

Good character at sentencing

JULY 2025

NSW
Sentencing
Council

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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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Recommendations

3. Good character as a mitigating factor

Recommendation 3.1: Abolish good character as a mitigating factor in sentencing

- (1) Legislation should be enacted that:
 - (a) abolishes the common law as it relates to good character as a mitigating factor, and
 - (b) repeals s 21A(3)(f) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
- (2) The legislation should be framed so that it:
 - (a) prevents courts from using evidence that goes solely to a finding of good character, and
 - (b) does not otherwise affect the ability of the court to consider relevant evidence in relation to any other purpose or principle of, or factor in, sentencing.

Recommendation 3.2: Remove the assistance requirement of the special rule

If good character is retained as a mitigating factor, s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended to remove from the special rule the requirement that the court must be satisfied that the relevant factor was of assistance to the offender in the commission of the offence.

Recommendation 3.3: Discretion to give good character no weight in mitigation

If good character is retained as a mitigating factor, legislation should be enacted to provide courts with discretion to give an offender's good character no weight in mitigation of sentence.

6. Consequential issues

Recommendation 6.1: Repeal the special rule

Legislation should repeal the special rule as stated in s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Recommendation 6.2: Amend considerations for some sentencing options

The lists of considerations before proceeding to no conviction, or imposing a conditional release order under s 9(2)(a) and s 10(3)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), should be amended to remove consideration of an offender's "character".

1. Introduction

In brief

The Council, by majority, recommends that good character should be abolished as a mitigating factor at common law and in statute in NSW. This chapter outlines the background to the review, our review process, and the scope of the review.

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- 1.1 On 11 April 2024, the NSW Attorney General asked us to review and report on the use of good character in sentencing in NSW.
- 1.2 This report is the product of extensive research and consultation. The issues arising in the review have been thoroughly considered by the Council and debated on more than one occasion. We found the the issues involved difficult and especially complex. The conclusions in our report were reached by a majority of the Council. A decision of the majority is a decision of the Council.¹

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 1A cl 12.

- 1.3 Based on the concerns raised, the Council, by majority, recommends that good character be abolished as a mitigating factor on sentence in NSW, both at common law and in statute. In line with this recommendation, the Council also recommends repealing the “special rule” in s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*Sentencing Act*) to ensure the law is clear and cohesive. We expect that consequential changes will flow from these recommendations. For example, the language used in court will need to adapt to reflect the abolition of good character as a mitigating factor, because terms like “character reference” will become inaccurate.
- 1.4 If, contrary to this recommendation, good character is retained as a mitigating factor, we make alternative recommendations that recognise the strong arguments for change in relation to sentencing for child sexual offences.
- 1.5 In this report, we explain why the Council reached these conclusions. We also discuss the other proposals for reform that were raised in our consultation paper.²
- 1.6 In making these recommendations, we are mindful of the need for courts to be able to undertake the sentencing process properly. As far as possible the recommendations are framed in a way that preserves the ability of the courts to exercise discretion and to be properly informed by relevant evidence.
- 1.7 Two Council members do not agree with recommendation 3.1 to abolish good character as a mitigating factor in sentencing, and the related recommendations 3.2 and 6.2. Their reasons are set out in chapter 4. These Council members, however, do support recommendation 3.3 which is offered as an alternative if the primary recommendations are not adopted by government. They also support recommendation 6.1.
- 1.8 Throughout the review, we heard from many victims, victim-survivors and family victims about their experience in the sentencing process. We acknowledge that revisiting these experiences can be extremely difficult and often re-traumatising. We express our gratitude to the people who took the time to tell us their personal stories, through submissions and in consultations.

Terms of reference

- 1.9 The terms of reference for this review state:

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:

2. NSW Sentencing Council, *Good Character at Sentencing*, Consultation Paper (2024) ch 5.

- 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.

Good character in NSW sentencing law

- 1.10 In NSW, the good character of an offender is a factor that is taken into account to mitigate their sentence.
- 1.11 Good character is a mitigating factor at common law,³ and in statute. Section 21A(3) of the *Sentencing Act* provides a list of mitigating factors that are to be taken into account in determining the sentence for an offence, and includes:
- (f) the offender was a person of good character.
- 1.12 An offender’s good character must be taken into account if it is relevant and known to the court.⁴ This position is reinforced by the High Court’s decision in *Ryan*.⁵
- 1.13 However, in 2008, an exception was introduced that applies to cases involving child sexual offences. When sentencing an offender for a child sexual offence, a court must not take into account an offender’s good character or a lack of previous convictions as a mitigating factor if either factor assisted the offender to commit the offence. This is known as the special rule.⁶
- 1.14 The general law and the special rule are explained further in chapter 2.

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

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

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

6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A).

Background to this review

- 1.15 While the review applies to the use of good character in sentencing generally, it has a particular relevance to sentencing for child sexual offences. The use of good character as a mitigating factor in sentencing for child sexual offences has been the focus of community concern for some time. It has been reviewed previously by the NSW Sentencing Council, and the Royal Commission into Institutional Responses to Child Sexual Abuse.
- 1.16 Though the introduction of the special rule represented a significant change to the use of good character in sentencing for child sexual offences, there are concerns that it is not operating effectively. The application of good character in mitigation of sentences, both in relation to the special rule, as well as in sentencing generally, remains problematic.

Past reviews of good character in sentencing

- 1.17 There have been two previous reviews in NSW of particular relevance to this project:
- the Sentencing Council’s review of child sexual assault offences, which reported in 2008, and
 - the Royal Commission into Institutional Responses to Child Sexual Abuse, which reported in 2017 (Royal Commission).

Sentencing Council’s review of child sexual assault offences

- 1.18 In 2007, the Attorney General sought advice from the NSW Sentencing Council on the appropriateness of the penalties for child sexual offences. The terms of reference asked the Council to advise whether there needed to be a legislative response to the use of the mitigating factor of good character in sentencing for these offences.
- 1.19 In its 2008 report, the Council recommended that legislation should prevent a sentencing court from taking into account an offender’s previous good reputation, character, and lack of previous convictions if any of those factors enabled the offender to commit the offence.⁷ In the Council’s view, the seriousness and prevalence of child sexual offences justified this special approach.⁸

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

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

- 1.20 Following the Council's recommendation, the special rule in s 21A(5A) of the *Sentencing Act* was introduced in NSW.⁹

Royal Commission into Institutional Responses to Child Sexual Abuse

- 1.21 In 2017, the Royal Commission reported on sentencing issues in child sexual offences across Australia, including the use of good character.¹⁰
- 1.22 The Royal Commission identified general concerns about the use of good character in child sexual offences, including that:
- 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 a lack of convictions can be misleading, as a lack of a conviction does not equate to a lack of prior bad behaviour (especially in child sexual abuse cases)
 - accepting that an offender who committed sexual offences on a child 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 was an offender's prior good character that allowed them or assisted them to commit the offence.¹¹
- 1.23 Like the Sentencing Council, the Royal Commission concluded that there should be no place for evidence of the good character of an offender to mitigate their sentence for child sexual offences where that good character facilitated the offending.¹² It recommended that all state and territory governments should introduce legislation, like the special rule in NSW and s 11(4)(c) of *Sentencing Act 2017* (SA).¹³
- 1.24 All the other states and territories, with the exception of Western Australia, passed or introduced legislation to give effect to this recommendation.¹⁴

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

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

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

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

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

14. *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)(b).

Renewed calls for change

- 1.25 Though the special rule was introduced to limit the use of an offender’s good character in cases involving child sexual offences, advocates and victim-survivors have recently raised concerns about its operation.
- 1.26 This current review was prompted, in part, by the recent “Your Reference Ain’t Relevant” campaign.

The “Your Reference Ain’t Relevant” campaign

- 1.27 Your Reference Ain’t Relevant was founded by advocates Harrison James and Jarad Grice who are themselves survivors of child sexual abuse. The campaign advocates removal of consideration of a lack of criminal history and “good character references” entirely, in sentencing for child sexual offences.
- 1.28 The campaign was launched in May 2023. An associated petition attracted 4,340 signatures.
- 1.29 On 22 August 2023, the petition was presented to the NSW Legislative Council. The petition sought an amendment to s 21A(5A) of the *Sentencing Act* to remove the requirement that an offender’s good character must have assisted them in the commission of the offence before it can be excluded from consideration as a mitigating factor.

Recent reviews and proposed changes across Australia

- 1.30 A number of other recent reviews across Australia have considered issues related to good character in sentencing, including:
- the Queensland Sentencing Advisory Council (QSAC) review of sentencing of sexual assault and rape (completed December 2024),¹⁵ and
 - the Australian Law Reform Commission review of justice responses to sexual violence (tabled March 2025).¹⁶
- 1.31 In response to the recommendations of QSAC, the Queensland Parliament has recently proposed amendments to sentencing law to restrict the use of evidence of good character in sentencing for offences of a sexual nature.¹⁷ We discuss these proposed changes in more detail in chapters 3 and 7.

15. Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect*, Final Report (2024) ch 9.

16. Australian Law Reform Commission, *Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence*, Report No 143 (2025) [19.50].

17. Penalties and Sentences (Sexual Offences) and Other Legislation Amendment Bill 2025 (Qld) cl 12.

Our approach to this report

The scope of the review

- 1.32 The scope of this review, and the issues considered in this report are constrained by the terms of reference.
- 1.33 Importantly, unlike earlier reviews of good character in sentencing, the terms of reference are not confined to considering the use of good character in relation to child sexual offences.
- 1.34 We have considered the utility and impact of good character as a mitigating factor as it applies to all offences and offenders. We have also been mindful of the desirability of achieving a consistent approach across all offences.
- 1.35 Some issues are beyond the scope of this review. We have not considered reforms to sentencing law and procedure that are not related to the use of good character in sentencing or that would affect sentencing more broadly. This includes:
- a review of all mitigating factors (or the leniency or otherwise they are said to give rise to)
 - the binary nature of the aggravating and mitigating factors in s 21A of the *Sentencing Act*, or
 - other ways in which victim-survivors' experiences of the criminal justice system could be improved, including by increased funding and allocation of resources.

How we conducted this review

- 1.36 In May 2024, we called for preliminary submissions on the terms of reference. On 9 July 2024, preliminary submissions on the review closed. We received 85 written submissions. Those submissions are listed in appendix A. We also met with three stakeholder groups for consultation.
- 1.37 On 4 December 2024, we released a consultation paper that provided background information to the review, discussed key issues and presented options for reform. The consultation paper presented a range of questions for consideration.
- 1.38 We received 169 written submissions in response to the consultation paper. The submissions received are listed in appendix B. We also conducted 4 consultations in response to the consultation paper. All consultations are listed in appendix C.
- 1.39 We thank everyone who took the time to meet with us or to provide a written submission.

The experiences of victims

- 1.40 The lived experience of victims, victim-survivors and family victims was a key consideration for us throughout the review. Though no two experiences are the same, some common themes arose in the submissions we received from victims, and relatives and friends of victims.
- 1.41 Many victims and victim-survivors emphasised that hearing the offender described as a person of “good character” was deeply re-traumatising.¹⁸ They told us that the use of good character to mitigate an offence minimised the offending.¹⁹ Several submissions observed that it sent the message that the offender’s reputation mattered more than the harm that the offending had caused the victim.²⁰
- 1.42 One submission told us that
- [W]hen courts give weight to good character references, they reinforce the idea that a person’s reputation matters more than the suffering of their victims. It sends a message that these crimes are somehow less serious when committed by someone who appears respectable.²¹
- 1.43 Several submissions observed that offenders often use their “good character” to commit the offence, evade detection, or avoid accountability.²² In some cases, it was suggested that a sentencing court did not recognise the offender’s use of their good character to commit the offence.²³
- 1.44 We also heard a concern that the consideration of the good character of an offender in court may discourage future victim-survivors from speaking out.²⁴

Terms used in this report

- 1.45 We heard from a wide range of people about their experience in the criminal justice system. Across the report, unless otherwise specified, we use the term “victim” to

18. See, eg, N Slater, *Submission GC107*; Anonymous, *Submission GC36*; C Mak, *Submission GC58*, 1; E Cardell, *Submission GC64*; S Young, *Submission GC91*; O Campos, *Submission GC08*; Anonymous, *Submission GC15*; G Bell, *Submission GC143*; Anonymous, *Submission GC52*.

19. Anonymous, *Submission GC36*; C Mak, *Submission GC58*, 1; E Cardell, *Submission GC64*; O Campos, *Submission GC08*; Anonymous, *Submission GC15*; G Bell, *Submission GC143*; P Buchanan, *Submission GC56*; Anonymous, *Submission GC52*.

20. E Cardell, *Submission GC64*; S Young, *Submission GC91*; O Campos, *Submission GC08*; Anonymous, *Submission GC15*; Anonymous, *Submission GC52*.

21. L Quinn, *Submission GC77*, 1.

22. Anonymous, *Submission GC36*; C Curran, *Submission GC130*; Confidential, *Submission GC57*, 1; M Loew, *Submission GC114*; M Burns, *Submission GC121*; S Cloughton, *Submission GC92*; Anonymous, *Submission GC140*, 3.

23. See, eg, H Frdelja, *Submission GC21*; Anonymous, *Submission GC24*.

24. Anonymous, *Submission GC140*, 3.

refer to victims, victim- survivors, and family victims (surviving family members of deceased victims, both from immediate and extended families).

- 1.46 In line with our recommendation to abolish good character as a mitigating factor on sentence, the terminology used to refer to the written character testimonials provided by those who know an offender will need to change. Throughout this report, we refer to this type of evidence as “written references”.
- 1.47 We use the term “previous convictions” to encompass a range of other commonly used terms, including prior convictions, criminal history, and antecedents.

Outline of this report

- 1.48 The remaining chapters of this report are arranged as follows:
- **Chapter 2 – Background:** considers the origins of the common law principle and statutory provisions relating to the use of good character in mitigation of sentence, the origins and application of the special rule in relation to child sexual offences, and the nature of good character.
 - **Chapter 3 – Good character as a mitigating factor:** recommends abolishing good character as a mitigating factor, considering the general systemic reasons for abolition and the reasons relating to specific offence types. It also notes our alternative recommendations.
 - **Chapter 4 – Dissenting view:** sets out the view of the Council members who do not agree with the recommendation to abolish good character as a mitigating factor.
 - **Chapter 5 – Lack of previous convictions as a mitigating factor:** recommends retaining a lack of previous convictions as a mitigating factor (with its limited field of operation) because it can provide insight into factors such as the prospects of rehabilitation and risk of reoffending.
 - **Chapter 6 – Consequential issues:** considers other aspects of sentencing law relating to good character, including in relation to young offenders, and recommends that the special rule be repealed and the considerations for imposing some non-custodial orders be amended to remove consideration of character.
 - **Chapter 7 – Evidence and procedure:** considers the ongoing use of written references to provide evidence about factors other than good character, such as a risk of reoffending, and prospects of rehabilitation.
 - **Chapter 8 – Rejected options for reform:** sets out the Council’s conclusions on other options for reform that were considered in the Consultation Paper, including making the use of good character an aggravating factor, reversing the onus in relation to evidence of assistance, and denying good character to offenders who plead not guilty.

2. History and background to the use of good character

In brief

The use of good character in sentencing began in the 18th century. Much has changed about society and criminal trials since then. Good character is not clearly defined but includes consideration of criminal record, reputation and “meritorious conduct”. Good character, where known and relevant, must be taken into account in sentencing, subject to the special rule that applies to some cases of child sexual offences.

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- 2.1 “Good character” is an expression that is widely used in law, but rarely 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 commendable or meritorious conduct.
- 2.2 The lack of clarity or clear definition makes good character an uncertain and unhelpful concept to use in sentencing. The following paragraphs consider some of these issues in addition to the origins of good character in sentencing.

The origins of good character

2.3 Historically, issues of character have been relevant at various stages of criminal proceedings, including:

- pre-trial, through the prosecutor/victim's knowledge of the offender (and their character)¹
- 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 in 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

2.4 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 could also be used to convince the judge to pass a lesser sentence (where discretion was available) or recommend a pardon.²

2.5 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".³ Good character therefore, often featured in the judge's observations.⁴ The Crown generally followed the recommendations of the judges.⁵ The effect of a pardon was to give an offender new capacity, credit and character.⁶

1. P King, *Crime, Justice, and Discretion in England 1740–1820* (Oxford University Press, 2000) 33.

2. D Hay and others, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Allen Lane, 1975) 42.

3. L Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (Stevens, 1948) vol 1, 114.

4. L Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (Stevens, 1948) vol 1, 114–115.

5. L Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (Stevens, 1948) vol 1, 120.

6. L Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (Stevens, 1948) vol 1, 107.

- 2.6 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.⁷ One writer 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, and absolute determinacy. Their political and social power was reinforced daily by bonds of obligation on 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.⁸

- 2.7 Studies of the judges' reports recommending pardon have highlighted this approach. One historian 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.⁹

- 2.8 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.¹⁰

- 2.9 Some offences – such as murder and forgery – were generally considered as not deserving of mercy, although there were exceptions.¹¹

7. D Hay and others, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Allen Lane, 1975) 43–49.

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

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

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

11. 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.

- 2.10 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.¹²
- 2.11 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.¹³
- 2.12 Sentencing has always had a different way of introducing evidence, when compared with a criminal trial. By the early 19th century, for misdemeanours, this was done by written affidavit from both sides.¹⁴ This use of written material may have been influenced by the pardon system that relied on written reports and petitions.¹⁵ The current, more informal, approach in sentencing hearings arose in the late 19th century when the primary focus of sentencing shifted to rehabilitation, and judges required information to assess and sentence the whole person.¹⁶
- 2.13 The system of executive pardon also continued through the 19th century. It is said that, until 1907 when the *Criminal Appeal Act 1907* (UK) 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.¹⁷
- 2.14 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

12. A Horovitz, "The Emergence of Sentencing Hearings" (2007) 9 *Punishment and Society* 271, 277–278.

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

14. J Chitty, *A Practical Treatise on the Criminal Law* (Butterworths, 2nd ed, 1816) vol 1, 691.

15. A Horovitz, "The Emergence of Sentencing Hearings" (2007) 9 *Punishment and Society* 271, 283.

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

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

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”.¹⁸

- 2.15 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 sentencing decisions in its first decades. Early English Court of Criminal Appeal decisions on good character therefore continued to be relied on and cited in a NSW criminal law practice book that was published in the 1950s.¹⁹

Use of good character at trial

- 2.16 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.²⁰
- 2.17 The common law has been varied by legislation to include evidence of good character, instead of just an offender’s reputation. The Uniform Evidence law now allows the accused to bring evidence of their good character at trial, either generally, or in a particular respect.²¹
- 2.18 Good character (in the fuller sense) is now used at trial in two ways. It can be relevant to:
- the accused’s credibility, and
 - the likelihood that the accused committed the offence, because being of “good character” may tend to prove that the accused is unlikely to have committed the crime since it is “out of character”.²²
- 2.19 The continued use of good character at trial has been criticised. In the High Court case of *Melbourne*, 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:

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

19. C E Weigall and R J McKay, *Hamilton and Addison: Criminal Law and Procedure New South Wales* (Law Book Co, 6th ed, 1956) 555–556.

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

21. *Evidence Act 1995* (NSW) s 110.

22. *Melbourne v R* [1999] HCA 32, 198 CLR 1 [30], [36]; *Ryan v R* [2001] HCA 21, 206 CLR 267 [29].

Life not being a morality play or a Victorian melodrama, men do not enjoy reputations for being bad or good simpliciter.²³

2.20 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.²⁴

2.21 The ongoing use of good character at trial is beyond the scope of this review.

The content of good character

2.22 The components of good character can be separated into three broad categories:

- criminal record
- general reputation, and
- meritorious conduct.

2.23 Victoria and the Northern Territory have attempted to clarify the concept by setting out in sentencing legislation a 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.²⁵

These considerations are expanded in the paragraphs that follow.

Character and criminal record

2.24 Issues arise about the interplay between character and criminal record. The two are often conflated in judgments and remarks on sentence, making them difficult to separate as concepts. This is made more complex in NSW because the statutory list of mitigating factors also includes a lack of previous convictions as a separate mitigating factor.

2.25 The merging of character and an offender’s prior record was noted by Chief Justice Gleeson:

[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

23. *Melbourne v R* [1999] HCA 32, 198 CLR 1 [35] quoting *Plato Films Ltd v Speidel* [1961] AC 1090, 1130. See also *Ryan v R* [2001] HCA 21, 206 CLR 267 [144].

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

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

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.²⁶

2.26 Justice Gummow has observed that, as bad character cannot aggravate a penalty because an offender cannot be punished for crimes for which they are not presently being sentenced, “this rather assumes that ‘bad character’ is measured by criminal behaviour alone”.²⁷

2.27 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.²⁸

2.28 The Sentencing Council previously noted the logical fallacy in the use of an absence of a prior criminal 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.²⁹

2.29 Some submissions considered the distinction between good character and a lack of convictions. The NSW Bar Association suggested that “good character” while ambiguous, and often referred to in conjunction with a lack of previous convictions, can be described as “a history of previous good works and contribution to the community”.³⁰ The Children’s Court emphasised the need to distinguish previous convictions from character evidence.³¹ Wirringa Baiya considered it problematic that a lack of previous convictions is correlated with good character.³²

Character and reputation

2.30 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”.³³ However, this

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

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

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

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

30. NSW Bar Association, *Submission GC161*, [31].

31. Children’s Court of NSW, *Submission GC158*, 3.

32. Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission GC148*, 3.

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

distinction is not always drawn in criminal law where a person is regarded as having “either a good character or a bad character”.³⁴

- 2.31 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 such assessments, whether positive or negative, are often more opinion than fact. They can be contrasted with objective evidence of a prior record.³⁵

Meritorious conduct

- 2.32 Meritorious conduct is conduct that is unrelated to the offence (as opposed to, for example, acts motivated by remorse for the offending), but it is seen as making the offender deserving of more lenient treatment. Examples include remarkable service in war,³⁶ and making a significant contribution to society, such as starting a youth club,³⁷ or rescuing someone from danger.³⁸
- 2.33 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.³⁹

Good character in sentencing today

Good character at common law

- 2.34 According to the common law, a person’s otherwise good character must be taken into account as a mitigating factor in sentencing. The principal Australian judgment

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

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

36. *R v Marrows* (1919) 13 Cr App R 207; *R v Tate* (1919) 14 Cr App R 103, 104; *R v Casey* (1919) 14 Cr App R 100, 101. See also *R v Goldrick* (1924) 24 SR (NSW) 396, 400–401.

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

38. *R v Reid* (1982) 4 Cr App R (S) 280, 281; *R v Keightley* [1972] Crim LR 262; *R v Wenman* [2004] EWCA Crim 2995, [2005] 2 Cr App R (S) 3 [10]–[11].

