



# **NSW Sentencing Council**

## **Consultation Paper**

### **Submissions: Good character at sentencing**

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13 February 2025

# 1. Background to SAMSN

SAMSN, a not-for-profit charity, was co-founded by male survivors in 2011, for male survivors and their supporters. Based in Parramatta, New South Wales, SAMSN remains the only specialist service in Australia supporting male survivors of child sexual abuse, their families, loved ones and supporters.

SAMSN believes male survivors can heal from child sexual abuse, support others to thrive and be leaders for change. SAMSN offers a range of professional and peer support services and resources to assist adult male survivors and their families. Combining a lived experience and professional service model, SAMSN has established itself as an essential service that is in high demand.

SAMSN is funded primarily through the NSW Government, through the Department of Communities and Justice and through NSW Health as the auspice for the National Partnership Agreement on Family, Domestic and Sexual Violence Responses. SAMSN also receives Commonwealth Government funding through the Department of Social Services to support survivors living in NSW to apply for Redress and funding to capacity build Redress Support Services in South Australia and Tasmania.

In March 2024, SAMSN had its three key programs (Peer Support Phone Line, Planned Support and the Eight-week Support Groups) accredited by Suicide Prevention Australia.

*“In a BIG way, it’s been profound. I’ve spent half my life in weekly therapy, the last 7.5 years with a specialist in CSA and it feels like I’ve got as much achieved in 8 weeks of SAMSN’s group as I have in 7 years. I’ve been able to disclose to 3 friends since starting SAMSN and I’ve had good responses. I feel like a huge weight has been lifted off my shoulders.”*

Roy



# Questions

## Definition of special rule

Section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999(NSW)* (*Crimes (Sentencing Procedure) Act*) provides “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.”*

## 5. Options for reform

### **Question 5.1: Use of good character generally**

In answering this question SAMSUN has assumed the question relates only to child sexual offences. Whether or not the special rule should apply to other offences is addressed later in the submissions to the Consultation Paper.

#### **(1) Should consideration of good character as a mitigating factor be abolished in all cases? Why or why not?**

The legislation prevents good character references from being used as a mitigating factor for child sexual offences, where the court is satisfied that that was a factor enabling the offender to commit the offence. This includes situations for example within a church, school, scouts or sporting organisation. It may exclude situations where the sexual offence has been committed within a family, where access to the child arose from the relationship to the child for example the child’s grandfather.

To make this distinction based on the situations or relationships where the offending has occurred, is flawed. Making this distinction creates two classes of victims/survivors and two classes of offenders, leading to inconsistencies in applying the law, causing distress to victim/survivors and their families.

Making this distinction importantly fails to acknowledge that grooming is a criminal offence in NSW. We know as a result of the investigations carried out by and the findings made by the



Royal Commission into Institutional Responses to Child Sexual Abuse, that grooming can often make survivors of child sexual abuse, feel complicit in the offending, even though they were children at the time and were not responsible in any way for the criminal behaviour of the offender.

Under the law as it stands at present where good character evidence is allowed by courts where the court is satisfied that the good character of the offender was not of assistance in the offence, the victim/survivor must hear what a 'good person' their offender otherwise was, reinforcing the feelings of somehow being complicit in the commission of the crime.

At SAMSN we have heard from many survivors who have been through the criminal justice system and who have listened to good character references being read out at court. They have felt that the severity of the crime has been diminished by these references; they have felt on listening to these references, humiliated and insulted, after the offender had been found guilty of the most serious of offences against a child.

SAMSN submits that the concept of allowing evidence of good character as a mitigating factor, is out of date. Such a concept benefits middle class offenders who are well connected in their communities and not those of lower socioeconomic status who generally do not foster those 'good' community connections.

Should we not be asking, what is the purpose of considering good character references at the time of sentencing? If the purpose is that the court by reducing the sentence is taking into account the likelihood of re-offending, the rehabilitation that has been completed or is being undertaken, are there not more effective, less traumatic and more transparent ways to find out this information?

Any information the Judge or Magistrate requires before sentencing an offender, could be obtained through a report or statement for example from a social worker addressing issues such as the potential for rehabilitation or risk of reoffending.

In addition, placing responsibility on the court to determine if "the factor concerned was of assistance to the offender in the commission of the offence" in order to decide whether "good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor," adds a further and unnecessary layer of complexity to the judicial process. It



may involve the court questioning the victim/survivor as to whether the defendant's character influenced their gaining access to them or being alone with them or was a factor in the victim/survivor making or delaying a complaint – resulting in the commission of further offences.

Further complexity may arise where a defendant who committed child sexual abuse offences, both within their home on a family member and outside the home, within the community, upon a non-family member. In this instance a 'character' reference may be 'included' in determining the sentence in one case and 'excluded' in another, for exactly the same defendant for similar sexual offences.

Not taking into account evidence of good character or the lack of prior convictions as mitigating factors in sentencing in all cases of child sex offences, would create good law. More importantly it would validate and vindicate the experiences of all victim/survivors – they have been believed, the crime against them has not been diminished.

