



The Hon Peter McClellan AM KC
NSW Sentencing Council
Department of Communities and Justice

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Via email: sentencingcouncil@dcj.nsw.gov.au

To the Hon Peter McClellan

Response to the NSW Sentencing Council's Consultation Paper on 'Good character at sentencing'

This submission is prepared on behalf of the Rape and Sexual Assault Advocacy and Research Association (**RASARA**) in response to the above Consultation Paper. It is made further to our preliminary submission to the NSW Sentencing Council's review of section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (CSP Act)* dated 8 July 2024.

This submission responds to the following questions posed by the Consultation Paper:

Question 5.7: Extending the special rule to adult sexual offences

(1) What adult sexual offences, if any, should be subject to the special rule?

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

As set out in our preliminary submission, and expanded upon in our research enclosed to this submission, good character evidence should never be admissible in sentencing adult (or child) sexual offences, because:

- (a) it is irrelevant and misleading, having no logical basis in furthering any sentencing outcomes, and in fact being suited to sexual offenders who use good character to groom victims; and
- (b) the special rule fails to prevent the consideration of good character evidence in child sexual offences even where the offender's good character facilitated the offence.

To that end, RASARA submits that the special rule be extended to all adult sexual offences by amending section 21A(5A) of the CSP as follows:

Special rules for ~~child~~ sexual offences

In determining the appropriate sentence for a ~~child~~ sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor-~~if~~



~~*the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.*~~

Thank you for the opportunity to provide this response.

Regards,

Dr Rachael Burgin (CEO, RASARA)

On behalf of the Board of RASARA

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I INTRODUCTION

Sexual offenders hide “in plain sight”.¹ In most cases, they are known to survivors: they are “fathers, co-workers, brothers, lovers, friends”.² Their offending is significantly underreported, in part because of that existing relationship. Survivors are also painfully aware of what awaits those who speak out: a justice system that responds with scepticism and doubt, treating them like a perpetrator.³ The infrequency with which rape and sexual assault are successfully prosecuted⁴ means it is vital that, on the rare occasion when a conviction is secured, courts have the correct tools to impose a sentence which adequately reflects the severity of the offender’s conduct, recognises the impact of their offending and sends a strong message to the offender, survivor, and the community that sexual violence is never acceptable.

Australian sentencing courts have recognised over 200 aggravating and mitigating factors, mostly from the common law.⁵ Factors in mitigation facilitate the general power of a court to hand down a reduced sentence, based on the circumstances of the offence and the offender. Mitigating factors which courts may consider⁶ include the offender’s remorse, poor health, mental impairment, prospects of rehabilitation, lack of prior convictions and supposed “good character”.⁷ In New South Wales (NSW), courts are compelled to consider a number of mitigating factors set out in the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the ‘*Sentencing Procedure Act*’). We examine two of these statutory mitigating factors. First, s 21A(3)(e) mandates courts to consider the offender’s absence of a record (or a “significant” record) of previous convictions. Second, s 21A(3)(f) makes similar provision regarding the offender being a “person of good character”.

The *Sentencing Procedure Act* carves out one exemption in relation to these factors in s 21A(5A). That section provides:

[T]he good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned *was of assistance to the offender* in the commission of the offence.⁸

This provision was ostensibly implemented to prevent child sexual abuse offenders from using their ability to lead a “double life” (one where they are a respected community member, and the other where they perpetrate horrific and lasting abuse of children) to mitigate the severity of their sentence where a conviction is secured.

¹ Veronique Valliere, *Unmasking the Sexual Offender* (Taylor & Francis, 2023) 30.

² *Ibid.*

³ V Lowik, A George, M Suzuki, N Corbett-Jarvis, ‘The Trauma-informed Court: Specialist Approaches to Managing Sexual Offence Proceedings – Part 1’ (2024) 33(1) *Journal of Judicial Administration* 29, 38-9; R Burgin and J Tassone (2024) Beyond Reasonable Doubt? Understanding Police Attrition of Reported Sexual Offences in the ACT, Swinburne University of Technology, 45.

⁴ B Gilbert (2024) *Attrition of Sexual Assaults from the New South Wales Criminal Justice System* NSW Bureau of Crime Statistics and Research (BOSCAR); World Health Organisation, ‘Devastatingly Pervasive: 1 in 3 Women Globally Experience Violence’ (9 March 2021) <<https://www.who.int/news/item/09-03-2021-devastatingly-pervasive-1-in-3-women-globally-experience-violence>>.

⁵ M Bagaric and G Wolf, ‘An Argument for Recognising Childhood Sexual Abuse and Physical Abuse as a Mitigating Factor in Sentencing’ (2020) 49(2) *Australian Bar Review* 227, 229

⁶ *Muldock v The Queen* (2011) 244 CLR 120, 129; [2011] HCA 39, [19].

⁷ Note that lack of prior convictions and the offender’s supposed “good character” are also mitigating factors recognised by the common law. See K Warner et al, ‘Aggravating and Mitigating Factors in Sexual and Non-Sexual Violent Cases’ (2021) 30(4) *Journal of Judicial Administration* 155, 168.

⁸ Emphasis added.

We argue that evidence of a sexual offender’s lack of prior convictions and good character should not be considered in mitigation of a sentence for any form of sexual offending, whether against adults or children. In making this argument, we draw on a review of sentencing decisions of NSW courts handed down between January 2023 and November 2024 for convictions of sexual offences perpetrated against children and adults. We begin by discussing the prevalence and nature of sexual violence in Australia, along with the legislative history, judicial treatment and public discourse surrounding good character evidence, which was brought into focus by the High Court’s decision in *Ryan v The Queen*⁹ and more recently raised by Harrison James and Jarad Grice’s “Your Reference Ain’t Relevant” campaign.¹⁰

We then explore three central issues arising from the application of evidence of lack of prior convictions and good character as mitigating factors. First, this evidence is premised on and perpetuates common misunderstandings of who commits sexual offences. Sexual offenders can maintain a “Jekyll and Hyde” persona of appearing to adhere to social and legal norms whilst engaging in sexual abuse. Good character evidence enables the offender to utilise this ability as a shield. In this way, the admissibility of good character evidence in sentencing offenders draws on rape myths and stereotypes, particularly false and pernicious ideas about what constitutes “real rape” and a “real rapist”.

Second, the ambiguous nature of “good character” evidence is inappropriate in the instinctive synthesis process of sentencing. Good character evidence is applied as a mitigating factor seemingly without prosecution of its merits or explanation as to the weight it is afforded, which permits the myths and biases which surround sexual offending to cloud decisions. This introduces significant uncertainty into the sentencing process.

Third, this evidence has no logical utility in determining the severity of a sentence, because it has no basis in furthering any sentencing purposes under the *Sentencing Procedure Act*. If an offender’s clean criminal record or good reputation did not prevent the commission of the offence—and indeed facilitated it, by providing the offender with a public façade of respectability and trust—then it is hard to see how it could speak to the offender’s likelihood of rehabilitation or furthers other sentencing objectives.