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

for this proposition is the 2001 High Court case of *Ryan*.⁴⁰ *Ryan* sets out the two steps to be followed by courts on the question of good character at sentencing:

- the court must, without considering the offence for which the person is being sentenced, determine if the offender is “otherwise of good character”,⁴¹ and
- if the court finds that the offender is of otherwise good character, the court must exercise discretion to determine what weight is to be given to this factor.⁴²

We explain the two steps in the following paragraphs.

Good character must be taken into account

- 2.35 In *Ryan*, the offender, a priest, committed sexual offences against young boys over a 20-year period. The sentencing judge found that, apart from the offences for which he was being sentenced, the offender had an unblemished character and reputation. However, the judge also found that his good character did not entitle him to any leniency whatsoever, because an unblemished character was expected of a priest.⁴³
- 2.36 On appeal, the majority of the High Court found that it was an error for the judge to give the appellant no leniency whatsoever for his good character.⁴⁴ The Court recognised that an offender’s otherwise good character is, at common law, “an established mitigating factor in the sentencing process”.⁴⁵ Not to take subjective considerations about the offender (such as good character) into account would be, as Justice Kirby put it, “a departure from basic sentencing principle”.⁴⁶ A sentencing court is, therefore, *bound* to take evidence of an offender’s otherwise good character into account.⁴⁷
- 2.37 Justice McHugh set out two principal justifications for why good character should attract leniency in sentencing:
- an offender’s prior good character may suggest that their actions in committing the offence were “out of character” and that they are unlikely to re-offend, and
 - a “morally good” person may be less deserving of punishment than a “morally neutral or bad” person, even if the offence committed was identical.⁴⁸

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

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

42. *Ryan v R* [2001] HCA 21, 206 CLR 267 [25].

43. *Ryan v R* [2001] HCA 21, 206 CLR 267 [18]–[23].

44. *Ryan v R* [2001] HCA 21, 206 CLR 267 [35].

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

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

47. *Ryan v R* [2001] HCA 21, 206 CLR 267 [25].

48. *Ryan v R* [2001] HCA 21, 206 CLR 267 [29]–[30].

It is, however, appropriate to ask why this should be so. We do this in chapter 3.

- 2.38 Both Justice Callinan and Justice Kirby also considered that the offender should not be deprived of credit for his good character just because he was a priest. To do so would “deny persons who happen to be priests (or in equivalent occupations) the benefit to which all other persons ... coming before a court for sentence are entitled”.⁴⁹ Justice Callinan highlighted that while good character may sometimes be obtained as a result of an offender diligently doing their duty, not everyone in such a position does the job equally. He explained:

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.⁵⁰

Good character may be given limited weight in some cases

- 2.39 Though a sentencing court is bound to take an offender’s otherwise good character into account as a mitigating factor, the weight that this factor is given in the sentencing exercise can vary according to the circumstances of each case.⁵¹ In some instances, the fact that an offender was of good character may be given very limited weight in mitigation.
- 2.40 The degree to which good character will mitigate the sentence is a matter for the sentencing judge to determine. It has been recognised that “sentencing is not a mathematical process”,⁵² and “[t]here is no formula or equation or percentage discount that automatically applies when there is evidence ... that an offender was formerly a person of good character”.⁵³
- 2.41 Rather, a sentencing court must balance multiple, often competing factors, when determining a sentence that is proportionate to the gravity of the offence.⁵⁴ While an offender’s good character is one factor that must be considered, the nature and circumstances of the offending is a “countervailing factor of the utmost

49. *Ryan v R* [2001] HCA 21, 206 CLR 267 [108].

50. *Ryan v R* [2001] HCA 21, 206 CLR 267 [177]–[178].

51. *Ryan v R* [2001] HCA 21, 206 CLR 267 [25].

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

53. *BG v R* [2020] NSWCCA 295 [140].

54. *BG v R* [2020] NSWCCA 295 [140]–[141]; *R v McNaughton* [2006] NSWCCA 242, 66 NSWLR 566 [15].

importance”.⁵⁵ Though mitigating factors that arise from an offender’s subjective case are an important consideration, they cannot lead to a sentence that is less than what the objective gravity of the offence requires.⁵⁶

- 2.42 It may be that, after assessing all considerations relevant to sentencing, a court will decide not to grant an offender any significant leniency on account of their good character. As Justice Kirby explained in *Ryan*:

A sentencing judge might conclude that the objective criminality of the offences, and the imperative need to give priority to general and specific deterrence in a case such as the present, meant that less weight could be given to such evidence in the appellant's case than in different circumstances, with different offences involving different victims over a different period of time. In a particular case, a sentencing judge might even come to a conclusion that no “significant leniency” could be given to such evidence when all considerations relevant to sentencing were assessed.⁵⁷

- 2.43 Courts have identified features that may support a finding that good character should be given less weight. These include cases where

- the offending is not an isolated act,⁵⁸ in particular, where there has been a pattern of repeat offending that goes undetected over a significant period, such as fraud or child sexual assault⁵⁹
- the acts were deliberately and carefully planned⁶⁰
- the offending involved an abuse of position or breach of trust, most commonly in white-collar fraud, theft in the course of employment and sexual offences by clergy, teachers or sports coaches,⁶¹ and
- the offending is objectively serious, increasing the need to highlight particular purposes of sentencing such as denunciation or deterrence, for example, in cases of armed robbery or child sexual offences.⁶²

- 2.44 There are situations where good character may generally carry less weight than others, because in addition to other factors, the offence is frequently committed by

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

56. *R v McNaughton* [2006] NSWCCA 242, 66 NSWLR 566 [15].

57. *Ryan v R* [2001] HCA 21, 206 CLR 267 [112].

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

59. *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]; *Dousha v R* [2008] NSWCCA 263 [49].

60. *Ryan v R* [2001] HCA 21, 206 CLR 267 [175]; *R v Morley* [1985] WAR 65, 73.

61. *R v Rivkin* [2004] NSWCCA 7, 59 NSWLR 284 [410]; *R v Kennedy* [2000] NSWCCA 527 [21].

62. K Warner, “Sentencing Review 2008–2009” (2010) 34 *Criminal Law Journal* 16, 22; *Ryan v R* [2001] HCA 21, 206 CLR 267 [112], [147]; *Smith v R* (1982) 7 A Crim R 437, 441–442; *R v Gent* [2005] NSWCCA 370 [51].

people of otherwise good character.⁶³ This is either because there is a general need for deterrence, for example, in the case of:

- dangerous driving⁶⁴
- drink driving,⁶⁵ and
- child pornography offences⁶⁶

or because good character facilitated or helped conceal the offence, for example, in the case of:

- white-collar offences,⁶⁷
- drug importation,⁶⁸ and
- child sexual offences.⁶⁹

- 2.45 While a court can make a finding of limited weight, the majority of the High Court in *Ryan* made clear that it is not permissible to give an offender's good character "no weight whatsoever" in mitigation, or to disregard it all together.⁷⁰ An offender who is of otherwise good character, is entitled to some leniency.⁷¹
- 2.46 Notably, not all judges of the High Court agreed with this position. While Justices Gummow and Hayne agreed with most of the general principles stated by the majority, they considered that a sentencing court should have the discretion to give no weight to an offender's good character, especially when there are other factors that can displace an offender's good character entirely.
- 2.47 Justices Gummow and Hayne found that the offender's good character was completely outweighed by the wrong that he did, the fact that it continued over several years and involved numerous victims, and that he had used the power that came with his position to commit the offences.⁷²

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

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

65. *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].

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

67. *R v El-Rashid* (Unreported, NSWCCA, 7 April 1995) 3–4; *R v Rivkin* [2004] NSWCCA 7, 59 NSWLR 284 [410]; *R v Adler* [2005] NSWSC 274 [51].

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

69. *R v PGM* [2008] NSWCCA 172 [44].

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

71. *Ryan v R* [2001] HCA 21, 206 CLR 267 [35].

72. *Ryan v R* [2001] HCA 21, 206 CLR 267 [68]–[69], [135], [147]–[149].

Subsequent application of *Ryan*

- 2.48 Since the decision in *Ryan*, courts have followed the principle that a sentencing court is bound to take good character into account, and while the weight to be given to an offender's otherwise good character may vary from case to case, it must be given *some* weight in mitigation.⁷³
- 2.49 However, the CCA appears to have taken a different approach in the 2020 case of *WG v R*.⁷⁴ In that case, the sentencing judge found that the offender was of otherwise good character, but that his good character was substantially diminished by the fact that he had committed many serious child sexual assaults over a lengthy period.⁷⁵ The judge denied the offender "any degree of leniency" for his good character.
- 2.50 The CCA found no legal error in the sentencing judge's approach.⁷⁶ The Court held that the finding was in accordance with *Ryan*, because the sentencing judge had not failed to take the appellant's good character into account. Rather, the judge had considered the appellant's good character but determined that the particular circumstances of the case dictated that it should not be given any weight in mitigation.⁷⁷
- 2.51 While *WG* appears to have taken a different approach to the principle in *Ryan*, it may also illustrate a difficulty in separating the concepts of taking good character into account, and giving it weight in mitigation.
- 2.52 There have not been any cases subsequent to *WG* that have considered its application of the principles of *Ryan*.

Good character in statute: aggravating and mitigating factors

- 2.53 The good character of an offender is also a statutory mitigating factor in s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*Sentencing Act*). The aggravating and mitigating factors in s 21A complement and, in some cases, expand the common law.
- 2.54 There are 22 aggravating factors and 14 mitigating factors that a court is to take into account together with "any other objective or subjective factor that affects the relative seriousness of the offence". These factors are taken into account along with all other sentencing purposes and principles through a process of "instinctive synthesis" which requires the court to reconcile all relevant factors, and impose a

73. See, eg, *Kelly v R* [2023] NSWCCA 104 [108]–[116]; *Quintero v R* [2018] NSWCCA 190 [76].

74. *WG v R* [2020] NSWCCA 155.

75. *WG v R* [2020] NSWCCA 155 [1478].

76. *WG v R* [2020] NSWCCA 155 [1100], [1486]–[1494].

77. *WG v R* [2020] NSWCCA 155 [1100], [1486]–[1494].

just and appropriate sentence without needing to disclose the precise way in which it reconciled all of those factors.

2.55 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.⁷⁸

2.56 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).⁷⁹

2.57 This makes the relationship between good character and record of previous convictions more complex. The distinction between “good character” and no record of previous convictions suggests an intention to separate previous convictions from other aspects of good character, such as reputation and contribution to the community. However, the use of the past tense in paragraph (f) still reflects an assumption that once someone has been convicted of an offence, they are no longer a person of good character.

2.58 Further, the aggravating factor is tightly constrained by the principle that a person cannot be sentenced again for past offences.⁸⁰ The courts have read down the requirement to take into account an offender’s record of previous convictions to ensure that it is only used within the boundaries of a proportionate sentence. The principle of proportionality requires that the objective circumstances of the offence (which do not include previous convictions) set the upper boundaries of a proportionate sentence.⁸¹

The special rule in relation to child sexual offences

2.59 When determining a sentence, a court is required to take into account any aggravating or mitigating factors that are relevant and known to the court.⁸² However, there is one statutory exception to this rule. A court sentencing an offender for a child sexual offence is prevented from taking into account either an offender’s prior good character or lack of previous convictions as mitigating factors, if either factor assisted the offender to commit the offence.

2.60 This exception is known as the special rule and is contained in s 21A(5A) of the *Sentencing Act* as follows:

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

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

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

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

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

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.

2.61 The special rule applies to child sexual offences, including:⁸³

- sexual offences (without consent) where the victim was under 16: sexual assault and assault with intent to have intercourse,⁸⁴ sexual touching,⁸⁵ sexual act,⁸⁶ and such offences against a person with cognitive impairment⁸⁷
- sexual offences against children (regardless of consent): sexual intercourse and assault with intent to have sexual intercourse,⁸⁸ sexual touching,⁸⁹ sexual act,⁹⁰ persistent sexual abuse,⁹¹ procurement and grooming,⁹² child prostitution,⁹³ and production, dissemination or possession of child abuse material⁹⁴
- other offences where the victim was under 16, including the sexual servitude offence,⁹⁵ voyeurism and filming private acts or private parts⁹⁶
- 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 intercourse⁹⁷
- 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.

2.62 The special rule was enacted in 2008. It was introduced to prevent an offender, who had misused their perceived trustworthiness and honesty in order to commit a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

sexual offence against a child, from having that good character taken into account in mitigation.⁹⁸

- 2.63 As mentioned in chapter 1, the special rule had its origins in a 2008 report of the Sentencing Council. In 2017, the special rule received support from the Royal Commission into Institutional Responses to Child Sexual Abuse which recommended its introduction in other Australian jurisdictions.

98. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 26 November 2008, 11707; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A), inserted by *Crimes Amendment (Sexual Offences) Act 2008* (NSW) sch 2.4 [1].

3. Good character as a mitigating factor

In brief

A finding that an offender was of good character should not operate to mitigate their sentence, in any circumstance. We recommend that good character be abolished as a mitigating factor on sentence, both at common law and in statute.

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- 3.1 In NSW, if an offender can be shown to have been a person of good character, it must be taken into account as a mitigating factor on sentence.¹
- 3.2 In this chapter, we conclude that the good character of an offender should not operate to mitigate a sentence, in any circumstance. We recommend that good character be abolished as a mitigating factor on sentence, both at common law and in statute.
- 3.3 The recommendation to abolish good character as a mitigating factor follows extensive research, consultation and debate.

Abolish good character as a mitigating factor

Recommendation 3.1: Abolish good character as a mitigating factor in sentencing

- (1) Legislation should be enacted that:
 - (a) abolishes the common law as it relates to good character as a mitigating factor, and
 - (b) repeals s 21A(3)(f) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
- (2) The legislation should be framed so that it:
 - (a) prevents courts from using evidence that goes solely to a finding of good character, and
 - (b) does not otherwise affect the ability of the court to consider relevant evidence in relation to any other purpose or principle of, or factor in, sentencing.

- 3.4 Good character should no longer be a mitigating factor in sentencing, either in statute or at common law.
- 3.5 Section 21A(3)(f) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*Sentencing Act*) should be repealed, to remove good character as a mitigating factor in statute. In addition, legislation should specifically provide that the common law surrounding good character on sentence no longer applies. This is important because the common law, which s 21A expressly acknowledges,² will continue to operate in the absence of s 21A(3)(f) unless abolished.
- 3.6 The good character of an offender is not an appropriate reason to mitigate a sentence, because it:
- is based on a vague and uncertain concept

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(f); *Ryan v R* [2001] HCA 21, 206 CLR 267.

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

- lacks evidence in support of its value in predicting a risk of reoffending or prospects of rehabilitation, and
 - engages an unjustified form of moral and social accounting.
- 3.7 The mitigating factor also has harmful effects. Evidence shows that the use of, and reference to, an offender’s good character in mitigation of sentence is harmful to and may be re-traumatising for victims. It can also contribute to systemic disadvantage, because not all groups have equal access to the mitigating factor.
- 3.8 Though we consider these broad concerns sufficient justification to abolish good character as a mitigating factor, there are several additional reasons that are more applicable to specific types of offences. These include child sexual offences, serious offences, and offences involving an abuse of a position of trust.
- 3.9 While it is not appropriate for a finding of good character to be treated as a mitigating factor, it is important that reforms do not prevent courts from considering evidence that goes to any other relevant consideration in sentencing. This includes any other factor, or principle or purpose of sentencing, such as prospects of rehabilitation,³ likelihood of reoffending,⁴ or community protection.⁵

Allowing mitigation for good character cannot be justified

- 3.10 There is no sufficient justification for allowing an offender’s good character to mitigate a sentence.
- 3.11 Good character is a vague and uncertain concept that takes a simplistic view of an offender, and rewards irrelevant good deeds and reputation. It is not a reliable predictor of an offender’s future behaviour.
- 3.12 A finding that an offender was a person of otherwise good character does not, as a standalone conclusion, add anything of value to the sentencing process that cannot be addressed by other mitigating factors, or other considerations in sentencing.

Good character is a vague and uncertain concept

- 3.13 In our view it is unreasonable for courts to make sentencing decisions informed by a factor that lacks an empirical basis and is one-dimensional, “speculative, misguided and arbitrary”.⁶

3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(h).

4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(g).

5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(c).

6. 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, 568.

- 3.14 There is no settled definition of what good character is, or what it reflects. In fact, the concept of good character has been criticised as being “vague and incoherent” and as lacking “a settled definition, including in philosophy or psychology, or empirical foundation”.⁷
- 3.15 Discerning what good character represents in practice is difficult, because it is conflated with other considerations about an offender. For instance, good character is often considered together with other factors that may mitigate a sentence, including that the offender:
- does not have any record (or any significant record) of previous convictions⁸
 - is unlikely to re-offend,⁹ or
 - has good prospects of rehabilitation, whether by reason of the offender’s age or otherwise.¹⁰
- 3.16 For example, in a recent sentencing for manslaughter in the Supreme Court, remarks on sentence about the offender’s good character were based entirely on his lack of previous convictions and the likelihood of reoffending.¹¹ This is not uncommon.¹²
- 3.17 The overlap in these concepts was acknowledged by the Court of Criminal Appeal (CCA) in *R v Gent*:
- 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 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 ...¹³
- 3.18 There is also overlap between good character and the mitigating factor that applies where an offender has good prospects of rehabilitation.¹⁴ Wirringa Baiya, for example, noted that
- it is difficult to discern the balance between good character evidence and other mitigating factors when good character speaks to the prospects of

7. 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, 568.

8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(e).

9. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(g).

10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(h).

11. *R v White* [2025] NSWSC 243 [50]–[52].

12. See, eg, *R v HE* [2024] NSWSC 417 [109]; *R v Mclver* [2019] NSWDC 834 [60].

13. *R v Gent* [2005] NSWCCA 370 [49] (citations omitted).

14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(h).

rehabilitation, but the prospect of rehabilitation is expressly addressed in the Sentencing Act.¹⁵

- 3.19 Importantly, the *Sentencing Act* makes it clear that good character is a separate consideration, that can impact sentencing independently of both an absence of previous convictions and good prospects of rehabilitation.¹⁶ For this reason, we consider it necessary to assess the relevance of good character separately from these other factors.
- 3.20 As we note in chapter 2, when good character is considered separately from an offender's previous convictions or prospects of rehabilitation, it is generally thought that it only relates to an offender's general reputation, meritorious conduct, and inherent moral qualities.¹⁷
- 3.21 In this sense, a finding that a person is of good character can be too simplistic. It is often based on an incomplete picture that shows only the good aspects of an offender and does not account for the complexity of life. For instance, Justice Hayne, in his dissent in *Ryan*, considered character and reputation of a person to have many contrasting elements, and observed that the "one-dimensional view" of character arising from some common law rules of evidence "can no longer be accepted without qualification". In his view, reputation could no longer be thought of as "a safe and certain guide to all aspects of a person's character".¹⁸ We agree with that view.
- 3.22 The incomplete picture is exacerbated by the fact that:
- negative aspects of an offender's character can be filtered out when evidence is presented, making written references, in the words of one submission, "fundamentally self-serving statements",¹⁹ and
 - the prosecution and courts may lack the resources to challenge evidence of good character.²⁰
- 3.23 Further, it does not account for the fact that there are certain crimes that are often committed by people of otherwise good character. As we note in chapter 2, these are recognised by the courts as cases where little or no weight should be given to an offender's good character.
- 3.24 One difficulty that accompanies the ambiguous concept of good character and its role as an innate quality is that it cannot be clearly, objectively or reliably

15. Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission GC148*, 17.

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

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

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

19. NSW Police Force, *Submission GC155*, 1.

20. NSW Police Force, *Submission GC155*, 1.

measured. It is often based on the subjective opinion of lay people. As Wolf and Bagaric observe:

Evidence of people's apparent reputation in the community, good deeds and prior criminal history have also been advanced as reflecting their character, but, like morality, they do not make the notion of character any clearer, objectively confirm that a person has inherent and/or unchanging traits or identify what those attributes are, or help to predict an individual's future behaviour.²¹

Good reputation and moral worth should not mitigate a sentence

- 3.25 Even if there was a way to assess character reliably and consistently, we do not consider that the components of good character that are unrelated to an offender's criminal history, such as reputation or moral worth, should mitigate a sentence.
- 3.26 Until now, a principal justification advanced for granting a person of good character leniency has been that a "morally good" person is less deserving of punishment than a "morally neutral or bad" person who has committed an identical offence.²² This is not an appropriate justification.
- 3.27 Allowing an offender's good character, as separate from a lack of previous convictions, to mitigate their sentence gives the impression that they are "being sentenced not for the offence but for their moral worth".²³ It also assumes that "moral worth can be calculated by a sort of moral book-keeping, in which spectacular actions count for more than does unobtrusive decency".²⁴
- 3.28 One writer observed that to grant mitigation for good character
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.²⁵
- 3.29 There is also a view that allowing an offender's good character to mitigate their sentence can act as a moral or social reinforcement.²⁶ As one author observed, a court may give the appearance of downgrading an offender's "major social contributions" if it fails to recognise these contributions. On this view there could be

21. 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, 590.

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

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

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

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

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

a risk that such a failure to give credit for such contributions would weaken the “collective conscience of society”.²⁷

- 3.30 However, it can also be argued that when good character is used to mitigate a sentence for a serious criminal offence, it gives the impression that the offence is less serious, or the offender is less morally culpable if they have accrued a history of good works before their offending. In this way, it can be seen as 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

Good character cannot reliably predict future conduct

- 3.31 There is a lack of empirical evidence to support the contention that good character, by itself, is a reliable predictor of an offender’s prospects of rehabilitation and risk of reoffending. At least for certain serious offences, there seems to be no foundation for the claim that good character in its most general sense, is connected with a lower risk of reoffending.
- 3.32 Another principal justification courts have relied on for granting leniency for good character is that a person may be less likely to reoffend if the offence was seen to be out of character.²⁹ 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 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”.³⁰
- 3.33 In addition, it has been said that good character may be relevant to rehabilitation by indicating the offender’s capacity to “appreciate the censure” of a criminal penalty. This may suggest that reoffending is unlikely.³¹ A history of good deeds may “suggest that the offender needs less punishment to reintegrate him or her into society”.³²
- 3.34 Rehabilitation, as a purpose of sentencing, is about the offender’s ability to reform their attitudes and behaviour so that they do not reoffend.³³ At a broader level, rehabilitation is also concerned with the offender’s renunciation of their

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

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

29. *Ryan v R* [2001] HCA 21, 206 CLR 267 [29].

