

Our reference MB/13598

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14 February 2025

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

Via email: [sentencingcouncil@dcj.nsw.gov.au](mailto:sentencingcouncil@dcj.nsw.gov.au)

**Submission of The Grace Tame Foundation to the NSW Sentencing Council's call for submissions on the issues raised in the Consultation Paper on 'Good character at sentencing'.**

**1. Introduction**

- 1.1 This submission is prepared on behalf of The Grace Tame Foundation (**GTF**) in response to your invitation for input on the above Consultation Paper and follows 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 (**Annexure A**) as well as our submission to the Department of Communities and Justice's review of section 21A(5A) of the CSP Act dated 27 October 2023 (**Annexure C**).
- 1.2 In this submission, we adopt the Council's reference to s 21A(5A) of the CSP Act as the "**special rule**".
- 1.3 Question 5.5(1) of the Consultation Paper sought submissions on the extension of the special rule to all child sexual offences:  
  
*(1) Should the special rule be extended to all child sexual offences? Why or why not?*
- 1.4 Together with all advocacy groups and individuals which made preliminary submissions to this review, the GTF also supports the extension of the special rule to all child sexual offences.<sup>1</sup>
- 1.5 Our substantive response to question 5.5(1) is set out in our preliminary submission, which is summarised at part 2 and enclosed at Annexure A, and in our further review of all cases of the New South Wales District Court and Court of Appeal which considered (or failed to consider) the application of the special rule to child sexual assault (**CSA**) conviction sentencing.

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<sup>1</sup> Consultation paper [5.28].

2. **Response to Question 5.5(1): Extending the special rule to all child sexual offences**

*Response in preliminary submissions*

2.1 Our preliminary submissions assessed sentencing decisions of New South Wales courts from October 2023 to July 2024 where good character evidence was considered in sentencing CSA offences. Our review of these cases was the basis for our submissions that:

- (a) good character evidence misleads courts by failing to recognise that many CSA offenders rely on their purported good character to access offending opportunities;
- (b) good character evidence furthers none of the sentencing objectives of the CSP, as:
  - (i) offenders evade accountability and punishment by pleading their offending was “uncharacteristic”, despite the fact of their conviction demonstrating the opposite;
  - (ii) CSA offenders often lack prior convictions, and it is nonsensical to apply this as evidence of better rehabilitation prospects;
  - (iii) offering more lenient sentences for those with better social standing or increased community engagement does not deter or denounce CSA offending; and
- (c) the inconsistent interpretation of the special rule, which may require ‘*evidence going beyond the fact of the relationship*’ to establish that an offender’s good character facilitated their offending, renders the special rule redundant in circumstances where most CSA offenders are family members, caregivers or persons known to the child survivor.

*Further submissions*

2.2 Our further review of cases spanning 2009 to 2024 of the New South Wales District Court and Court of Appeal which sentenced CSA offenders (**Annexure B**) supported the trends identified in our preliminary submissions, including:

- (a) that the majority of decisions found that s 21A(5A) was inapplicable (being 61 of the 92 cases);
- (b) of the cases where the special rule was inapplicable, over 50% of offenders were family members or friends of the victim’s family;
- (c) of the cases where the special rule was applicable, over 50% of the offenders were teachers, priests, or persons in position of authority over the victim.

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Yours sincerely

**Michael Bradley**  
Managing Partner



Our reference MB/14638  
Phone [REDACTED]  
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8 July 2024

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

Via email: [sentencingcouncil@dcj.nsw.gov.au](mailto:sentencingcouncil@dcj.nsw.gov.au)

**Submissions of the Grace Tame Foundation to the NSW Sentencing Council’s call for preliminary submissions regarding a review of s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)***

**1. Introduction**

- 1.1 This submission has been prepared on behalf of The Grace Tame Foundation (**GTF**), in response to your invitation to provide feedback for the purposes of the above review. The Board of GTF is grateful for this opportunity. The writer is a member of the Board, and Marque Lawyers assists GTF with its work.
- 1.2 The mission of GTF is to campaign for and help fund initiatives which work to prevent and respond to child sexual abuse (**CSA**). Law reform is a key strategic interest for GTF, and one of the critical areas we have identified is that of sentencing approaches to CSA offenders. We are therefore keenly interested in this review.
- 1.3 This submission is made further to our review of section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (NSW) (CSP Act)* of 27 October 2023 provided to the NSW Department of Communities and Justice, including **Appendix A** to this submission, which tables further decisions of New South Wales courts which have (or have not) applied the provision since October 2023.
- 1.4 It is GTF’s position that section 21A(5A) fails to achieve the purpose for which it was implemented. Good character evidence misleads courts by applying an outdated understanding of who sexual offenders are, and furthers none of the sentencing objectives of the CSP. Section 21A(5A) must be amended to bar the application of evidence of good character and the absence of prior convictions as a mitigating factor in sentencing:
- (a) regardless of whether or not either factor “assisted” in the commission of the convicted offence, and
  - (b) in the sentencing of all sexual offences, whether the survivor is an adult or a child.

## 2. Summary

- 2.1 Section 21A(5A) was seemingly implemented in an attempt to prevent CSA 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 on children) to mitigate the severity of their sentence on the (rare) occasion that a conviction is secured.
- 2.2 If that is the case, the provision is abjectly failing, as revealed by the inconsistency in its application by courts, its purported narrowing to circumstances where sufficient evidence of good character *actively* facilitates the offending, and most recently, the absence of its application to CSA sentencing decisions.
- 2.3 The difficulties associated with its application can be understood, in part, through frequent misunderstandings of *who* perpetrates CSA. While section 21A(5A) might offer assistance in the context of sentencing institutional offenders, the bulk of perpetrators are family members, caregivers or persons known to the child survivor, who likely cannot tender evidence that the offender’s known good character or lack of convictions was what facilitated their being granted access to the child.
- 2.4 When assessed against the CSP sentencing objectives, the consideration of good character evidence in the context of CSA offending is demonstrably counterproductive.
- 2.5 Section 21A(5A) provides a guide to the misleading nature of good character evidence generally. The words “if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence” should be struck from section 21A(5A).

## 3. Difficulty of requirement that an offender’s good character or lack of previous convictions be “of assistance to the offender in the commission of the offence”

### Drafting and introduction of section 21A(5A)

- 3.1 Section 21A(3) requires an offender’s “good character” and absence of prior convictions to be considered as mitigating factors in sentencing. The provision was brought into focus by the High Court’s decision in *Ryan v The Queen* (2001) 206 CLR 267, 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”.<sup>1</sup>

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<sup>1</sup> At [34]-[35] (McHugh J).

