

# GOOD CHARACTER AT SENTENCING

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## About us

Domestic Violence NSW (DVNSW) is the peak body for specialist domestic and family violence (DFV) services in NSW. With approximately 200 member organisations across the state and diverse lived expertise advisory groups, we work to improve policy, legislative and program responses to domestic and family violence through advocacy and collaboration, while promoting good practice and primary prevention.

We exist to eliminate domestic and family violence from society.

DVNSW members represent the diversity of NSW specialist DFV services, working to support adults, children, families and communities impacted by domestic and family violence. Our member organisations consist of services such as crisis and refuge specialist homelessness services, domestic violence response enhancement, specialist DFV case management, Aboriginal controlled organisations, migrant and refugee specialist organisations, community housing, staying home leaving violence, women's legal and women's court advocacy services, men's behaviour change programs, and general community, women and children's support programs. It's our role to ensure our members are listened to, respected and heard by the change-makers in society.

We recognise that lived experience is central to change. We understand that DFV impacts some communities disproportionately – which is why we ensure the experiences of Aboriginal and Torres Strait Islander people, LGBTIQ+ people, migrant and refugee people and people with disability have a central voice in our advocacy. With guidance from lived experts, we elevate the experiences, voices and needs of victim-survivors through all work we undertake.

Together with victim-survivors, our members, our partners and our team – we will end gender-based violence in NSW.

## Acknowledgement

This report was written on the stolen and unceded lands of the Gadigal People of the Eora Nation. We pay respects to the Elders past and present.

DVNSW acknowledges Aboriginal and Torres Strait Islander peoples as the first sovereign nations across the breadth and depth of Australia. We recognise that Aboriginal and Torres Strait Islander people have lived and cared for Country for over 60,000 years and continue to do so, honouring ancestors and knowledge holders within community, and observing ancient cultural practices. We acknowledge the damaging impacts of colonisation and hold their stories with great care.

We acknowledge that domestic and family violence are not part of Aboriginal culture and assert that the responsibilities of Aboriginal families and kinship systems do not align nor are reflected in current government policies. We work to position ourselves as allies and give voice and strength to the unique position that Aboriginal and Torres Strait people hold in their own family systems and communities.



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## A note on terminology

### **Domestic violence**

Interpersonal violence or abuse perpetrated by an intimate partner or ex-partner. Domestic violence can include a variety of forms of abuse including but not limited to, physical, sexual, psychological, financial abuse, physical stalking, and intimidation. Domestic violence is gendered and is most commonly underpinned by coercive control, which is a pattern of behaviour utilising many different tactics to create a web of entrapment, often involving the exploitation of power imbalances.

### **Family violence**

Violence perpetrated by a family member, carer, guardian, child, or kinship carer. Family violence can include a variety of forms of abuse including but not limited to, physical, sexual, psychological, financial abuse, physical stalking, and intimidation. Family violence is gendered and is most commonly underpinned by coercive control, which is a pattern of behaviour utilising many different tactics to create a web of entrapment, often involving the exploitation of power imbalances.

### **Gendered violence**

Gendered violence or gender-based violence refers to harmful acts directed at an individual or a group of individuals because of their gender. It is rooted in gender inequality, the abuse of power and harmful norms. The term is primarily used to draw attention to the fact that structural, gender-based power differentials place women and girls at risk for multiple forms of violence. While women and girls suffer disproportionately from gendered violence, men and particularly boys can also be victims. The term is inclusive of LGBTIQ+ populations, referencing violence related to norms of masculinity/femininity and/or gender norms.

### **Intimate Partner Violence (IPV)**

Abuse perpetrated by a current or former intimate partner such as a partner, husband, wife, girlfriend, boyfriend, or person who someone is dating. Term is often used interchangeably with domestic violence.

### **People with lived expertise**

People with lived expertise are people who have experience of sexual, domestic and/or family violence whose expertise as context experts due to their lived experience is noted.

### **Specialist sexual, domestic, and family violence sector**

The specialist sexual, domestic, and family violence sector includes crisis and refuge services, transitional accommodation and community housing providers, family support services, Aboriginal controlled organisations, specialist multicultural community organisations, specialist LGBTIQ+ organisations, counselling services, sexual violence services, specialist homelessness service providers, men's behaviour change programs and networks, community organisations working with high-risk communities, specialist women's legal and support services, women's health centres, women and children's support services, Safe at Home programs and the Women's Domestic Violence Court Advocacy Services.