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

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

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

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

wrongdoing and their integration or re-integration into society as a law-abiding person.³⁴

- 3.35 However, the connection between good character and a risk of reoffending or prospects of rehabilitation relies on a false assumption that people invariably behave in accordance with inherent moral qualities, and that a person's character is indivisible.³⁵ In reality, research has demonstrated that behaviour is highly situational, and will vary according to the context and environment. A person's future behaviour cannot be entirely predicted from their character.³⁶
- 3.36 The courts have acknowledged the poor predictive value of good character. In the case of *Melbourne*, Justice McHugh noted that "empirical psychological studies now deny that character is as accurate a predictive tool as earlier generations so confidently believed".³⁷
- 3.37 In relation to sexual reoffending, 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".³⁸ Research has also found that prior sexual offending is a notable risk factor for sexual reoffending.³⁹
- 3.38 Some common characteristics of "high risk" offenders that may increase a likelihood of sexual reoffending include where an offender has:
- stable deviant sexual preferences;
 - identifiable antisocial personality;
 - committed diverse sexual offences;
 - committed non-contact sexual offences;

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

35. 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, 592; *Melbourne v R* [1999] HCA 32, 198 CLR 1 [63]; NSW Law Reform Commission, *Uniform Evidence Law*, Report 112 (2005) [3.10].

36. NSW Law Reform Commission, *Uniform Evidence Law*, Report 112 (2005) [3.10]–[3.14]; M A Méndez, "The Law of Evidence and the Search for a Stable Personality" (1996) 45 *Emory Law Journal* 221; 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; J M Doris, *Lack of Character: Personality and Moral Behavior* (Cambridge University Press, 2002); P Goldie, *The Emotions: A Philosophical Exploration* (Oxford University Press, 2000).

37. *Melbourne v R* [1999] HCA 32, 198 CLR 1 [47].

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

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

- targeted extra-familial child victims;
- targeted male child victims;
- targeted strangers;
- began offending sexually at an early age;
- never been married; and
- failed to complete (dropped out of) a treatment program.⁴⁰

- 3.39 Notably, none of these established characteristics or factors are related to a finding that someone is of good character by reference to a history of “good works and contribution to the community”.⁴¹
- 3.40 The rehabilitative justifications are also clearly inapplicable in cases where the offender used their good character to commit the offence in question. Such justifications assume that aspects of “good character”, even if they could be identified with certainty, can counter criminogenic factors and are protective against reoffending.
- 3.41 The better approach, in our view, is not to use the uncertain lens of good character to approach the question of whether an offender has good prospects of rehabilitation or is at risk of reoffending. Instead, a court should limit its consideration to other established protective factors, like stable employment, and pro-social ties to the community. We discuss the importance of considering these other factors further, below.

Consideration of good character harms victims of crime

- 3.42 The reference to, and use of good character in sentencing proceedings harms victims in a number of ways, including by re-traumatising them, by needlessly marginalising and minimising their experience, and by undermining the system that ought to protect and vindicate them. Many submissions drew our attention to the harm caused to victims and their families by allowing consideration of good character.
- 3.43 On the other hand, some submissions suggested that the use of good character is of little concern because the courts already give minimal weight to good character in a range of appropriate cases.⁴² These cases are set out in chapter 2.
- 3.44 Some submissions suggested that there should be better information available for victims and the community about the relevance and use of good character in

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

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

42. NSW Bar Association, *Submission GC161* [24]; Law Society of NSW, *Submission GC154*, 6; Community Restorative Centre, *Submission GC159*, 7.

sentencing.⁴³ However, in our view this change alone will likely not appropriately minimise the harmful effect of a finding of good character in individual cases. As we note below, submissions from victims, families, and advocates point out that the simple reference to the offender as a person of good character itself can be re-traumatising and invalidating.

Reference to good character can be re-traumatising

- 3.45 The most serious outcome of allowing consideration of good character is that it can re-traumatise victims, particularly in cases involving child sexual offences, adult sexual offences, homicide, and domestic violence. This was highlighted by many submissions.⁴⁴
- 3.46 Submissions to the Royal Commission also reported that victim-survivors were often distressed at hearing evidence of an offender’s good character and suffered emotional harm as a result.⁴⁵
- 3.47 The use of good character evidence can be seen as part of a wider re-traumatising effect that the criminal justice system response can have in these cases. For example, one submission reported:
- Having personally been through the court system, the references to my perpetrators “good character” was extremely traumatising to witness and listen to, especially after my own character had been brutally picked to pieces by the defence.⁴⁶
- 3.48 Findings of good character may minimise and invalidate the harm an offender caused the victim, which can include feelings of anxiety, depression, or suicidality.⁴⁷ One preliminary submission pointed out that drawing attention to an offender’s good character can re-traumatise and cause further psychological distress in the case of victim-survivors of child sexual offences.⁴⁸
- 3.49 There is no specific research which details the impact that considering good character has on victim-survivors of adult sexual offences. However, it can be

43. Law Society of NSW, *Submission GC154*, 9; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission GC169*, 2; Legal Aid NSW, *Submission GC71*, 11; Office of the Director of Public Prosecutions (Cth), *Submission GC165* [24].

44. N Slater, *Submission GC107*; H Frdelja, *Submission GC21*; Anonymous, *Submission GC36*; C Mak, *Submission GC58*, 2; E Cardell, *Submission GC64*; A James, *Submission GC68*, 1; Anonymous, *Submission GC89*; S Young, *Submission GC91*; O Campos, *Submission GC08*; Lily, *Submission GC05*; Anonymous, *Submission GC15*.

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

46. N Slater, *Submission GC107*.

47. 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, 107.

48. MayaKosha Healing, *Preliminary Submission PGC20*, 7–8.

inferred that it can also be re-traumatising and evoke some of the same responses it does in the context of child sexual offending.⁴⁹ This is especially the case where power imbalances and abuse of trust are central factors.

- 3.50 As one submission raised, accepting evidence of good character in some domestic violence cases can cause further harm because they reinstate the power imbalances that existed within the relationship.⁵⁰

Needlessly marginalises victims and minimises their experience

- 3.51 Reference to good character in sentencing proceedings leads to the perception, if not the reality, that courts are downplaying the seriousness of the offence because of an offender's character.
- 3.52 As we discussed in chapter 2, an offender's good character must be considered by the court and therefore, referred to in the remarks on sentence. This can give the appearance that good character is an influential consideration, even if given only minimal weight in the circumstances of a particular case.
- 3.53 For many victims, the use of good character, involving the presentation of an offender in a positive light, is at odds with the violence and harm they were caused by the offender. One submission, for example, noted victims may perceive this incongruity as the offender manipulating the legal system. This could add to their trauma, particularly if they expected the court to denounce the offender's conduct.⁵¹ Victims may feel like "the rights and interests of the perpetrator superseded their own".⁵²
- 3.54 Another submission suggested that considering prior good conduct shifts the focus from the central issue: the harm to the victim and the need for unequivocal condemnation of sexual violence. It, therefore, risks giving offenders a narrative of partial redemption that may minimise victims' lasting trauma and creates the perception that past good deeds can offset the severity of the crime.⁵³

49. 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; *Trauma-Informed Care in Behavioral Health Services: A Treatment Improvement Protocol* (Substance Abuse and Mental Health Services Administration, 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.

50. Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission GC148*, 12.

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

52. O Brooks-Hay, M Burman and J Glinski *Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences* (Scottish Sentencing Council, 2024) 31.

53. Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission GC148*, 15–16; NSW Aboriginal Women's Advisory Network, *Submission GC164*, 6.

- 3.55 This needlessly sets up a comparison between the offender’s good character and the offender’s responsibility for the harm to the victim.

Perpetuates systemic harms

- 3.56 Submissions also highlighted the role that the use of good character in sentencing has in perpetuating systemic harms, including:
- encouraging victim blaming
 - contributing to a harmful culture of misconceptions around sexual offending, and
 - discouraging disclosure of offences.⁵⁴
- 3.57 The possibility of re-traumatisation may discourage reporting by victim-survivors, particularly in the case of child sexual offences, adult sexual offences and domestic violence.⁵⁵ Although there is no directly proven link, the underreporting of such offences is a known problem, and as one author points out, “a key barrier to reporting rape and sexual violence is the perception that the violation experienced by the victim was not serious enough or that they will not be believed”.⁵⁶
- 3.58 Several victims told us that they had discontinued proceedings because of the use, or potential use of good character evidence.⁵⁷ For example, one submission stated:

I made the difficult decision not to proceed with court action, largely due to the fear that I would not be believed or that my abuser could use good character references to diminish the severity of the crime or avoid more serious

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54. Anonymous, *Preliminary Submission PGC10*, 1, 4–5; J Simpson, *Preliminary Submission PGC15*, 1; MayaKosha Healing, *Preliminary Submission PGC20*, 5; J Scott, *Preliminary Submission PGC29*; L Vosu, *Preliminary Submission PGC30*; D Turnbull, *Preliminary Submission PGC31*; Your Reference Ain’t Relevant, *Preliminary Submission PGC34*, 3; 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; K Tynan, *Preliminary Submission PGC65*, 1; L McIntosh, *Preliminary Submission PGC76*, 1–2; D Ertel, *Preliminary Submission PGC77*, 1–2; Victims of Crime Assistance League (Hunter), *Submission GC162*, 9.
55. 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; Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences*, Report (2021) [2.28], [7.2]; 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) 6–7; 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) 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.
56. E Dowds, “Challenging the Role of Good Character Evidence in Rape Trials: Monsters, Myths and Mitigation”, (2025) *International Journal of Evidence and Proof* 1, 15 (advance).
57. S Watson, *Submission GC10*; Anonymous, *Submission GC48*; Anonymous, *Submission GC47*; Anonymous, *Submission GC69*, 1; A Johnson, *Submission GC63*; K Martin-Files, *Submission GC83*; Anonymous, *Submission GC151*, 1.

consequences. This fear, combined with the impact on my mental health, has been a significant burden that I have carried for years.⁵⁸

3.59 Another submission reported:

As a woman having fled a domestic violence situation from my former fiancé, I knew when speaking to police initially that my abuser's "good character" would have been focused on if we proceeded to a formal complaint and pressing charges, and eventually, court.

His public facing, pillar-of-the-community facade would have been paramount to painting the picture he was a loving and caring partner. Whilst who he truly is behind closed doors would not be considered or believed.⁵⁹

3.60 Another told us:

During my childhood, my abuser deliberately used his good character in the eyes of other[s] to groom and abuse me under my family's nose. Devastatingly, he maintained his good standing in the eyes of many of my loved ones after I came forward and exposed his heinous acts. I never pursued justice through the legal system because of the pain this caused; hearing my offender's "good character" referenced during the legal process by my loved ones would have been unbearable.⁶⁰

3.61 The resort to good character in sentencing proceedings and the harms arising can also undermine support for the legal system from both victims and the general community. It was submitted that removing the use of good character for child sexual offenders would, therefore, enhance accountability and bolster public confidence or trust in the justice system.⁶¹

Not all offenders have equal access to the mitigating factor

3.62 The availability of good character as a mitigating factor on sentence may contribute to inequality in the sentencing process, because the mitigating factor of good character is likely to be more readily available to some groups than others.

3.63 Consequently, considering good character as a mitigating factor (that tends towards a more lenient sentence within the exercise of judicial discretion) can be criticised as breaching the principle of equality before the law. As one author points out, allowing reputation, good works, and social contributions to mitigate a sentence infringes the principle because a person "should not be sentenced more favourably because of his or her social position or perceived respectability".⁶²

58. S Watson, *Submission GC10*.

59. Anonymous, *Submission GC47*.

60. A Johnson, *Submission GC63*.

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

62. K Warner, "Sentencing Review 2008–2009" (2010) 34 *Criminal Law Journal* 16, 20, 23.

- 3.64 It has also been suggested that allowing mitigation for good character gives the appearance of offenders using their status and connections to obtain leniency in sentencing.

It may contribute to systemic disadvantage

- 3.65 Several submissions observed that some groups may be more likely to have access to influential character references.⁶³ This includes offenders who:

- are from a privileged background⁶⁴
- are well-connected⁶⁵
- have social standing or are influential,⁶⁶ or
- are wealthy or have greater access to resources.⁶⁷

- 3.66 The Community Restorative Centre simply observed:

In our decades of experience providing support to people affected by the criminal legal system, we hold that it is generally white, middle-class men who most benefit from prior good character considerations.⁶⁸

- 3.67 On the other hand, individuals who do not have the means or opportunities to make similar contributions to the community may not receive the same benefit of mitigation.⁶⁹ This can exacerbate existing inequality and reinforce systemic biases.⁷⁰

- 3.68 Academic writers have also raised concerns that mitigating the sentence of an offender who has had the means and opportunity to contribute to society creates a “clear danger of inequitable treatment”.⁷¹ 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”.⁷²

63. See, eg, Older Women’s Network NSW, *Preliminary Submission PGC60*, 4–5.

64. K Tynan, *Preliminary Submission PGC65*, 1.

65. Older Women’s Network NSW, *Preliminary Submission PGC60*, 3.

66. Older Women’s Network NSW, *Preliminary Submission PGC60*, 4, 5.

67. Older Women’s Network NSW, *Preliminary Submission PGC60*, 5; Victims of Crime Assistance League (Hunter), *Submission GC162*, 9.

68. Community Restorative Centre, *Submission GC159*, 6.

69. Victims of Crime Assistance League (Hunter), *Submission GC162*, 9; J V Roberts, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (Oxford University Press, 2008) 110.

70. Victims of Crime Assistance League (Hunter), *Submission GC162*, 9.

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

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

- 3.69 Some submissions highlighted ways in which some groups may face barriers to relying on good character. For example, the Intellectual Disability Rights Service considered that people with intellectual disability may be “especially disadvantaged” in relation to obtaining written references, “due to a range of socio-economic factors” including that people with a disability have lower rates of employment, income, education and life participation.⁷³ They also considered that
- the “shared assumptions” about what constitutes good character is likely to disadvantage people with disability due to widespread misconceptions ... and negative assumptions about people with disability within the criminal justice system.⁷⁴
- 3.70 In this way, the mitigating factor could undermine the principle of equality before the law, impinge on justice for people with disability, and contribute to systemic barriers.⁷⁵
- 3.71 By being more accessible to offenders from a privileged background, the mitigating factor can embed and perpetuate social privilege, and disadvantage those who experience systemic marginalisation. As Wirringa Baiya observed, the inability of this mitigating factor to apply equally to all communities is problematic.⁷⁶ It may mean that offenders from non-marginalised groups are held in “higher regard” than other offenders.⁷⁷
- 3.72 The unequal access to the benefits of good character in sentencing is also out of touch with modern community standards, at least for certain offences.⁷⁸ One submission, for example, considered that using written references in relation to sexual offences is “anachronistic and out of touch with community expectations”.⁷⁹ They added:
- Some offences are too far outside community expectations for the offender to rescue themselves by providing recommendations of character by former prime ministers or business leaders. Does a person who commits violent crimes but lacks such luminaries as referees not deserve a level playing field at sentencing with someone of public note?⁸⁰

Disparate application to Aboriginal and Torres Strait Islander offenders

- 3.73 The risk of inequality in the application of the mitigating factor may disadvantage Aboriginal and Torres Strait Islander offenders, in particular.

73. Intellectual Disability Rights Service, *Submission GC125*, 3.

74. Intellectual Disability Rights Service, *Submission GC125*, 3.

75. Intellectual Disability Rights Service, *Submission GC125*, 1.

76. Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission GC148*, 5.

77. Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission GC148*, 21.

78. J Byrnes and S Geisler, *Submission GC126*, 3; Full Stop Australia, *Submission GC160*, 9.

79. Feminist Legal Clinic, *Submission GC115*, 1.

80. Feminist Legal Clinic, *Submission GC115*, 1–2.

- 3.74 The culturally narrow construction of good character means that it may not align with the values or lived realities of Aboriginal and Torres Strait Islander peoples. This may exclude them from access to the factor to mitigate their sentence.
- 3.75 Wirringa Baiya submitted that good character sits within a colonial western framework and does not account for the “nuances and cultural differences” of what may be good or bad character within Indigenous communities and family and kin networks.⁸¹
- 3.76 Aboriginal and Torres Strait Islander offenders may be disadvantaged, because they do not have the same access to good character evidence as other offenders do. Even if they are considered a person of good character within their community, this character may not be accepted by a court because it looks different from the “white and western cultural construct of these terms”.⁸²
- 3.77 Wirringa Baiya noted that many Aboriginal and Torres Strait Islander women in particular have experienced significant social and economic disadvantage and marginalisation, and would have fewer opportunities to provide “powerful” good character references for a court to consider in mitigation.⁸³ In their view, this raises questions about whether a lack of access to the mitigating factor plays a part in the higher incarceration rates for Aboriginal and Torres Strait Islander women.⁸⁴
- 3.78 Another submission, from the NSW Aboriginal Women’s Advisory Network, suggested that good character references are an extension of white privilege, noting that “the ability to benefit from a good character reference is connected to white privilege and proximity to institutional power”. It also noted that Aboriginal offenders “do not access the same level of credibility when invoking character references”. This is because more organisational reputational weight may be given to mainstream organisations when compared with Aboriginal community-controlled organisations.⁸⁵
- 3.79 The abolition of good character as a mitigating factor accords with the Australian Law Reform Commission recommendation that sentencing courts should take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.⁸⁶ It also aligns with the Closing the Gap targets,

81. Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission GC148*, 4.

82. Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission GC148*, 5.

83. Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission GC148*, 21.

84. Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission GC148*, 20–21. See, eg, NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2023 (2024) [1.19]–[1.23].

85. NSW Aboriginal Women’s Advisory Network, *Submission GC164*, 6–7.

86. Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report 133 (2017) rec 6-1 [6.77]–[6.79].

which include a commitment by NSW and all other Australian governments to reducing Aboriginal and Torres Strait Islander incarceration rates.⁸⁷

Some offending is too serious

- 3.80 The seriousness of some offences, both in terms of the objective seriousness and the significant harm they cause to victims, is often suggested as a reason for precluding consideration of good character. We agree with this position. While this argument predominantly applies to specific offences, it is another reason in support of our recommendation to abolish consideration of good character for all offences.
- 3.81 Submissions considered that several offence categories, in addition to child sexual offences, are inherently too serious to allow good character to feature as a mitigating factor. These included:
- sexual offences against adults,⁸⁸ or at least vulnerable people⁸⁹
 - white collar crime and serious fraud⁹⁰
 - domestic violence offences,⁹¹ including coercive control,⁹² and
 - serious crimes resulting in harm or death to an individual, such as dangerous driving causing death or grievous bodily harm, murder, and manslaughter,⁹³ and serious forms of these offences, such as murder with sexual assault, murder with stalking, murder with sadism, murder of a child and multiple murders.⁹⁴
- 3.82 These submissions proposed precluding good character from consideration for these offences by extending the application of the special rule.
- 3.83 Your Reference Ain't Relevant suggested that the special rule should apply to any offence involving exploitation, coercion, abuse, or deliberate harm of another person, because:
- each involves a serious breach of trust and power dynamics involving the manipulation of victims and others to escape accountability
 - allowing good character in mitigation in these cases minimises the gravity of their actions and undermines justice for survivors, and

87. Council of Australian Governments, *National Agreement on Closing the Gap* (2020) target 10–11.

88. NSW Police Force, *Submission GC155*, 4; In Good Faith Foundation, *Submission GC78*, 9.

89. Bravehearts Foundation Ltd, *Submission GC138*, 1–2; Intellectual Disability Rights Service, *Submission GC125*, 4.

90. NSW, Office of the Advocate for Children and Young People, *Submission GC156*, 2.

91. Road Trauma Support Group NSW, *Submission GC166*, 1.

92. Your Reference Ain't Relevant, *Submission GC122*, 17. See also Domestic Violence NSW, *Submission GC119*, 8.

93. Road Trauma Support Group NSW, *Submission GC166*, 1.

94. E Culleton, *Submission GC163*, 5.

- offenders in such cases “often use their social status, professional reputation, or public trust to facilitate their offences”.⁹⁵

3.84 The fact that good character is less appropriate for consideration in certain serious offences is already recognised, to an extent, because the common law allows courts to give minimal weight to good character. In these cases, the objective seriousness of the offence increases the need for denunciation and deterrence, for example, in cases of armed robbery or sexual offences against children.⁹⁶

3.85 For this reason, some submissions considered that the common law already provided significant guidance on how to approach these categories, so there was no need to extend the special rule to other offences.⁹⁷ They were concerned that there was insufficient justification to extend the rule to such a broad range of offences.⁹⁸

Long-lasting trauma related harm

3.86 In the consultation paper, we identified that some offences are particularly serious because of the long-lasting, often trauma-related, harm caused to victims of these offences. This includes child sexual offences, adult sexual offences and domestic violence offences.

3.87 Broadly, the long-lasting harms included detrimental impacts on mental health, general physical health, emotional health and interpersonal relationships and interactions with society.⁹⁹ The incidence of harm varies between and within each of these categories. For example, in the case of domestic violence offences, there is evidence of long-lasting physical harm as well as mental health and emotional harm.¹⁰⁰ Courts have recently developed a better understanding of these long-lasting harms, particularly in relation to child sexual abuse.¹⁰¹

Good character can be used to commit the offence or avoid detection

3.88 Some offending is rendered more serious because the offender’s good character assisted them to commit the offence or avoid detection. This applies not only to

95. Your Reference Ain’t Relevant, *Submission GC122*, 15–16.

96. *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.

97. Law Society of NSW, *Submission GC154*, 7; Legal Aid NSW, *Submission GC71*, 18.

98. Legal Aid NSW, *Submission GC71*, 18.

99. NSW Sentencing Council, *Good Character at Sentencing*, Consultation Paper (2024) [3.6]–[3.24], [3.51]–[3.53], [3.66]–[3.71].

