

Consultation
Paper

Good character at sentencing

DECEMBER 2024

NSW
Sentencing
Council

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Cataloguing-in-publication

Cataloguing-in-publication data is available from the National Library of Australia.

ISBN 978-1-922254-68-9 (electronic)

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Terms of reference

The Sentencing Council is asked to conduct a review of the operation of section 21A(5A) and other relevant sections of the Crimes (Sentencing Procedure) Act 1999 and the common law that relate to the use of "good character" in sentencing, and make any recommendations for reform that it considers appropriate.

In undertaking the review, the Sentencing Council should consider:

- whether the limitations on the use of evidence concerning 'good character' or a lack of previous convictions in certain sentencing proceedings, as per s 21A(5A) of the Crimes (Sentencing Procedure) Act 1999, should be extended to all sentencing proceedings for child sexual offending by removing the requirement that the offender's good character or lack of previous convictions, "was of assistance to the offender in the commission of the offence";
- the operation of good character as a mitigating factor in sentence proceedings in general, including the interaction between good character and other mitigating factors and the purposes of sentencing, the utility of good character evidence in sentence proceedings, and whether the use to which good character evidence is put in sentence proceedings remains appropriate, equitable, and fit for purpose;
- the experience of victim-survivors in all sentencing proceedings involving the admission of evidence of good character and whether there are any legislative or other changes that could be made to improve their experience;
- procedures for receiving good character evidence in sentencing proceedings; and
- any other matter the Council considers relevant.

Received 11 April 2024.

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1. Introduction

In brief

We have been asked to review the law relating to the use of “good character” in sentencing. A particular focus of this review is the special rule for child sexual offences which prevents the use of good character or lack of previous convictions if the sentencing court is satisfied that it assisted the offender to commit the offence.

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- 1.1 This consultation paper outlines the law and practice surrounding the use of good character as a factor in sentencing, examines its background and utility, and considers the impact on victim-survivors, in particular of child sexual assault.
- 1.2 We seek your views on whether any law or practices relating to the use of good character at sentencing should change. A list of options for reform can be found in chapter 5.

Terms of reference

- 1.3 We received the following terms of reference from the Attorney General, on 11 April 2024:

The Sentencing Council is asked to conduct a review of the operation of s 21A(5A) and other relevant sections of the *Crimes (Sentencing Procedure) Act 1999* and the common law that relate to the use of “good character” in sentencing, and make any recommendations for reform that it considers appropriate.

In undertaking the review, the Sentencing Council should consider:

- whether the limitations on the use of evidence concerning “good character” or a lack of previous convictions in certain sentencing proceedings, as per section 21A(5A) of the *Crimes (Sentencing Procedure) Act*, should be extended to all sentencing proceedings for child sexual offending by removing the requirement that the offender's good character or lack of previous convictions, “was of assistance to the offender in the commission of the offence”;

- the operation of good character as a mitigating factor in sentence proceedings in general, including the interaction between good character and other mitigating factors and the purposes of sentencing, the utility of good character evidence in sentence proceedings, and whether the use to which good character evidence is put in sentence proceedings remains appropriate, equitable, and fit for purpose;
- the experience of victim-survivors in all sentencing proceedings involving the admission of evidence of good character and whether there are any legislative or other changes that could be made to improve their experience;
- procedures for receiving good character evidence in sentencing proceedings; and
- any other matter the Council considers relevant.

The special rule

- 1.4 While the terms of reference are broad and relate to the use of good character as a mitigating factor in sentencing generally, an important focus of this review is s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*Crimes (Sentencing Procedure) Act*). It provides “special rules for child sexual offences”:

In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

- 1.5 For the purposes of this provision, a child sexual offence is defined as including:¹
- sexual offences (without consent) where the victim was under 16: sexual assault and assault with intent to have intercourse,² sexual touching,³ sexual act,⁴ and such offences against a person with cognitive impairment⁵
 - sexual offences against children (regardless of consent): sexual intercourse and assault with intent to have sexual intercourse,⁶ sexual touching,⁷ sexual act,⁸ persistent sexual abuse,⁹ procurement and grooming,¹⁰ child prostitution,¹¹ and production, dissemination or possession of child abuse material¹²

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(6).

2. *Crimes Act 1900* (NSW) s 61I, s 61J, s 61JA, s 61K.

3. *Crimes Act 1900* (NSW) s 61KC, s 61KD.

4. *Crimes Act 1900* (NSW) s 61KE, s 61KF.

5. *Crimes Act 1900* (NSW) s 66F.

6. *Crimes Act 1900* (NSW) s 66A, s 66B, s 66C, s 66D.

7. *Crimes Act 1900* (NSW) s 66DA, s 66DB.

8. *Crimes Act 1900* (NSW) s 66DC, s 66DD, s 66DE, s 66DF.

9. *Crimes Act 1900* (NSW) s 66EA.

10. *Crimes Act 1900* (NSW) s 66EB, 66EC.

11. *Crimes Act 1900* (NSW) s 91D, s 91E, s 91F.

12. *Crimes Act 1900* (NSW) s 91G, s 91H.

- other offences where the victim is under 16, including the sexual servitude offence,¹³ voyeurism and filming private acts or private parts¹⁴
- former offences using old terminology where the victim was under 16, including: indecent assaults, acts of indecency and gross indecency, rape, carnal knowledge, buggery, and homosexual intercourse¹⁵
- attempting, conspiring or inciting to commit any of the above offences, and
- committing an offence under a previous enactment that was substantially similar to any of the above offences.

Why this review?

- 1.6 This review sits against a background of dissatisfaction with the operation of the special rule in relation to child sexual offences. Problems with judicial interpretation of the special rule and potential problems are discussed in chapter 2.
- 1.7 A particular focal point for the dissatisfaction with the operation of the special rule is the “Your Reference Ain’t Relevant” campaign.

The “Your Reference Ain’t Relevant” campaign

- 1.8 The “Your Reference Ain’t Relevant” campaign was founded by advocates Jarad Grice and Harrison James who are themselves survivors of child sexual abuse. The campaign seeks to remove consideration of a lack of criminal history and the provision of “good character references” during sentencing for such crimes. The campaign was launched May 2023, and an associated petition attracted 4,340 signatures.
- 1.9 On 22 August 2023, the petition was presented to the Legislative Council on behalf of the campaign and victim-survivors of child sexual abuse seeking an amendment to s 21A(5A) of the *Crimes (Sentencing Procedure) Act* to remove the requirement of establishing that an offender’s good character assisted them in the commission of the offence.
- 1.10 The member presenting the petition noted:
- child sexual abuse is a predatory crime which often involves manipulation and grooming of victims, the victim’s caregivers and the wider community, including through seeking positions of power, authority and respect in the community.¹⁶
- 1.11 The campaign has been launched across most jurisdictions in Australia.

13. *Crimes Act 1900* (NSW) s 80D, s 80E.

14. *Crimes Act 1900* (NSW) s 91J, s 91K, s 91L.

15. *Crimes Act 1900* (NSW) sch 1A.

16. NSW, *Parliamentary Debates*, Legislative Council Notice Paper No 24, 19 September 2023 [98].

Conducting this review

Preliminary submissions and consultations

- 1.12 To help us to identify relevant issues, we invited preliminary submissions from members of the community and organisations and agencies. We received 85 submissions. They are listed in appendix B and published on our website.
- 1.13 Some of the submissions raised personal experiences of victims and family members. We thank all those who took the time to write to us.
- 1.14 We also held preliminary consultations to help get some understanding of the issues that might arise. These are listed in appendix C.

This consultation paper

- 1.15 This consultation paper is arranged as follows.
- 1.16 **Chapter 2 – The law and its origins** sets out the common law principle and legislative basis for the use of good character in mitigation in sentencing proceedings. We then consider the origins of good character, what the courts treat as “good character”, and the situations where mitigation for good character is qualified. Finally, we look at the origins and the interpretation of the special rule.
- 1.17 **Chapter 3 – Victim experiences** considers the experience of victim-survivors of child sexual abuse as important context for consideration of the impact of the use of good character at sentencing. We also consider the experience of other groups of victims that the special rule could be applied to, including adult victim-survivors of sexual assault, victim-survivors of domestic violence of offenders and victims of fraud.
- 1.18 **Chapter 4 – Utility of good character at sentencing** sets out the traditional justifications for good character evidence at sentencing and challenges some of these reasonings, particularly in relation to child sex offending.
- 1.19 **Chapter 5 – Options for reform** sets out a range of options including abolishing the use of good character entirely and not changing the existing law, as well as various incremental adjustments to the current law and practice that lie in between these two options.

Call for submissions

- 1.20 We invite submissions on any of the issues raised in this consultation paper, particularly the options for reform, as well as any other relevant matters you think we may have overlooked. For convenience, a list of questions asked in chapter 5 is provided in appendix A.

- 1.21 Submissions should be sent to sentencingcouncil@dcj.nsw.gov.au. The due date for submissions is **14 February 2025**.

2. The law and its origins

In brief

The use of good character in mitigation of an offender’s sentence is long-established in common law and statute. It originated in a very different criminal legal system. Good character can be found in many ways and its use can be qualified in certain circumstances. There has been dissatisfaction with the interpretation of the special rule for child sexual offences.

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- 2.1 This chapter sets out the common law principle that establishes the use of good character in mitigation in sentencing proceedings. It also sets out the relevant statements of this position in the statutory aggravating and mitigating factors under the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*Crimes (Sentencing Procedure) Act*). It then considers the origins of good character, what makes up good character, and the situations where mitigation for good character is qualified. Finally, it looks at the origins and the interpretation of the special rule that prohibits the use of good character in certain cases of child sexual assault.
- 2.2 The origins of the use of good character at sentencing suggest that it may not have a sound basis and may not be entirely fit for purpose in a modern sentencing regime. This chapter, together with the discussion of the victim experience in chapter 3 and of the utility of good character in chapter 4, provide the necessary background to consider the options for reform suggested in chapter 5.

A well-established principle at common law

- 2.3 It is well-established at common law that a person's good character can be taken into account as a mitigating factor in sentencing.
- 2.4 The principal High Court decision on good character is *Ryan*.¹ In this case, the offender claimed that the trial judge erred in holding that his unblemished character and reputation did not entitle him to any leniency whatsoever. The trial judge took this view because unblemished character was expected of a priest. The majority of the court, however, found that he was entitled to some leniency.
- 2.5 Justice McHugh held that consideration of an offender's otherwise good character was, at common law, "an established mitigating factor in the sentencing process".² He stated that there were two stages of enquiry. First the court must determine if the offender is of "otherwise good character". Then it must determine the weight to be given to this factor in mitigation. Once a judge finds otherwise good character, they are *bound* to take it into account. The weight, however, will vary "according to all of the circumstances".³
- 2.6 Justice Kirby observed that to ignore evidence of subjective considerations about the offender involved "a departure from basic sentencing principle", unless "a statute or some other law requires the contrary".⁴ However, he acknowledged that

1. *Ryan v R* [2001] HCA 21, 206 CLR 267.

2. *Ryan v R* [2001] HCA 21, 206 CLR 267 [31].

3. *Ryan v R* [2001] HCA 21, 206 CLR 267 [23], [25], [31], [36].

4. *Ryan v R* [2001] HCA 21, 206 CLR 267 [110].

a sentencing judge could, in a particular case, give no “significant leniency” because of all the circumstances of that case.⁵

- 2.7 The reasons of Justice Callinan illustrate how entrenched good character is as a consideration at sentencing:

One who does conscientiously perform his or her duty is entitled to the benefit of his or her reputation and character for so doing. And to acknowledge that some occupations, such as, perhaps, nursing, teaching, the clergy and the armed services, may attract well-motivated men and women and give them special opportunities to perform public service is not to disparage or demean others.

...

There is no reason why a priest who had conducted himself diligently and helpfully in other respects over many years, and has earned a good character in those respects, should not be treated somewhat differently from a priest who has not conducted himself so as to earn a good character, but had committed the same offences as this appellant.⁶

Statute: Aggravating and mitigating factors

- 2.8 In NSW the aggravating and mitigating factors in s 21A of the *Crimes (Sentencing Procedure) Act* complement and, in some cases, expand the common law. The relevant mitigating factors are:

- (e) the offender does not have any record (or any significant record) of previous convictions,
- (f) the offender was a person of good character.⁷

- 2.9 There is also an aggravating factor:

- (d) the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences).⁸

- 2.10 The relationship between good character and prior record is discussed further below.

Origins of good character

- 2.11 Historically, issues of character have been relevant at various stages of criminal procedure:

5. *Ryan v R* [2001] HCA 21, 206 CLR 267 [112].
6. *Ryan v R* [2001] HCA 21, 206 CLR 267 [177]–[178].
7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3).
8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).

- pre-trial, through the prosecutor/victim’s knowledge of the offender (and their character)⁹
- at trial, where evidence of character may, in certain circumstances, go to the offender’s credit as a witness or to the likelihood that the offender committed the offence
- at sentence, where character may be taken into account in the exercise of judicial discretion on sentencing and, in the past, on questions of reprieve, recommendation of pardon and commutation of sentence, and
- after sentence in the executive prerogative of mercy.

Good character in sentencing and related proceedings

- 2.12 In 18th century England, character witnesses were frequently used by an accused person in criminal trials to establish innocence. However, if a conviction resulted, favourable character evidence might be used to convince the judge to pass a lesser sentence (where discretion was available) or recommend a pardon.¹⁰
- 2.13 At a time when there were many capital offences for felonies, including for property crimes, the inflexibility and harshness of the mandatory death penalty led to a practice of judges recommending a pardon as an “indispensable element in the administration of criminal justice”.¹¹ Good character therefore, often featured in the judge’s observations.¹² The Crown generally followed the recommendations of the judges.¹³ The effect of a pardon was to give a defendant new capacity, credit and character.¹⁴
- 2.14 The legal processes to mitigate a sentence, through judicial discretion or recommendation to pardon, were useful for preserving the social order and ensuring the support of the governed.¹⁵ One writer has explained:

Here was the peculiar genius of the law. It allowed the rulers of England to make the courts a selective instrument of class justice, yet simultaneously to proclaim the law’s incorruptible impartiality, with absolute determinacy. Their political and

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9. P King, *Crime, Justice, and Discretion in England 1740–1820* (Oxford University Press, 2000) 33.
10. D Hay and others, *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* (Allen Lane, 1975) 42.
11. L Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (Stevens, 1948) vol 1, 114.
12. L Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (Stevens, 1948) vol 1, 114–115.
13. L Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (Stevens, 1948) vol 1, 120.
14. L Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (Stevens, 1948) vol 1, 107.
15. D Hay and others, *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* (Allen Lane, 1975) 43–49.

social power was reinforced daily by bonds of obligation on the one side and condescension on the other, as prosecutors, gentlemen and peers decided to invoke the law or agreed to show mercy. Discretion allowed a prosecutor to terrorize the petty thief and then command his gratitude, or at least the approval of his neighbourhood as a man of compassion. It allowed the class that passed one of the bloodiest penal codes in Europe to congratulate itself on its humanity. It encouraged loyalty to the king and the state. ... And in the countryside the power of gentlemen and peers to punish or forgive worked in the same way to maintain the fabric of obedience, gratitude and deference.¹⁶

- 2.15 Studies of the judges' reports recommending pardon have highlighted this approach. One historian has observed of the judges' reports:

The language of good character ... [focused] primarily ... on the individual's capacity to prove that they had lived in a neighbourly, honest, and orderly manner, supporting themselves by their own labour. Prisoners whose established neighbours were willing to say that previous to the offence they had regarded them as honest, steady, trustworthy, or of good credit were well on the way to building a good case for mitigation, particularly if they were also described as sober, quiet, or inoffensive — that is as having never been a threat to the good order of the community. ... The other recurring theme — the prisoner's attitude to work — is seen in such phrases as "always laborious and industrious according to his neighbours", has "maintained his family in a decent manner by his own industry", "willing and industrious", "bore the character of an industrious man". Prisoners who could show that their previous employers would take them back, or that local people would offer them permanent work were particularly well placed.¹⁷

- 2.16 It has also been noted that since first offence pleas were

much more credible when supported by former neighbours, character evidence, whether presented at the trial or after conviction in petitions and supporting letters, was undoubtedly a central building block in many pleas for mercy.¹⁸

- 2.17 There were always offences which, generally, were considered as not deserving of mercy, such as murder and forgery, although there were always exceptions.¹⁹

16. D Hay and others, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Allen Lane, 1975) 48–49.

17. P King, *Crime, Justice, and Discretion in England 1740–1820* (Oxford University Press, 2000) 309.

18. P King, *Crime, Justice, and Discretion in England 1740–1820* (Oxford University Press, 2000) 310.

19. See, eg, L Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (Stevens, 1948) vol 1, 376–377; D Hay and others, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Allen Lane, 1975) 19.

2.19 By the late 18th century, a separate procedure had developed around the sentencing stage of a trial. This was brought on by the introduction of legal representation, the development of the adversarial system and the emergence of rules of evidence designed to exclude irrelevant evidence from the trial.²⁰ These new procedures required Chief Justice Kenyon, in 1789, to clarify that judges could make use of evidence of an offender’s conduct after they had been found guilty:

[I]t is well settled that the conduct of a defendant, subsequent to the time when he is found guilty, may be taken into consideration either by way of aggravating or mitigating the punishment. In general it is done for his benefit, in order to extenuate the offence; but it is also done, if required, to aggravate. Though in such cases the Court will always take care not to inflict a greater punishment than the principal offence itself will warrant.²¹

2.20 The sentencing stage has always had a different way of introducing the necessary evidence. By the early 19th century, for misdemeanours, this was done by affidavit from both sides.²² It is suggested that writing was adopted at the time under the influence of the pardon system that relied on written reports and petitions.²³ The current, more informal, approach to the sentencing hearing arose in the late 19th century when the primary focus of sentencing shifted to rehabilitation and the need to treat the whole offender.²⁴

2.21 The system of executive pardon also continued through the 19th century. It is said that, until 1907 when the English *Criminal Appeal Act* was passed, the Home Office, in administering pardons, effectively stood in the position of a court of appeal in criminal cases. The Home Secretary was not bound by technical rules of evidence and could obtain knowledge of facts that were unknown to the courts.²⁵

2.22 From the earliest reports of the proceedings of the English Court of Criminal Appeal, the court reduced sentences in circumstances much like those described above, where good character had not, for whatever reason, been raised at sentencing. For example, in 1908, the court released a first offender, convicted of burglary, who had been “led away by bad companions” and whose “last employer was now present and was willing to take him back directly the Court allowed”.²⁶

20. A Horovitz, “The Emergence of Sentencing Hearings” (2007) 9 *Punishment and Society* 271, 278–279.

21. *R v Withers* (1789) 2 TR 428, 100 ER 657, 660–661.

22. J Chitty, *A Practical Treatise on the Criminal Law* (Butterworths, 2nd ed, 1816) 691.

23. A Horovitz, “The Emergence of Sentencing Hearings” (2007) 9 *Punishment and Society* 271, 283.

24. A Horovitz, “The Emergence of Sentencing Hearings” (2007) 9 *Punishment and Society* 271, 281, 284.

25. L Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (Stevens, 1948) vol 1, 123.

26. *R v Francis* (1908) 1 Cr App R 259, 259–260.

- 2.23 In 1910, the court reduced the sentence of an offender who embezzled three days' takings of a cinematograph theatre, because it was a first offence and the offender was "not an associate of criminals" and the court did not think it "necessary that he should associate with criminals".²⁷
- 2.24 In 1918, the court reduced a sentence for an offender with previous convictions for dishonesty, who stole a bike, and asked for other larcenies to be taken into account at sentence, because "only a short time before his conviction [he] had been doing a good deal of work which was honest work, and which was of great value to the country in the active state of war in which it then was".²⁸
- 2.25 In 1919, the court reduced a sentence for an offender with a past record who was convicted of larceny because
- [a]lthough he has a very bad record, we feel that he made good on two occasions while serving in the army, and that he did make an endeavour to turn over a new leaf. In these circumstances the Court hopes that a reduction of the sentence will induce him to remain for the rest of his life the same honest man that he was when serving in the army.²⁹
- 2.26 Again, in 1919, the court reduced the sentence of "an incorrigible rogue" with eight previous convictions for acts of indecency before the Great War, because the sentence seemed to the court to have been harsh "on a man who had been fighting for the country for 4 1/2 years without a blot on his character":
- We consider that it was severe to sentence a returned soldier without inquiry, and without taking into account what he had done towards wiping out the memory of his former misdeeds.³⁰
- 2.27 In 1928, the court reduced a sentence for a fraud offender with a prior history because it had not been made sufficiently clear to the sentencing court that he had "from time to time done honest work in various employments" which the court described as "efforts ... to earn an honest living".³¹
- 2.28 The decisions of the English Court of Criminal Appeal guided NSW sentencing courts for many years. The NSW Court of Criminal Appeal (CCA), which was introduced in 1912, was seldom reported as interfering with sentences. All of the cases mentioned above were cited in a NSW criminal law practice book that was published in the 1950s.³²

27. *R v Heap* (1910) 6 Cr App R 100, 101.

28. *R v Marrows* (1918) 13 Cr App R 207.

29. *R v Tate* (1919) 14 Cr App R 103, 104.

30. *R v Casey* (1919) 14 Cr App R 100, 101.

31. *R v Coulthurst* (1928) 21 Cr App R 58.

32. C E Weigall and R J McKay, *Hamilton and Addison: Criminal Law and Procedure New South Wales* (Law Book Co, 6th ed, 1956) 555.

- 2.29 One observation from this historical overview is that good character may have served a useful purpose when the community considered the criminal laws too harsh, as was the case in Georgian England. However, it becomes problematic when the community considers the criminal laws are not harsh enough, as now appears to be the case with child sex offences.

First offender and related provisions

- 2.30 Issues around good character have had particular relevance in the imposition of some low-level penalties. For example, in deciding to record no conviction or impose a conditional release order without conviction, a court is to have regard to factors including the person's "character" and "antecedents".³³ A form of this provision was first introduced in NSW in 1929.³⁴ It was based on a 1907 provision from England.³⁵
- 2.31 While not strictly related to "character", there was also a bond available in NSW for an offender who had not previously been convicted of an indictable offence in NSW and was convicted of a minor offence.³⁶ This had its origins in the *First Offenders Probation Act 1894* (NSW) the preamble of which stated:

Whereas there is reason to believe that many offenders might be induced to reform if, instead of being committed to prison on their first conviction, an opportunity of reformation were afforded them, and it is expedient to amend the law so far as to allow of such opportunity being afforded.

