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NSW Sentencing Council
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Good character at sentencing:
Consultation Paper

To whom it may concern,

As an agency that works with, and advocates for, survivors of child sexual abuse and exploitation, and with a focus on ensuring that systems and legislation are established to better respond and support those impacted by these crimes, we are writing in response to the *Good Character References at Sentencing: Consultation Paper*.

GENERAL COMMENT: CHILD SEX OFFENCES

Child sexual offenders often present as trusted and good members of the community; while for other offender-types evidence of good character and conduct may be a redeeming feature, this very aspect of a sex offender's public image is about gaining the trust of children, parents and carers and the community generally. It allows sex offenders to perpetrate their crimes.

Child sexual abuse is a hidden but significant problem in every community in Australia. As revealed by the first ever national Australian Child Maltreatment Study (Mathews et.al., 2023), 28% of Australians experience child sexual abuse (1 in 3 girls and 1 in 5 boys).

Child sexual abuse does not discriminate along lines of region, race, religion, socio-economic status or gender; it crosses all boundaries to impact every community. Impacts of sexual abuse and exploitation are a result of not just the nature and seriousness of the offence, but of the grooming process undertaken by offenders, the silence, shame and secrecy that victims and survivors live with, and the often-complex relationships with offenders (we know that most offenders are known, loved and trusted by the victim and his or her family).

But what we know about child sex offenders suggests that the 'perceived good character' is integral to the offences.

OPTIONS FOR REFORM

Question 5.1: Use of good character generally

- (1) Should consideration of good character as a mitigating factor be abolished in all cases? Why or why not?
- (2) How could consideration of evidence of good character be limited?

As an agency that works around child sexual abuse and exploitation and advocates with and for victims and survivors, Bravehearts advocates that the consideration of good character should be abolished in all cases of child sexual offences. We would also note that the use of good character references in other matters involving sexual offences against other vulnerable

individuals, sexual or domestic/family violence generally or where there is a breach of trust or authority, the use of good character references is similarly problematic.

These offences are often perpetrated under a guise of good character and reputation, and similarly to child sexual offences, this perceived status of the offender as a good person impacts on victims and survivors in multiple ways: from decreasing the likelihood of disclosure, to facilitating ongoing and persistent harms, to disbelief when a survivor bravely speaks out, and to ongoing trauma.

Courts have traditionally held that the otherwise “good character” and “good works” of an offender may carry some weight by way of mitigation of sentence. An offender’s prior good works, good reputation, or absence of any earlier involvement with the criminal justice system are accepted as indicative of good character, and as such warrant consideration in sentencing. This may be true for some offence types, but for child sex offences, as well as other sexual offences against vulnerable persons or adults, and domestic and family violence, where perceived good character is an integral component of grooming, the offending itself, and of the silence and secrecy surrounding it, the use of good character references should be abolished.

We argue that the justifications for use of good character, as discussed in the Consultation Paper, are not applicable in matters of child sex offending, other sexual offences against vulnerable persons or adults, or domestic and family violence or cases where there is a breach of trust or authority.

Prospects of rehabilitation

A good character reference is of little use in determining prospects of rehabilitation. The notion that an individual is of perceived good character, aside from the current offence, and that the offence is simply ‘out of character’ is a problematic when considering prospects of rehabilitation or likelihood of future offending.

Those who often provide character references, have little knowledge or understanding of the role that character and reputation play in child sex offending or grooming and offending processes. For most who provide these references, the ‘alleged’ offending is truly seen as out of character and an aberration from the person they know.

Psychological reports and risk assessments, although themselves not without issue, would be a more reliable and valid indicator of both future offending and rehabilitative projections.

Person of good character is less deserving of punishment

Bravehearts would strongly argue that punishment should be based on the offence committed, not the perceived character of the person who committed the offence. As noted in the Consultation Paper, the presumption behind this premise is that “offenders are being sentenced not for the offence but for their moral worth”.

For victims and survivors of sexual abuse, it is akin to alleviating guilt and responsibility, if an offender’s “good” character is presented as a mitigating factor. Those providing character references, do so without understanding how offenders use their public image to groom, offend and cover their offences.

Child sex offenders actively seek access to children and the opportunity to be alone with them. Contrary to the common “stranger-danger” myth, child sex offenders are rarely strangers; at

least 90% of sexually abused children are abused by someone the child and/or family knows and trusts.

While some sexual abuse is opportunistic, most children are groomed and lured into situations where they are vulnerable to abuse. Common grooming strategies include elements of being perceived as of “good character”, such as:

- Befriending parents, particularly single parents, to gain access to their children.
- Offering babysitting services to busy parents or guardians.
- Taking jobs and participating in community events that involve children.
- Attending sporting events for children.
- Offering to coach children's sports.
- Volunteering in youth organisations.
- Offering to chaperone overnight trips.