100. NSW Sentencing Council, *Good Character at Sentencing*, Consultation Paper (2024) [3.67]–[3.68].

101. *R v Allpass* (1994) 72 A Crim R 561, 565; *R v King* [2009] NSWCCA 117 [41]; *R v Gavel* [2014] NSWCCA 56 [106], [110]–[112]; *Culbert v R* [2021] NSWCCA 38 [115]; *DPP (NSW) v Wolinski* [2024] NSWCCA 139 [233].

child sexual offences but also, for example, to white-collar crime and drug importation by couriers.¹⁰²

- 3.89 The Royal Commission observed that, in many of the case studies it examined, the offender's good character and reputation assisted them to commit the offence, and in some cases enabled them to continue offending even after allegations had been made against them.¹⁰³
- 3.90 Some submissions noted that the logic underpinning such an approach to child sexual offences extends to all survivors of domestic abuse, particularly because domestic violence offences frequently rely on public reputation and social influence to silence victims, evade accountability and discredit victim-survivors.¹⁰⁴ This is recognised by the UK Sentencing Council guidelines:
- one of the factors that can allow domestic violence to continue unnoticed for lengthy periods is the ability of the perpetrator to have a public and a private face. In respect of offences committed within a domestic context, an offender's good character in relation to conduct outside the home should generally be of no relevance where there is a proven pattern of behaviour.¹⁰⁵
- 3.91 One submission observed that, in the case of child sexual offences, adult sexual offences, domestic violence and other offences involving breach of trust or authority, the offender's good character can facilitate grooming, and the offending itself. It may also contribute to silence and secrecy surrounding the behaviour, by decreasing the likelihood a victim will disclose the offending or that people will believe them if they do.¹⁰⁶
- 3.92 There is also a view that good character should not be available in such cases because reliance on it can allow an offender's behaviour to continue, by perpetuating a belief that the offender is a "good person".¹⁰⁷ Some submissions argued that the gathering of written references by an offender at sentencing is also a form of grooming, because authors of these references may themselves have been manipulated by the offender.¹⁰⁸ Such manipulation could, in turn, assist the

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

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

104. Your Reference Ain't Relevant, *Submission GC122*, 10, 14; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission GC148*, 9.

105. UK, Sentencing Council, "Domestic Abuse: Overarching Principles" (24 May 2018) <<https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/domestic-abuse/>> (retrieved 16 June 2025).

106. Bravehearts, *Submission GC138*, 2. See also Grace Tame Foundation, *Submission GC145*, 5; Your Reference Ain't Relevant, *Preliminary Submission PGC34*, 5.

107. Anonymous, *Preliminary Submission PGC10*, 2.

108. Your Reference Ain't Relevant, *Submission GC122*, 13.

offender to gain access to more victims and engage in further offending.¹⁰⁹ In this way, the use of written references may perpetuate and validate the offender's misuse of good character in committing the offence. This is particularly so in relation to child sexual offences, some adult sexual offences and serious fraud.

No restriction on individualised justice or assessing the whole person

- 3.93 Our recommendation to abolish good character as a mitigating factor would not affect a court's ability to assess the whole person or administer individualised justice.
- 3.94 Though an offender would not be able to rely on their good character as a mitigating factor, evidence of their subjective case, including their background, community ties and employment would remain admissible if it is relevant to another consideration in sentencing.
- 3.95 Importantly, existing mitigating factors including a lack of previous convictions, good prospects of rehabilitation, and a low risk of reoffending would remain available.

Evidence will remain admissible for other purposes

- 3.96 While good character would no longer be a discrete mitigating factor, the court would not be deprived of evidence of an offender's background and personal circumstances.
- 3.97 One of the main justifications put forward by submissions for the use of good character at sentencing was that it helps courts to assess the "whole person". Some preliminary submissions highlighted the importance of good character to sentencing, noting that information about a person's character assists in contextualising their behaviour, and is necessary to achieve individualised justice.¹¹⁰
- 3.98 In our view, the whole person can be appropriately and fully assessed using available evidence without the need to make a finding, or even refer to the uncertain, unhelpful and arbitrary concept of good character. Evidence that might have been relied on to establish an offender's good character would remain admissible if it was relevant to a purpose other than establishing an offender's good character. It still has a legitimate use if it has a logical connection to other relevant considerations, such as illustrating an offender's subjective case, and addressing whether an offender:
- has good prospects of rehabilitation

109. MayaKosha Healing, *Preliminary Submission PGC20*, 3, 5.

110. Confidential, *Preliminary Submission PGC22*, 1; NSW Young Lawyers Criminal Law Sub-Committee, *Preliminary Submission PGC84*, 4.

- is at risk of reoffending
- is likely to experience hardship in custody, or
- requires a sentence with an element of specific deterrence.¹¹¹

3.99 In this respect, an analogy may be drawn with restrictions on the use of tendency evidence at trial. While evidence is generally not admissible if it is relied on to establish that the accused had a tendency to act in a particular way or have a particular state of mind (unless certain conditions are met), the same evidence may be admissible if it is relied on for another purpose.¹¹²

Nothing of value in the sentencing process will be lost

- 3.100 As we observed earlier in this chapter, components of good character overlap with other mitigating factors. In our view, nothing of value will be lost by removing good character as a mitigating factor in the sentencing process, because the only components of good character that have a justifiable reason to bear upon the sentencing decision will continue to be covered by other mitigating factors.
- 3.101 For instance, evidence that an offender has no history of criminal offending or anti-social behaviour is currently relied on to establish them as a person of good character. However, this evidence may also be relevant to whether they are likely to re-offend. Similarly, the fact that they are a part of a pro-social community and have the support of family and friends may indicate that they have good prospects of rehabilitation. These factors can be addressed without a finding of good character.
- 3.102 This change would also improve clarity and consistency in the way a lack of previous convictions is taken into account in mitigation. Importantly, in cases where a finding that an offender was of otherwise good character is based entirely on the fact that they had no record of previous convictions, the sentence could be mitigated on that basis, without the need to make a separate finding about character.
- 3.103 This change also addresses the fallacy identified by the Royal Commission, and some submissions to this review, that a finding of prior good character is misleading if it is based solely on a lack of previous convictions.¹¹³

111. See, eg, Aboriginal Legal Service (NSW/ACT) Ltd, *Submission GC169*, 3; Law Society of NSW, *Submission GC167*, 2.

112. *Evidence Act 1995* (NSW) s 97, s 94.

113. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X and Appendices* (2017) 291–292; Rape and Sexual Assault Advocacy and Research Association, *Submission GC127*, 12–13.

- 3.104 While an offender will no longer be able to rely on their moral worth, social contributions or reputation alone to mitigate their sentence, their lack of previous convictions and prospects or rehabilitation will remain relevant and available evidence for consideration.

No need for a finding of good character

- 3.105 We note that the abolition of good character as a mitigating factor would remove the need for courts to use the expression “good character” at all.
- 3.106 In particular, courts would no longer need to make a finding of good character, or to refer to evidence as “evidence of good character” when it is evidence going to another consideration. We accept that elements that might have supported a finding of good character may be referred to for other purposes. If the sort of evidence that might have gone to good character is used, it should be relevantly referred to, for example, as “evidence going to prospects of rehabilitation and/or risk of reoffending”.
- 3.107 We expect that courts will develop their approaches in the new environment to avoid referring to any relevant evidence as “evidence of good character”. The Sentencing Bench Book should be updated to explain the effect of the abolition - that the offender’s good character is not to be taken into account as a mitigating factor – just as it did with self-induced intoxication.¹¹⁴
- 3.108 We note that some submissions suggested removing “good” from the expression to leave the more neutral sentencing consideration of “character”, like that contained in the Commonwealth sentencing law.¹¹⁵ They considered this change would address some of the concerns without total abolition of the mitigating factor. However, this suggestion fails to take into account the binary division of s 21A of the *Sentencing Act* between aggravating and mitigating factors, which requires “character” to be categorised as either good or bad.
- 3.109 Even without the binary restriction, it is likely that sentencing courts would apply the established common law principles of good character when considering “character”. The Office of the Director of Public Prosecutions (Commonwealth) pointed out that sentencing courts have consistently adopted the language of “good character” when considering “character” in Commonwealth sentencing law.¹¹⁶ Therefore, a change in terminology alone would be unlikely to address any of the concerns about the mitigating effect of good character.

114. Judicial Commission of NSW, *Sentencing Bench Book* (May 2024) [10-680] (retrieved 16 June 2025).

115. *Crimes Act 1914* (Cth) s 16A(2)(m).

116. *Crimes Act 1914* (Cth) s 16A(2)(m); Office of the Director of Public Prosecutions (Cth), *Submission GC165* [16].

Legislation should recognise the relevance of evidence to other factors

- 3.110 We do not consider it likely that courts would reject evidence of an offender's subjective circumstances if it was relevant to another mitigating factor.
- 3.111 In formulating the recommendation to abolish good character as a mitigating factor, we considered the practical operation of the law that abolished self-induced intoxication as a mitigating factor on sentence.¹¹⁷ Section 21A(5AA) of the *Sentencing Act*, introduced in 2014, provides that
- in determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor.
- 3.112 While the fact that an offender was intoxicated cannot mitigate a sentence, some courts have considered that intoxication may be taken into consideration if it is relevant to other factors in the sentencing decision. For instance, the fact that an offender was drunk at the time has been considered relevant to a lack of planning and premeditation, or prospects of rehabilitation.¹¹⁸
- 3.113 However, in recent decisions, the CCA interpreted the prohibition more broadly. A majority of the court in the case of *Fisher* found that s 21A(5AA) excluded any consideration of self-induced intoxication that could mitigate a sentence.¹¹⁹ This extends to any explanation of the offender's behaviour that minimises their moral culpability, or impacts on the objective seriousness of the offending.¹²⁰ While Justice Brereton disagreed and considered that self-induced intoxication is still relevant if it informs some other mitigating factor, such as the degree of pre-planning,¹²¹ the decision of the majority remains the construction of the law in NSW.¹²²
- 3.114 We do not think this issue is likely to arise in respect of evidence about an offender's subjective case that may have otherwise been relevant to a finding of good character. Unlike self-induced intoxication, we do not suggest that an offender's good character is relevant to another mitigating factor. Rather, it is pieces of evidence about an offender's background that may remain relevant.
- 3.115 However, for abundant caution we recommend that the legislation that abolishes good character as a mitigating factor specifically provides that evidence may still be considered if it is relevant to another consideration in sentencing.

117. *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW) sch 3 [1], inserting *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5AA).

118. *R v Hines (No 3)* [2014] NSWSC 1273 [48]; *R v Unardi* [2018] NSWDC 512 [12].

119. *Fisher v R* [2021] NSWCCA 91 [221], [224]–[225].

120. *Fisher v R* [2021] NSWCCA 91 [73]–[76], [221], [224]–[225].

121. *Fisher v R* [2021] NSWCCA 91 [27].

122. *Pender v R* [2023] NSWCCA 291 [53].

Unintended consequences are unlikely

- 3.116 Some advocates for retaining the mitigating factor raised concerns that broad negative consequences may flow from its abolition. These include that:
- it would lead to a slippery-slope, and threaten the existence of other important factors on sentence,¹²³ and
 - it would give rise to injustice.¹²⁴
- 3.117 We do not consider that, as some suggested, abolishing good character as a mitigating factor would lead to the abolition of other “unpopular” mitigating factors on sentence, such as mental health considerations.¹²⁵ There is, in our view, significant justification for the abolition of good character. Our reasons for this recommendation are largely specific to that factor and do not apply more broadly to any other factor in the offender’s favour.
- 3.118 Further, we do not consider there to be a risk of unjust outcomes, particularly since we recommend that evidence remain admissible if it is relevant to any other consideration on sentence. In any event, the possibility that “injustice” may be cured in a particular case is not a reason for retaining an otherwise unnecessary, archaic, and unhelpful part of the law.
- 3.119 Some submissions suggested that good character could be used to avoid otherwise unjust outcomes, for example, in domestic violence cases where the predominant victim is convicted of an offence, or where an offender’s earning capacity is compromised to the detriment of a dependant family. In each case, it was submitted that the availability of good character was necessary to reach a decision to impose a conditional release order, preferably without conviction.¹²⁶
- 3.120 However, in such a case many other mitigating factors would remain available, including a lack of previous convictions,¹²⁷ non-exculpatory mitigating factors (like duress,¹²⁸ provocation or diminished responsibility), and consideration, in exceptional cases, of the impact on third parties, such as family members.¹²⁹ Further, the abolition of good character as a mitigating factor does not prevent a court from considering all the facts and circumstances of the case to determine the objective seriousness of the offending, or the offender’s moral culpability.

123. Lawyers and Prosecutors Roundtable, *Consultation GCC01*.

124. Lawyers and Prosecutors Roundtable, *Consultation GCC01*; Legal Aid NSW, *Submission GC71*, 13; NSW Bar Association, *Submission GC161*, 4-5.

125. Lawyers and Prosecutors Roundtable, *Consultation GCC01*.

126. Domestic Violence NSW, *Submission GC119*, 7-8; Full Stop Australia, *Submission GC160*, 10.

127. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(e).

128. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(d).

129. *R v Edwards* (1996) 90 A Crim R 510, 515-517; *R v MacLeod* [2013] NSWCCA 108 [43]-[52]; *Hoskins v R* [2016] NSWCCA 157 [62]-[64].

- 3.121 As we note above, some people, for example, Aboriginal women, may be convicted of a domestic violence offence in circumstances where they are the primary victim, but are unable to take advantage of good character because of ingrained systemic issues. Wirringa Baiya submitted that it was more relevant to such offenders that a court gain an understanding of the offender's life, trauma and disadvantage through considerations other than good character.¹³⁰

Alternative recommendations

- 3.122 While we recognise that abolition of the mitigating factor of good character would be a significant change to the law, for the reasons discussed in this chapter, we consider it the most appropriate course.
- 3.123 However, if our recommendation is not implemented and good character is retained as a mitigating factor, we provide two alternative recommendations. These recommendations do not address many of the concerns raised in this review but do recognise the strong arguments for change in relation to sentencing for child sexual offences.

Extend the special rule to all child sexual offences

Recommendation 3.2: Remove the assistance requirement of the special rule

If good character is retained as a mitigating factor, s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended to remove from the special rule the requirement that the court must be satisfied that the relevant factor was of assistance to the offender in the commission of the offence.

- 3.124 We urge the government, should it decide not to abolish good character generally, to make the mitigating factor of good character unavailable in sentencing for all child sexual offences. This can be achieved by removing the assistance requirement from s 21A(5A) of the *Sentencing Act*.
- 3.125 As we note above, some reasons that speak strongly in favour of abolishing good character relate primarily to its role in sentencing for child sexual offences. There are compelling reasons why good character should not be an available mitigating factor in child sexual offences.
- 3.126 A number of submissions considered that the seriousness of the conduct, the impact on the victims, the prevalence of the offending, and unique dynamics of child sexual offending means good character should never be mitigating in these cases.¹³¹ The fact that child sexual offences usually involve a vulnerable victim and

130. Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission GC148*, 21.

131. Full Stop Australia, *Submission GC160*, 3–5; Victims of Crime Assistance League (Hunter), *Submission GC162*, 12; Fighters Against Child Abuse Australia, *Submission GC62*, 6–7.

the use of power dynamics places them in a special category, particularly because good character can assist the offender to commit the offence.¹³²

- 3.127 Fighters Against Child Abuse Australia distinguished child abuse from all other crimes:

Child abuse is simply the single most unjustifiable crime in the entire criminal justice system. You can justify murder, theft, violence in extreme cases, but with child abuse there can be no justification, no “I needed to do this to feed my family” or “I had to because I feared for my life”. The abuse of our most vulnerable, the most innocent members of our society has no justification what so ever.¹³³

- 3.128 As the NSW Police Force submitted, removing good character from consideration in child sexual offence cases is consistent with community attitudes and ensures that child sexual offenders are appropriately held accountable for offending against the most vulnerable members of society.¹³⁴

- 3.129 Some submissions supported removal of the assistance requirement in the current law noting that it creates a double standard, because it applies only to individuals in more formal positions of authority, leaving family members, friends, and others to use good standing to commit these crimes.¹³⁵ This ignores the reality that a significant number of child sexual offences are domestic or family violence related and the offender is known to the victim. In these cases, it cannot be established that the offender’s good character contributed to their access to the victim in order to exclude its consideration.¹³⁶

- 3.130 The Grace Tame Foundation observed that the assistance requirement is especially problematic, because it renders the special rule redundant in cases where offenders are family members, caregivers or people known to the child victim. They noted that the majority of relevant published decisions found the special rule (with the assistance requirement) inapplicable, and of the inapplicable cases, over 50% were family members or friends of the victim’s family.¹³⁷ We discuss the difficulties with the assistance requirement further, in chapter 6.

132. Law Society of NSW, *Submission GC154*, 7.

133. Fighters Against Child Abuse Australia, *Submission GC62*, 9.

134. NSW Police Force, *Submission GC155*, 3.

135. Grace Tame Foundation, *Submission GC145*, 2; Your Reference Ain’t Relevant, *Submission GC122*, 8; Full Stop Australia, *Submission GC160*, 5–6; Survivors and Mates Support Network, *Submission GC134*, 3.

136. NSW Aboriginal Women’s Advisory Network, *Submission GC164*, 4.

137. Grace Tame Foundation, *Submission GC145*, 2.

Provide discretion to give no weight to good character

Recommendation 3.3: Discretion to give good character no weight in mitigation

If good character is retained as a mitigating factor, legislation should be enacted to provide courts with discretion to give an offender's good character no weight in mitigation of sentence.

- 3.131 In the event that good character remains a mitigating factor on sentence, we also recommend that legislation should be introduced to provide courts with discretion to give this factor no weight in mitigation.
- 3.132 As we discussed in chapter 2, the High Court in *Ryan* set out the steps that a sentencing court must follow when good character is raised by an offender in mitigation of their sentence. First, the court must decide if the offender is of “otherwise good character”.¹³⁸ Second, if the court finds the offender is of good character, it must determine what weight that factor should be given in mitigating the sentence.¹³⁹ Though the court has discretion to give limited weight to an offender's good character, the scope of this discretion does not extend to an ability to give it no weight.¹⁴⁰
- 3.133 Introducing legislation to allow sentencing courts discretion to give an offender's good character no weight in mitigation, or in other words, not extend any leniency to an offender on account of their good character, would overrule one aspect of the majority decision in *Ryan*. It would also resolve any conflict between *Ryan* and the CCA decision in *WG*, which we outline in chapter 2.¹⁴¹
- 3.134 This discretion should be extended to courts in all cases and should not be contingent only on the type of evidence used to prove good character. In our view, a finding of no weight should be available in cases where the facts and circumstances of the offending require it.
- 3.135 The Queensland Sentencing Advisory Council recently recommended that courts should have discretion to give no weight to good character, but only in cases where character references, or evidence of standing or contribution to the community, is the only evidence supporting good character.¹⁴² This has been adopted in a Bill that

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

139. *Ryan v R* [2001] HCA 21, 206 CLR 267 [25].

140. *Ryan v R* [2001] HCA 21, 206 CLR 267 [25], [31], [35].

141. [2.49]–[2.51].

142. Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect*, Final Report (2024) 307, 310–311.

is before the Queensland Parliament,¹⁴³ and is, at the time of writing, being considered by the Justice, Integrity and Community Safety Committee of the Queensland Parliament. While this approach might go some way to addressing concerns about the reliability of written references, courts will still be required to give weight to good character if it is proved by other more “reliable” forms of evidence, such as psychological reports.

- 3.136 If legislation is introduced in NSW to allow courts discretion to give good character no weight in mitigation, we do not think this discretion should be limited to cases where character references are the only source of this evidence.
- 3.137 If granted this discretion, courts may look to circumstances in which good character is currently given limited weight to determine where a finding of “no significant leniency” or “no weight” might be appropriate. As we discuss in chapter 2, good character may be given less weight as a mitigating factor in cases where:
- the objective criminality of the offending is high
 - general deterrence is an important consideration
 - a particular offence is one frequently committed by persons of good character
 - the prior good character of the offender has enabled him or her to gain a position where the particular offence can be committed, or
 - there is a pattern of repeat offending over a significant period of time.¹⁴⁴
- 3.138 These factors are focused not on the reliability of the source of good character evidence, but on the facts and circumstances of the offending behaviour.
- 3.139 It is important to note that legislating to give courts this discretion would still leave good character operating as a mitigating factor and would not address many of the concerns raised in this review. Even with the ability to give the factor no weight in mitigation, a court would not be entitled to reject good character entirely and would still be bound to consider it, even if only to give it no weight. This change would inadequately address broader concerns around good character, including that:
- the use of and reference to good character causes further trauma to victims
 - the mitigating factor is no longer fit for purpose
 - there is no empirical foundation to connect good character to a lower risk of reoffending, and
 - the factor may contribute to inequality before the law.

143. Penalties and Sentences (Sexual Offences) and Other Legislation Amendment Bill 2025 (Qld) cl 12.

144. [2.42]–[2.44]. See also *R v Kennedy* [2000] NSWCCA 527 [21]–[22].

- 3.140 For this reason, we still consider abolition of good character as a mitigating factor the most appropriate course. We only recommend this option in the event our primary recommendation is not implemented.

4. Good character: the dissenting view

In brief

This chapter sets out the views of the two Council members who do not agree with the recommendation to abolish good character as a mitigating factor on sentence.

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In chapter 3, the Council recommended that good character be abolished as a mitigating factor in NSW, both at common law and in statute.

This chapter was written by the two members of the Council, Felicity Graham and Richard Wilson SC, who do not agree with that recommendation.

- 4.1 The following opinion addresses the recommendation that good character should be completely abolished as a factor in sentencing. We acknowledge that in many cases, such as those involving ongoing physical or sexual abuse, prior good character may have little or no significance to the sentence to be imposed. To that end, we support recommendation 3.3 which would clarify that, while a court is required to take into account the factor, it has the discretion to give good character such weight as it considers appropriate – including none at all.
- 4.2 It is a long-standing principle that sentencing courts should take into account prior good character when determining the appropriate penalty to be imposed on an offender for an offence. The principle recognises that the significance of, and the weight to be given to that factor, will depend on all of the circumstances of the case: most importantly the nature and seriousness of the offence. There are a number of reasons why sentencing courts should continue to apply the principle.

Lower moral culpability

- 4.3 Depending upon the type and extent of offending, good character may suggest lower moral blameworthiness, especially if the particular offence is found to be out of character or an aberration in an otherwise law-abiding and prosocial life. A person may have committed an offence in exceptional or pressured circumstances or whilst labouring under a momentary lapse in judgement. Sentencing aims to reflect not only the harm caused by an offence but also the offender's moral culpability for their wrongdoing. This recognition helps to ensure that punishment reflects not just what was done, but why and by whom it was done.

Encouragement of rehabilitation

- 4.4 Recognising good character can encourage an offender to maintain or return to lawful behaviour, aligning with one of the criminal legal system's purposes – rehabilitation - and with the ultimate goal of protecting the community.

Proportionality and individualised justice

- 4.5 Sentencing aims to be fair and proportionate. Considering good character ensures that the punishment fits not only the crime but also the person who committed it. This is often encapsulated in the idea that a court is 'sentencing the whole person', such that a judicial officer must look beyond the crime itself and take into account the broader context of the offender's life and character in order to arrive at a just result. In this way sentencing courts are responsive to an offender's life story and potential for the future. Sentencing is not a mechanical exercise, but involves an inherently human task.

