

Preliminary submission in response to the Sentencing Council's Review of the use of "good character" in sentencing

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NSW Sentencing Council

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The NSW Young Lawyers Criminal Law Sub-Committee makes the following preliminary submission in response to the Sentencing Council's 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 (**the Review**)

NSW Young Lawyers

NSW Young Lawyers is a Committee of the Law Society of New South Wales that represents the Law Society and its members on issues and opportunities arising in relation to young lawyers i.e. those within their first five years of practice or up to 36 years of age. Through its 15 sub-committees, each dedicated to a substantive area of law, NSW Young Lawyers supports practitioners in their professional and career development by giving them the opportunity to expand their knowledge, advance their career and contribute to the profession and community.

The Criminal Law Sub-Committee (**the Sub-Committee**) comprises a group of volunteers and subscribers who practice in, or are interested in, criminal law. The Sub-Committee takes a keen interest in providing comment and feedback on criminal law and the criminal justice system and considers the provision of submissions to be an important contribution to the community. The Sub-Committee aims to educate the legal profession and the wider community about criminal law developments and issues through its events and helps to develop the careers of aspiring criminal lawyers by providing a peer support network and a forum for young lawyers to discuss issues of concern. The Sub-Committee's members are drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Summary of Recommendations

The Sub-Committee welcomes the Sentencing Council's review of "good character" in sentencing. The Sub-Committee supports the current s. 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (**CSP Act**) but is of the view that the Sentencing Council should exercise caution in considering the addition of further legislative exceptions to the consideration of "good character" as a mitigating factor on sentence. The Sub-Committee notes that "good character" evidence in sentencing has an important role to play in ensuring individualised justice and interacts with other aggravating and mitigating factors on sentence. The Sub-Committee also notes that the common law already provides guidance as to when "good character" evidence should be given little to no weight. However, the Sub-Committee would welcome a wide review of published judgments to assess whether the common law principles are being consistently applied in sentencing decisions.

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.

Further the Sub-Committee suggests that, in the next stage of its review, the Sentencing Council consider both procedural and legislative options for reform to facilitate the appropriate and consistent use of "good character" evidence in sentencing and to reduce the distress that the consideration of such evidence may cause to victim-survivors. These suggestions include:

Legislative

- Re-thinking the use of the term "good" character and considering wording such as "prior" character.

Procedural

- Encouraging the use of trauma-informed language by judicial officers when referring to "good character" evidence in the sentencing proceedings.
- Reforms to encourage consistency in the way in which "good character" evidence is received and scrutinised in courts.

The role of “good character” as a factor in sentencing

1. The consideration of “good character” is central to ‘individualised justice’ - a foundational principle of sentencing in Australia and other common law jurisdictions. Individualised justice in sentencing requires proportionality not only to the harm caused, but also to the circumstances of the offender. The sentencing process is an individualised one, tailored to the particular offence, offender and facts of the case. As Kirby J stated in *Weininger v The Queen*:¹

Even before *Ryan*, it had been pointed out that sometimes ‘good character’ had been taken as referring, negatively, to an absence of prior convictions. But, often, as in *Ryan*, it refers to more positive indications by which, otherwise than in respect of the offences acknowledged before the court, the offender has demonstrated good personal qualities and conduct that should be taken into account. The object is to ensure a sentence that reflects more than a ‘one-dimensional’ view of the offender’s criminal record or personal characteristics.

2. The nature and circumstances of the offence are not diminished by admitting “good character” evidence. The courts are required to assess the nature and circumstances of the offence, together with the aggravating and mitigating factors, and the purposes of sentencing, to decide the appropriate penalty. For the above reasons, the Sub-Committee accepts there is, as a general position, a role for “good character” evidence to be considered in sentencing.
3. The concept of “good character” is a broad one that overlaps other mitigating factors in s. 21A(3) of the *CSP Act* such as a lack of prior convictions and prospects of rehabilitation, but also goes beyond these factors. “Good character” may also have relevance to aggravating factors,² for example an offender’s prior good character may in fact allow them to be in a position of trust which is then abused. Further, there are countervailing aggravating factors such as a record of prior convictions. The interactions between these factors makes it difficult to remove considerations of character and the personal qualities of the offender from the sentencing process.
4. In *R v Gent*,³ Johnson J stated at [49] that:

It has been said that there 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

¹ (2003) 212 CLR 629; [2003] HCA 14 at [62].