Use of good character at trial

- 2.32 As noted above, before the 19th century, evidence of reputation was widely admitted in trials. Justice Gummow observed that evidence of good reputation of an accused was permitted at a time before the accused became a competent witness and there would have been no question of a jury using such evidence to assess the accused's credit.³⁷
- 2.33 Stephen, in his history of the English criminal law, observed that evidence of the character of an accused was admitted at trial "as a sort of indulgence, though character is usually treated as irrelevant".³⁸ The law was settled in 1863 that if evidence of good character was given for an accused, evidence of bad character

33. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(3)(a).

34. *Crimes Act 1900* (NSW) s 556A, inserted by *Crimes (Amendment) Act 1929* (NSW) s 15, repealed by *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW) sch 3 [7].

35. *Probation of Offenders Act 1907* (UK) s 1.

36. *Crimes Act 1900* (NSW) s 558, repealed by *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW) sch 3 [7].

37. *Melbourne v R* [1999] HCA 32, 198 CLR 1 [68].

38. J F Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol 1, 449.

could also be given against them.³⁹ However, character was taken to mean evidence of reputation as opposed to disposition. This led Stephen to conclude that the case of *Rowton* decided that “if a man gains a reputation for honesty or morality by the grossest hypocrisy he is entitled to give evidence of it, which evidence cannot be contradicted by people who know the truth”.⁴⁰

- 2.34 The *Evidence Act 1995* (NSW), which refers to proving that the defendant “is, either generally or in a particular respect, a person of good character”,⁴¹ varies the common law, which only permitted evidence about a defendant’s reputation.
- 2.35 Good character (in the fuller sense) is now generally used at trial in two respects, as:
- evidence of the defendant’s credibility, and
 - evidence going to issues (that is, the likelihood that the defendant committed the offence).
- 2.36 It is worth noting that evidence of good character going to credibility could only be applied in relation to the accused and could not be applied to witnesses, including victims.⁴²
- 2.37 Being of “good character” may tend to prove that the accused is unlikely to have committed the crime because it is “out of character”.⁴³
- 2.38 The continued use of good character in the context of a trial has been subject to some criticism. Justice Hayne, in his dissent in *Ryan*, observed that “the one-dimensional view of ‘character’ from which some common law rules of evidence proceeded can no longer be accepted without qualification”.⁴⁴
- 2.39 In an earlier High Court case, for example, Justice McHugh observed that in criminal cases, evidence of good character in the general sense, threw “little, if any light upon the probability whether he or she committed the crime in question” and quoted Lord Radcliffe on the question of general reputation:

Life not being a morality play or a Victorian melodrama, men do not enjoy reputations for being bad or good simpliciter.⁴⁵

39. *R v Rowton* (1865) Le and Ca 520, 169 ER 1497.

40. J F Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol 1, 450.

41. *Evidence Act 1995* (NSW) s 110(1).

42. New Zealand, Law Commission, *Evidence Law: Character and Credibility*, Preliminary Paper 27 (1997) [185].

43. *Melbourne v R* [1999] HCA 32, 198 CLR 1 [36]; *Ryan v R* [2001] HCA 21, 206 CLR 267 [29].

44. *Ryan v R* [2001] HCA 21, 206 CLR 267 [144], citing *R v Rowton* (1865) Le and Ca 520, 169 ER 1497 and *Melbourne v R* [1999] HCA 32, 198 CLR 1.

45. *Melbourne v R* [1999] HCA 32, 198 CLR 1 [35] quoting *Plato Films Ltd v Speidel* [1961] AC 1090, 1130.

2.40 Justice Hayne also observed:

The argument that an accused is of previous good character seeks to attribute a single qualitative description (good) to an indivisible character. But people are not divisible into two classes: those who are good and those who are not. And the use that a jury may make of such evidence as is given about the previous character of an accused will vary greatly according to the circumstances of the case. It will vary according to what is said about the previous character of the accused and what relationship (if any) that has to the case that it is sought to make against the accused.⁴⁶

What is good character?

2.41 “Good character” is an expression that is widely used in the law, but seldom if ever fully defined. It is something that people may recognise when they see it. But this requires some shared assumptions. It is sometimes defined as merely the absence of a relevant criminal record, or by contrasting it with “bad character”. It sometimes incorporates concepts of reputation or standing in the community. It can also be said to derive in part from forms of meritorious conduct.

2.42 Victoria and the Northern Territory have attempted to clarify some of this by expressly set out in sentencing legislation an inclusive list of the factors that a court may consider (among other things) in determining an offender’s character:

- the number, seriousness, date, relevance and nature of any previous findings of guilty or convictions
- the offender’s general reputation, and
- any significant contributions to the community.⁴⁷

2.43 The following paragraphs consider some of these issues.

Character and criminal record

2.44 A question arises about the interplay between character and criminal record. The two are often elided. This is made more complex in NSW because the statutory mitigating factors, in addition to good character, include:

- (e) the offender does not have any record (or any significant record) of previous convictions,⁴⁸

2.45 The aggravating factors also include:

- (d) the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences).⁴⁹

46. *Melbourne v R* [1999] HCA 32, 198 CLR 1 [152].

47. *Sentencing Act 1991* (Vic) s 6; *Sentencing Act 1995* (NT) s 6.

48. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(e)–(f).

49. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(d).

- 2.46 An example of the merging of character and prior record can be seen in a 2003 High Court case. A majority of the High Court, when considering whether an offender had been sentenced for crimes with which he had not been charged, observed that imposing a heavier sentence on a person with a prior record
- is to do no more than give effect to the well-established principle (in this case established by statute) that the character and antecedents of the offender are, to the extent that they are relevant and known to the sentencing court, to be taken into account in fixing the sentence to be passed. Taking all aspects, both positive and negative, of an offender’s known character and antecedents into account in sentencing for an offence is not to punish the offender again for those earlier matters; it is to take proper account of matters which are relevant to fixing the sentence under consideration.⁵⁰
- 2.47 Chief Justice Gleeson observed:
- [T]here is a certain ambiguity about the expression “good character” ... [in the sentencing context]. Sometimes it refers only to an absence of prior convictions and has a rather negative significance, and sometimes it refers to something more of a positive nature involving or including a history of previous good works and contribution to the community.⁵¹
- 2.48 When it is said that “bad character” cannot aggravate a penalty because an offender cannot be sentenced for crimes for which they are not being dealt with,⁵² as Justice Gummow has observed, “this rather assumes that ‘bad character’ is measured by criminal behaviour alone”.⁵³
- 2.49 Some writers have seen the two concepts as more intertwined:
- Treating a clean record, however, as a mitigation is very much the same thing as making an allowance for “good character”; and it seems less artificial simply to argue that previous convictions show how little respect the offender has for the law, and justify sentencing him accordingly. Either way, it means that courts are sentencing a defendant for character as well as offence.⁵⁴
- 2.50 The Sentencing Council has previously noted the logical fallacy in the use of an absence of a prior record to indicate good character. By itself, the absence of a prior record is generally neutral and the absence of tangible evidence of bad character cannot be equated with positive evidence of good character.⁵⁵
- 2.51 However, it is not only prior criminal convictions that can be used to negate good character. For example, civil penalty proceedings brought by the Australian

50. *Weinger v R* [2003] HCA 14, 212 CLR 629 [32].

51. *R v Levi* (Unreported, NSWCCA, 15 May 1997) Gleeson CJ, 5; *R v Gent* [2005] NSWCCA 370 [49].

52. *R v McLnerney* (1986) 42 SASR 111, 113; *Ryan v R* [2001] HCA 21, 206 CLR 267 [67].

53. *Ryan v R* [2001] HCA 21, 206 CLR 267 [67].

54. N Walker and N Padfield, *Sentencing: Theory, Law and Practice* (Butterworths, 2nd ed, 1996) [4.5].

55. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008) vol 1 [5.25].

Securities and Investments Commission were found to be sufficient to show that an insider trading conviction was not an aberration.⁵⁶

- 2.52 Good character can also be negated where a person has been convicted of an offence which they have expressly admitted is a “representative” offence, or where there is uncontested evidence to this effect, or where the sentencing judge has found beyond reasonable doubt that the person has engaged in other conduct that would amount to an offence.⁵⁷ It can also be negated where an offender has otherwise admitted to conduct but is not subject to conviction for it.⁵⁸
- 2.53 A significant period free from offending will also justify mitigation.⁵⁹ For example, the CCA noted that a 13-year gap in offending for an offender was significant because it was “evident that given the appropriate circumstances the [offender] appears capable of maintaining himself in a situation of good behaviour for an extended period”.⁶⁰

Character and reputation

- 2.54 There is a technical distinction between character and reputation. Justice McHugh observed that strictly character refers to the “inherent moral qualities of a person” and is contrasted with reputation “which refers to the public estimation or repute of a person irrespective of the inherent moral qualities of that person”.⁶¹ However, this distinction is not always drawn in criminal law where a person is regarded as having “either a good character or a bad character”.⁶²
- 2.55 Warner observed that in sentencing, reputation must count as evidence of character and then asks:

Is it only a general reputation which reflects well on an offender which is relevant, such as a reputation for selflessness, kindness, generosity and honesty? What of a reputation for selfishness, greed, dishonesty or sexual aggression and predatoriness? If the number and nature of prior convictions are relevant it is not immediately apparent why bad aspects of reputation should not be equally relevant. However, an offender should be punished for the crime committed and not for his or her poor reputation or past conduct. Similarly, aside from a clean record, an unblemished reputation should not be relevant to his or her culpability — taking it into account is open to the same objection as making valuable social contributions relevant. Moreover, because evidence of reputation is likely to be based on character testimonials or references, it is subject to the problem that

56. *R v Hall (No 2)* [2005] NSWSC 890 [101].

57. *R v JCW* [2000] NSWCCA 209 [67]–[68]; *R v Weininger* [2000] NSWCCA 501 [65].

58. *R v Carbone* (1984) 36 SASR 306, 310, 315.

59. D A Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2nd ed, 1979) 200–202.

60. *R v McGarrity* [1999] NSWCCA 73 [11].

61. *Melbourne v R* [1999] HCA 32, 198 CLR 1 [33]; *Ryan v R* [2001] HCA 21, 206 CLR 267 [28].

62. *Melbourne v R* [1999] HCA 32, 198 CLR 1 [33]–[34]; *Ryan v R* [2001] HCA 21, 206 CLR 267 [28].

such assessments, whether positive or negative, are often more opinion than fact. They can be contrasted with objective evidence of a prior record.⁶³

Meritorious conduct

- 2.56 Meritorious conduct is conduct that is unrelated to the offence (as opposed to, for example, acts motivated by remorse for the offence), but it is seen as making the offender deserving of more lenient treatment. Examples include conspicuous service in war, and making a significant contribution to society, such as starting a youth club, or rescuing someone from danger.⁶⁴
- 2.57 In 1924, the CCA considered that, among other things, the offender’s excellent war record (which included an award of the Military Cross) justified the application of the first offender’s provisions of the *Crimes Act 1900* (NSW).⁶⁵
- 2.58 In one 1982 English case, an offender, before his appearance in court, had “valiantly” attempted to rescue three children from a burning house. This incident was not known to the offender’s lawyers or the court. The Court of Appeal observed that, while it would not usually interfere in a sentence because the offender had committed an act of bravery, the court, had it known about the incident, may have formed a different view of the offender and might have come to the conclusion that he “was a much better and more valuable member of society than his criminal activities had led him to suppose”.⁶⁶ Likewise, in a 1971 English case, a fraud offender received an award after trial for rescuing a child from drowning (an incident not known by the trial judge). On appeal the court considered that the sentence might have been less had the sentencing judge known of the heroism.⁶⁷
- 2.59 In another English case in 2005, the Court of Appeal reduced a sentence to reflect the offender’s “selfless and courageous conduct” in saving a man’s life after a motor accident, just before the sentencing hearing. This was said to show he was a person “whose natural instincts are caring and responsible”.⁶⁸
- 2.60 It appears that factors such as acts of bravery or being a “valuable member” of the community are accepted as mitigating without challenge in NSW courts.⁶⁹

63. K Warner, “Sentencing Review 2008–2009” (2010) 34 *Criminal Law Journal* 16, 20.

64. D A Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2nd ed, 1979) 200.

65. *R v Goldrick* (1924) 24 SR (NSW) 396, 400–401.

66. *R v Reid* (1982) 4 Cr App R (S) 280, 281.

67. *R v Keightley* [1972] Crim L R 262.

68. *R v Wenman* [2004] EWCA Crim 2995, [2005] 2 Cr App R (S) 3 [10]–[11].

69. See, eg, *R v Zamagias* [2002] NSWCCA 17 [19]; *Osborne v R* [2015] NSWCCA 260 [86].

Situations where mitigation for good character is qualified

- 2.61 When considering mitigation for good character, the nature and circumstances of the offences will always be a “countervailing factor of the utmost importance”.⁷⁰ The courts have developed some categories of situations where mitigation for good character is qualified.
- 2.62 There is some overlap between the categories, particularly in relation to child sexual offences committed over a period of time.
- 2.63 Some of these categories may also amount to aggravating factors.

Not an isolated act

- 2.64 Mitigation is qualified where the offending is not an isolated act,⁷¹ in particular where there has been a pattern of repeat offending over a significant period of time. For example, fraud or child sexual offences which involve a number of offences over a number of years where the offences go undetected for a long time.⁷² In *Ryan*, Justice McHugh said that such a contradiction between the offender’s offending and otherwise good character showed that the good character “was a minor factor to be weighed”.⁷³
- 2.65 In relation to sexual offences against children committed over a lengthy period of time, an offender “enjoys a good reputation before detection occurs only because such offences are committed in secret and are unknown to the offender’s friends and associates or even to other family members”.⁷⁴
- 2.66 In another CCA case it was noted:
- To give to an [offender’s] so-called “previous good character” much weight in such circumstances is to give an appearance that the court is conceding to a parent or person in loco parentis or within the family unit some right to use a child for sexual pleasure at will.⁷⁵

70. *Ryan v R* [2001] HCA 21, 206 CLR 267 [33].

71. *R v Sidlow* (1908) 1 Cr App R 28, 29.

72. *R v Smith* [2000] NSWCCA 140 [21]–[22]; *R v Kennedy* [2000] NSWCCA 527 [22]; *Phelan* (1993) 66 A Crim R 446, 448; *R v ABS* [2005] NSWCCA 255 [25].

73. *Ryan v R* [2001] HCA 21, 206 CLR 267 [34].

74. *R v Levi* (Unreported, NSWCCA, 15 May 1997) Sperling J, 4; *R v L* (Unreported, NSWCCA, 3 July 1986) Lee J, 6; *R v DCM* (Unreported, NSWCCA, 26 October 1993) Badgery-Parker J. See also *R v H* (1980) 3 A Crim R 53, 74.

75. *R v Hermann* (1988) 37 A Crim R 440, 448.

Acts deliberately or carefully planned

- 2.67 Justice Callinan, in *Ryan*, referred to the proposition that “good character is of less weight when a series of crimes are deliberately and carefully planned and executed”.⁷⁶ The authority cited for this was a Western Australian case, where the Full Court observed that, while the offender (who had committed a string of armed robberies) had not previously offended, “he is a man of mature years who chose deliberately to embark on a career of crime”.⁷⁷
- 2.68 While one of the aggravating factors is that the offence was part of a planned or organised criminal activity,⁷⁸ there is some authority for the proposition that deliberate and carefully planned acts negate the idea that an offence is “out of character” or a “one off”. For example, it has been observed that sexual offences against children cannot be said to be out of character because they are “usually ... committed in a calm and calculated way”. To the extent that such offences can be seen as a function of the offender’s personality, “weight can rarely be given to a submission that offences of this kind are out of character, that the [offender] is therefore unlikely to re-offend and that special deterrence is therefore unnecessary”.⁷⁹

Abuse of position

- 2.69 Another exception to mitigation for good character is that the offences were committed in breach of trust in the course of duties which provide the basis for a finding of good character. The most common examples are fraud⁸⁰ or theft in the course of employment and sexual offences by clergy or teachers.
- 2.70 The common law has long held that good character is not to be considered where the person used that good character to get the opportunity to commit the offence. Good character will have little weight, for example, where an offender in a position of trust uses the position to commit fraud and it may even be an aggravating circumstance.⁸¹ Justice Hayne developed this point in his dissent in *Ryan*:

Only because the appellant had worked with his adult parishioners in the way he had, was he afforded the trust, respect, and position in the community which were essential to continuing his wrong doing. Viewed in that way, the material which he now says the sentencing judge was bound to treat as mitigating would not go in mitigation of sentence. Indeed, that material could be seen as revealing the

76. *Ryan v R* [2001] HCA 21, 206 CLR 267 [175].

77. *R v Morley* [1985] WAR 65, 73. See also *R v Tait* (1979) 46 FLR 386, 399.

78. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(n).

79. *R v Levi* (Unreported, NSWCCA, 15 May 1997) Sperling J, 4.

80. *R v Rivkin* [2004] NSWCCA 7, 59 NSWLR 284 [410].

81. *Halsbury’s Laws of England* (Butterworths, 1909) vol 9, 427.

extent of the breach of the trust which the appellant was bound to, and did, seek to foster in his parishioners.⁸²

2.71 Similarly, Justice Lee said, in relation to holders of public office who commit crimes in carrying out their duties, that their good character

cannot form a basis for the same mitigation of sentence as in the case of an ordinary citizen committing crime, for the public is entitled to expect that those who are placed in high office will necessarily be persons whose character makes them fit to hold that office. ... The holding of such office may indeed bring distinction to him personally but, from the point of view of sentence, it is not a matter which can advance the respondent any more than if he had been some hardworking person carrying on a menial occupation.⁸³

2.72 The law also recognises an exception where an offender's prior good character is used to gain the position that allows the offence to be committed.⁸⁴

Particular offences commonly committed by people of otherwise good character

2.73 These offences, which have been singled out as unsuited to mitigation, can be grouped into two broad categories:

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

2.74 There is no closed category of such offences.⁸⁵ There have been cases where the courts have declined to find that an offence is committed frequently by people of good character, for example, possession of prohibited firearms.⁸⁶

2.75 Those offences where there is a greater need for deterrence include:

- dangerous driving because many such offences are committed by people without criminal records and courts need to avoid the impression that people of good character may “take the lives of others and yet receive lenient treatment”⁸⁷
- drink driving, because many such offences are committed by people without criminal records,⁸⁸ and

82. *Ryan v R* [2001] HCA 21, 206 CLR 267 [148].

83. *Jackson v R* (1988) 33 A Crim R 413, 436–437.

84. *R v Kennedy* [2000] NSWCCA 527 [21].

85. *R v Gent* [2005] NSWCCA 370 [61].

86. *Athos v R* [2013] NSWCCA 205 [44].

87. *R v McIntyre* (1988) 38 A Crim R 135, 139.

88. *Attorney General's application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 3 of 2002)* [2004] NSWCCA 303, 61 NSWLR 305 [118]–[119].

- possession of child abuse material, because it is frequently committed by people of prior good character.⁸⁹

2.76 Those offences where good character can be used to facilitate or conceal include:

- offences relating to drug trafficking, because drug couriers are selected for past records that are unlikely to attract suspicion⁹⁰
- white-collar offences, because good character normally helps them to commit the offences, and they are, therefore, seldom committed by people with criminal records,⁹¹ and
- child sexual offences, especially where there is a pattern of repeat offending.⁹²

Objectively serious cases

2.77 Outside of cases where certain offences are commonly committed by people of good character, there will be cases where the objective seriousness of the offence increases the need for denunciation or deterrence. For example, armed robbery and sexual offences against children.⁹³

Some other issues

The approach to “bad character”

2.78 At common law, while “bad character” can be a relevant consideration, it cannot be used to increase a sentence beyond what is proportional to the offence. This was expressed by Chief Justice King in a South Australian case:

The cardinal rule is that while good character may operate to reduce the sentence which the facts of the crime would otherwise attract, bad character cannot increase it. A person is not to be punished, or punished again, for crimes other than the crime for which sentence is being passed. Offences committed prior to sentence for the offence under consideration may affect the sentence in two ways. They may diminish or abrogate any leniency by reason of good character. They may, moreover, lead to a greater sentence than would otherwise be imposed, although within the proper limits indicated by the facts of the immediate crime, for the purpose of personal deterrence; the prisoner's record may indicate that greater punishment is needed to protect the public by deterring him from further crime. ... The effect of the prior offences is more cogent if they have been the subject of conviction before the immediate offence. In such cases, the offender has committed the immediate offence notwithstanding the formal

89. *Mouscas v R* [2008] NSWCCA 181 [37]; *R v Gent* [2005] NSWCCA 370 [64]; *Minehan v R* [2010] NSWCCA 140 [97]–[98].

90. *R v Leroy* [1984] 2 NSWLR 441, 446–447.

91. *R v El-Rashid* (Unreported, NSWCCA, 7 April 1995) Gleeson CJ, 3; *R v Rivkin* [2004] NSWCCA 7, 59 NSWLR 284 [410]; *R v Adler* [2005] NSWSC 274 [51].

92. *R v PGM* [2008] NSWCCA 172 [44]; *Dousha v R* [2008] NSWCCA 263 [49].

93. *Ryan v R* [2001] HCA 21, 206 CLR 267 [112], [147]; *Smith v R* (1982) 7 A Crim R 437, 441–442; K Warner, “Sentencing Review 2008–2009” (2010) 34 *Criminal Law Journal* 16, 22.

judgment and condemnation of the law in respect of the earlier offences and notwithstanding the warning as to the future which the conviction experience implies.⁹⁴

2.79 The High Court in *Veen (No 2)* held that prior record is also relevant:

to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted.⁹⁵

2.80 Some have, therefore, seen “bad character” as:

- involving a withdrawal (sometimes a gradual withdrawal) of credit for good character, and
- showing need for different emphasis on purposes of sentencing such as specific deterrence.⁹⁶

2.81 In relation to the withdrawal of credit, one writer observed:

The differential which will normally be observed when offenders with different records are sentenced for similar offences is not the result of a progressive aggravation of the sentence beyond the level fixed by reference to the gravity of the offence. The imposition of longer sentences as a criminal record is extended reflects a progressive loss of credit until the offender has exhausted all the mitigating effect of good character and arrived at the point where he is exposed to the full length of the sentence appropriate to his offence.⁹⁷

2.82 Some have suggested that the CCA has taken a position consistent with the progressive loss of mitigation.⁹⁸

Post-offence conduct

2.83 Good character as part of post-offence conduct comes into play particularly in delayed cases.

2.84 It has been held that, where there has been a lengthy delay in sentencing, whether because of an interstate sentence or otherwise, fairness to an offender requires that weight be given, among other things, to the progress of their rehabilitation.⁹⁹ In South Australia, Justice Cox accepted the proposition that when an offender is tried

94. *R v McLnerney* (1986) 42 SASR 111, 113.