Reduced risk of reoffending and improved prospects of rehabilitation

- 4.6 Depending upon the type and extent of offending, individuals with a history of good conduct may be seen as less likely to commit future crimes, and more likely to have good prospects of rehabilitation, making harsher punishment potentially unnecessary and counter-productive in some cases.

Overlapping factors and wrong exclusion of evidence

- 4.7 Unlikelihood of reoffending and good prospects of rehabilitation are already included as mitigating factors in s 21A. Evidence adduced in relation to these factors often overlaps with evidence that is adduced in relation to prior good character. This means that eliminating good character will not necessarily shield victims of crime from such evidence being adduced. Abolishing prior good character as a factor to be taken into account may have a tendency to encourage courts to wrongly exclude evidence from consideration, create unnecessary complexity and lead to further litigation of matters where the evidence will be publicly re-iterated.

A harsher approach is not warranted

- 4.8 In essence, good character as a mitigating factor allows the justice system to deliver more individualised and just outcomes. Removing the requirement to consider evidence of prior good character is reactive to populist demands for, and likely to further encourage, a more severe approach to sentencing. There is no evidence such an approach better protects the community and indeed much evidence to the contrary. There is also no evidence that courts have been taking good character into account in ways that are leading to unjustifiably lenient sentences.

Good character is accessible and inclusive

- 4.9 Proponents of abolishing prior good character as a mitigating factor point to the potential for the factor to operate as a ‘privilege discount’. That is an important critique – that it benefits those with stable upbringings, higher education and access to opportunities, while disadvantaging those from marginalised or disadvantaged backgrounds who may have prior convictions due to structural inequalities or have lacked opportunities for steady employment or to perform community service through well recognised organisations. However, there are a number of matters we wish to address in response to this critique.
- 4.10 Good character is not synonymous with social privilege. It can be demonstrated through lawful behaviour, community service, family responsibility, selflessness and honesty – qualities that exist across socioeconomic strata. Most people from disadvantaged backgrounds live law-abiding, constructive lives. The concept of good character, properly applied, is accessible and inclusive. Nor is good character synonymous with a lack of previous convictions of any kind. Depending upon the type, age and seriousness of previous convictions, a convicted offender can be found to be a person of good character.
- 4.11 Sentencing principles already recognise disadvantage in other ways. Sentencing courts may consider social disadvantage, trauma, discrimination or deprivation as relevantly mitigating. For example, a court may take into account, in an offender’s favour, that they have a history of having suffered systemic racism or abuse, or having committed poverty-driven offences.
- 4.12 Justice requires individualisation, not equal harshness. Treating everyone exactly the same regardless of background or conduct may seem equal, but it can lead to unfair outcomes. Sentencing must be individualised. Someone who has lived a responsible, law-abiding life and then commits a single offence may deserve leniency – not because they are privileged but because proportionality and personal culpability demand it.
- 4.13 Encouraging rehabilitation helps everyone. Recognising good character, especially for first-time offenders and offenders who have committed an isolated offence out

of step with their values and with their behaviour before and after, serves rehabilitative and preventive purposes. These aims benefit society as a whole. If we remove consideration of good character out of concern for equality, we risk eroding incentives for reform. We risk treating people as beyond redemption, especially those who have otherwise demonstrated social responsibility.

- 4.14 The real issue is unequal access to justice, not the principle itself. Evidence of good character may take a myriad of forms. The problem here may lie less in recognising prior good character as a mitigating factor and more in ensuring that all offenders have the opportunity to present their full individual circumstances to the court. Addressing this means improving access to legal representation, especially funding for Legal Aid NSW and the Aboriginal Legal Service. It may also mean improving legal and judicial education to avoid narrow views about how good character might manifest and be proven. By analogy, in recent years, there has been increasing understanding about how to recognise and present evidence of disadvantage because of educational endeavours such as the *Bugmy Bar Book Project*.
- 4.15 While the concern about a ‘privilege discount’ highlights real risks of unequal treatment, the solution is not to eliminate good character as a mitigating factor, but to ensure its fair and equitable application. The criminal legal system must balance consistency with individualised justice, ensuring that no one is punished unfairly – whether due to privilege or lack of it.

Balancing fairness to offenders with compassion for victims

- 4.16 Proponents of abolishing prior good character as a mitigating factor also rely on the traumatising effect on victims of evidence of prior good character and of the submissions and judicial findings based on it. This is a very important concern. Emphasising an offender’s good character, especially if it appears to excuse or downplay the harm done, may tend to have this effect. This concern is especially pronounced in cases involving sexual or other violence or abuse and where there has been an abuse of power by the offender.
- 4.17 Mitigation of a sentence does not excuse the crime. Recognising good character as a mitigating factor is not a defence, nor does it deny that harm has occurred or downplay the seriousness of an offence. Recognising good character, where such a finding is made on the evidence, simply helps the court decide on a proportionate and just sentence based on the full context, including the seriousness of the offence and the offender’s background. Courts can – and should – acknowledge the victim’s suffering and the seriousness of the offending while also recognising that not all offenders are the same.
- 4.18 Victim impact statements are an important mechanism by which victims may inform the court about the impact of offending on their lives. This is one way of ensuring that the victim’s voice is part of the process.

- 4.19 Sentencing serves multiple purposes. It is a complex task in which many facts and factors must be weighed, many of which point in different directions. Ignoring or eliminating mitigating factors to avoid causing upset – or even re-traumatisation – to victims risks turning sentencing into a retributive performance, rather than a just and principled process. Our courts are both required and equipped to balance fairness to the offender with compassion for, and vindication of, victims. Sentencing courts can carefully acknowledge and validate a victim’s experience while still taking into account factors like good character. Sentencing judgments typically make clear that mitigation does not reduce the harm to a victim, helping to reduce the risk of re-traumatisation. However, training for participants in the judicial system, including judicial officers and advocates appearing on both sides, on conducting sentencing proceedings with a trauma-informed approach could enhance the overall capacity of the system to accommodate the interests of victims.
- 4.20 A fair process is a safeguard for all. Victims ultimately benefit from a justice system that is principled, even-handed, and seen as fair – even if the outcome, or an aspect of the process, is painful. A system that disregards fairness to the accused or individualised justice in favour of emotional satisfaction can become arbitrary and unjust, undermining public confidence in justice for everyone, including victims.

A risk of ongoing litigation

- 4.21 Finally, given the extent to which the principles around character are inherent to both the common law and statute-based criminal law throughout Australia, a fundamental change such as complete removal of this principle is likely to result in extensive litigation over many years and in many unintended and unforeseen consequences. The fact that it is not possible to predict those consequences is not a cogent argument in favour of radical and unnecessary change.

5. Lack of previous convictions as a mitigating factor

In brief

A lack of previous convictions should remain a mitigating factor on sentence. We do not recommend any change to this mitigating factor, which has a useful role and limited range of operation.

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- 5.1 An offender who does not have any record (or any significant record) of previous convictions is entitled to have that fact taken into account in mitigation of sentence. A lack of previous convictions is a mitigating factor both at common law, and in statute.¹
- 5.2 When properly applied, a lack of previous convictions cannot lead to a sentence that does not reflect the objective seriousness of the offence. Just as the principle of proportionality dictates that a sentence should not exceed what is proportionate to the gravity of the crime, it also applies so that a sentence should not be less than what the objective seriousness of the offence requires.²
- 5.3 Like good character, this mitigating factor is subject to the special rule that applies to child sexual offences. That is, the fact that an offender lacks previous

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(e); *Veen v R (No 2)* (1988) 164 CLR 465.

2. *Veen v R (No 2)* (1988) 164 CLR 465; *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [156]–[158].

convictions cannot be taken into account as a mitigating factor if it assisted them in committing the offence.³

5.4 The terms of reference for this review ask us to consider:

- the interaction between good character and other mitigating factors and the purposes of sentencing, such as a lack of previous convictions, and
- whether the limitations on the use of evidence of a lack of previous convictions in the special rule under s 21A(5A) should be extended to all child sexual offences.

5.5 While an absence of previous convictions may reflect an offender's character,⁴ it is a separate mitigating factor in the *Crimes (Sentencing Procedure) Act 1999* (NSW).⁵ As we discuss in chapters 2 and 3, there is often overlap between the concepts of good character and a lack of previous convictions. They are at times conflated in sentencing remarks and are difficult to separate.

5.6 Because there is an interaction between the two mitigating factors, we considered whether the existing mitigating factor of a lack of previous convictions should be retained or removed entirely, and if the special rule, as it applies to a lack of previous convictions, should be altered.

5.7 We have reached two conclusions:

- there should be no change to the mitigating factor of a lack of previous convictions, and
- the special rule should no longer apply to this mitigating factor in any form.

5.8 The first of these conclusions is the subject of this chapter. The second is considered in chapter 6.

Some supported abolishing the mitigating factor

5.9 Some submissions argued that a lack of previous convictions should not be a mitigating factor.⁶ There was particular support for this proposal among victims and victim advocacy groups.⁷

3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A).

4. 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, 585.

5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(e).

6. Your Reference Ain't Relevant, *Submission GC122*, 6; Victims of Crime Assistance League (Hunter), *Submission GC162*, 10; Survivors and Mates Support Network, *Submission GC134*, 5–6.

7. Your Reference Ain't Relevant, *Submission GC122*, 6; Victims of Crime Assistance League (Hunter), *Submission GC162*, 10; Survivors and Mates Support Network, *Submission GC134*, 5–6.

- 5.10 While some submissions considered that the mitigating factor should be abolished entirely,⁸ others were of the view that the factor should only be unavailable for certain offence types, such as:
- murder offences⁹
 - violent offences
 - sexual offences
 - Table 1 and strictly indictable offences, and
 - domestic violence offences.¹⁰

An absence of convictions is not the whole picture

- 5.11 One argument in support of reform is that a lack of previous convictions should not mitigate a sentence because it does not present the full picture of an offender's past behaviour or conduct.
- 5.12 Some submitted that mitigating a sentence because an offender lacks a recorded conviction may be inaccurate and misleading,¹¹ and relies on a false assumption that there has been no previous offending.¹² The fact that an offender does not have a record of convictions does not mean that they have never offended before.
- 5.13 This argument is particularly applicable to sentencing for types of offences that are typically undetected or underreported, or occur in private against vulnerable victims, such as child sexual offences, sexual offences against adults, and domestic violence offences.¹³ A lack of previous convictions, particularly in these types of cases, might not be a reliable indicator of previous offending.¹⁴ Rather, it might instead reflect the covert nature of these offences, and the fact that they are difficult to detect, report, or prosecute.¹⁵
- 5.14 Others pointed out that, particularly in cases of child sexual offending, an offender may engage in a pattern of offending behaviour over an extended period or begin

8. Your Reference Ain't Relevant, *Submission GC122*, 6; Victims of Crime Assistance League (Hunter), *Submission GC162*, 10; Survivors and Mates Support Network, *Submission GC134*, 5–6.

9. E Culleton, *Submission GC163*, 9.

10. NSW Police Force *Submission GC155*, 2.

11. MayaKosha Healing, *Submission GC60*, 7.

12. Survivors and Mates Support Network, *Submission GC134*, 5. See also Anonymous, *Submission GC06*, 3; Rape and Sexual Assault Advocacy and Research Association, *Submission GC127*, 11; E Culleton, *Submission GC163*, 9.

13. Your Reference Ain't Relevant, *Submission GC122*, 6; Survivors and Mates Support Network, *Submission GC134*, 5; Victims of Crime Assistance League (Hunter), *Submission GC162*, 10.

14. B Spence, *Submission GC61*, 2.

15. NSW Police Force, *Submission GC155*, 2; Domestic Violence NSW, *Submission GC119*, 6; B Spence, *Submission GC61*, 2; E Culleton, *Submission GC163*, 9.

grooming and exploitation years before offences are reported or detected.¹⁶ In these cases, it has been submitted that offenders should not be entitled to leniency simply because they have not been caught before.¹⁷

5.15 Your Reference Ain't Relevant submitted that

[g]ranting leniency to offenders based on an absence of prior convictions ignores the well-documented reality that many perpetrators have engaged in misconduct long before they are caught.¹⁸

5.16 For this reason, Your Reference Ain't Relevant considered the assumption that a clean record means there will be a lower risk of reoffending to be “fundamentally flawed”.¹⁹

Mitigation fails to reflect the seriousness of the offence

5.17 Submissions also argued that the mere absence of previous convictions did not mean that an offence should be considered less serious.²⁰

5.18 One submission observed that treating a sexual offence as a “first offence” may overlook elements of premeditation, and “create an impression that the offence was an isolated lapse in judgment, rather than part of a systematic and predatory pattern”.²¹

5.19 It may also give an appearance of diminishing the harm caused to the victim, by shifting the focus away from the harm and gravity of the offence.²² Victims of Crime Assistance League (VOCAL), for example, submitted that allowing mitigation because an offender lacked previous convictions does not properly reflect the harm that the offence caused to the victim and the community.²³

5.20 Those in support of removing the mitigating factor emphasised that the focus in sentencing should remain on the severity of the crime and impact on the victim.²⁴

16. NSW, Office of the Advocate for Children and Young People, *Submission GC156*, 1; Your Reference Ain't Relevant, *Submission GC122*, 6; Victims of Crime Assistance League (Hunter), *Submission GC162*, 10. See also MayaKosha Healing, *Submission GC60*, 6–7.

17. Victims of Crime Assistance League (Hunter), *Submission GC162*, 10.

18. Your Reference Ain't Relevant, *Submission GC122*, 6.

19. Your Reference Ain't Relevant, *Submission GC122*, 6. See also Victims of Crime Assistance League (Hunter), *Submission GC162*, 10.

20. See, eg, Victims of Crime Assistance League (Hunter), *Submission GC162*, 10.

21. MayaKosha Healing, *Submission GC60*, 6–7.

22. M Smith, *Submission GC40*, 1.

23. Victims of Crime Assistance League (Hunter), *Submission GC162*, 10.

24. Your Reference Ain't Relevant, *Submission GC122*, 6; Victims of Crime Assistance League (Hunter), *Submission GC162*, 10.

Mitigation is likely to benefit some groups unequally

- 5.21 Some submissions also raised concerns that a lack of previous convictions as a mitigating factor causes inequality in the sentencing process, because some groups are more likely to have had previous interactions with the criminal justice system.²⁵ For instance, the Intellectual Disability Rights Service pointed out that people with disability are more likely to have contact with the criminal justice system. Offenders with disability may then be more likely to have a history of previous offences.²⁶
- 5.22 VOCAL submitted that the mitigating factor is also more likely to benefit those with greater access to legal resources, influence or institutional connections, who are more likely to be charged but not convicted.²⁷

The mitigating factor should remain

- 5.23 We acknowledge that, like good character, a lack of previous convictions may not show the full picture of an offender's actions and may be more likely to benefit those from a privileged background.
- 5.24 However, we do not recommend removing this mitigating factor. In contrast to good character, a lack of previous convictions is a more reliable and objective factor with a limited scope. It has direct relevance to recognised purposes of sentencing, including the rehabilitation of an offender, prevention of crime, and protection of the community.
- 5.25 We do not consider it desirable to make the mitigating factor unavailable for certain classes of offences. The mitigating factor should apply consistently across all offences, and courts should retain the discretion to give the factor limited weight in appropriate circumstances.

It is an objective factor with limited scope

- 5.26 Unlike the subjective, speculative, and arbitrary concept of good character, a record of previous convictions is a measure that is objective and easy to define.

25. Intellectual Disability Rights Service, *Submission GC125*, 5; Victims of Crime Assistance League (Hunter), *Submission GC162*, 11.

26. Intellectual Disability Rights Service, *Submission GC125*, 5.

27. Victims of Crime Assistance League (Hunter), *Submission GC162*, 11.

- 5.27 In contrast to written references attesting to an offender's good character, evidence of a lack of previous convictions is established through formal records, which can be tested objectively.²⁸ It does not rely on subjective or biased opinion.
- 5.28 Further, a lack of previous convictions has clear bounds. It is only evidence that an offender has never been convicted of a criminal offence. It does not mean that they have not previously engaged in criminal activity.²⁹ The Court of Criminal Appeal (CCA), for example, has drawn a distinction between a finding that an offender had no previous convictions and a finding that the offender has not, as a matter of fact, engaged in any offending conduct.³⁰
- 5.29 Notably, without good character operating as a mitigating factor, courts will be unable to rely on an absence of criminal convictions to make broader conclusions about the offender's good character.
- 5.30 When considered on its own, courts have construed a lack of previous convictions narrowly. For instance, the mitigating factor may be unavailable when an offender is being sentenced for multiple offences, even though they have no recorded convictions at the time of sentence. The CCA in one case involving fraud observed:
- [the offender] was not a first offender from the time he committed the second offence, only he had not been caught out. ... In many respects the position may be compared with a sexual offender who commits a number of offences on young persons over a number of years where those offences go undetected for a long time. He cannot rely on the fact that he has no previous convictions when he comes to be sentenced for those offences. These offences are of a very different nature but, so far as relying on prior good character, it seems to me that similar considerations apply.³¹
- 5.31 An offender may also be deprived of the leniency the mitigating factor might otherwise have given them if they committed further offences after the crime for which they are being sentenced.³² In the case of *MAK*, the offender was not given leniency even though he was being sentenced for a sexual assault that took place before other offences for which he had already been convicted and sentenced. The CCA held that, given the seriousness of the conduct, the fact that the offender had no previous convictions at the time of the offence was not "a basis for treating as a mitigating factor the absence of any criminal record".³³

28. 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.

29. NSW Sentencing Council, *Good Character at Sentencing*, Consultation Paper (2024) [5.14]; *Richards v R* [2023] NSWCCA 107 [83]–[85].

30. See, eg, *Richards v R* [2023] NSWCCA 107 [83].

31. *R v Smith* [2000] NSWCCA 140 [21]–[22].

32. *R v MAK* [2006] NSWCCA 381 [61].

33. *R v MAK* [2006] NSWCCA 381 [61].

- 5.32 Even where the mitigating factor is available, the nature and seriousness of the offending may mean that an offender’s lack of convictions is given less weight in the sentencing decision.³⁴

Previous convictions can be relevant to the sentencing decision

- 5.33 The subjective features of an offender, including their previous convictions (or lack of them) is a relevant consideration in sentencing. It is a factor that a court can take into account to assess the importance of, and balance the various purposes of sentencing, including:
- promoting the rehabilitation of the offender
 - protecting the community from the offender, and
 - preventing crime by deterring the offender from committing similar offences.³⁵
- 5.34 The inclusion of a lack of previous convictions as a mitigating factor recognises that it can be relevant to assessing an offender’s risk of reoffending and prospects of rehabilitation.

Assessing risk of reoffending and prospects of rehabilitation

- 5.35 Whether or not an offender has previous convictions is a factor that can assist in predicting their risk of reoffending and assessing their prospects of rehabilitation.³⁶ Promoting the rehabilitation of an offender is a recognised purpose of sentencing and can help to prevent crime.³⁷
- 5.36 The courts have traditionally accepted that having a record of previous convictions may suggest that an offender’s behaviour was not an “uncharacteristic aberration”. On the other hand, a lack of previous convictions has been said to show that the behaviour was out of character and may indicate that the offender was unlikely to reoffend.³⁸ This could also be the case where there was a long gap in offending.³⁹
- 5.37 Importantly, the relationship between past offending and future behaviour is more than a traditionally applied assumption based on concepts of character. There is evidence that the number of previous convictions is a powerful predictor of the

34. See, eg, *R v DJH* [2016] NSWDC 211 [104].

35. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A. See also NSW Bar Association, *Submission GC161* [7].

36. Law Society of NSW, *Submission GC154*, 5; Legal Aid NSW, *Submission GC71*, 13.

37. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

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

39. NSW Sentencing Council, *Good Character at Sentencing*, Consultation Paper (2024) [2.53].

likelihood that an offender will offend again.⁴⁰ Possessing a record of previous convictions is an accepted “criminogenic factor” that is statistically associated with an increased risk of offending and is used in risk assessment tools.⁴¹ Studies have found a history of previous offending to be the strongest predictor than an offender will reoffend.⁴²

- 5.38 Unlike modifiable, or “dynamic” risk factors, such as substance use or unemployment, “static” risk factors, like a record of convictions are not susceptible to change and provide “information about an unchanging baseline level of risk”.⁴³ Static risk factors may also be a more reliable indicator of future behaviour than dynamic factors because they are often readily available through formal record keeping systems.⁴⁴

The importance of specific deterrence and protection of community

- 5.39 One purpose of sentencing is to prevent crime by deterring the offender from going on to commit similar offences.⁴⁵ This is known as “specific deterrence”. Courts have recognised that there is less need for specific deterrence if an offender has good prospects of rehabilitation and is unlikely to reoffend.⁴⁶
- 5.40 Allowing an offender’s lack of previous convictions to operate in mitigation of sentence recognises that specific deterrence is of less importance, and that there may be less need for a punitive sentence.⁴⁷

40. K Warner, “Sentencing Review 2008–2009” (2010) 34 *Criminal Law Journal* 16, 19; J Halliday, C French and C Goodwin, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (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); *Ryan v R* [2001] HCA 21, 206 CLR 267 [29].

41. A Raudino and others, *The Community Triage Risk Assessment Scale (Community TRAS): A Statistical Model for Predicting Recidivism among Community-Based Offenders*, Research Bulletin No 38 (Corrective Services NSW, 2018) 4.

42. A Raudino and others, *The Community Triage Risk Assessment Scale (Community TRAS): A Statistical Model for Predicting Recidivism among Community-Based Offenders*, Research Bulletin No 38 (Corrective Services NSW, 2018) 3.

43. K Eagle and A Ellis, *Risk Assessment Tools and Their Efficacy*, (2025) 37 *Judicial Officers’ Bulletin* 36. See also A Raudino and others, *The Community Triage Risk Assessment Scale (Community TRAS): A Statistical Model for Predicting Recidivism among Community-Based Offenders*, Research Bulletin No 38 (Corrective Services NSW, 2018) 3–4.

44. A Raudino and others, *The Community Triage Risk Assessment Scale (Community TRAS): A Statistical Model for Predicting Recidivism among Community-Based Offenders*, Research Bulletin No 38 (Corrective Services NSW, 2018) 4.

45. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

46. See, eg, *R v Mauger* [2012] NSWCCA 51 [39]; *Stanford v R* [2007] NSWCCA 73 [19].

47. Legal Aid NSW, *Submission GC71*, 13.

- 5.41 It has been observed that furthering the rehabilitation of an offender may, in an appropriate case, further community protection.⁴⁸

Government should monitor the operation of the factor

- 5.42 The NSW Government should monitor the operation of a lack of previous convictions as a mitigating factor, in the context of the abolition of good character.
- 5.43 At present, we do not precisely know how the courts would respond to a lack of previous convictions standing alone as a mitigating factor without good character also being available. This is because most of the statements in case law have conflated a lack of previous convictions with the other aspects of character under the general mitigating factor of “good character”.
- 5.44 It is important that a lack of previous convictions does not lead to an assumption that an offender has no history of misconduct or criminal behaviour and is not used to reach conclusions about an offender’s good character, or to circumvent the abolition of good character as a mitigating factor.

