

NSWCCL SUBMISSION

NSW SENTENCING COUNCIL

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

9 July 2024

Acknowledgment

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The NSW Council for Civil Liberties (NSWCCL) welcomes the opportunity to make a submission to the NSW Sentencing Council in regard to the review of the operation of section 21A(5A) and other relevant sections of the *Crimes (Sentencing Procedure) Act 1999* ["the Act"] and the common law that relate to the use of "good character" in sentencing.

Introduction

'Prior good character' is a factor that has long been relevant to the sentencing exercise in appropriate cases (cf Section 21A(3)(e) and (f) of the Act and the common law). Its application must be understood in the context of the sentencing task, and this submission commences with a brief survey of the nature of the sentencing task with a focus on general principles of particular relevance to this submission. The submission then turns to briefly state the law governing the operation of good character as a mitigating factor. Next, the submission sketches existing limitations on good character as a mitigating factor in sentencing. The final two sections contain NSWCCL's assessment of the continued importance of good character as a mitigating factor in sentencing, and its consequent recommendations.

The nature of the sentencing task

The purposes of sentencing are prescribed by Section 3A of the Act which reflects Australian common law. Those purposes are: punishment; deterrence, both specific and general; the protection of the community; the promotion of rehabilitation; rendering the offender accountable for the conduct; denunciation; and recognition of the harm done to the victim and the community. As the High Court explained in *Veen v R (No 2)*¹ these purposes often pull in different directions. The task is a difficult one, rendered more difficult by the imposition of constraints or the prescription of rigid and inflexible rules and numerous considerations to be taken into account.

The correct approach to the sentencing task involves a process of instinctive synthesis. Discussing that process in *Wong v The Queen*; *Leung v The Queen*², the High Court said:

So long as a sentencing judge must, or may, take account of **all** of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform.

The core of the difficulty lies in the complexity of the sentencing task. A sentencing judge must take into account a wide variety of matters which concern the seriousness of the offence for which the offender stands to be sentenced and the personal history and circumstances of the offender. Very often there are competing and contradictory considerations. What may mitigate the seriousness of one offence may aggravate the seriousness of another. Yet from these the sentencing judge must distil an answer which reflects human behaviour in the time or monetary units of punishment." (Original emphasis)

The personal history and circumstances of an offender is a core aspect of the sentencing task. It is central to the principle of individualised justice. In *Director of Public Prosecutions (Vic) v Dalglish (a pseudonym)*³ the High Court said:

In *Elias v The Queen* [(2013) 248 CLR 483 at 494-495 [27]; [2013] HCA 31], French CJ, Hayne, Kiefel, Bell and Keane JJ said: '[t]he administration of the criminal law involves individualised justice.' The imposition of a just sentence on an offender in a particular case is an exercise of judicial discretion concerned to do justice in that case. It is also the case that, as Gleeson CJ said in *Wong v The Queen* [(2001) 207 CLR 584 at 591 [6]; [2001] HCA 64]: '[t]he administration of criminal justice works as a system ... It should be systematically fair, and that involves, amongst other things, reasonable consistency.' As was explained by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in *Hili v The Queen* [(2010) 242 CLR 520 at 535 [49]; [2010]

¹ (1988) 164 CLR 465.

² (2001) 207 CLR 584 at 611-612 per Gaudron, Gummow and Hayne JJ at [75]-[77].

³ 91 ALJR 1063 per Kiefel CJ, Bell and Keane JJ at [49].

HCA 45]: '[t]he consistency that is sought is consistency in the application of the relevant legal principles'.