We then turn to s 21A(5A) of the *Sentencing Procedure Act*, which demonstrates each of these three issues in the specific context of child sexual abuse, and that the question of whether an offender’s good character or lack of convictions “assisted” their offending is a misnomer. For this reason, the provision is failing. Sentencing decisions from NSW courts demonstrate the inconsistent application of the provision, its narrowing to circumstances where there is sufficient evidence that good character actively facilitates the offending, and most recently (and perhaps because of this confusion), a failure to apply the provision to child sexual abuse sentencing decisions.

While s 21A(5A) theoretically helps in the context of sentencing institutional offenders, such as by preventing priests from relying on evidence of illustrious pastoral careers as a mitigating factor, the bulk of sexual offenders are family members, caregivers or other persons known to the survivor. In these cases, the survivor likely cannot tender evidence that the offender’s known good character or lack of convictions facilitated the offender’s access to them. The inefficacy of the existing ban on a lack of prior convictions and good character considerations in sentencing child sexual offenders, speaks to the need for a blanket limitation on the application of these two mitigating factors when sentencing all sexual offences.

⁹ (2001) 206 CLR 267.

¹⁰ See L Twyford, ‘Mates Harrison James and Jarad Grice are on a mission to scrap good-character references for convicted paedophiles’ *ABC News* (3 November 2023) <<https://www.abc.net.au/news/2023-11-03/act-calls-remove-paedophile-sentencing-good-character-references/103057246>>.

The cumulative effect of these difficulties shows the irrelevant and misleading nature of evidence of lack of prior convictions and good character. Breaking cycles of sexual violence requires us to hold offenders accountable and to remove existing excuses which minimise or deflect from the severity of their conduct. For this reason, s 21A(5A) of the *Sentencing Procedure Act* should be amended to bar consideration of ss 21A(3)(e) and (f) as mitigating factors in all sexual offences, committed against adult or child survivors, and regardless of whether it can be established that these factors facilitated the commission of the offence.

II CONTEXT AND DEVELOPMENT OF GOOD CHARACTER EVIDENCE

A Prevalence of sexual offending

Assessing the prevalence of sexual offending by reference to reported statistics is somewhat misleading. Reported rates reflect a significant underreporting of the actual incidence of sexual offences against adults and children alike (and especially of those against infants, who are wholly incapable of complaining).¹¹ With this underreporting in mind, the Australian Bureau of Statistics (ABS) estimates that 22.2% of women, and 6.1% of men, have experienced sexual violence since the age of 15 years.¹² Eleven percent of women have experienced child sexual abuse, as have 3.6% of men.¹³ Eighty-five percent of perpetrators of sexual violence against women were a person the woman knew, with most perpetrators being their cohabitating partner (28%), boyfriend or date (25.4%), friend or housemate (14.4%), acquaintance or neighbour (11.7%), or coworker (4.7%).¹⁴ Nearly seventy percent of incidents occurred in a home.¹⁵

The ABS reports that only 8.3% of women who experienced sexual violence contacted the police (or were contacted by police) regarding the offence.¹⁶ Of the survivors who chose not to report to police, 25% decided against reporting because they felt they will not be believed.¹⁷ Given common misconceptions of who commits sexual offences, this is understandable. While the majority of sexual offenders are persons intimately known to survivors, society's conception of "real" sexual offenders are "monsters—vile people we could never like or love".¹⁸ They are "older, violent", "prey upon small children", and elicit "images of scuzzy men with puppies and clown vans or cold, sexually sadistic serial killers".¹⁹ However, rather than the "creepy paedophile who will snatch up any child" or "animalistic offender who has no control over their lust", most perpetrators of child sexual offences have arousal to appropriate partners, and are capable of demonstrating "kindness, compassion, concern and friendliness", being "good fathers" and "good husbands".²⁰ Rather than falling into these stereotypes, it serves offenders' interests to maintain a "normal" persona whilst engaging in their offending.

In the context of post-conviction therapy, offenders have been observed to actively build a "public face" of being pleasant, prosocial, and engaging actively in the therapeutic process.²¹ In a 2023 study of fifty

¹¹ Valliere (n 1) 9.

¹² Australian Bureau of Statistics, *Personal Safety, Australia, 2021-22* (Catalogue number [4906.0](#), 15 March 2023).

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Australian Bureau of Statistics, *Sexual Violence, Australia, 2021-22* (Catalogue number [unknown](#), 23 August 2023).

¹⁶ Ibid.

¹⁷ Australian Bureau of Statistics (n 15); S Stewart et al, "I Thought I'm Better Off Just Trying To Put This Behind Me" — A Contemporary Approach to Understanding Why Women Decide not to Report Sexual Violence' (2024) 35(1) *Journal of Forensic Psychiatry & Psychology* 85, 93.

¹⁸ Valliere (n 1) 43. See also B Mathews et al, 'Child Sexual Abuse by Different Classes and Types of Perpetrator: Prevalence and Trends from an Australian National Survey' (2024) 147 *Journal of Child Abuse and Neglect* 106562, 2.

¹⁹ Valliere (n 1) 30.

²⁰ Ibid 31-32. See also J Goodman-Delahunty, N Martschuk and A Cossins, 'What Australian Jurors Know and Do Not Know about Evidence of Child Sexual Abuse' (2017) 41(2) *Criminal Law Journal* 86, 88, 94.

²¹ Valliere (n 1) 20

sexual offenders, 80% of those surveyed admitted to intentionally presenting to potential victims as a “nice guy”, because of the misconception that offenders are “the guy on the corner with his shades drawn”.²² One offender explained that he would “clean up” before offending, because “no one would come near him when he looked unkempt and poor”.²³ It is logical that offenders avoid presenting like “someone we would automatically distrust or suspect” and “cannot be generally repellent”, or that they even “create a public persona that others can believe in and think they can trust”, as this provides them with greater opportunities to commit planned or opportunistic offences.²⁴

The distinction between “real” offenders, and “good” persons who committed an “out of character” offence, is a false one: offenders can be “employed”, of “high socio-economic-status”, “well educated” and “married”.²⁵ This distinction draws upon persistent “rape myths” including the mythical concept of “real rape” that is deserving of criminal sanction, while assaults that do not meet this stereotype are excused. “Rape myths” are “prejudicial, stereotyped, or false beliefs about rape, rape victims and rapists”.²⁶ They include “attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women.”²⁷

The term “real rape” refers to a stereotypical rape committed by a stranger, in a public place, using overt violence or a weapon.²⁸ This stereotype does not resemble how most rapes occur. Most offenders are persons intimately known to the survivor and are likely to present to the survivor and others as “a very good person”.²⁹ In many cases, this is a deliberate tactic adopted by the offender to facilitate their offending and avoid suspicion. It is against this false understanding of “real” rapes and “real” rapists that the use of good character evidence has been developed and applied to sentencing sexual offences. We return to this topic in greater detail in Part IIIA below.

B Development of mitigating factors

Evidence of an offender’s “good character”, and its relevance to questions of guilt and penalty, is said to originate from the Anglo Saxon tradition of the oath of compurgators, where cases were decided not upon factual or legal queries but on an oath “as to the justice or defence of a claim as a whole”.³⁰ This oath was sworn by a number of persons which “varied according to the nature of the case and the rank of the person concerned”.³¹ Criminal procedure has since afforded this evidence special treatment, with carve outs preventing it from being discarded as hearsay or tendency evidence. From the late nineteenth century, the *Evidence Act 1898* (NSW) provided that witnesses in criminal proceedings could give evidence as to the accused’s character, and that this evidence was admissible on the question of guilt.³²

²² Ibid 28.

