

# NICE OR NASTY?: REASONS TO ABOLISH CHARACTER AS A CONSIDERATION IN AUSTRALIAN SENTENCING HEARINGS AND PROFESSIONALS' DISCIPLINARY PROCEEDINGS

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*An offender's character is a consideration that often influences the outcomes of Australian sentencing hearings; good character is generally a mitigating consideration, while bad character can increase the severity of the penalty. Character can also play a central role in lawyers' and health practitioners' disciplinary proceedings and lead to determinations that restrict the practise of their professions. In this article, we argue that it is unfair and unnecessary for purported evaluations of the character of the subject of a sentencing or disciplinary hearing to influence decisions made in those matters about penalties or determinations respectively. The concept of character is vague and incoherent, and lacks any settled definition or empirical foundation. Consequently, judicial and tribunal decisions that are based on assessments of individuals' character and impinge on their legal rights and interests may be unjust and violate the rule of law. Further, it is sufficient for decision-makers to evaluate the crime or misconduct of the subjects of sentencing and disciplinary hearings, without referring to their character, to reach decisions that achieve the appropriate objectives of those proceedings and, in particular, the protection of the community. We therefore propose that the law be reformed to abolish character as a consideration in sentencing hearings and professionals' disciplinary proceedings.*

## I INTRODUCTION

An important commonality between sentencing hearings and professionals' disciplinary proceedings is that one of their principal objectives is to protect the community. Another major similarity is that, in seeking to achieve this aim, courts and tribunals often purport to evaluate the character of the subject of the sentencing hearing or disciplinary proceeding when deciding on the penalty or determination to impose in those matters respectively. In a sentencing hearing, an assessment that the offender has a good character can mitigate the penalty, while a conclusion that he or she is of bad character can increase its severity.

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Criminal sanctions include imprisonment, community-based orders and fines. In professionals' disciplinary proceedings, decision-makers' judgments about their character can influence the determinations they make, which may involve fining the practitioners and/or restricting the practise of their profession.

Decision-makers' assessments of character in sentencing hearings and disciplinary proceedings can thus have a marked impact on the cherished human interests of liberty and wealth.<sup>1</sup> Whereas sentencing judges are explicitly instructed to focus on the goal of retribution, many courts and tribunals have claimed that they were not intending to punish professionals in disciplinary proceedings.<sup>2</sup> Nevertheless, all of these decision-makers are empowered to impose sanctions that significantly impinge on individuals' rights and privileges, and have an adverse effect on them. Indeed, limitations on professionals' employment and income, which can be an outcome of disciplinary proceedings, are a form of punishment: they constitute a deprivation that is imposed in response to a finding that a practitioner has contravened professional standards.<sup>3</sup>

In this article, we argue that, although it is appropriate for decision-makers in sentencing hearings and disciplinary proceedings to focus on protecting the public, in attempting to realise this objective, it is unfair and unnecessary for them to evaluate the character of the subjects of those matters. In our view, therefore, assessments of character should never influence decisions about penalties and determinations in such hearings.<sup>4</sup>

At first glance, it might seem intuitive that people's character dictates whether they are likely to endanger the community in the future and thus indicates sanctions that are required to ensure that they do not do so. Yet the concept of character is vague and incoherent, and lacks a settled definition, including in philosophy or psychology, or empirical foundation. Consequently, decisions that rely on purported evaluations of individuals' character and adversely affect their legal rights are at risk of being speculative, misguided and arbitrary. It is therefore unreasonable for courts and tribunals to reach decisions about which penalties

1 See Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3<sup>rd</sup> ed, 2014).

2 See, eg, *Ha v Pharmacy Board of Victoria* (2002) 18 VAR 465, 474 [91] (Gillard J) ('*Ha*'); *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630, 637–8 (Gleeson CJ, Meagher and Handley JJA) ('*Litchfield*'), quoting *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 201–2 and *New South Wales Bar Association v Evatt* (1968) 117 CLR 177, 183–4.

3 Mirko Bagaric, Lidia Xynas and Victoria Lambropoulos, 'The Irrelevance to Sentencing of (Most) Incidental Hardships Suffered by Offenders' (2016) 39 *University of New South Wales Law Journal* 47; C L Ten, 'Crime and Punishment' in Peter Singer (ed), *A Companion to Ethics* (Blackwell Publishing, 1991) 366. Some judges have in fact recognised that professionals could experience a suspension of and imposition of conditions on their registration, in particular, as punishments: see, eg, *Health Care Complaints Commission v Wingate* [2007] NSWCA 326, [54]–[55]; *Craig v Medical Board of South Australia* (2001) 79 SASR 545, [43], [45].

4 Arguably, the notion of character should be abolished in all areas of the law that affect individuals' interests. Character also plays a role in criminal law hearings when courts assess similar fact evidence (described as tendency and coincidence evidence in the *Uniform Evidence Law*) and evidence relating to a witness's credibility. Courts' treatment of this evidence and the use of character in other legal contexts does not, however, directly interfere with important individual rights or interests and thus falls outside the scope of the discussion in this article. See generally Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 12<sup>th</sup> ed, 2016); J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 10<sup>th</sup> ed, 2015).

and determinations should be imposed by reference to assessments of individuals' character; indeed, such decisions may violate the rule of law, according to which infringements of individuals' interests can only be justified on the basis of clear, consistent and transparent criteria. Further, it is sufficient for decision-makers to evaluate the crime or misconduct of the subjects of sentencing and disciplinary hearings, without referring to their character, to reach sound decisions about which penalties or determinations will meet the objectives of those proceedings and, in particular, the protection of the public.

Disciplinary proceedings and sentencing hearings are not generally evaluated in the same jurisprudential context. Nevertheless, we discuss both streams of law in this article owing to their crucial shared features, which we have identified, namely that the subjects of those matters can experience significant tangible deprivations as a consequence of decision-makers assessing those individuals' character in their attempts to protect the community.

In the next part of this paper, we examine how character influences the outcomes of certain disciplinary proceedings. Given the large range of professionals' disciplinary bodies and hearings in Australia, we are unable in this article to consider how professionals' character is taken into account in all of those matters. We have confined our investigation to disciplinary proceedings involving lawyers in New South Wales ('NSW') and Victoria, and health practitioners in Victoria, as it is in those jurisdictions — which are the largest in Australia — and in relation to those professions that decision-makers have considered the relevant legal principles most extensively. We have not examined health practitioners' disciplinary proceedings in NSW because, although it is a large jurisdiction, there are significant differences between the regulation of health practitioners in NSW and most other states and territories, and NSW is the only Australian jurisdiction in which the definition of 'professional misconduct' in relevant legislation does not refer to character or fitness and propriety to practise a health profession.<sup>5</sup> This analysis is followed in Part III by a discussion of the role of character in decision-making in sentencing hearings. In Part IV, we outline problems with relying on purported evaluations of individuals' character to reach decisions about sanctions and determinations in sentencing hearings and disciplinary proceedings respectively. We set out our recommendations for law reform in Part V.

## II THE ROLE OF CHARACTER IN DISCIPLINARY PROCEEDINGS

When a lawyer in NSW or Victoria, or a practitioner in one of the 15 health professions in Victoria that are regulated within the National Registration and Accreditation Scheme ('NRAS'), is the subject of a disciplinary proceeding,

5 See *Health Practitioner Regulation National Law (NSW) 2009* (NSW) s 139E (definition of 'professional misconduct') and s 139B (definition of 'unsatisfactory professional conduct'). For a discussion of the differences between the regulation of health practitioners in NSW and other Australian jurisdictions, see Gabrielle Wolf, 'Regulating Health Professionals' in Anne-Maree Farrell et al (eds), *Health Law: Frameworks and Context* (Cambridge University Press, 2017) 73, 73–92.

assessments of his or her character can have a major impact on the outcomes of those matters.<sup>6</sup> Relevant legislation and case law permit decision-makers to evaluate the practitioners' character in order to establish whether they have engaged in 'professional misconduct' and which determinations to make if they find that they have behaved in this manner. Appraisals of those professionals' characters can thus have significant ramifications for their careers and even lead to them being prevented from pursuing their livelihood. Yet courts and tribunals have failed to develop a coherent definition of character, and many have perfunctorily adopted glib interpretations of this concept.

In this part of the article, we outline how legislation that governs disciplinary hearings involving lawyers in NSW and Victoria, and health practitioners in Victoria, addresses character; explain the objectives that decision-makers are required to pursue in these proceedings; and analyse courts' and tribunals' consideration of character in professionals' disciplinary matters.

### **A Legislation Governing Disciplinary Proceedings, and Overview of the Connection between Fitness and Propriety, and Character**

One of the definitions of a lawyer's 'professional misconduct' in schedule 1 to the *Legal Profession Uniform Law Application Act 2014* (Vic) ('*Legal Profession Uniform Law*'), which is in force in Victoria and NSW, is 'conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice'.<sup>7</sup> The *Legal Profession Uniform Law* provides that, to decide 'whether a lawyer is or is not a fit and proper person to engage in legal practice ... regard may be had to the matters that would be considered if the lawyer were an applicant for admission to the Australian legal profession or for the grant or renewal of an

6 Pursuant to the National Registration and Accreditation Scheme ('NRAS'), which commenced operation in 2010, National Health Practitioner Boards now register and regulate practitioners in 15 health professions in Victoria: Aboriginal and Torres Strait Islander health practice; Chinese medicine; chiropractic; dental; medical; medical radiation practice; nursing and midwifery; occupational therapy; optometry; osteopathy; pharmacy; physiotherapy; podiatry; psychology; and paramedicine: *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic) s 4, citing *Health Practitioner Regulation National Law Act 2009* (Qld) sch ss 31, 35 ('*National Law*'). For a discussion of the NRAS, see Wolf, above n 5, 73–99. In this article, we confine our discussion to the process of making disciplinary determinations, but note that fitness and propriety to practise law and the registered health professions (which, relevant case law explains, involves character) is also a prerequisite for admission and registration to practise those professions. See, eg, *National Law* sch s 55(1)(h)(i); *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 ss 15(b), 17(c) ('*Legal Profession Uniform Law*').

7 *Legal Profession Uniform Law* s 297(1)(b). A lawyer's 'professional misconduct' is also defined in this statute as including 'unsatisfactory professional conduct ... where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence': at s 297(1)(a). Victoria hosted the *Legal Profession Uniform Law* and NSW applied schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic) as a law of its jurisdiction: *Legal Profession Uniform Law Application Act 2014* (NSW) s 4.

Australian practising certificate'.<sup>8</sup> 'In considering whether a person is a fit and proper person to be admitted to the Australian legal profession',<sup>9</sup> according to the *Legal Profession Uniform Admission Rules 2015*, the Victorian Legal Admissions Board or NSW Admission Board<sup>10</sup> 'must have regard to', inter alia, 'whether the person is currently of good fame and character'.<sup>11</sup> Likewise, in deciding whether to grant or renew an Australian practising certificate, the Victorian Legal Services Board or NSW Law Society Council must ascertain whether the person is 'not a fit and proper person to hold the certificate'<sup>12</sup> and, to do so, 'may have regard to ... whether the applicant is currently of good fame and character'.<sup>13</sup>

Where the Victorian or NSW Legal Services Commissioner is 'of the opinion' that a lawyer's 'alleged conduct may amount to professional misconduct', he or she 'may initiate and prosecute proceedings against' the lawyer in the Victorian Civil and Administrative Tribunal ('VCAT') or the Civil and Administrative Tribunal of NSW ('NCAT').<sup>14</sup> If, after assessing the lawyer's fitness and propriety, a panel of the tribunal finds the lawyer guilty of professional misconduct, it may make orders — including those that require the lawyer to pay a fine;<sup>15</sup> impose a condition on the lawyer's practising certificate;<sup>16</sup> require the lawyer to 'do or refrain from doing something in connection with the practice of law';<sup>17</sup> recommend that the lawyer's name be removed from the roll kept by the Supreme Court (which includes the names of lawyers whom the Court has admitted);<sup>18</sup> and direct that the lawyer's Australian practising certificate be suspended for a period or cancelled<sup>19</sup> — and the panel must require the lawyer to pay costs unless it is satisfied that exceptional circumstances exist.<sup>20</sup>

The *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic) — which applies the Health Practitioner Regulation National Law that is set out in the schedule to the *Health Practitioner Regulation National Law Act 2009*

8 *Legal Profession Uniform Law* s 297(2).

9 *Ibid* s 17(2).

