend the special rule to sexual offences against other vulnerable groups.

²⁸ *R v PGM* [2008] NSWCCA 172 152, [43]–[44] and *Dousha v R* [2008] NSWCCA 263, [49].

²⁹ The area of law of child sexual offending covers the most serious crimes, but also extends to less serious offences, for example, young persons sharing photos of themselves in a state of undress. This has been the subject of amendments to the NSW Crimes Act 1900 (NSW) but remains a crime at the Federal level, see 'Crimes Amendment (Intimate Images) Act 2017', *Legal Aid NSW* (Web page) < <https://www.legalaid.nsw.gov.au/for-lawyers/resources-and-tools/criminal-law-resources-and-tools/criminal-law-resources-summary-criminal-law/crimes-amendment-intimate-images-act-2017> >

³⁰ NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales* (Report, 2008) vol 1 [5.57].

³¹ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(l).

5.7 Extending the special rule to adult sexual offences

5.7.1 What adult sexual offences, if any, should be subject to the special rule?

We do not support the expansion of the special rule to sexual offences against adults.

In its 2008 review of good character as a mitigating factor in sentencing for sexual offences the NSW Sentencing Council concluded that statutory limits were unnecessary for adult sexual offences and that courts should instead rely on general sentencing principles, which were “adequate for sentencing in such cases”.³² Legal Aid NSW agrees with this finding and considers the case has not been made to reconsider this position.

In our experience, good character is typically given reduced weight when considered alongside other factors in adult sexual offence cases. However, judicial discretion allows this assessment to occur on a case-by-case basis. In some instances, aspects of an offender’s background, such as charitable work, may still be relevant to their rehabilitation potential or other sentencing considerations, without unduly mitigating the gravity of the offence.

Additionally, the serious nature of sexual assaults against adults is reflected in the maximum penalties, the ineligibility of such offenders for intensive corrections orders, and prevailing sentencing practices. A Judicial Information Research System (JIRS) search conducted on 30 January 2025 shows that 94 percent of offenders convicted of sexual intercourse without consent under section 61I of the *Crimes Act 1900* (NSW) receive full-time custody.³³ We therefore do not consider reforms that would increase sentences for adult sexual offences to be necessary.

5.8 Extending the special rule to domestic violence offences

5.8.1 Should domestic violence offences be subject to the special rule? Why or why not?

Legal Aid NSW does not support the expansion of the special rule to domestic violence offences. Domestic violence offences that do not involve child sexual assault are fundamentally different from child sexual offences. We are not persuaded that the reasons outlined in the consultation paper justify extending the special rule to this category of offending.

Additionally, sentencing for domestic violence offences already prioritise general deterrence³⁴ and community protection,³⁵ which invariably limits the weight given to good character. While good character may somewhat mitigate a sentence by indicating a lower risk of recidivism, the focus remains on punishment to reflect the long-lasting impact of domestic violence.

5.9 Extending the special rule to other serious offences

³² NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales* (Report, 2008) vol 1 [5.48].

³³ Additionally, 87.3 percent of offenders with no prior criminal record received full-time custody- Judicial Commission of New South Wales, *Judicial Information Research System* (Webpage, accessed 30 January 2025).

³⁴ *Yaman v R* [2020] NSWCCA 239 at [131].

³⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 4A, 4B

5.9.1 What other serious offences, if any, should be subject to the special rule?

We do not support the expansion of the special rule to any other serious offences.

The consultation identifies two categories of offences for consideration,³⁶ namely:

- i. offences commonly committed by people with otherwise good character and where there is a general need for deterrence,³⁷ and
- ii. offences commonly committed by people because their good character facilitates or helps to conceal the offence.³⁸

As previously mentioned, the common law provides significant guidance on these categories of offences and supports giving limited weight to good character in such circumstances.³⁹

We are particularly concerned about the proposal outlined in the consultation paper to extend the special rule to all “serious indictable offences”, meaning any offence that is punishable by 5 years imprisonment or more.⁴⁰ Such a proposal would capture a broad range of offending conduct (including offences of shoplifting and intimidation) with no clear justification.