95. *Veen v R (No 2)* (1988) 164 CLR 465, 477.

96. *R v Wickham* [2004] NSWCCA 193 [24].

97. D A Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2nd ed, 1979) 197.

98. J V Roberts, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (Oxford University Press, 2008) 110–111, citing *R v McNaughton* [2006] NSWCCA 242, 66 NSWLR 566.

99. *R v Todd* [1982] 2 NSWLR 517, 519; *R v Dawson* [2000] NSWCCA 433 [35]–[36].

and sentenced a considerable time after the offence, an offender’s exemplary life in the meantime is relevant as would be their continuing to live in a “lawless way”:

In other words, the sentencing judge may have regard, within the limits of practicability, to all of the defendant’s behaviour, favourable or unfavourable, prior to sentence.¹⁰⁰

- 2.85 For example, in one Victorian case, involving a 6-year delay in finalisation, it was observed that the offender had “rehabilitated himself, reverting to his earlier good character” and that this was “most relevant” to the sentence.¹⁰¹ The offender in this case received a non-custodial penalty.
- 2.86 It has also been observed that, in cases where the offender might have been given credit for conduct between the crime and the sentence, one or more further offences in that period may be relevant, even if not yet subject to conviction.¹⁰²

Operation of the rules of evidence

- 2.87 The rules of evidence operate differently in relation to good character at sentencing. Justice Kirby has emphasised that the rules governing the receipt of evidence of good character at trial and at sentencing are quite distinct, because their purposes are different. It would, therefore, be a “mistake of principle” to confuse them.¹⁰³ The admission of evidence for the former is strictly controlled whereas

evidence of good conduct, or of matters which reveal redeeming features of the offender’s character, tendered as relevant to sentencing will rarely, if ever, be discarded as immaterial to the sentencing function. The evidence may sometimes be disbelieved. It may sometimes be overridden by the objective seriousness of the offences or by countervailing evidence or by other considerations. But it is a mistake in sentencing to treat such evidence as irrelevant to the task at hand.¹⁰⁴

Subsection 21A(5A)

Origins

- 2.88 The special rule set out in s 21A(5A) of the *Crimes (Sentencing Procedure) Act* (reproduced in chapter 1¹⁰⁵) was enacted in 2008.¹⁰⁶ It had its origins in a 2008 report of the Sentencing Council. In 2017, the special rule received support from the

100. *R v McLnerney* (1986) 42 SASR 111, 123.

101. *R v Smith* (1982) 7 A Crim R 437, 444.

102. *R v McLnerney* (1986) 42 SASR 111, 113.

103. *Ryan v R* [2001] HCA 21, 206 CLR 267 [101]–[102].

104. *Ryan v R* [2001] HCA 21, 206 CLR 267 [102].

105. [1.4].

106. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A), inserted by *Crimes Amendment (Sexual Offences) Act 2008* (NSW) sch 2.4 [1].

Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) which recommended its introduction in other Australian jurisdictions.

The Sentencing Council's review of penalties relating to child sexual assault

2.89 In October 2007, the Attorney General sought advice from the NSW Sentencing Council on the appropriateness of the penalties then attached to child sexual offences in NSW. The terms of reference relevantly required the Sentencing Council to:

Advise whether or not “good character” as a mitigating factor has an impact on sentences and sentence length and if so whether there needs to be a legislative response to the operation of this factor.

2.90 Recommendation 38 of the Sentencing Council's 2008 report was that the Government consider:

Amending s 21A(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to preclude a sentencing Court taking into account as mitigating factors within the meaning of the section the previous good general reputation, prior good character and absence of any prior criminal antecedents of an offender who is to be sentenced for a sexual offence involving a child, including a child pornography offence, if and to the extent that any of those considerations have better enabled the offender to commit the offence.

2.91 The Sentencing Council received a number of submissions opposing “the inclusion of good character evidence as a circumstance of mitigation when sentencing sexual offenders, particularly where their crimes are committed against children”.¹⁰⁷

2.92 Some stakeholders submitted that good character could not be relevant to sentencing for child sexual offences because such offences are regularly committed by people of good character, and a person's good character therefore does not make them any less likely to commit such offences. Others submitted that it was misleading to characterise a child sexual offender as a person of prior good character, because such offences were generally committed in secret and the person's bad character therefore would not come to light until their offending was detected.

2.93 The Sentencing Council report acknowledged that many of the submissions against the inclusion of good character as a mitigating factor in child sexual offence cases focused on the potential for offenders to rely on their good character to assist them in committing the offence. Some submissions argued that, where relying on good character amounted to an abuse of trust, this should attract a higher, not lower, level of culpability.¹⁰⁸

107. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008) vol 1 [5.40].

108. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008) vol 1 [5.43].

- 2.94 The Sentencing Council noted that other submissions argued that good character is a relevant mitigating factor with respect to all offences because it points to greater prospects of rehabilitation. However, the Council cast doubt on the validity of this argument, citing other submissions and judicial comments about the lack of empirical evidence that prior good character supports future prospects of rehabilitation, particularly with respect to child sexual offences that are routinely committed by people of good character who are notoriously resistant to rehabilitation efforts.¹⁰⁹
- 2.95 In relation to sexual offences committed against adults, the Sentencing Council considered that there was no need for statute to limit the use of good character at sentencing, and that it was preferable to permit courts to be guided by general sentencing principles.¹¹⁰
- 2.96 The Sentencing Council noted that courts in NSW have traditionally given limited weight to an offender's prior good character in child sexual offence cases, particularly in cases involving multiple offences committed over an extended period of time.¹¹¹
- 2.97 The Sentencing Council discussed that 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. While this argument may also hold true for other areas of offending, such as some white-collar crimes or drug importation offences, the seriousness and prevalence of child sexual offences justified a special approach.¹¹²
- 2.98 The Council's report concluded that these considerations justified an exception to s 21A(3) providing that an offender cannot rely on their prior good character or lack of criminal convictions as a mitigating factor where the offender has used these factors to assist them to commit the offence.¹¹³

109. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008) vol 1 [5.45], [5.59].

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

111. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008) vol 1 [5.49].

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

113. NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008) vol 1 [5.60].

The Royal Commission into Institutional Responses to Child Sexual Abuse

- 2.99 In 2017, the Royal Commission published its Criminal Justice Report. This dealt with sentencing issues in child sexual offences, including the use of good character as a mitigating factor.¹¹⁴
- 2.100 The Royal Commission identified the following concerns with the use of good character in child sexual offences:
- there is a lack of empirical support for the proposition that prior good character is indicative of improved prospects of rehabilitation
 - prior good character based on lack of convictions can be misleading, as a lack of conviction (especially in child sexual abuse cases) does not equate to lack of prior bad behaviour
 - accepting that a child sexual offender is a person of prior good character may belittle or trivialise the harm suffered by victim-survivors, especially where it gives the impression that an offender may be less culpable for their offending, and
 - often, it is an offender's prior good character that allowed them or assisted them to commit the offence.¹¹⁵
- 2.101 The Royal Commission observed that, in many of the case studies it examined, the offender's good character and reputation assisted them in the commission of the offence, and in some cases enabled them to continue offending even after allegations had been made against them.¹¹⁶
- 2.102 Submissions to the Royal Commission from victim-survivors advocacy groups reported that victim-survivors were often distressed at hearing evidence of an offender's good character and suffered emotional harm as a result.¹¹⁷
- 2.103 Some submissions to the Royal Commission supported the approach adopted in England and Wales of treating prior good character as an aggravating factor when it is used to assist an offender to commit an offence.¹¹⁸ Other submissions considered that the law in most Australian jurisdictions (including NSW) already requires courts to take into account a breach of trust or abuse of authority as

114. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X* (2017) 288, 291–299.

115. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X* (2017) 291–292.

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

117. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X* (2017) 295–296.

118. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X* (2017) 296.

aggravating factors, and that this is adequate.¹¹⁹ Ultimately, the Royal Commission agreed and did not recommend treating good character as an aggravating factor in these circumstances.¹²⁰

2.104 The Royal Commission noted that, at that time, NSW and South Australia were the only jurisdictions with express legislative provisions that prevented good character being taken into account as a mitigating factor in cases where the offender's good character assisted them in committing the offence.¹²¹

2.105 The Royal Commission noted that many of the submissions it received expressed support for other states and territories enacting legislative provisions to the same effect. Very few submissions opposed this action. Those that opposed it generally did so on the basis that courts already gave good character minimal weight in child sexual offence cases, and legislative amendments were therefore unnecessary.

2.106 The Royal Commission concluded that it was satisfied that:

in child sexual abuse cases, including institutional child sexual abuse cases, there should be no place for evidence of good character to be led on behalf of an offender as a mitigating factor in sentencing where that apparently good character has facilitated the offending.¹²²

2.107 The Royal Commission recommended that:

All state and territory governments (other than New South Wales and South Australia) should introduce legislation to provide that good character be excluded as a mitigating factor in sentencing for child sexual abuse offences where that good character facilitated the offending, similar to that applying in New South Wales and South Australia.¹²³

2.108 All states and territories, with the exception of Western Australia, have now passed or introduced legislation to give effect to this recommendation.¹²⁴

Interpretation

2.109 Since the introduction of s 21A(5A) in 2008, the provision has been applied in a number of cases. Some submissions observed that s 21A(5A) is not applied

119. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X* (2017) 296–298.

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

121. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A); *Sentencing Act 2017* (SA) s 11(4)(c).

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

123. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X* (2017) rec 74.

124. *Crimes Act 1914* (Cth) s 16A(2)(ma); *Sentencing Act 1991* (Vic) s 5AA; *Crimes (Sentencing) Act 2005* (ACT) s 34A(b); *Penalties and Sentences Act 1992* (Qld) s 9(6)(h), s 9(6A); *Sentencing Act 1995* (NT) s 5(3A); *Sentencing Act 1997* (Tas) s 11A(2).

consistently or coherently on the question of assistance.¹²⁵ The Office of the Director of Public Prosecutions acknowledged this concern.¹²⁶

- 2.110 Courts have held that, for the provision to apply, there must be evidence capable of demonstrating that the offender’s good character was of some assistance to them in the offence. Where no such connection is established, an offender may still be able to rely on their prior good character as a mitigating factor on sentence, subject to the operation of the common law.¹²⁷
- 2.111 There was some disagreement in submissions about the threshold for the assistance exception. One submission considered that the high threshold could lead to the prosecution being unwilling to argue that good character was of assistance.¹²⁸ However, the Aboriginal Legal Service, in supporting no change to existing drafting, argued that the threshold was low, simply requiring “some material contribution”.¹²⁹
- 2.112 Some CCA cases have dealt with the application of s 21A(5A):
- **R v Stoupe:** The offender committed offences against a child under his care through his role at an after-school care provider. The CCA found that the offender’s prior good character assisted him in obtaining the role. This fell “within the terms of [s 21A(5A)]” and the offender’s prior good character and lack of criminal record should not have been taken into account at all.¹³⁰
 - **AH v R:** The offender committed sexual offences against the daughter of his de facto partner. The CCA found that although his relationship with the victim’s mother created a trusting environment in which the offences could be committed, the offender’s good character could not be said to assist his commission of the offences. The offender was not exercising a role, such as teacher, which might have afforded him access to children.¹³¹
 - **GG v R:** The offender committed offences against his 14-year-old stepdaughter. The CCA was split as to whether s 21A(5A) applied. Justice Payne was not satisfied that the offender’s good character had assisted him in the commission of the offence, but did not elaborate on the issue further. Justice Schmidt found that the offender’s prior good character had been of real assistance to him in the commission of the offences, “helping him to pursue the terrible breach of trust

125. Rape and Sexual Assault Research and Advocacy, *Preliminary Submission PGC42*, 2; Grace Tame Foundation, *Preliminary Submission PGC43* [1.4]; Older Women’s Network NSW, *Preliminary Submission PGC60*, 6; Full Stop Australia, *Preliminary Submission PGC78*, 5.

126. Office of the Director of Public Prosecutions NSW, *Preliminary Submission PGC83*, 5.

127. *Bhatia v R* [2023] NSWCCA 12 [129]–[130].

128. Grace Tame Foundation, *Preliminary Submission PGC43* [3.13].

129. Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PGC69*, 3.

130. *R v Stoupe* [2015] NSWCCA 175.

131. *AH v R* [2015] NSWCCA 51.

involved in him as the victim’s stepfather”. Justice Fagan did not express any view on s 21A(5A).¹³²

- ***Bhatia v R***: The offender was a close friend of the victim’s family and had been for many years. The offender babysat and cared for the victim while his parents were at work. The offences occurred when the offender was babysitting. The CCA held that the provision requires that the offender’s good character made some “material contribution” to the commission of the offence, although this was not “an especially high causal threshold to overcome”.¹³³

2.113 There are also some recent CCA cases where lack of previous convictions and good character appear to have been accepted without argument in cases of child sexual offences, including cases involving:

- a close personal friend of the 12 to 13-year-old victim’s mother who acted as “a kind of father figure”¹³⁴
- the step-brother of a 9 to 12-year-old victim,¹³⁵ and
- the biological father of a 6 to 8-year-old victim, who was separated from the victim’s mother.¹³⁶

2.114 Justice Hamill, in *Bhatia*, observed that the language of the special provision is:

quite broad and is apt to catch a wider range of offenders than those who trade on their trusted position and good reputation to gain access to unsuspecting children because the child or parent is misled into believing the perpetrator is a person of good character.¹³⁷

2.115 He noted that, aside from the obvious examples of ministers of religion, politicians, teachers and community leaders, the special provision could also apply, depending on the circumstances of the case, to

offenders, with no other connection to the family, who act as babysitters or carers by providing references attesting to their good character and reputation. It may also apply, in some instances, to family friends and relatives, but only where there is evidence going beyond the fact of the relationship and which suggests that the offender’s good character or reputation played a role in assisting them to gain access to the child or to commit the offence.¹³⁸

132. *GG v R* [2018] NSWCCA 280.

133. *Bhatia v R* [2023] NSWCCA 12.

134. *R v Carey* [2024] NSWCCA 90 [12].

135. *STB v R* [2024] NSWCCA 36 [52].

136. *R v BH* [2023] NSWCCA 278 [89].

137. *Bhatia v R* [2023] NSWCCA 12 [144].

138. *Bhatia v R* [2023] NSWCCA 12 [144].

3. Victim experiences

In brief

The impact of offences and consequent legal proceedings on victims are an important consideration in this review. Child sexual offences cause long-lasting harms for victim-survivors and the criminal justice responses, including the use of good character at sentencing, cause secondary harms. This can also be the case, in a variety of ways, for other offences, including adult sexual offences and domestic violence offences.

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- 3.1 The experience of victims is important to understanding the context in which good character is used at sentencing. This is particularly so for victim-survivors of child sexual abuse, as emphasised by many preliminary submissions.
- 3.2 In considering whether to extend the special rule to other classes of victims, it is helpful to consider the experiences of these victims, too. This chapter, therefore, also looks at the experience of victims of adult sexual offences, domestic violence offences and fraud. As with child sexual offences, these offences can involve abuse of trust and authority, long-lasting harms, particularly emotional and psychological harms, secondary harms from the criminal justice response, and a reluctance to report.

Victim-survivors of child sexual abuse

- 3.3 Child sexual abuse can cause immediate, short, and long-term harm to the wellbeing and health of victim-survivors. It can impact many areas of their lives including their mental and physical health, their interpersonal relationships, and their sexual identity and behaviour.¹
- 3.4 The harms of child sexual abuse are different for each victim-survivor and can change over time. The following interrelated factors influence how victim-survivors are impacted:
- the characteristics of the abuse, such as the type, duration, and frequency
 - the relationship of the victim-survivor to the perpetrator
 - the social, historical, or institutional context of the abuse
 - the victim-survivor's experiences and characteristics such as their age, gender, or disability, and
 - social support, resources, and validating responses available to the victim-survivor following the abuse.²

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1. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 9–10; Australian Institute of Health and Welfare, “Child Sexual Abuse” (19 July 2024) *Family, Domestic and Sexual Violence* <<https://www.aihw.gov.au/family-domestic-and-sexual-violence/types-of-violence/child-sexual-abuse#:~:text=Experiences%20of%20childhood%20sexual%20abuse,Shackel%202013%3B%20ORCIRCSA%202017c>> (retrieved 15 November 2024).
2. S Ali and others, “Examining the Short and Long-Term Impacts of Child Sexual Abuse: A Review Study” (2024) 56(4) *SN Social Sciences* 1; Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 10; J N Briere and D M Elliot, “Immediate and Long-Term Impacts of Child Sexual Abuse” (1994) 4 *Sexual Abuse of Children* 54.

- 3.5 Although the harms of child sexual abuse are different for each victim-survivor, the literature highlights common issues that victim-survivors experience.³

Long-lasting harm

- 3.6 To understand the long-lasting and cumulative impacts of child sexual abuse on victim-survivors, it is important first to recognise the impact of trauma.
- 3.7 Child sexual abuse is traumatic as it “overwhelm[s] the ordinary human adaptations of life” and a person’s capacity to cope; it fundamentally disrupts a child’s sense of safety, trust, and bodily autonomy.⁴ Trauma is especially detrimental to the development of a child and their interpersonal relationships. It changes the structure and function of the brain, disrupting areas which are responsible for processing memory and emotion.⁵ This has profound and long-lasting effects which are associated with negative life outcomes.
- 3.8 Because the long-lasting harms of child sexual abuse are complex and plentiful, we focus on impacts which may be most relevant to the use of good character in sentencing.

Mental health impacts

- 3.9 Research consistently underscores the association between ongoing mental health harms and child sexual abuse.⁶
- 3.10 Victim-survivors commonly report issues with trusting others and feelings of fear, shame, guilt, self-blame and low self-esteem which negatively shape how they view the world.⁷ Feelings of guilt and shame are particularly pervasive, as many victim-survivors believe they could have stopped or prevented the abuse.⁸

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3. C Eastwood and W Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (Criminology Research Council, c 2003) 7.
4. L L Iacono, C Trentini and V Carola, “Psychobiological Consequences of Childhood Sexual Abuse: Current Knowledge and Clinical Implications” (2021) 15(771511) *Frontiers in Neuroscience* 1, 2; Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 77.
5. L L Iacono, C Trentini and V Carola, “Psychobiological Consequences of Childhood Sexual Abuse: Current Knowledge and Clinical Implications” (2021) 15(771511) *Frontiers in Neuroscience* 1, 3–5; Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 80–84.
6. S Ali and others, “Examining the Short and Long-Term Impacts of Child Sexual Abuse: A Review Study” (2024) 56(4) *SN Social Sciences* 1, 10; Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 85.
7. S Ali and others, “Examining the Short and Long-Term Impacts of Child Sexual Abuse: A Review Study” (2024) 56(4) *SN Social Sciences* 1, 10; Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 85–99.
8. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 88.

- 3.11 Victim-survivors often experience profound emotions of anger, sadness, grief, and isolation.⁹ Sadness and grief are linked to the loss of a normal childhood and the emotional toll of trauma. Many victim-survivors describe an inability to feel joy or love, as they are constantly tormented by intrusive memories of their abuse.¹⁰ This emotional disconnection prevents them from fully engaging in life.
- 3.12 Research reveals an association between child sexual abuse and diagnosable mental health issues such as short and long-term depression, anxiety, post-traumatic stress disorder (PTSD).¹¹ PTSD is especially common among survivors and manifests through symptoms like flashbacks, emotional responses to reminders of the abuse, hyperarousal, and avoidance of trauma-related triggers.¹² PTSD can also present in other complex ways such as through physical symptoms and dissociation.¹³
- 3.13 Victim-survivors may also experience a form of PTSD known as complex PTSD. Complex PTSD is often associated with exposure to prolonged and repetitive traumatic events.¹⁴ This is especially compounded in situations where victim-survivors find it difficult to escape, such as repeated child sexual abuse or domestic violence.¹⁵ Such serial exposure to extremely threatening or horrific events can cause long-standing disturbances of self-organisation, effect dysregulation, create negative self-concept and increase disturbances in relationships.¹⁶

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9. S Ali and others, “Examining the Short and Long-Term Impacts of Child Sexual Abuse: A Review Study” (2024) 56(4) *SN Social Sciences* 1, 9; Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 85–99.
10. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 92.
11. K J Saywitz and others, “Treatment of Sexually Abused Children and Adolescents” (2000) 55 *American Psychologist* 1040; L L Iacono, C Trentini and V Carola, “Psychobiological Consequences of Childhood Sexual Abuse: Current Knowledge and Clinical Implications” (2021) 15(771511) *Frontiers in Neuroscience* 1, 2; Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 93–97.
12. K J Saywitz and others, “Treatment of Sexually Abused Children and Adolescents” (2000) 55(1) *American Psychologist* 1040; L L Iacono, C Trentini and V Carola, “Psychobiological Consequences of Childhood Sexual Abuse: Current Knowledge and Clinical Implications” (2021) 15(771511) *Frontiers in Neuroscience* 1, 2; Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 93–97.
13. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 99.
14. C R Brewin, “Complex Post-Traumatic Stress Disorder: A New Diagnosis in ICD-11” (2020) 26 *British Journal of Psychiatric Advances* 145.
15. International Classification of Diseases, “ICD-11 for Mortality and Morbidity Statistics: Code 6B41” <<https://icd.who.int/browse/2024-01/mms/en#585833559>> (retrieved 26 November 2024).
16. R Sarr and others, “A Systematic Review of the Assessment of ICD-11 Complex Post-Traumatic Stress Disorder (CPTSD) in Young People and Adults” (2024) 31 *Clinical Psychology and Psychotherapy* 1.

- 3.14 In addition, the impact of the trauma from the abuse disrupts a person’s ability to regulate these distressing emotions.¹⁷ Being unable to regulate emotions can lead to unhealthy coping strategies and risk-taking behaviours.¹⁸ Victim-survivors, especially as children, commonly externalise their distress through disruptive, angry, or aggressive behaviour.¹⁹ There is also a link between child sexual abuse and the subsequent development of alcohol and drug abuse issues.²⁰ Victim-survivors report using alcohol and drugs in their early years to cope with the pain of sexual abuse, and then continue to rely on them in adulthood.²¹ The excessive use of alcohol and drugs may lead to other negative outcomes, such as the breakdown of relationships, unemployment and criminal behaviour.²²
- 3.15 These mental health issues accumulate and increase the risk of suicide and self-harm for many victim-survivors.²³ Many survivors report attempting suicide at a young age and later in their lives.²⁴ Self-harm is an act resulting from emotional dysregulation and can include cutting, burning and medication overdose. It is often not a suicide attempt, but an attempt at regulating strong emotions. Self-harming behaviours can also include eating disorders (restricted eating or binge eating).
- 3.16 Mental health harms further shape and influence how victim-survivors interact with others and society.