## **(2) How could consideration of evidence of good character be limited?**

Refer to SAMSN's answer to question 5.1(1).

### **Question 5.2: Use of lack of previous convictions generally**

In answering this question SAMSN has assumed the question relates only to child sexual offences. Whether or not the special rule should apply to other offences is addressed later in the Consultation Paper.

## **(1) Should consideration of lack of previous convictions also be abolished as a mitigating factor in all cases? Why or why not?**

It is SAMSN's submission that the lack of previous convictions should also be abolished as a mitigating factor in all cases. To consider the relevance in sentencing of the lack of previous convictions, is to make an assumption that no offending has occurred. It is well known that victim/survivors especially of sexual offending do not report to police. There is thus often no record of the prior offending for that offender.

As with the question raised in question 5.1, the question needs to be asked here - what is the purpose of considering a lack of previous convictions? Is it to consider a reduction in the sentence based on the offending before the court being a 'one-off' and out of character? If the answer is yes, then as suggested above, a set of questions asked by the sentencing judge would be more transparent, yield more accurate answers and better inform the judge as to an appropriate sentence.



**(2) In what circumstances should the fact that the offender does not have a record of previous convictions not be used in mitigation?**

It is our submission that the fact the offender does not have a record of previous convictions should not be used in mitigation in any circumstance. To take into account an offender not having a record of previous convictions, relies on the false assumption that there has been no prior offending by the offender to be sentenced.

**Question 5.3: Use of good character for offenders who plead not guilty**

**Under what conditions could good character not be available as a mitigating factor for offenders who plead not guilty?**

It is SAMSN's submission that good character without or with conditions attached, should never be a mitigating factor in sentencing, when the offender has been found guilty after entering a not guilty plea. It is our submission that the fact the offender has been found guilty, indicates the offender has little, if any insight, into their offending and certainly nothing to indicate the existence of good character.

**Question 5.4: Good character as an aggravating factor**

**Under what conditions could use of good character in the commission of an offence be treated as an aggravating factor?**

SAMSN accepts that when good character has enabled an offence to occur, that this evidence should be available to the sentencing judge. SAMSN does not have the expertise to comment under what conditions this evidence should be used, other than to submit that for all child sexual abuse offences, evidence of good character when it has been an aggravating factor should be made available to the sentencing judge.

**Question 5.5: Extending the special rule to all child sexual offences**

**(1) Should the special rule be extended to all child sexual offences? Why or why not?**

It is SAMSN's submission that the special rule should apply uniformly to all child sexual offences. It is our submission, there should be no distinction between a sexual offence where the good character was seen to be of assistance in the offending and the sexual offence where good character was not an enabler of the offending.



It is our submission that the relevant legislation should read

*“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.”*

Our responses to questions 5.1(1) and 5.2(1) set out the reasons why this special rule should be extended to all child sexual offences.

**(2) What offences, if any, should be added to the definition of ‘child sexual offences’ for the purposes of this special rule?**

It is our submission that all offences relating to the sexual abuse of children as detailed in state and commonwealth legislation should be included in the application of this special rule. In particular SAMSUN is concerned by the increase in the use of technology and the internet to facilitate the sexual abuse of a child including the production and sharing of child sexual abuse material online. These offences need to be included in the application of the special rule.

**Question 5.6: Extending the special rule to sexual offences against other vulnerable groups**

**(1) What other vulnerable groups of offences against vulnerable groups could be subject to the special rule?**

It is SAMSUN’s submission that the special rule should apply to all offences. In relation to this question, SAMSUN would agree with the proposition that the special rule should be extended to sexual offences against other vulnerable groups. These groups include but are not limited to people with disability, Aboriginal and Torres Strait Islander people, elderly people, people from culturally and linguistically diverse communities and people identifying as gender diverse.

**(2) How could they be identified?**

It is our submission that vulnerability could be identified by the nature of the relationship, the existence of any inequality and of any power imbalance between the victim/survivor and the offender.

**(3) Should any of these offences be subject to the condition that the offender’s good behaviour or lack of previous convictions was of assistance in the commission of the offence?**

As for the reasons set out above in the answers to questions 5.1 and 5.2, SAMSUN does not support the placement of any condition as to whether or not evidence of good character should be considered on sentencing. The fact that good character may have enabled the



sexual offending to have occurred, and therefore that character evidence should not be allowed, only creates two classes of victim/survivors and two classes of offenders.

As stated above SAMSN supports the changing of this legislation to eliminate the final words “*if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.*”

#### **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?**

It is SAMSN’s submission that the special rule should be extended to all offences, including adult sexual offences. However, to answer this question specifically, SAMSN would be supportive of the position taken by the Sentencing Council, that the special rule should apply to adult sexual offences where a power imbalance existed between the adults for example in a doctor/patient relationship or a student/lecturer relationship.

##### **(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?**

It is SAMSN’s submission that there should be a blanket statement that the good character or lack of previous convictions of an offender is not taken into account as a mitigating factor. SAMSN submits that to place conditions on whether or not this evidence may be taken into account, is to create two classes of victim/survivors and two classes of perpetrators and to create uncertainty in the operation of the law.