- 3.2 Section 21A(5A) was introduced to the CSP Act in 2008,<sup>2</sup> following a review by the Sentencing Council of the penalties attaching to sexual offences and the impact of good character evidence as a mitigating factor on sentencing.<sup>3</sup>
- 3.3 The Sentencing Council's recommendations included that section 21A(3) of the CSP be amended to preclude a sentencing court from taking evidence of good general reputation, prior good character or 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".<sup>4</sup>
- 3.4 In the second reading speech for the bill implementing this provision, 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 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.<sup>5</sup>
- 3.5 The provision 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 of a similar effect to section 21A(5A).<sup>6</sup>
- 3.6 However, the application of the provision (or the lack of its application) in practice in New South Wales and its actual effect on sentencing outcomes speaks to its inefficacy. It is not achieving the outcomes for which it was purportedly implemented, and if anything, speaks only to the fundamental illogic and detachment of good character evidence from sentencing objectives.

Application of section 21A(5A)

- 3.7 We refer to the review of New South Wales case law applying section 21A(5A) included in GTF's submission to the Department of Communities and Justice of 27 October 2023.

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<sup>2</sup> By the *Crimes Amendment (Sexual Offences) Act 2008* (NSW).

<sup>3</sup> *Crimes Amendment (Sexual Offences) Bill 2008* (Second Reading speech by the Hon John Hatzistergos, 26 November 2008, accessed at: [Legislative Council Hansard - 26 November 2008 \(nsw.gov.au\)](https://www.legislation.nsw.gov.au/Hansard/2008/26-November-2008)).

<sup>4</sup> NSW Sentencing Council's review of [Penalties Relating to Sexual Assault Offences in New South Wales](#) (August 2008) at vol 1, page 26 (recommendation 38).

<sup>5</sup> *Crimes Amendment (Sexual Offences) Bill 2008* (Second Reading speech by the Hon John Hatzistergos, 26 November 2008, accessed at: [Legislative Council Hansard - 26 November 2008 \(nsw.gov.au\)](https://www.legislation.nsw.gov.au/Hansard/2008/26-November-2008)).

<sup>6</sup> Royal Commission, *Criminal Justice Report: Executive Summary and Parts I to II* (Report, 2017) 99 (recommendation 74).

- 3.8 That submission spoke to the inconsistent application of section 21A(5A) by courts and its lack of efficacy in applying to the bulk of CSA offenders who gain access to children through their familial or social relationship with the survivor’s parents.
- 3.9 Since the time of that review, *one* District Court decision sentencing offenders for CSA has applied section 21A(5A), in circumstances where the offenders were friends of the survivor’s father.<sup>7</sup> The far greater number of instances where it has *not* been applied include – perplexingly – also where the offending was perpetrated by a friend of a child’s father;<sup>8</sup> a family friend who acted as a “father figure” to a child;<sup>9</sup> and family members or neighbours.<sup>10</sup>
- 3.10 Otherwise, two decisions which *considered* the application of section 21A(5A) were consistent with the narrow interpretation of section 21A(5A) espoused by the Criminal Court of Appeal in ***Bhatia v R***.<sup>11</sup> This decision remains the leading authority on s 21A(5A), and ruled that the Crown must establish an “active” use of good character to gain access to the child or commit the offence.
- 3.11 In *Bhatia*, the court’s decision contemplated that the “language of [section 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. However, each require “evidence going beyond the fact of the relationship”.
- 3.12 Requiring such evidence entirely misses the point. Sexual offenders are inherently and implicitly Janus faced, masking their offending by their “*perceived* trustworthiness and honesty”.<sup>12</sup>
- 3.13 In light of the apparently high threshold of establishing that good character or an absence of prior convictions “assisted” the offender in the commission of the offence, it is unsurprising that the Crown is apparently reluctant to attempt to argue for the limitation of good character evidence. In the first of the two instances where it was considered, it was found that there was “no suggestion” that the offender had “used his prior good character to assist his offending” against his step-child.<sup>13</sup> In the second, it was similarly found that there was no evidence that the

<sup>7</sup> *R v Bamforth; R v Bamforth* [2024] NSWDC 45 at [698]. Notably, the offenders did not seek to rely on such evidence, and the decision made no reference to *Bhatia v R* [2023] NSWCCA 12, with which it is inconsistent.

<sup>8</sup> *R v PRATAP* [2024] NSWDC 221.

<sup>9</sup> *R v Carey* [2024] NSWCCA 90.

<sup>10</sup> *R v AS* [2024] NSWDC 54; *R v MacDonald* [2024] NSWDC 136.

<sup>11</sup> [2023] NSWCCA 12, [144] (emphasis added).

<sup>12</sup> *Crimes Amendment (Sexual Offences) Bill 2008* (Second Reading speech by the Hon John Hatzistergos, 26 November 2008, accessed at: [Legislative Council Hansard - 26 November 2008 \(nsw.gov.au\)](https://www.parliament.nsw.gov.au/hansard/2008/26-november-2008)).

<sup>13</sup> *R v WD* [2023] NSWDC 542 at [29].

offender took steps to gain access to the survivor (his grandchild).<sup>14</sup> The one decision which applied s 21A(5A) provided no reasons for its inconsistency with *Bhatia*, and applied the provision despite no character evidence being led. In any case, 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.

3.14 This begs the question – what is the point of section 21A(5A)?

*CSA incidence not reflected by s 21A(5A) outcomes*

3.15 The present application of section 21A(5A) is clearly falling short of its intended application. Any utility that the provision offers when sentencing institutional CSA offences falls away when the context of all CSA offences is considered. Over a third of sexual assaults are domestic or family violence related,<sup>15</sup> and most are perpetrated by someone the survivor knows.<sup>16</sup> CSA most frequently occurs in a residential location,<sup>17</sup> with parents or caregivers in the home, or other known adults being the most frequent adult perpetrators.<sup>18</sup>

3.16 Section 21A(5A) fails to account for the fact that CSA offenders frequently possess behavioural characteristics that align precisely with the courts' understanding of "good character" and yet are also characteristics which are intrinsic to offending. CSA offenders are inherently capable of committing despicable offences 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.<sup>19</sup>

<sup>14</sup> *R v RJ (No 5)* [2024] NSWDC 26 at [56].

<sup>15</sup> Australian Bureau of Statistics, Recorded Crime - Victims 2022 (29 June 2023) ('ABS Victims 2022'). Recorded means offences which may have been reported by a victim, witness or other person, or detected by police. Sexual assault definition is based on ANZSOC classification 0311 and 0312).

<sup>16</sup> Australian Institute of Health and Welfare, Sexual Assault in Australia, 2020, 8-9 ('Sexual Assault in Australia').

<sup>17</sup> PSS 2021-22 (n 3) Sexual Violence (female experiences in PSS) - Incident characteristics.

<sup>18</sup> Ben Mathews et al, 'Child sexual abuse by different classes and types of perpetrator: Prevalence and trends from an Australian national survey' *Journal of Child Abuse and Neglect* (147, January 2024).