² *Crimes (Sentencing Procedure) Act 1999* s. 21A(2)(d) and (k).

³ (2005) 162 A Crim R 29; [2005] NSWCCA 370.

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 (citations omitted).

5. The Sub-Committee welcomes the consideration in Terms of Reference of the overlap between “good character” and other mitigating factors and aggravating factors in s. 21A *CSP Act*. The Sub-Committee considers that distinguishing “good character” from other mitigating factors may assist in suggesting appropriate ways such evidence can be presented, received, and considered in sentencing proceedings. For example, the Sub-Committee notes with interest that s. 21A(3)(f) *CSP Act* provides that “the offender **was** a person of good character”, compared to s. 21A(3)(g) “the offender **is** unlikely to re-offend” and s. 21A(3)(h) “the offender **has** good prospects of rehabilitation, whether by reason of the offender’s age or otherwise” (emphasis added). Distinguishing the temporal aspects of these mitigating factors may assist in clarifying the role of “good character” in sentencing and go some way towards ameliorating concerns about whether “good character” evidence is being used appropriately on sentence (see below at paragraph 12 for further discussion).

Limitations on the use of “good character” in sentencing

6. There are exceptions to the general position that “good character” is relevant as a mitigating factor in sentencing. On 1 January 2009, section 21A(5A) of the *CSP Act* was inserted and provides that, in determining the sentence for a child sexual offence, an offender’s good character or lack of previous convictions 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.
7. In its submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice System Consultation Paper,⁴ the Sub-Committee supported the need for this provision and advocated for the adoption of similar legislation across all Australian states and territories. This was on the basis that:

..[S]uch amendments take into account the unique role that an offender’s apparent good character can play in enabling, not only the initial commission of child sexual abuse offences, but also in the concealment of those offences by increasing the difficulties for victims in reporting and prosecution, thereby enabling the commission of future offences. It would be anomalous for a court to reduce a

⁴ NSW Young Lawyers, Submission No. 87 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice System Consultation Paper* (1 November 2016) 11 -12.

sentence given to a child sexual abuse offender on the basis of their reputation, social standing and prior non-convictions, where those very same characteristics enabled them to be put into a position of trust that allowed the offending to take place.

8. The Sub-Committee adheres to this position, but also draws attention to the very specific reasons for this exemption which support this departure from the general relevance of “good character” in sentencing proceedings.
9. In any event, the weight “good character” is currently given in sentencing varies according to the circumstances of the case, and also the nature of the offending. For example, “good character” has been given little to no real weight in sentencing proceedings for offences other than child sexual offences where that prior good character assisted the offender to be in a position to commit the offence.⁵ Further, where classes of offences are often committed by persons of “good character”, this factor may carry less weight in the sentencing process,⁶ and other factors, such as general deterrence, take on more significance. Examples include drug couriers,⁷ dangerous driving,⁸ drink driving,⁹ child pornography,¹⁰ and white-collar crimes,¹¹ noting that these categories can be expanded where appropriate.¹² Importantly for the purposes of the Review, these classes of offences also include child sexual offences where s 21A(5A) does not apply as the “good character” of the offender was not strictly “of assistance” to them in the commission of the offending.¹³
10. Therefore, common law sentencing principles guide a judicial officer to give little to no real weight to evidence of an offender’s “good character” in relation to certain types of offences. Further, the common law allows these categories of offences to be more flexibly considered, expanded, and adapted where appropriate. The Sub-Committee is therefore of the view that caution should be exercised before recommending legislative amendment to expand the circumstances where “good character” cannot be taken into account as a mitigating factor on sentence. However, the

⁵ For example, where an offender is a registered health professional, as discussed in *Jung v R* [2017] NSWCCA 24 at [56]-[58]).

⁶ For discussion of the case law on this topic, see the Judicial Commission of New South Wales, ‘Sentencing Bench Book’, Judicial Commission of New South Wales (Online Bench Book, last reviewed March 2024) 10-410 <https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/subjective_matters.html#p10-410>.

