RELYING ON EVIDENCE OF YOUR CLIENT'S GOOD CHARACTER

AT TRIAL / HEARING
AT SENTENCE

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SCOPE OF THIS PRESENTATION

What it covers

- What is "good character"?
- What is its relevance at trial and/or sentence?
- How is evidence of good character admissible?
- How is good character evidence adduced?
- Forensic considerations in trials and the risk of rebuttal evidence
- Directions to be given when good character is adduced
- The use of good character evidence in sentence proceedings – amendments to s 21A *Crimes (Sentencing Procedure) Act 1999*

What it does not cover

- When evidence of good character is not relied on, but accidentally or inadvertently raised by the client or advocate
- When evidence of bad character is accidentally or inadvertently raised by an accused or witness
- Cross-examination of a co-accused or prosecution witness about their character.
- The close link between evidence of character and evidence being led to rebut a prosecution tendency.

TRIALS AND SUMMARY HEARINGS

EVIDENCE ACT 1995 (NSW)

110 Evidence about character of accused persons

(1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either **generally** or **in a particular respect**, a person of good character.

(2) If evidence adduced to prove (directly or by implication) that a defendant is **generally** a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a person of good character.

(3) If evidence adduced to prove (directly or by implication) that a defendant is a person of good character **in a particular respect** has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not a person of good character in that respect.

…

112 Leave required to cross-examine about character of accused or co-accused

A defendant must not be cross-examined about matters arising out of evidence of a kind referred to in this Part **unless the court gives leave**.

WHAT DOES "GOOD CHARACTER" MEAN?

- No definition provided in the *Evidence Act* for "good character" – common law applies.
- The meaning of "good character" depends on the context in which it is being used.
- *"In its strict sense, character refers to the inherent moral qualities of a person or what the New Zealand Law Commission has called 'disposition - which is something more intrinsic to the individual in question'. It is to be contrasted with reputation, which refers to the public estimation or repute of a person, irrespective of the inherent moral qualities of that person":* per McHugh J in *Melbourne v The Queen* [1999] HCA 32' 198 CLR 1 at [33]
- In both trials / hearing and in sentencing, the expression "good character" cannot be treated as a "single undifferentiated whole". The expression has positive and negative aspects.
  - **Positive aspect**: that the accused possesses certain qualities or has performed good works and contributed to the community.
  - **Negative aspect**: an absence of criminal convictions or absence of previous criminal conduct.
- Relevant cases**:**
  - *Melbourne v The Queen* [1999] HCA 32; 198 CLR 1
  - *Weininger v The Queen* (2003) 212 CLR 629; [2003] HCA 14 at [25];
  - *Ryan v The Queen* (2001) 206 CLR 267; [2001] HCA 21 at [27];
  - *Warton v R* [2025] NSWCCA 5 at [66]-[67];
  - *Neil v The King* [2025] NSWCCA 160 at [50].

RATIONALE OF THE RELEVANCE OF GOOD CHARACTER EVIDENCE IN TRIALS

- Understanding the rationale of good character assists in understanding its relevance, its limits, and the discretionary nature of directions.
- Evidence of good character has a long history that pre-dates the *Evidence Act,* and pre-dates the accused being a competent witness in his own trial.
- The existence of good character, if established, is relevant (i.e. could rationally affect, directly or indirectly, the assessment of the probability that the accused committed the offence) in two ways:

  (a) It may demonstrate that it is less likely the accused committed the act charged; and/or

  (b) It may be used in assessing the credibility of out-of-court statements made by the accused and, if applicable, the accused's sworn evidence

- <u>Relevant cases:</u>
  - *Attwood v The Queen* (1960) 102 CLR 353; [1960] HCA 15
  - *Melbourne v The Queen* (1999) 198 CLR 1; [1999] HCA 32
  - *TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46
  - *Braysich v The Queen* (2011) 243 CLR 434; [2011] HCA 14
  - *Ryan v The Queen* (2001) 206 CLR 267; [2001] HCA 21