<sup>19</sup> S J Nicol and others, Evading Detection: What do we know about men charged with extrafamilial child sexual abuse following delayed detection?, *Journal of Child Sexual Abuse* 4 March 2022.



3.17 In the recent cases we reviewed, evidence was led (and applied as a mitigating factor) that the respective offenders had led a “*blameless life*”<sup>20</sup> and were a “*good family man*”,<sup>21</sup> “*known in the town as a good bloke*”, the “*best dad ... ever known*”,<sup>22</sup> a “*man who has led an active life, has contributed to the community and raised a family*”,<sup>23</sup> an “*honest, down to earth character who they trust*”,<sup>24</sup> and who was “*kind, respectful and patient, with an appropriate understanding and respect for boundaries*”.<sup>25</sup>

*Lack of relevance to CSP sentencing objectives*

3.18 Each of the sentencing objectives outlined by section 3A of the CSP are hindered by the provision of good character evidence as a mitigating factor.

3.19 That an offender can decompartmentalise their offending conduct from the rest of their life fails to make the offender accountable for their actions. Their conduct is rendered “opportunistic”, “out of character” or “uncharacteristic” of the offender’s “true nature”.<sup>26</sup> Understanding such horrific (and intentional) offences as CSA as being caused by momentary lapses of character fails to adequately punish offenders for their conduct. Good character evidence has even been applied in circumstances where the offender “*expressed no remorse or any acceptance of responsibility*” for their conduct.<sup>27</sup>

3.20 If the prior good character or absence of convictions did not prevent the commission of the offence in the first instance, it is unclear why it should speak to an offender’s prospects of rehabilitation. Of the cases we reviewed, only one of the offenders had a prior conviction (for a minor offence which was deemed “in effect, no criminal history”):<sup>28</sup> Some decisions seemingly purported to make findings of good character *premised in* the absence of prior convictions.<sup>29</sup> Applying evidence of good character or a lack of prior convictions as a mitigating factor ignores the fact that CSA offenders will usually lack prior convictions and are often rehearsed at grooming audiences to maintain a positive public façade.

<sup>20</sup> *R v RJ (No 5)* [2024] NSWDC 26 at [55].

<sup>21</sup> *R v Williams (No 2)* [2024] NSWDC 9 at [37].

<sup>22</sup> *R v Carey* [2024] NSWCCA 90 at [29].

<sup>23</sup> *R v AS* [2024] NSWDC 54 at [37].

<sup>24</sup> *R v MacDonald* [2024] NSWDC 136 at [64].

<sup>25</sup> *R v Smees* [2023] NSWDC 618 at [144].

<sup>26</sup> Eg, *R v Burns* [2024] NSWDC 173 at [96].

<sup>27</sup> *R v MacDonald* [2024] NSWDC 136 at [66].

<sup>28</sup> An offender with a record of minor offences was still considered to have “in effect no criminal history”: *R v AS* [2024] NSWDC 54 at [23].

<sup>29</sup> *R v PRATAP* [2024] NSWDC 221 at [33] and *R v WD* [2023] NSWDC 542 at [29].

- 3.21 Good character evidence also tends to suggest that engaging in CSA is more justifiable for certain types of offender who have “*led an active life, contributed to the community and raised a family*”.<sup>30</sup> The more an offender engages with their community, the more lenient a sentence shall be available to them, even where that community engagement is a method of accessing children. Community protection and deterrence or denunciation of the offence can hardly be achieved by this. Where an offender is a person of good community standing and reputation, good character evidence may even deter survivors from reporting claims for fear of entering what appears to be a personality contest. The lack of a cohesive approach in the courts’ interpretation of section 21A(5A) also fails to encourage a consistent and strong stance against CSA.
- 3.22 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, the survivor is further traumatised by the very fact that the offender may seek leniency in sentencing because their offending was “uncharacteristic”. That the perpetrator of their assault was an otherwise law abiding and family minded community member makes no difference to the survivor’s experience of the assault and their resultant lifelong suffering. It is plainly insulting and retraumatising for courts to offer a more lenient sentence for a sexual offence conviction because of *who the offender is*.
- 3.23 Our previous submissions spoke to the Sentencing Council’s 2008 review of CSA penalties, which erred against giving good character evidence too much weight, lest it appear that a court is conceding to give a parent or caregiver “some right to use a child for sexual pleasure at will”.<sup>31</sup> This is the most frightening effect of section 21A(5A) and its narrow application by the courts. We end these submissions with an extract from a recent District Court sentencing decision concerning a grandfather’s multiple counts of unlawful sexual intercourse with his 11 year old grandchild:

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”**.<sup>32</sup>

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<sup>30</sup> *R v AS* [2024] NSWDC 54 at [37].

<sup>31</sup> NSW Sentencing Council’s review of [Penalties Relating to Sexual Assault Offences in New South Wales](#) (August 2008) at vol 1, page 131 citing *Hermann v R* (1988) 37 A Crim R 440 at 448.

<sup>32</sup> *R v AS* [2024] NSWDC 54 at [37].

**4. Proposed reform**

4.1 For the above mentioned reasons, GTF submits that section 21A(5A) of the CSP should be amended as follows.

(5A) **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.~~

Yours sincerely

**Michael Bradley**  
Managing Partner

**Appendix 1: Review of further cases where s 21A(5A) was (or was not) applied**

We found **one** sentencing decision of New South Wales courts made since October 2023 which applied section 21A(5A) when sentencing child sex offences, even where the circumstances of the offending plainly involved the offender gaining access to the child by virtue of the same characteristics which were then accepted as evidence of good character.