10 *Legal Profession Uniform Law Application Act 2014* (Vic) s 10; *Legal Profession Uniform Law Application Act 2014* (NSW) s 11.

11 *Legal Profession Uniform Law* s 17(2)(b); *Legal Profession Uniform Admission Rules 2015* r 10(1)(f).

12 *Legal Profession Uniform Law* ss 45(2)–(3).

13 *Legal Profession Uniform General Rules 2015* r 13(1)(a).

14 *Legal Profession Uniform Law* s 300(1)(b). See *Legal Profession Uniform Law Application Act 2014* (Vic) ss 3, 10 (definitions of 'Victorian Commissioner' and 'designated local regulatory authority', respectively) and *Legal Profession Uniform Law Application Act 2014* (NSW) ss 3, 11(1), (3) (definitions of 'NSW Commissioner', 'designated local regulatory authorities' and 'designated tribunals', respectively), 135.

15 *Legal Profession Uniform Law* s 302(1)(l).

16 *Ibid* s 302(1)(g).

17 *Ibid* s 302(1)(a).

18 *Ibid* s 302(1)(f). See also at ss 22(1), 23(1)(c).

19 *Ibid* s 302(1)(h).

20 *Ibid* s 303. In *Stirling v Legal Services Commissioner* [2013] VSCA 374 (17 December 2013) [62] (Warren CJ, Neave JA and Dixon AJA), the Victorian Court of Appeal confirmed, 'the main issue when considering whether to suspend a practising certificate or remove a practitioner from the roll is whether that person is a fit and proper person to practise. This is the guiding principle that informs a tribunal or court in conducting and handing down penalties in legal disciplinary proceedings'.

(Qld) (*National Law*) as a law of Victoria — provides that a panel of VCAT may find that a health practitioner who is registered to practise any of the health professions regulated within the NRAS has engaged in ‘professional misconduct’ if his or her ‘conduct ... whether occurring in connection with the practice of the health practitioner’s profession or not ... is inconsistent with the practitioner being a fit and proper person to hold registration in the profession’.<sup>21</sup> If a VCAT panel finds that the health practitioner ‘has behaved in a way that constitutes professional misconduct’,<sup>22</sup> it ‘may decide’, inter alia, to ‘impose a condition on the practitioner’s registration’;<sup>23</sup> ‘require the practitioner to pay a fine’;<sup>24</sup> ‘suspend the practitioner’s registration’;<sup>25</sup> and ‘cancel the practitioner’s registration’.<sup>26</sup>

Although the *National Law* does not explicitly refer to decision-makers’ power to assess professionals’ character in evaluating their fitness and propriety to practise their professions, at common law, as Ian Freckelton observes, ‘there is a close relationship between the notions of whether a person is “fit and proper” and whether they are of “good character”’.<sup>27</sup> Courts and tribunals tend to discuss the phrases, ‘good fame and character’ and ‘fit and proper person’, as though they are separate concepts.<sup>28</sup> Yet, mostly, they use either of those expressions simply because they feature in the legislation that they are applying.<sup>29</sup> Moreover, they identify overlaps between the concepts of ‘good character’ and ‘fit and proper person’, and often interpret and apply them in the same manner.<sup>30</sup> Indeed, where legislation stipulates that they must evaluate a professional’s ‘character’, courts and tribunals frequently cite cases interpreting the phrase ‘fit and proper’; for instance, in *Ex parte Tziniolis; Re Medical Practitioners Act* (*Tziniolis*), Walsh JA asserted that, to determine ‘whether or not the applicant is a man of good character ... some assistance can properly be obtained as to the mode of approach

21 *National Law* sch s 5 (definition of ‘professional misconduct’). One of the grounds for making a voluntary notification about a registered health practitioner to a National Health Practitioner Board is that ‘the practitioner is not, or may not be, a suitable person to hold registration in the health profession, including, for example, that the practitioner is not a fit and proper person to be registered in the profession’: at sch s 144(1)(c).

22 *Ibid* sch s 196(1)(b)(iii).

23 *Ibid* sch s 196(2)(b).

24 *Ibid* sch s 196(2)(c).

25 *Ibid* sch s 196(2)(d).

26 *Ibid* sch s 196(2)(e).

27 Ian Freckelton, ““Good Character” and the Regulation of Medical Practitioners’ (2008) 16 *Journal of Law and Medicine* 488, 502.

28 See, eg, *Prothonotary of the Supreme Court of New South Wales v Alcorn* [2007] NSWCA 288 (29 October 2007) [57]–[72] (Beazley, McColl JJA and Hoeben J) (*Alcorn*).

29 See, eg, *Ex parte Tziniolis; Re Medical Practitioners Act* [1967] 1 NSW 357, 367 (Holmes JA) (*Tziniolis*). In this case, the Court was required to apply s 17(7) of the *Medical Practitioners Act 1938–64* (NSW), which provided that ‘no person shall be registered under this Act unless the board is satisfied that such person is of good character’, so the Court referred to the ‘character’ of the doctor who was the subject of this proceeding rather than to his fitness and propriety.

30 See, eg, *Alcorn* [2007] NSWCA 288 (29 October 2007) [67]: Beazley, McColl JJA and Hoeben J stated, “[i]n determining the question of fitness to remain on the Roll, as with the question of “good fame and character”, the focus of the inquiry is upon fitness as at the time of the application’.

to be made from observations made in cases where the question was whether or not a person was a fit and proper person to be a barrister'.<sup>31</sup>

In addition, some courts and tribunals indicate that character is a core component of fitness and propriety to practise a profession, though they perceive fitness and propriety to be a broader concept than character, too. In *Law Society of New South Wales v Foreman* ('*Foreman*'), Mahoney JA stated, '[i]n deciding whether a person is a fit and proper person ... [t]he Court may consider the character of the practitioner, or those aspects of it relevant to the office of a solicitor'.<sup>32</sup> More specifically, in *Re Davis* ('*Davis*'), Dixon J asserted, 'the more enduring moral qualities denoted by the expression, "good fame and character," ... describe the test of [a barrister's] ethical fitness for the profession'.<sup>33</sup> One of those 'moral qualities' that are ascribed to good character, and also to fitness and propriety to practise a profession, is honesty.<sup>34</sup> Isaacs J thus stated in *Incorporated Law Institute of New South Wales v Meagher* ('*Meagher*') that '[f]itness includes honesty as well as knowledge and ability'.<sup>35</sup> Fitness and propriety is also interpreted as referring to a practitioner's propensity to uphold the standards of his or her profession.<sup>36</sup> Judges have suggested that assessments of practitioners' character are relevant to ascertaining their fitness and propriety particularly because (they assume) they indicate their inclination to behave in accordance with professional standards and thus their likelihood of reoffending.<sup>37</sup>

## B Objectives of Disciplinary Proceedings

The *Legal Profession Uniform Law* and the *National Law* refer to the protection of the public as a principal objective of the regulation of legal and health professionals respectively.<sup>38</sup> Many judicial decisions have similarly discussed this goal as fundamental to determinations made in professionals' disciplinary proceedings.<sup>39</sup> These cases confirm that protecting the public involves ensuring that only practitioners who are of good character, and are fit and proper, are permitted to practise their professions.<sup>40</sup> The authorities interpret the goal of protecting the public in various ways and it appears that determinations can

31 [1967] 1 NSW 357, 358–9.

32 (1994) 34 NSWLR 408, 444 ('*Foreman*').

33 (1947) 75 CLR 409, 420 ('*Davis*').

34 *Sherman v Medical Practitioners Board (Vic)* [2005] VCAT 644 (15 April 2005) [36] (Senior Member Davis) ('*Sherman*'), quoting *McGoldrick v Medical Practitioners Board of Victoria* [2004] VCAT 2433 (14 December 2004) [33] (Senior Member Davis).

35 (1909) 9 CLR 655, 682 ('*Meagher*'), quoted in *Foreman* (1994) 34 NSWLR 408, 443 (Mahoney JA).

36 See, eg, *Litchfield* (1997) 41 NSWLR 630, 639, where the Court indicated that, in circumstances where a practitioner 'could not be trusted to observe proper professional standards in his conduct towards female patients unless a femal [sic] chaperone was present ... the necessity for imposing ... conditions on the appellant's registration demonstrated that he was unfit to practise medicine'.

37 See, eg, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 380 (Toohey and Gaudron JJ); *Foreman* (1994) 34 NSWLR 408, 444 (Mahoney JA).

38 *Legal Profession Uniform Law* s 3(c); *National Law* sch s 3(2)(a).

39 See, eg, *Craig v Medical Board of South Australia* (2001) 79 SASR 545, 553–4 (Doyle CJ) ('*Craig*').

40 See, eg, *Foreman* (1994) 34 NSWLR 408, 451 (Mahoney JA).

legitimately be made in relation to professionals who are not of good character to achieve any of these aims.

Protecting the public can mean literally safeguarding the community.<sup>41</sup> Kirby P commented in *McBride v Walton* ('*McBride*') that '[t]he relevant function of the Tribunal (as of this Court) is to protect the public from medical practitioners whose continued practice may cause harm to the public'.<sup>42</sup> In addition, protection of the public entails preserving the legal and medical professions' good standing, reputation, and ethical and professional standards.<sup>43</sup> Sheller JA asserted in *Law Society of New South Wales v Bannister* ('*Bannister*') and in *Council of the Law Society of New South Wales v A Solicitor*, respectively, that 'protecting the public' by restricting the practice of 'those unfit to practise' involves 'ensuring ... that high standards are maintained',<sup>44</sup> and 'the reputation and standing of the legal profession ... [are] upheld'.<sup>45</sup> Other judges have considered that protection of the public also refers to the maintenance of public confidence and trust in professionals.<sup>46</sup> Dixon CJ in *Ziems v Prothonotary of the Supreme Court of New South Wales* ('*Ziems*') and Spigelman CJ in *New South Wales Bar Association v Cummins* ('*Cummins*') indicated that the 'public' in this sense includes, in the case of barristers and lawyers, the courts, fellow legal practitioners and clients.<sup>47</sup> Judges, including Sheller JA in *Bannister* and Doyle CJ in *Craig*, have further interpreted protecting the public as involving deterring the individual practitioner and other professionals from engaging in misconduct.<sup>48</sup>

The cases suggest that, if a practitioner is assessed to be not of good character or not fit and proper, in general the only determination that will properly protect the public is one that prevents him or her from practising his or her profession. In *McBride*, Handley JA asserted:

Parliament made a legislative judgment that persons who were not of good character should not become registered as medical practitioners. It also provided that lack of good character should be a ground of complaint against a registered medical practitioner. In these circumstances I have difficulty in seeing how the Tribunal could properly decide to leave a medical practitioner on the Register

41 See, eg, *Ha* (2002) 18 VAR 465, 474 [91], 475 [97] (Gillard J).

42 (Unreported, New South Wales Court of Appeal, Kirby P, Handley and Powell JJA, 15 July 1994) 15 ('*McBride*').

43 See, eg, *Craig* (2001) 79 SASR 545, 554 (Doyle CJ); *Ha* (2002) 18 VAR 465, 474 [91] (Gillard J); *Litchfield* (1997) 41 NSWLR 630, 637 (Gleeson CJ, Meagher and Handley JJA).

44 *Law Society of New South Wales v Bannister* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Handley and Sheller JJA, 27 August 1993) 8 ('*Bannister*').

45 *Council of the Law Society of New South Wales v A Solicitor* [2002] NSWCA 62 (12 March 2002) [80].

46 See, eg, *Ha* (2002) 18 VAR 465, 475 [97] (Gillard J); *Craig* (2001) 79 SASR 545, 553–4 (Doyle CJ); *Domburg v Nurses Board of Victoria* (2000) 16 VAR 305, 314–15 [42] (Ashley J).

47 *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 285–6 ('*Ziems*'); *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279, 284 (Spigelman CJ) ('*Cummins*').