### **Victim-survivor**

Victim-survivor refers to a person who is being or has experienced violence, acknowledging that people who have been victimised are survivors and are also victims of crime. We acknowledge that people who have been victimised are survivors and are also victims of crime. This is not intended as an identity term. In the specialist domestic and family violence sector, the preferred term is victim-survivor.

DVNSW notes that the justice sector and legislation use the term victim. In this submission, although used interchangeably, the emphasis has been placed on the term victim-survivor, with victim used at times particularly when discussing the justice system or legislation.

### **Coercive control**

Coined by Evan Stark, Buzawa and Stark (2017, p. 105) define coercive control as “a strategic course of gender-based abuse in which some combination of physical and sexual violence, intimidation, degradation, isolation, control and arbitrary violations of liberty are used to subjugate a partner and deprive her of basic rights and resources”. This web of abuse has the end goal of entrapment and is a conscious, concerted effort by the abuser. Also known as intimate terrorism, this coercive control is the foundational underpinning of domestic and family violence, not simply another form of violence. Another way to think about this comes from Emma Katz, who describes coercive control as a toolbox, and the forms of abuse (financial, technological, humiliation and degradation etc.) as the individual tools. This is different to rarer instances of situational couple violence, which can be just as lethal, but are not motivated by the desire to entrap their victim.

## Recommendations

1. DV matters should not immediately be subject to the special rule, due to the complexity of domestic and family violence matters.
2. Perform a systemic review of the *Crimes (Domestic and Personal Violence) Act 2007*.

## Good Character at Sentencing

Due to the remit of DVNSW, this submission<sup>1</sup> will primarily address question 5.8 of the consultation paper, addressing the extension of the special rule to domestic violence offences. References are also made throughout to question 5.2 of the discussion paper pertaining to the use of lack of previous convictions. There is limited research available on character references in domestic violence matters, particularly those dealt with in the Local Court. Rather, much of the research focuses on the ethics and morals of good character in criminal matters, more complex criminal trials such as those dealt with in the District Court, and the recent advocacy around child sexual assault. As such, much of the below is based on practice experience of domestic and family violence specialist services.

### 1. Should domestic violence offences be subject to the special rule? Why or why not?

Important issues were raised in the discussion paper around perpetrators of domestic and family violence often presenting as “good guys”, and how this can be a barrier for women and children seeking safety and support. DVNSW members have reported this being an extensive issue, with victim-survivors feeling unheard and dismissed when the court takes the perpetrator’s good character into account when sentencing.

The most harmful skill a perpetrator has is how effectively they are able to manipulate their public image, and the victims are the ones who are often most aware of this. It is often victim-survivors enter the court space knowing that there will be no impactful repercussions on the perpetrator of violence due to how they are perceived by their friends, colleagues, works and often police who have spoken directly to them. Hearing references of good character for perpetrators of DFV undermines a victim-survivors experience of abuse and allows the system invalidate abuse and as a result minimize the harm that has been caused. The system responds with lesser sentencing, thus diminishing the severity of violence, further invalidating trauma. In turn this reinforces societies harmful narratives that result in victim blaming and lack of accountability held by abusers.

DVNSW Member

These are the cases in which DVNSW would express concern around consideration of a lack of previous convictions as a mitigating factor referred to in question 5.2 of the discussion paper. It is quite common for victim-survivors of domestic and family violence to have significant histories of unreported violence before finally coming to the attention of the legal system. There are many barriers that prevent victims of domestic and family violence from reporting abuse to police, whether they be practical barriers such as an inability to access finances or support themselves and their children on their own, psychological factors such as a lack of confidence or still holding deep feelings of love for the perpetrator, or socio-structural factors, such as patriarchal norms or cultural expectations (Burman and Chantler 2005; Murray 2008; Saunders 2021). Therefore, a lack of previous domestic and family convictions does not mean that this is the first incident of abuse.

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<sup>1</sup> This submission has been endorsed by Full Stop Australia.

However, DVNSW would argue that good character at sentencing for domestic and family violence matters is much more complicated than in Child Sexual Assault (CSA) matters and would not recommend domestic violence offences be subject to the special rule at this time.

Of most concern are female victims who have been charged with domestic violence offences. Due to the incident-based nature of the criminal legal system, there are frequently incidents of violence where women who are predominant victims of domestic and family violence employ retaliatory violence for several reasons (Johnson 2008; Stark 2007). In these cases, the defendant has not necessarily been *misidentified*, as they have committed a criminal offence under the current legislation, which results in police being required to lay charges. An example of this below.