²³ Ibid 37.

²⁴ Ibid 86, 93.

²⁵ N Stevens and S Wendt, ‘The “Good” Child Sex Offender: Constructions of Defendants in Child Sexual Abuse Sentencing’ (2014) 24(2) *Journal of Judicial Administration* 95, 96.

²⁶ MR Burt, ‘Cultural Myths and Supports for Rape’ (1980) 38(2) *Journal of Personality and Social Psychology* 217, 217. See generally S Estrich, ‘Rape’ (1986) 95(6) *Yale Law Journal* 1087; KA Lonsway and LF Fitzgerald, ‘Rape Myths: In Review’ (1994) 18(2) *Psychology of Women Quarterly* 133; G Bohner et al, ‘Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs That Blame the Victim and Exonerate the Perpetrator’ in M Horvath et al (eds), *Rape: Challenging Contemporary Thinking* (Willan, 2009); KM Ryan, ‘The Relationship between Rape Myths and Sexual Scripts: The Social Construction of Rape’ (2011) 65 *Sex Roles* 774.

²⁷ Lonsway and Fitzgerald (n 28) 134. See also Lowik (n 3) 39.

²⁸ Estrich (n 26) 1092.

²⁹ [R v VR \[2024\] NSWCCA 91, \[43\]](#).

³⁰ C E Weigall, ‘Perjury’ (1931) 5(6) *Australian Law Journal* 179, 180. See also *Melbourne v The Queen* (1999) 198 CLR 1, [68].

³¹ Weigall (n 30) 180.

³² See s 41, now repealed. Today, the *Evidence Act 1995* (NSW) carves out evidence of a defendant’s good character from the usual application of the hearsay, opinion, tendency and credibility rules: s 110(1)-(3).

The *Sentencing Procedure Act* was introduced following judicial debate in Australia and the United Kingdom in the late twentieth century on the proper application of good character evidence as a common law mitigating factor.³³ The Act was amended in March 2002 to require sentencing courts to consider matters including the offender’s “character” and “antecedents” (taken to mean previous convictions) when imposing a sentence.³⁴ Shortly after, in late 2002, s 21A was again amended to introduce distinct “aggravating” and “mitigating” factors in a substantially similar form to those in place today.³⁵ Section 21A(3)(e)-(f) introduced the mitigating factors of the offender being “a person of good character” and lacking a “record (or any significant record) of previous convictions”.

The explanatory notes and second reading speeches for these two amending acts shed little light on why the legislature considered it important to enshrine these factors as mandatory considerations in mitigating sentences.³⁶ The second reading speech for the Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Bill 2002 focused on the increase of violent assaults against the elderly and deliberate targeting of victims who are “vulnerable and defenceless”,³⁷ while the second reading speech for the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002 reflected party divisions regarding the relevance of race as a proposed mitigating factor (with a representative of a far-right conservative party expressing revulsion at “Muslim gang rapists”).³⁸ In any case, the legislative intention underpinning the introduction of s 21A(3)(e)-(f) was plainly not to create a loophole for offenders to secure less severe sentences.

C Introduction of s 21A(5A)

Section 21A(5A) was introduced into the *Sentencing Procedure Act* in 2008,³⁹ following a review by the NSW Sentencing Council of the penalties attaching to sexual offences and the impact of good character evidence as a mitigating factor in sentencing.⁴⁰ The Sentencing Council’s report reviewing this provision⁴¹ paid close attention to the High Court’s decision in *Ryan v The Queen*, in which a majority of the Court ruled that a serial paedophile priest who led a “double life”, doing “good works” while “committing grave offences”, was still entitled to “some leniency for his otherwise good character”.⁴²

The Sentencing Council’s reform recommendations included that s 21A(3) of the *Sentencing Procedure Act* be amended to preclude a sentencing court from considering evidence of good general reputation, prior good character or lack of prior convictions of offenders being sentenced for child sexual offences “if and to the extent that any of those considerations have better enabled the offender to commit the offence”.⁴³ In the second reading speech for the amending legislation, it was aptly noted that:

The simple fact of a person’s clean record and good character may assist an offender to gain the trust of the child, or the child’s parents, in order to commit a sexual offence against

³³ See, eg, *Melbourne* (n 30) at [22]-[27] (McHugh J), [82]-[83] (Kirby J), [155] (Hayne J).

³⁴ See sch 1 to the *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Act 2002* (NSW) at s 21A(2)(i) and (j).

³⁵ *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).

³⁶ Explanatory Notes, Crimes (Sentencing Procedure) Amendment ([Standard Minimum Sentencing](#)) Bill 2002 (NSW);

Explanatory Notes, Crimes (Sentencing Procedure) Amendment ([General Sentencing Principles](#)) Bill 2002 (NSW).

³⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, [14 March 2002](#).

³⁸ New South Wales, *Parliamentary Debates*, Legislative Council, [21 November 2002 \(David Oldfield\)](#).

³⁹ *Crimes Amendment (Sexual Offences) Act 2008* (NSW).

⁴⁰ See the *Crimes Amendment (Sexual Offences) Bill 2008*, and New South Wales, *Parliamentary Debates*, Legislative Council, [26 November 2008 \(John Hatzistergos\)](#).

⁴¹ New South Wales Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales* ([Volume 1](#), August 2008).

⁴² (2001) 206 CLR 267, [34]-[35] (McHugh J).

⁴³ New South Wales Sentencing Council (n 42) 26 (Recommendation 38).

the child. Any offender who has misused his or her perceived trustworthiness and honesty in this way cannot use his or her good character and clean record as a mitigating factor in sentencing.⁴⁴

The introduction of s 21A(5A) in NSW was cited with apparent approval by the Royal Commission into Institutional Responses to Child Sexual Abuse, which included as a recommendation that all state and territory governments introduce legislation to similar effect.⁴⁵ However, the application and outcomes of ss 21A(3)(e)-(f) and 21A(5A) demonstrate their inefficacy in preventing offenders of child sexual abuse from using good character evidence where it facilitated their offending. We consider the application of these provisions in the following sections.

III THE APPLICATION OF GOOD CHARACTER EVIDENCE

We reviewed 29 sexual offences sentencing decisions of NSW courts spanning January 2023 to November 2024 which considered the application of good character evidence or a lack of prior convictions as mitigating factors. Two of these decisions involved offending perpetrated by a person unknown to the survivor,⁴⁶ three involved offending in an employment context (including a crisis support manager assaulting a resident, a nurse assaulting a colleague, and a masseuse assaulting a client in session);⁴⁷ and 24—the overwhelming majority—involved offending by a family member or friend of the survivor. The offending in this group of cases was against the perpetrator’s child,⁴⁸ a child otherwise in their care through domestic relationships (such as grandparents, family friends, neighbours or older siblings),⁴⁹ a child they met through educational or religious activities (such as dance teachers or school priests),⁵⁰ and in the adult context the survivor’s domestic partner⁵¹ or their friend.⁵²

Five of the offenders had no previous “significant” convictions (with driving and firearms offences both considered to be insignificant convictions)⁵³ and fourteen of the offenders had no prior convictions (which was considered in mitigation even where the perpetrator’s lack of convictions only stemmed from the fact that he was not reported for other offences committed during that time).⁵⁴ In reference to their good character, many of these offenders were considered to have a good work or volunteering history⁵⁵ and to be supportive of or to have the continued support of their family, partners or friends (including where they had sexually assaulted a family member, partner or friend).⁵⁶ Many decisions referred to the offending conduct as “opportunistic”,⁵⁷ an “aberration”, “unusual”, or “uncharacteristic” of the offender’s “true nature”.⁵⁸

⁴⁴ New South Wales, *Parliamentary Debates*, Legislative Council, [26 November 2008 \(John Hatzistergos\)](#).