48 *Bannister* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Handley and Sheller JJA, 27 August 1993) 8; *Craig* (2001) 79 SASR 545, 555 (Doyle CJ).



after it had found that at the time of its decision he or she was not a person of good character in the context of fitness to practise medicine.<sup>49</sup>

Decision-makers are, however, guided to make determinations that are less severe than removal of a professional from practice if there is a possibility that he or she can be reformed. McHugh JA clarified in *Prothonotary of the Supreme Court of New South Wales v Ritchard*:

[a]n order for the involuntary removal of the name of a practitioner from the Roll of solicitors is made only because the probability is that the solicitor is permanently unfit to practise. Unless the Court is persuaded that the probability exists, the proper order to make will usually be one of suspension or fine instead of removal.<sup>50</sup>

### **C The Consideration of Character in Professionals' Disciplinary Matters**

None of the NSW or Victorian legislation governing disciplinary proceedings concerning legal and health practitioners defines the phrases 'fit and proper' and 'good fame and character'. That legislation also provides no guidance for decision-makers about how their assessments of professionals' character should inform their conclusions regarding which determinations to make. Consequently, panels of NCAT and VCAT, and courts to which those tribunals' findings and determinations have been appealed, have continued to refer to a long line of decisions that seek to explain the meaning of character and its role in disciplinary proceedings where lawyers, barristers or health practitioners in particular are alleged to have engaged in professional misconduct.<sup>51</sup> Cases that involved legal practitioners have been applied in disciplinary proceedings concerning health practitioners and, to a lesser extent, vice versa.<sup>52</sup> Decision-makers have followed these cases despite differences between the legislation that they, and the courts and tribunals in the matters to which they referred, were required to apply.

Notwithstanding the extensive references to practitioners' character and fitness and propriety in legislation and case law over many years, they are

49 (Unreported, New South Wales Court of Appeal, Kirby P, Handley and Powell JJA, 15 July 1994) 41. See also *Bannister* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Handley and Sheller JJA, 27 August 1993) 7 (Sheller JA).

50 (Unreported, New South Wales Court of Appeal, Kirby P, Mahoney and McHugh JJA, 31 July 1987).

51 See, eg, *Hilton v Legal Profession Admission Board* (2016) 339 ALR 580, 604 [99] (Beech-Jones J) ('*Hilton*'). Although some of the authorities involved applications for admission to a profession, they have been applied in disciplinary proceedings. A majority of the High Court of Australia explained in *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239, 250–1 (Deane, Dawson, Toohey and Gaudron JJ) that, while '[t]here are ... differences between admission and disciplinary proceedings' due to 'the different issues involved', those proceedings 'are alike in that they are not ordinary legal proceedings', and, 'because they have the protection of the public as one of their primary objects, they cannot necessarily be determined on the same basis as adversarial proceedings'.

52 See, eg, *Tziniolis* [1967] 1 NSW 357, 359 (Walsh JA), citing *Ziems* (1957) 97 CLR 279, 285, 288, 290, 298–9, 301; *Hilton* (2016) 339 ALR 580, 604 [101] (Beech-Jones J), citing *Ex parte Tziniolis; Re Medical Practitioners Act* (1966) 67 SR (NSW) 448, 475.

still ‘imprecise’ concepts.<sup>53</sup> In *Avelaid v Dental Board of Victoria*, Coldrey J observed, ‘[t]he concept of good character has been the subject of considerable judicial pronouncement. It nonetheless retains a somewhat nebulous quality’.<sup>54</sup> Significantly, courts and tribunals have made various assumptions about character in disciplinary proceedings, but none has identified any clear philosophical or psychological theory or empirical evidence that underpins them. It appears that, in the absence of legislative definition, courts and tribunals have simply sought to interpret character as anything they believe the community understands it to be, and adapted their understandings of it in light of the different circumstances of individual cases. As Basten JA noted in *Health Care Complaints Commission v Karalasingham* (*‘Karalasingham’*), ‘[t]he concept of “good character”, though given statutory recognition, is not one which bears some special or technical meaning: rather, the words are used in their ordinary meaning. Such a meaning has traditionally been identified as a question of fact, not law’.<sup>55</sup>

## 1 Character Is Tied to Morality

The authorities concur that professionals’ character is tied to their morality. In *Tziniolis*, Walsh JA stated that a decision-maker must ask ‘whether it is satisfied that [the professional] is of good character’ and, in answering this question, ‘consider matters affecting the moral standards, attitudes and qualities of the applicant’.<sup>56</sup> Holmes JA believed that the ‘character’ of the doctor in *Tziniolis* was ‘not good enough to require his entitlement to registration as a member of a profession on whom the public is entitled to rely ... for decency and probity’.<sup>57</sup> In *McBride*, Handley JA similarly implied that professionals’ good character connoted their ethical uprightness, commenting that legislators understood that ‘[m]edicine was to be an honourable ... profession’.<sup>58</sup> Courts have considered a professional’s morality to be innate; McHugh J asserted in *Melbourne v The Queen* (*‘Melbourne’*), ‘character refers to the inherent moral qualities of a person’.<sup>59</sup> Decision-makers in several cases have also indicated that, in evaluating character, they must determine whether practitioners possess moral traits that they believe are especially relevant to and necessary for practising their particular professions.<sup>60</sup>

53 Laurie Warfe, ‘Determining the Risk of Recidivism in Previously De-Registered Health Practitioners’ (2013) 21 *Journal of Law and Medicine* 67, 71.

54 [1999] VSC 255 (26 July 1999) [65] (*‘Avelaid’*).

55 [2007] NSWCA 267 (2 October 2007) [45] (*‘Karalasingham’*).

56 [1967] 1 NSW 357, 358.

57 Ibid 378.

58 (Unreported, New South Wales Court of Appeal, Kirby P, Handley and Powell JJA, 15 July 1994) 32.

59 (1999) 198 CLR 1, 15 [33] (*‘Melbourne’*).

60 See, eg, *ibid* 25 [66] (Gummow J); *McBride* (Unreported, New South Wales Court of Appeal, Kirby P, Handley and Powell JJA, 15 July 1994) 14–15 (Kirby P); *Sherman* [2005] VCAT 644 (15 April 2005) [35] (Senior Member Davis); *Dorman v Rodgers* (1982) 148 CLR 365, 376 (Murphy J).

## 2 Conduct May Reflect Character

In permitting decision-makers to conclude that practitioners are not of good character or fit and proper based on their conduct, current legislation follows a longstanding position at common law. Spigelman CJ stated explicitly in *Health Care Complaints Commission v Hatoum* ('Hatoum'), 'it is possible to draw an inference as to character from conduct'.<sup>61</sup> In *Foreman*, Mahoney JA justified this presumption: '[c]haracter involves ... the acceptance of high standards of conduct; and acting in accordance with those standards under pressure. Character is tested not by what one does in good times but in bad'.<sup>62</sup>

In *Ziems*, Kitto J recognised that it can be challenging to discern which misconduct confirms that a professional lacks the requisite morality to be considered 'of good character':

It is not difficult to see in some forms of conduct, or in convictions of some kinds of offences, instant demonstration of unfitness for the Bar. Conduct may show a defect of character incompatible with membership of a self-respecting profession ... But it will be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line [between this conduct and the former conduct to which his Honour referred] is by no means always an easy task.<sup>63</sup>

Despite this difficulty, some courts have indicated the nature of a professional's misconduct that might substantiate a finding that he or she lacks the necessary moral traits to be considered of good character. In *McBride*, Powell JA endorsed the Tribunal's direction that decision-makers should consider 'the intrinsic seriousness of the misconduct qua fitness to practice [sic] medicine' in ascertaining a doctor's character.<sup>64</sup> For Holmes JA in *Tziniolis*, '[an] inability to withstand the importunings of the evilly disposed' and 'the propensity to exploit the gullible' constituted crucial 'defects in moral fibre'.<sup>65</sup> Many judges have considered honesty to be a moral attribute that is crucial for practising law and medicine, and, consequently, that a professional's dishonest conduct signals that he or she may not be of good character or fit and proper.<sup>66</sup> In *Meagher*, for instance, Isaacs J suggested that conduct that surpasses 'the imperfections inherent in our nature' to render a barrister not of good character may include 'deliberate misleading, or reckless laxity of attention to necessary principles of honesty on the part of those the Courts trust to prepare the essential materials for doing justice'.<sup>67</sup>

61 [2004] NSWCA 30 (26 February 2004) [8] ('Hatoum').

62 (1994) 34 NSWLR 408, 449.

63 (1957) 97 CLR 279, 298.

64 (Unreported, New South Wales Court of Appeal, Kirby P, Handley and Powell JJA, 15 July 1994) 71.

65 [1967] 1 NSW 357, 377.

66 *Davis* (1947) 75 CLR 409, 420 (Dixon J); *McBride* (Unreported, New South Wales Court of Appeal, Kirby P, Handley and Powell JJA, 15 July 1994) 59–60 (Powell JA); Warfe, above n 53, 71; Freckelton, above n 27, 498, 510; Victorian Legal Services Board, *Fit and Proper Person Policy* (December 2011), [1.3], [4.6] <[http://www.lsb.vic.gov.au/documents/RRP\\_017\\_Fit\\_&\\_Proper\\_Person\\_Policy\\_V2\\_\(Dec\\_11\).pdf](http://www.lsb.vic.gov.au/documents/RRP_017_Fit_&_Proper_Person_Policy_V2_(Dec_11).pdf)>.

67 (1909) 9 CLR 655, 681, quoted in *Foreman* (1994) 34 NSWLR 408, 442 (Mahoney JA).

Judges have agreed that professionals who are not of good character engage in conduct that demonstrates fundamental immorality or amorality, which they distinguish from common human shortcomings and mistakes. In *Ziems*, Kitto J asserted, ‘it cannot be that every proof which [a barrister] may give of human frailty so disqualifies him [from remaining at the Bar]. The ends which he has to serve are lofty indeed, but it is with men and not with paragons that he is required to pursue them’.<sup>68</sup> In *McBride*, Powell JA approved of the approach taken by the Medical Tribunal of NSW whose decision the NSW Court of Appeal was required to review. The Tribunal had distinguished between ‘an error of judgment’ and ‘a defect of character’, with only the latter leading to a ‘finding that the practitioner is not of good character’.<sup>69</sup> Also in *McBride*, Kirby P stated, ‘no person’s character is entirely flawless. Thus, it is not every flaw of character ... which will warrant a conclusion that he or she is “not of good character” ... something more grave and serious and of relevance to capacity to practise medicine must be shown’.<sup>70</sup> In the recent case of *Hilton v Legal Profession Admission Board* (*‘Hilton’*), Beech-Jones J found an individual not fit and proper to practise as a lawyer because he demonstrated ‘not ... moral weakness’, but ‘amorality in the sense of an indifference to the unethical nature of his conduct’, which, according to his Honour, constitutes ‘the most damning type of character defect that a legal practitioner can ever possess’.<sup>71</sup>

Certain judges have emphasised that factors that influenced professionals’ behaviour may nonetheless invalidate an inference from their conduct that they are not of good character. In *Ziems*, Fullagar J asserted that a conviction ‘is admissible prima facie evidence bearing on the ultimate issue [whether the professional is fit and proper] ... [b]ut ... its weight may be seriously affected by circumstances attending it’ and ‘we are bound to ascertain ... the real facts of the case’.<sup>72</sup> Referring to *Ziems*, in *A Solicitor v Council of the Law Society of New South Wales* (*‘A Solicitor’*), the High Court noted ‘the importance that may attach to a consideration of the detailed subjective and objective circumstances of offending behaviour’.<sup>73</sup> Similarly, Kirby P and Powell JA considered in *McBride* that decision-makers should take into account the professional’s apparent ‘motivation’ for engaging in misconduct in determining whether it reflects that he or she is not of good character.<sup>74</sup> This approach echoed Holmes JA’s comment in *Tziniolis* that “[g]ood character” is not a summation of acts alone but relates rather to the quality of a person. The quality is to be judged by acts and motives, that is to say, behaviour and the mental and emotional situations accompanying that behaviour’.<sup>75</sup>

68 (1957) 97 CLR 279, 298.

69 (Unreported, New South Wales Court of Appeal, Kirby P, Handley and Powell JJA, 15 July 1994) 71.

70 Ibid 15.

71 (2016) 339 ALR 580, 595 [68].

72 (1957) 97 CLR 279, 288. See also Taylor J: at 303.

73 (2004) 216 CLR 253, 268 [22] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ) (*‘A Solicitor’*).

74 (Unreported, New South Wales Court of Appeal, Kirby P, Handley and Powell JJA, 15 July 1994) 16 (Kirby P), 57 (Powell JA).

75 [1967] 1 NSW 357, 377.