48. *R v Zamagias* [2002] NSWCCA 17 [32].

6. Consequential issues

In brief

Other parts of the *Crimes (Sentencing Procedure) Act 1999* (NSW) require amendment, following from our recommendation to abolish good character as a mitigating factor. We recommend that the special rule in s 21A(5A) be repealed, and that the government review the factors a court must consider when deciding to dismiss an offender without penalty, or to impose a conditional release order. We also consider the role of good character in guideline judgments and how our recommendations relate to young offenders.

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- 6.1 This chapter considers other issues arising from our recommendations. This includes amendments that are needed to give effect to our recommendation that good character be abolished as a mitigating factor, and to ensure the law remains clear and consistent.

The special rule

- 6.2 The special rule restricts the availability of good character and a lack of previous convictions as mitigating factors in sentencing an offender for a child sexual offence. Section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*Sentencing Act*) sets out the rule:

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.

- 6.3 The special rule and its origins are discussed in chapter 2.

- 6.4 If recommendation 3.1 is implemented and good character is removed as a mitigating factor, the special rule, if retained, would only apply to a lack of previous convictions. We, therefore, considered what role, if any, the special rule should continue to have in relation to a lack of previous convictions.
- 6.5 Consideration of an offender's good character and lack of previous convictions is often combined in sentencing remarks, reviews, and academic commentary. Submissions mostly considered the rule generally, rather than how it applies to each mitigating factor separately. However, we have taken what they have said into account to the extent that their comments are relevant to the rule's application to a lack of previous convictions.

The special rule should be repealed

Recommendation 6.1: Repeal the special rule

Legislation should repeal the special rule as stated in s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

- 6.6 We recommend that s 21A(5A) be repealed, leaving the mitigating factor of lack of previous convictions to operate on its own.¹ The effect of such a change is that the special rule will no longer apply to this mitigating factor. A lack of previous convictions will therefore be available as a mitigating factor on sentence for all offences, including child sexual offences.
- 6.7 The mitigating factor will be available even in cases where an offender's lack of previous convictions assisted them in the commission of the offence. However, for the reasons outlined below, we do not consider there is a strong case for retaining the special rule only for the mitigating factor of a lack of previous convictions.
- 6.8 In chapter 5 we encourage the government to monitor the operation of the lack of previous convictions as a mitigating factor once good character is abolished. This monitoring should include consideration of the impact of the removal of the special rule.
- 6.9 As we explain below, we make this recommendation because:
- once divorced from good character, a lack of previous convictions is a narrow concept and the special rule (with or without the assistance requirement) is not needed
 - the special rule is not operating effectively, and these problems will remain
 - it is desirable to have a consistent approach across all offences, and

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(e).

- there is no justification for expanding the coverage of the special rule to all offenders.

Lack of previous convictions alone has a narrow field of operation

- 6.10 As we note in chapter 5, once separated from considerations of good character, the mitigating factor of a lack of previous convictions has a very narrow field of operation. The Court of Criminal Appeal (CCA) has observed that, by itself, a lack of previous convictions is only evidence of the fact that an offender has not been convicted of a criminal offence. It is not evidence of an absence of offending.²
- 6.11 Some submissions raised concerns that this narrow scope was not adequately or consistently acknowledged by the courts across all cases, particularly in relation to child sexual offences.³ The boundaries of a lack of previous convictions may be more important to acknowledge in child sexual offence cases, because a lack of convictions may simply be indicative of delays in reporting, low reporting rates, institutional barriers to reporting, and high attrition rates when matters are reported.⁴
- 6.12 Unlike good character, a lack of previous convictions is an objective and measurable fact and does not have to be examined extensively to reach a finding that the mitigating factor is engaged. We therefore do not expect that reference to this mitigating factor alone will have the same negative impact on victims that discussion of good character can have.

The special rule is not operating effectively: the assistance requirement

- 6.13 For the special rule to apply, an offender's good character or lack of previous convictions must have assisted them to commit the offence. This is commonly referred to as the "assistance requirement". Submissions raised concerns that the assistance requirement is difficult to apply, and when applied, it is often done inconsistently or problematically.⁵
- 6.14 Courts have held that, for the special rule to apply, an offender's good character or lack of previous convictions must have made some "material contribution" to the

2. *Richards v R* [2023] NSWCCA 107 [83]–[85].

3. Rape and Sexual Assault Research and Advocacy, *Submission GC127*, 12–13; Bravehearts Foundation Ltd, *Submission GC138*, 3–4; NSW Aboriginal Women's Advisory Network, *Submission GC164*, 4; Ellie, *Preliminary Submission PGC40*, 5.

4. Bravehearts Foundation Ltd, *Submission GC138*, 3–4; NSW Aboriginal Women's Advisory Network, *Submission GC164*, 4; Ellie, *Preliminary Submission PGC40*, 5.

5. Rape and Sexual Assault Research and Advocacy, *Preliminary Submission PGC42*, 2; Rape and Sexual Assault Research and Advocacy, *Submission GC127*, 4; Grace Tame Foundation, *Preliminary Submission PGC43*, 3, 4–5; Full Stop Australia, *Preliminary Submission PGC78*, 5; Office of the Director of Public Prosecutions NSW, *Preliminary Submission PGC83*, 5–7.

commission of the offence.⁶ Where no such connection is established, an offender may still be able to rely on their prior good character or lack of previous convictions as mitigating factors, subject to the operation of the common law.⁷

- 6.15 Some submissions suggested that the assistance requirement sets an evidential hurdle that is too high and is applied too narrowly.⁸ However, the CCA has said the assistance requirement is not “an especially high causal threshold to overcome”, but does place a “practical, if not evidential, onus” on the prosecution to satisfy the court of the condition.⁹ The Aboriginal Legal Service argued that the threshold was low, simply requiring “some material contribution”.¹⁰
- 6.16 For instance, in the case of *Bhatia*, the offender babysat and cared for the victim while the victim’s parents were at work. Though the offences occurred when the offender was babysitting, the CCA concluded that the evidence, at best, showed that the victim’s father had known the offender for 20 years and trusted him. There was no evidence that the father had assessed the character of the offender or considered whether he had criminal convictions.¹¹
- 6.17 Notwithstanding the conclusion on the facts of the case, Justice Hamill 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.¹²
- 6.18 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.¹³

6. *Bhatia v R* [2023] NSWCCA 12 [13].

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

8. Rape and Sexual Assault Research and Advocacy, *Submission, Submission GC127*, 4; Grace Tame Foundation, *Preliminary Submission PGC43*, 4–5; M Smith, *Submission GC40*, 1. See Your Reference Ain’t Relevant, *Submission GC122*, 13, 15.

9. *Bhatia v R* [2023] NSWCCA 12 [13]–[14].

10. Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PGC69*, 3; *Bhatia v R* [2023] NSWCCA 12 [13].

11. *Bhatia v R* [2023] NSWCCA 12 [15], [141]–[143].

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

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

- 6.19 The assistance requirement was also criticised in submissions because it sets up an arbitrary and flawed distinction between circumstances of offending that may not be based in reality,¹⁴ and causes the special rule to be applied inconsistently.¹⁵
- 6.20 The inconsistent application is evident in some cases considering the special rule. For example, in one case, the good character of an offender was found to have assisted the commission of the offence where the offender was a childcare worker and their good character assisted them in securing their role.¹⁶ In another case, the offender was a friend of the victim's parents and was trusted to take care of the victim. The court found that his good character had assisted the commission of the offence because the offender and the victim's family both lived in a country town and if he had lacked good character or had previous convictions it would have been known in the town, and he would likely not have been trusted to care for the child.¹⁷
- 6.21 On the other hand, a court found good character did not assist in the case of an offender who was a high school teacher and offended against a student.¹⁸ In another case, a court found good character did not assist an offender who was the victim's foster parent and had been required to undergo background checks for the victim to be placed in his care.¹⁹ The CCA was split in another case as to whether good character had been of real assistance to an offender who was the victim's stepfather.²⁰
- 6.22 One submission also pointed to the complexity that may arise where an offender has committed offences both against victims in an institutional environment and against victims in a family environment.²¹
- 6.23 Aside from the challenges raised by the assistance requirement, we also heard that the special rule is of little practical use, because "the most common perpetrator of child sexual abuse is the survivor's parent or guardian — a person who seemingly cannot have evidence led that establishes they gained access to the child because of their good character".²²

14. Full Stop Australia, *Submission GC160*, 5; Grace Tame Foundation, *Submission GC145*, 2. See also Your Reference Ain't Relevant, *Submission GC122*, 8, 12; Full Stop Australia, *GC160*, 5.

15. Rape and Sexual Assault Research and Advocacy, *Submission GC127*, 15–16; Full Stop Australia, *Submission GC160*, 5–6.

16. *R v Stoupe* [2015] NSWCCA 175 [86]–[87].

17. *R v Rose* [2022] NSWDC 705 [45].

18. *R v Hovell* [2021] NSWDC 326 [140].

19. *R v NC* [2020] NSWDC 547 [48]–[49].

20. *GG v R* [2018] NSWCCA 280 [10], [98]–[99].

21. Survivors and Mates Support Network, *Submission GC134*, 5.

22. Rape and Sexual Assault Research and Advocacy, *Submission GC127*, 16.

- 6.24 Another concern was that the special rule leaves open the possibility of good character being raised in all cases, even if only to be ultimately rejected as a mitigating factor because it assisted in the commission of the offence. As we observe in chapter 3, even reference to “good character” can be retraumatising for victims.

Consistency of approach across all offences is desirable

- 6.25 At present, there is also inconsistency because the special rule does not apply to all offences. To achieve consistency, the special rule (with the assistance requirement) could apply to all offences, or it could be removed for all offences.
- 6.26 Some submissions advocated for a consistent application across all offences.²³ The Children’s Court, for instance, submitted that the “law should be consistent and apply equally to all offenders and all classes of victims”.²⁴
- 6.27 On the other hand, some submissions supported extending the special rule to only some offences, such as:
- sexual offences²⁵
 - violent offending²⁶
 - domestic violence offences²⁷
 - any offence where there is a significant power imbalance between victim and offender,²⁸ and
 - murder,²⁹ or aggravated forms of murder.³⁰
- 6.28 Extending the special rule (with the assistance requirement) to all offences will only continue the problems that already exist with the assistance requirement.
- 6.29 This would also lead to a situation where the special rule applied only to specified offences and/or offenders who met the assistance requirement. This would present particular challenges in cases involving multiple offences, where some offences were subject to the special rule, and some were not.

23. M Smith, *Submission GC40*, 2; F Gilroy, *Submission GC59*, 36.

24. Children’s Court of NSW, *Submission GC158*, 2.

25. Your Reference Ain’t Relevant, *Submission GC122*, 10; Victims of Crime Assistance League (Hunter), *Submission GC162*, 14; Office of the Advocate for Children and Young People (NSW), *Submission GC156*, 2.

26. NSW Police Force, *Submission GC155*, 2.

27. Your Reference Ain’t Relevant, *GC122*, 14–15; NSW Police Force, *Submission GC155*, 4; E Culleton, *Submission GC163*, 16.

28. Your Reference Ain’t Relevant, *Submission GC122*, 11.

29. NSW Police Force, *Submission GC155*, 4.

30. E Culleton, *Submission GC163*, 5.

- 6.30 Based on the problems with the application of the special rule and our conclusions in chapter 5 about the usefulness of previous convictions as a consideration, it is preferable to have the mitigating factor of a lack of previous convictions available for all offences. This can be achieved by repealing the special rule.

Character in other aspects of sentencing

- 6.31 Consideration of good character arises in some other aspects of sentencing:
- the matters that courts must consider in deciding whether to order a dismissal with no conviction, or impose a conditional release order, and
 - some guideline judgments.
- 6.32 In light of our primary recommendation to abolish good character as a mitigating factor, we consider it necessary to consider these other aspects of sentencing. This is important because the reasons for abolishing good character as a mitigating factor, in particular reducing harm to victims, apply equally in other aspects of sentencing. It would undermine the primary recommendation if good character was still considered in other aspects of sentencing.

Character as a factor in non-custodial orders

Recommendation 6.2: Amend considerations for some sentencing options

The lists of considerations before proceeding to no conviction, or imposing a conditional release order under s 9(2)(a) and s 10(3)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), should be amended to remove consideration of an offender's "character".

- 6.33 Currently, some non-custodial sentencing orders require consideration of an offender's "character, antecedents, age, health and mental condition" before they can be imposed.³¹ These are:
- a dismissal of charges without proceeding to conviction
 - a conditional release order (CRO) with a conviction, and
 - a CRO without a conviction.³²
- 6.34 Leaving "character" in the list of considerations would require a court to consider an offender's character, including the offender's good character, despite the abolition of it as a mitigating factor. Therefore, we recommend removing "character" from the list of considerations for the above orders.

31. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9(2)(a), s 10(3)(a).

32. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9(1), s 10(1)(a)–(b).

- 6.35 These considerations, including the character consideration, were first introduced in NSW in 1929.³³ They were based on an English law from 1907.³⁴ The references to “antecedents” and “mental condition” are also outdated. As a result, we suggest that the government consider a holistic review of the terminology used in the remaining list of considerations for these orders.
- 6.36 Character, antecedents, age, health and mental condition are also factors that a court must consider when determining if a traffic offender is suitable for participation in a pre-sentence traffic offender intervention program. If a person’s character would prevent participation or disrupt the conduct of the program, then a court may decide they are an unsuitable candidate.³⁵ In this context, the reference to “character” can only be taken to be a reference to bad character. The provision does not require change, although our suggestion for review of the terminology applies equally in this context.

Character in guideline judgments

- 6.37 Guideline judgments can be issued by the CCA, either on the application of the Attorney General or on the CCA’s “own motion in any proceedings”.³⁶ Guideline judgments contain guidelines to be taken into account by sentencing courts. They often relate to a particular offence or classes of offences.³⁷
- 6.38 In this context, an offender’s good character arises in some guideline judgments as a characteristic of a “typical case”. For example, the guideline judgment of *R v Whyte*, for sentencing of dangerous driving offences, sets out some features of a “typical case”:
- the offence involved a young offender who was of good character and had no, or limited, prior convictions
 - the offence caused death or permanent injury to a single person, who was a stranger to the offender
 - there was no, or limited, injury to the offender or anyone close to the offender
 - the offender was genuinely remorseful, and
 - the offender pleaded guilty, but the plea had limited utilitarian value.³⁸
- 6.39 If an offence is a “typical case” the guideline judgment says:

33. *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].

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

35. *Criminal Procedure Regulation 2017* (NSW) cl 99(2)(a).

36. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37(1), s 37A(1).

37. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 36 definition of “guideline judgment”.

38. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [204].

- a custodial sentence is usually appropriate unless the offender has a low level of moral culpability, such as with cases of momentary inattention or misjudgement,³⁹ and
 - where the offender's moral culpability is high, a full-time custodial head sentence of less than 3 years' imprisonment (for an offence causing death) or less than 2 years' imprisonment (for an offence causing grievous bodily harm) would generally not be appropriate.⁴⁰
- 6.40 The guideline identifies good character as a common feature of a typical case. Therefore, it is not a factor that makes an offender deserving of a non-custodial sentence. This may mean that an offender's good character is of less relevance in mitigation than it is for other offences that are not commonly committed by people of good character.⁴¹ This is consistent with the common law approach to offences commonly committed by people of otherwise good character.⁴²
- 6.41 Good character features in a similar way in the guideline judgment for offences of driving with a high range of a prescribed concentration of alcohol.⁴³
- 6.42 Our recommendation to abolish good character as a mitigating factor in sentencing applies in all cases, including those covered by a relevant guideline judgment.
- 6.43 Changes to laws that interact with guideline judgments are to be expected, particularly for guideline judgments such as *Whyte*, that are now more than 20 years old. There have been substantial developments in statutory and common law sentencing principles since these guideline judgments were formulated. All of these subsequent developments are taken into account when dealing with matters that are subject to a guideline. This includes, for example, the enactment of the purposes of sentencing in s 3A of the *Sentencing Act* and the aggravating and mitigating factors in s 21A of the *Sentencing Act*.⁴⁴
- 6.44 We therefore consider that there is no need to make further changes to the law to deal with the fact that some guideline judgments refer to good character. Courts will continue to apply the guideline judgments in light of this change to the law.

39. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [214].

40. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [229].

41. *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]. See *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [145].

42. *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]; *R v Gent* [2005] NSWCCA 370 [61]–[64]; *Athos v R* [2013] NSWCCA 205 [44]; *R v McIntyre* (1988) 38 A Crim R 135, 139; *Mouscas v R* [2008] NSWCCA 181 [37]; *Minehan v R* [2010] NSWCCA 140 [97]–[98].

43. *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], [146].

44. *Foaiaulima v R* [2020] NSWCCA 270 [17]–[24]. See also *Stanton v R* [2021] NSWCCA 123 [29].

Good character and young offenders

- 6.45 In the consultation paper we raised exemptions for young offenders in the context of the extension of the special rule to other offences and/or the removal of the assistance requirement.⁴⁵ It has become unnecessary to consider this issue since we recommend abolishing good character as a mitigating factor in all circumstances and for all offenders (as set out in chapter 3), and retaining a lack of previous convictions as a mitigating factor without the application of the special rule (see chapters 5 and 6).
- 6.46 A number of submissions considered that exempting young offenders from any changes was justified. We include these views for completeness, since the question of exempting young people from the special rule may need to be resolved if our main recommendation is not adopted.
- 6.47 Some submissions supported exempting young people from the operation of the special rule, at least in principle.⁴⁶ Reasons for this position include:
- the situation that the special rule addresses (positions of privilege, trust or authority) are less pronounced in cases involving a child offender, where cases are more likely to be “opportunistic”⁴⁷
 - there are differences between child and adult offenders in terms of age, development and level of maturity (making them susceptible to peer influence),⁴⁸ and
 - the Convention on the Rights of the Child emphasises rehabilitation and reintegration, not punitive measures for children, and requires children to be treated differently from adults.⁴⁹
- 6.48 However, the NSW Police Force pointed out that people under 18 can attain positions of trust (for example, as sporting coaches and workplace supervisors) with the help of good character or a lack of previous convictions.⁵⁰
- 6.49 Some submissions conceded that an exemption might be appropriate in certain cases, for example, where a young person developmentally does not understand

45. NSW Sentencing Council, *Good Character at Sentencing*, Consultation Paper (2024) [5.51]-[5.54].

46. Law Society of NSW, *Submission GC154*, 7; Legal Aid NSW, *Submission GC71*, 19; NSW, Office of the Advocate for Children and Young People, *Submission GC156*, 3; Survivors and Mates Support Network, *Submission GC134*, 10–11; In Good Faith Foundation, *Submission GC78*, 12.

47. Law Society of NSW, *Submission GC154*, 7; Legal Aid NSW, *Submission GC71*, 19.

48. Legal Aid NSW, *Submission GC71*, 19. See NSW, Office of the Advocate for Children and Young People, *Submission GC156*, 1–3.

49. NSW, Office of the Advocate for Children and Young People, *Submission GC156*, 1, 3; *Convention on the Rights of the Child*, 1577 UNTS 3 (entered into force 2 September 1990) art 37, art 40.

50. NSW Police Force, *Submission GC155*, 5.

the severity of the behaviour and has not engaged in persistent or repeat offending.⁵¹ One submission considered there was a distinction between “isolated incidents stemming from immaturity and entrenched patterns of sexual offending”.⁵² Other relevant conditions that might justify an exemption included that the young offender did not abuse a position of trust or authority (for example, as a sporting coach or baby sitter) and the young offender could demonstrate genuine rehabilitation.⁵³

- 6.50 The Children’s Court of NSW submitted that evidence contained in written references can provide information about an offender’s relationships within the community. Such information can inform a judge’s decisions about the weight to be given to community protection and prospects of rehabilitation during sentencing.⁵⁴
- 6.51 In our view, our recommendations will not prevent any court sentencing young offenders from receiving evidence that addresses relevant issues at sentencing. These relevant issues include the special principles that apply to young offenders under the *Children (Criminal Proceedings) Act 1987* (NSW)⁵⁵ and at common law.⁵⁶ Importantly, this includes the focus on rehabilitation.

51. Bravehearts Foundation Ltd, *Submission GC138*, 7; Your Reference Ain’t Relevant, *Submission GC122*, 20–21.

52. Your Reference Ain’t Relevant, *Submission GC122*, 20.

53. Your Reference Ain’t Relevant, *Submission GC122*, 21.

54. Children’s Court of NSW, *Submission GC158*, 2.

55. *Children (Criminal Proceedings) Act 1987* (NSW) s 6.

56. *KT v R* [2008] NSWCCA 51 [22].

7. Evidence and procedure

In brief

The ongoing role of written references as a type of evidence is a separate consideration from their connection to the mitigating factor of good character. We do not recommend prohibiting the use of written references on sentence. However, improvements can be made to the language and procedure surrounding their use.

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- 7.1 In chapter 3, we recommended that good character be abolished as a mitigating factor in sentencing for all offences.
- 7.2 A related, but separate issue for consideration is whether written references, the typical source of evidence of good character, have any ongoing role to play in the sentencing process. This chapter focuses on the form and substance of written references, as a separate consideration from their connection to good character as a mitigating factor.
- 7.3 We conclude that written references, so far as they address relevant factors or considerations other than good character, should remain admissible. However, improvements can be made to the language and procedure surrounding their use, in particular to reduce harmful impacts on victims in the sentencing process. We note

that several submissions supported further and more extensive reforms to reduce trauma and better support victims in the sentencing process. These broader reforms to the sentencing process fall outside the scope of this review.

Written references as a form of evidence

- 7.4 Written references, commonly referred to as “character references”, are frequently tendered by an offender to provide the court with evidence about their personal circumstances and background. They are usually testimonials written by those who know the offender, such as family members, friends, employers, or associates.
- 7.5 There are no formal requirements for written references because the *Evidence Act 1995 (NSW)* (*Evidence Act*) does not generally apply to sentencing proceedings.¹ This means that the author usually does not need to attend court to give evidence or be cross examined under oath or affirmation.² Instead, the subjective opinions of the author, as a lay person, can be tendered as evidence in a letter.³
- 7.6 Written references are not the exclusive source of evidence about an offender’s personal circumstances. This sort of evidence can also be drawn from a range of different sources including expert psychological or psychiatric reports, sentencing assessment reports (SARs), and oral evidence from the offender or other witnesses.
- 7.7 However, written references are perhaps the most common and controversial source of this evidence. They are controversial because they are often a key source of evidence used to establish “good character” on sentence.