| Decision   | Relationship of perpetrator and survivor  | Relevant extracts regarding s 21A(5A), good character and / or prior offences  |
|--|---|--|
| <p>1. <a href="#"><u>R v PRATAP [2024] NSWDC 221</u></a></p> | <p>Friend of child's father who occasionally stayed overnight at the children's family home</p> | <p>In sentencing for four counts of sexual intercourse with two children under the age of 10, good character evidence was given limited weight as a mitigating factor (but apparently was given <i>some</i> weight).</p> <p>[33] <i>The offender ... has nothing recorded on his criminal history and accordingly is of prior good character. However, there is clear authority for the proposition that that factor does not have the same significance with this kind of offending as it might in other cases.</i></p> <p>[39] <i>... It would seem that the offender has a good work ethic and a good work history...</i></p>   |
| <p>2. <a href="#"><u>STB v R [2024] NSWCCA 36</u></a></p>    | <p>Step-siblings (20-22 years and 9-12 years old)</p>   | <p>In an appeal of a sentence for three counts of sexual intercourse with a child under the age of 10 to 14 in breach of ss 66A(1) and 66C(1) of the <i>Crimes Act 1900</i>, the appeal court assessed whether the sentencing judge erred by failing to make a finding in relation to the applicant's lack of previous convictions. It is not clear why s 21A(5A) was not applied by the primary or appeal court. The offences (being multiple counts of sexual intercourse with a child) occurred in New South Wales between 2018 to 2020.</p> <p>[17] <i>... The mitigating factor of (otherwise) good character of the offender was "noted to be taken into account", although how it was taken into account and what effect that had on the sentence imposed was not specified.</i></p> <p>[52] <i>... in the remarks on sentence at [53], the sentencing judge made reference to the fact that the good character of the offender is a matter that can be taken into account in mitigation under s 21A(3)(f) of the Sentencing Act. She did so under the heading "Mitigating Factors". This is an unambiguous acceptance of the submissions made about the absence of any criminal record. There is no basis to doubt that this was considered by her Honour to be a mitigating factor given where it is placed in the remarks on sentence. Because of that placement under that heading, its role and relevance can easily be inferred as having been taken into account as a mitigating factor.</i></p> |
| <p>3. <a href="#"><u>R v Carey [2024] NSWCCA 90</u></a></p>  | <p>Family friend who acted as "father figure" to child</p>                                      | <p>Appeal of sentence for manifest inadequacy for six counts of sexual intercourse and indecent assault with a child aged between 10 and 16 in breach of ss 66M(1) and 66C(2) of the <i>Crimes Act 1990</i>. The sentencing judge expressly applied the absence of prior convictions as a mitigating factor, and good character evidence was seemingly applied as same. The appeal court did not disturb this approach.</p>  |

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|    |   |   | <p>[29] <i>On the other hand, the respondent presented with positive references which Judge Williams described in his remarks on sentence:</i></p> <p><i>“22 There are two references provided by counsel on behalf of the offender, one from his partner [redacted], who says that they have been in a relationship since 2014. She says he has treated her and their five children with nothing but respect and kindness. He was known in the town as a good bloke, and a decent man who loved his family and was always there to lend a hand to everyone. Obviously, his extradition to New South Wales to face these charges has negatively affected her and her children greatly. She describes him as the best dad she has ever known and that their boys are growing up without a father.</i></p> <p><i>23 There is a further reference from a Year 2 teacher named [redacted] who has known the offender since he enrolled his boys at her school in 2020, and she has taught three of his children. She is aware of the allegations that have been made against him, and says that type of behaviour does not reflect his character and the person that he is. She said he was devoted to his children’s learning and supporting them.”</i></p> <p>[34] <i>The sentencing Judge accepted that the respondent’s lack of previous convictions was a mitigating feature and found that he had good prospects of rehabilitation and was unlikely to re-offend.</i></p> |
| 4. | <a href="#"><u>R v Burns [2024] NSWDC 173</u></a> | Unspecified family member and five children aged between 7 to 13 years of age | <p>Sentencing for ten counts of sexual intercourse with a child, sexually touching a child and producing child abuse material in breach of ss 66C(1), 66DB(a), 91G(1)(a) of the <i>Crimes Act 1900</i>. The court accepted the offender was of “prior good character” and this was seemingly applied as a limited mitigating factor.</p> <p>[60] <i>A handwritten letter of apology from the offender was also tendered without objection, together with a number of character references and his health records from Justice Health.</i></p> <p>[96] <i>A letter from the offender’s sister, Ms Gabrielle Burns, was also tendered. She indicated that she believed it to be important to share her perspective of the offender’s character and conduct. She described her brother having a large and committed support system both in her and the entire family. She expressed the firm belief that the charges against him were uncharacteristic of his true nature. She indicated her willingness to assist him in positively contributing to the community in the future and said that she will be there for him when he is released.</i></p> <p>[149] <i>I accept that the offender is a person of prior good character. That factor is of but small moment in the circumstances of the offending.</i></p>  |
| 5. | <a href="#"><u>R v AS [2024] NSWDC 54</u></a>     | Grandfather (77 years of age) and grandchild (11 or 12 years of age)          | <p>Sentencing of six counts of sexual intercourse with a child, sexual touching of a child, attempted grooming of a child and inciting a child to carry out a sexual offence in breach of ss 66C(2), 66DB(a), 66EB(3), 66EB(3) and 66DD(b) of the <i>Crimes Act 1990</i>. Leniency in sentencing was expressly applied because of good character evidence tendered.</p>   |

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|    |  |  | <p>[23] <i>The offender has in effect no criminal history with his record showing one PCA offence in 1973 for which he was fined \$100 and disqualified for one month.</i></p> <p>[24] <i>The offender relies on a psychologist's report dated 6 February 2024 of Sarah Campbell. The history given is of a pro social life prior to this offending.</i></p> <p>[37] <i>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. <b>The victim I find, accepting the view of Ms Campbell was used as "a safe surrogate sexual partner".</b></i></p>  |
| 6. | <u><i>R v MacDonald</i></u><br><u>[2024] NSWDC</u><br><u>136</u> | Neighbour and two children (under 14 years of age) | <p>Sentencing for multiple counts of sexual assault and non-consensual sexual intercourse with two children under 14 years of age in breach of historic sections of the <i>Crimes Act 1900</i>. Good character evidence was expressly applied to reduce the severity of the sentence.</p> <p>[52] <i>The offender has no criminal record. He comes before the Court as a person who was, until he started committing these offences, a person of good character. I am sure if people knew his true character he would not have been trusted with their children or allowed contact with them. He had not offended in any other way, apart from the matters before the Court. Prior good behaviour is one indication of future good behaviour. I will have more to say about this in a minute.</i></p> <p>[53] <i>Since the offending ceased, there is no evidence he has offended again. Those matters go to my assessment of his future risk of offending. Of course, he will be much older on release. He will also be a convicted sex offender. Anyone having an association with him, especially a parent would obviously have concerns.</i></p> <p>[63] <i>The references must be taken into account. The fact that people speak to his good character does not excuse his crimes. Their references are put forward there to inform the Court about the man for sentence. Each sentencing exercise involves proper consideration not just of the crimes, but of the person to be sentenced. Courts try, so far as is practical, to engage in individualised justice.</i></p> <p>[64] <i>His referees who have known him most of his life speak of an honest, down to earth character who they trust. They say that their knowledge of his offending is out of character with the Ken MacDonald they know. I accept that, but given the evidence of the trial, most of the people who were part of his close friendship circle at the time also felt the same thing. But he was not honest with them, he was not trustworthy, and for the period of this offending, he was not a person who deserved their trust.</i></p> <p>[65] <i>His children still support their father. He also has, as the material before me indicates, support from prosocial members of the community. That is one important factor that has to be taken into account when I consider his risk of reoffending, as ultimately, he must be reintegrated into the community. Despite the wishes of Dawn, these are not matters that require a life sentence.</i></p> |