Cases dating back to the 19<sup>th</sup> century articulate — as current legislation similarly provides — that practitioners' conduct can reflect their character and fitness and propriety even where they engage in it outside their professional practice. In *Re Weare*, Lopes LJ asserted:

the jurisdiction of the Court extends, not only to the case where the misconduct has been connected with the profession of the solicitor, but also to cases where the conduct, though not so connected, has been such as to make it clear to the Court that that person is no longer fit to be held out as a fit and proper person to exercise the important functions with which the Court intrusts him.<sup>76</sup>

Subsequently, in *Tziniolis*, Walsh JA provided a name for this behaviour: 'we are entitled to inquire into what may be described as personal misconduct, as distinct from professional misconduct, in determining ... whether or not the applicant is a man of good character'.<sup>77</sup>

Professionals' 'personal misconduct' is deemed pertinent to evaluations of their character where it apparently reflects that they lack the necessary intrinsic moral attributes to practise their professions. Kirby P explained in *McBride*:

wrong doing by a practitioner, extraneous to his or her profession, may be relevant to demonstrating a want of good character but only if the conduct in question showed what can be taken to be a characteristic of the individual, ie not an isolated lapse which is uncharacteristic to the practitioner or irrelevant to the practice [sic] of the profession.<sup>78</sup>

In *Cummins*, Spigelman CJ in fact considered that 'personal conduct may be regarded as professional misconduct' where either the 'acts may be sufficiently closely connected with actual practice, albeit not occurring in the course of such practice' or 'conduct outside the course of practice may manifest the presence or absence of qualities which are incompatible with, or essential for, the conduct of practice'.<sup>79</sup> According to Young CJ in Eq in *Prothonotary of the Supreme Court of New South Wales v P*, personal misconduct may '[amount] to incompatibility with the personal qualities essential for the conduct of practice' if, even where it has not resulted in a criminal conviction, 'the conduct over a long period shows systematic non-compliance with legal and civic obligations'.<sup>80</sup>

### **3 Conduct Preceding and Following Misconduct May Also Reflect Character**

The authorities confirm that, to evaluate a professional's character, decision-makers should examine his or her behaviour in addition to the conduct that is the subject of the proceeding, regardless of when it occurred. In *Davis*, Latham CJ stated, 'the Court may consider any conduct of the barrister which is

76 [1893] 2 QB 439, 449.

77 [1967] 1 NSWLR 357, 358.

78 (Unreported, New South Wales Court of Appeal, Kirby P, Handley and Powell JJA, 15 July 1994) 15.

79 (2001) 52 NSWLR 279, 289 [56].

80 [2003] NSWCA 320 (18 September 2003) [17] ('P') (citations omitted).

relevant to the question of whether he is a fit and proper person’, ‘immediately recent and more distant behaviour may be taken into account’, and especially ‘[w]hen a considerable period of time has elapsed ... weight should be given to the subsequent behaviour of the person’.<sup>81</sup> Similarly, Powell JA approved of the Tribunal’s direction in *McBride* that, in determining ‘whether a finding of proven misconduct should be followed by a consequential finding that the practitioner is not of good character’, it is appropriate to consider ‘the underlying qualities of character shown by previous and other misconduct’.<sup>82</sup>

According to various decisions, professionals’ behaviour preceding and subsequent to their misconduct can confirm whether the misconduct was an anomalous occurrence in their lives and thus not reflective of their character.<sup>83</sup> Kitto J emphasised in *Ziems* that the barrister’s ‘conviction relates to an isolated occasion, and ... does not warrant any conclusion as to the man’s ... inherent qualities’.<sup>84</sup> By contrast, in *New South Wales Bar Association v Evatt*, the High Court found that ‘[t]he facts ... demonstrated ... not some isolated or passing departure from proper professional standards amounting to something less than proved unfitness’.<sup>85</sup> Similarly, in the recent case of *Medical Board of Australia v Cukier*, a panel of VCAT explained: ‘An isolated one-off incident may well be described as out of character. Where the conduct is repeated, and the repetition is unexplained, it begins to look more like a pattern of behaviour that arises out of a person’s character’.<sup>86</sup> Nevertheless, Basten JA indicated in *Karalasingham* that a series of events over time could still constitute an ‘isolated episode’ if, in the context of ‘the background of the practitioner’s life and practice’, it did not disclose ‘an underlying defect of character’.<sup>87</sup>

#### 4 *The Possibility of Character Reformation*

Various judges have considered that professionals’ behaviour following their misconduct may, very occasionally, indicate that their character has changed, and they have, therefore, emphasised the importance of decision-makers assessing whether a person is of good character and fit and proper at the time when they are ‘asked to consider’ this issue.<sup>88</sup> In *McBride*, Handley JA endorsed the Tribunal’s view that it is ‘necessary’ for decision-makers ‘[i]n assessing present fitness to practise ... to consider the conduct’ of the practitioner since he or she engaged in misconduct ‘up to the present time to determine whether, since the episodes

81 (1947) 75 CLR 409, 416.

82 (Unreported, New South Wales Court of Appeal, Kirby P, Handley and Powell JJA, 15 July 1994) 71.

83 *Ibid*; *Victorian Legal Services Commissioner v O’Brien (No 2)* [2016] VCAT 1797 (26 October 2016) [23] (Member Wentworth).

84 (1957) 97 CLR 279, 299.

85 (1968) 117 CLR 177, 183 (Barwick CJ, Kitto, Taylor, Menzies and Owen JJ).

86 [2017] VCAT 109 (24 January 2017) [98] (Members Wentworth, Collopy and Reddy).

87 [2007] NSWCA 267 (2 October 2007) [54].

88 *Tziniolis* [1967] 1 NSW 357, 377 (Holmes JA). See also *A Solicitor* (2004) 216 CLR 253, 268 [21] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ); *P* [2003] NSWCA 320 (18 September 2003) [17] (Young CJ in Eq).

of proven misconduct, he has retrieved his good character'.<sup>89</sup> This position was consistent with Latham CJ's earlier statement in *Davis* that '[a] man may be guilty of grave wrongdoing and may subsequently become a man of good character'.<sup>90</sup> By 2005, Senior Member Davis noted in *Sherman v Medical Practitioners Board of Victoria*: 'It is well established that a person who has previously been assessed as not having a sufficiently good character can recover good character.'<sup>91</sup> Judges have nonetheless been wary of inferring from professionals' behaviour following their misconduct that they have transformed their character because they consider that this is a rare event, and they have often quoted Walsh JA's assertion in *Tziniolis* that:

Reformations of character ... can doubtless occur but their occurrence is not the usual but the exceptional thing. One cannot assume that a change has occurred merely because some years have gone by and it is not proved that anything of a discreditable kind has occurred. If a man has exhibited serious deficiencies in his standards of conduct and his attitudes, it must require clear proof to show that some years later he has established himself as a different man.<sup>92</sup>

## 5 Reputation and Character

In interpreting the phrase, 'good fame and character', judges distinguish between reputation (good fame) and morality (good character).<sup>93</sup> McHugh J explained in *Melbourne* that character, which 'refers to the inherent moral qualities of a person ... 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'.<sup>94</sup> Young CJ in *Eq* subsequently made a similar distinction in *P*, noting that '[t]he concept of good fame and character has a twofold aspect. Fame refers to a person's reputation in the relevant community, character refers to the person's actual nature'.<sup>95</sup>

Evaluations of professionals' moral traits seem to have influenced decisions about determinations to impose in disciplinary proceedings more than their apparent reputations. Holmes JA advised in *Tziniolis* that '[r]eputation is obviously relevant to the solution of the problem [whether a professional is of good fame and character] but cannot be the exclusive test'.<sup>96</sup> Not only is it not the exclusive test, but Latham CJ implied in *Davis* that, if a decision-maker considers that a professional is not morally upright, he or she will be found to be not of good fame and character, regardless of his or her reputation: 'It may be that he had by that time become a person of good fame, i.e., of good reputation among those who

89 (Unreported, New South Wales Court of Appeal, Kirby P, Handley and Powell JJA, 15 July 1994) 37.

90 (1947) 75 CLR 409, 416.

91 [2005] VCAT 644 (15 April 2005) [36].

92 [1967] 1 NSW 357, 366, quoted in *Litchfield* (1997) 41 NSWLR 630, 637 (Gleeson CJ, Meagher, Handley JJA); *Alcorn* [2007] NSWCA 288 (29 October 2007) [61] (Beazley and McColl JJA, Hoeben J).

93 *Avelaid* [1999] VSC 255 (26 July 1999) [65] (Coldrey J).

94 (1999) 198 CLR 1, 15 [33].

95 [2003] NSWCA 320 (18 September 2003) [17] (citations omitted).

96 [1967] 1 NSW 357, 377.

then knew him. But intrinsic character is a different matter'.<sup>97</sup> If a professional is deemed to be morally upright, he or she will usually be esteemed by others, so an individual's poor reputation would rarely be the sole basis for a finding that he or she is not of good fame and character. Beech-Jones J observed in *Hilton* that '[n]o case was cited in which an applicant for admission was found to have the requisite qualities to be of good character yet their personal reputation was such that they were refused admission'.<sup>98</sup>

Judges have, however, considered that character references provided on behalf of professionals that indicate their 'good fame' can also demonstrate that they are of 'good character' if those references reflect that their misconduct was atypical of their behaviour and they are therefore unlikely to repeat it.<sup>99</sup> In *McBride*, Kirby P explained that evidence of a practitioner's 'service in the profession and the community' and 'good fame and character in the eyes of patients, fellow practitioners and other citizens' may 'assist in the evaluation of the overall character of the practitioner', and 'lead the Tribunal to the view that the particular conduct ... is to be regarded as exceptional and such as will not require the ultimate conclusion that the practitioner is "not of good character"'.<sup>100</sup> Spigelman CJ similarly assumed that such references can reflect whether the professional's misconduct is uncharacteristic of that person and thus not indicative of their tendencies, opining in *Hatoum* that 'character evidence is also relevant to determining whether or not a person is likely to repeat conduct that he or she has committed in the past'.<sup>101</sup> In *Tziniolis*, Walsh JA nonetheless urged decision-makers to question the accuracy of character references and compare them with other available evidence, observing, 'the Court is always without the benefit of knowing to what extent, if at all, the persons who provide [character references] had knowledge of facts now known to the Court which might have influenced their opinions', and this evidence must be 'weighed against [any] adverse opinions of the [practitioner's] character'.<sup>102</sup>

### III THE ROLE OF CHARACTER IN SENTENCING HEARINGS

Although courts and tribunals have discussed character at length in professionals' disciplinary matters, they have not rigorously interrogated this concept and assumptions made about it. In Australian sentencing hearings, courts have considered the notion of character in even less depth, and judges as well as legislatures have not provided a coherent definition of character or clearly articulated matters that can inform evaluations of it. Assessments of an offender's character may nonetheless be relevant to the sentence that he or she will receive:

97 (1947) 75 CLR 409, 416.

98 (2016) 339 ALR 580, 606 [109].

99 Freckelton, above n 27, 500.

100 (Unreported, New South Wales Court of Appeal, Kirby P, Handley and Powell JJA, 15 July 1994) 16.

101 [2004] NSWCA 30 (26 February 2004) [19].

102 [1967] 1 NSW 357, 367.



good character generally mitigates penalty, while bad character can increase the severity of the punishment. In this part of the article, we provide a brief overview of Australian sentencing law and its objectives; examine how character has been interpreted in sentencing legislation and case law; explain how courts reach conclusions that an offender is of good or bad character; and consider the impact that such findings can have on decisions about penalties.

## A Overview of Sentencing Law and Its Objectives

Australian sentencing law derives from legislation and case law. Although each jurisdiction has its own statutory scheme, the main considerations that determine sentencing outcomes are broadly similar across Australia. The principal sentencing statutes in each jurisdiction set out the objectives of sentencing, which include: community protection; general and specific deterrence; rehabilitation; retribution; and denunciation.<sup>103</sup> While these aims are not formally ranked in order of importance, it is generally accepted that the key goal is community protection.<sup>104</sup> The principle of proportionality, which provides that the hardship of the sanction that is imposed should match the severity of the crime, is the main determinant of the extent to which an offender is punished.<sup>105</sup>

In addition to these considerations, a large number of aggravating and mitigating factors can influence sentencing outcomes. Legislation in different jurisdictions attributes varying weight to these factors; for instance, the *Crimes (Sentencing Procedure) Act 1999* (NSW) lists approximately 30 such considerations,<sup>106</sup> while most sentencing statutes deal only sparingly with these factors. Nevertheless, aggravating and mitigating factors are mainly defined by the common law and are treated similarly across Australia.<sup>107</sup> In total, there are more than 200 mitigating

103 See *Crimes Act 1914* (Cth) ss 16A(1)–(2); *Crimes (Sentencing) Act 2005* (ACT) s 7(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1995* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5(1); *Sentencing Act 1995* (WA) s 6.