Concerns about written references

- 7.8 The substance of good character evidence is sometimes difficult to separate from the form in which it is presented to the court. Concerns about written references are strongly linked with their use to establish good character as a mitigating factor. These concerns were evident in submissions.
- 7.9 Many submissions advocated for a complete prohibition on the use of written references in sentence proceedings because they are used to establish good character as a mitigating factor. However, others raised separate and specific concerns about this type of evidence that would persist even if good character as a mitigating factor was abolished.

1. Unless the court so directs: *Evidence Act 1995 (NSW)* s 4(2).

2. NSW Bar Association, *Submission GC161* [23].

3. Office of the Director of Public Prosecutions (Cth), *Submission GC165* [23].

- 7.10 For example, the use of written references that speak of an offender's positive attributes or contributions may continue to be damaging to victims. The Victims of Crime Assistance League submitted that:

for many survivors, hearing a courtroom discussion about an offender's community contributions or personal virtues can feel like a dismissal of their own suffering.⁴

- 7.11 Several submissions emphasised that written references could be re-traumatising and invalidating, particularly if they seemed to undermine the experience of the victim or diminish the seriousness of the offence.⁵ One victim told us:

The harm that was inflicted on me and just like many others with similar experience of violence, is life long. This is diminished in court proceedings when the perpetrator is allowed to often bring in people of power to speak of the irrelevant good actions they have done, outside of these crimes. Hearing these words was re-traumatising and made me feel invalidated, particularly as I was only a child when these crimes occurred.⁶

- 7.12 Another concern is that written references lack reliability, given they are often written by friends, family members, or professional colleagues.⁷

- 7.13 References provided by people known to an offender could allow an offender to present an "idealised" or "distorted" version of themselves, which does not reflect their offending behaviour.⁸ This may not be a reliable source of evidence, particularly if references are:

- provided by people who are unaware of the offender's behaviour and offences⁹
- written for another purpose¹⁰
- influenced by bias or personal loyalty¹¹

4. Victims of Crime Assistance League (Hunter), *Submission GC162*, 6.

5. See, eg, NSW Aboriginal Women's Advisory Network, *Submission GC164*, 5; Road Trauma Support Group NSW, *Submission GC166*, 1; Office of the Director of Public Prosecutions (Cth), *Submission GC165* [22]; C Hosking, *Submission GC35*; M Smith, *Submission GC40*, 1–2; Fighters Against Child Abuse Australia, *Submission GC62*, 6.

6. C Mak, *Submission GC58*, 1.

7. 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*, 6–7; Ellie, *Preliminary Submission PGC40*, 4; Anonymous, *Preliminary Submission PGC41*; K Tynan, *Preliminary Submission PGC65*, 1; V Hay, *Preliminary Submission PGC73*, 1; Your Reference Ain't Relevant, *Submission GC122*, 4.

8. Victims of Crime Assistance League (Hunter), *Submission GC162*, 8.

9. See, eg, Anonymous, *Submission GC140*, 3; B Braithwaite, *Submission GC146*, 1; Survivors and Mates Support Network, *Submission GC134*, 4; Anonymous, *Submission GC34*, 3; C Hosking, *Submission GC35*.

10. In Good Faith Foundation, *Submission GC78*, 2.

11. Victims of Crime Assistance League (Hunter), *Submission GC162*, 8.

- written by friends, family members, or professional colleagues who have no expertise in risk assessment or rehabilitation,¹² or
 - written by people who themselves have been manipulated or influenced by the offender.¹³
- 7.14 Your Reference Ain't Relevant submitted that for these reasons, all written references are inherently unreliable, and no reform, regulation, or additional scrutiny would fix the issues.¹⁴

Written references should remain available

- 7.15 It is important that sentencing decisions are informed by reliable and relevant evidence. It is also important that harm to victims through the sentencing process should be avoided, as much as possible.
- 7.16 However, for the reasons outlined below, we do not recommend prohibiting the use of written references as evidence on sentence.

References can provide relevant information

- 7.17 Written references remain a relevant and necessary source of evidence on sentence, even without good character operating as a mitigating factor.¹⁵
- 7.18 Assessing the personal circumstances and background of an offender is a part of the sentencing process. Written references are a source of this information and often address topics that have relevance to considerations, other than an offender's character, in the sentencing decision.¹⁶
- 7.19 For example, a reference might indicate that an offender has ongoing employment, has engaged in pre-sentence programs, or that they have the support of pro-social family and friends. It may also include information that shows an offender has accepted responsibility for the offending or acknowledged the harm caused. This information could assist a court in considering:
- an offender's prospects of rehabilitation
 - the likelihood that an offender will re-offend
 - whether specific deterrence is an important factor, or
 - whether the offender has shown remorse for the offending.

12. Your Reference Ain't Relevant, *Submission GC122*, 4.

13. MayaKosha Healing, *Submission GC60*, 9.

14. Your Reference Ain't Relevant, *Submission GC122*, 22–23.

15. Law Society of NSW, *Submission GC154*, 2.

16. Law Society of NSW, *Submission GC154*, 2; Children's Court of NSW, *Submission GC158*, 2.

- 7.20 This type of information is often used in actuarial assessment tools to predict an offender's risk of reoffending and identify their intervention, supervision, and monitoring needs. For example, the Level of Service Inventory – Revised (LSI-R), commonly used in pre-sentence court reports, assesses an offender's risk of re-offending by scoring them across ten subscales, including education and employment, family and marital, and leisure and recreation, among others.¹⁷
- 7.21 The fact that this type of information is used in a well-established risk assessment tool like the LSI-R, highlights its relevance to other aspects of the sentencing process, beyond an assessment of an offender's character. Similar information to that gathered by questions in these categories may be evidenced by a written reference.
- 7.22 Even in cases where expert evidence and risk assessments are available, written references can be useful. In many cases involving serious offending, both expert reports and written references are part of the evidence at sentence. In this context, a written reference can add detail to the contents of a report, or address aspects of an offender's personal circumstances that were not considered in the report.
- 7.23 In other cases, expert reports may not be available. This may more often be the case in the Local Court, where cases are finalised in a shorter time frame.¹⁸ If no expert assessment or report is available, written references may be the only available source of information. The Children's Court of NSW, for example, submitted that in the absence of formal reports, written references can aid judicial officers in "determining the weight to be allocated to the different principles of sentencing".¹⁹
- 7.24 Given the practical application of written references, particularly in Local Court matters, we consider that their inherent limitations can be dealt with by a court undertaking careful assessment of the evidence and allocating it appropriate weight in all the circumstances.

Courts can determine appropriate weight

- 7.25 When determining an appropriate sentence, a sentencing court must identify all the factors that are relevant to the sentence and determine the weight to be attached to each factor, as well as the weight to place on each piece of evidence.²⁰

17. B Schurr, *Criminal Procedure NSW* (Westlaw AU, online, retrieved 26 May 2025) [10.40.150].

18. C Ringland, *The Second Tranche of the Table Offences Reform: Impacts on District and Local Court Finalisations, Time to Finalisation and Sentencing Outcomes*, Bureau Brief No 156 (NSW Bureau of Crime Statistics and Research, 2021) 2.

19. Children's Court of NSW, *Submission GC158*, 3.

20. *Markarian v R* [2005] HCA 25, 228 CLR 357 [51]. See also *Muldrock v R* [2011] HCA 39, 244 CLR 120 [26].

- 7.26 Though written references are routinely admitted into evidence, sentencing courts individually assess and determine the weight to give them in each particular case.²¹ Rather than imposing a blanket prohibition on written references, we consider it preferable that courts retain the discretion to consider this type of evidence, and determine the weight to be attached to it, on a case-by-case basis.
- 7.27 In practice, judicial officers already give limited weight to written references that:
- do not show familiarity with the offences and the facts underlying them²²
 - conflict with other evidence, such as the offender’s criminal history,²³ or
 - are not supported by sworn evidence.²⁴
- 7.28 Courts might also treat a written reference with caution or give it limited weight if there are doubts about its reliability, and the author is not available to give sworn evidence or be subject to cross examination.²⁵
- 7.29 As the NSW Bar Association pointed out, a court’s ability to temper the weight given to written references already “goes some way to ensuring that the court is not acting on unreliable evidence”.²⁶
- 7.30 However, there may be more room for sentencing courts to make clear this critical assessment of the reliability of written references, especially in circumstances where references are given limited weight. We discuss this further, below.

Prohibiting written references may have unintended consequences

- 7.31 Some submissions in support of prohibiting the use of written references suggested that evidence about prospects of rehabilitation and risk of reoffending should only be relied on if supported by expert opinion.²⁷ This might include a report or statement from a professional, such as a social worker,²⁸ forensic psychologist, or within a SAR, prepared by Community Corrections.

21. See, eg, *Lloyd v R* [2022] NSWCCA 18 [45].

22. NSW Bar Association, *Submission GC161* [24]; *Taitoko v R* [2020] NSWCCA 43 [109].

23. See, eg, *R v Johnson* [2022] NSWSC 404 [105].

24. *Taitoko v R* [2020] NSWCCA 43 [107]–[109]; *R v Bloodsworth (No 5)* [2018] NSWSC 79 [61]; *R v Biber* [2018] NSWSC 535 [50].

25. *Taitoko v R* [2020] NSWCCA 43 [107]–[109]; *R v Bloodsworth (No 5)* [2018] NSWSC 79 [61]; *R v Biber* [2018] NSWSC 535 [50].

26. NSW Bar Association, *Submission GC161* [24].

27. Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect*, Final Report (2024) 307; Office of the Director of Public Prosecutions (Cth), *Submission GC165* [23]; Your Reference Ain’t Relevant, *Submission GC122*, 4–5; Survivors and Mates Support Network, *Submission GC134*, 4.

28. Survivors and Mates Support Network, *Submission GC134*, 4.

- 7.32 While expert reports might be considered inherently more reliable than written references, we are concerned that prohibiting the use of written references entirely could leave courts without relevant evidence and cause delays.

It could cause a strain on time and resources

- 7.33 Restricting evidence of an offender's subjective case to expert or professional opinion could significantly delay sentence proceedings and lead to a backlog of cases.
- 7.34 Expert reports and risk assessments can take several weeks to months to complete and are not used in every case. For example, SARs, which are ordered by courts and prepared by Community Corrections, usually take a minimum of six weeks to prepare.²⁹ Requiring the preparation of a SAR for each sentence would contribute to a significant backlog and delay the finalisation of sentences. This strain on time and resources is a particular concern in the Local Court, which finalises the majority of criminal cases in NSW, and has a high turnover of cases.³⁰
- 7.35 In addition to increasing the time and cost of proceedings, lengthy delays could negatively impact on some victims, who may benefit more from an efficient finalisation of the matter.
- 7.36 Further, a SAR or expert report may not be necessary in every case, particularly in sentences for minor summary offences. As Legal Aid NSW pointed out, written references are "often an efficient and appropriate way to ensure evidence of an offenders background is before the court".³¹
- 7.37 Notably, there is a risk that limiting subjective evidence to expert reports may disadvantage those offenders who lack the financial means to obtain a report. Expert reports are often costly to obtain. If an offender cannot adduce evidence of their subjective case through other means, like a written reference, their personal circumstances may not be appropriately presented to the court and factored into a sentence.

A court may be deprived of information to sentence the whole person

- 7.38 Prohibiting the use of written references could therefore limit the information available to a court and compromise the delivery of individualised justice.³² The

29. Corrective Services NSW, *Community Corrections and Offender Services and Programs Reports* (2018) 2.

30. NSW Bureau of Crime Statistics and Research, "NSW Criminal Courts Statistics Jul 2019 to Jun 2024" (Dec 2024) <<https://bocsar.nsw.gov.au/research-evaluations/2024/criminal-court-statistics-jun-2024.html>> (retrieved 18 June 2025).

31. Legal Aid NSW, *Submission GC71*, 21.

32. See Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect*, Final Report (2024) 308; Law Society of NSW, *Submission GC167*, 2.

personal circumstances of offenders vary from case to case. It is important that a sentencing court should be equipped with the information that will help it to sentence the whole person.³³

- 7.39 As we note above, expert and other pre-sentence reports are not always available. Even if they are, they may not cover the full breadth of information found in written references.
- 7.40 SARs, for example, may not cover the same information as a written reference.³⁴ These reports have a different focus from written references, and are usually limited to information on factors related to the offending, the offenders current circumstances, suitability for particular sentences involving work or home detention components, a risk assessment, and recommended conditions for any court orders and supervision.³⁵ They do not include “historical information about the offender” unless relevant to the offences, risk assessment, or the possible community based sentencing options.³⁶

Suggestions for regulation of written references

- 7.41 While several groups did not support the use of written references in any circumstance, some contended that if references were to be allowed, they should be subject to more stringent procedural and admissibility requirements.³⁷
- 7.42 First, it was suggested that a written reference should only be admissible if it addresses the offender’s prospects of rehabilitation or risk of reoffending.³⁸ The Queensland Sentencing Advisory Council (QSAC), in its recent review, recommended similar reforms to prevent a court taking into account evidence in the form of a written reference for certain sexual violence offences unless it is relevant to assessing prospects of rehabilitation or risk of re-offending.³⁹
- 7.43 The Queensland Parliament currently has before it a Bill to amend sentencing law following QSAC’s recommendations. At the time of writing, the Bill was under consideration of the Justice, Integrity and Community Safety Committee of the Queensland Parliament. The Bill proposes restrictions on the use of evidence of

33. See, eg, *Ryan v R* [2001] HCA 21, 206 CLR 267 [108].

34. Legal Aid NSW, *Submission GC71*, 21.

35. Corrective Services NSW, *Community Corrections and Offender Services and Programs Reports* (2018) 2.

36. Corrective Services NSW, *Community Corrections and Offender Services and Programs Reports* (2018) 2.

37. See, eg, Victims of Crime Assistance League (Hunter), *Submission GC162*, 9; Fighters Against Child Abuse Australia, *Submission GC62*, 5; In Good Faith Foundation, *Submission GC78*, 5.

38. J Byrnes and S Geisler, *Submission GC126*, 5.

39. Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect*, Final Report (2024) rec 5.

good character in sentencing for offences of a sexual nature.⁴⁰ If an offender's purported good character is based only on evidence from a character reference or their standing or contributions in the community, their good character could only be treated as a mitigating factor if it is relevant to their prospects of rehabilitation or risk of reoffending.⁴¹

- 7.44 We also received suggestions that references should be required to be given as oral evidence in court, or by affidavit. Both suggestions would require the person to swear to the truthfulness of the reference and be available for cross examination.⁴² This approach has recently been introduced in Ireland, in sentencing for certain sexual offences.⁴³
- 7.45 Some suggested that written references should have to be signed by the author and provided to the prosecution a certain period in advance of the sentence hearing.⁴⁴
- 7.46 In support of more stringent admissibility conditions, submissions pointed to the fact that victim impact statements are subject to strict legislative requirements and contended that it is unfair that similar requirements do not apply to written references tendered by an offender.⁴⁵

There should not be admissibility requirements

- 7.47 While imposing more stringent admissibility conditions may go some way to improving the reliability of written references, we consider judicial discretion the most appropriate way to regulate the use of this evidence. We are concerned that adding admissibility hurdles would be inconsistent with the general rule that the *Evidence Act* does not apply to sentence proceedings, and could contribute to delays and a strain on available resources without significant benefit.⁴⁶ We do not recommend introducing admissibility requirements even if, contrary to our recommendation, good character remains a mitigating factor on sentence.

40. Penalties and Sentences (Sexual Offences) and Other Legislation Amendment Bill 2025 (Qld) cl 12.

41. Penalties and Sentences (Sexual Offences) and Other Legislation Amendment Bill 2025 (Qld) cl 12.

42. In Good Faith Foundation, *Submission GC78*, 5; NSW Police Force, *Submission GC155*, 6. See also Fighters Against Child Abuse Australia, *Submission GC62*, 9; J Byrnes and S Geisler, *Submission GC126*, 5.

43. In Good Faith Foundation, *Submission GC78*, 4; *Criminal Law (Sexual Offences and Human Trafficking) Act 2024* (Ireland) s 14.

44. Office of the Director of Public Prosecutions (Cth), *Submission GC165* [24]; NSW Police Force, *Submission GC155*, 6.

45. See, eg, NSW Police Force, *Submission GC155*, 6.

46. *Evidence Act 1995* (NSW) s 4(2).

- 7.48 We do not consider it desirable to introduce reforms to require that all written references are given by oral evidence or affidavit. As we outlined above, in practice, courts often treat unsworn statements with caution and may exercise discretion to give them limited weight. Strictly requiring each referee to give sworn evidence, and be subject to cross examination, is likely to lengthen sentence proceedings significantly.
- 7.49 There is no capacity to test every piece of evidence on sentence, particularly in the Local Court. Legal Aid, for example, opposed any change to procedures for receiving written references on the basis that additional procedures could complicate and prolong the process and require additional resources.⁴⁷
- 7.50 This does not mean that authors of written references can never be called to give sworn evidence. Importantly, the prosecution can object to the tender of a written reference and seek a ruling that the rules of evidence apply to the sentence proceedings.⁴⁸ If this occurs, a referee may be called to give oral evidence and be cross examined.
- 7.51 It would be desirable for all written references to be signed by the author and served on the prosecution in advance of a sentence hearing. However, we do not think that this should be imposed as a strict admissibility requirement. To do so would significantly impact on the limited resources of legal practitioners. These requirements would be particularly difficult to meet for defence lawyers who work for Legal Aid on a duty basis and meet clients for the first time on the day of the sentence hearing.
- 7.52 As the Community Restorative Centre pointed out, family members of offenders are often tasked with obtaining and compiling written references.⁴⁹ Without guidance, lay people are unlikely to possess adequate knowledge of legislative requirements to enable them to obtain compliant references.
- 7.53 If references prepared on an offender's behalf are inadmissible because they are unsigned or served late, this could deprive a court of evidence about an offender's subjective case. While some courts may prefer to adjourn proceedings rather than proceed to sentence, adjournments based only, for example, on a reference being unsigned would undesirably delay the finalisation of a case.
- 7.54 Lastly, we do not consider it appropriate to deem inadmissible any reference that does not refer to a risk of reoffending or prospects of rehabilitation, as has been proposed in Queensland. Instead, if a reference does not contain information

47. Legal Aid NSW, *Submission GC71*, 20–21.

48. *Evidence Act 1995* (NSW) s 4(3)–(4). See also *R v Bourchas* [2002] NSWCCA 373 [61].

49. Community Restorative Centre, *Submission GC159*, 7.

relevant to any established sentencing principles or factors, it may simply carry little or no weight in the sentencing process.

- 7.55 However, there is merit in encouraging courts to explain how a written reference is taken into account in relation to established factors, considerations, and principles of sentencing. As we discuss below, this may assist in reducing some of the trauma experienced by victims.

Terminology and language

- 7.56 While written references should be retained as a source of evidence on sentence, some improvements to procedure and language should flow from our recommendation to abolish good character as a mitigating factor on sentence.

Terminology should change

- 7.57 Consistent with our recommendation to abolish good character as a mitigating factor, we expect that the language used to describe and refer to written references in court will change. These changes will be required to reflect the removal of good character as a mitigating factor.
- 7.58 Instead of referring to this type of evidence as “character references” it could be referred to instead as “written references”. This is particularly important if, as we recommend, good character is abolished as a mitigating factor, because referring to an offender’s character may indicate an erroneous consideration of this factor.
- 7.59 As many submissions to our review recognised, even the use of the words “good character” can be distressing to victims. As Full Stop Australia put it, the term can “be ‘a kick in the guts’ to victims of crime”.⁵⁰ Even if our recommendation to abolish good character is not implemented, a change in terminology may go some way to reducing harm to victims in the sentencing process.
- 7.60 The need for language to change was recognised by several submissions.⁵¹ Even groups that did not support the abolition of good character as a mitigating factor acknowledged the harm that discussing an offender’s good character could cause to victims.
- 7.61 Changing the terminology may also go some way to reducing confusion about the ongoing relevance and utility of written references, particularly if good character is abolished as a mitigating factor. The Law Society of NSW, while not supporting the abolition of good character as a mitigating factor generally, suggested:

50. Full Stop Australia, *Submission GC160*, 11.

51. Law Society of NSW Young Lawyers *Preliminary Submission PGC84* [13]; Community Restorative Centre, *Submission GC159*, 12–13; Full Stop Australia, *Submission GC160*, 11.

[A] more precise term that removes the moral judgment of character and better reflects the reality that evidence related to an offender’s general behaviour and social engagement is relevant to the sentencing exercise, including assessment of an offender’s continuing risk to the community and amenability to rehabilitation.⁵²

- 7.62 Referring to this evidence as “written references” may give all participants a better understanding of the purpose of the evidence contained in such statements and make clear that good character is no longer a consideration on sentence.⁵³

The relevance of written references should be clearly articulated

- 7.63 We consider that it would be beneficial for courts, in sentencing remarks, to articulate clearly:
- the relevance of the contents of a written reference to sentencing factors (for example, to assessing a risk of reoffending)
 - the reasons for a critical assessment of, or caution around, a particular reference, and
 - why a reference has been given significant or limited weight.
- 7.64 Communicating the relevance and weight of written references in judgments may help victims, as well as the wider community, understand how and why the evidence is taken into account.⁵⁴ It also may go some way to addressing concerns that unreliable references are uncritically accepted.⁵⁵
- 7.65 QSAC, though not recommending the abolition of good character as a mitigating factor, observed that there is room for judges to “more clearly articulate the rationale for giving [good character] significant weight”.⁵⁶ This could, as the Advisory Council recognised, promote a fuller, and more transparent setting out of all of the relevant considerations in each case.⁵⁷

Use of trauma informed language

- 7.66 The use of trauma-informed language by courts and legal practitioners can minimise distress for victims during the sentencing process. Increasing the use of trauma-informed language was supported by several groups, including the Law

52. Law Society of NSW, *Submission GC154*, 2–3.

53. NSW Sentencing Council, *Good Character at Sentencing*, Consultation Paper (2024) [5.68].

54. Full Stop Australia, *Submission GC160*, 11.

55. See, eg, Anonymous, *Submission GC140*, 3; Victims of Crime Assistance League (Hunter), *Submission GC162*, 8.

56. Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect*, Final Report (2024) 307.

57. *Markarian v R* [2005] HCA 25, 228 CLR 357 [84].