⁷ *R v Leroy* [1984] 2 NSWLR 441 at 446-447.

⁸ *R v McIntyre* (1988) 38 A Crim R 135 at 139.

⁹ *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305 at [118]-[119].

¹⁰ *Mouscas v R* [2008] NSWCCA 181 at [37].

¹¹ *R v Gent* (2005) 162 A Crim R 29 [2005] NSWCCA 370 at [59].

¹² *Ibid.*, at [61].

¹³ See, e.g., *Dousha v R* [2008] NSWCCA 263 at [49]; *R v PGM* [2008] NSWCCA 172 at [43]-[44]; *R v DSM* [2021] NSWDC 283 at [22]; *R v NC* [2020] NSWDC 547 at [51]-[52].

Sub-Committee would welcome a wide review of published judgments to assess whether the common law principles regarding “good character” are being consistently applied in sentencing decisions.

The impact of “good character” evidence on victim-survivors

11. Notwithstanding the above position, the Sub-Committee accepts that the way in which “good character” evidence is received, used, and referred to during sentencing proceedings can be distressing and traumatising to victim-survivors and families. The Sub-Committee also notes advocacy from victim-survivor groups for consideration of “good character” to be removed when sentencing for all child sexual offences, and potentially also to be removed from consideration in the sentencing process for a broader range of offences.¹⁴
12. The Sub-Committee is strongly in favour of a comprehensive review of procedures as to how “good character” evidence is adduced and dealt with during the sentencing process. For example, the use of the term “good” character, or a person being “otherwise” of good character can seem inapt or jarring to describe an offender who has committed serious crimes and caused significant harm. The Sub-Committee accepts that rewording the legislation to specify an offender’s “**prior**” character (or other similar term) may go some way towards facilitating the more sensitive consideration of this evidence, and the Sub-Committee supports consideration of such reform.¹⁵
13. The way in which judicial officers refer to “good character” evidence in their sentencing judgments is also important. Whilst it is necessary for judicial officers to clearly identify how “good character” evidence has been considered in their sentencing decision (including when it has not been accepted or given little weight), the Sub-Committee encourages the use of trauma informed language when referring to such evidence, particularly in proceedings where victim-survivors or victim’s families are present, or in published judgments.

¹⁴ See, e.g., Charlotte Gore, ‘ACT Bar Association rejects proposal to scrap good-character references in sentencing convicted child sexual abusers,’ *ABC News*, (online, 6 February 2024) <<https://www.abc.net.au/news/2024-02-06/act-bar-association-child-sexual-abuse-good-character-reference/103429558>>; Lottie Twyford, ‘Mates Harrison James and Jarad Grice are on a mission to scrap good-character references for convicted paedophiles,’ *ABC News*, (online, 3 November 2024) < <https://www.abc.net.au/news/2023-11-03/act-calls-remove-paedophile-sentencing-good-character-references/103057246#>>; Full Stop Australia, ‘Submission to the NSW Sentencing Council Review of Character in Sentencing’, *Full Stop Australia* (online submission, July 2024). <<https://fullstop.org.au/uploads/main/Submissions-Reports/2024/FSA-NSW-Sentencing-Council-Submission-9.7.24.pdf>>.

¹⁵ Full Stop Australia, ‘Submission to the NSW Sentencing Council Review of Character in Sentencing’, *Full Stop Australia* (online submission, July 2024) <<https://fullstop.org.au/uploads/main/Submissions-Reports/2024/FSA-NSW-Sentencing-Council-Submission-9.7.24.pdf>>.

14. Whilst the Sub-Committee has suggested some possible recommendations for reform, it accepts that any such reforms must be informed by the input of victim-survivors to be effective in achieving their purpose.

Procedural reforms

15. Sub-Committee members have observed an inconsistency in how character references are received and presented to courts, and anecdotally note that it is relatively unusual for writers to be questioned about their references. The Sub-Committee accepts that judicial officers are able to appropriately give little weight to references which do not contain relevant details or have not been specifically prepared for the purposes of the proceedings. The Sub-Committee also acknowledges the time limitations and restrictions that arise from high caseloads and the number of matters proceeding through the courts. Nonetheless, 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.



Concluding Comments

NSW Young Lawyers and the Sub-Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

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