104 While the legislative provisions that set out the main objectives of sentencing generally do not prioritise any of the competing objectives, the courts in applying these objectives generally regard community protection as the cardinal objective of sentencing adult offenders: see, eg, *Channon v The Queen* (1978) 20 ALR 1; *R v Valentini* (1980) 48 FLR 416; *R v Williscroft* [1975] VR 292, 298; *R v Radich* [1954] NZLR 86, 87; *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370, 377. In the case of child offenders, courts treat rehabilitation as the most important sentencing objective: see Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010); Freiberg, above n 1.

105 In *Hoare v The Queen* (1989) 167 CLR 348, 354, the High Court stated: 'a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances' (emphasis added)(citations omitted). In *Veen v The Queen [No 1]* (1979) 143 CLR 458, 467 and *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472, the High Court stated that proportionality is the primary aim of sentencing. Proportionality has also been given statutory recognition in all Australian jurisdictions: *Crimes Act 1914* (Cth) s 16A(2)(k); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a); *Sentencing Act 1995* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j); *Sentencing Act 1991* (Vic) ss 5(1)(a), (c)–(d); *Sentencing Act 1995* (WA) s 6(1).

106 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A, 24.

107 See, eg, *Bui v DPP (Cth)* (2012) 244 CLR 638 with particular reference to the federal sentencing regime.

and aggravating factors in sentencing law.<sup>108</sup> Common mitigating factors include an offender's: guilty plea;<sup>109</sup> mental illness;<sup>110</sup> and poor health.<sup>111</sup> Key aggravating factors include an offender's: prior criminal record;<sup>112</sup> significant level of injury;<sup>113</sup> offences committed while on bail;<sup>114</sup> and breach of trust.<sup>115</sup> Significantly, an offender's prior good character is a mitigating factor, while bad character is an aggravating factor.<sup>116</sup>

The 'instinctive synthesis' is the phrase used to describe the reasoning process that courts apply to make sentencing decisions.<sup>117</sup> In *Muldrock v The Queen*, French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ adopted the following description of it: '[T]he judge identifies *all* the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case.'<sup>118</sup> The defining characteristic of the instinctive synthesis is that it neither requires nor permits judges to set out with any particularity the weight (in mathematical or proportional terms) that they attach to any consideration. The instinctive synthesis is an 'exercise in which all relevant considerations are simultaneously unified, balanced, and weighed by the sentencing judge'.<sup>119</sup> It thus involves courts making a global judgment without recourse to a step-by-step process that demarcates precisely how any factors have influenced their judgment. As

108 Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge & Kegan Paul, 1981) 55, identified 229 factors, while R Douglas, 'Sentencing' in Legal Studies Department La Trobe University (ed), *Guilty, Your Worship: A Study of Victoria's Magistrates' Courts* (La Trobe University, 1980) 55, 68 identified 162 relevant sentencing factors. For an overview of the operation of mitigating and aggravating factors, see Mackenzie and Stobbs, above n 104, ch 4; Freiberg, above n 1, chs 4–6.

109 See *Cameron v The Queen* (2002) 209 CLR 339, 343–4 [11]–[15] (Gaudron, Gummow and Callinan JJ), 350–1 [39] (McHugh J), 357–9 [65] (Kirby J).

110 See *R v Tsiaras* [1996] 1 VR 398, 400; *Muldrock v The Queen* (2011) 244 CLR 120, 138–9 [53]–[55], 141 [60]; *R v Verdins* (2007) 16 VR 269.

111 See *AWP v The Queen* [2012] VSCA 41 (8 March 2012) [12], citing *R v Verdins* (2007) 16 VR 269; *Eliassen v The Queen* (1991) 53 A Crim R 391, 395–6.

112 *R v Field* [2011] NSWCCA 13 (16 February 2011) [32], [37], [45]–[53]; *Saunders v The Queen* [2010] VSCA 93 (15 April 2010) [12]–[13], [15], quoting *DPP (Vic) v Terrick* (2009) 24 VR 457, 470–1 [54].

113 *DPP (Vic) v Marino* [2011] VSCA 133 (13 May 2011) [30]–[31].

114 *R v Gray* [1977] VR 225, 229; *R v Basso* (1999) 108 A Crim R 392, 397–8 [21]–[26]; *R v AD* (2008) 191 A Crim R 409.

115 *DPP (Vic) v Truong* [2004] VSCA 172 (24 September 2004) [6], [20]; *Carreras v The Queen* (1992) 60 A Crim R 402, 408; *A-G (Tas) v Saunders* [2000] TASSC 22 (22 March 2000) [10]–[11]; *Hill v The Queen* [1999] TASSC 29 (19 March 1999); *R v Ottobriano* [1999] WASCA 207 (14 July 1999) [9]; *R v Black* [2002] WASCA 26 (18 February 2002).

116 *Ryan v The Queen* (2001) 206 CLR 267, 270 [2], 276–7 [29]–[31], 278 [33] (McHugh J), 287–8 [67]–[68] (Gummow J), 297 [100]–[101] (Kirby J), 308–9 [142]–[143] (Hayne J), 317–18 [174] (Callinan J) ('*Ryan*'). See also below Part III(D).

117 This term originated in the Full Court of the Supreme Court of Victoria decision of *R v Williscroft* [1975] VR 292, where Adam and Crockett JJ stated, '[n]ow, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process': at 300.

118 (2011) 244 CLR 120, 131–2 [26] (emphasis in original), quoting *Markarian v The Queen* (2005) 228 CLR 357, 378 [51].

119 Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?' (2013) 76(1) *Law and Contemporary Problems* 265, 268.

a result, when considerations such as character influence sentencing outcomes, judges do not indicate the weight that they have accorded to this factor.<sup>120</sup> Indeed, in *Director of Public Prosecutions (Vic) v Terrick*, it was expressly stated that, in sentencing decisions, quantitative significance must not be assigned to individual considerations.<sup>121</sup>

## **B The Consideration of Character in Sentencing Legislation and Case Law**

Although an offender's character can play a significant role in the sentencing calculus, there are uncertainties within and inconsistencies between relevant statutes and case law about the matters that may indicate an individual's character. Confusion has particularly surrounded the issue of whether an individual's past convictions or absence of criminal history either reflect his or her character or constitute a consideration separate from character that can influence penalty.

Some courts have treated an individual's prior convictions as constituting the only consideration that can definitely inform an evaluation of his or her character. Indeed, certain judges have deemed previous criminal history as so critical to character that they regard an absence of prior convictions as equating to good character. In *Director of Public Prosecutions (Cth) v D'Alessandro*, for example, Harper JA (Redlich JA and Williams AJA agreeing) stated, '[i]t is true that the respondent has no prior convictions. He *therefore* comes to be sentenced as a person of good character'.<sup>122</sup>

Nevertheless, some legislative provisions stipulate or infer that character is a separate consideration from prior criminal history that can have an impact on decisions about sanctions. For instance, the *Crimes (Sentencing Procedure) Act 1999* (NSW) states that both the absence of significant prior convictions<sup>123</sup> and good character mitigate penalty.<sup>124</sup> Similarly, the *Crimes Act 1914* (Cth) provides that, in determining the appropriate sentence, the court must consider the 'character [and] antecedents' of the accused.<sup>125</sup> Not all courts have, however, accepted this distinction between character and prior convictions. Interpreting this provision of the *Crimes Act 1914* (Cth) in *Weininger v The Queen* ('*Weininger*'), Gleeson CJ, McHugh, Gummow and Hayne JJ noted, '[f]or present purposes, the "character" of the appellant had at least two relevant aspects — his absence of previous convictions and whether he had previously engaged in other criminal conduct',

120 There are only two considerations that attract a mathematical sentencing discount: pleading guilty and assisting the authorities: see Mackenzie and Stobbs, above n 104, 90–1, 93–4.

121 (2009) 24 VR 457, 459 [5]. See also *Pesa v The Queen* [2012] VSCA 109 (4 June 2012) [10]. Judges cannot prescribe the amount of weight to be accorded to aggravating and mitigating considerations because this would constitute a two-tier approach to sentencing and hence contradict the instinctive synthesis approach: see *Markarian v The Queen* (2005) 228 CLR 357, 375 [39].

122 (2010) 26 VR 477, 484 [26] (emphasis added).

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

124 *Ibid* s 21A(3)(f).

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

though they acknowledged that ‘other aspects of his “character” could have been identified’, too.<sup>126</sup> These Justices suggested, too, that it is an offender’s criminal history, or lack thereof, that most influences sentencing decisions:

A person who has been convicted of, or admits to, the commission of other offences will, all other things being equal, ordinarily receive a heavier sentence than a person who has previously led a blameless life. Imposing a sentence heavier than otherwise would have been passed is not to sentence the first person again for offences of which he or she was earlier convicted or to sentence that offender for the offences admitted but not charged. It is to do no more than give effect to the well-established principle (in this case established by statute) that the character and antecedents of the offender are, to the extent that they are relevant and known to the sentencing court, to be taken into account in fixing the sentence to be passed.<sup>127</sup>

Also in *Weininger*, Kirby J explained that, while Parliament and judges have ‘viewed’ ‘character’ and ‘antecedents’ — which ‘refers to any past criminal conviction’ — as ‘separate considerations’ that are both ‘relevant to sentencing’, ‘past criminal convictions may also be relevant to a court’s assessment of the “character” of the person being sentenced’.<sup>128</sup> This approach is similar to the *Sentencing Act 1991* (Vic), which also treats character and criminal history as distinct considerations, but nonetheless suggests, too, that a court can take into account prior convictions in assessing character. This statute states that, in determining whether to record a conviction, a court must consider ‘the character and past history of the offender’,<sup>129</sup> but also provides:

In determining the character of an offender a court may consider (among other things) —

- (a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender; and
- (b) the general reputation of the offender; and
- (c) any significant contributions made by the offender to the community.<sup>130</sup>

Like this statute and the comments of the majority of the High Court in *Weininger*, some courts have indicated that an offender’s character can be reflected in matters in addition to his or her prior criminal history, though they have not definitively or clearly outlined those factors. The Court in *R v Gent* acknowledged that the meaning of character in sentencing hearings is nebulous and the concept has been interpreted in diverse ways:

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

126 (2003) 212 CLR 629, 638 [25] (*Weininger*).

127 *Ibid* 640 [32].

128 *Ibid* 647 [58].

129 *Sentencing Act 1991* (Vic) s 8(1)(b).

130 *Ibid* s 6.

something more of a positive nature involving or including a history of previous good works and contribution to the community ...<sup>131</sup>

Similar to the view expressed by many decision-makers in professionals' disciplinary proceedings, some judges in sentencing matters have indicated that character comprises innate moral traits. In *Ryan v The Queen* ('*Ryan*'), for instance, McHugh J quoted from his judgment in *Melbourne* in which he stated, 'character refers to the inherent moral qualities of a person or ... *disposition* — which is something more intrinsic to the individual in question'.<sup>132</sup> Also in this case, and contrary to the *Sentencing Act 1991* (Vic) and some decisions in disciplinary matters, the Court indicated that an offender's reputation is irrelevant to an evaluation of his or her character. McHugh J noted that character is often closely, but inaccurately, associated with reputation,<sup>133</sup> while Hayne J emphasised that 'reputation' is not 'a safe and certain guide to all aspects of a person's character'.<sup>134</sup>

## C Good Character and Sentencing

A court's finding that an offender is of good character can result in a reduction in the severity of the sentence that is imposed. Such a finding can be based on an absence of prior convictions, but also other evidence. Kirby J stated in *Weininger*:

Even before *Ryan*, it had been pointed out that sometimes 'good character' had been taken as referring, negatively, to an absence of prior convictions. But, often, as in *Ryan*, it refers to more positive indications by which, otherwise than in respect of the offences acknowledged before the court, the offender has demonstrated good personal qualities and conduct that should be taken into account. The object is to ensure a sentence that reflects more than a 'one-dimensional' view of the offender's criminal record or personal characteristics.<sup>135</sup>

Nevertheless, evidence that some judges consider courts must disregard in determining whether an offender is of good character is his or her current offences. McHugh J noted in *Ryan*: 'When considering *this* issue [of good character], the sentencing judge must not consider the offences for which the prisoner is being sentenced. Because that is so, many sentencing judges refer to the offender's "previous" or "otherwise" good character.'<sup>136</sup>

According to case law, an offender's good character will not significantly mitigate penalty in four situations, namely, where:<sup>137</sup> the offence is of a kind that is usually committed by a person who does not have a criminal history, such as sexual offences against children,<sup>138</sup> or driving offences that cause death or

131 (2005) 162 A Crim R 29, 40–1 [49] ('*Gent*') (citations omitted).