"IN A PARTICULAR RESPECT" – THE DIVISIBILITY OF CHARACTER

- The concept of good character "in a particular respect" was introduced by the *Evidence Act 1995* – at common law there was no divisibility of character.
- No definition or guidance in the *Evidence Act* about what is meant by "in a particular respect".
- There are few appellate authorities considering the scope of the statutory concept of divisibility of character.
  - *R v Zurita* [2002] NSWCCA 22
  - *Decision restricted* [2021] NSWCCA 74
- The judgment in *R v Wiggins (No 7)* [2022] NSWSC 1249 (N Adams J) considers in depth the concept of divisibility of character.
  - A particular respect = a particular character trait
  - **A person who is not of general good character, who wishes to raise character in a "particular respect" must establish that that *specific* aspect of their character is relevant to the charged offence(s) *and* the trial judge will not necessarily err if no character direction is then given.**
- Where character evidence is adduced that is limited to good character "in a particular respect" that has a logical connection with the elements of the offence/s, the rebuttal evidence is limited to that aspect of the character evidence that was raised by the accused: *Decision restricted* [2021] NSWCCA 74

"IN A PARTICULAR RESPECT" CONT

- The "particular respect" cannot be too specific that it runs the risk of misleading the jury: *Wiggins (No 7)* at [48].
- Multiple particular respects? This will be a question of degree, raising one's character in *more than one* "particular respect" is potentially tantamount to raising one's good character generally. (See *Wiggins (No 7)* at [79])
- The "particular respect" relied on may impact whether a direction is given about character, and the content of any direction (i.e. guilt and/or credibility limb).
- Some examples of obvious divisibility: good character regarding sexual conduct, good character regarding behaviour with children, good character regarding violence, good character regarding domestic / romantic relationships.
- **Be aware:** Having a lack of convictions is not having good character in a particular respect. Rather, an absence of convictions is one mode of *proof* of evidence of good character (i.e. it is the negative aspect of good character evidence). You can rely on good character by using only the negative aspect (i.e. your evidence is limited to adducing absence of convictions), but you will be raising character generally and the prosecution's rebuttal evidence will not be limited to only adducing evidence of convictions. (see e.g. *Melbourne v The Queen* per Kirby J at [108])

FORENSIC DECISIONS ABOUT CHARACTER

- Decide whether you are relying on good character generally or in a particular respect (*noting this may depend on rebuttal evidence)*
- Forensic decisions about whether the rely on character in "a particular respect" (i.e. will it raise a question in the mind of the jury about other aspects of character)
- Rebuttal evidence: Make sure you are aware of the existence of potential rebuttal evidence prior to making a decision about good character evidence.
  - Do not rely on your client.
  - Enquire with prosecution about existence of any rebuttal evidence that would be called if you adduced evidence of good character (and ask them to check with the OIC, or ask the OIC yourself).
  - Are there unresolved allegations / outstanding trials (including after a successful separate trial application for example).
  - Is there context evidence that might be used as character evidence (i.e. violence
- If there is evidence which would be led in rebuttal, a forensic decision is required, whether to:
  - call the good character evidence (regardless).
  - not call the good character evidence because of the risk of the rebuttal evidence being before the jury.
  - seek an advance ruling as to whether the Crown would in fact be granted leave to call the rebuttal evidence.
- These forensic decisions will always be context dependent - every case will be different depending on many factors: the charges, the evidence, the value of the good character evidence, the damage of the rebuttal evidence, whether the accused will give evidence.

FORENSIC DECISIONS CONT.

- Questions to consider where there is rebuttal evidence available:
  - Can you eliminate the risk of rebuttal evidence by only relying on character in 'a particular respect'?
  - How important is good character in your particular case given the charges?
  - How strong/persuasive is your good character evidence? Are you adducing evidence of positive good character through witnesses or relying only on the negative aspect by asking the OIC about absence of convictions?
  - How damaging is the rebuttal evidence? Can you deal with it if it is admitted?
  - Will you be calling sworn evidence from the accused or relying on out of court statements, and thus relying on the credibility relevance of good character as well?
- Seek an advance ruling pursuant to s 192A *Evidence Act*.
  - In respect of whether the trial judge would admit the rebuttal evidence pursuant to s 110(2) (good character generally) or s 110(3) (good character in a particular respect).
  - In respect of whether leave would be granted to cross-examine the accused about character pursuant to s 112 (if you anticipate calling your client)
- Don't forget ss 135 and 137 *Evidence Act* also apply.