5.10 Extending the special rule where there is a breach of trust or authority

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

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

5.10.3 Should a finding that an offender abused a position of trust or authority in relation to the victim of the offence make the offender subject to the special rule?

Legal Aid NSW opposes expanding the special rule to additional offences involving a breach of trust or authority, as existing legislation and common law already address these issues appropriately. A breach of trust or authority is treated as an aggravating factor,⁴¹ and good character may carry little weight in such cases,⁴² or none at all where it enabled the offender to be in a position of trust and thus commit the offence.⁴³

Broadly applying the special rule to all offences involving a breach of trust or authority risks unintended consequences, potentially capturing minor breaches. Therefore, limiting judicial discretion to consider an offender’s personal circumstances would be inappropriate.

³⁶ NSW Sentencing Council, *Good Character at Sentencing* (Consultation Paper, December 2024), 22.

³⁷ For example, various driving offences, and possession of child abuse material.

³⁸ These include drug trafficking, white collar offences, and child sex offences (particularly where there is a pattern of repeat offending).

³⁹ *Ryan v The Queen* (2001) 206 CLR 267.

⁴⁰ *Crimes Act 1900* (NSW), s 4(1) definition of “serious indictable offence”.

⁴¹ *Crimes (Sentencing Procedure) Act 1999*, s 21A(2)(k).

⁴² *Ryan v The Queen* (2001) 206 CLR 267.

⁴³ *R v Jung* [2017] NSWCCA 24, [59].

5.11 Extending the special rule to all offences

5.11.1 Should all offences be subject to the special rule?

For the reasons outlined above, Legal Aid NSW strongly opposes extending the special rule to all offences.

Recommendation 7

- The special rule in section 21A(5A) of the *Criminal Procedure Act* should not be extended beyond the category of offence to which it currently applies.

5.12 Exempting under 18-year-olds from the special rule

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

Legal Aid NSW strongly supports exempting offenders under 18 from the special rule for all offences and endorse the following statement from the UK sentencing guidelines (as cited in the consultation paper):

Sentencing a child or young person for sexual offences involves a number of different considerations from adults. The primary difference is the age and level of maturity. Children and young people are less emotionally developed than adults; offending can arise through inappropriate sexual experimentation; gang or peer group pressure to engage in sexual activity; or a lack of understanding regarding consent, exploitation, coercion and appropriate sexual behaviour.⁴⁴

Children have diminished impulse control and judgment, reducing their moral culpability.⁴⁵ In our experience, sexual offences committed by children often differ significantly from those committed by adults. A key factor is the child's developmental stage, with these offences often being isolated within this context. The absence of an exemption to the special rule fails to account for the unique developmental stage a child offender is at when a child sex offence is committed by a child.

Additionally, child-on-child sexual offences, particularly those involving peers, often lack the power imbalance, grooming behaviours, and breach of trust typically seen in child sexual offences committed by adults. In our experience, child-on-child sexual offences are more commonly 'opportunistic' rather than the result of deliberate "grooming" behaviours. These differences are essential in distinguishing child offenders from adult offenders.

⁴⁴ UK, Sentencing Council, "Sexual Offences: Sentencing Children and Young People" (2024), as quoted in NSW Sentencing Council, *Good Character at Sentencing* (Consultation Paper, December 2024).

⁴⁵ See *Children's (Criminal Proceedings) Act 1987* (NSW), s 6.

Sentencing principles for child offenders are different to those that apply to adults and specifically require rehabilitation to be prioritised over punishment.⁴⁶ These considerations are the same regardless of whether the child is being sentenced for a minor or serious offence. If adopted, the special rule would undermine these objectives.