132 (2001) 206 CLR 267, 276 [28], quoting *Melbourne* (1999) 198 CLR 1, 15 [33] (citations omitted).

133 *Ryan* (2001) 206 CLR 267, 276 [27]–[28].

134 *Ibid* 310 [144].

135 (2003) 212 CLR 629, 649 [62] (citations omitted).

136 (2001) 206 CLR 267, 275 [23].

137 *Gent* (2005) 162 A Crim R 29, 41–3 [51]–[61].

138 See *Ryan* (2001) 206 CLR 267.

serious injury;<sup>139</sup> the offender's good character enabled him or her to occupy the position from which the offences could be committed, for example, white-collar offences;<sup>140</sup> there is a powerful countervailing sentencing objective that typically applies to the offence in question, such as very serious offences,<sup>141</sup> including drug distribution offences (in relation to which general deterrence is a strong consideration) and armed robbery;<sup>142</sup> and the offender is sentenced for a number of crimes that he or she committed over a period of time.<sup>143</sup>

## D *Bad Character and Sentencing*

A finding that an offender is of 'bad character' can lead to an increase in the severity of the sanction that is imposed. Courts have considered that prior criminal history is the main indication of an offender's 'bad character'. Indeed, prior criminality is probably the most influential aggravating factor in the sentencing calculus.<sup>144</sup> Judges have provided various justifications for imposing a sentencing premium on offenders with prior convictions, including that: a history of criminality supposedly indicates that the offender's current crime is not an aberration; the offender is especially morally culpable; the offender has poor prospects of rehabilitation; and the objectives of retribution, deterrence and community protection assume particular importance.<sup>145</sup> Courts have, however, also indicated that prior convictions cannot result in such an increase to penalty that the sanction is disproportionate to the objective gravity of the offence.<sup>146</sup> Rather, prior convictions can influence where in the continuum of a proportionate penalty the actual penalty is set.<sup>147</sup>

139 In *R v MacIntyre* (1988) 38 A Crim R 135 Lee CJ at CL stated in relation to the offence of culpable driving (at 139):

His Honour took into account, of course, the good character of the respondent, and properly so. But it must be said that this class of offence is one which in many, perhaps even in most, cases is committed by persons who are not in any sense members of the criminal class or who even have criminal convictions against them, and for that reason the courts need to tread warily in showing leniency for good character to avoid giving the impression that persons of good character may, by their irresponsible actions at the time, take the lives of others and yet receive lenient treatment.

See also *Pasznyk v The Queen* (2014) 43 VR 169.

140 See *R v Coukoulis* (2003) 7 VR 45, 59–60 [41]–[42].

141 *McMahon v The Queen* [2011] NSWCCA 147 (22 June 2011) [37], [76]–[77]; *R v Kennedy* [2000] NSWCCA 527 (13 December 2000) [21].

142 *R v Knell* [2001] VSCA 82 (17 May 2001) [9].

143 *R v Kennedy* [2000] NSWCCA 527 (13 December 2000) [22].

144 See, eg, *Saunders v The Queen* [2010] VSCA 93 (15 April 2010) [13]–[16].

145 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 477–8; *Lang v The Queen* [2013] NSWCCA 29 (19 February 2013) [34]–[36]; *Le v The Queen* [2014] VSCA 283 (11 November 2014) [30]; *Brown v The Queen* [2014] NSWCCA 215 (13 October 2014) [53]–[62].

146 *Van der Baan v The Queen* [2012] NSWCCA 5 (1 August 2012) [30], [43].

147 *R v McNaughton* (2006) 66 NSWLR 566, 574 [25]; *Matthews v The Queen* [2014] NSWCCA 185 (17 September 2014) [24]; *R v McCusker* [2015] QCA 179 (29 September 2015). It is well established in sentencing that there is no single, correct penalty. Instead, there is an appropriate band, which is termed a 'tariff'. Prior convictions can justify setting a penalty at the higher end of the tariff.

Notwithstanding this position, legislation in most Australian jurisdictions permits courts to impose penalties that are disproportionate to the gravity of a current offence where the offender has prior convictions and is therefore deemed to be of 'bad character'. This is especially the case where offenders have committed serious violent and sexual crimes and are regarded as being a danger to the community; in several jurisdictions, such offenders can be sentenced to indefinite terms of imprisonment.<sup>148</sup> There are 'serious offender' provisions in various jurisdictions that explicitly allow for lengthy sentences to be imposed on recidivist serious offenders.<sup>149</sup> In Victoria, community protection is the principal purpose of sentencing offenders who commit certain types of serious crimes, including sexual, violent, drug or arson offences, and have one — or in the case of particular sexual offences two — previous conviction(s) for similar offences.<sup>150</sup> To achieve this objective, the *Sentencing Act 1991* (Vic) provides that a sentence longer than one that is proportionate to the gravity of the instant offence may be imposed.<sup>151</sup> Also in Victoria, offenders who commit serious property offences<sup>152</sup> may be sentenced to a maximum term of imprisonment that is twice the length of the maximum term prescribed for the instant offence or 25 years — whichever is the lower — for a third similar offence.<sup>153</sup> The prior criminality provisions in South Australia are, however, the most severe: offenders who are convicted of certain crimes, even if they are not particularly serious, can be sentenced to disproportionately harsh terms if they have two, or in some cases three, prior convictions for offences of the same class.<sup>154</sup>

An offender's character is therefore an important sentencing consideration. Even though character assessments that do not take into account an offender's prior criminality can only result in mitigation of penalty, offenders who are deemed to be of bad character on the basis of their previous convictions will receive harsher penalties than offenders who are considered to be of good character.<sup>155</sup>

148 See *Sentencing Act 1995* (NT) ss 65–78; *Penalties and Sentences Act 1992* (Qld) ss 162–79; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13; *Criminal Law (Sentencing) Act 1988* (SA) ss 21–9; *Sentencing Act 1997* (Tas) s 19; *Sentencing Act 1991* (Vic) ss 18A–18P; *Sentencing Act 1995* (WA) ss 98–101. See also *Crimes (High Risk Offenders) Act 2006* (NSW) ss 13A–18 (which offers the State of New South Wales the option of seeking continuing detention orders against, for example, certain sex offenders). For an overview of the operation of these provisions, see NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) 12–16 <[http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing\\_Serious\\_Violent\\_Offenders/online%20final%20report%20hrvo.pdf](http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing_Serious_Violent_Offenders/online%20final%20report%20hrvo.pdf)>.

149 See, eg, *Sentencing Act 1995* (NT) ss 65–78; *Penalties and Sentences Act (1992)* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) ss 20A–20B; *Sentencing Act 1997* (Tas) s 19; *Sentencing Act 1991* (Vic) ss 6A–6D.

150 See *Sentencing Act 1991* (Vic) ss 6A–6D.

151 *Ibid* s 6D(b). See also *R v LD* [2009] VSCA 311 (18 December 2009) [20]–[30] (applying the *Sentencing Act 1991* (Vic)).

152 Serious property offences are termed 'continuing criminal enterprise offences': see *Sentencing Act 1991* (Vic) s 6H (definition of 'continuing criminal enterprise offence'), sch 1A.

153 *Ibid* s 6I.

154 See *Criminal Law (Sentencing) Act 1988* (SA) ss 20A–20B. Qualifying offences include home invasions and firearm crimes.

155 See Mirko Bagaric, 'The Punishment Should Fit the Crime — Not the Prior Convictions of the Person That Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing' (2014) 51(2) *San Diego Law Review* 343.

## **IV PROBLEMS WITH RELYING ON ASSESSMENTS OF CHARACTER TO REACH DECISIONS ABOUT SANCTIONS AND DETERMINATIONS**

In this part of the article, we explain our two major objections to courts and tribunals relying on their purported evaluations of individuals' character to reach decisions about the penalty or determination to impose in a sentencing hearing or professional's disciplinary proceeding respectively: first, this decision-making is unfair and, second, it is unnecessary.

### **A The Unfairness of Evaluating Character**

Character is an illusory and incoherent concept. There is no single, accepted definition of character,<sup>156</sup> and varied explanations of it have been posited in the fields of philosophy and psychology.<sup>157</sup> Courts' and tribunals' treatment of character bears similarities to some of those interpretations, though they have not generally acknowledged any congruence with them. In particular, many decision-makers have adopted one of the more popular ideas about character, namely, that it comprises moral traits. Yet no evidence confirms that each individual has a distinctive, immutable morality that can be observed and measured, and that consistently dictates their behaviour. 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. Decisions based on ostensible assessments of people's character, which lack rigorous consideration and empirical foundation, are likely to be speculative, misguided and arbitrary. Given that such determinations can profoundly affect people's lives and adversely impinge on their legal rights and interests, they may in fact violate the rule of law. Several judges have acknowledged the unfairness that decision-making on the basis of unsubstantiated and unsophisticated assumptions about character can engender, but it has persisted nonetheless.<sup>158</sup>

#### **1 Flaws in the Moral Conception of Character**

Although character has no settled meaning, as we have seen, it is frequently explained by the notion that each individual has a particular character that comprises moral (and perhaps other) traits, which are consistent in their ethical orientation, enduring and evident in varied circumstances.<sup>159</sup> This is a fundamental understanding of many decision-makers that has underlain the

156 Christine McKinnon, *Character, Virtue Theories, and the Vices* (Broadview Press, 1999) 57.

157 Freckelton, above n 27, 490.

158 See, eg, *Melbourne* (1999) 198 CLR 1, 23–4 [63] (Gummow J), 33 [90], 40 [105] (Kirby J).

159 Nafsika Athanassoulis, *Virtue Ethics* (Bloomsbury Publishing, 2013) 40.



outcomes of numerous character evaluations. While this theory has some adherents, it is neither universally held nor based on empirical research, and has attracted criticism from philosophers, psychologists, and even some judges.<sup>160</sup> According to philosopher Gilbert Harman, 'there is no empirical support for the existence of character traits' that differentiate individuals from one another and explain their behaviour.<sup>161</sup> Kirby J in fact queried in *Melbourne*, '[d]oes "good character" exist at all? Is it an outmoded or antiquated notion of morality and human propensity which has been overtaken by psychological experimentation and understanding[?]'.<sup>162</sup>

The 'ethical' 'sense' of 'character', as philosopher Christine McKinnon describes it,<sup>163</sup> which courts and tribunals appear to have often adopted, overlooks human variations and complexity. McKinnon observes, 'we judge people to have good or bad characters according to whether we think they possess or lack the kinds of traits that make their lives ethically praiseworthy and/or that enhance the lives of those around them'.<sup>164</sup> On occasion, decision-makers seem to have assumed that people are born with either 'virtues' (such as honesty) or 'vices' (such as dishonesty), so they have an identifiable, biologically-determined, innate 'good' or 'not good' character.<sup>165</sup> Indeed, several decision-makers' interpretations of character conform to the 'exclusionary thesis' that, as philosopher John Doris identifies, some philosophers have endorsed in the past: 'virtues and vices cannot coexist in a single personality, because genuine instances of virtues manifest evaluative commitments that preclude vices' (and vice versa).<sup>166</sup> This approach does not, however, allow for the possibility that, under different conditions, one individual may display traits that could be classified as virtues and vices.<sup>167</sup> Recent psychological research has in fact led to the theory, which Christian Miller has propounded, that most people have 'mixed character traits', 'which are neither moral virtues nor vices', but rather 'have positive and negative features', and are not necessarily 'stable' or 'cross-situationally consistent'.<sup>168</sup>

Some judges have criticised the moral idea of character. In *McBride*, Kirby P denounced decision-makers' dichotomous moral treatment of character as crude and archaic:

160 See, eg, John M Doris, *Lack of Character: Personality and Moral Behavior* (Cambridge University Press, 2002) 1–6; Leslie C Levin, Christine Zozula and Peter Siegelman, 'The Questionable Character of the Bar's Character and Fitness Inquiry' (2015) 40 *Law and Social Inquiry* 51, 53.

161 Gilbert Harman, 'Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error' (1999) 99 *Proceedings of the Aristotelian Society* 315, 330. See also at: 315–16, 329.

162 (1999) 198 CLR 1, 33 [90] (citations omitted).