#### **Question 5.8: Extending the special rule to domestic violence offences**

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

As stated above it is SAMSN’s submission that the special rule should apply to all offences, this would include domestic violence offences.

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

SAMSN reiterates its position as stated above, that this condition should not be included on





the basis there should be a blanket statement that the offender's good character or lack of previous convictions should not be taken into account as a mitigating factor in sentencing.

#### **Question 5.9 Extending the special rule to other serious offences**

##### **(1) What other serious offences, if any, should be subject to the special rule?**

It is SAMSN's submission as detailed above, that the special rule should apply to all offences and relies on its responses to questions 5.1 and 5.2.

##### **(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?**

#### **Question 5.10: Extending the special rule where there is a breach of trust or authority**

##### **(1) What offences, if any, involving breach of trust or authority 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?**

##### **(3) Should a finding that an offender abused a position of trust or authority in relation to the victim of the offence make the offender subject to the special rule? Why or why not?**

It is SAMSN's submission as detailed above, that the special rule should apply to all offences.

However should the Sentencing Council not accept that the special rule should be extended to all offences, SAMSN submits that in situations where a trust or authority relationship has enabled an offence to be committed and that trust or authority breached, then the special rule should be extended.

We would again submit that for these offences, that the law should state that in all circumstances, evidence of good character or lack of previous convictions should not be taken into account as a mitigating factor in sentencing.

#### **Question 5.11: Extending the special rule to all offences**

##### **(1) Should all offences be subject to the special rule? Why or why not?**

As stated above, SAMSN submits that the special rule should apply to all offences.



SAMSN submits that the concept of allowing good character as a mitigating factor is out of date. Such a concept benefits middle class offenders who are well connected in their communities and not those of lower socioeconomic status who generally do not foster those 'good' community connections. These character references are varied in content; there is no set form nor are specific and consistent questions addressed.

As stated above should we not be asking, what is the purpose of considering good character references at the time of sentencing? If the purpose is that the court by reducing the sentence is taking into account the likelihood of re-offending, the rehabilitation that has been completed or is being undertaken, are there not more effective, less traumatic and more transparent ways to obtain this information?

Any information the Judge or Magistrate requires before sentencing an offender, could be obtained through a report or statement for example from a social worker addressing issues such as the potential for rehabilitation or risk of reoffending. To obtain this information would provide some hope to victim/survivor that there was a possibility of rehabilitation for their offender.

**(2) If yes, should the special rule be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of any or all offences?**

It is SAMSN's submission as set out above that the use of good character evidence or lack of previous convictions should not in any circumstance be taken into account in sentencing, regardless of whether or not either could have enabled the offence to occur. To allow this condition as outlined above, creates in the one offence, two sets of victim/survivors and two sets of offenders. To allow this to occur creates uncertainty in the application of the law.

**Question 5.12: Exempting under 18-years-olds from the special rule**

**Under what conditions should offenders who are under 18 be exempt from the application of the special rule?**

It is SAMSN's submission that offences where under 18 year olds have been found guilty an exemption from the application of the special rule should apply. There can be a number of factors that have set the under 18 year old on the trajectory of criminal offending. The



sentencing of the young person should provide an opportunity to better understand the drivers of the offending and the opportunities for rehabilitation. However, in line with the comments above, rather than allowing subjective good character references to be submitted at sentencing, specific questions could be directed to the offender and to those providing therapeutic and other support, as to the likely causes of the offending including any childhood trauma, any rehabilitation and the likelihood of reoffending.

The Consultation Paper refers to the non-exemption of offenders under 18 where they have been found guilty of serious children's indictable offences. SAMSUN would be supportive of the comments made at 5.53 and 5.54 at pages 82 and 83 of the Consultation Paper.

#### **Question 5.13 No change to the current law**

**(1) What justification is there for courts continuing to take good character into account in sentencing for:**

- (a) Sexual offences against children, and**
- (b) Other sexual offences?**

**(2) How should courts inform themselves of good character in these cases?**

**(3) Why should courts not take good character into account in sentencing for:**

- (a) Sexual offences against children, and**
- (b) Other offences?**

SAMSUN strongly supports changes being made to the current law, for the reasons outlined in these submissions.

#### **Question 5.14: Adjusting procedures for tendering evidence**

**What changes could be made to the procedures surrounding the tendering and use of evidence of good character in sentencing proceedings?**

SAMSUN is not a legal service and is not in a position to comment on legal procedures.

#### **Question 5.15: Placing the evidential burden on offenders**

**In relation to what offences, if any, should the burden be placed on an offender in a**



**sentencing hearing, to establish that their good character did not assist in committing the offence?**

SAMSN is not a legal service and is not in a position to comment on issues of law.

SAMSN would like to thank the Sentencing Council for issuing this Consultation Paper providing SAMSN with the opportunity to make submissions on this very important topic. The use of good character evidence in sentencing is distressing and traumatising for our clients. Any chance to address this issue with a view to remedy what is seen by many victim/survivors as an anomaly, is eagerly accepted.