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|    |  |  | <p>[66] <i>MacDonald has expressed no remorse or any acceptance of responsibility. He told the author of the Sentence Assessment Report that he did not care about the impact of the offending. He is entitled to his view. He cannot be punished for maintaining his innocence, that is his right, but he gets no advantages that often follow an early guilty plea or expressions of remorse.</i></p>   |
| 7. | <p><u><i>R v RJ (No.5)</i></u><br/><u>[2024] NSWDC 26</u></p>                        | <p>Grandfather and grandchild (8 years old)</p>      | <p>Sentencing for 12 counts of sexual intercourse and indecent assault against a child in breach of ss 66A(2) and 61M(2) of the <i>Crimes Act 1900</i>. The Court found that good character evidence was available in the absence of evidence that it facilitated the offence, though ultimately refused to make findings of good character on the basis of the offending.</p> <p>[54] <i>Lack of antecedents and prior good character</i><br/><i>At the trial, the offender relied upon the lack of any relevant or material criminal history and prior good character. The latter submission was supported from evidence of a family member who was clearly partial to the offender's cause.</i></p> <p>[55] <i>In this sentencing hearing, written character references were given by the offender's wife and several (3) of his grandchildren and (2) cousins, which I have read. Notably the wife did not refer to his character; but assuredly, the grandchildren and friends spoke positively of his character. It is true, of course, that for virtually all of his adult life, he has led a blameless life.</i></p> <p>[56] <b><i>By s 21A(5A) of the Crimes (Sentencing Procedure) Act 1999 (NSW) (the 'CSP Act'), the Court is enjoined against taking into account a lack of antecedents and good character as mitigating factors if the Court is satisfied that either factor assisted the offender to commit his offending.</i></b> <i>The Court of Criminal Appeal recently referred to this provision in Bhatia v R [2023] NSWCCA 12. There, it was observed that the Crown carried the onus of discharging an evidential onus of a connection between the offender's good character or lack of convictions and the offender having access to the complainant. In particular, in that case, it was found that the victim's father gave no evidence he had assessed the offender's character or history. No other evidence suggested that the offender actively used his good character or befriended the family to gain access to the victim.</i></p> <p>[57] <i>In this case, there was no evidence from the victim's mother (or father). To the contrary, the evidence was such that the offender did not engage in any steps to try to procure the proximity of the victim to him.</i></p> <p>[58] <i>However, the circumstance that the offender engaged in repeated sexual abuse of the victim over several years disentitles him from a finding of good character or any suggestion that the offences were isolated. They underscored the victim's vulnerability.</i></p> |
| 8. | <p><u><i>R v Williams</i></u><br/><u><i>(No.2)</i></u> [2024]<br/><u>NSWDC 9</u></p> | <p>Family friend and child aged 6-7 years of age</p> | <p>In sentencing for multiple counts of indecent assault contrary to a historic provision of the <i>Crimes Act 1900</i>, limited weight was given to good character evidence as a mitigating factor.</p> <p>[21] <i>The Crown asserted two statutory aggravating factors. The first was that the offender was in a position of authority over the</i></p>   |

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|     |   |  | <p>victim. Emphasis was placed here on the offender being a close friend of the victim's father as well as being a family friend of the victim's foster father. The Crown says that the offender had been entrusted with the victim's care. The Accused accepts that, to a minor degree, there was an 'atmosphere' of a position of authority</p> <p>[37] The offender tendered a written reference from his son, Mr Wasiak. The offender's son spoke of his father as being a good family man and indicated his continued personal support of his father; whilst acknowledging the seriousness of the offences for which his father is to be sentenced.</p> <p>[38] The Crown does not suggest that the offending occurred because he used his good character (or absence of convictions). Thus there is no impediment to me giving some weight to these circumstances. Nevertheless little weight should be accorded to them for offences of the present kind.</p>   |
| 9.  | <u><a href="#">R v Bamforth; R v Bamforth [2024] NSWDC 45</a></u> | Husband and wife who assaulted a friend's child (14 years old) | <p>Sentencing for multiple counts of sexual intercourse with a child, indecent assault of a child, sexually touching a child, using a child to make child abuse material (and other offences) in breach of ss 91G, 66C, 61M of the <i>Crimes Act 1900</i>. The offenders did not seek to rely on good character, but the court found it was excluded by s 21A(5A).</p> <p>[698] I do not understand Counsel for either offender to rely on good character. Nonetheless, it is necessary to have regard to subsection (5A), which dictates that "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." 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.</p>   |
| 10. | <u><a href="#">R v Smee [2023] NSWDC 618</a></u>                  | Acquaintances (survivor 15 years of age)                       | <p>Sentencing for one count of non-consensual sexual intercourse with a person under 16 years in breach of 61J(1) of the <i>Crimes Act 1900</i>. Good character was applied as a mitigating factor.</p> <p>[144] After the proceedings were adjourned, from the hearing date to today for the imposition of sentence, further material was forthcoming on behalf of the offender, consisting of documents speaking to his character and qualities. These were provided by his partner. There is no need for me to announce her name onto the record. There is no controversy that they are in a relationship and it has been ongoing and, by all accounts, is likely to be a permanent relationship. She speaks of him as kind, respectful and patient, with an appropriate understanding and respect for boundaries. She is aware of the charges and has been so since January 2021, and has first hand witnessed according to her writing his emotions and the effect of the mental toll brought by these proceedings and his need to travel to New South Wales for the prosecution of the trial.</p> <p>[145] Her mother provided a reference for the offender and again speaks of him in the highest terms, as a person of good character. It is obvious that she would welcome him into her family as her</p> |



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|     |                                 |  | <p>daughter's partner. Once again, there is no need for me to include the particulars of that person on the record of this judgment.</p> <p>[151] All of that said, I accept that but for this misconduct, the offender is a person of good character, and that the risk of reoffending can be accepted to be demonstrably low.</p>   |
| 11. | <u>R v WD [2023] NSWDC 542</u>  | Step-father and daughter aged 14 years | <p>Sentencing for three counts of sexually touching a child under 16 years in breach of s 66DB(a) of the <i>Crimes Act 1990</i>. Leniency was granted on the basis of good character.</p> <p>[29] <i>Relevant mitigating factors are: The offender does not have any record of previous convictions and is a person of good character (ss 21A(3)(e), (f) CSPA). This can be taken into account as there is no suggestion he used his prior good character to assist his offending (cf s 21A(5A) CSPA)...</i></p> <p>[42] <i>I accept that the risk of the offender re-offending is low. That is based on his prior good character, the references provided in his favour and the assessment contained in the Sentencing Assessment Report. It is difficult to understand, in the circumstances where he was regarded as a stable father figure to his former partner's children (who authored one of the references) and his prior good character, why the offender did what he did. He has experienced gaol since his arrest and seen institutionalised offenders. I am confident from the material that he does not want to return to prison after he has served his sentence for these offences and is unlikely to re-offend.</i></p> <p>[45] <i>Thus, the Court finds itself with the task of sentencing this offender who has committed serious sexual offences, in breach of trust, against a young victim with understandable resultant and likely long-lasting trauma. At the same time, the offender is of prior good character, unknown to police and has shown remorse and has good prospects of rehabilitation. He is entitled to appropriate leniency.</i></p> |
| 12. | <u>R v BH [2023] NSWCCA 278</u> | Father and daughter aged 6-8 years     | <p>Appeal of sentence for multiple counts of historic child sexual abuse for manifest inadequacy. The respondent's good character evidence was accepted as entitling him to limited leniency.</p> <p>[22] <i>The respondent's evidence in relation to his subjective matters consisted of a report from the psychologist, Jason Borkowski and 13 character references.</i></p> <p>[89] <i>The respondent's prior good character, attested to in the references put forward on his behalf, and his lack of offending entitle him to a measure of leniency, but that leniency is limited because the offending extended over almost a two year period.</i></p>  |