163 McKinnon, above n 156, 58.

164 *Ibid.*

165 Harman, above n 161, 316.

166 Doris, above n 160, 21 (citations omitted).

167 McKinnon, above n 156, 71.

168 Christian B Miller, *Moral Character: An Empirical Theory* (Oxford University Press, 2013) 3, 18, 26; Adam Feltz, 'Moral Character: An Empirical Theory' (2015) 28 *Philosophical Psychology* 1079, 1079.

[t]he etymological origins of the word [character], from the Greek word for an instrument for engraving, suggests that now somewhat dated view of complex psychological phenomena, viz that persons may be readily catalogued as being either of ‘good character’ or of ‘bad character’. Certainly, the classifications are well known to the law which usually finds such simplistic notions of human and other classifications congenial.<sup>169</sup>

Subsequently, in *Melbourne*, Kirby J expressed concern about decision-makers’ conception of character for the further reason that it disregards the possibility that people’s ethical orientation might fluctuate: ‘the etymology’ of ‘character’ ‘suggests that “character” in relation to an individual refers to a permanent and unchanging pattern of the nature of the individual concerned. However, this reflects a now somewhat outdated view of complex psychological phenomena’.<sup>170</sup> Freckelton observes, like Kirby J, that courts’ and tribunals’ predominant idea of character is ‘incompatible with the inclination ... to acknowledge the potential for personal growth and transformation’.<sup>171</sup> Indeed, recent philosophical theory suggests that an individual may change his or her moral behaviour and, in Saba Fatima’s words, ‘through effort and education’ can ‘[attempt] ... to habituate certain virtues’ and be ‘trained to respond appropriately for the right reasons in any given situation’.<sup>172</sup>

In his judgment in *Melbourne*, Gummow J shared Kirby J’s unease with decision-makers’ acceptance of the notion that all people fall within either one of the categories of good character or bad character, because it prevents them from applying a more nuanced view of human nature.<sup>173</sup> Gummow J was equally concerned that decisions about sanctions and determinations have been based on assumptions that it is possible to ascertain whether people have particular moral attributes and that they invariably behave in accordance with them:

it may appear curious that legal consequences follow from the attachment to a designated individual, and without further analysis, of the description ‘good character’ or ‘bad character’. First, this appears to assume polarities with no space for occupation by those whose frailties place them somewhere towards the centre of a continuum. Secondly, it allows too little scope for the infinite variety of mental processes which lead to action or inaction, and assumes that people act across a range of circumstances in conformity with a measurable trait which can be the subject of testimony.<sup>174</sup>

There is in fact heated philosophical debate in meta-ethics — the study of the nature of moral judgments — about whether objective moral truths exist (realism) or whether our moral judgments merely represent personal desires or tastes

169 (Unreported, New South Wales Court of Appeal, Kirby P, Handley and Powell JJA, 15 July 1994) 13.

170 (1999) 198 CLR 1, 40 [105] (citations omitted).

171 Freckelton, above n 27, 510.

172 Saba Fatima, ‘Can Doctors Maintain Good Character? An Examination of Physician Lives’ (2016) 37 *Journal of Medical Humanities* 419, 429, citing Rosalind Hursthouse, *On Virtue Ethics* (Oxford University Press, 1999) 113–19.

173 (1999) 198 CLR 1, 23–4 [63].

174 *Ibid.*

(irrealism).<sup>175</sup> Thus, a tenable argument can be mounted that no individual's tangible interests should be set back by reference to the abstract, obscure construct that is morality. Yet, even if morality is a real phenomenon and we were to accept that people are inherently inclined to demonstrate either virtues or vices, there is no agreed objective reference point by which the persuasiveness of the respective moral theories should be evaluated.<sup>176</sup> Moreover, as Gummow J highlights, no criteria have been empirically proven as capable of confirming individuals' dispositions.

In the absence of such measures, courts and tribunals have formed judgments about people's moral character based on unreliable information, without reference to an accepted standard, and not always in the same ways as one another. As Harman observes, 'ordinary attributions of character traits to people are often deeply misguided'.<sup>177</sup> In the case of decision-makers, it appears that, in seeking to ascertain individuals' character, they have depended to a large extent on their intuitive and emotional responses to them, which can be influenced by misleading information. For instance, they may misinterpret witnesses' body language. Further, courts and tribunals may adopt different evaluative strategies from one another when seeking to assess individuals' moral characters depending on whether they subscribe to a 'consequential' or 'non-consequential' normative moral theory. Consequential moral theories — the most popular of which is utilitarianism — maintain that an act will be ethically-upright if it has the capacity to maximise a virtue, such as happiness, while according to non-consequential (also described as 'deontological') theories, the appropriateness of an act is determined by its intrinsic features, rather than its instrumental ability to produce particular ends.<sup>178</sup> Utilitarian and deontological decision-makers are likely to reach different conclusions especially about the character of individuals who break the law, where their motivation for contravening the law is to promote the common good. For example, a deontological judge would probably impose a harsher sanction than a utilitarian judge on a lawyer for neglecting to advise his or her client, who is charged with serious terrorism offences, of an available defence, where the lawyer is of the view that the client will reoffend if he or she is acquitted.

## **2 The Fallacies That Character Dictates Conduct and That Conduct Reflects Character**

Another misconception that many decision-makers appear to have imbibed — though Gummow J criticised it in *Melbourne* — is that people always behave in

175 See H J McCloskey, *Meta-Ethics and Normative Ethics* (Martinus Nijhoff, 1969); Michael Smith, 'Realism' in Peter Singer (ed), *A Companion to Ethics* (Blackwell Publishers, 1991) 399.

176 For an overview of the respective theories, see J J C Smart and Bernard Williams (eds), *Utilitarianism: For and Against* (Cambridge University Press, 1973); Peter Singer, *Practical Ethics* (Cambridge University Press, 2<sup>nd</sup> ed, 1993); Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 4<sup>th</sup> ed, 1977).

177 Harman, above n 161, 316.

178 See Nancy (Ann) Davis, 'Contemporary Deontology' in Peter Singer (ed), *A Companion to Ethics* (Blackwell Publishers, 1991) 205.

a coherent, unified manner that is driven by their character traits. This notion is consistent with a longstanding philosophical tradition dating back to Aristotle that maintains that an individual develops a character that ‘leads to stable, predictable and dependable dispositions that express themselves in actions’, that is, our traits dispose us to behave in particular ways.<sup>179</sup> It also conforms to the view of some philosophers who subscribe to ‘virtue ethics’ theories that a person with a ‘virtuous disposition’ has chosen certain character traits because he or she believes they will benefit him or her and others, and those traits incline him or her to act in a particular way; such an individual has ‘[internalised] a certain normative standard of excellence, in such a way that one is able to adjust one’s ... conduct so that it conforms ... with that standard’.<sup>180</sup> Yet Harman notes, ‘[e]mpirical studies designed to test whether people behave differently in ways that might reflect their having different character traits have failed to find relevant differences’.<sup>181</sup> ‘Personality psychologists’ have also observed that ‘behavior alone is not diagnostically decisive’.<sup>182</sup>

Indeed, contemporary experimental psychology emphasises that multifarious life circumstances can influence people’s behaviour, and encourage them to act in inconsistent ways and also contrary to inclinations they may otherwise have.<sup>183</sup> In particular, situational social psychology observes a ‘fundamental attribution error’ in ‘ordinary moral thought’ whereby incorrect assumptions are made that people’s behaviour is attributable to their character, rather than to situations in which they find themselves.<sup>184</sup> According to this theory, ‘situational factors’ and environment have a far greater impact on people’s behaviour than any apparent character traits.<sup>185</sup> Fatima explains, ‘behavior is situation dependent rather than character dependent’ and ‘different people react in similar ways in similar ethical situations (i.e. they have a trait *local* to the situation), and a person reacts differently (i.e. with inconsistency of an overarching *global* trait within that person) in different moral situations’.<sup>186</sup> In the case of doctors, for instance, Fatima maintains, ‘there are a number of factors that habituate a particular way of reasoning which is not conducive to inculcating good character, such as ... stress of time constraints, [and the] competitive nature of medical training’.<sup>187</sup>

Some judges have, to a certain extent, been wary of committing the fundamental attribution error. As noted above, the Courts in *Ziems* and *A Solicitor* recognised the importance of decision-makers examining circumstances that may have

179 Athanassoulis, above n 159, 48. See also Harman, above n 161, 317; Doris, above n 160, 15; Freckelton, above n 27, 491.

180 Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press, 2001) 28. See also McKinnon, above n 156, 29–31, 35, 57.

181 Harman, above n 161, 316.

182 Doris, above n 160, 26.

183 Ibid ix, 2, 24, 93.

184 Lee Ross, ‘The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process’ in Leonard Berkowitz (ed), *Advances in Experimental Social Psychology* (Academic Press, 1977) vol 10, 174–220, cited in ibid 93; cited in Harman, above n 161, 316.

185 Doris, above n 160, ix, 2, 15–16, 24, 26, 28, 93; Fatima, above n 172, 428; Freckelton, above n 27, 491.

186 Fatima, above n 172, 428 (citations omitted) (emphasis in original).

187 Ibid 429.

incited people's behaviour,<sup>188</sup> and, in *McBride*, Kirby P and Powell JA considered it appropriate for them to take into account an individual's 'motivation' for acting in a certain way.<sup>189</sup> Also in *McBride*, Kirby P relevantly opined:

A single act, or connected series of acts ... may not amount to showing that a registered practitioner is 'not of good character'. Proof that a person cheated once does not demonstrate that he or she is 'a cheat', in the sense of being engraved with the 'character' of a cheat. ... To hold otherwise would be to compound 19<sup>th</sup> century notions of psychology and to inflate the balloon of 'good conduct' beyond its function in [the relevant legislation] ...<sup>190</sup>

Another problem with the notion that it is possible to reach conclusions about individuals' character based on their conduct is that, to do so, decision-makers must make assumptions about how an ethically-upright person would behave. In this respect, they share the view of some virtue ethicists that '[a]n action is right if ... it is what an agent with a virtuous character would do in the circumstances'.<sup>191</sup> Yet in order for decision-makers, in Harman's words, to 'determine what a person *ought morally* to do in a particular situation by considering what a person of good character would do in that situation',<sup>192</sup> they need to make suppositions that are largely arbitrary and always theoretical and speculative.

### **3 Errors in Using Purported Character Evaluations to Forecast Future Conduct**

This discussion highlights that a further assumption that has been central to courts' and tribunals' decision-making about sanctions and determinations to impose is deeply unsound, namely, that their evaluations of people's character, including on the basis of their past conduct, enables them to predict accurately those individuals' future behaviour.<sup>193</sup> As we have argued, it cannot be definitively established that individuals have a distinctive character; even if people do have certain moral traits or inclinations, there are no means for decision-makers to ascertain them reliably; and individuals' conduct does not necessarily reflect such attributes and tendencies.

In addition, there is no certainty that people will act in ethical ways even if they have done so previously. Indeed, as situational social psychology illuminates, particular circumstances may lead to individuals making unlikely choices and decisions, and behaving in unpredictable ways, and differently from how they have acted in the past. Doris in fact observes that most people change their behaviour

188 *Ziems* (1957) 97 CLR 279, 288 (Fullagar J), 303 (Taylor J); *A Solicitor* (2004) 216 CLR 253, 268 [22] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

189 (Unreported, New South Wales Court of Appeal, Kirby P, Handley and Powell JJA, 15 July 1994) 16 (Kirby P), 71 (Powell JA).

190 *Ibid* 15.