⁴⁵ Royal Commission, Criminal Justice Report: Executive Summary and Parts I to II (Report, 2017) 99 (Recommendation 74).

⁴⁶ *Arizabaleta v R* [2023] NSWCCA 217; *Du Plessis v R* [2024] NSWCCA 164.

⁴⁷ *R v Jeremiah* [2024] NSWDC 206; *R v Bao* [2024] NSWDC 200; *R v Moh'd* [2024] NSWDC 522.

⁴⁸ [R v Smith \(a pseudonym\) \[2024\] NSWDC 103](#); [R v Burns \[2024\] NSWDC 173](#); [R v WD \[2023\] NSWDC 542](#); [R v BH \[2023\] NSWCCA 278](#); [RA v R \[2024\] NSWCCA 149](#).

⁴⁹ [R v PRATAP \[2024\] NSWDC 221](#); [STB v R \[2024\] NSWCCA 36](#); [R v Carey \[2024\] NSWCCA 90](#); [R v AS \[2024\] NSWDC 54](#); [R v MacDonald \[2024\] NSWDC 136](#); [R v RJ \(No 5\) \[2024\] NSWDC 26](#); [R v Duong \(No 2\) \[2024\] NSWDC 472](#); [R v TK \[2024\] NSWDC 451](#); [R v Ferguson \(No 2\) \[2024\] NSWDC 437](#); [R v Zhong](#); [R v Jackson \[2024\] NSWCCA 156](#).

⁵⁰ *Lincoln v R* [2024] NSWCCA 173; *R v RH* [2024] NSWDC 379; *R v Stokes* [2024] NSWDC 405.

⁵¹ *VR* (n 29); [R v Matthews \[2023\] NSWDC 611](#).

⁵² [Rawat v R \[2024\] NSWCCA 64](#); *Kramer v R*; *R v Kramer* [2023] NSWCCA 153; [R v Smee \[2023\] NSWDC 618](#).

⁵³ *Jeremiah* (n 47); *Smith* (n 48); *AS* (n 49); *TK* (n 49); *Jackson* (n 49).

⁵⁴ *VR* (n 29); *Bao* (n 47); *Rawat* (n 52); *PRATAP* (n 49); *Carey* (n 49); *RJ* (n 40); *Duong* (n 49); *Moh'd* (n 47); *Ferguson* (n 49); *Lincoln* (n 50); *Zhong* (n 49); *Stokes* (n 50); *RA* (n 48).

⁵⁵ *Jeremiah* (n 47); *VR* (n 29); *Kramer* (n 52); *PRATAP* (n 49); *Duong* (n 49); *AS* (n 49).

⁵⁶ *VR* (n 29) [44]; see also *Jeremiah* (n 47); *Arizabaleta* (n 46); *Kramer* (n 52); *Carey* (n 49); *Burns* (n 48); *AS* (n 49); *MacDonald* (n 49); *RJ* (n 49); *Smee* (n 52); *WD* (n 48).

⁵⁷ *Jackson* (n 49) [29].

⁵⁸ *Kramer* (n 52); *Arizabaleta* (n 46); *Carey* (n 49); *Burns* (n 48); *MacDonald* (n 49).

Evidence was led and applied as a mitigating factor in these cases that the respective offenders had led a “blameless life”,⁵⁹ was a “good family man”,⁶⁰ the “best dad ... ever known”,⁶¹ that one was a “man who has led an active life, has contributed to the community and raised a family”,⁶² an “honest, down to earth character who they trust”,⁶³ and another “kind, respectful and patient, with an appropriate understanding and respect for boundaries”.⁶⁴ The issue with this character evidence is not that these offenders are wholly incapable of doing any “good” deeds, but that their offending is facilitated by their being perceived as the “best dad”, “down to earth”, and “kind”. This is illustrated in the three fundamental problems with the application of these mitigating factors under the *Sentencing Procedure Act*, to which we turn through reference to the cases in our data set.

A The role of rape myths

The purported relevance of good character evidence has two elements that are reflected in the rape and sexual assault sentencing decisions of NSW courts we considered.⁶⁵ One is the importance of the sentencing principles of rehabilitation, specific deterrence and protection of the community, for which the offender’s character is theoretically relevant by speaking to the likelihood of recidivism.⁶⁶ The other is “lapse theory”, the notion that a person of otherwise good character can have a momentary lapse of judgement when presented with an opportunity that leads them to commit an offence opportunistically and “out of character”,⁶⁷ meaning they are not likely to do it again. Offenders’ conduct at the time of the offence is compartmentalised from their conduct at all other times, with character evidence being assessed independently from the offence for which the sentence is being considered.⁶⁸ Indeed, the High Court has expressly ruled that when assessing good character evidence, the sentencing judge “must not consider the offences for which the prisoner is being sentenced”.⁶⁹

The decisions we reviewed referred to the offender’s behaviour using terms such as it being an “aberration”, “unusual” or “uncharacteristic” of the offender’s “true nature”.⁷⁰ One offender’s conduct was described as “out of character ... explained at least in part by intoxication”.⁷¹ Similarly, another’s offending was attributed to his being a “sexually aroused man of otherwise good character” who consumed alcohol and became “disinhibited”.⁷² In the same manner that offenders rely upon their perceived good character to commit offences in the first instance, the offender can then use their character to reduce the severity of their sentences, pleading for mitigation by reference to their lack of previous convictions and references from friends, family members and associates.

The references in the cases we examined spoke to the offenders’ ability to engage in “normal healthy sexual relationships”⁷³ and their community involvement including through religion,⁷⁴ and stated that

⁵⁹ *RJ* (n 49) [55].

⁶⁰ *R v Williams (No 2)* [2024] NSWDC 9, [37].

⁶¹ *Carey* (n 49) [29].

⁶² *AS* (n 49) [37].

⁶³ *MacDonald* (n 49) [64].

⁶⁴ *Smee* (n 52) [144].

⁶⁵ See *Stevens* (n 25).

⁶⁶ See, eg, *VR* (n 29); *Carey* (n 49); *WD* (n 48).

⁶⁷ *Ryan* (n 9) [29] (McHugh J), [68] (Kirby J). See also W Larcombe ‘Sex with Children “A Foolish Lapse”: What’s the Story?’ (2008) 28(1) *Australian Feminist Law Journal* 151-174; *Stevens* (n 25) 97.

⁶⁸ *Aoun v The Queen* [2007] NSWCCA 292.