## Section 21A(5A) Case Analysis

### Summary

In total, there are 92 cases that have considered the application of s 21A(5A)

- s 21A(5A) was applicable in 31 cases
- s 21A(5A) was not applicable in 61 cases

In the 31 cases where s 21A(5A) was applicable:

- 7 offenders were friends of the victim's family
- 5 offenders were the victim's school teacher
- 5 offenders were priests or clergy members
- 6 offenders were family members
- 3 offenders were in positions of authority in facilities where the victims resided
- 2 offenders were the victim's teacher in an extracurricular activity
- 1 offender was a foster parent of the victim
- 1 offender was a child care worker
- 1 offender was in an other position of authority and care over the victim

Of the cases where s 21A(5A) was applicable:

- There were two cases where it was found that the "good character" of the offender was accounted for as a mitigating factor incorrectly but not rectified<sup>1</sup>
- There were two cases where the judge applied s 21A(5A) to offences against one victim but not the other<sup>2</sup>
- There two cases where the judge gave weight to the "good character" of the offender in the years after the offending<sup>3</sup>

In the 61 cases where s 21A(5A) was not applicable:

- 35 offenders were family members
- 9 offenders were friends of the victim's family
- 4 offenders were in a relationship with the victim's mother
- 3 offenders were the victim's school teacher
- 3 offenders were the victim's teacher in an extracurricular activity
- 3 offenders were convicted of child pornography charges
- 2 offenders were in other positions of authority and care over the victim
- 1 offender was a foster parent of the victim
- 1 offender was a priest or clergy member

There were two cases where the court was split non whether or not 21A(5A) applied.<sup>4</sup>

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<sup>1</sup> *Slattery v The King (No 2)* [2023] NSWCCA 171; *O'Brien v The Queen* [2013] NSWCCA 197.

<sup>2</sup> *R v DRM* [2019] NSWDC 495; *R v Slattery* [2017] NSWDC 373.

<sup>3</sup> *R v Rose* [2022] NSWDC 705; *Richards v The King* [2023] NSWCCA 107.

<sup>4</sup> *BG v The Queen* [2020] NSWCCA 295; *GG v The Queen* [2018] NSWCCA 280.

| <u>Relationship of the perpetrator to the victim</u> | <u>Cases where section 21A(5A) was applicable</u>   | <u>Cases where section 21A(5A) was not applicable</u>   |
|--|---|---|
| Father/Stepfather/parent                             | <ul style="list-style-type: none"> <li>• <i>GG v The Queen</i> [2018] NSWCCA 280<sup>5</sup> (stepfather)</li> </ul>  | <ul style="list-style-type: none"> <li>• <i>R v Brown</i> [2024] NSWDC 618 (stepfather)</li> <li>• <i>R v WD</i> [2023] NSWDC 542 (stepfather)</li> <li>• <i>R v RM (No. 6)</i> [2023] NSWDC 305 (father)</li> <li>• <i>Director of Public Prosecutions (NSW) v TH</i> [2023] NSWCCA 81 (stepfather)</li> <li>• <i>BB v The Queen</i> [2021] NSWCCA 283 (father)</li> <li>• <i>R v NK</i> [2021] NSWDC 275 (stepfather)</li> <li>• <i>BG v The Queen</i> [2020] NSWCCA 295 (stepfather)</li> <li>• <i>WG v R; KG v R</i> [2020] NSWCCA 155 (parents of the child)</li> <li>• <i>R v Hamilton</i> [2019] NSWDC 382 (father)</li> <li>• <i>KAB v The Queen</i> [2015] NSWCCA 55 (stepfather)</li> </ul> |
| Grandfather/Step-Grandfather                         | <ul style="list-style-type: none"> <li>• <i>NLR v The Queen</i> [2011] NSWCCA 246</li> </ul>  | <ul style="list-style-type: none"> <li>• <i>R v TK</i> [2024] NSWDC 451 (grandfather)</li> <li>• <i>R v DW</i> [2024] NSWDC 380 (grandfather)</li> <li>• <i>R v RJ (No.5)</i> [2024] NSWDC 26 (grandfather)</li> <li>• <i>R v KH</i> [2022] NSWDC 706 (grandfather of one child and step grandfather of the other)</li> <li>• <i>R v DSM</i> [2021] NSWDC 283 (grandfather)</li> <li>• <i>Scott v The Queen</i> [2020] NSWCCA 81 (grandfather)</li> <li>• <i>R v JM</i> [2020] NSWDC 140 (grandfather)</li> <li>• <i>R v JP</i> [2019] NSWDC 700 (grandfather of one child and step grandfather of the other)</li> <li>• <i>R v YY (No 3)</i> [2016] NSWDC 364 (grandfather)</li> </ul>               |
| Uncle  | <ul style="list-style-type: none"> <li>• <i>R v GC</i> [2020] NSWDC 186</li> <li>• <i>R v SH</i> [2019] NSWDC 889</li> <li>• <i>R v DRM</i> [2019] NSWDC 495<sup>6</sup></li> </ul> | <ul style="list-style-type: none"> <li>• <i>R v NB (No 2)</i> [2024] NSWDC 598</li> <li>• <i>R v Farrell</i> [2022] NSWDC 695</li> <li>• <i>R v Sanchez</i> [2021] NSWDC 561</li> </ul>   |

<sup>5</sup> The court was split on whether 21A(5A) applied (see summary)

<sup>6</sup> The offender also abused two children who were friends of his son.