A predominant victim has experienced sustained coercive control by partner for many years. Most nights, she is able to manage his behaviour so she is able to bathe, feed, and put the kids to bed without him abusing her the whole time. However, on this particular night, she is particularly tired and unable to prevent him from escalating his verbal abuse towards her. The predominant aggressor is yelling at her and belittling her in front of the children for an hour and a half while she's taking care of the children, no matter how much she begs him to stop. She finally reaches the point where she lashes out and slaps him. While there is a history of his physical abuse towards her, she has never called police. However, on the first occasion she employs physical violence, he calls police instantly. When police arrive, the predominant victim is honest in admitting she did strike the predominant aggressor. Police charge her with assault.

One of the ways in which the criminal legal system is currently able to manage these matters is through a Section 10 Dismissal in the *Crimes (Sentencing Procedure) Act 1999*. This is where the court finds guilt (usually through an early plea), but discharges the matter without recording a conviction, meaning there will be no criminal record for the offence. This is important for the defendant's employment opportunities, but also to protect predominant victims. If the predominant victim is convicted of the offence, the predominant aggressor is afforded more power and control due to the barriers the criminal record may create for employment for the predominant victim, as well as the shame they may feel. An important piece of supporting evidence that can be tendered by the defendant or their legal representative to obtain a section 10 is good character references. In these cases, consideration of a lack of previous convictions as a mitigating factor referred to in question 5.2 of the discussion paper is appropriate.

It is important to note, good character references and consequential section 10s may be of less benefit for women from a First Nations background. Ongoing contact with the justice system, contributed to by ongoing systemic racism and discrimination experienced by First Nations people, drives cycles of re-incarceration. As a result, First Nations women are over five times more likely than non-Indigenous people to be charged for minor, non-violence offences and receive harsher sentences (AHRC, 2024).

Further, another situation in which Good Character References are important is when the predominant aggressor contributes a significant portion of the finances. An example of this is below.

A couple are in the process of divorce. During the separation, the defendant sent several threatening text messages to the victim, resulting in him being charged with Stalk/Intimidate. This is the first occasion of domestic and family violence in the relationship. The defendant is the primary earner and works in the education sector, with the victim working part time and performing the majority of the unpaid domestic labour.

A criminal conviction and subsequent criminal history would likely impact the defendant's job, which could cause further harm to the victim and their children without financial support. In these circumstances, Good Character References would assist in advocating for the matter to be dealt with under a Section 10 Dismissal, allowing the family to move forward with the separation with the protection of an Apprehended Domestic Violence Order, but without the additional pressure of unemployment of the primary earner.

While often displaying similar behaviours, every domestic and family violence situation is individually nuanced and in need of a tailored response to both keep victim-survivors safe, whilst also providing them agency in the situation. As such, there are some circumstances in which Good Character References are appropriate in domestic and family violence matters.

**Recommendation 1:** DV matters should not immediately be subject to the special rule, due to the complexity of domestic and family violence matters.

## **2. Should these offences be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence?**

The offender's good character or lack of previous convictions can be used as a tool to mask their abuse. For example, it is very common for predominant aggressors of domestic and family violence to publicly position themselves as the loving, calm husband, and their partner as the mentally ill, erratic wife. This is even more problematic in cases when the victim-survivor does suffer from a mental illness, which the perpetrator's abuse exacerbates or is used as a tool in the perpetrator's abuse. This is one of the reasons why those who live with a mental health condition are at greater risk of experiencing domestic and family violence than those without mental health conditions (Khalifeh et al. 2015). Further, there are also circumstances in which the perpetrator's sustained abuse causes the victim-survivor to develop mental health conditions, including anxiety, depression, and dependence on alcohol and other drugs as a coping mechanism (the latter of which can lead to further interaction with the criminal legal system).

These particular forms of coercive control have become significantly more visible since the introduction of the *Crimes Legislative Amendment (Coercive Control) Act 2022*, which commenced in July 2024. As such, there are potential benefits to exploring the condition that the offender's good character or lack of previous convictions was of assistance in the commission of domestic violence offences.

In addition to the reforms to good character at sentencing, DVNSW recommend that a review of the *Crimes (Domestic and Personal Violence) Act 2007* is crucial and should be prioritised. This legislation is no longer fit for purpose with its continued view of domestic violence as incident-based offence. A comprehensive review is required to ensure the legislation has an up-to-date, contextual understanding of domestic violence. A thorough and holistic review of this legislation would involve further interrogation of Good Character at sentencing in the context of domestic and family violence, rather than examining it in isolation, which may have unintended consequences. As such, DVNSW recommend reviewing the *Crimes (Domestic and Personal Violence) Act 2007* as a matter of urgency.

**Recommendation 2:** Perform a systemic review of the *Crimes (Domestic and Personal Violence) Act 2007*.



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