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17. S Ali and others, “Examining the Short and Long-Term Impacts of Child Sexual Abuse: A Review Study” (2024) 56(4) *SN Social Sciences* 1, 10–11; L L Iacono, C Trentini and V Carola, “Psychobiological Consequences of Childhood Sexual Abuse: Current Knowledge and Clinical Implications” (2021) 15(771511) *Frontiers in Neuroscience* 1, 3; Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 78.
18. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 82, 103.
19. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 82.
20. A Lange and others, “Long-Term Effects of Childhood Sexual Abuse: Objective and Subjective Characteristics of the Abuse and Psychopathology in Later Life” (1999) 187 *Journal of Nervous and Mental Disease* 150.
21. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 106.
22. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 107.
23. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 101–104.
24. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 103.

Interpersonal relationships and interactions with society

- 3.17 It is difficult for many victim-survivors to trust others because child sexual abuse often occurs in the context of close and personal relationships.²⁵ This impedes their capacity to establish relationships. Often, it is difficult for victim-survivors to trust others, or to trust their own judgement.²⁶ In addition, the mental health impact of child sexual abuse can compromise their relationships. Many relationships break down due to the stress of coping with mental illness and other negative outcomes.
- 3.18 The general distrust experienced by victim-survivors in interpersonal relationships also extends to wider society, especially when the abuse occurred in an institution.²⁷ Victim-survivors feel an ongoing distrust towards institutions and authorities such as police, government authorities and schools. Institutions in their lives failed to protect them from harm and, in a lot of cases, perpetuated the abuse and punished them for disclosing it. This distrust extends to legal and court processes which will be further explored below.

Specific impacts on Aboriginal and Torres Strait Islander people

- 3.19 Many Aboriginal children who were sexually abused in missions and institutions confront specific cultural and collective harms.
- 3.20 Due to discriminatory protection laws and assimilation policies, many Aboriginal children were separated from kin, country and culture and placed in institutions where they were sexually abused or mistreated.²⁸ This forced institutionalisation destroyed cultural connections, stopping Aboriginal victim-survivors from gaining cultural knowledge and developing strong networks.²⁹
- 3.21 It follows that the intergenerational trauma, grief, and social disadvantage associated with the ongoing impact of colonisation further compound the impact of sexual abuse.³⁰

25. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 107.

26. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 114.

27. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 138–140.

28. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 44.

29. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 131.

30. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 30.

- 3.22 The cumulative effect has contributed to children of victim-survivors experiencing removal from their homes, perpetuating the cycle of harm.³¹
- 3.23 Aboriginal communities therefore confront collective harm and trauma. Widespread sexual abuse across multiple generations of Aboriginal children in institutions has collectively degraded and disrupted Aboriginal culture and social relations. This has left Aboriginal communities grieving and overwhelmed.³²
- 3.24 Ongoing experiences of racism, discrimination and marginalisation particularly compound feelings of injustice and distrust for institutions and authorities.³³

Courts recognising long-lasting harm

- 3.25 When sentencing a perpetrator for child sexual abuse, a court must have regard to the effects of trauma of sexual abuse on children at the time of sentencing.³⁴ In doing so, the NSW Court of Criminal Appeal (CCA) has specifically acknowledged the long-lasting harms of child sexual abuse.
- 3.26 The CCA has recognised the profound and deleterious effects of child sex offences upon victim-survivors lasting many years, if not their whole lives, including the inevitable rise to psychological damage. It was recognised by the CCA as early as 1994.³⁵ This recognition is reflected in developments such as the fact that the Crown does not have to prove the harmful effect on a child of sexual abuse beyond reasonable doubt; it can now be inferred, as the CCA observed in 2009:
- It should not be assumed, without evidence to the contrary, that there is no significant damage by way of long-term psychological and emotional injury resulting from a sexual assault of a child who is old enough, as was the complainant, to appreciate the significance of the act committed by the offender. It should be assumed that there is a real risk of some harm of more than a transitory nature occurring. That should be a factor taken into account when sentencing for a child sexual assault offence. It is an inherent part of what makes the offence so serious.³⁶
- 3.27 In 2014, it was confirmed that sentencing judges are entitled to proceed on the basis that child sexual assault has “adverse psychological consequences”.³⁷ The CCA further recognised that child sex offences have profound and deleterious

31. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 218.

32. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 225.

33. J McCalman and others, “Responding to Indigenous Australian Sexual Assault: A Systematic Review of the Literature” (2014) (January–March) *Sage Open* 1, 10.

34. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25AA(3).

35. *R v Allpass* (1994) 72 A Crim R 561, 565.

36. *R v King* [2009] NSWCCA 117 [41].

37. *R v Gavel* [2014] NSWCCA 56 [106].

effects upon victim-survivors for many years, if not their whole lives. The Court recognised that sexual abuse of children will inevitably give rise to psychological damage and that young child victim-survivors are especially vulnerable.³⁸ The CCA in 2021 specifically listed the “typical effects” of child sexual abuse and further acknowledged long-lasting harm:

It has become a matter of common experience in this Court that the adverse psychological effects of sexual abuse on children tend to be long-lasting. ... The typical effects, as appear in judgments of this Court, include difficulties with intimate relationships, self-loathing, guilt, self-harm and a tendency to self-medicate.³⁹

- 3.28 The CCA continues to use the phrase “profound and deleterious effects” to describe the long-lasting harm of child sexual offending.⁴⁰

Secondary harm from criminal justice responses

- 3.29 Criminal justice responses can impact the harms of child sexual abuse favourably or unfavourably.
- 3.30 Victim-survivors from the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) described disclosing child sexual abuse to the police as unsettling and invalidating.⁴¹ In addition, the Bureau of Crime Statistics and Research (BOCSAR) recently found that only 15.4% of contemporary child sexual assault incidents was proceeded against and only 14.3% of historic child sexual abuse incidents was proceeded against.⁴² The decision of police not to pursue complaints particularly exacerbates feelings of injustice.⁴³
- 3.31 Disclosure of sexual abuse for Aboriginal victim-survivors has been particularly difficult.⁴⁴ Relationships between Aboriginal communities, police and welfare agencies have been adversely affected by the removal of children over

38. *R v Gavel* [2014] NSWCCA 56 [110]–[112].

39. *Culbert v R* [2021] NSWCCA 38 [115].

40. *DPP (NSW) v Wolinski* [2024] NSWCCA 139 [233].

41. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 184.

42. B Gilbert, *Attrition of Sexual Assaults from the New South Wales Criminal Justice System*, Bureau Brief No 170 (NSW Bureau of Crime Statistics and Research, 2024) 12.

43. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 184.

44. C Bailey, M Powell and S Brubacher, “Reporting Rates of Child Sexual Abuse in Indigenous Communities in two Australian Jurisdictions” (2017) 68 *Child Abuse and Neglect* 74, 75.

generations.⁴⁵ Many Aboriginal victim-survivors fear negative repercussions, such as child removal, stigmatisation, and discrimination.⁴⁶

3.32 In addition, the low conviction rate for child sexual assault offences, and sexual assault offences generally, has been a consistent feature of the criminal justice system.⁴⁷

3.33 It follows that victim-survivors often feel re-traumatised, betrayed, ignored and powerless when they engage with the criminal justice system and court processes.⁴⁸

Re-traumatisation from court processes

3.34 Re-traumatisation, which means becoming traumatised again, occurs when an aspect of a current experience triggers memories of past trauma, such as the inability to avoid or escape a perceived or actual personal threat.⁴⁹

3.35 Engagement with the court can trigger the impact of the abuse after many years. Court proceedings can trigger traumatic memories, especially for victim-survivors with PTSD.⁵⁰ Victim-survivors have emphasised the process of providing evidence as particularly difficult.⁵¹ Because child sexual offending is often private, the victim-survivor's evidence is crucial in establishing the accused's guilt beyond reasonable doubt. Research further reveals that recounting the details of the abuse, without sufficient trauma-informed support, can trigger intrusive thoughts and memories and cause further psychological distress.⁵²

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45. C Bailey, M Powell and S Brubacher, "Reporting Rates of Child Sexual Abuse in Indigenous Communities in two Australian Jurisdictions" (2017) 68 *Child Abuse and Neglect* 74, 75.
 46. M Willis, *Non-Disclosure of Violence in Australian Indigenous Communities*, Trends and Issues in Crime and Criminal Justice No 405 (Australian Institute of Criminology, 2011) 4.
 47. B Gilbert, *Attrition of Sexual Assaults from the New South Wales Criminal Justice System*, Bureau Brief No 170 (NSW Bureau of Crime Statistics and Research, 2024) 2.
 48. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 172–197; Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, Executive Summary and Parts I–II (2017) 75.
 49. A Sweeney and others, "A Paradigm Shift: Relationships in Trauma-Informed Mental Health Services" (2018) 24 *British Journal of Psychiatric Advances* 319, 322.
 50. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 88, 185.
 51. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 88 177, 185, 193.
 52. A Jacobs-Kayam and R Lev-Wiesel, "In Limbo: Time Perspective and Memory Deficit Among Female Survivors of Sexual Abuse" (2019) 10(912) *Frontiers in Psychology* 1, 2–3; C Eastwood and W Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System*, Trends and Issues in Crime and Criminal Justice (Criminology Research Council, c 2003) 16.

- 3.36 The adversarial nature of the criminal justice system is problematic for many victim-survivors.⁵³ Many victim-survivors of institutional child sexual abuse detail the power imbalance they experience during court proceedings, which mirrors the dynamics of abuse.⁵⁴ In institutional settings, perpetrators hold positions of authority while victim-survivors are vulnerable, silenced, or unable to resist due to fear or coercion. In the courtroom, victim-survivors face legal processes over which they have little control. For many victim-survivors, cross-examination, and the need to defend the credibility of their evidence, reinforces the belief that their voices are not believed.⁵⁵
- 3.37 Delays in court processes can cause distress and impact a victim-survivor’s recovery from the harms of child sexual abuse.⁵⁶ The delays extend a victim-survivor’s exposure to stress, anxiety and trauma. Victim-survivors face constant fears that the justice system will exonerate the perpetrator.⁵⁷ Consequently, victim-survivors find it difficult to move forward. In addition, victim-survivors perceive delays as the justice system being unresponsive to their particular harm.⁵⁸ This may further “invalidate” their experiences of child sexual abuse.⁵⁹
- 3.38 Younger victim-survivors are particularly vulnerable to the impact of delays with a significant proportion of their childhood being spent as a passive participant in the criminal justice system.

53. C Eastwood, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System*, Trends and Issues in Crime and Criminal Justice No 250 (Australian Institute of Criminology, 2003) 2.

54. Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 185; C Eastwood and W Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System*, Trends and Issues in Crime and Criminal Justice (Criminology Research Council, c 2003) 119.

55. A Cossins, “Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?” (2009) 33 *Melbourne University Law Review* 68, 70.

56. Royal Commission into Institutional Responses to Child Sexual, *Criminal Justice Report*, Parts VII–X and Appendices (2017) 203–204.

57. Royal Commission into Institutional Responses to Child Sexual, *Criminal Justice Report*, Parts VII–X and Appendices (2017) 207.

58. Royal Commission into Institutional Responses to Child Sexual, *Criminal Justice Report*, Parts VII–X and Appendices (2017) 207.

59. Royal Commission into Institutional Responses to Child Sexual, *Criminal Justice Report*, Parts VII–X and Appendices (2017) 207.

Impacts of the use of good character in sentencing

- 3.39 The use of good character in sentencing is a specific part of the court process that may re-traumatise victim-survivors. Research on how court processes can re-traumatise victims can also apply to the use of good character in sentencing.⁶⁰
- 3.40 Many submissions raised that the use of good character in sentencing is inappropriate because:
- its use by the offender replicates grooming and abuse-exposure behaviours
 - it gives offenders the opportunity to engage in further grooming behaviours, and
 - it minimises victim experiences.⁶¹
- 3.41 For many victim-survivors, the positive presentation of perpetrators minimises the intentions of the perpetrator at the time of the abuse and is at odds with the experiences of violence and harm they caused.
- 3.42 One preliminary submission drew attention to research which highlights how this can re-traumatise and cause further psychological distress.⁶² It can result in trauma responses such as:
- acute stress responses or nervous system responses (like fight or flight)
 - intrusive memories and thoughts of the initial abuse
 - the use of drugs and alcohol or other risk-taking behaviours to numb the short-term effects of being re-traumatised, and
 - feelings of anxiety and/or depression.⁶³

60. A Jacobs-Kayam and R Lev-Wiesel, "In Limbo: Time Perspective and Memory Deficit Among Female Survivors of Sexual Abuse" (2019) 10(912) *Frontiers in Psychology* 1, 2–3; Substance Abuse and Mental Health Services Administration, *Trauma-Informed Care in Behavioural Health Services* (2014) 59; C Eastwood, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System*, Trends and Issues in Crime and Criminal Justice No 250 (Australian Institute of Criminology, 2003) 2.

61. Anonymous, *Preliminary Submission PGC10*; S Colston, *Preliminary Submission PGC11*; J Simpson, *Preliminary Submission PGC15*, 6; Maya Kosha Healing, *Preliminary Submission PGC20*, 3, 4, 5; Your Reference Ain't Relevant, *Preliminary Submission PGC34*, 4; Older Women's Network NSW, *Preliminary Submission PGC60* [4], [7].

62. Maya Kosha Healing, *Preliminary Submission PGC20*, 8.

63. Maya Kosha Healing, *Preliminary Submission PGC20*, 5, 8.

Not reporting due to secondary harm

- 3.43 It is not surprising then, considering the secondary harm caused by the justice system, that many victim-survivors do not disclose experiences of child sexual abuse. Only 19% of victim-survivors, who provided submissions to the Royal Commission, previously reported their abuse to the police.⁶⁴

Victim-survivors becoming offenders

- 3.44 Recent studies have found that child sexual abuse confers a significant risk of subsequent offending.⁶⁵ While most child sexual abuse victim-survivors do not commit crimes, some research indicates a higher prevalence of offending amongst this cohort compared with the general population. A large Australian study found that such victim-survivors are nearly five times more likely to be charged with an offence. Studies on victim-survivors of institutional abuse also show increased rates of criminal behaviour. However, research findings vary, and a direct link between abuse and later offending has not been established.⁶⁶
- 3.45 The effect may be amplified if victim-survivors have experienced domestic violence during their childhood. Children and adolescents exposed to domestic violence face a higher risk of emotional, physical, and sexual abuse. They are also more likely to develop emotional and behavioural issues and encounter other adverse psychosocial outcomes.⁶⁷ Children who experienced dual violence, of child abuse and witnessing domestic violence, were more consistently at risk for the entire range of behavioural problems than those who experienced only one form of violence exposure.⁶⁸ This may indicate that victim-survivors who experience overlapping forms of child abuse may be at a higher risk of adverse life outcomes, such as behavioural issues, poor psychosocial outcomes, and possible criminogenic behaviour.

64. B Gilbert, *Attrition of Sexual Assaults from the New South Wales Criminal Justice System*, Bureau Brief No 170 (NSW Bureau of Crime Statistics and Research, 2024) 4.

65. A Drury, M Elbert and M DeLisi, "Childhood Sexual Abuse is Significantly Associated with Subsequent Sexual Offending: New Evidence among Federal Correctional Clients" (2019) 95(104035) *Child Abuse and Neglect* 1; Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 144.

66. A Drury, M Elbert and M DeLisi, "Childhood Sexual Abuse is Significantly Associated with Subsequent Sexual Offending: New Evidence among Federal Correctional Clients" (2019) 95(104035) *Child Abuse and Neglect* 1; Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 144.

67. S Holt, H Buckley and S Whelan, "The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature" (2008) 32 *Child Abuse and Neglect* 797, 799–800.

68. C A Moylan and others "The Effects of Child Abuse and Exposure to Domestic Violence on Adolescent Internalizing and Externalizing Behaviour Problems" (2010) 25 *Journal of Family Violence* 53, 54.

- 3.46 For men, experiencing violence as adults is significantly linked to witnessing parental violence and, to a lesser extent, physical abuse. For women, witnessing neighbourhood violence and generally experiencing violence during adolescence significantly increase the likelihood both of experiencing violence and of engaging in violent offending in adulthood. In men, violent behaviour in adolescence often leads to violent behaviour in adulthood, and physical abuse in adolescence leads to being subject to violence as adults. For women, experiencing violence in adolescence and exposure to neighbourhood violence led to violence as both victim and offender.⁶⁹
- 3.47 The path from victim to offender is complex and influenced by various factors. Common patterns among survivors involved in criminal behaviour included deteriorating behaviour in their teens and early 20s, marked by increased substance abuse and antisocial actions, leading to criminal activities.⁷⁰

Adult victim-survivors of sexual offences

- 3.48 Sexual offences can also affect the psychological, physical, and social wellbeing of adult victim-survivors.
- 3.49 People experience sexual offences in diverse ways. These offences can occur in private and public spaces, with other forms of violence. They may happen repeatedly or occur in different forms.
- 3.50 The resulting harms also depend on many factors, although literature highlights multiple commonalities.

Long-lasting harm

- 3.51 Research reveals multiple overlapping harms between child sexual abuse and adult sexual offences. These include:
- emotional effects such as feelings of anger, shock, numbness, ongoing fear, disorientation, vulnerability, self-blame, and guilt
 - diagnosable mental health disorders such as anxiety and depression
 - PTSD, complex PTSD and its symptoms

69. R J Franzese and others, "Adolescent Exposure to Violence and Adult Violent Victimization and Offending" (2017) 42 *Criminal Justice Review* 42, 52.

70. A Drury, M Elbert and M DeLisi, "Childhood Sexual Abuse is Significantly Associated with Subsequent Sexual Offending: New Evidence among Federal Correctional Clients" (2019) 95(104035) *Child Abuse and Neglect* 1, 3; Royal Commission into Institutional Responses to Child Sexual Abuse, *Impacts*, Final Report (2017) vol 3, 144–145.

- disruption of a victim-survivors' relationship with the surrounding community and the world
- maladaptive coping strategies and behaviours like alcohol and drug abuse
- negative impacts on employment, economic wellbeing, spirituality, and personal relationships, and
- suicidality and self-harm.⁷¹

3.52 Despite these similarities, research has highlighted some differences.⁷² Some literature revealed that child sexual abuse was associated primarily with PTSD and complex PTSD, while adult sexual abuse was associated with a “more general posttraumatic profile of comorbid PTSD and depression”.⁷³ In addition, child sexual abuse seemed more linked with obsessive-compulsive disorder, conduct disorders and dissociative disorders than adult sexual abuse.⁷⁴ Some literature also suggested that adult sexual abuse was more related to poorer academic, professional, and occupational functioning.⁷⁵

3.53 Nevertheless, further work is needed to understand the interplay and differential effects of adult sexual abuse and child sexual abuse.⁷⁶

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71. G Rowland and others, “Child Sexual Abuse versus Adult Sexual Assault: A Review of Psychological and Neurobiological Sequelae” (2024) 2(2) *Mental Health Science* 1, 2; K A Chivers-Wilson, “Sexual Assault and Posttraumatic Stress Disorder: A Review of the Biological, Psychological and Sociological Factors and Treatments” (2006) 9 *McGill Journal of Medicine* 111.
72. G Rowland and others, “Child Sexual Abuse versus Adult Sexual Assault: A Review of Psychological and Neurobiological Sequelae” (2024) 2(2) *Mental Health Science* 1, 2.
73. G Rowland and others, “Child Sexual Abuse versus Adult Sexual Assault: A Review of Psychological and Neurobiological Sequelae” (2024) 2(2) *Mental Health Science* 1, 7. See also T M Au and others, “Co-Occurring Posttraumatic Stress and Depression Symptoms after Sexual Assault: A Latent Profile Analysis” (2013) 149 *Journal of Affective Disorders* 209.
74. See, eg, A Caspi and others, “Relationship Between Childhood Sexual Abuse and Obsessive-Compulsive Disorder: Case-Control Study” (2008) 45 *Israel Journal of Psychiatry and Related Sciences* 177.
75. See, eg, V L Banyard and others, “Academic Correlates of Unwanted Sexual Contact, Intercourse, Stalking and Intimate Partner Violence: An Understudied but Important Consequence for College Students” (2020) 35 *Journal of Interpersonal Violence* 4375.
76. G Rowland and others, “Child Sexual Abuse versus Adult Sexual Assault: A Review of Psychological and Neurobiological Sequelae” (2024) 2(2) *Mental Health Science* 1, 4.

Secondary harm from criminal justice responses

- 3.54 Victim-survivors lack faith in the criminal justice system because it is not trauma-informed and may cause further harm.⁷⁷ Criminal justice responses were not victim-centred and left many experiences of sexual offending unacknowledged.⁷⁸
- 3.55 Victim-survivors who engaged with police consistently reported that those processes were re-traumatising, which in turn contributed to a lack of community trust and low rates of reporting.⁷⁹ Vulnerable victim-survivors of sexual violence, such as people with disability, reported experiences of discrimination when they disclosed the violence to the police.⁸⁰ BOCSAR revealed that no offender was charged for 75% of sexual offences reported for one year.⁸¹ For many, the traumatising impacts of the investigative process and the low success following the report was enough to not disclose their abuse.

Re-traumatisation from court processes

- 3.56 Court processes can re-traumatise victim-survivors of adult sexual offences the same way it can for victim-survivors of child sexual abuse. Although there have been various reforms to improve court processes in dealing with sexual offences in NSW, there remain fundamental issues which continue to impact victim-survivors.⁸²
- 3.57 Most importantly, the experience of cross-examination stops many victim-survivors from coming forward.⁸³ Although there are limits to cross-examination, a victim-survivor may feel offended, humiliated, or distressed when the defence attempts to point out inconsistencies in their evidence.⁸⁴ The Victorian Law Reform Commission, through transcript analysis, identified that defence barristers would commonly use

77. ACT, Sexual Assault Prevention and Response Reform Program Steering Committee, *Listen. Take Action to Prevent, Believe and Heal*, Report (2021) 13.