⁶⁹ *Ryan* (n 9) [23] (McHugh J).

⁷⁰ *Kramer* (n 52); *Arizabaleta* (n 46); *Carey* (n 49); *Burns* (n 48); *MacDonald* (n 49).

⁷¹ *Du Pleissis* (n 46) [42].

⁷² *Burns* (n 48), [96], see also *Kramer* (n 52); *Arizabaleta* (n 46); *Carey* (n 49); *MacDonald* (n 49).

⁷³ *VR* (n 29).

⁷⁴ *Ibid*; *Jeremiah* (n 47).

they are “simply a very good person”, “articulate”, with “a great sense of humour”,⁷⁵ “capable of being kind and affectionate”,⁷⁶ “known in the town as a good bloke” and as “a decent man who loved his family and was always there to help everyone”.⁷⁷ Reference was also made to their history of employment, even where the offending occurred in the course of that employment and involved serious breaches of trust,⁷⁸ such as a youth worker assaulting a person in his care,⁷⁹ a nurse assaulting his colleagues at a hospital,⁸⁰ and a masseuse assaulting a client during an appointment.⁸¹

In hearing good character evidence of this kind, courts are susceptible to be groomed by offenders’ “insidious normalcy”⁸² and “excellent capacity for presenting themselves in a prosocial way”.⁸³ By giving weight to such evidence, courts treat an offender’s public persona as indicative of their private activities, despite the fact that many offenders live “double, even triple lives” where their ability to offend depends on their ability to present as “nice, open, [and] honest”.⁸⁴ That an offender has an excellent employment history, a clean slate of convictions, or family members who vouch for their compassionate nature does not detract from their demonstrated capacity and willingness to engage in rape or sexual assault. That these factors have been considered as indicative of a lower likelihood of engaging in sexual offending is a bias rooted in class which clearly favours those with greater wealth and employment prospects.⁸⁵ This is patently misleading given that many offenders commit offences at their place of work, or simultaneously to leading exemplary careers. Indeed, scholars have argued that when “incidents of privilege”, such as employment or education, constitute the court’s understanding of “good” character, “white cultural values are deeply embedded in the practice of weighing offender characteristics at sentencing”.⁸⁶ It is illogical to consider these factors as mitigating the severity of a sentence when these factors did not prevent commission of the offence, especially in the context of offenders intentionally trying to, and being adept at, constructing positive public façades.

We referred earlier to the concepts of “rape myths” and “real rape”. “Rape myths”, as previously discussed, are “attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women”.⁸⁷ They include the stereotype of a “real rape” as a violent assault in a public place, as well as the idea of the “real rapist” as a deviant, monstrous and sexually depraved predator.⁸⁸ The reality, however, is that most rapists present as normal, well-adjusted people and are known and trusted by the victim. Studies show that many men say they would commit rape if they were certain they would not be caught⁸⁹ and that there is no consistent relationship between sexual aggression and psychopathy.⁹⁰ In this context, good character

⁷⁵ *VR* (n 29).

⁷⁶ *Ibid* [43], [45].

⁷⁷ *Carey* (n 49) [29].

⁷⁸ *Jeremiah* (n 47).

⁷⁹ *Ibid*.

⁸⁰ *Moh’d* (n 47).

⁸¹ *Bao* (n 47).

⁸² *Valliere* (n 1) 3.

⁸³ *Ibid* 44.

⁸⁴ *Ibid*.

⁸⁵ *Stevens* (n 25) 97.

⁸⁶ L Saccomano ‘Defining the Proper Role of “Offender Characteristics” in Sentencing Decisions: A Critical Race Theory Perspective’ (2019) 56(1) *American Criminal Law Review* 1693, 1639

⁸⁷ *Lonsway* (n 28) 134.

⁸⁸ S Jackson ‘The Social Context of Rape: Sexual Scripts and Motivation’ (1978) 1 *Women’s Studies International Quarterly* 27, 27–28.

⁸⁹ NM Malamuth, S Haber and S Feshbach, ‘Testing Hypotheses Regarding Rape: Exposure to Sexual Violence, Sex Differences, and the “Normality” of Rapists’ (1980) 14 *Journal of Research in Personality* 121, 134; T Tieger, ‘Self-Rates Likelihood of Raping and the Social Perception of Rape’ (1981) 15 *Journal of Research in Personality* 147, 154; R Lev-Wiesel, ‘Male University Students’ Attitudes Toward Rape and Rapists’ (2004) 21(3) *Child and Adolescent Social Work Journal* 199, 206.

⁹⁰ JVP Check and N Malamuth, ‘An Empirical Assessment of Some Feminist Hypotheses About Rape’ (1985) 8 *International Journal of Women’s Studies* 414, 414–415; MP Koss et al, ‘Nonstranger Sexual Aggression: A Discriminant Analysis of the

evidence provides no genuine assurance that the offender’s criminal conduct is an aberration as opposed to an integral, but hidden, facet of their character. Maintaining otherwise involves applying the false myth of the “real rapist” within the domain of sentencing.

The absence of previous convictions is an equally concerning mitigating factor. A standing principle of sentencing practice is that an offender can only be punished for crimes of which they have been convicted. When considering character, having no prior convictions is translated into a presumption that the offender has not committed any other offences at all. Concerningly, in one case in our dataset, the absence of a criminal history was used as a mitigating factor even in circumstances where an offender was sentenced for sexual offences spanning many years. In this case, the absence of prior convictions flowed only from an absence of prior reporting of these crimes.⁹¹

In this example, the offender was convicted of raping three women on multiple occasions over a period of 17 years. He was in a domestic or serious relationship with each survivor at the time of the offending. At sentencing, the defence tendered good character evidence from another ex-partner, who spoke to his ability to have “normal healthy sexual relationships” and that “he never coerced, humiliated or degraded her”.⁹² The offences being sentenced were recognised by the court as being “of an extreme nature”, involving “significant degradation and humiliation of the victims” and were described as “twisted” and “cruel”.⁹³ The ex-partner’s good character evidence, along with the offender’s lack of previous convictions, were considered as evidencing the offender’s prospects of rehabilitation, and were applied as a mitigating factor under the *Sentencing Procedure Act*.

While the court noted that the consideration of this evidence must be limited in this case, it nonetheless gave “some weight to the finding of prior good character” because it demonstrated that the offender “was capable of being kind and affectionate”, although this was “completely overshadowed by the offender’s tendency to control and to escalate in abuse”.⁹⁴ The offender’s lack of prior convictions, or his ability to engage in otherwise healthy intimate relationships, did not prevent his offending against multiple women over 17 years. It is therefore not clear how evidence that he did not assault another ex-partner could be construed as relevant to any leniency in sentencing. Instead, this evidence demonstrates that the offender’s character involves both an ability to be perceived as abiding by legal and social norms, and simultaneously a capacity for abhorrent treatment of those he is emotionally intimate with, over a period of at least 17 years.

B Ambiguous nature

Section 21A(3)(f) of the *Sentencing Procedure Act* has been described as giving courts wide discretion to consider how an offender’s “inherent moral qualities” should inform sentencing.⁹⁵ Overly broad discretion is dangerous in the context of sexual violence, where decision-making is still heavily influenced by rape myths, misogyny, and subjective biases which influence whether we perceive a person’s conduct to be good, bad, or otherwise excusable.⁹⁶ This danger is amplified by the amorphous nature and application of “good character” evidence, which tends to cloud, rather than clarify, sentencing decisions.