Less need for specific deterrence

The argument that those who are of perceived good character are seen as requiring less consideration of deterrence during sentencing, is one Bravehearts would completely oppose when considering child sex offences.

While in cases such as fraud, as provided as an example in the Consultation Paper, there may be consideration when the reason behind the offending is easily separable from the character of the offender, Bravehearts would argue this is not the case when sentencing for child sex offences.

Question 5.2: Use of lack of previous convictions generally

- (1) Should consideration of lack of previous convictions also be abolished as a mitigating factor in all cases? Why or why not?
- (2) In what circumstances should the fact that the offender does not have a record of previous convictions not be used in mitigation?

We would like to stress that many individuals offend for years before they may be caught and receive a conviction. To suggest that an offender’s lack of previous convictions or lack of contact with the criminal justice system (prior to or after known abuse) should in any way be considered a mitigating factor is concerning.

Research consistently tells us that only a small percentage of survivors will disclose, typically around 10%. Offenders may be sexually harming children for years without discovery.

Recent research reviewing studies relating to disclosure of child sexual abuse has shown that barriers to disclosure continue to outweigh facilitators. As we know from evidence gathered through the Royal Commission into Institutional Responses to Child Sexual Abuse, many victims and survivors do not disclose for many years after the abuse. Among survivors participating in private sessions for the Royal Commission, 57% said they did not disclose about the abuse until they were an adult. Further, survivors took on average, 23.9 years to disclose the abuse, with men taking longer to disclose than women (25.7 years for men and 20.6 years for women) (Royal Commission, 2017).

The subsequent attrition rate as reported matters proceed through the system reduces that number further. The Bureau of Crime Statistics and Research (NSW) found that criminal

proceedings were initiated in only 15% of incidents of sexual assault reported to police involving child victims, and 19% of incidents involving adult victims (Fitzgerald, 2006, cited in Millsted & McDonald, 2017).

Ting, Scott and Palmer (2020) found that more than 140,000 sexual assaults (including assaults of adults and children) were reported to Australian police in the 10 years to 2017; just under 42,600 or 30% of sexual assault reports led to an arrest, summons, formal caution or other legal action.

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

- (1) Under what conditions could good character not be available as a mitigating factor for offenders who plead not guilty?

Regardless of whether an offender pleads guilty or not guilty, Bravehearts advocates that ‘any’ reference to good character should not be considered a mitigating factor.

Those who plead not guilty do not offer any responsibility for the offences committed, and while we understand that there may be some benefit to seeing a plea of guilty as a mitigating factor (less trauma going through the court process for the victim or survivor etc.), we reiterate that consideration of good character should not be considered.

Question 5.4: Good character as an aggravating factor

- (1) Under what conditions could use of good character in the commission of an offence be treated as an aggravating factor?

As we have previously advocated, the perceived “good character” and “good works” of child sex offenders is the very mask behind which the crimes are committed – and should always be considered of assistance to the offender in the commission of the offence. It is our contention that in dealing with sexual abuse matters, the perceived “good character” should never be considered as a mitigating factor.

Our position is that perceived good character should always be considered as an assistance to the offence. The question on whether ‘good character’ should be considered an aggravating factor is a difficult one, as our view is that the perception of the offender as a ‘good’ person is almost always integral to grooming and offending and feeds into the secrecy that surrounds child sex offences.

Whether it should be considered an aggravating factor, based on the assumption that ‘good’ people should ‘know better’ is a bit of an issue – all individuals, especially adults, whether of good character or bad character, should know better than to sexually abuse a child.

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?
- (2) What offences, if any, should be added to the definition of “child sexual offences” for the purposes of the special rule?

As noted above: child sexual offenders often present as trusted and good members of the community; while for other offender-types evidence of good character and conduct may be a redeeming feature, this very aspect of a sex offender's public image is about gaining the trust of children, parents and carers and the community generally. It allows offenders to offend. We believe that perceived 'good character' is directly related to the creation of the mask behind which the offender and their offending hides.

Bravehearts fully endorses the outcome sought by the #YourReferenceAintRelevant campaign, that all child sexual offences should be made subject to the special rule in all cases by removing the condition at the end of s 21A(5A):

In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

We would strongly argue that removing 'good character' references for consideration in any child sexual offence, is the only trauma-informed option that demonstrates and understanding of the dynamics of offending (modus operandi in gaining trust from the child, family, community; impact on silencing and a victim speaking out) and the long-term impacts on the victims.

We would additionally advocate that the sexual offences (committed against a child) that are not currently covered by the definition of 'child sexual offence', be added to the definition. That is:

- administering or encouraging the use of a digital platform for child abuse material, and
- sexual assault by forced self-manipulation.

Finally, to the issue of definition, we strongly suggest that any other or new offences that are created that refer to 'any' sexual offence against a child, be added as they are legislated.