Society of NSW, Office of the Director of Public Prosecutions (Commonwealth) and the Community Restorative Centre.⁵⁸

- 7.67 The government should consider encouraging training that focuses on the appropriate language to use when referring to written references, and accurately but sensitively explaining how such evidence is taken into account in sentencing remarks.

58. Law Society of NSW, *Submission GC154*, 3, 5; Law Society of NSW, *Submission GC167*, 2; Office of the Director of Public Prosecutions (Cth), *Submission GC165* [24]; Community Restorative Centre, *Submission GC159*, 12–13.

8. Rejected options for reform

In brief

This chapter outlines some options for reform that were raised in our consultation paper. Even if, contrary to our recommendation, good character is retained as a mitigating factor, we do not recommend any of these options. This includes making good character an aggravating factor, requiring offenders to prove that the special rule does not apply, and denying the use of the mitigating factor for offenders who plead not guilty.

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- 8.1 In reaching our conclusion to abolish good character as a mitigating factor, we rejected several other options for reform that were raised in our consultation paper.¹
- 8.2 We received mixed feedback on these options. Some submissions did not support these options, because they considered the only appropriate solution would be to remove good character as a mitigating factor at sentence entirely.²
- 8.3 If, contrary to our recommendation, good character remains as a mitigating factor, we do not recommend:
- introducing an aggravating factor that applies where an offender used good character to commit the offence
 - requiring offenders to prove their good character was not of assistance to them in committing the offence, or
 - making the mitigating factor unavailable to offenders who plead not guilty.

Good character as an aggravating factor

- 8.4 We considered whether good character should be an aggravating factor on sentence where it assisted the offender to commit the offence.³ However, we do not recommend this option because it would face the same problems associated

1. NSW Sentencing Council, *Good Character at Sentencing*, Consultation Paper (2024).
2. See, eg, Survivors and Mates Support Network, *Submission GC134*, 6.
3. NSW Sentencing Council, *Good Character at Sentencing*, Consultation Paper (2024) [5.19]–[5.22].

with the assistance requirement of the special rule and is therefore unlikely to address concerns about the harm that the use of, and reference to, good character evidence causes to victims.

- 8.5 In sentencing for Commonwealth offences, the fact that an offender used their “standing in the community” to help commit the offence is an aggravating factor.⁴ A similar approach is taken by the sentencing guidelines in England and Wales, which provide that where an offender uses positive character or status to facilitate or conceal the offending, such conduct could be treated as an aggravating factor.⁵
- 8.6 Some submissions supported introducing a similar form of aggravating factor in NSW, that would apply where the offender’s prior good character assisted them to commit the offence.⁶ They considered that this would reflect that some offenders actively use their good character and reputation to gain the trust of victims, families, and communities, which allows them to access victims and avoid suspicion.⁷ It could also acknowledge that some offenders cultivate their public image to enable repeat offending.⁸
- 8.7 While adding good character as an aggravating factor could highlight the seriousness of this conduct, so long as it is subject to the requirement that it assisted the offender to commit the offence, it would have the same problems as the assistance requirement of the special rule (discussed in chapter 6). To apply the aggravating factor, the prosecution would need to prove the offender used their good character, which necessarily requires the prosecution to point to the relevant positive character traits that assisted the offender to commit the offence.
- 8.8 The Office of the Director of Public Prosecutions (Commonwealth) (CDPP) observed that courts approach the assistance requirement for the aggravating factor in the *Crimes Act 1914* (Cth) with a “similar degree of inconsistency” to which the special rule is applied in NSW.⁹ The CDPP pointed to one case involving both state and Commonwealth offences, where the offender was a sports coach who was trusted

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

5. UK, Sentencing Council, “Rape” (2025) <<https://www.sentencingcouncil.org.uk/offences/crowncourt/item/rape/>> (retrieved 21 June 2025).

6. Victims of Crime Assistance League (Hunter), *Submission GC162*, 14–15; NSW Police Force, *Submission GC155*, 2; NSW, Office of the Advocate for Children and Young People, *Submission GC156*, 1; Survivors and Mates Support Network, *Submission GC134*, 6; In Good Faith Foundation, *Submission GC78*, 7.

7. Victims of Crime Assistance League (Hunter), *Submission GC162*, 14–15. See also NSW, Office of the Advocate for Children and Young People, *Submission GC156*, 1; Anonymous, *Submission GC06*, 1; In Good Faith Foundation, *Submission GC78*, 7; Anonymous, *Submission GC108*, 1.

8. Anonymous, *Submission GC06*, 1.

9. Office of the Director of Public Prosecutions (Cth), *Submission GC165* [18]; *Crimes Act 1914* (Cth) s 16A(2)(ma).

with babysitting victims as a result of connections through the sporting club. In that case, the District Court was not satisfied that the offender's good character (which was necessary to obtain a working with children check) assisted in committing the offence because it was not an important feature in obtaining access to the children.¹⁰

8.9 The CDPP reported, however, that it has "experienced fewer challenges" in establishing the use of "standing in the community" in fraud cases, with the courts "more readily making findings that tax agents, accountants, solicitors and company directors used their standing in the community to aid their fraud".¹¹

8.10 Your Reference Ain't Relevant highlighted that introducing an aggravating factor could "inadvertently perpetuate the very issues it seeks to resolve" and suggested that it "could lead to inconsistent applications and potential challenges in judicial proceedings":

The subjective nature of character evaluations may result in disparities in sentencing, as courts grapple with determining the extent to which 'good character' contributed to the offence. Moreover, this approach may inadvertently shift focus away from the primary elements of the crime, placing undue emphasis on character assessments.¹²

8.11 In our view, making the use of good character an aggravating factor would fail to address concerns that reference to an offender's good character causes harm to victims, and is likely to be subject to the same inconsistent application as the assistance requirement of the special rule.

Reversing the onus of proof for the special rule

8.12 The burden of proof for establishing good character as a mitigating factor rests with the offender on the balance of probabilities.¹³ If an offender raises good character upon sentence for child sexual offences and disputes the application of the special rule, the prosecution will usually be required to advance evidence that the offender's good character assisted them in the commission of the offence.¹⁴

8.13 The Office of the Director of Public Prosecutions (NSW) observed that it can be difficult for the prosecution to prove the special rule applies. It submitted that the burden to adduce evidence of assistance should not rest on the prosecution because the fact that good character assists an offender to commit a child sexual

10. *R v Fisher* (Unreported, NSWDC, Pickering DCJ, 16 Nov 2022).

11. Office of the Director of Public Prosecutions (Cth), *Submission GC165* [21].

12. Your Reference Ain't Relevant, *Submission GC122*, 7, 8.

13. *R v Olbrich* [1999] HCA 54, 199 CLR 270 [27].

14. Office of the Director of Public Prosecutions NSW, *Preliminary Submission PGC83*, annexure A, 3; *Bhatia v R* [2023] NSWCCA 12 [13]–[14]; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A).

offence is not a “controversial proposition”.¹⁵ Instead, it was suggested that the offender should have to prove that their good character did not assist in the commission of the offence.¹⁶

- 8.14 However, we do not recommend reversing the onus of proof in this way. The change would leave good character operating as a mitigating factor and would not address the concerns raised in the review about the negative impact upon victims. In this way, the concerns raised by Your Reference Ain’t Relevant in relation to the introduction of an aggravating factor also apply to the option.¹⁷
- 8.15 Reversing the onus of proof also risks further trauma to victims, particularly because they may be called to give evidence on the topic of an offender’s good character, at a sentence hearing.¹⁸ The offender’s use of good character is not ordinarily relevant to the issues in a criminal trial and is unlikely to be introduced at that earlier stage.¹⁹

Denying the use of good character for offenders who plead not guilty

- 8.16 The mitigating factor of good character is available irrespective of whether an offender pleads guilty to an offence or pleads not guilty and is convicted after trial.
- 8.17 We considered whether it would be appropriate to make the mitigating factor unavailable for those offenders who plead not guilty, but are convicted after a trial, at least in circumstances where a lesser alternative offence is not available on the facts.
- 8.18 Several submissions strongly opposed this option.²⁰ Some submitted that denying the availability of the mitigating factor for offenders who plead not guilty risks contravening fundamental principles that underpin the criminal legal system, including the right to a criminal defence and the presumption of innocence.²¹

15. Office of the Director of Public Prosecutions NSW, *Preliminary Submission PGC83*, annexure A, 3.

16. Office of the Director of Public Prosecutions NSW, *Preliminary Submission PGC83*, annexure A, 3–4.

17. Your Reference Ain’t Relevant, *Submission GC122*, 7, 8, 23.

18. NSW Bar Association, *Submission GC161* [25]–[26].

19. Office of the Director of Public Prosecutions NSW, *Preliminary Submission PGC83*, annexure A, 3.

20. Law Society of NSW, *Submission GC154*, 5; Legal Aid NSW, *Submission GC71*, 14; NSW Police Force, *Submission GC155*, 2; NSW, Office of the Advocate for Children and Young People, *Submission GC156*, 1; Survivors and Mates Support Network, *Submission GC134*, 6; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission GC169*, 5.

21. Law Society of NSW, *Submission GC154*, 5; Legal Aid NSW, *Submission GC71*, 14; NSW Police Force, *Submission GC155*, 2; NSW, Office of the Advocate for Children and Young People, *Submission GC156*, 1; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission GC169*, 5.

- 8.19 The ability to plead not guilty is a fundamental right of an accused. It would be inappropriate to preclude an offender from raising a mitigating factor only because they exercised this right.²² This could also risk contravening the principle that it is impermissible to penalise an offender for pleading not guilty.²³
- 8.20 As Legal Aid NSW submitted, “[p]enalising offenders for asserting their legal rights would contradict the core principles of fairness and the presumption of innocence”.²⁴
- 8.21 Other submissions opposed the idea on the grounds that consideration of good character is inappropriate in any circumstance, irrespective of whether an offender pleads guilty or not.²⁵
- 8.22 However, one submission did support denying the use of good character for offenders who plead not guilty,²⁶ because:
- offences, particularly serious offences such as sexual assault, domestic violence or fraud, often involve significant harm to victims²⁷
 - not guilty pleas can prolong the legal process, and force victims to relive trauma,²⁸ and
 - not guilty pleas demonstrate a refusal to take responsibility (which should not be offset by good character) and go to questions of remorse and accountability demonstrated by the offender.²⁹
- 8.23 Parallels may be drawn between the concept that a not guilty plea is a refusal to take responsibility, and the principle that remorse may be unavailable as a factor in mitigation for those who plead not guilty but are convicted after a trial.³⁰
- 8.24 In some circumstances, the mitigating factor that ordinarily applies where an offender has shown remorse may be unavailable following a plea of not guilty.³¹

22. Law Society of NSW, *Submission GC154*, 5; NSW Police Force, *Submission GC155*, 2; NSW, Office of the Advocate for Children and Young People, *Submission GC156*, 1.

23. *Siganto v R* [1998] HCA 74, 194 CLR 656 [22].

24. Legal Aid NSW, *Submission GC71*, 14.

25. Your Reference Ain’t Relevant, *Submission GC122*, 7; Bravehearts Foundation, *Submission GC138*, 4; Anonymous, *Submission GC108*, 1.

26. Victims of Crime Assistance League (Hunter), *Submission GC162*, 11.

27. Victims of Crime Assistance League (Hunter), *Submission GC162*, 11.

28. Victims of Crime Assistance League (Hunter), *Submission GC162*, 11.

29. Victims of Crime Assistance League (Hunter), *Submission GC162*, 12.

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

31. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(i); *Allen v R* [2008] NSWCCA 11 [37]–[41]. See also *R v Thomson* [2000] NSWCCA 309, 49 NSWLR 383 [117].

However, a not guilty plea does not of itself, indicate a lack of remorse,³² noting that it is an accused's right to require the prosecution to prove guilt.

- 8.25 While a plea of guilty can be viewed as a manifestation of remorse,³³ there are other avenues, beyond the plea, through which evidence of an offender's remorse is available.³⁴ A finding of remorse is not automatically unavailable simply because the offender pleaded not guilty. Making the mitigating factor of good character unavailable without exception for offenders who plead not guilty would therefore be more restrictive than the approach taken to remorse, without justification.

32. Legal Aid NSW, *Submission GC71*, 14; *R v Thomson* [2000] NSWCCA 309, 49 NSWLR [117].

33. *R v Thomson* [2000] NSWCCA 309, 49 NSWLR 383 [3].

34. *Allen v R* [2008] NSWCCA 11 [41]; *R v Thomson* [2000] NSWCCA 309, 49 NSWLR 383 [118].

Appendix A:

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** MayaKosha 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 Confidential, 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 Highet, 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 Confidential, 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 B:

Submissions

- GC01** Angela Miller, 5 December 2024
- GC02** Tess Royale Clancy, 5 December 2024
- GC03** Alice Delavale Wickens, 6 December 2024
- GC04** Kim Zoe Evans, 6 December 2024
- GC05** Lily, 6 December 2024
- GC06** Anonymous, 6 December 2024
- GC07** Marissa Heymann, 6 December 2024
- GC08** Olivia Campos, 6 December 2024
- GC09** Stacey Sharkey, 6 December 2024
- GC10** Sam Watson, 6 December 2024
- GC11** Jemma Russell, 6 December 2024
- GC12** Christy Leggo, 6 December 2024
- GC13** Jessica Murray, 6 December 2024
- GC14** Lauren McDonald, 6 December 2024
- GC15** Anonymous, 6 December 2024
- GC16** Julia Gerling, 6 December 2024
- GC17** Amy Wilson, 6 December 2024
- GC18** Anna Hapiuk, 6 December 2024
- GC19** Sahra Favaro, 6 December 2024
- GC20** Confidential, 6 December 2024
- GC21** Harriet Frdelja, 6 December 2024
- GC22** Charlii Johnson, 6 December 2024
- GC23** Mitchell Montgomery, 6 December 2024
- GC24** Anonymous, 6 December 2024
- GC25** Layla Grace, 6 December 2024
- GC26** Yasmine Laycock, 6 December 2024
- GC27** Emily Bayfield, 6 December 2024
- GC28** Rebecca Henry, 7 December 2024
- GC29** Nicole Krivohlavy, 7 December 2024

GC30 Renee Williams, 7 December 2024
GC31 Anonymous, 7 December 2024
GC32 Mikayla Ramm, 7 December 2024
GC33 Samara Mill, 8 December 2024
GC34 Anonymous, 8 December 2024
GC35 Carina Hosking, 8 December 2024
GC36 Anonymous, 9 December 2024
GC37 Caitlin Gibson, 9 December 2024
GC38 Joanne Roberts, 4 December 2024
GC39 Billy Jack Velder, 4 December 2024
GC40 Mia Smith, 4 December 2024
GC41 Jessi Salonen, 10 December 2024
GC42 Tanya Langford, 10 December 2024
GC43 Millie Bartlett, 10 December 2024
GC44 Erin Clancy, 12 December 2024
GC45 Rhiannon King, 12 December 2024
GC46 Kate Plummer, 14 December 2024
GC47 Anonymous, 16 December 2024
GC48 Anonymous, 16 December 2024
GC49 Adam Cassidy, 17 December 2024
GC50 Thea Hunter, 17 December 2024
GC51 The Survivor Hub, 17 December 2024
GC52 Anonymous, 17 December 2024
GC53 Anonymous, 20 December 2024
GC54 Confidential, 21 December 2024
GC55 Anonymous, 21 December 2024
GC56 Peter Buchanan, 22 December 2024
GC57 Confidential, 23 December 2024
GC58 Chanelle Mak, 10 January 2025
GC59 Frank Gilroy, 13 January 2025
GC60 MayaKosha Healing, 14 January 2025
GC61 Ben Spence, 18 January 2025

GC62 Fighters Against Child Abuse Australia, 27 January 2025

GC63 Amy Johnson, 3 February 2025

GC64 Erin Cardell, 3 February 2025

GC65 Tino Timba, 5 February 2025

GC66 Adam Ferris, 5 February 2025

GC67 Anonymous, 6 February 2025

GC68 Alyssa James, 6 February 2025

GC69 Anonymous, 6 February 2025

GC70 Erika Seidel, 7 February 2025

GC71 Legal Aid NSW, 11 February 2025

GC72 Brea Roadley, 11 February 2025

GC73 Melissa Browne, 11 February 2025

GC74 Amy Mackenzie, 11 February 2025

GC75 Louise Edmonds, 11 February 2025

GC76 Tracy Cunningham, 11 February 2025

GC77 Liz Quinn, 11 February 2025

GC78 In Good Faith Foundation, 11 February 2025

GC79 NK, 11 February 2025

GC80 Anonymous, 11 February 2025

GC81 Laura Evans, 11 February 2025

GC82 We Are W/M, 11 February 2025

GC83 Klaudia Martin-Files, 11 February 2025

GC84 Ashley Stanton, 11 February 2025

GC85 Anonymous, 11 February 2025

GC86 Crystal Milton, 11 February 2025

GC87 Mary, 11 February 2025

GC88 Jess Peron, 11 February 2025

GC89 Anonymous, 11 February 2025

GC90 Millie Mickle, 11 February 2025

GC91 Sam Young, 11 February 2025

GC92 Shaun Cloughton, 11 February 2025

GC93 Ashleigh Blake, 11 February 2025

GC94 Kim Hancock, 11 February 2025
GC95 Confidential, 11 February 2025
GC96 Karyn Roe, 11 February 2025
GC97 Lauren Kron, 11 February 2025
GC98 Candice Heggelund, 11 February 2025
GC99 Anonymous, 12 February 2025
GC100 Molly Rhys Jones, 12 February 2025
GC101 Jessie Foley, 12 February 2025
GC102 Ielena Lesar, 12 February 2025
GC103 Louise Leonard, 12 February 2025
GC104 Cade Burgess, 12 February 2025
GC105 Anonymous, 12 February 2025
GC106 Ryan Fuoco, 12 February 2025
GC107 Naomi Slater, 12 February 2025
GC108 Anonymous, 12 February 2025
GC109 Confidential, 12 February 2025
GC110 Anonymous, 12 February 2025
GC111 Leanne Lenassi, 12 February 2025
GC112 Anonymous, 12 February 2025
GC113 Anonymous, 12 February 2025
GC114 Marianne Loew, 12 February 2025
GC115 Feminist Legal Clinic Inc, 12 February 2025
GC116 Candice Fieg, 12 February 2025
GC117 Selene Pais, 12 February 2025
GC118 Anonymous, 12 February 2025
GC119 Domestic Violence NSW, 13 February 2025
GC120 Elizabeth Mansfield, 13 February 2025
GC121 Mike Burns, 13 February 2025
GC122 Your Reference Ain't Relevant, 13 February 2025
GC123 Anonymous, 13 February 2025
GC124 Victoria Simpson, 13 February 2025
GC125 Intellectual Disability Rights Service, 13 February 2025

GC126 Josh Byrnes and Shane Geisler, 13 February 2025

GC127 Rape and Sexual Assault Advocacy and Research Association, 13 February 2025

GC128 Anonymous, 13 February 2025

GC129 Confidential, 13 February 2025

GC130 Casey Curran, 14 February 2025

GC131 Jody Smith, 14 February 2025

GC132 Libby, 14 February 2025

GC133 Confidential, 14 February 2025

GC134 Survivors and Mates Support Network, 14 February 2025

GC135 Cynthia Bradley, 14 February 2025

GC136 Blue Butterfly Institute, 14 February 2025

GC137 Tracy Ayrton, 14 February 2025

GC138 Bravehearts Foundation Ltd, 14 February 2025

GC139 Tiffany Mak, 14 February 2025

GC140 Anonymous, 14 February 2025

GC141 Dr Marianne Edwards, 14 February 2025

GC142 Confidential, 14 February 2025

GC143 Georgina Bell, 14 February 2025

GC144 Dr Jonathan Mak, 14 February 2025

GC145 Grace Tame Foundation, 14 February 2025

GC146 Barbara Braithwaite, 14 February 2025

GC147 Confidential, 14 February 2025

GC148 Wirringa Baiya Aboriginal Women's Legal Centre Inc, 14 February 2025

GC149 Helen Doutty, 14 February 2025

GC150 Anonymous, 14 February 2025

GC151 Anonymous, 14 February 2025

GC152 Anonymous, 14 February 2025

GC153 RS, 15 February 2025

GC154 Law Society of NSW, 17 February 2025

GC155 NSW Police Force, 18 February 2025

GC156 Office of the Advocate for Children and Young People (NSW), 18 February 2025

- GC157** National Association for Prevention of Child Abuse and Neglect, 19 February 2025
- GC158** Children's Court of NSW, 19 February 2025
- GC159** Community Restorative Centre, 21 February 2025
- GC160** Full Stop Australia, 21 February 2025
- GC161** NSW Bar Association, 25 February 2025
- GC162** Victims of Crime Assistance League (Hunter), 28 February 2025
- GC163** Eileen Culleton, 28 February 2025
- GC164** NSW Aboriginal Women's Advisory Network, 28 February 2025
- GC165** Office of the Director of Public Prosecutions (Cth), 3 March 2025
- GC166** Road Trauma Support Group NSW, 10 March 2025
- GC167** Law Society of NSW, 19 March 2025
- GC168** Confidential, 24 March 2025
- GC169** Aboriginal Legal Service (NSW/ACT) Ltd, 31 March 2025

Appendix C:

Consultations

Your Reference Ain't Relevant (PGCC01)

29 May 2024

Jarad Grice, Your Reference Ain't Relevant

Harrison James, Your Reference Ain't Relevant

Tara Hunter, Full Stop Australia

Emily Dale, Full Stop Australia

Children's Court of NSW (PGCC02)

10 September 2024

Judge Ellen Skinner

Local Court of NSW (PGCC03)

22 October 2024

Judge Michael Allen

Matilda Bogart

Yasmin Hunter

Reece Nuttall

Lawyers and prosecutors roundtable (GCC01)

20 February 2025

Helen Wilson SC, NSW Office of the Director of Public Prosecutions

Elizabeth Nicholson, NSW Office of the Director of Public Prosecutions

Jane Sanders, Law Society of NSW

Jasmine Stanton, Law Society of NSW

Thomas Woods, NSW Bar Association

Cara Feiner, The Public Defenders

Michelle Fernando, The Public Defenders

Rhiannon McMillan, Legal Aid NSW

Superintendent Duane Carey, NSW Police Force

Sergeant Corey Wolven, NSW Police Force

District Court of NSW (GCC02)

25 February 2025

District Court Judges

Victims groups (GCC03)

26 February 2025

Sophie Wheeler, Victims of Crime Assistance League

Tom Daher, Road Trauma Support Group NSW

Katie Dokmanovic, Road Trauma Support Group NSW

Supreme Court of NSW (GCC04)

26 February 2025

Supreme Court Judges