78. ACT, Sexual Assault Prevention and Response Reform Program Steering Committee, *Listen. Take Action to Prevent, Believe and Heal*, Report (2021) 61.

79. NSW Department of Communities and Justice, “*This is My Story. It’s Your Case, but it’s My Story.*” *Interview Study: Exploring Justice System Experiences of Complainants in Sexual Offence Matters* (NSW Bureau of Crime Statistics and Research, 2023) [3.1]; ACT, Sexual Assault Prevention and Response Reform Program Steering Committee, *Listen. Take Action to Prevent, Believe and Heal*, Report (2021) 34.

80. ACT, Sexual Assault Prevention and Response Reform Program Steering Committee, *Listen. Take Action to Prevent, Believe and Heal*, Report (2021) 21–32.

81. B Gilbert, *Attrition of Sexual Assaults from the New South Wales Criminal Justice System*, Bureau Brief No 170 (NSW Bureau of Crime Statistics and Research, 2024) 4.

82. B Gilbert, *Attrition of Sexual Assaults from the New South Wales Criminal Justice System*, Bureau Brief No 170 (NSW Bureau of Crime Statistics and Research, 2024) 4–5.

83. Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, Report (2021) 459–460.

84. Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, Report (2021) [21.18].

questions to confuse victim-survivors to undermine their credibility.⁸⁵ It follows that the risk of re-traumatisation is high.

- 3.58 In addition, delays, in the context of child sexual abuse, worsen a victim-survivor's mental health. Sexual offences take much longer to be resolved than other offences in NSW.⁸⁶ This prolongs a victim-survivor's trauma, affects the quality of their evidence, and leads them to withdraw complaints.⁸⁷
- 3.59 Trials also involve complex law and language, and the formalised and solemn setting of the court can be intimidating for many victim-survivors.⁸⁸ This particularly problematic for vulnerable victim-survivors. These cumulative effects outlined above increase re-traumatisation of victim-survivors.

Not reporting offences

- 3.60 The Victorian Law Reform Commission highlighted that 87% of people who experienced sexual violence did not report it to the police.⁸⁹ They emphasised concerns about access to justice, the justice system itself, and the risk of discrimination as some of the many barriers preventing victim-survivors from coming forward.⁹⁰

Impacts of good character in sentencing

- 3.61 While abuse of trust and power imbalance can be factors in some adult sexual offences, they tend to be more pronounced in cases of child sexual abuse. In addition, grooming is a central feature of child sexual abuse which may not necessarily be a factor in adult sexual offences.
- 3.62 There is no specific research which considers the impact of using good character on victim-survivors of adult sexual offences. However, it can be inferred that such a process can also be re-traumatising and evoke some of the same responses it does

85. Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, Final Report (2021) 460.

86. NSW Department of Communities and Justice, *"This is My Story. It's Your Case, but it's My Story." Interview Study: Exploring Justice System Experiences of Complainants in Sexual Offence Matters* (NSW Bureau of Crime Statistics and Research, 2023) 99. See also Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, Report (2021) 421.

87. NSW Department of Communities and Justice, *"This is My Story. It's Your Case, but it's My Story." Interview Study: Exploring Justice System Experiences of Complainants in Sexual Offence Matters* (NSW Bureau of Crime Statistics and Research, 2023) 86–87, 99.

88. NSW Department of Communities and Justice, *"This is My Story. It's Your Case, but it's My Story." Interview Study: Exploring Justice System Experiences of Complainants in Sexual Offence Matters* (NSW Bureau of Crime Statistics and Research, 2023) 81.

89. Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, Final Report (2021) [7.2].

90. Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, Final Report (2021) [2.28].

in the context of child sexual offending.⁹¹ This is especially the case where power imbalances and abuse of trust are central factors.

- 3.63 Nevertheless, the use of good character is at odds with the experiences of violence and harm caused by the perpetrator. Good character arguably minimises and invalidates this harm causing feelings of anxiety, depression, or suicidality.⁹²

Victim-survivors of domestic violence

- 3.64 Domestic and family violence is one of the leading causes of death, illness and disability for women aged under 45 and has numerous short and long-term physical and emotional, psychological, financial, and other impacts on victim-survivors.
- 3.65 Around 41,000 people aged 15 and over in NSW experience physical violence by an intimate partner or family member each year.⁹³ In 2009 it was reported that one in three Australian women had experienced physical violence during their lifetime, nearly one in five women had experienced some form of sexual violence and nearly one in five had experienced violence by a current or previous partner.⁹⁴ In 2004 one-third of women who had a former or current intimate partner reported experiencing some form of physical, sexual or psychological violence.⁹⁵ Victim surveys for 2008–2020 show that approximately 60% of victim-survivors reported the most recent incident to the police.⁹⁶ Women are more likely to be victims, and young people are

91. A Jacobs-Kayam and R Lev-Wiesel, “In Limbo: Time Perspective and Memory Deficit Among Female Survivors of Sexual Abuse” (2019) 10(912) *Frontiers in Psychology* 1, 2–3; Substance Abuse and Mental Health Services Administration, *Trauma-Informed Care in Behavioural Health Services* (2014) 59; N Stevens and S Wendt, “The ‘Good’ Child Sex Offender: Constructions of Defendants in Child Sexual Abuse Sentencing” (2014) 24 *Journal of Judicial Administration* 95, 106.

92. M B Elzy, “Examining the Relationship between Childhood Sexual Abuse and Borderline Personality Disorder: Does Social Support Matter?” (2011) 20 *Journal of Child Sexual Abuse: Research, Treatment and Program Innovations for Victims* 284, 304.

93. K Freeman, *Has the Rate of Domestic and Family Violence Changed in NSW? Victim Survey Results from July 2008 to June 2020*, Bureau Brief No 158 (NSW Bureau of Crime Statistics and Research, 2022) 4.

94. A Morgan and H Chadwick, *Key Issues in Domestic Violence*, Research in Practice, Summary Paper No 7 (Australian Institute of Criminology, 2009) 2.

95. J Mouzos and T Makkai, *Women’s Experiences of Male Violence: Findings from the Australian Component of the International Violence against Women Survey (IVAWS)*, Research and Public Policy Series No 56 (Australian Institute of Criminology, 2004).

96. K Freeman, *Has the Rate of Domestic and Family Violence Changed in NSW? Victim Survey Results from July 2008 to June 2020*, Bureau Brief No 158 (NSW Bureau of Crime Statistics and Research, 2022) 1.

also significantly affected.⁹⁷ Rates of domestic violence vary across regions, with higher rates in remote and regional areas.⁹⁸

Long-lasting harm

- 3.66 In summary, the personal harm experienced by victim-survivors of domestic abuse includes physical, emotional, and economic harm. This can include poor mental health, physical health, financial abuse, loss of or interference with employment and the human cost of pain and suffering.⁹⁹
- 3.67 Besides physical violence experienced by victim-survivors, there can also be long-term negative physical health consequences of domestic abuse. Women abused by intimate partners are more likely to be injured than those assaulted by others, with injuries ranging from minor to severe, including increased risk of traumatic brain injuries. Victim-survivors report poorer general health compared with non-abused individuals.¹⁰⁰
- 3.68 Intimate partner abuse contributes to chronic conditions, stress-related problems, and a higher likelihood of sexually transmitted diseases, among other health issues. Female victim-survivors are more likely to experience sexually transmitted diseases, pelvic inflammatory disease, chronic pain, bladder, kidney, and urinary tract infections, broken bones, seizures, headaches, stomach ulcers, spastic colon, indigestion, and hypertension.¹⁰¹ Abused women may engage in unhealthy weight control behaviours and have worse diets, while abused men report issues like impotence and loss of appetite.¹⁰²
- 3.69 Domestic violence through intimate partner abuse is strongly linked to mental health disorders such as PTSD and depression. Rates of PTSD among women experiencing intimate partner violence range from 31% to 84%, much higher than in the general

97. NSW Bureau of Crime Statistics and Research, “Domestic Violence” (20 November 2024) <<https://bocsar.nsw.gov.au/topic-areas/domestic-violence.html>> (retrieved 22 November 2024).

98. NSW Bureau of Crime Statistics and Research, “Domestic Violence” (20 November 2024) <<https://bocsar.nsw.gov.au/topic-areas/domestic-violence.html>> (retrieved 22 November 2024).

99. S Walby, *The Cost of Domestic Violence* (UK, Women and Equality Unit, 2004) [2.2].

100. A L Coker and others, “Physical Health Consequences of Physical and Psychological Intimate Partner Violence” (2000) 9 *Archives of Family Medicine* 451, 454.

101. A L Coker and others, “Physical Health Consequences of Physical and Psychological Intimate Partner Violence” (2000) 9 *Archives of Family Medicine* 451, 453.

102. L-A McNutt and others, “Cumulative Abuse Experiences, Physical Health, and Health Behaviors” (2002) 12 *Annals of Epidemiology* 123, 127; M J George and D J Yarwood, *Male Domestic Violence Victims Survey 2001: Main Findings* (Dewar Research, 2004) 11; J G Silverman and others, “Dating Violence against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality” (2001) 286 *Journal of the American Medical Association* 572.

female population.¹⁰³ Physical, psychological, and stalking violence contribute significantly to PTSD symptoms.¹⁰⁴ Physical injuries from intimate partner violence are well-documented and can lead to emotional trauma, exacerbating PTSD and depression.¹⁰⁵

- 3.70 Economic harms suffered by victim-survivors can include the intentional destruction or depletion of their resources or credit, and economic control by preventing or tracking their access to resources, bank accounts or shared assets or employment.¹⁰⁶ Technology has allowed abusive partners to exert control from a distance, making it possible to continue economic abuse without physical contact. This type of control can persist even after separation, complicating efforts to end the abuse and exacerbating its ongoing harm.¹⁰⁷
- 3.71 Most studies indicate that economic abuse correlates with a decline in the victim-survivor's financial resources. There are significant associations between economic abuse and increased material or economic hardship for the victim-survivor.¹⁰⁸

Secondary harm from criminal justice responses

- 3.72 Victim-survivors of domestic or sexual violence can experience re-traumatisation from the legal process. This can occur through facing the accused in court, hearing

103. J M Golding, "Intimate Partner Violence as a Risk Factor for Mental Disorders: A Meta-Analysis" (1999) 14 *Journal of Family Violence* 99, 116.

104. K C Basile and others, "The Differential Association of Intimate Partner Physical, Sexual, Psychological, and Stalking Violence and Posttraumatic Stress Symptoms in a Nationally Representative Sample of Women" (2004) 17 *Journal of Traumatic Stress* 413.

105. D G Kilpatrick and others, "Victim and Crime Factors Associated with Development of Crime-Related Posttraumatic Stress Disorder" (1989) 20 *Behavior Therapy* 199, 200–201.

106. A E Adams and others, "Development of the Scale of Economic Abuse" (2008) 14 *Violence Against Women* 563; A M Stylianou, J L Postmus and S McMahon, "Measuring Abusive Behaviors: Is Economic Abuse a Unique Form of Abuse?" (2013) 28 *Journal of Interpersonal Violence* 3186; A M Stylianou, "Economic Abuse within Intimate Partner Violence: A Review of the Literature" (2018) 33 *Violence and Victims* 3; J L Postmus, A Hetling and G L Hoge, "Evaluating a Financial Education Curriculum as an Intervention to Improve Financial Behaviors and Financial Well-Being of Survivors of Domestic Violence: Results from a Longitudinal Randomized Controlled Study" (2015) 49 *Journal of Consumer Affairs* 250; C K Sanders, "Economic Abuse in the Lives of Women Abused by an Intimate Partner: A Qualitative Study" (2015) 21 *Violence Against Women* 3.

107. R Afrouz, "The Nature, Patterns and Consequences of Technology-Facilitated Domestic Abuse: A Scoping Review" (2023) 24 *Trauma, Violence and Abuse* 913; A M Stylianou, J L Postmus and S McMahon, "Measuring Abusive Behaviors: Is Economic Abuse a Unique Form of Abuse?" (2013) 28 *Journal of Interpersonal Violence* 3186; A M Stylianou, "Economic Abuse within Intimate Partner Violence: A Review of the Literature" (2018) 33 *Violence and Victims* 3.

108. A E Adams, M L Beeble and K A Gregory, "Evidence of the Construct Validity of the Scale of Economic Abuse" (2015) 30 *Violence and Victims* 363; R J Voth Schrag, "Economic Abuse and Later Material Hardship: Is Depression a Mediator?" (2015) 30 *Affilia: Journal of Women and Social Work* 341, 343; R J Voth Schrag, K E Ravi and S R Robinson, "The Role of Social Support in the Link between Economic Abuse and Economic Hardship" (2020) 35 *Journal of Family Violence* 85.

graphic details of their case recounted, and having their account questioned or challenged, particularly during cross-examination.¹⁰⁹

Not reporting offences

3.73 Some estimates indicate that only 14% to 36% of domestic violence victims reported the latest incident to the police, although the reporting rate has risen over the past decade.¹¹⁰ One reason for the low reporting rate is that victims of physical or sexual violence by current partners may not view the incident as a crime, which would be the case if it were by a stranger.¹¹¹ Other reasons include:

- the perception that the incident was too minor
- feelings of shame or embarrassment
- wanting to handle it privately
- fear of the perpetrator or consequences of reporting
- cultural barriers, and
- the distress of reliving the event by recounting it multiple times.¹¹²

While victim surveys offer a more accurate estimate of the prevalence of domestic violence, they may still underestimate the true extent, especially among vulnerable groups.

109. J D Ciorciari and A Heindel, "Trauma in the Courtroom" in B van Schaack and others (ed), *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Documentation Center of Cambodia, 2011) 121, 127-129.

110. G Marcus and R Braaf, *Domestic and Family Violence Studies, Surveys and Statistics: Pointers to Policy and Practice* (Australian Domestic and Family Violence Clearinghouse, 2007) 6.

111. J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence against Women Survey (IVAWS)*, Research and Public Policy Series No 56 (Australian Institute of Criminology 105-106).

112. J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence against Women Survey (IVAWS)*, Research and Public Policy Series No 56 (Australian Institute of Criminology 105-106; National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (2009) 16.

Victim-survivors becoming offenders

- 3.74 Victim-survivors of domestic violence or intimate partner violence are also at risk of becoming offenders.¹¹³ Research suggests that the risk of becoming a victim is greater among female offenders than for women in the general population.¹¹⁴
- 3.75 Victim-survivors who later become incarcerated also experienced re-traumatisation from their interaction with the criminal justice system. Both domestic and sexual abuse have been identified as primary predictors of entry into the justice system for women.¹¹⁵
- 3.76 Individuals who experience or engage in violent behaviour during adolescence — whether as victims, perpetrators, or witnesses in family and community settings — are at a higher risk of encountering violence in adulthood, both as victims and offenders.¹¹⁶ Physical abuse of children by parents during adolescence was linked to later involvement in violent and property offences.¹¹⁷ Physical abuse during childhood and adolescence is correlated with subsequent arrests for violent crimes and other criminal behaviour.¹¹⁸

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113. L R Muftić, M A Finn and E A Marsh, “The Victim-Offender Overlap, Intimate Partner Violence, and Sex: Assessing Differences Among Victims, Offenders, and Victim-Offenders” (2015) 61 *Crime and Delinquency* 899.
114. M Chesney-Lind, “Imprisoning Women: The Unintended Victims of Mass Imprisonment” in M Mauer and M Chesney-Lind (Ed), *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (Free Press, 2002) 79; L Dugan and J Castro, “Comparing Predictors of Violent Victimization for NCVS Women with those for Incarcerated Women” in K Heimer and C Kruttschnitt (Ed), *Gender and Crime: Patterns in Victimization and Offending* (New York University Press, 2006) 171; C W Harlow, Prior Abuse Reported by Inmates and Probationers, Bureau of Justice Statistics, Selected Findings NCJ 172879 (US Department of Justice, 1999) 1.
115. M S Saar and others, *The Sexual Abuse to Prison Pipeline: The Girls’ Story* (Georgetown University, 2015) 5.
116. R J Franzese and others, “Adolescent Exposure to Violence and Adult Violent Victimization and Offending” (2017) 42 *Criminal Justice Review* 42, 42.
117. C J Rebellon and K van Gundy, “Can Control Theory Explain the Link between Parental Physical Abuse and Delinquency? A Longitudinal Analysis” (2005) 42 *Journal of Research in Crime and Delinquency* 247.
118. C S Widom, “Child Abuse, Neglect and Adult Behavior: Research Design and Findings on Criminality, Violence and Child Abuse (1989) 59 *American Journal of Orthopsychiatry* 355, 356; C S Widom, C Spatz and M G Maxfield, “A Prospective Examination of Risk for Violence among Abused and Neglected Children” (1996) 794 *Annals of the New York Academy of Sciences* 224; M T Zingraff and others, “Child Maltreatment and Youthful Problem Behavior” (1993) 31 *Criminology* 173.

Victims of fraud

3.77 Fraud takes many forms, and this chapter considers fraud which causes substantial losses, not minor instances of fraud.¹¹⁹ Fraud causing substantial losses or non-violent crime for financial gain committed by means of deception includes fraud, forgery, and embezzlement. Victims of such fraud can experience financial and emotional harm.

The impact of fraud on victims

3.78 Even when financial impact is minimal, fraud can have devastating effects on victims.¹²⁰ In many cases, the financial impact is significant for those who may face significant consequences due to the financial repercussions of fraud.

3.79 The most apparent consequence is financial loss. For some fraud victims, the loss is so severe that they are forced to sell assets (often their homes) or return to work if they were retired. They may become unable to secure credit, and in the worst cases, they might even face bankruptcy.¹²¹

3.80 Victims of fraud may also experience emotional harm. Emotional harm can manifest through feelings of betrayal, breach of trust, and lack of trust in future financial situations. Good character may be significantly relied on at sentencing by fraud offenders notwithstanding that the good character may have helped the offender establish a position of trust to commit the offence in the first place, for example, as an investment advisor.¹²²

3.81 Some researchers compared the psychiatric effects of white-collar crime with violent crime. Some found that victims of white-collar crime tend to be older, more affluent, and more likely to be female than victims of violent crime. This difference highlights that the term “white-collar” applies not only to the perpetrators but also to their victims.¹²³ Other researchers found that victims of fraud were a more diverse group, from the young, educated and professional through to the elderly

119. L Ganzini, M Bentson and J Bloom, "Victims of Fraud: Comparing Victims of White Collar and Violent Crime" (1990) 18 *Bulletin of the American Academy of Psychiatry and Law* 55, 55.

120. B Spalek, "Exploring the Impact of Financial Crime: A Study Looking into the Effects of the Maxwell Scandal upon the Maxwell Pensioners (1999) 6 *International Review of Victimology* 213, 214.

121. M Button, C Lewis and J Tapley, "Not a Victimless Crime: The Impact of Fraud on Individual Victims and their Families" (2014) 27 *Security Journal* 36, 38.

122. NSW Sentencing Council, *Fraud*, Report (2023) [3.1], [3.15]–[3.25], [6.30].

123. L Ganzini, M Bentson and J Bloom, "Victims of Fraud: Comparing Victims of White Collar and Violent Crime" (1990) 18 *Bulletin of the American Academy of Psychiatry and Law* 55, 61.

and more vulnerable.¹²⁴ The impact of fraud was individualised depending on specific factors relating to the victim.¹²⁵

- 3.82 Both groups (victims of violent and non-violent crime such as fraud) commonly experienced generalised anxiety disorder and major depressive disorder. Dementia and mania, which need to be ruled out in cases of financial loss, were not present in victims of financial fraud. Important factors in predicting psychiatric disturbances in both groups included a previous history of psychiatric illness and the degree of fraud experienced. For fraud victims, a history of depression, significant financial loss, and a reduced standard of living increased the risk of major depressive disorder and suicidality, often leading to more severe and prolonged depression.¹²⁶ Another commonality in this group was partial self-blame.¹²⁷
- 3.83 A study of 800 fraud victims found that:
- 68% of victims felt strong anger
 - 45% were significantly affected emotionally by financial loss
 - 44% experienced stress
 - 37% reported profound psychological or emotional impacts, with some mentioning relationship issues, health problems, or suicidal thoughts, and
 - 10% noted severe impacts from losing their credit rating or pension.¹²⁸
- 3.84 Along with the mental health and emotional impact, some victims of fraud also experienced behavioural changes. While a quarter of victims saw no change in behaviour:
- 37% became more cautious with investments or purchases, especially online or by telephone
 - 14% became wary of using credit cards online
 - 13% took preventive measures like stopping card use, and

124. M Button, C Lewis and J Tapley, *A Better Deal for Fraud Victims* (National Fraud Authority, 2009) 6.

125. M Button, C Lewis and J Tapley, *A Better Deal for Fraud Victims* (National Fraud Authority, 2009) 6.

126. L Ganzini, M Bentson and J Bloom, "Victims of Fraud: Comparing Victims of White Collar and Violent Crime" (1990) 18 *Bulletin of the American Academy of Psychiatry and Law* 55, 61–62.

127. M Button, C Lewis and J Tapley, "Not a Victimless Crime: The Impact of Fraud on Individual Victims and their Families" (2014) 27 *Security Journal* 36, 38.

128. M Button, C Lewis and J Tapley, *A Better Deal for Fraud Victims* (National Fraud Authority, 2009) 8.

- 11% reported significant changes like frequent anger, loss of trust, addiction to scam emails, agoraphobia, and reliance on partners for financial decisions.¹²⁹

Many victims experienced feelings of violation, stress and anger.¹³⁰

- 3.85 There may be some overlap with the consideration of good character in sentencing for victims of fraud with those who are victims of child sexual abuse or domestic violence offences, however the severity or extent of the overlap may not be much, if at all, in relation to the impact of good character in sentencing.

129. M Button, C Lewis and J Tapley, *A Better Deal for Fraud Victims* (National Fraud Authority, 2009) 8.

130. M Button, C Lewis and J Tapley, *A Better Deal for Fraud Victims* (National Fraud Authority, 2009) 49.

4. Utility of good character at sentencing

In brief

The use of good character in mitigation has been justified on grounds, including that the offender is less deserving of punishment, and that it can show prospects of rehabilitation and less need for specific deterrence. However, its use has also been criticised on grounds including that it is not fit for purpose and, more particularly in the case of child sexual offences, on grounds such as the seriousness of the offending and the continuing harm to victim-survivors.

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- 4.1 This chapter sets out the traditional justifications for good character evidence at sentencing and challenges some of these reasonings, particularly in relation to child sex offending.