ADDUCING THE EVIDENCE

- Evidence of the positive aspect of good character is usually given by character witnesses called in the defence case (but may also be elicited from prosecution witnesses).
- Evidence of the negative aspect of good character is commonly adduced in cross-examination of the OIC or a police officer called in the prosecution case (but can also be given by the accused)
- Remember: if the accused gives evidence, the prosecution cannot cross-examine them about character unless the court has granted leave (even if evidence of good character relied on)
  - *Evidence Act* s 112 and s 192
- Rebuttal evidence: the hearsay, opinion, credibility and tendency rules do not apply which means the prosecution can seek to adduce the rebuttal evidence in a hearsay manner through the OIC (or other relevant witness) and are not obliged to call the witnesses to the other conduct directly.

DIRECTIONS REQUIRED

- The starting point: A direction to the jury (or self-direction to a tribunal of fact) is **not** mandatory.
  - The trial judge retains a discretion as to whether to direct the jury on evidence of good character after evaluating its probative significance in relation to both (a) the accused's propensity to commit the crime charged; and (b) the accused's credibility.
  - The judge may conclude that the good character evidence adduced is of probative significance in relation to (a) only, (b) only, both (a) and (b) or neither (a) nor (b), and can direct (or not direct) the jury accordingly.
  - Whether to give a direction at all, or the form of it (that is, the relevant to guilt limb and/or relevant to credibility limb) will require close attention to the relevance of the character evidence to the offence, and to the issue or issues to which the character evidence relates.
  - *Simic v The Queen* (1980) 144 CLR 319; [1980] HCA 25; *Melbourne v The Queen* (1999) 198 CLR 1; [1999] HCA 32 ; *Stanoevski v The Queen* (2001) 202 CLR 115; [2001] HCA 4
- **However,** a trial judge is obliged to correct misstatements made by counsel about the relevance of evidence of good character.
  - E.g. if the Crown Prosecutor or defence counsel incorrectly address the jury on how character can be used (or how it cannot be used).
  - *Neil v The King* [2025] NSWCCA 160; *R v Murphy* (1985) 4 NSWLR 42; *Melbourne v The Queen* (1999) 198 CLR 1; [1999] HCA 32
- As a matter of practice, the direction is given where relevant evidence has been adduced and the direction is requested.
- If rebuttal evidence has been adduced, ordinarily an anti-tendency direction should be given to make clear how the rebuttal character evidence can be used and how it **cannot** be used (i.e. anti-tendency type direction).

PROCEDURAL STEPS

- **Make relevant enquiries:**
  - Ascertain whether the accused has good character evidence available to him/her
    - Ask about their convictions history.
    - Ask about whether, even if they have no convictions, they have had any charges that did not proceed, any AVOs or trouble with police.
    - Make enquiries about whether any witnesses might give evidence on their behalf about positive character traits, honesty, moral disposition and contribution to the community.
  - Make enquiries with prosecution about whether, if good character evidence was relied on, there would be any rebuttal evidence relied on.
  - If you wish to rely on evidence of good character, but there is rebuttal evidence available, consider an application for an advance ruling pursuant to s 192A.
  - Don't forget that, in addition to argument pursuant to s 110, you can object pursuant to ss 135 and 137 to any application by the prosecution to adduce rebuttal evidence.
- **Know how you are going to adduce the evidence:**
  - Are you calling character witnesses for positive good character evidence? If not, can you obtain this evidence through any other person (such as a prosecution witness or the accused)
  - Are you adducing evidence of negative good character via the OIC or by other means?
- **Is the accused giving evidence?**
  - Remember leave is required before the prosecution can cross-examine on character (s 112)
- **Know what direction/s you will ask for and why:**
  - Be prepared to make submissions about whether a good character direction is warranted – and if so, which limbs of the direction (i.e. that the evidence is relevant to guilt and credibility, or just one or the other)
  - Be prepared to articulate the relevance of the character evidence to the issues in the case so as to justify the direction.
  - Be alert to any misstatements by prosecution counsel that might require correction by the trial judge (irrespective of whether a good character direction is given)
  - If rebuttal evidence has been adduced, consider an anti-tendency direction to make clear its limited use

IMPORTANT CASES

There is no substitute

for reading the law!