191 Oakley and Cocking, above n 180, 9.

192 Harman, above n 161, 318 (emphasis in original).

193 See Levin, Zozula and Siegelman, above n 160, 51, 78. These authors found that 'information collected during the character and fitness inquiry [when people apply for admission to the American bar] does not appear to be very useful in predicting subsequent lawyer discipline': at 78.

in response to different situations and thus are more likely to act inconsistently than consistently. He notes that ‘consistent behavioral profiles are abnormal or, more judgmentally, pathological’, while ‘behavioral inconsistency reflects the adaptability associated with successful social functioning’.<sup>194</sup>

The understanding of certain judges that individuals’ character can occasionally be ‘reformed’ actually suggests that it is erroneous to predict future behaviour based on past conduct. Moreover, some judges have appreciated that contemporary research undermines the validity of decision-makers’ presumption that their assessments of individuals’ character can help them to forecast their risk of reoffending. In *Melbourne*, McHugh J recognised that ‘empirical psychological studies now deny that character is as accurate a predictive tool as earlier generations so confidently believed’.<sup>195</sup> Also in that case, Kirby J stated:

The belief that individuals are indelibly marked by an identifiable ‘character’ has value in the law only so far as it is based on an assumption that such ‘character’ has a predictive value, whether for good or bad. This notion is not only challenged by the fact that every first offender once had a ‘good character’. It is also difficult to reconcile with modern psychological experimental literature.<sup>196</sup>

Reflecting the findings of situational social psychology, Kirby J also observed:

To possess a predictive quality ... it must be hypothesised that the ‘character’ of individual human beings demonstrates qualities which are sufficiently enduring and unvarying to be useful to a court. ... [W]here a person does not have a stable personality or is exposed to new, special or extraordinary circumstances, the assumption that the person’s conduct may be predicated on a previous absence of convictions, or even on a general reputation for, or existence of, good character, is doubtful. The previous assumption of lawyers ... was that individual behaviour was comparatively stable under a variety of similar situations. Upon this view, behaviour arose from ‘certain attributes or mental structures called “traits”’ unique to each individual. That belief is now criticised as lacking empirical support.<sup>197</sup>

#### **4 Reputation, Good Deeds and Prior Criminal History Fail to Indicate Character**

As noted above, in seeking to ascertain people’s character, some decision-makers have referred to evidence of their reputation, good deeds, and prior convictions or absence thereof. Yet, arguably, these factors are as unhelpful as the notion of an individual’s moral traits in making character a clearer concept; establishing that an individual has inherent attributes or inclinations and identifying what they might be; forecasting a person’s probable future conduct; and thus in reaching decisions about sanctions or determinations.

194 Doris, above n 160, 65.

195 (1999) 198 CLR 1, 20 [47].

196 Ibid 40 [105].

197 Ibid 41 [106]–[107] (citations omitted).

It is particularly unfair for decision-makers to impinge on an individual's legal rights and interests on the basis of his or her reputation, which represents the wholly subjective judgment of one or more laypersons that, in turn, is unrelated to any impartial or legally-determined standards. In any event, often an individual will not have one reputation on which decision-makers can rely as a reflection of his or her character, but will rather have varied reputations in different contexts and communities, depending on prevailing values and attitudes. In some exceptional cases, an individual attracts a dominant reputation. For instance, it could be concluded with some confidence that a large proportion of society would condemn Charles Manson and revere Mother Teresa. Nevertheless, such popular views do not confirm that an individual has particular intrinsic traits or assist in predicting how he or she might behave in different circumstances. They are therefore of negligible value in establishing which sanction or determination might be appropriate to impose.

Likewise, we cannot reliably infer from an individual's good deeds and absence of prior convictions that he or she has certain innate qualities or tendencies. Even if we agree on the nature of deeds that are 'good', such as for the reason that they are beneficial to the community, those acts alone do not indicate anything essential about the person or his or her future behaviour. Merely because an individual performed 'good deeds' on one or more occasions does not confirm that under different conditions he or she would not commit 'bad deeds'. The lack of a criminal record similarly does not assist in forecasting how an individual will conduct himself or herself in various situations.

As the Court identified in *Ziems*, an individual's convictions or past misconduct are as unreliable an indicator of any intrinsic traits of that person or his or her likely recidivism as previous good behaviour.<sup>198</sup> They do not reflect the factors that may have influenced an individual's offending or misconduct and his or her potential to behave differently in other circumstances.

We nonetheless consider that it may be appropriate for courts and tribunals to refer to individuals' past proven crimes or misconduct, or absence of this history, in determining appropriate sanctions or determinations to impose, provided that they do not make inferences from this evidence about their character. In contrast to largely impressionistic assumptions about individuals' character, their past breaches of the law and/or professional standards have been established through evidence that has been tested objectively. Moreover, there can be sound reasons for a recidivist burglar and a lawyer who has mishandled trust funds on a number of occasions to receive a harsher penalty than an offender or lawyer with no previous convictions or professional transgressions. (There are, however, persuasive reasons for abolishing the aggravating factor of prior convictions or significantly reducing its weight,<sup>199</sup> but that issue is beyond the scope of this article.)

198 (1957) 97 CLR 279, 298–9 (Kitto J). See above Part II(C)(2).

199 See, eg, Richard S Frase et al, *Criminal History Enhancements Sourcebook* (2015) Robina Institute of Criminal Law and Criminal Justice <<https://robinainstitute.umn.edu/publications/criminal-history-enhancements-sourcebook>>.

It is clear from this discussion that it is unfair for decision-makers to impinge on individuals' legal rights and interests on the basis of purported assessments of their character. It may be considered reasonable in non-legal settings for people to judge others according to their intuitive sense of their qualities. These inferences are, however, highly subjective, indeterminate and vague, and comparable to other popular observations about individuals that are similarly unsubstantiated by empirical evidence, such as those that refer to a person's stature or aura. It is thus unjust to rely upon such evaluations in legal decision-making that must comply with the rule of law and be impartial and precise.

## **B The Futility of Evaluating Character**

Given the subjectivity and unreliability of assessments of individuals' character, it is not only unfair, but also unhelpful to refer to them in order to reach decisions about sanctions and determinations to impose. Moreover, there is no need for decision-makers to depend on character evaluations because the offending behaviour of the subjects of the hearings will provide them with sufficient information to reach decisions that can help achieve the objectives of those proceedings.

To respond to the misconduct of legal and health professionals in a way that will protect the community, decision-makers need only determine whether their behaviour has breached professional standards, without seeking to infer their character from their conduct. For instance, to justify imposing a harsh determination on a lawyer who steals trust money or a doctor who sexually abuses a patient, a decision-maker must merely find that this conduct is incompatible with professional practice because it threatens the community, without evaluating the practitioner's character. Indeed, Freckelton observes that a health professional's supposed character is irrelevant to an assessment in a disciplinary proceeding of whether his or her conduct indicates that he or she will endanger the public:

In each instance the question to be posed is whether the *conduct* previously engaged in and apparently the product of such an aspect of character is of a kind which would unacceptably reduce the practitioner's capacity to function safely and competently as a health professional.<sup>200</sup>

Similarly, in sentencing hearings, courts only need to consider the offender's crime, and not assess his or her character, to determine which penalty will protect the community, deter the individual offender and others from committing crimes, punish and rehabilitate the offender, and denounce his or her crime. Assessments of an offender's character have no role to play in courts' application of the principle of proportionality, which requires them to evaluate only the seriousness of the offender's crime and ensure that the severity of the sanction corresponds to it. In addition, there are sufficient appropriate aggravating and mitigating considerations that help courts to assess the gravity of an offence without judges

200 Freckelton, above n 27, 510 (emphasis added).



needing to attempt to undertake the impossible task of ascertaining an offender's character for this purpose.

## V PROPOSAL FOR LAW REFORM

We consider that one law reform proposal logically follows from the above discussion about the unfairness and futility of courts and tribunals relying on purported character assessments to reach decisions about sanctions or determinations. In our view, character should be completely abolished as a consideration of decision-makers in sentencing hearings and professionals' disciplinary proceedings.

As we have demonstrated, character is such an indeterminate and imprecise concept that there is no consensus about its definition. Even if a loose definition of it could be developed and agreed upon, there are no means of objectively, precisely measuring people's character and ensuring that different decision-makers attempt to ascertain individuals' character in the same ways as one another. Purported evaluations of character are consequently at risk of violating the rule of law, which requires the clear, transparent and consistent application of promulgated legal standards.<sup>201</sup> In some realms, it may be acceptable to consider that concepts can be meaningful and applicable even if they are not defined precisely. In our view, however, there is no scope for such latitude in the context of sentencing hearings and professionals' disciplinary proceedings, because the outcomes of these matters can substantially impinge on individuals' rights, interests and liberties. Further, as we have demonstrated through a close analysis of the case law, courts and tribunals have not developed a tenable working definition of character, as they have not consistently and clearly identified traits and considerations that should always inform this concept.

In any event, as explained above, it is unnecessary for decision-makers to refer to arbitrary evaluations of individuals' character in order to determine appropriate measures to impose on criminal offenders and professionals who breach regulatory standards. The conduct of the subjects of those hearings provides sufficient information for decision-makers to formulate suitable responses to it.

It could be argued that, because character has been such a longstanding and popular concept in Western thought, abolishing references to it in the law will inevitably result in it reappearing in some other guise.<sup>202</sup> Nevertheless, in our view, this would not occur if concepts that invoke objective and measurable standards displace the notion of character in relevant legal areas. For example, in the context of professionals' disciplinary proceedings, the term 'fit and proper' could be replaced by a clear standard that is informed by specified criteria, such

201 See, eg, Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 211, 214–16; John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) 270–6; Jeffrey Jowell, 'The Rule of Law Today' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Clarendon Press, 2<sup>nd</sup> ed, 1989) 3.

202 We thank the anonymous referee for this insightful observation.

as that the professional has not been found guilty of an offence punishable by imprisonment for more than one year.<sup>203</sup>

This approach would also assuage possible concerns that removing character as a consideration in sentencing hearings and professionals' disciplinary proceedings could undermine the legitimacy of the law, for the reason that the community expects character assessments to influence decision-making in these matters.<sup>204</sup> While the community might have a strong sense of morality, and character has been interpreted as having moral connotations, there is no evidence that it is necessary for the law to refer to certain moral traits in order for it to maintain its legitimacy and efficacy. For example, the fact that an individual's loyalty, although perceived by the community to be an important moral virtue, has no impact on his or her legal obligations does not undermine the legitimacy of the law. In fact, legal positivists contend that law and morality are separate domains.<sup>205</sup> Clear standards for people's behaviour, and sanctions and penalties for breach of those standards, could reflect community values and norms more closely and appropriately than the amorphous concept of morality. For instance, a law that an individual is ineligible for legal practice if he or she was convicted of an offence punishable by imprisonment within the preceding five years would give effect to community views about how past misconduct should affect individuals' legal entitlements, but in a manner that does not violate the rule of law.

## VI CONCLUSION

In this article, we have argued that Australian courts and tribunals should never seek to evaluate the character of criminal offenders and professionals in reaching decisions about sanctions and determinations to impose in sentencing hearings and disciplinary proceedings respectively. Superficially and intuitively, the notion of character seems comprehensible. Nevertheless, close analysis of it highlights that it is illusory and incoherent, has been interpreted in different ways in philosophy and psychology, and is not underpinned by empirical evidence. Perhaps as a consequence, decision-makers and legislatures have failed to define character or the factors that may influence it clearly and consistently. Moreover, some attempts to explain character — such as the notion that individuals have a suite of largely immutable traits, moral and otherwise, that dictate their behaviour and compel them to act similarly in all circumstances — have relied on assumptions that are unsubstantiated and unduly simplify complexities in the

203 This is similar to one of the tests of eligibility for being chosen or sitting as a senator or member of the House of Representatives in Australia's federal Parliament: see *Australian Constitution* s 44(ii).

204 We thank the anonymous referee for this insightful observation. For a discussion of the importance for the law to have normative legitimacy, see Tom R Tyler, *Why People Obey the Law* (Yale University Press, 1990); Tom R Tyler and Robert J Boeckmann, 'Three Strikes and You Are Out, but Why? The Psychology of Public Support for Punishing Rule Breakers' (1997) 31 *Law and Society Review* 237.

205 The seminal text on legal positivism arguably remains John Austin, *The Province of Jurisprudence Determined*, ed Wilfrid E Rumble (Cambridge University Press, 1995).

human condition. Further, as Nigel Walker suggests, descriptions of a person's character 'assume a superhuman level of insight into the individual'.<sup>206</sup>

Sanctions imposed on criminal offenders and determinations made in professionals' disciplinary proceedings can profoundly affect people's lives by adversely affecting their legal rights, interests and liberties. It is both deeply unfair and unnecessary for courts and tribunals, in reaching decisions about sanctions and determinations, even to contemplate whether a person who has committed a crime or breached the standards of the legal or medical professions is nice or nasty. In a system governed by the rule of law, individuals should be punished for their misconduct, and not on the basis of arbitrary, highly subjective and opaque evaluations of their character. Further, there is no need for decision-makers to resort to categorising individuals as being either of good or bad character to justify imposing a particular sanction or determination; proof of a breach of the law or professional standards constitutes sufficient evidence to substantiate such decisions.

206 Nigel Walker, *Punishment, Danger and Stigma: The Morality of Criminal Justice* (Basil Blackwell, 1980) 138–9.