The operation of good character as a mitigating factor

At common law, and now under s 21A(3)(f) of the Act, the good character of the offender is a matter that must be taken into account in mitigation of penalty, where relevant and known to the court. It is a factor that is distinct from the offender's record of previous convictions, both at common law and by the specific provision in s 21A(3)(e) of the Act. Good character is a matter that must be taken into account in sentencing also for a federal offence. S 16A(2)(m) of the *Crimes Act 1914 (Commonwealth)* provides that the court must take into account the character, antecedents, age, means and physical or mental condition of the person. Again, the terms of s 16A(2)(m) make it clear that "character" and "antecedents" are viewed by the Parliament, as by the common law, as separate considerations.⁴

A leading modern authority on good character as a mitigating factor is *Ryan v The Queen*.⁵ When considering prior good character, a court must approach the task in two logically distinct stages. First, it must determine whether the offender is of otherwise good character (prior to the offence). In making this assessment, the sentencing judge must not consider the offences for which the offender is being sentenced. Next, if it is determined that the offender is of otherwise good character, the sentencing judge is bound to take that fact into account.⁶ The weight that must be given to the prisoner's otherwise good character will vary according to all of the circumstances of the case.⁷ The otherwise good character of the offender is only one of a number of matters the court must consider and the nature and circumstances of the offence is of utmost importance.⁸

In *Ryan v The Queen*, Kirby J observed:

The evidence of good conduct, or of matters which reveal redeeming features of the offender's character, tendered as relevant to sentencing will rarely, if ever, be discarded as immaterial to the sentencing function. The evidence may sometimes be disbelieved. It may sometimes be overridden by the objective seriousness of the offences or by countervailing evidence or by other considerations. But it is a mistake in sentencing to treat such evidence as irrelevant to the task at hand.⁹

In *R v Gent*, the Court observed that:

It has been said that there is a certain ambiguity about the expression "good character" in the sentencing context. Sometimes, it refers only to an absence of prior convictions and has a rather 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 ...¹⁰

Relatedly, if a sentencing judge considers an offender's antecedent criminal history of little relevance, those prior offences should not then be relied on to establish bad character.¹¹

In *Ryan v The Queen*, McHugh J said: "what makes a person of otherwise 'good character' will necessarily vary according to the individual who stands for sentence. It is impossible to state a universal rule."¹²

Existing limitations on good character as a mitigating factor

⁴ *Weininger v R* [2003] 212 CLR 629 per Kirby J (in dissent).

⁵ (2001) 206 CLR 267.

⁶ *Ryan v The Queen* per McHugh J at [23] and [25]; section 21A(1)(b) of the *Crimes (Sentencing Procedure) Act 1999* NSW.

⁷ *Ryan v The Queen* per McHugh J at [25].

⁸ *R v Gent* [2005] NSWCCA 370 at [53].

⁹ *Ryan v The Queen* per Kirby J at [102].

¹⁰ [2005] NSWCCA 370; 162 A Crim R per Johnson J (McClellan CJ at CL and Adams J agreeing) at [49].

¹¹ *Pfeiffer v The Queen* [2009] NSWCCA 145; *Elomar v R* [2018] NSWCCA 224.

¹² (2001) 206 CLR 267 per McHugh J at [31].

The *Crimes Amendment (Sexual Offences) Act 2008* inserted special rules regarding good character as a mitigating factor for child sexual offences through s 21A(5A) of the Act, which commenced operation on 1 January 2009. That section provides that an offender's good character or lack of previous convictions is not to be taken into account as a mitigating factor for a child sexual offence if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

During the Second Reading Speech, the then Attorney General said:

The bill also makes important changes to the Crimes (Sentencing Procedure) Act 1999 to ensure that when sentencing an offender for a child sexual offence the court is not to take into account the offender's prior good character or lack of previous convictions if that factor was of assistance to the offender in the commission of the offence. The simple fact of a person's clean record and good character may assist an offender to gain the trust of the child, or the child's parents, in order to commit a sexual offence against the child. Any offender who has misused his or her perceived trustworthiness and honesty in this way cannot use his or her good character and clean record as a mitigating factor in sentencing.¹³