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

- (1) What other vulnerable groups or offences against vulnerable groups could be subject to the special rule?
- (2) How could they be identified?
- (3) 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 noted earlier: Bravehearts advocates that the consideration of good character should be abolished in all cases of child sexual offences. We would also note that the use of good character references in other matters involving sexual offences against other vulnerable individuals, sexual or domestic/family violence generally or where there is a breach of trust or authority, the use of good character references is similarly problematic.

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 noted earlier: Bravehearts advocates that the consideration of good character should be abolished in all cases of child sexual offences. We would also note that the use of good character references in other matters involving sexual offences against other vulnerable individuals, sexual or domestic/family violence generally or where there is a breach of trust or authority, the use of good character references is similarly problematic.

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?
- (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?

As noted earlier: Bravehearts advocates that the consideration of good character should be abolished in all cases of child sexual offences. We would also note that the use of good character references in other matters involving sexual offences against other vulnerable individuals, sexual or domestic/family violence generally or where there is a breach of trust or authority, the use of good character references is similarly problematic.

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?
- (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 noted earlier: Bravehearts advocates that the consideration of good character should be abolished in all cases of child sexual offences. We would also note that the use of good character references in other matters involving sexual offences against other vulnerable individuals, sexual or domestic/family violence generally or where there is a breach of trust or authority, the use of good character references is similarly problematic.

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?

As noted earlier: Bravehearts advocates that the consideration of good character should be abolished in all cases of child sexual offences. We would also note that the use of good character references in other matters involving sexual offences against other vulnerable individuals, sexual or domestic/family violence generally or where there is a breach of trust or authority, the use of good character references is similarly problematic.

Question 5.11: Extending the special rule to all offences

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

As noted earlier under Question 5.1: Courts have traditionally held that the otherwise “good character” and “good works” of an offender may carry some weight by way of mitigation of sentence. An offender’s prior good works, good reputation, or absence of any earlier involvement with the criminal justice system are accepted as indicative of good character, and as such warrant consideration in sentencing. This may be true for some offence types (for example fraud or theft), but for child sex offences, as well as other sexual offences against vulnerable persons or adults, and domestic and family violence, where perceived good character is an integral component of grooming, the offending itself, and of the silence and secrecy surrounding it, the use of good character references should be abolished.

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

- (1) Under what conditions should offenders who are under 18 be exempt from the application of the special rule?

While we believe that, as articulated in the UK Sentencing Guidelines, sentencing a child or young person (of the current age of criminal responsibility 10-17 years of age), should take into consideration a range of different factors, our experience with children and young people engaging in harmful, abusive behaviour is that it is not always as black and white.

Certainly, there are children and young people who may commit sexual offences against another child or young person, without understanding the severity of the behaviour (for example, those with intellectual diversities or neurodiversity, those who have a lack of awareness or understanding of consent, or who may be under the influence of alcohol or subjected to pressure from peers).

It is our position that were there is persistent offending by a young person, evidence of a ‘good’ character should not be considered.

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 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?

Bravehearts does not support a continuation of the status quo where it relates to child sexual offences, sexual offences against other vulnerable individuals, sexual or domestic/family violence generally or where there is a breach of trust or authority,

Question 5.14: Adjusting procedures for tendering evidence

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

Question 5.15: Placing the evidential burden on offenders

- (1) 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?

As noted: Bravehearts advocates that the consideration of good character should be abolished in all cases of child sexual offences. We would also note that the use of good character references in other matters involving sexual offences against other vulnerable individuals, sexual or domestic/family violence generally or where there is a breach of trust or authority, the use of good character references is similarly problematic.

To continue to allow 'good character' to be considered, even with changes to procedure or placement of evidential burden, simply ensures that the system continues to exacerbate impacts through unjust and unfair processes (real or perceived) from the criminal justice system.

The process of pursuing justice through the criminal justice system can be retraumatising and is rarely trauma responsive. The presentation, to the court, of references that support the offender as having a 'good character' does nothing to alleviate the trauma. The impact on victims and survivors is instead one that frames the person who has committed a sexual harm, as someone who is ultimately a good person – its suggests that the offending is inconsequential in relation to who the offender really is, and consequently the harm caused.

Summary

We would argue that taking into consideration perceived good behaviour (prior to or after a known offence), is based on a lack of understanding around the dynamics of child sexual abuse. We strongly advocate that in sentencing for sexual offences against a child, perceived character should not be considered. However, we are supportive of other factors that are more relevant to the crime and to sentencing being considered (e.g., acknowledgment of responsibility, willingness to proactively engage in treatment, admissions, or mental illness)

We are grateful for the opportunity to provide our feedback on the current Consultation Paper and look forward to the response of the NSW Sentencing Council. We can be contacted on research@bravehearts.org.au if any further information is required.

Kind Regards,

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