Psychological Characteristics of Undetected Offenders’ (1985) 12(9–10) *Sex Roles* 981, 982; KK Baker, ‘Once a Rapist? Motivational Evidence and Relevancy in Rape Law’ (1997) 110(3) *Harvard Law Review* 563, 576–577; CE Wells and EE Motley, ‘Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation’ (2001) 81(1) *Boston University Law Review* 127, 157.

⁹¹ VR (n 29) [46].

⁹² VR (n 29) [44]–[45].

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ As character evidence was described by the High Court in *Melbourne* (n 30) [33].

⁹⁶ Valliere (n 1) 10.

Precisely what is evidence of “good character” does not have neat boundaries—or seemingly any boundaries at all.⁹⁷ Justice McHugh posited that it is “impossible” to state a universal rule, and “[w]hat makes a person of otherwise ‘good character’ will necessarily vary according to the individual who stands for sentence”.⁹⁸ The question of good character is seemingly answered by reference to the offender’s “conduct or matters which reveal redeeming features of the offender’s character”,⁹⁹ including as evidenced through positive references which the offender is able to source (and which, ironically, are mostly anonymised in published decisions), their employment history and community involvement, their family and friend networks, and even their absence of prior convictions. While the High Court has posited that evidence of an offender’s “reputation” is unsafe and uncertain in comparison to evidence of their character,¹⁰⁰ the practice of establishing good character through references is, patently, one which relies on the offender’s public reputation.

In the majority of cases we reviewed, the apparent result of this ambiguity is that courts will simply accept an offender’s submission that they have “good character” without reference to how they came to that finding, or whether any evidence of this tendered by the offender is persuasive.¹⁰¹ Only one decision demonstrated the court’s engagement in an active process of considering whether to accept the offender’s evidence of good character.¹⁰²

Given the instinctive synthesis process of sentencing,¹⁰³ the precise extent to which good character evidence acts as a mitigating factor is equally unclear on the face of most judgments. Some judges have recognised that “it is not at all uncommon for people to be otherwise of good character to commit [sexual] offences”,¹⁰⁴ and have purported to apply “less weight” to an offender’s evidence of good character on that basis. However, even where a court has purported to apply “less weight” to that evidence, *some* weight has still been accorded, and the court has dedicated time to ‘restoring’ the reputation of the offender through this process. The practical effect of such evidence is seemingly to offer leniency to the offender such as by imposing a shorter term of imprisonment or a non-custodial or suspended sentence. Concerningly, good character and a lack of prior convictions often seem to be applied as a single consideration with the two factors speaking to each other.¹⁰⁵ Some courts consider an individual’s absence of prior convictions as the only consideration as evidencing their “good character”,¹⁰⁶ despite these clearly being defined as separate mitigating factors.

In 19 of the decisions we reviewed, the court applied the offender’s absence of relevant prior convictions as proof of their good character. Even where an offender does have a criminal record, courts will apply the absence of relevant convictions as a mitigating factor.¹⁰⁷ This approach rests on two unsound inferences: first, that the offender’s lack of prior relevant convictions shows they have good character apart from the current offences; and, second, that their lack of previous convictions is because they have committed no other crimes. The absence of proof either way is converted into a positive

⁹⁷ See G Wolf and M Bagaric, ‘Nice or Nasty? Reasons to Abolish Character as a Consideration in Australian Sentencing Hearings and Professionals’ Disciplinary Proceedings’ (2018) 44(3) *Monash University Law Review* 567, 582.

⁹⁸ *Ryan* (n 9) [31].

⁹⁹ *Ryan* (n 9) [32] (McHugh J), [102] (Kirby J), [142] (Hayne J).

¹⁰⁰ *Ryan* (n 9) [144].

¹⁰¹ *Rawat* (n 52); *Smith* (n 48); *Matthews* (n 51); *Arizabaleta* (n 46); *Kramer* (n 52); *STB* (n 49); *MacDonald* (n 49); *Smee* (n 52); *WD* (n 48); *BH* (n 48).

¹⁰² *Williams* (n 60).

¹⁰³ *Markarian v The Queen* (2005) 228 CLR 357, [51] (McHugh J); *Wong v The Queen* (2001) 207 CLR 584; *Barbaro v The Queen* (2014) 253 CLR 58; *Muldock* (n 6).

¹⁰⁴ *Matthews* (n 51) [67].

¹⁰⁵ *R v Levi* (unreported, NSWCCA, 15 May 1997) [5] (Gleeson J).

¹⁰⁶ See, eg, *R v Ferguson* (n 49) [50].

¹⁰⁷ *Jeremiah* (n 47) [89]; *Smith* (n 48) [29].

presumption to the benefit of the offender. In the context of sexual violence, this is fundamentally illogical.

Judicial discretion, it has been purported, is sufficient to ensure that good character evidence is employed properly.¹⁰⁸ In sentencing child sexual abuse, the common law provides that only limited weight should be given to evidence of good character.¹⁰⁹ The utility of judicial discretion in this regard is limited by the subjective nature of “character”. Providing courts with “lots of information about the person being sentenced”¹¹⁰ can be blinding, rather than clarifying, where the relevance and weight of that information is subjective. Judges bring to their role unique beliefs and assumptions—legal knowledge and social prejudices alike, as moulded by their class, sex, gender, age, ethnicity, and religion.¹¹¹ This has significant implications for generalisations made by courts about good character evidence in the context of sexual offending, given the discretionary nature of the decision and the vagueness of the factors involved. That an ostensibly “good” person is capable of “bad” deeds demonstrates that survivors, courts, and the community alike cannot truly know the “character” of others. Compounding the amorphous nature of this evidence is its lack of relevance to the sentencing process, which we explore below.

C Detachment from sentencing purposes

Section 3A of the *Sentencing Procedure Act* sets out the purposes for which a court may impose a sentence on an offender. They are to ensure that the offender is adequately punished for the offence, to prevent crime by deterring the offender and other persons from committing similar offences, to protect the community from the offender, to promote the rehabilitation of the offender, to make the offender accountable, to denounce the conduct of the offender, and/or to recognise the harm done to the victim of the crime and the community. The application of good character evidence serves none of these purposes.

The justification of good character evidence as being relevant to an offender’s prospects of rehabilitation fails to acknowledge sexual offenders’ ability to maintain a positive public façade: offenders “tell us what we want to hear” and “act in compliant ways” under observation.¹¹² For example, in one of the cases we reviewed, an offender convicted of child sexual assault claimed to have no other “sexual attraction to anybody other than” their partner, despite being convicted of assaulting his pre-pubescent granddaughter and two of her friends.¹¹³ If an offender is capable of “being a valuable and contributing member of the community”, of “engaging in functional and healthy relationships” and of “being kind and affectionate”,¹¹⁴ but nonetheless elected to commit a sexual offence, questions might be raised about the reliability of the offender’s public façade as a guide to their character and whether apparent signs of rehabilitation can be trusted as a sign of their propensity for future offences. It is therefore far from clear whether this kind of evidence should be viewed as counting in favour of rehabilitation rather than against it.