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|  |   | <ul style="list-style-type: none"> <li>• <i>R v Shackfield</i> [2020] NSWDC 939</li> <li>• <i>R v CG</i> [2020] NSWDC 107</li> <li>• <i>R v DS</i> [2020] NSWDC 66</li> <li>• <i>R v DER</i> [2018] NSWDC 98<sup>7</sup></li> <li>• <i>R v ND</i> [2016] NSWCCA 103</li> </ul>   |
| Other family member                        | <ul style="list-style-type: none"> <li>• <i>Freeman v Director of Public Prosecutions (NSW) (No 2)</i> [2020] NSWDC 333<sup>8</sup></li> </ul>  | <ul style="list-style-type: none"> <li>• <i>R v Underwood (a pseudonym)</i> [2023] NSWDC 309 (cousin)</li> <li>• <i>BR v The Queen</i> [2021] NSWCCA 279<sup>9</sup></li> <li>• <i>R v A</i> [2021] NSWDC 232<sup>10</sup></li> <li>• <i>R v H</i> [2021] NSWDC 107<sup>11</sup></li> <li>• <i>R v Threlkeld</i> [2019] NSWDC 695</li> <li>• <i>R v PJD</i> [2019] NSWDC 45<sup>12</sup></li> <li>• <i>R v DJH</i> [2016] NSWDC 211<sup>13</sup></li> <li>• <i>R v Flax</i> [2014] NSWDC 268<sup>14</sup></li> </ul> |
| Family friend                              | <ul style="list-style-type: none"> <li>• <i>R v Scholz</i> [2023] NSWDC 222</li> <li>• <i>R v Pethybridge (No 3)</i> [2022] NSWDC 520</li> <li>• <i>R v Rose</i> [2022] NSWDC 705</li> <li>• <i>R v David Ford</i> [2018] NSWDC 183</li> <li>• <i>O'Brien v The Queen</i> [2013] NSWCCA 197</li> <li>• <i>Director of Public Prosecutions (NSW) v KPB</i> [2013] NSWLC 12</li> <li>• <i>R v Craig Andrew Woodley</i> [2013] NSWDC 14</li> </ul> | <ul style="list-style-type: none"> <li>• <i>R v Lincoln</i> [2023] NSWDC 68</li> <li>• <i>Bhatia v The King</i> [2023] NSWCCA 12</li> <li>• <i>R v JK</i> [2021] NSWDC 502</li> <li>• <i>R v Cannon</i> [2020] NSWDC 901</li> <li>• <i>R v PG</i> [2020] NSWDC 144</li> <li>• <i>R v Grimmer</i> [2020] NSWDC 63</li> <li>• <i>R v Curran</i> [2019] NSWDC 460</li> <li>• <i>R v Mollé</i> [2017] NSWDC 36</li> <li>• <i>R v Van Ryn</i> [2016] NSWCCA 1<sup>15</sup></li> </ul>                                     |
| In a relationship with the victim's mother | NA  | <ul style="list-style-type: none"> <li>• <i>R v Hodson</i> [2024] NSWCCA 238</li> <li>• <i>R v BQL</i> [2022] NSWDC 295</li> <li>• <i>R v JA</i> [2019] NSWDC 641</li> <li>• <i>AH v The Queen</i> [2015] NSWCCA 51</li> </ul>   |

<sup>7</sup> The offender also abused one child who was a friend of his children.

<sup>8</sup> The offender was related to the child's father. The child referred to the offender as "uncle".

<sup>9</sup> The offender was the father, stepfather and step-grandfather of the children.

<sup>10</sup> The offender was the great uncle of the child.

<sup>11</sup> The offender was the half brother of the child's mother

<sup>12</sup> The offender was the child's brother in law.

<sup>13</sup> The offender abused multiple children. He was a cousin of LF, a babysitter to TB, the uncle of MH, SH and JH, a family friend of EH and KB'.

<sup>14</sup> The offender was in a relationship with the child's grandmother.

<sup>15</sup> The offender was friends with all nine of the children's families.

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| Foster parent   | <ul style="list-style-type: none"> <li>• <i>R v Maguire (No 3)</i> [2022] NSWDC 359</li> </ul>  | <ul style="list-style-type: none"> <li>• <i>R v NC</i> [2020] NSWDC 547</li> </ul>  |
| School teacher  | <ul style="list-style-type: none"> <li>• <i>R v Collins</i> [2023] NSWDC 599</li> <li>• <i>Regina v Richards</i> [2021] NSWDC 603</li> <li>• <i>R v O'Toole (No 5)</i> [2021] NSWDC 64</li> <li>• <i>Hall v R</i> [2021] NSWCCA 20</li> <li>• <i>Thomas v The Queen</i> [2019] NSWCCA 265</li> </ul>                                | <ul style="list-style-type: none"> <li>• <i>Fenner v The Queen</i> [2022] NSWCCA 48</li> <li>• <i>R v Hovell</i> [2021] NSWDC 326</li> <li>• <i>O'Sullivan v The Queen</i> [2019] NSWCCA 261</li> </ul> |
| Teacher in an extracurricular activity                                    | <ul style="list-style-type: none"> <li>• <i>R v Barnes</i> [2023] NSWDC 33</li> <li>• <i>DPP v Gumbleton</i> [2009] NSWLC 8</li> </ul>  | <ul style="list-style-type: none"> <li>• <i>R v Crawford</i> [2023] NSWDC 203</li> <li>• <i>R v Stevenson (No 2)</i> [2019] NSWDC 611</li> <li>• <i>Cross v The Queen</i> [2012] NSWCCA 114</li> </ul>  |
| Child care worker   | <ul style="list-style-type: none"> <li>• <i>R v Stoupe</i> [2015] NSWCCA 175</li> </ul>   | NA  |
| In a position of authority in facilities where the victim resided         | <ul style="list-style-type: none"> <li>• <i>Greenaway v The Queen</i> [2021] NSWCCA 253</li> <li>• <i>R v Greenaway</i> [2020] NSWDC 97</li> <li>• <i>R v McIver</i> [2019] NSWDC 834</li> </ul>  | NA  |
| Priest/clergy member  | <ul style="list-style-type: none"> <li>• <i>Slattery v The King (No 2)</i> [2023] NSWCCA 171</li> <li>• <i>Richards v The King</i> [2023] NSWCCA 107</li> <li>• <i>R v Slattery</i> [2017] NSWDC 373</li> <li>• <i>Stanton v The Queen</i> [2017] NSWCCA 250</li> <li>• <i>R v Robert James Hickman</i> [2016] NSWDC 383</li> </ul> | <ul style="list-style-type: none"> <li>• <i>R v RH</i> [2024] NSWDC 379</li> </ul>  |
| In other positions of authority and care over the victim                  | <ul style="list-style-type: none"> <li>• <i>R v Chamseddine</i> [2015] NSWDC 233<sup>16</sup></li> </ul>  | <ul style="list-style-type: none"> <li>• <i>R v Duncan</i> [2022] NSWDC 543<sup>17</sup></li> <li>• <i>Cheung v The Queen</i> [2022] NSWCCA 168<sup>18</sup></li> </ul>                                 |
| Convicted of child pornography charges/sexually abusing children overseas | NA  | <ul style="list-style-type: none"> <li>• <i>R v Hansen</i> [2021] NSWDC 457</li> <li>• <i>R v Mirigliani</i> [2020] NSWDC 21</li> <li>• <i>R v P</i> [2015] NSWDC 262</li> </ul>                        |

<sup>16</sup> The offender was a taxi/bus driver for the children.