Lastly, it is important to note that common law principles regarding good character evidence (discussed above) also apply to child offenders. This means evidence of good character is weighed alongside other factors and, where appropriate, may be given limited weight.

Recommendation 8

- The special rule in section 21A(5A) of the *Criminal Procedure Act* should not apply to offenders under the age of 18 years.

5.13 No change to the current law

5.13.1 What justification is there for courts continuing to take good character into account in sentencing for: (a) sexual offences against children, and (b) other offences?

For reasons outlined above, Legal Aid NSW considers it appropriate to retain judicial discretion in taking good character into account in appropriate cases.

5.13.2 How should courts inform themselves of good character in these cases?

Legal Aid NSW views the current practices used by courts to inform themselves of good character as appropriate. That is, by considering and scrutinising the evidence tendered by the defence (i.e. the oral evidence of the offender and other witnesses, affidavits, character references etc) against that tendered by the prosecution (i.e. the offender's criminal record, the facts of the offence, the Victim Impact Statements), courts have been able to appropriately determine weight to be placed on the offender's purported good character.

5.14 Adjusting procedures for tendering evidence

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

Legal Aid NSW does not recommend changes to current procedures for receiving good character evidence in sentence proceedings.

We are concerned that proposed reforms could lengthen and complicate the sentencing process, placing an additional burden on an already overstretched criminal justice system and contributing to further delays. This is especially relevant in the Local Court, where most criminal cases are finalised and resources are limited. Any reforms would likely require additional resources to manage the increased complexity of sentence proceedings and the

⁴⁶ Ibid.

extra time needed for defence practitioners to gather material that meets procedural requirements.

Limiting the use of character references

Character references are often an efficient and appropriate way to ensure evidence of an offenders background is before the court. We disagree they are inherently problematic.⁴⁷ For character references to carry weight, they must be signed, dated, include the referee's contact details, and confirm that the referee is aware of the charges against the offender. Defence lawyers, who typically tender these references, have a duty to ensure they do not mislead the court and often conduct due diligence, especially in District Court cases where time generally permits. Additionally, it is open to the court to outright reject unreliable character references or to place limited weight on them.

Limiting good character evidence to that contained in Sentencing Assessment Reports

We do not support limiting the use of good character evidence to that contained in Sentencing Assessment Reports (**SARs**). SARs are not required in most Local Court matters, and report writers generally have large caseloads and limited time. Therefore, it is unusual for SARs to contain detailed information about the offender's background or character. Instead, such reports are generally focused on the offender's risk of reoffending (calculated using a simple, standardised risk assessment tool), and their ability to undertake supervision and/or community service. Further, the tone, content and level of detail of a SAR may sometimes be informed by the attitude of the SAR author towards the offender.

Restricting the admission of good character evidence to what is contained in a SAR will significantly reduce an offender's opportunity to present important evidence about their background and character. This could lead to unjust outcomes. It may also result in lengthier sentence proceedings where SAR authors are required for cross examination.

Recommendation 9

- No changes should be made to procedures surrounding the tendering and use of evidence of good character in sentencing proceedings.

5.15 Placing the evidential burden on offenders

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

We oppose placing the burden of proof on offenders to show that their good character did not contribute to the offence. In *R v Olbrich* (1999) 199 CLR 270, the High Court of Australia clarified that any fact adverse to the offender must be proven by the Crown beyond a reasonable doubt, while mitigating factors need only be established on the balance of probabilities.⁴⁸ This approach prevents unfair prejudice and ensures that adverse inferences

⁴⁷ See NSW Sentencing Council, *Good Character at Sentencing* (Consultation Paper, December 2024), 64.

⁴⁸ *R v Olbrich* (1999) 199 CLR 270.

are not drawn without sufficient evidence. It also takes into account the limited resources of criminal defendants compared to the Crown’s extensive resources.

Recommendation 10

- The burden of proof should not be placed on the offender to show that their character did not assist them in committing the offence.



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