Justification for the use of good character

- 4.2 Broadly, the justification for the use of good character at sentence is that it helps courts make an assessment of the “whole person” as part of the sentencing exercise. Some preliminary submissions highlighted the importance of sentencing discretion, noting that 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.¹
- 4.3 We have identified three justifications traditionally proposed by the courts for the use of good character evidence at sentencing:
- it allows the court to infer the offender’s prospects of rehabilitation
 - a person of otherwise good character is less deserving of punishment, and
 - it can show less need for individual or specific deterrence for the offender.
- 4.4 The validity of each of these reasons is open to question.

It helps to infer prospects of rehabilitation

- 4.5 It has been noted that being of otherwise good character (usually in the sense of having no prior convictions) may suggest that the offence was “out of character” and that the offender is unlikely to reoffend.² It follows that many prior convictions may suggest that the offence being sentenced was not an “uncharacteristic aberration”.³ The unlikelihood of reoffending can also be inferred where there is a long gap in offending.⁴
- 4.6 Rehabilitation, as a purpose of sentencing, concerns the offender’s ability to reform their attitudes and behaviour so that they do not reoffend.⁵ At a broader level, rehabilitation is also concerned with the offender’s renunciation of their wrongdoing and their integration or re-integration into society as a law-abiding person.⁶
- 4.7 The courts have said that a person, whose character has been shaped by a good upbringing but has lapsed into criminal behaviour, is a good subject for

1. Confidential, *Preliminary Submission PGC22*, 1; Office of the Director of Public Prosecutions NSW, *Preliminary Submission PGC83*, 2; NSW Young Lawyers Criminal Law Sub-Committee, *Preliminary Submission PGC84*, 4.

2. *Ryan v R* [2001] HCA 21, 206 CLR 267 [29]; *Weininger v R* [2003] HCA 14, 212 CLR 629 [58]. See also *Vartzokas v Zanker* (1989) 51 SASR 277, 279–280.

3. *Veen v R (No 2)* (1988) 164 CLR 465, 477; *Ryan v R* [2001] HCA 21, 206 CLR 267 [29].

4. [2.53].

5. *R v Pogson* [2012] NSWCCA 225, 82 NSWLR 60 [103].

6. *Vartzokas v Zanker* (1989) 51 SASR 277, 279; *R v Pogson* [2012] NSWCCA 225, 82 NSWLR 60 [120].

rehabilitation. This is because they have “the physical and mental qualities and, by reason of [their] upbringing, the potential moral fibre to provide a sound basis for rehabilitation”.⁷

- 4.8 In addition, good character may be relevant to rehabilitation by indicating the offender’s capacity to “appreciate the censure” of a criminal penalty. This can suggest that reoffending is unlikely.⁸
- 4.9 In relation to “good deeds”, it has also been observed that, like remorse, they “suggest that the offender needs less punishment to reintegrate him or her into society”.⁹
- 4.10 One writer observed, in relation to this, that the justification for the discount for first offenders can rest partly on the “recognition of human fallibility” and partly on respect for people’s ability to “respond to the censure expressed in the sentence”. He summarised the position, as follows:
- Ordinary people do have occasional aberrations. Human weakness is not so unusual, especially in a context of peer pressure or multiple social disadvantages. The sentencing system should recognise not only this, but also the capacity of people to respond to formal censure, and to ensure that their future conduct conforms to the law. This is embodied in the idea of giving someone a “second chance”.¹⁰
- 4.11 This approach assumes that aspects of good character can counter criminogenic factors and are protective against reoffending. Particular concerns around reoffending by sexual offenders are outlined below.

A person of good character is less deserving of punishment

- 4.12 A further reason suggested for referring to good character is said to be that a “morally good” person is less deserving of punishment than a “morally neutral or bad” person who has committed the same offence.¹¹ In some cases courts use this to justify a reduction in a sentence of imprisonment. For example, one court, in a case of significant fraud committed by an accountant, observed that “[i]t is only just to observe ... that a first time in gaol, for a person of previous good character, is likely to be severer punishment than the same period would be for a hardened criminal, or even when suffered for the second time”.¹² The court concluded that, once it has been decided to impose a significant term of imprisonment, it would not be useful to increase the length by “refusing to give due weight to factors such as

7. *Vartzokas v Zanker* (1989) 51 SASR 277, 279.

8. *Ryan v R* [2001] HCA 21, 206 CLR 267 [68].

9. A Ashworth and R Kelly, *Sentencing and Criminal Justice* (Hart, 7th ed, 2021) 163.

10. A Ashworth and R Kelly, *Sentencing and Criminal Justice* (Hart, 7th ed, 2021) 288.

11. *Ryan v R* [2001] HCA 21, 206 CLR 267 [30].

12. *McDonald v R* (1994) 48 FCR 555, 563–4.

... previous good record, previous positive contributions to the community, real prospects of rehabilitation”.¹³ Meritorious conduct often features in such assessments of character.

- 4.13 In another case often referred to from the English Court of Appeal, the court observed, in reducing the sentence imposed: “for a man of good character, undergoing his first custodial sentence, conviction and a prison sentence are in themselves a substantial punishment”.¹⁴ At one extreme, it may even justify a mere conviction without further punishment:

where the offence is an isolated lapse representing human frailty or the offence is one of strict liability, to a person valuing a good reputation the mere fact of conviction may be a punishment. “Good character” in such a case also may indicate the capacity of the person to appreciate the censure inherent in the outcome of the criminal process and may suggest that repetition of the criminal conduct is unlikely.¹⁵

- 4.14 One writer noted that such cases were interesting “because they seem to result from two assumptions”:

- (i) that offenders are being sentenced not for the offence but for their moral worth; and
- (ii) that moral worth can be calculated by a sort of moral book-keeping, in which spectacular actions count for more than does unobtrusive decency.¹⁶

- 4.15 Another writer observed that to grant mitigation on such grounds

implies that passing sentence is a form of social accounting, and that courts should draw up a kind of balance sheet when sentencing. The offence(s) committed would be the major factor on the minus side: and any creditable social acts would be major factors on the plus side.¹⁷

- 4.16 This writer then claimed that “the only way” to support the practice of taking such factors as “good deeds” into account at sentence was

by means of some modified Durkheimian concept of sentencing as a form of moral/social reinforcement, whereby courts which failed to recognise major social contributions by the offender might be taken symbolically to downgrade those contributions, and that might in turn be regarded as weakening instead of strengthening the collective conscience of society. If the public expects sentencing courts to take account of positive social contributions, it will have less confidence in a system that refuses to do so.¹⁸

13. *McDonald v R* (1994) 48 FCR 555, 565.

14. *R v Vinson* (1981) 3 Cr App R (S) 315, 316.

15. *Ryan v R* [2001] HCA 21, 206 CLR 267 [68]. See C C Ruby, *Sentencing* (Butterworths, 6th ed, 2004) [5.212]; A Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2010) 170.

16. N Walker and N Padfield, *Sentencing: Theory, Law and Practice* (Butterworths, 2nd ed, 1996) [4.27].

17. A Ashworth and R Kelly, *Sentencing and Criminal Justice* (Hart, 7th ed, 2021) 162.

18. A Ashworth and R Kelly, *Sentencing and Criminal Justice* (Hart, 7th ed, 2021) 163.

This view has echoes in some historians' views of the use of good character to mitigate sentences in 18th century England as legitimising the social order at the time (see chapter 2).

- 4.17 Criticisms of this “social accounting approach” to the use of good character are set out later in this chapter.

There is less need for specific deterrence

- 4.18 Likewise, in some cases, good character was seen as requiring less emphasis to be placed on specific deterrence in the sentencing exercise. In one Victorian Court of Appeal case involving fraud, it was observed that the offender had “lived an entirely commendable life up till now”.¹⁹ Justice Starke further added:

in circumstances of this nature, a convicted person is entitled to call in aid his good character and is entitled to have the court give it the greatest weight. What weight it will have depends, of course, on the character of the offence committed. In some cases, like armed robberies and so on, the fact of good character would have very little weight at all. In other cases, such as this, where a man has lived an honest life and has found himself in circumstances perhaps through no fault of his own and fell to temptation, the situation is quite different. Indeed the old *First Offenders Act 1958* (Eng) rather indicated that the court should not, except in exceptional circumstances, make a custodial order against a man who had reached maturity and who had led a blameless life.²⁰

Criticisms of the use of good character

- 4.19 The following paragraphs set out some of the more general criticisms of the use of good character in sentencing, followed by some specific reasons why the use of good character may not be appropriate in sentencing for child sexual offences. Options for reform taking these positions into account are set out in chapter 5.

General criticisms

The concept is not fit for purpose

- 4.20 Criticisms have suggested that it is perhaps too simplistic or one dimensional to give credit for good character. That is, it does not take into account the complexity of people's lives and the root causes of crime.
- 4.21 For example, Justice Hayne in his dissent in *Ryan* considered that the “one-dimensional view” of character arising from some common law rules of evidence “can no longer be accepted without qualification”. Further, in his view, reputation could no longer “be thought to be a safe and certain guide to all aspects of a person's character”.²¹

19. *R v Smith* (1982) 7 A Crim R 437, 441.

20. *R v Smith* (1982) 7 A Crim R 437, 442.

21. *Ryan v R* [2001] HCA 21, 206 CLR 267 [144].

4.22 Drawing on the example of minister of religion who is devoted to his adult parishioners but uses that to secure the trust of the victims' parents, he asked is "his assiduous attention to his adult parishioners relevant to sentence? If it is, does it make his crimes less, or more, worthy of punishment?".²²

4.23 He further noted that:

As I have pointed out, the "character" and reputation of an offender will ordinarily have many disparate elements. None of those elements can be seen as inevitably and invariably tending in aggravation or mitigation of sentence. The art of the advocate may be to place those features in one light rather than another, and to do so by application of descriptions such as "good character" or "unblemished reputation". But the task of the sentencer requires consideration of what the offender did, and why, as well as who the offender is, and requires consideration of the particular purposes for which sentence is to be imposed. There will be many competing strands of information which are available to be taken into account.²³

4.24 Justice Hayne further observed that the comparison of a person of good character with a person who is not of good character, reveals the unreality of the exercise:

Presumably the hypothetical comparison is with the case of a priest who was not as assiduous or attentive to his adult parishioners ... Whether such a priest could have had the reputation and position in the community which the appellant did may be a difficult, and in the end irrelevant, question. Even if he could, the hypothetical offender's lack of attention to his people should not properly lead to some harsher sentencing of him than the punishment which must be imposed on this appellant.²⁴

4.25 One writer suggested that the minority judgments in *Ryan* show that "moral accounting exercises can be rather semantic".²⁵

4.26 A 2018 article criticised the concept of good character as "vague and incoherent" and as lacking "a settled definition, including in philosophy or psychology, or empirical foundation". As a result, it is unreasonable for courts to make sentencing decisions based on an evaluation of character that risks being "speculative, misguided and arbitrary".²⁶

It breaches the principle of equality of treatment

4.27 Imposing a more lenient sentence because of good character has been criticised as breaching the principle of equality before the law.

22. *Ryan v R* [2001] HCA 21, 206 CLR 267 [144].

23. *Ryan v R* [2001] HCA 21, 206 CLR 267 [145].

24. *Ryan v R* [2001] HCA 21, 206 CLR 267 [150].

25. K Warner, "Sentencing Review 2008–2009" (2010) 34 *Criminal Law Journal* 16, 19.

26. G Wolf and M Bagaric, "Nice or Nasty? Reasons to Abolish Character as a Consideration in Australian Sentencing Hearings and Professionals' Disciplinary Proceedings" (2018) 19 *Monash University Law Review* 567, 568.

- 4.28 Some submissions raised the potential for class bias in references leading to different sentences for some offenders and undermining/exacerbating equality before the law.²⁷
- 4.29 One writer questioned the rationale that people deserve credit for good character, especially in relation to meritorious conduct, on the grounds that:
- it is socially inequitable (by privileging those who have the opportunity to do “good works” for the community), and is unrelated to an offender’s culpability. It also builds on an implicit notion of a moral “bank balance” which can be increased or depleted by the person’s conduct, and which may or may not be related to the offending.²⁸
- 4.30 Another writer criticised this approach as creating “a clear danger of inequitable treatment by privileging offenders with the means and opportunities to make a contribution to the community’s welfare”.²⁹ This may particularly disadvantage Aboriginal and other socially marginalised groups.
- 4.31 Another writer suggested that apart from the “out of character” assumption applied to first offenders, “there can be little room for mitigation based on character.” According to the writer, it “is antagonistic both to proportionality and to equality of treatment”.³⁰

It has no empirical foundation

- 4.32 It may be that, at least for certain serious offences, there is no empirical foundation to the claim that good character in its most general sense is connected with a lower risk of reoffending. For example, it can be argued that there does not appear to be a clear link between good character and a lower risk of sexual reoffending. The identified characteristics of sexual reoffenders, although limited, does not demonstrate an apparent association.
- 4.33 Determining the characteristics of sexual reoffenders is not a straightforward task, noting that proven sexual reoffending is apparently not common and different types of sex offenders have varying likelihoods of reoffending.³¹

27. Older Women’s Network NSW, *Preliminary Submission PGC60*, 3–4; K Tynan, *Preliminary Submission PGC65*, 1; L McIntosh, *Preliminary Submission PGC76*, 2.

28. A Freiberg, *Fox and Freiberg’s Sentencing: State and Federal Law in Victoria* (Lawbook, 3rd ed, 2014) 351.

29. J V Roberts, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (Oxford University Press, 2008) 110.

30. A Manson, “The Search for Principles of Mitigation: Integrating Cultural Demands” in J V Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 57.

31. K Gelb, *Recidivism of Sex Offenders*, Research Paper (Sentencing Advisory Council, 2007) 21.

- 4.34 However, there is “general consensus among researchers and practitioners that sexual recidivism is associated with at least two broad factors: deviant sexual interests and antisocial behaviour/lifestyle instability”.³²
- 4.35 Research has also found that prior sexual offending is a notable risk factor for sexual reoffending.³³
- 4.36 Research has also been able to identify some common characteristics in “high risk” offenders that may increase their likelihood of sexual reoffending:
- offenders with stable deviant sexual preferences;
 - offenders with identifiable antisocial personality;
 - offenders who have committed diverse sexual offences;
 - offenders who committed non-contact sexual offences;
 - offenders who have targeted extra-familial child victims;
 - offenders who have targeted male child victims;
 - offenders who have targeted strangers;
 - offenders who began offending sexually at an early age;
 - offenders who have never been married; and
 - offenders who have failed to complete (who have dropped out of) a treatment program.³⁴
- 4.37 While there is one relevant risk factor (prior offending), these characteristics and factors are not relevant to a finding that someone is of good character as demonstrated by having a history of “good works and contribution to the community”.³⁵ It therefore does not appear that a person of “good character” would be less likely to possess the above characteristics or factors and be less likely to reoffend.

There are inherent problems with character references

- 4.38 Some preliminary submissions questioned the probity and reliability of references, particularly in the context of child sex offences, pointing out that some referees lack full knowledge of the offence, may be open to manipulation and even have other motives.³⁶

32. K Gelb, *Recidivism of Sex Offenders*, Research Paper (Sentencing Advisory Council, 2007) 30.

33. D Lievore, *Recidivism of Sexual Assault Offenders; Rates, Risk Factors and Treatment Efficacy* (Australian Institute of Criminology, 2004) 46.

34. K Gelb, *Recidivism of Sex Offenders*, Research Paper (Victoria, Sentencing Advisory Council, 2007) 30.

35. *R v Levi* (Unreported, NSWCCA, 15 May 1997) 5; *Ryan v R* [2001] HCA 21, 206 CLR 267 [27].

36. See, eg, Anonymous, *Preliminary Submission PGC07*; Anonymous, *Preliminary Submission PGC10*, 1; S Colston, *Preliminary Submission PGC11*; J Simpson, *Preliminary Submission PGC15*, 1–2;

- 4.39 The Office of the Director of Public Prosecutions (ODPP) reports that, for efficiency and fairness to offenders, it does not generally challenge the volume or quality of references unless “some aspect ... undermines the reference’s reliability or value (such as the referee not being properly acquainted with the nature of the offending)”.³⁷

Why good character should not be used for child sexual offenders

- 4.40 A particular focus of this reference is the sentencing for child sexual offences.
- 4.41 There has been some judicial questioning of the use of good character, including in relation to child sexual offences. For example, Justice Hayne, in *Ryan*, stated that it was wrong to assume that “good character in other respects” is relevant to the sentencing task. He observed, in relation to a priest convicted of child sexual offences:

His assiduous discharge of other aspects of his priestly calling is no more relevant to this sentencing task than it would be relevant to say of a fraudulent solicitor who had stolen clients’ trust funds that he or she was a skilled and careful conveyancer. Moreover, there must come a point where the “bad” outweighs the “good” in the sentencing process. This appellant had, despite his calling, despite complaint, reproof, and advice to seek help, continued to prey upon those whom the sentencing judge correctly referred to as “the young, the vulnerable, the impressionable, the child needing a friend or a father figure and the child seeking approval from an adult”. This was not a case in which the offender had had a momentary lapse in an otherwise good and blameless life. He had committed many offences over a very long time. Those features could rightly be held to render reference to the good opinion in which he was held by some irrelevant to the sentencer’s task. They are features which reveal that it is artificial to speak of the appellant as being “otherwise” of good character.³⁸

- 4.42 Many preliminary submissions addressed reasons for not allowing use of good character particularly in relation to child sexual offences.

The offending is extremely serious

- 4.43 In relation to the seriousness of the offending, many submissions drew attention to the devastating and lasting impact that such offending has on victim-survivors and

Anonymous, *Preliminary Submission PGC19*, 2; Anonymous, *Preliminary Submission PGC23*, 1; Anonymous, *Preliminary Submission PGC26*, 2; Your Reference Ain’t Relevant, *Preliminary Submission PGC34*, 7–8; Ellie, *Preliminary Submission PGC40*, 4; Anonymous, *Preliminary Submission PGC41*; K Tynan, *Preliminary Submission PGC65*; V Hay, *Preliminary Submission PGC73*, 1.

37. Office of the Director of Public Prosecutions NSW, *Preliminary Submission PGC83*, 4.

38. *Ryan v R* [2001] HCA 21, 206 CLR 267 [149].

the community.³⁹ Some drew attention to the prevalence of the offending as justifying different treatment.⁴⁰ One quoted from the Australian Child Maltreatment Study, which provided national prevalence estimates for child sexual abuse of 28.5% of survey respondents.⁴¹

- 4.44 Some considered that allowing good character to mitigate a sentence diminished or undermined the gravity of the offences,⁴² and that denying the use of good character would make such offenders fully accountable.⁴³

The offender has misused good character

- 4.45 Many preliminary submissions referred to the direct or indirect use of good character to gain access to children. They pointed out that an offender's good

39. See, eg, Maya Kosha Healing, *Preliminary Submission PGC20*, 5; Anonymous, *Preliminary Submission PGC26*, 1; J Scott, *Preliminary Submission PGC29*; Your Reference Ain't Relevant, *Preliminary Submission PGC34*, 4, 5; P Edwards, *Preliminary Submission PGC35*; Ellie, *Preliminary Submission PGC40*, 3; J Kanizay, *Preliminary Submission PGC49*; S Allen, *Preliminary Submission PGC51*; Older Women's Network NSW, *Preliminary Submission PGC60*, 2, 3; J Helinski, *Preliminary Submission PGC61*; V Hay, *Preliminary Submission PGC73*, 1; L Davis, *Preliminary Submission PGC75*; D Ertel, *Preliminary Submission PGC77*, 1; Full Stop Australia, *Preliminary Submission PGC78*, 3–4; G Malone, *Preliminary Submission PGC79*; D Malone, *Preliminary Submission PGC80*; A Malone, *Preliminary Submission PGC81*; Anonymous, *Preliminary Submission PGC82*.

40. See, eg, Full Stop Australia, *Preliminary Submission PGC78*, 3.

41. D Ertel, *Preliminary Submission PGC77*, 1; B Mathews and others, "The Prevalence of Child Maltreatment in Australia: Findings from a National Survey" (2023) 218 *Medical Journal of Australia* S13, S15.

42. Your Reference Ain't Relevant, *Preliminary Submission PGC34*, 3; P Edwards, *Preliminary Submission PGC35*; Z Saunders, *Preliminary Submission PGC36*; A Diskin, *Preliminary Submission PGC37*; Anonymous, *Preliminary Submission PGC38*; H Roovers, *Preliminary Submission PGC39*; Ellie, *Preliminary Submission PGC40*, 5; B Valesini, *Preliminary Submission PGC44*; The Survivor Hub, *Preliminary Submission PGC45*; E Jade, *Preliminary Submission PGC46*; C Richardson, *Preliminary Submission PGC47*; S Allen, *Preliminary Submission PGC51*; L Arnold, *Preliminary Submission PGC53*; M Blanden, *Preliminary Submission PGC54*; Anonymous, *Preliminary Submission PGC55*; C Codeco, *Preliminary Submission PGC59*; Older Women's Network NSW, *Preliminary Submission PGC60*, 2; J Helinski, *Preliminary Submission PGC61*; C Rodriguez, *Preliminary Submission PGC62*; C Jones, *Preliminary Submission PGC63*; K Tynan, *Preliminary Submission PGC65*; S Ervasti, *Preliminary Submission PGC66*; M Douziech, *Preliminary Submission PGC67*; N Pilgrim, *Preliminary Submission PGC71*; V Hay, *Preliminary Submission PGC73*, 1; Anonymous, *Preliminary Submission PGC74*; D Ertel, *Preliminary Submission PGC77*, 1; G Malone, *Preliminary Submission PGC79*; D Malone, *Preliminary Submission PGC80*; A Malone, *Preliminary Submission PGC81*.

43. S Allen, *Preliminary Submission PGC51*; L Arnold, *Preliminary Submission PGC53*; M Blanden, *Preliminary Submission PGC54*; Anonymous, *Preliminary Submission PGC55*; C Towers, *Preliminary Submission PGC57*; C Codeco, *Preliminary Submission PGC59*; Older Women's Network NSW, *Preliminary Submission PGC60*, 2, 3; C Rodriguez, *Preliminary Submission PGC62*; C Jones, *Preliminary Submission PGC63*; S Ervasti, *Preliminary Submission PGC66*; M Douziech, *Preliminary Submission PGC67*; N Pilgrim, *Preliminary Submission PGC71*; Anonymous, *Preliminary Submission PGC74*; G Malone, *Preliminary Submission PGC79*; D Malone, *Preliminary Submission PGC80*; A Malone, *Preliminary Submission PGC81*.

character was something that facilitated their offending by gaining the confidence of those close to the victim. Some also observed that the process of seeking good character references was a continuation of that original deception.