- *Simic v The Queen* (1980) 144 CLR 319; [1980] HCA 25
- *Melbourne v The Queen* (1999) 198 CLR 1; [1999] HCA 32
- *Stanoevski v The Queen* (2001) 202 CLR 115; [2001] HCA 4
- *Ryan v The Queen* (2001) 206 CLR 267; [2001] HCA 21
- *TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46
- *Weininger v The Queen* (2003) 212 CLR 629; [2003] HCA 14
- *FB v R* [2020] NSWCCA 137
- *Warton v R* [2025] NSWCCA 5
- *Neil v The King* [2025] NSWCCA 160
- *R v Wiggins (No 7)* [2022] NSWSC 1249

SENTENCE PROCEEDINGS

CRIMES (SENTENCING PROCEDURE) ACT 1999

- Section 21A(1)(b): The court is to take into account any mitigating factors referred to in s 21A(3) that are **relevant and known to the court.**
- Section 21A(5): the fact that any such… mitigating factor is relevant and known to the court does not require the court to… reduce the sentence for the offence.
- Section 21A(5A): 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.

- Section 21A(3)(e): the offender does not have any record (or any significant record) of previous convictions
- Section 21A(3)(f): the offender was a person of good character.
- Section 21A(3)(g): the offender is unlikely to reoffend.
- Section 21A(3)(h): the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise

RELEVANCE OF GOOD CHARACTER IN SENTENCE PROCEEDINGS - COMMON LAW RATIONALE

- *Ryan v The Queen* (2001) 206 CLR 267; [2001] HCA 21 at [29] – [30]
  - An offender's prior good character may suggest that their actions in committing the offence were "out of character" or "an uncharacteristic aberration" and that they are unlikely to re-offend (per McHugh J at [29])
  - A "morally good" person may be less deserving of punishment than a "morally neutral or bad" person, even if the offence committed was identical. (per McHugh J at [30]).
  - Where an offender is of otherwise good character, it may indicate that the value a good reputation and the mere fact of conviction may be a punishment; or it may indicate the capacity of the person to appreciate the censure inherent in the outcome of the criminal process and thus suggest that repetition of the criminal conduct is unlikely (per Gummow J at [68]) (see also *Kenny v R* [2010] NSWCCA 6 at [13]-[17])
- Issues arise about the interplay between character and criminal record – often conflated in judgments and remarks on sentence, and difficult to separate as concepts.

ESTABLISHING GOOD CHARACTER AND WEIGHT TO BE GIVEN TO THAT FACTOR

- It is for the offender to establish on the balance of probabilities the fact that he is "of otherwise good character":
- 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 *(Ryan*).
- Good character is not the same as "reputation". The meaning is as in *Melbourne v The Queen* = disposition or qualities (positive and negative aspects of character)
- Where good character is established on balance of probabilities, a sentencing judge is bound to take it into account: *Ryan v The Queen* **(current position but *Crimes (Sentencing Procedure) Amendment (Good Character at Sentencing) Bill 2026* will change this.)**
- BUT the weight that this factor is given in the sentencing exercise can vary according to the circumstances of each case, and it may be given very little weight in mitigation in some circumstances: e.g.
  - The class of offence is frequently committed by persons of good character.
  - The offender's good character facilitated or helped conceal the offence.
  - The offending reveals a pattern, not isolated conduct; or the offender committed offences over a long period of time while also doing the "good works" that are relied on for good character.
  - The objective gravity of the offence (where the offence is very serious, good character may be given less weight).
  - The offending involved careful or deliberate planning.

PROPER APPROACH IN SENTENCE PROCEEDINGS

- *First:* the court must consider whether it is satisfied on the balance of probabilities that the offender is of "otherwise good character", disregarding the offence for which the offender is being sentenced.
  - Can be established negatively (absence of criminal convictions) or positively (evidence of good acts and moral qualities).
- *Second:* if the court is so satisfied, then the judge must take that factor into account in the instinctive synthesis (**presently**)
- *Third*: the weight to be given to that factor is within the discretion of the sentencing judge and will vary according to the circumstances of the case.