S 21A(5A) was not a novel reform; the common law has long established limitations on good character as a mitigating factor. In *R v Kennedy*¹⁴ and later in *Jung v R*¹⁵, it was held that little or no weight may be attributed to an offender's prior good character where: general deterrence is important and the particular offence before the court is serious and one frequently committed by persons of good character;¹⁶ the prior good character of the offender has enabled the offender 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. Similarly, there are established classes of offence where good character may carry less weight as a mitigating factor. These classes are not closed.¹⁷ They include drug couriers,¹⁸ dangerous driving,¹⁹ drink driving,²⁰ child pornography/abuse offences,²¹ and child sexual assault offences (including where s 21A(5A) does not apply).²²

The operation of s 21A(5A) and other laws relating to the use of good character in sentencing

S 21A(5A) limits the operation of both s 21A(3)(e) ('prior criminal record') and s 21A(3)(f) ('prior good character'). As explained above, there is some intersection between 'prior criminal record' and 'prior good character', but they remain distinct concepts. NSWCCCL considers this distinction useful, because the latter is a far wider concept that encompasses a full suite of considerations that arise in the application of the principle of individualised justice.

The common law provides for wider limitations on the use of good character as a mitigating factor in sentencing than that provided by s 21A(5A). However, s 21A(5A) expressly adopts a qualifier that accords with the common law approach, namely it is excluded 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." NSWCCCL considers that qualifier an essential safeguard that preserves the provision's underlying principle without creating the kind of rigidity and inflexibility that undermines the process of instinctive synthesis in sentencing.

¹³ Legislative Council Hansard – 26 November 2008, Crimes Amendment (Sexual Offences) Bill 2008, Second Reading, The Hon. John Hatzistergos.

¹⁴ [2000] NSWCCA 527 at [21]–[22].

¹⁵ [2017] NSWCCA 24.

¹⁶ See also *Vincenzo Jon Fedele v R* [2015] NSWCCA 286 at [53].

¹⁷ *R v Gent* at [61].

¹⁸ *R v Leroy* (1984) 2 NSWLR 441 at 446–447.

¹⁹ *R v McIntyre* (1988) 38 A Crim R 135 at 139

²⁰ *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305 at [118]–[119]

²¹ *R v Gent* [2005] NSWCCA 370 at [64]

²² *R v PGM* [2008] NSWCCA 172 152 at [43]–[44] and *Dousha v R* [2008] NSWCCA 263 at [49].

Good character is a consideration that contends with an offender's past behaviour (not including the offence for which they are being sentenced). It might be contrasted to a consideration such as remorse, which contends with an offender's present behaviour, or prospects of rehabilitation, which contends with an offender's anticipated future behaviour. The personal circumstances of an offender are a central feature of instinctive synthesis in sentencing. NSWCCCL is concerned that the diminution of the application of good character as a sentencing principle tends to undermine the importance of circumstances personal to an offender in the sentencing exercise. In appropriate cases, a finding of prior good character is key to achieving the purposes of sentencing.

Prior good character is a term of art, which refers to evidence that an offender has previously engaged in some socially beneficial or otherwise worthwhile activities. In the sentencing context, the term is not deployed to diminish the gravity or moral blameworthiness of the instant criminality. NSWCCCL understands that the use of the term may impact on the experience of victim-survivors who misapprehend its technical relevance in the sentencing context. NSWCCCL considers that victim-survivors should be provided with an appropriate explanation of the application of the principle in the sentencing context in accordance with the Guidelines of the Office of the Director of Public Prosecutions.

Recommendations

1. 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" should not be removed from s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999*.
2. Any reforms to clarify the application of principle should maintain the availability of good character as a mitigating factor in sentencing proceedings in appropriate cases.
3. The experience of victim-survivors in sentence proceedings could be improved through an appropriate explanation of the role of evidence of prior good character in the offender's subjective case, including that it is not intended to diminish the gravity or moral blameworthiness of the offending.
4. The procedures for receiving good character evidence in sentencing proceedings should not be changed, and any reform should not unduly restrict material that informs the Court of an offender's personal circumstances.

This submission was prepared by Edward McMahon on behalf of the New South Wales Council for Civil Liberties.

Yours sincerely,

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