- 4.46 One submission drew attention to a recent Australian study that found that those who commit child sexual offences are more likely to be well-connected and relatively wealthy members of the community.⁴⁴ This study, about men who had sexual feelings towards children and who had offended against children, found:
- They had better on average social supports and relationships. They were 1.63 times more likely to be married and had 1.18 times greater overall social support scores, than men who did not have sexual feelings or offending with children.
 - They are more likely to be high income. Men who had sexual feelings and offending with children are two times more likely to have an annual household income greater than \$150,000.⁴⁵

Offenders cannot be of “good character”

- 4.47 A number of submissions also pointed to the impossibility that a person of good character could commit such an offence,⁴⁶ suggesting that such offenders were automatically of bad character.
- 4.48 Some considered that good character was irrelevant to the crime or the propensity to commit the crime,⁴⁷ or asserted that good character does not lower risk of reoffending in such cases.⁴⁸
- 4.49 Other observations included:
- good character did not prevent the commission of the offence⁴⁹
 - the offence is not a minor mistake or lack of judgment — it is a calculated act⁵⁰
 - “out of character” does not apply for acts done in secret,⁵¹ and

44. Anonymous, *Preliminary Submission PGC17*, 1.

45. M Salter and others, *Identifying and Understanding Child Sexual Offending Behaviours and Attitudes Among Australian Men* (UNSW, 2023) 30.

46. See, eg, Full Stop Australia, *Preliminary Submission PGC78*, 4–5.

47. See, eg, Older Women’s Network NSW, *Preliminary Submission PGC60*, 4; K Tynan, *Preliminary Submission PGC65*; L McIntosh, *Preliminary Submission PGC76*, 2–3; Full Stop Australia, *Preliminary Submission PGC78*, 4; Anonymous, *Preliminary Submission PGC82*.

48. See, eg, Anonymous, *Preliminary Submission PGC19*, 1; C Richardson, *Preliminary Submission PGC47*; L Miller, *Preliminary Submission PGC50*.

49. Rape and Sexual Assault Research and Advocacy, *Preliminary Submission PGC42*, 2–3.

50. L Miller, *Preliminary Submission PGC50*.

51. A Boyd, *Preliminary Submission PGC28*, 2.

- being able to show good character may demonstrate continuing risk of reoffending.⁵²

It undermines the legitimacy or credibility of the justice system

- 4.50 Some submissions drew attention to the impact that allowing good character had on the legitimacy or credibility of the justice system.
- 4.51 Some noted that allowing mitigation for good character gave rise to perceptions of leniency⁵³ and the belief on the part of offenders that they would be protected from the full consequences of their actions (giving rise to diminution of deterrence).⁵⁴ Preventing the use of good character for child sex offenders would, therefore, enhance accountability and bolster public confidence or trust in the justice system.⁵⁵

It causes continuing harm to victim-survivors

- 4.52 Some submissions drew attention to the harm (usually in the form of revictimisation) caused for victim-survivors and their families by allowing consideration of good character. One submission noted that use of good character could add to victims' trauma through what they saw as the offender's manipulation of the legal system.⁵⁶
- 4.53 Systemic harms were also highlighted such as:
- perpetuating a harmful culture (of misconceptions around sexual offending and the encouragement of victim-blaming), and
 - discouraging disclosure of offences.⁵⁷

52. L Davis, *Preliminary Submission PGC75*.

53. L Vosu, *Preliminary Submission PGC30*; Rape and Sexual Assault Research and Advocacy, *Preliminary Submission PGC42*, 5; Grace Tame Foundation, *Preliminary Submission PGC43* [3.21].

54. Older Women's Network NSW, *Preliminary Submission PGC60*, 2; L McIntosh, *Preliminary Submission PGC76*, 3.

55. Your Reference Ain't Relevant, *Preliminary Submission PGC34*, 3; Older Women's Network NSW, *Preliminary Submission PGC60*, 4.

56. Legal Aid NSW, *Preliminary Submission PGC68*, 3–4.

57. Anonymous, *Preliminary Submission PGC10*, 1, 4–5; Anonymous, *Preliminary Submission PGC12*; R Thomas, *Preliminary Submission PGC14*; J Simpson, *Preliminary Submission PGC15*, 1; Maya Kosha Healing, *Preliminary Submission PGC20*, 5; H Leon, *Preliminary Submission PGC21*; J Scott, *Preliminary Submission PGC29*; L Vosu, *Preliminary Submission PGC30*; D Turnbull, *Preliminary Submission PGC31*; P Holmes, *Preliminary Submission PGC33*; Your Reference Ain't Relevant, *Preliminary Submission PGC34*, 3; Anonymous, *Preliminary Submission PGC41*; Rape and Sexual Assault Research and Advocacy, *Preliminary Submission PGC42*, 4; J Kanizay, *Preliminary Submission PGC49*; Older Women's Network NSW, *Preliminary Submission PGC60*, 3; J Helinski, *Preliminary Submission PGC61*; K Tynan, *Preliminary Submission PGC65*; L McIntosh, *Preliminary Submission PGC76*, 1; D Ertel, *Preliminary Submission PGC77*, 1–2.

It detracts from the needs of victim-survivors

- 4.54 One submission drew attention to the fact that allowing evidence of good character did not meet victim-survivors needs, which were identified by the Victorian Law Reform Commission, in its report on *Providing the Justice System Response to Sexual Offences*, as being for:
- validation (that is, to have their story believed), and
 - vindication (that is, a response that denounces the offence and stands with the victim).⁵⁸
- 4.55 Some submissions considered that removing good character for all child sex offences was necessary to ensure that victim-survivors are the priority of the system, not offenders.⁵⁹

58. Full Stop Australia, *Preliminary Submission PGC78*, 8–9; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, Report (2021) [2.41]–[2.44], [2.45].

59. J Kanizay, *Preliminary Submission PGC49*; L Davis, *Preliminary Submission PGC75*; L Arnold, *Preliminary Submission PGC53*; M Blanden, *Preliminary Submission PGC54*; C Codeco, *Preliminary Submission PGC59*; Older Women’s Network NSW, *Preliminary Submission PGC60*, 5–6; C Rodriguez, *Preliminary Submission PGC62*; C Jones, *Preliminary Submission PGC63*; R Butcher, *Preliminary Submission PGC64*; K Tynan, *Preliminary Submission PGC65*; S Ervasti, *Preliminary Submission PGC66*; M Douziech, *Preliminary Submission PGC67*; V Hay, *Preliminary Submission PGC73*; D Ertel, *Preliminary Submission PGC77*, 1.

5. Options for reform

In brief

Options for reforming the use of good character in sentencing include abolishing its consideration altogether, and extending the special rule to certain other, or even all, offences. Making no changes to the existing law also has some support. There are also some procedural and evidential options for reform.

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- 5.1 The terms of reference for this review are broad and cover the use of good character generally. While one of the chief concerns of this review is the situation as it applies to sentencing for sexual offences against children, broader questions of principle are raised.
- 5.2 Given the background to the use of good character and the changes in criminal trials and sentencing since the 18th century, one important question is whether the law as handed down to us is fit for purpose. Other tools are now available to sentencing judges for assessing offenders, including, for example, sentencing

assessment reports,¹ and deferral of sentencing for various purposes including those relating to rehabilitation and participation in intervention programs.² Sentencing procedures are now also now more concerned with matters that are known to have an impact on offending behaviour, for example, *Bugmy* considerations related to the effects of profound deprivation on individual offenders.³ The offender is now also in a different position so far as the ability to put their case through legal representation.

- 5.3 We therefore seek views on abolishing use of good character entirely and on not changing the existing law, as well as various incremental adjustments to the current law that lie in between these two options.

Abolish consideration of good character

- 5.4 At present, the special rule applies to both good character and lack of previous convictions. Questions, therefore, arise as to whether consideration of good character should be abolished altogether. Questions about abolishing consideration of the lack of previous convictions are considered in the next section.
- 5.5 Some academics proposed effectively abolishing the consideration of good character as a matter of mitigation by itself (all offences, in all circumstances, statute and common law). Warner framed it as limiting good character to lack of prior convictions, while Wolf and Bagaric framed it as abolishing good character, but without consideration of what to do about prior record.⁴ One submission thought good character should not be considered in relation to any crime.⁵
- 5.6 As we note in chapter 4 there are some general criticisms of the use of good character that could be seen as supporting abolition.⁶
- 5.7 Warner suggested that a “more principled” approach would be to limit the relevance of good character in all cases (not just to sex offences against children) to “an absence of prior convictions” with “the common law determining the weight to be given to this consideration in particular categories of case”.⁷

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 2 div 4B.

2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11.

3. *Bugmy v R* [2013] HCA 37, 249 CLR 571.

4. K Warner, “Sentencing Review 2008–2009” (2010) 34 *Criminal Law Journal* 16, 16–17; G Wolf and M Bagaric, “Nice or Nasty? Reasons to Abolish Character as a Consideration in Australian Sentencing Hearings and Professionals’ Disciplinary Proceedings” (2018) 44 *Monash University Law Review* 567, 597.

5. Anonymous, *Preliminary Submission PGC17*.

6. [4.20]–[4.39].

7. K Warner, “Sentencing Review 2008–2009” (2010) 34 *Criminal Law Journal* 16, 16–17.

- 5.8 One reason for this approach is said to be that there is “abundant evidence that the most powerful predictor of reconviction is the number of previous convictions”.⁸ There is, however, the problem that absence of evidence of prior criminal behaviour is not evidence of absence of such behaviour. This was noted by several submissions and is particularly problematic for sexual offences that have low reporting, charge and conviction rates.
- 5.9 Another reason for this approach is that taking into account reputation or meritorious conduct by the offender “involves a form of moral accounting to assess the moral worth of the offender which goes beyond an assessment of the offender’s culpability for the offence and is, in any case, a difficult and unreliable exercise”.⁹ In Warner’s view, the sentencing exercise should not be “complicated” by such considerations. She also noted that taking such matters into account infringes the principle of equality before the law and observed that “an offender should neither be sentenced more favourably, nor more harshly because of their social status, reputation, respectability or social contributions”.¹⁰
- 5.10 Wolf and Bagaric have also taken the view that the uncertain nature of good character and the highly subjective and arbitrary nature of assessments of it, justify removing the ability of courts to evaluate the character of offenders in sentencing hearings.¹¹
- 5.11 We also note that parliament has acknowledged the irrelevance and unreliability of reputation in other areas, for example in relation to complainants in trials for prescribed sexual offences.¹² It has also limited the use of evidence of character reputation and conduct through the tendency rule.¹³
- 5.12 The issue of the use of evidence that can go to good character for other purposes, such as assessing prospects of rehabilitation, is considered below.

8. K Warner, “Sentencing Review 2008–2009” (2010) 34 *Criminal Law Journal* 16, 19. See, eg, J Halliday, C French and C Goodwin, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (Halliday Report) (Home Office, 2001) 93; A Pisani, *Long-Term Re-Offending Rates of Adults and Young People in NSW*, Bureau Brief No 162 (NSW Bureau of Crime Statistics and Research, 2022).

9. K Warner, “Sentencing Review 2008–2009” (2010) 34 *Criminal Law Journal* 16, 23.

10. K Warner, “Sentencing Review 2008–2009” (2010) 34 *Criminal Law Journal* 16, 23.

11. G Wolf and M Bagaric, “Nice or Nasty? Reasons to Abolish Character as a Consideration in Australian Sentencing Hearings and Professionals’ Disciplinary Proceedings” (2018) 44 *Monash University Law Review* 567, 600–601.

12. *Criminal Procedure Act 1986* (NSW) s 294CB.

13. *Evidence Act 1995* (NSW) s 97.

Question 5.1: Use of good character generally

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

Abolish consideration of lack of previous convictions

- 5.13 Bearing in mind that there is some support, noted above, for retaining the consideration of lack of previous convictions, arguments can still be put for its abolition.
- 5.14 Some submissions, while agreeing with previous convictions being a relevant factor in aggravation,¹⁴ considered that lack of previous convictions should not be relevant because they are only evidence of lack of proof.¹⁵ This is especially so given the lag time in reporting for child sex offences.¹⁶
- 5.15 The response to this suggestion would involve repealing the mitigating factor that “the offender does not have any record (or any significant record) of previous convictions” or amending it so that it does not apply to particular categories of offences, such as child sexual offences.

Question 5.2: Use of lack of previous convictions generally

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

Make good character unavailable for offenders who plead not guilty

- 5.16 Consideration could be given to making good character unavailable as a mitigating factor for offenders who plead not guilty, at least in circumstances where a lesser alternative offence is not available on the facts.
- 5.17 This could apply to child sexual offenders, or to some or all other offenders.

14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(d).

15. Anonymous, *Preliminary Submission PGC17*; Rape and Sexual Assault Research and Advocacy *Preliminary Submission PGC42 3*; Grace Tame Foundation *Preliminary Submission PGC43* [3.20].

16. Ellie, *Preliminary Submission PGC40*, 5.

- 5.18 It would not be a punishment for pleading not guilty, but rather a recognition that a not guilty plea is something that a person of “good character” would not be expected to make when confronted with their wrongdoing. A parallel could be drawn with the unavailability in many cases, of remorse as mitigation for those who plead not guilty.¹⁷

Question 5.3: Use of good character for offenders who plead not guilty

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

Make the use of good character an aggravating factor

- 5.19 Consideration could be given to treating good character as an aggravating factor when it is used to assist an offender to commit an offence.
- 5.20 This is the case in sentencing for Commonwealth offences where using “standing in the community” to help in committing the offence is an aggravating factor.¹⁸ This may be the common law position (see chapter 2) and is adopted by the UK sentencing guidelines which allow that, where an offender uses positive character or status to facilitate or conceal the offending, such conduct *could* be treated as an aggravating factor.¹⁹
- 5.21 One submission suggested that good character should be an aggravating factor for child sex offences because people of “good character” should know better.²⁰
- 5.22 We note that this option was considered unnecessary by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) in light of the availability of other aggravating factors such as breach of trust or authority, or the special vulnerability of the victim-survivor.²¹

Question 5.4: Good character as an aggravating factor

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

17. *Allen v R* [2008] NSWCCA 11 [37]–[41]. See also *R v Thomson* [2000] NSWCCA 309, 49 NSWLR 383 [117].

18. *Crimes Act 1914* (Cth) s 16A(2)(ma).

19. UK, Sentencing Council, “Rape” (2024) <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/rape/>> (retrieved 21 October 2024).

20. Anonymous, *Preliminary Submission PGC41*.

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

Extend the special rule to more offences

- 5.23 Most submissions proposed extending the special rule to all sexual offences against children, by removing the condition that the good character of lack of previous convictions was of assistance to the offender in the commission of the offence.
- 5.24 Only a few submissions considered extending the special rule to offences other than child sex offences.
- 5.25 The following paragraphs, deal first with the question of extending the special rule to all sexual offences against children, before going on to consider the extension of the rule to other categories of offences. An overarching question in considering these categories is whether there is an identifiable principle behind any such extension. For example, can they be seen as offences involving breach of trust, victim-survivors with special vulnerability, significant harm to victims, or the sort of offence often or usually committed by people of “good character”?
- 5.26 In the case of the other offences, the question also arises whether the condition to the special rule (that the offender’s good character was of assistance to them in the commission of the offence) should be retained or removed.

All child sexual offences

- 5.27 All child sexual offences, as currently defined,²² could be made subject to the special rule in all cases by removing the condition at the end of s 21A(5A), as follows:
- ~~In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.~~
- 5.28 This is the outcome sought by the Your Reference Ain’t Relevant campaign and is supported by all the individuals and advocacy groups who made preliminary submissions. The general reasons for this position included the heinous nature of the offences, the misuse of “good character” to commit the offences, and the fact that such offenders cannot be of “good character”. Some also pointed to the use of good character as contributing to the revictimisation of victim-survivors. One submission took this position expressly notwithstanding the “limited weight” position of the common law for such offences.²³ More details on these reasons are outlined in chapter 4.²⁴

22. See [1.15].

23. Full Stop Australia, *Preliminary Submission PGC78*, 3.

24. [4.40]–[4.55].

- 5.29 The removal of the condition from the special rule would also remedy a problem that may emerge with historical child sexual offences where “good character” gained in the period after the offending may not be excluded from consideration because it was not of assistance in the commission of the offence.²⁵
- 5.30 A number of preliminary submissions stated that the current framing of s 21A(5A) creates two classes of victim-survivors – institutional victims and family victims.²⁶ Full Stop Australia stated that they saw no reason to distinguish between cases where the impact of character was “indirect”.²⁷ The Royal Commission considered that the special rule could apply to child sexual abuse cases which included, but were not limited to, institutional cases.²⁸
- 5.31 Further, some sexual offences that may be committed against children are currently not covered by the definition of “child sexual offence” for the purposes of the special rule.²⁹ The offences that could be added to the definition of “child sexual offence” include:
- administering or encouraging the use of a digital platform for child abuse material,³⁰ and
 - sexual assault by forced self-manipulation.³¹

Question 5.5: Extending the special rule to all child sexual offences

- (1) Should the special rule be extended to all child sexual offences? Why or why not?
- (2) What offences, if any, should be added to the definition of “child sexual offences” for the purposes of the special rule?

Sexual offences in relation to other vulnerable groups

- 5.32 Consideration could be given to extending the special rule (with or without the condition of assistance) to sexual offences that protect other vulnerable groups. Examples of such offences include:

25. Tasmania, Sentencing Advisory Council, *Sex Offence Sentencing*, Final Report (2015) 104.

26. Survivors and Mates Support Network, *Preliminary Submission PGC25*, 3; Your Reference Ain't Relevant, *Preliminary Submission PGC34*, 3; Grace Tame Foundation, *Preliminary Submission PGC43* [3.15]; Full Stop Australia, *Preliminary Submission PGC78*, 5.

27. Full Stop Australia, *Preliminary Submission PGC78*, 5.

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

29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(6) definition of “child sexual offence”.

30. *Crimes Act 1900* (NSW) s 91HAA, s 91HAB.

31. *Crimes Act 1900* (NSW) s 80A.

- sexual offences against a person with cognitive impairment,³² and
 - sexual intercourse and touching against a young person (aged 16 or 17) under special care.³³
- 5.33 The latter group of offences involve protecting young people aged 16 and 17 in a variety of family and institutional contexts, including schools, churches, and musical and sporting organisations.
- 5.34 Another approach could be to extend the special rule to offences when committed against people in these vulnerable groups. For example, the special rule in the Northern Territory and Victoria is extended to offences involving 16 and 17-year-olds.³⁴

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

- (1) What other vulnerable groups or offences against vulnerable groups could be subject to the special rule?
- (2) How could they be identified?
- (3) Should any of these offences be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence?

Adult sexual offences

- 5.35 Three preliminary submissions considered that the special rule should extend to any offender convicted of sexual offences.³⁵
- 5.36 On the other hand, one expressly said there was no need to extend the special rule to sexual offences involving adult victim-survivors. It drew on a Sentencing Council Report from 2008 which concluded that the general principles on the use of good character in sentencing were “adequate for sentencing in such cases”.³⁶
- 5.37 In Tasmania, the special rule was extended potentially to all victim-survivors of sexual assault provided the offender's good character or lack of convictions was of assistance in the commission of the offence.³⁷ The concern of the Tasmanian

32. *Crimes Act 1900* (NSW) s 66F.

33. *Crimes Act 1900* (NSW) s 73. See *Fenner v R* [2022] NSWCCA 48 [51].

34. *Sentencing Act 1991* (Vic) s 5AA(3); *Sentencing Act 1995* (NT) s 5(3A)(a).

35. Rape and Sexual Assault Research and Advocacy, *Preliminary Submission PGC42*, 2; Grace Tame Foundation, *Preliminary Submission PGC43* [1.4]; Full Stop Australia, *Preliminary Submission PGC78*, 7–8.

36. Law Society of NSW, *Preliminary Submission PGC32*, 1–2; NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales*, Report (2008) vol 1 [5.48].

37. *Sentencing Act 1997* (Tas) s 11A(2)(b).

Parliament in enacting this was the protection of “vulnerable groups such as children, people with disabilities, or the elderly”, that is, the sort of groups to whom an offender could gain access because of their “position in the community, occupation or volunteer status”.³⁸ However, such a provision could also conceivably extend to situations where there are power imbalances between adults and, for example, religious personnel, doctors and other professionals, and employers.

Question 5.7: Extending the special rule to adult sexual offences

- (1) What adult sexual offences, if any, should be subject to the special rule?
- (2) Should any of these offences be subject to the condition that the offender’s good character or lack of previous convictions was of assistance in the commission of the offence?

Domestic violence

- 5.38 Two preliminary submissions raised the possible extension of the special rule to domestic/family violence offences,³⁹ with one suggesting this would give victim-survivors more faith in the justice system.⁴⁰
- 5.39 Other preliminary submissions drew parallels or comparisons with domestic violence without expressing a view about extension to such offences. One submission noted that the “good man” issue that arises in references for child sex offenders also arises in the context of violence against women.⁴¹ Another referred to sexual abuse being part of gendered violence in Indigenous communities.⁴²
- 5.40 In our review of homicide, in 2020, one submission from Women’s Safety NSW noted:

It is also the case that perpetrators of domestic and family violence often present as “good guys” and positive contributors to the community even whilst perpetrating violence and abuse behind closed doors at home. This can in fact serve as a barrier for women and children seeking safety and support as friends, family members and community may not believe them when they disclose the violence and abuse they are experiencing.⁴³

38. Tasmania, *Parliamentary Debates*, House of Assembly, Second Reading Speech, 25 Aug 2016, 27.

39. Anonymous, *Preliminary Submission PGC26*, 1; Full Stop Australia, *Preliminary Submission PGC78*, 7–8.

40. Full Stop Australia, *Preliminary Submission PGC78*, 8.

41. D Turnbull, *Preliminary Submission PGC31*.

42. M Blanden, *Preliminary Submission PGC54*.

43. Women’s Safety NSW, *Submission MU28*, 9.

- 5.41 It may also be noted that domestic violence offences, like child sex offences, are prevalent (and consequently in need of particular emphasis on deterrence)⁴⁴ and can often also involve an abuse of a position of trust.⁴⁵

Question 5.8: Extending the special rule to domestic violence offences

- (1) Should domestic violence offences be subject to the special rule? Why or why not?
- (2) Should these offences be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence?