¹⁰⁸ See, eg, S Hickey and U Nedim, ‘Can Good Character References Be Used During Sentencing Proceedings for Child Sex Offences?’ *Sydney Criminal Lawyers* (4 November 2023) <<https://www.sydneycriminallawyers.com.au/blog/can-good-character-references-be-used-during-sentencing-proceedings-for-child-sex-offences/>>.

¹⁰⁹ Warner (n 7) 168, citing *Ryan* (n 9).

¹¹⁰ Warner (n 7).

¹¹¹ E McDonald, ‘From “Real Rape” to Real Justice? Reflections on the Efficacy of More than 35 Years of Feminism, Activism and Law Reform’ (2014) 45 *Victoria University Wellington Law Review* 487, 498.

¹¹² Valliere (n 1) 28.

¹¹³ *TK* (n 49) [43].

¹¹⁴ *VR* (n 29) [45], [83].

In a recent decision of the NSW District Court, for example, a 77-year-old man was sentenced for multiple counts of unlawful sexual intercourse, touching and grooming of a child. The sentencing judge found that:

The offender is a man who has led an active life, has contributed to the community and raised a family. Some leniency will be extended as a result. With age and health he declined and sex was no longer available to him. The victim I find ... was used as “a safe surrogate sexual partner”.¹¹⁵

The victim referred to as “a safe surrogate sexual partner” was the offender’s grandchild. She was aged between 11 to 12 years at the time of the offending. Nonetheless, the offender’s apparently active life, community contributions, and most disturbingly, his having raised a family, were considered as demonstrating his good character and applied in mitigating the severity of his sentence. It could equally be said that the offender’s choice to abuse the trust of his grandchild and family member despite these other markers of respectability casts doubt on his capacity to rehabilitate in a trustworthy fashion.

The application of good character evidence also undermines the other sentencing purposes listed in s 3A. Good character evidence weakens any message of denunciation otherwise delivered through a strong and cohesive approach to sentencing. The NSW legal system can hardly be said to denounce rape and sexual assault if support for the offender is admissible as evidence to justify a more lenient sentence. The continued admissibility of good character evidence suggests that committing sexual offences is more acceptable where an offender can establish certain redeeming qualities, therefore failing to deter either the offender or other persons from similar conduct. The use of such evidence may indeed encourage other offenders to cultivate their public façade as an aid both to their offending and any future sentence. Good character evidence, in this respect, fails to recognise the harm afflicted upon the survivor or their family by effectively rewarding the offender for being able to hide their conduct by adhering to social norms.

The only punitive purpose achieved by good character evidence is punishment of the survivor. After having their credibility attacked during cross-examination during the offender’s trial, good character evidence risks further traumatising the survivor by requiring that they hear evidence of the good person and valuable community member who harmed them, conversely contributing further to the shaming of the survivor, rather than the offender. Indeed, where an offender appears to be a person of good community standing and reputation, good character evidence may deter survivors from reporting sexual violence for fear of entering what appears to be a personality contest.

IV INADEQUACY OF SECTION 21A(5A)

Section 21A(5A) of the *Sentencing Procedure Act*, which bars consideration of good character evidence in sentencing child rapists where the offender’s good character “assisted” commission of the offence, offers little assistance in remedying the inappropriate use of good character evidence. Our analysis of decisions applying s 21A(5A) demonstrates neither consistency nor coherence in how NSW courts have dealt with good character evidence in this context since enactment of the provision. Specifically, courts have demonstrated confusion as to whether the provision requires an offender’s “active” use of good character to commit the offence.

In *Bhatia v The King*,¹¹⁶ the leading authority on the scope and application of s 21A(5A), the NSW Court of Criminal Appeal found that establishing that an offender’s good character or lack of previous

¹¹⁵ [AS \(n 49\)](#) [37].

¹¹⁶ [2023] NSWCCA 12.

convictions “assisted” the commission of the offence required the adducing of sufficient evidence of a “causal threshold or material contribution” showing that the offender’s good character or lack of prior convictions “played a role” in assisting them to commit the offence.¹¹⁷ It was found that an offender “misusing his or her perceived trustworthiness and honesty” would require “some active use of good character”, as established by evidence led by the prosecution.¹¹⁸

The decisions in our dataset that directly considered the application of s 21A(5A) were consistent with the narrow interpretation of the provision espoused in *Bhatia*. In one instance where the provision was considered and found not to apply, it was held that there was “no suggestion” that the offender had “used his prior good character to assist his offending” against the survivor (his step-child).¹¹⁹ In another, it was similarly found that there was no evidence that the offender took steps to gain access to the survivor (his grandchild).¹²⁰ The refusal to apply this provision to sexual violence inflicted upon children the offender knows through family or domestic relationships has been justified because “[the child] had access” to the perpetrator “because he was a relative, not because he was a person of good character.”¹²¹

Our data set included two District Court decisions that did apply s 21A(5A) in sentencing offenders for child sexual assault. The first was in circumstances where the offenders were friends of the survivor’s father,¹²² while the second sentenced a former priest for historic sexual abuse of a student.¹²³ The far greater number of instances where the provision has *not* been applied include —perplexingly—another case where the offending was perpetrated by a friend of a child’s father,¹²⁴ as well as cases where the offenders were a family friend who acted as a “father figure” to a child¹²⁵ and family members or neighbours.¹²⁶

One of the two decisions we reviewed which did apply s 21A(5A), did so despite *no* character evidence being led. In *R v Bamforth*, s 21A(5A) was applied to two offenders who assaulted their friend’s child, despite neither purporting to tender or rely on evidence of good character. This means that the provision was presumably implemented in the absence of any evidence which established an *active* use of that character, which is inconsistent with *Bhatia*. The sentencing judge reasoned as follows:

*I do not understand Counsel for either offender to rely on good character. Nonetheless, it is necessary to have regard to subsection (5A). ... I find that both offenders’ good character and lack of previous convictions of child sexual offending facilitated their access to the victim, and on that basis, I decline to apply this as a mitigating factor in respect of the child sexual abuse offences.*¹²⁷

The reasoning in *Bamforth* seems to follow earlier decisions of the NSW District Court which considered that an offender’s good character and lack of previous convictions at the time of the commission of the offence was of “assistance”, because had the offender lacked such good character or held previous

¹¹⁷ *Ibid* [144].

¹¹⁸ *Ibid*.

¹¹⁹ *WD* (n 48) [29].

¹²⁰ *RJ* (n 49) [56].

¹²¹ *R v Farrell* [2022] NSWDC 695. This was a disturbing reversal of the statutory test, suggesting that it was not the offender’s acts but those of the victim that matter for the purposes of s 21A(5A).

¹²² *R v Bamforth; R v Bamforth* [2024] NSWDC 45, [698].

¹²³ *RH* (n 50).

¹²⁴ *PRATAP* (n 49).

¹²⁵ *Carey* (n 49).

¹²⁶ *AS* (n 49); *MacDonald* (n 49).