LEGISLATIVE AMENDMENTS

- *Crimes (Sentencing Procedure) Amendment (Good Character at Sentencing) Bill 2026 (NSW)*
  - Passed by both houses on 12 May 2026.
  - Amendments were confined to "sexual offences"
- *Crimes (Sentencing Procedure) Amendment (Good Character) Bill 2026* introduced the following day (13 May 2026).
  - Passed by both Houses on 4 June 2026.
  - Blanket amendments (not confined to sexual offending).
- The object of the Bill is to amend the *Crimes (Sentencing Procedure) Act 1999* to prevent good character from being taken into account as a mitigating factor in determining appropriate sentences for offences and to make consequential and related amendments.
- Commences on a day to be appointed by proclamation.
- Once commenced, the amendments will apply to all sentence proceedings (including begun but not finalised, and where sentence is imposed after; where offence committed before or after commencement; and where criminal proceedings commenced before or after commencement)
- Subject to a review by the Minister after 2 years.

SUBSTANTIVE CHANGES

- Sections 9(2)(a) and 10(3)(a): Remove "character" as one of the factors a court must have regard to in deciding whether to impose a CRO or CCO or dismissal / conditional discharge.
- Section 45(1)(a): Remove "antecedent character" and replace with "antecedents" in reference to when a court may decline to set a non-parole period for the offence or offences (i.e. where the court considers it is appropriate to do so "because of…. the antecedents of the offender"
- Section 21A(3)(f) is removed.
- Section 21A(5A) special rule for child sexual offences: amended to provide that in determining the appropriate sentence for a child sexual offence, the lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that this factor was of assistance to the offender in the commission of the offence. (*ie omits reference to character)*
- Section 21A(5D) – (5F) added:
  - Section 21A(5D): The principle or rule of common law that requires or allows good character to be considered by a court as a mitigating factor in determining the appropriate sentence for an offence is abolished.
  - Section 21A(5E) A court, in determining the appropriate sentence for an offence, must not consider evidence adduced solely for the purpose of establishing good character.
  - Section 21A(5F) Subsection (5E) does not prevent a court from considering evidence adduced for another purpose or principle of, or factor in, sentencing.

IS THE EVIDENCE ADDUCED **SOLELY** FOR THE PURPOSE OF ESTABLISHING GOOD CHARACTER (OR RELEVANT FOR ANOTHER SENTENCING PURPOSE)?

- **Sections 21A(5E) and (5F) are important**.
  - A court must not consider evidence adduced **solely** for the purpose of establishing good character.
  - But this does not prevent a court from considering evidence adduced **for another purpose or principle of or factor in sentencing**.
- Thus, an offender can still rely on evidence which is relevant to establish:
  - An absence of any criminal convictions (or any significant record)
  - That he/she has good prospects of rehabilitation: this may include evidence of family or social supports, employment, remorse, any other positive works or contributions to the community which would indicate pro-social choices.
  - That he/she is unlikely to reoffend: this may include evidence of family or social supports, evidence of previous good character in a negative or positive sense (i.e. no convictions or positive good works and contributions), history of employment, references from others who know the offender and can express an opinion on likelihood of reoffending given their previous knowledge of character of the offender.
- Not precluded or prohibited from adducing evidence otherwise relevant to establishing other mitigating factors pursuant to s 21A(3) which the court is required to take into account where "known to the court" or evidence relevant to purposes of sentencing pursuant to s 3A.

DOES THE RATIONALE REMAIN PROTECTED?

- Reminder, the common law understood the following as the rationale of good character in sentencing (*Ryan v The Queen* (2001) 206 CLR 267; [2001] HCA 21)
  - First: to suggest that the offender's actions in committing the offence were "out of character" and that they are unlikely to re-offend – **this rationale is protected by ss 21A(3)(e), (g) and (h), and s 3A.**
  - Second: the idea that a "morally good" person may be less deserving of punishment than a "morally neutral or bad" person, even if the offence committed was identical **– this aspect of the rationale will not persist with the amendments**
  - Third: to suggest that the offender values their reputation and the mere fact of conviction may be a punishment; or indicate the person's capacity to appreciate the censure inherent in the outcome of the criminal process and thus suggest that repetition of the criminal conduct is unlikely – **this rationale is protected by ss 21A(3)(e), (g) and (h) and 3A.**
  - Section 3A also makes relevant any evidence which addresses less need for specific deterrence, less need to protect community, the degree of punishment required for a particular individual, evidence relevant to the weight to be given to purposes of rehabilitation for a particular individual, and what is required to make a particular offender accountable.