Other serious offences

- 5.42 Consideration could be given to extending the special rule to other serious offences.
- 5.43 Individual offences could be identified, such as murder, or murder in aggravated circumstances.⁴⁶
- 5.44 Alternatively, serious offences could be identified through an existing definition, such as "serious indictable offence" which is an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more.⁴⁷ This, however, could extend to offences covering a very wide range of offending, with no clear justification for excluding other similar offences.

Question 5.9: Extending the special rule to other serious offences

- (1) What other serious offences, if any, should be subject to the special rule?
- (2) Should any of these offences be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence?

Offences where there is a breach of trust or authority

- 5.45 Consideration could be given to extending the special rule to offences where there is a breach of trust or authority in relation to the victim-survivor. This could include:
- offences where breach of trust or authority is an element of the offence, or

44. *R v Hamid* [2006] NSWCCA 302 [68]; *R v Greene* [2001] NSWCCA 258 [16].

45. *R v Hamid* [2006] NSWCCA 302 [75].

46. E Culleton, *Preliminary Submission PGC85*, 4–5.

47. *Crimes Act 1900* (NSW) s 4(1) definition of "serious indictable offence".

- situations where it is found that the aggravating circumstance that “the offender abused a position of trust or authority in relation to the victim” was established.⁴⁸

5.46 Such a breach, either as an element of the offence or as an aggravating factor, is involved in many of the child sexual offences already subject to the special rule. However, this would extend the special rule to some sexual offences involving victim-survivors aged 16 or more⁴⁹ and to non-sexual offences where a breach of trust could be found, such as fraud.

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

- (1) What offences, if any, involving breach of trust or authority should be subject to the special rule?
- (2) Should any of these offences be subject to the condition that the offender’s good character or lack of previous convictions was of assistance in the commission of the offence?
- (3) Should a finding that an offender abused a position of trust or authority in relation to the victim of the offence make the offender subject to the special rule? Why or why not?

All offences

5.47 Consideration could be given to making the special rule apply to all offences.

5.48 This is the case for Commonwealth crimes, where it is an aggravating factor if the offender’s standing in the community was used to aid in the commission of the offence.⁵⁰ Case law indicates that the aggravating factor has been considered for cartel⁵¹ and unlawful communication offences.⁵²

5.49 On the other hand, one submission considered that good character could be applied fairly in contexts other than those involving child sexual offences.⁵³ Another considered that good character could be used in sentencing for non-violent crimes.⁵⁴

5.50 The question of whether the condition that the offender’s good character or lack of previous convictions was of assistance in the commission of the offence is

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

49. For example, special care offences.

50. *Crimes Act 1914* (Cth) s 16A(2)(ma).

51. *DPP (Cth) v Joyce* [2022] FCA 1423 [19]; *DPP (Cth) v Alkaloids of Australia Pty Ltd* [2022] FCA 1424 [17]; *DPP (Cth) v Vina Money Transfer Pty Ltd* [2022] FCA 665, 294 FCR 449 [93].

52. *R v McBride (No 4)* [2024] ACTSC 147 [237].

53. M Loew, *Preliminary Submission PGC05*.

54. E Culleton, *Preliminary Submission PGC85*, 4.

considered above in the discussion of abolishing entirely the consideration of good character and lack of previous convictions.

Question 5.11: Extending the special rule to all offences

- (1) Should all offences be subject to the special rule? Why or why not?
- (2) If yes, should the special rule be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of any or all offences?

Exempt under 18-year-olds from the special rule

- 5.51 Regardless of whether the special rule is extended to more offences, a question arises whether under 18-year-old offenders should be exempted from the application of the special rule, as is the case in Victoria.⁵⁵
- 5.52 The UK sentencing guidelines also place no restriction on the consideration of good character where a sex offender is under 18.⁵⁶ The guidelines note:
- 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.⁵⁷
- 5.53 Another option could be to exempt offenders under 18 from the application of the special rule, except in the case of certain defined offences, for example, serious children's indictable offences (SCIOs) as defined by the *Children (Criminal Proceedings) Act 1987* (NSW).⁵⁸ These offences, which must be tried by a higher court and sentenced "according to law",⁵⁹ include the following relevant offences:
- sexual intercourse against a child under 10⁶⁰
 - persistent sexual abuse of a child,⁶¹ and

55. *Sentencing Act 1991* (Vic) s 5AA(2).

56. UK, Sentencing Council, "Sexual Offences: Sentencing Children and Young People" (2024) <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/sexual-offences-sentencing-children-and-young-people/>> (retrieved 23 October 2024).

57. UK, Sentencing Council, "Sexual Offences: Sentencing Children and Young People" (2024) <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/sexual-offences-sentencing-children-and-young-people/>> (retrieved 23 October 2024).

58. *Children (Criminal Proceedings) Act 1987* (NSW) s 3(1) definition of "serious children's indictable offence".

59. *Children (Criminal Proceedings) Act 1987* (NSW) s 17; *R v WKR* (1993) 32 NSWLR 447, 449.

60. *Crimes Act 1900* (NSW) s 66A(1).

61. *Crimes Act 1900* (NSW) s 66EA(1).

- actual or attempted assault with intent to have sexual intercourse.⁶²
- 5.54 Two sexual offences that are SCIOs do not apply under the current definition of child sexual offence:
- actual or attempted aggravated sexual assault⁶³ (because there is an exception where the complainant is under 16)
 - sexual assault by forced self-manipulation where the victim was under 10⁶⁴ (which is not in the current definition).

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

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

No change to the current law

- 5.55 Some submissions did not support proposals to extend the special rule to all sex offences against children.⁶⁵ They argued that the current requirements under s 21A(5A) are appropriate, drawing in part on conclusions of the Sentencing Council in 2008 and the Royal Commission.⁶⁶
- 5.56 It was felt that the common law works appropriately in giving little weight to good character for child sex offences and in prioritising general and specific deterrence.⁶⁷ One submission noted there was no need for change because there are many mitigating and aggravating factors, that weight will vary according to circumstances, and good character does not guarantee a reduction in sentence.⁶⁸ Another submission noted that the law had been around for a long time.⁶⁹
- 5.57 Some highlighted the importance of sentencing discretion, noting that information about character was needed for the proper exercise of the sentencing discretion

62. *Crimes Act 1900* (NSW) s 61K.

63. *Crimes Act 1900* (NSW) s 61J(1).

64. *Crimes Act 1900* (NSW) s 80A. See *Children (Criminal Proceedings) Regulation 2021* (NSW) cl 4.

65. Confidential, *Preliminary Submission PGC22*; Legal Aid NSW, *Preliminary Submission PGC68*, 2; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PGC69*, 1; NSW Council for Civil Liberties, *Preliminary Submission PGC70*, 6; Office of the Director of Public Prosecutions NSW, *Preliminary Submission PGC83*, 2.

66. Law Society of NSW, *Preliminary Submission PGC32*, 1–2, Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PGC69*, 1–2; Office of the Director of Public Prosecutions NSW *Preliminary Submission PGC83*, 2; NSW Young Lawyers, *Preliminary Submission PGC84* [7].

67. Legal Aid NSW, *Preliminary Submission PGC68*, 2; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PGC69*, 2–3; NSW Young Lawyers, *Preliminary Submission PGC84* [9]–[10].

68. Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PGC69*, 3.

69. NSW Council for Civil Liberties, *Preliminary Submission PGC70*, 3.

and the achievement of individualised justice, as it assisted in contextualising a person's behaviour.⁷⁰ This was particularly the case where the spectrum of offending was broad.⁷¹

- 5.58 Legal Aid NSW suggested that the correct response to good character evidence was not to narrow sentencing discretion.⁷² The Aboriginal Legal Service observed that a blanket prohibition would undermine procedural fairness, and needlessly fetter judicial discretion.⁷³
- 5.59 The interaction between all considerations at sentencing makes it difficult to remove character from the sentencing process. Submissions drew attention to the importance of good character evidence to the sentencing exercise more broadly, including as evidence of remorse, rehabilitation, prospects of reoffending and protection of community.⁷⁴ One suggested that a complete ban could compromise the sentencing process including in relation to proportionality and reflecting the purposes of sentencing.⁷⁵

Question 5.13: No change to the current law

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

Evidential and procedural options

- 5.60 We have identified some options for adjusting evidential and procedural aspects of the sentencing hearing.

70. Confidential, *Preliminary Submission PGC22*; Office of the Director of Public Prosecutions NSW, *Preliminary Submission PGC83*, 2; NSW Young Lawyers, *Preliminary Submission PGC84* [9]–[10].

71. NSW Young Lawyers, *Preliminary Submission PGC84* [9].

72. Legal Aid NSW, *Preliminary Submission PGC68*, 2.

73. Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PGC69*, 4.

74. Confidential, *Preliminary Submission PGC22*; Law Society of NSW, *Preliminary Submission PGC32*, Legal Aid NSW, *Preliminary Submission PGC68*, 3; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PGC69*, 4; NSW Council for Civil Liberties, *Preliminary Submission PGC70*, 6.

75. Law Society of NSW, *Preliminary Submission PGC32*, 3.

Adjust procedure for tendering evidence

- 5.61 Some submissions were open to changing some practices around the format, reception and use of evidence that goes to good character. This is relevant no matter the option preferred, but may be particularly relevant to obtaining evidence of, for example, prospects of rehabilitation in cases where resort to good character evidence has been ruled out.
- 5.62 NSW Young Lawyers suggested investigating “reforms to encourage consistency in the way in which ‘good character’ evidence is received and scrutinised in courts”, adding:
- the Sub-Committee encourages consideration of practical and realistic procedural reforms to encourage consistency in the presentation of such evidence to courts and suggests that the Review explore ways in which opportunities to test such evidence can feasibly be facilitated.⁷⁶
- 5.63 The Office of the Director of Public Prosecutions (ODPP) addressed the concerns about the probity and reliability of good character references raised by many submissions,⁷⁷ by suggesting that we might “wish to consider whether some parameters can fairly and appropriately be implemented to address these concerns”.⁷⁸
- 5.64 In this context, it may be worth considering the purpose of character evidence and how best to achieve reliability, credibility and relevance to the sentencing decision. Warner in proposing the abolition of good character as a mitigating factor, however, did acknowledge that this would not necessarily eliminate the use of character references:
- The offender may still wish to try to persuade the court that the offender’s prospects of rehabilitation are a relevant consideration. However, in cases of child sexual offending, this is unlikely to be an important consideration. There may also be some benefit to offenders in terms of their future reintegration into society in the knowledge that people were willing to come forward and vouch for them when they were facing the judgment of the court.⁷⁹
- 5.65 Another writer, in rejecting mitigation where an offender’s good actions are unrelated to their offending, suggested that positive conduct could be relevant provided the acts related to the prior offending, such as efforts to stop offending by

76. NSW Young Lawyers, *Preliminary Submission PGC84*, 8.

77. See, eg, Anonymous, *Preliminary Submission PGC07*; Anonymous, *Preliminary Submission PGC10*, 1; S Colston, *Preliminary Submission PGC11*; J Simpson, *Preliminary Submission PGC15*, 1–2; Anonymous, *Preliminary Submission PGC19*, 2; Anonymous, *Preliminary Submission PGC23*, 1; Anonymous, *Preliminary Submission PGC26*, 2; Your Reference Ain’t Relevant, *Preliminary Submission PGC34*, 7–8; Ellie, *Preliminary Submission PGC40*, 4; Anonymous, *Preliminary Submission PGC41*; K Tynan, *Preliminary Submission PGC65*; V Hay, *Preliminary Submission PGC73*, 1.

78. Office of the Director of Public Prosecutions NSW, *Preliminary Submission PGC83*, 4.

79. K Warner, “Sentencing Review 2008–2009” (2010) 34 *Criminal Law Journal* 16, 24.

addressing addiction or securing and maintaining employment.⁸⁰ The writer suggested that this was not a novel proposal since “courts have long given offenders credit for ‘going straight’, as manifested in a protracted period of crime-free living”.⁸¹

- 5.66 Such forms of evidence may be more relevant to other sentencing considerations, such as prospects of rehabilitation, genuine remorse and the need for deterrence, rather than the more amorphous “good character” and may be more appropriately directed to these questions. In this regard, NSW Young Lawyers observed:

As “good character” is an ambiguous concept, identifying how it can be defined and separated from other mitigating factors may assist in determining the appropriate way such evidence can be presented, received, and considered in sentencing proceedings.⁸²

- 5.67 If evidence was only needed to address questions of potential for rehabilitation and risk of offending, perhaps regulations could specify the content of statements that address these questions and templates could be developed from such regulations.

- 5.68 Reframing this information as a “statement addressing factors that address the risk of reoffending” (or similar) could address concerns by some preliminary submissions around the impact of the expression “good character” on victim-survivors and others. This could reduce the distress caused to victim-survivors and give all participants a better understanding of the purpose of the evidence contained in such statements.⁸³

- 5.69 Consideration could be given to having other formal requirements for the tender of character evidence. For example, in the case of victim impact statements (VISs), there are requirements around content and formal requirements around tendering, receipt and consideration by the courts.⁸⁴ One submission observed:

It is unfair that victims need to sign a statutory declaration to submit their victim impact statement, but offenders appear to be able to provide character references with little checks and safeguards in place to make sure they are fit for purpose.⁸⁵

- 5.70 Changes to procedures may need to be different depending on the court. The District Court is, for example, used to dealing with the requirements for the

80. J Roberts, *Punishing Persistent Offenders* (Oxford University Press, 2008) 221–222.

81. J Roberts, *Punishing Persistent Offenders* (Oxford University Press, 2008) 222. See also D A Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (Heinemann, 2nd ed, 1979).

82. NSW Young Lawyers, *Preliminary Submission PGC84*, 3.

83. Confidential, *Preliminary Submission PGC22*; Legal Aid NSW, *Preliminary Submission PGC68*, 4; Full Stop Australia, *Preliminary Submission PGC78*, 9; NSW Young Lawyers, *Preliminary Submission PGC84* [12]–[13]; NSW Council for Civil Liberties, *Preliminary Submission PGC70*, 6.

84. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 2.

85. Anonymous, *Preliminary Submission PGC19*, 2.

tendering of VISs and could conceivably accommodate other changes to procedure in the sentencing hearing. However, any changes could have an adverse impact on proceedings in the Local Court, which tends to involve large volumes of matters with relatively quick turnarounds. It could be argued that the current procedures of allowing letters of reference in the Local Court is the most efficient way to deal with what can often be marginal questions of good character.

- 5.71 In cases where sentencing assessment reports are required (usually in relation to more serious offending) the relevant information could be provided to the officer who prepares the reports, without the need to submit the information directly to the court unless some aspects of the report were challenged.

Question 5.14: Adjusting procedures for tendering evidence

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

Place the evidential burden on offenders

- 5.72 The ODPP suggested that one option for reform is to place the burden on offenders to establish that their good character did not assist them to commit the offence:

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. While there may be exceptions to this rule, these would be rare. 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 proposition.⁸⁶

- 5.73 It may be that in some cases, the prosecution has been unable to make a submission about the application of the special rule because of the difficulty in gathering, or the unavailability of, relevant evidence.
- 5.74 This would apply only to evidence of good character, as evidence of previous convictions (and the lack of them) is more objectively certain and is already governed, in part, by statute.⁸⁷

Question 5.15: Placing the evidential burden on offenders

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

86. Office of the Director of Public Prosecutions NSW, *Preliminary Submission PGC83*, 7.

87. *Evidence Act 1995* (NSW) s 178.

Appendix A:

Questions

This list is provided for the convenience of those making a submission that addresses some or all of the questions.

The background to each question may be found in chapter 5.

5. Options for reform

Question 5.1: Use of good character generally

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

Question 5.2: Use of lack of previous convictions generally

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

Question 5.3: Use of good character for offenders who plead not guilty

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

Question 5.4: Good character as an aggravating factor

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

Question 5.5: Extending the special rule to all child sexual offences

- (1) Should the special rule be extended to all child sexual offences? Why or why not?
- (2) What offences, if any, should be added to the definition of “child sexual offences” for the purposes of the special rule?

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

- (1) What other vulnerable groups or offences against vulnerable groups could be subject to the special rule?
- (2) How could they be identified?
- (3) Should any of these offences be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence?

Question 5.7: Extending the special rule to adult sexual offences

- (1) What adult sexual offences, if any, should be subject to the special rule?
- (2) Should any of these offences be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence?

Question 5.8: Extending the special rule to domestic violence offences

- (1) Should domestic violence offences be subject to the special rule? Why or why not?
- (2) Should these offences be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence?

Question 5.9: Extending the special rule to other serious offences

- (1) What other serious offences, if any, should be subject to the special rule?
- (2) Should any of these offences be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence?

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

- (1) What offences, if any, involving breach of trust or authority should be subject to the special rule?
- (2) Should any of these offences be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence?

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

Question 5.11: Extending the special rule to all offences

- (1) Should all offences be subject to the special rule? Why or why not?
- (2) If yes, should the special rule be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of any or all offences?

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

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

Question 5.13: No change to the current law

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

Question 5.14: Adjusting procedures for tendering evidence

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

Question 5.15: Placing the evidential burden on offenders

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

Appendix B:

Preliminary submissions

- PGC01** Anonymous, 14 May 2024
- PGC02** Rebecca Henry, 14 May 2024
- PGC03** Lillian Starrett, 17 May 2024
- PGC04** Anonymous, 17 May 2024
- PGC05** Marianne Loew, 19 May 2024
- PGC06** Sonia Smith, 29 May 2024
- PGC07** Anonymous, 30 May 2024
- PGC08** Anonymous, 30 May 2024
- PGC09** Anonymous, 1 June 2024
- PGC10** Anonymous, 18 June 2024
- PGC11** Sarah Colston, 3 July 2024
- PGC12** Anonymous, 3 July 2024
- PGC13** Anonymous, 3 July 2024
- PGC14** Rinu Thomas, 4 July 2024
- PGC15** Jaime Simpson, 4 July 2024
- PGC16** Anne Soares, 4 July 2024
- PGC17** Anonymous, 4 July 2024
- PGC18** Milly Bannister, 4 July 2024
- PGC19** Anonymous, 5 July 2024
- PGC20** Maya Kosha Healing, 5 July 2024
- PGC21** Haley Leon, 5 July 2024
- PGC22** Confidential, 5 July 2024
- PGC23** Anonymous, 6 July 2024
- PGC24** Michelle Lin, 7 July 2024
- PGC25** Survivors and Mates Support Network, 8 July 2024
- PGC26** Anonymous, 8 July 2024
- PGC27** Eli Morrison, 8 July 2024
- PGC28** Abigail Boyd MLC, 8 July 2024
- PGC29** Jane Scott, 8 July 2024

PGC30 Liam Vosu, 8 July 2024
PGC31 Daisy Turnbull, 8 July 2024
PGC32 Law Society of NSW, 8 July 2024
PGC33 Patrick Holmes, 8 July 2024
PGC34 Your Reference Ain't Relevant, 8 July 2024
PGC35 Prudence Edwards, 8 July 2024
PGC36 Zara Saunders, 8 July 2024
PGC37 Alison Diskin, 8 July 2024
PGC38 Anonymous, 8 July 2024
PGC39 Hannah Roovers, 8 July 2024
PGC40 Ellie, 8 July 2024
PGC41 Anonymous, 8 July 2024
PGC42 Rape and Sexual Assault Research and Advocacy, 8 July 2024
PGC43 Grace Tame Foundation, 8 July 2024
PGC44 Brock Valesini, 8 July 2024
PGC45 The Survivor Hub, 8 July 2024
PGC46 Evie Jade, 8 July 2024
PGC47 Carly Richardson, 8 July 2024
PGC48 Fay Hight, 8 July 2024
PGC49 Jane Kanizay, 8 July 2024
PGC50 Larissa Miller, 8 July 2024
PGC51 Samantha Allen, 8 July 2024
PGC52 Harriet Woods, 8 July 2024
PGC53 Luke Arnold, 8 July 2024
PGC54 Maggie Blanden, 8 July 2024
PGC55 Anonymous, 8 July 2024
PGC56 Confidential, 8 July 2024
PGC57 Chantelle Towers, 8 July 2024
PGC58 Denise Papamichos, 8 July 2024
PGC59 Crystal Codeco, 8 July 2024
PGC60 Older Women's Network NSW , 8 July 2024
PGC61 Jessica Helinski, 8 July 2024

PGC62 Cindy Rodriguez, 8 July 2024
PGC63 Catherine Jones, 8 July 2024
PGC64 Rowey Butcher, 8 July 2024
PGC65 Katharine Tynan, 8 July 2024
PGC66 Sophie Ervasti, 8 July 2024
PGC67 Melina Douziech, 8 July 2024
PGC68 Legal Aid NSW, 8 July 2024
PGC69 Aboriginal Legal Service (NSW/ACT) Ltd, 8 July 2024
PGC70 NSW Council for Civil Liberties Inc, 8 July 2024
PGC71 Nea Pilgrim, 8 July 2024
PGC72 Cynthia Bradley, 8 July 2024
PGC73 Victoria Hay, 8 July 2024
PGC74 Anonymous, 8 July 2024
PGC75 Lauren Davis, 8 July 2024
PGC76 Louise McIntosh, 8 July 2024
PGC77 D'Arcy Ertel, 8 July 2024
PGC78 Full Stop Australia, 8 July 2024
PGC79 Grace Malone, 8 July 2024
PGC80 Danny Malone, 8 July 2024
PGC81 Anne Malone, 8 July 2024
PGC82 Anonymous, 8 July 2024
PGC83 Office of the Director of Public Prosecutions NSW, 19 July 2024
PGC84 NSW Young Lawyers Criminal Law Sub-Committee, 25 July 2024
PGC85 Eileen Culleton, 26 July 2024

Appendix C:

Preliminary consultations

Your Reference Ain't Relevant (PGCC01)

29 May 2024

Jarad Grice, Co-Founder, Your Reference Ain't Relevant

Harrison James, Co-Founder, Your Reference Ain't Relevant

Tara Hunter, Director of Clinical and Client Services, Full Stop Australia

Emily Dale, Head of Advocacy, Full Stop Australia

Children's Court of NSW (PGCC02)

10 September 2024

Judge Ellen Skinner, President, Children's Court

Local Court of NSW (PGCC03)

22 October 2024

Judge Michael Allen, Chief Magistrate, Local Court

Matilda Bogart, Policy Officer

Yasmin Hunter, Executive Officer, Chief Magistrate's Office

Reece Nuttall, Associate to Judge Michael Allen