¹²⁷ *Bamforth* (n 122) [698] (emphasis added).

convictions, he likely would not have been placed in a repeated position of trust in the care of a child.¹²⁸ However, looking to earlier decisions of NSW courts, we also found various decisions where s 21A(5A) was not raised at all, in circumstances where it otherwise would seem to apply.¹²⁹

In *Bhatia*, the court contemplated that the “language of [s 21A(5A)] is quite broad and is apt to catch a wider range of offenders”, including priests, politicians, teachers and community leaders, babysitters or carers who provide references attesting to their good character and reputation, or family friends and relatives.¹³⁰ It was held that in each of these cases “evidence going beyond the fact of the relationship” is required for s 21A(5A) to be enlivened.¹³¹

What form this evidence should take remains unclear. Moreover, requiring such evidence entirely misunderstands the ways in which sexual offenders rely upon their purported good character and community standing to facilitate their offending. Sexual offenders are inherently and implicitly Janus-faced, masking their offending by their perceived trustworthiness and honesty. They frequently possess behavioural characteristics that align precisely with the courts’ understanding of “good character” and yet are also characteristics which are intrinsic to their offending. Offenders tend to prefer “particular methods” of gaining access to victims, which may involve taking certain jobs, or using existing access points such as family structures.¹³² In either case, child sexual offenders are characteristically capable of committing despicable crimes whilst maintaining a guise of good character. Many offenders exhibit:

neither high levels of general impulsivity, offense histories, nor many typical criminogenic characteristics, which helps to explain why they were able to obtain positions of trust. Indeed, acquiring these positions of trust within institutions appears to be one of the enabling factors that helps them maintain secrecy and evade detection for extended periods.¹³³

Regardless of how this distinction is treated by the courts, s 21A(5A) offers little practical use for most child sexual offences. The most common perpetrator of child sexual abuse is the survivor’s parent or guardian¹³⁴—a person who seemingly cannot have evidence led that establishes they gained access to the child because of their good character. It is difficult to envisage exactly what evidence could demonstrate that a caregiver or family member used their good character and lack of convictions to *gain access* to a child.

Similarly, in the context of sexual offences against adult survivors, the most common offender is the survivor’s current or former intimate partner or friend or acquaintance.¹³⁵ This limits the application of any similarly worded provision extended to sexual offences more generally.

Given the high threshold for establishing that good character or an absence of prior convictions “assisted” the offender in the offence, it is unsurprising that the Crown is apparently reluctant to attempt to argue for the application of s 21A(5A).

¹²⁸ *R v Rose* [2022] NSWDC 705.

¹²⁹ See *Cheung v The Queen* [2022] NSWCCA 168; *BR v The Queen* [2021] NSWCCA 279; *R v A* [2021] NSWDC 232; *R v H* [2021] NSWDC 107; *R v Hamilton* [2019] NSWDC 382; *R v Mollel* [2017] NSWDC 36; *R v ND* [2016] NSWCCA 103; *R v van Ryn* [2016] NSWCCA 1.

¹³⁰ *Bhatia* (n 116) [139].

¹³¹ *Ibid* [144].

¹³² Valliere (n 1) 51.

¹³³ S J Nicol et al, ‘Evading Detection: What Do We Know About Men Charged with Extrafamilial Child Sexual Abuse Following Delayed Detection?’ (2022) 31 *Journal of Child Sexual Abuse* 333, 334.

¹³⁴ B Mathews et al, ‘Child Sexual Abuse by Different Classes and Types of Perpetrator: Prevalence and Trends from an Australian National Survey’ (2024) 147 *Journal of Child Abuse and Neglect* 106562, 5.

¹³⁵ See Part IIA.

Limitations on good character evidence where that good character “assisted” the offender are more easily applied within the context of institutional abuse. This is of little utility in the reality of child sexual assault. Of the four “typologies” of male perpetrators of child sexual abuse identified by the Royal Commission, only one was “professional” perpetrators who use their workplace and employment to conceal their targeting and sexual abuse of children.¹³⁶ The wording and application of s 21A(5A) therefore speaks to a fundamental misunderstanding—or denial—of who sexual offenders are. As set out in Part IIA, most assaults occur in a residential location, and of these, nearly a third occur inside a survivor’s home.¹³⁷ In nearly *all* cases of rape and sexual assault, the offender weaponises their ability to appear sufficiently trustworthy and safe to marry, parent, teach, care for, befriend or work with the survivors they eventually assault. However, s 21A(5A) is currently being interpreted so as not to apply to the vast majority of these cases.

V CONCLUSION

Rather than searching for reasons to minimise sexual offences or deflect from offenders’ accountability, breaking cycles of sexual violence requires us to “make sense of offenders without excusing them”.¹³⁸ The intent of removing good character evidence from sentencing sexual offences is not to reduce offenders to “one-dimensional personalities who have either good or bad characters”,¹³⁹ but to recognise and accommodate the unique context of this offending. Perpetrators of sexual offences are both invested in, and equipped at, being a person of “good character”. Without this real or perceived good character, they would never be permitted to take the job, babysit the child, marry the woman or volunteer in the community where they enact their offending in the first place.

The development of good character legislation in NSW was plainly not intended to offer leniency to sexual offenders, but our review of recent decisions demonstrates it has had that effect, even despite the introduction of s 21A(5A). This is in part referable to good character evidence being poorly adapted to the unique context of sexual offences, which are largely inflicted in domestic settings by caregivers and intimate partners who are likely to have a good work history, no significant prior offences, a supportive network of family or friends, and otherwise are considered a “good” person whose conduct is an “aberration”.

We consider it is precisely these offenders whose “insidious normalcy”¹⁴⁰ poses the greatest threat of sexual offending, and as such that the availability of good character evidence is a misleading and inappropriate mitigating factor which should not be considered in relation to the severity of an offender’s sentence. It is impossible to compartmentalise these offenders’ “good deeds” from their offending, because the two are indivisible. Nor is it logical for good character or an absence of prior convictions to provide evidence of the likelihood of recidivism or rehabilitation where these factors likely facilitated the commission of the offence—and in any event did not prevent it.

Restricting the use of good character evidence would help courts to consistently decide sentences which adequately reflect the nature of an offence, without considering information which offers offenders undeserved leniency. To that end, we propose that 21A(A)(5A) of the *Sentencing Procedure Act* should be amended as follows:

¹³⁶ Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 2: Nature and Cause* (Report 2017) 128-130.

¹³⁷ See Part IIA.

¹³⁸ Valliere (n 1) 2.

¹³⁹ *Melbourne* (n 30) [34].

¹⁴⁰ Valliere (n 1).

Special rules for sexual offences

In determining the appropriate sentence for a sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor.

To properly meet the sentencing purposes of the *Sentencing Procedure Act*,¹⁴¹ sexual offence sentencing must strive to punish the offender without minimising their crime; deter the offender by demonstrating that their conduct has consequences; protect the community by identifying why these offences occur; rehabilitate the offender and make them accountable by not offering excuses for their offending; denounce the offending conduct by not offering leniency for the factors which contribute to the commission of the crime; and recognise the harm to victims by not excusing the offender's behaviour. Evidence of good character or lack of previous convictions undermines these objectives, because rules which consistently make certain offenders less responsible for bad acts can and will be used by those offenders to mitigate their culpability. The objectives of sentencing would be better served in relation to sexual offences by removing these factors altogether.

¹⁴¹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.