<sup>17</sup> The victims were friends of the offender's daughter.

<sup>18</sup> The offender was the husband of the child's babysitter.

Cases where section 21A(5A) was applicable

|    | Case name   | Relationship of the perpetrator to the child/children                | Remarks on 21A(5A)   |
|----|---|--|--|
| 1. | <i>R v Collins</i> [2023] NSWDC 599                 | The offender was the child's teacher.                                | <p>[65] <u>I take into account Ms Collin's otherwise good character</u> in the sense that she has a blemish free record and has never been charged or accused of any criminal offence let alone a matter of this nature. There is no suggestion that she formed any other sexual relationships with children in or outside her school life either before or after her relationship with AW. The available evidence is that she was a well-respected, devoted teacher and coach. <u>In some ways, of course, her lack of criminal record and her position as a teacher allowed her to form the mentoring relationship with AW in plain sight. Whilst her otherwise good character must not mitigate her sentence, per s 21A(5A) it does nonetheless differentiate her case from those where there is repetitive and pronounced sexual interest demonstrated towards children.</u></p> <p>The evidence does not support that Ms Collins is a paedophile. I have little doubt that had Ms Collins come to terms with her sexuality at an earlier time and not sought to suppress it, that she would not have engaged in such a secret, age-inappropriate and unlawful relationship. I note that she has gone on to have otherwise healthy adult homosexual relationships since this one ended in 2014. I am satisfied that the offender is unlikely to reoffend and has good prospects of rehabilitation.</p> |
| 2. | <i>Slattery v The King (No 2)</i> [2023] NSWCCA 171 | The offender was a Christian Brother and the child's school teacher. | <p><i>(although it was found that the sentencing judge applied "good character" in error, this was not rectified)</i></p> <p>[29] "Her Honour took into account the Appellant's lack of prior convictions at the time of the offending, and to a lesser extent, his prior good character, although arguably his good character (as apparently reflected in his status in the Brotherhood) may have assisted in the commission of the offences. Her Honour appeared to reach this conclusion. As such, <u>it was a factor which should not have been taken into account as a mitigating factor by reason of s 21A(5A) of the Crimes (Sentencing Procedure) Act 1999 (NSW) (Sentencing Act).</u>"</p>  |
| 3. | <i>R v Scholz</i> [2023] NSWDC 222                  | The offender was friends with the child's family.                    | <p>[116] <u>I am satisfied beyond reasonable doubt that the offender's good character, in particular, assisted him in the commission of his offending.</u> This appeared to be implicitly acknowledged by the offender at trial; where he portrayed himself as being responsible and, indeed, a pillar of the community - a local RFS "hero" - who prudently made known to the mothers of the two victims his involvement in and role with the RFS - itself a badge of good character - and even</p>   |

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|    |   |  | went so far as to assure BJ's mother that he had undertaken a "working with children" check. BJ's mother's knowledge of his having that particular credential helped her to form an assessment of the offender's good character. This was the functional equivalent of a reference to good character to which Hamill J referred to in <i>Bhatia</i> . His good character was of some assistance to the offender ( <i>Bhatia</i> per Beech-Jones CJ at CL, at [14]-[15]). Accordingly, I do not treat his prior good character, itself, as a mitigating factor.   |
| 4. | <i>Richards v The King</i><br>[2023] NSWCCA 107 | The offender was a Christian Brother and the Child's school teacher. | <p>(<i>the was an appeal - the offender argued that the sentencing judge did not give enough weight to his "good character"</i>)</p> <p>[21] "The Crown submitted that s 21A(5A) of the Crimes (Sentencing Procedure) Act 1999 (NSW) (the Act) applied (namely, that "[i]n 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")"</p> <p>[58] The sentencing judge found that the applicant's moral culpability was not reduced by subjective matters and that he was not a person of good character at the time he committed the offences. Her Honour found that the applicant "<u>was assisted by his lack of relevant convictions and the respectable positions within the community and his employment that he held. Such standing assisted him to gain access to the victims who he then subsequently sexually abused.</u></p> <p>[81] The weight to be given to particular factors fell within her Honour's sentencing discretion: <i>Neal v The Queen</i> (1982) 149 CLR 305 at 326 (Brennan J); [1982] HCA 55; approved in <i>Bugmy v The Queen</i> (2013) 249 CLR 571; [2013] HCA 37 at [39] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Thus, <u>the weight to be given to post-offence character was a matter for the sentencing judge.</u> The weight to be given to character varies according to all the circumstances of the case: <i>Ryan v The Queen</i> (2001) 206 CLR 267; [2001] HCA 21 at [36] (McHugh J). <u>That her Honour said that it ought be given little weight indicated that it was taken into account</u> (<i>R v Baker</i> [2000] NSWCCA 85 at [11] (Spigelman CJ, Grove and Hidden JJ agreeing)). This assessment was open to her Honour. For these reasons ground 5 has not been made out.</p> |
| 5. | <i>R v Barnes</i> [2023]<br>NSWDC 33            | The offender was the child's martial arts teacher.                   | [76] The offender's otherwise good character and lack of previous convictions, in my opinion, should not be taken into account as a mitigating factor. This is because, in the circumstances, I am satisfied that the offender's good reputation in the conduct of his operation of the gym was  |

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|    |   |   | <p><u>of assistance to the offender in the commission of the offences</u> (<i>Crimes (Sentencing Procedure) Act 1999</i> (NSW), s 21A(5A)).</p>   |
| 6. | <p><i>R v Pethybridge (No 3)</i> [2022] NSWDC 520</p> | <p>The offender was friends with the parents of the children.</p> | <p>[92] Ms Crown emphasised that s 21A(5A) would preclude such a finding and referred to <i>Erazo v R</i> [2016] NSWCCA 139 at [73] where it was stated that since the offending persisted over a five-year period (in that case), prior good character counts for very little in the synthesis relevant to the appropriate sentence. Ms Crown also emphasised that to the extent that good character could have been considered, the Court of Criminal Appeal would have assessed this at the time of re-sentencing. I accept these submissions.</p> <p>[96] By reason of s 21A(5A) of the CSP Act, the offender's good character or lack of antecedents cannot be taken into account as mitigating factors if the factors assisted the offender to commit the offences. As I have found when addressing aggravating factors above, <u>a significant reason why the parents left their very young children in the company of the offender was their friendship which was substantially the result of their respect and admiration for his position and character. Accordingly, in my view, written testimonials of his good character cannot be taken into account to prove that particular mitigating factor.</u></p>   |
| 7. | <p><i>R v Rose</i> [2022] NSWDC 705</p>               | <p>The offender was friends with the child's mother.</p>          | <p><i>(although s 21A(5A) applied, the judge still gave weight to the "good character" of the offender in the years after the offending as a mitigating factor)</i></p> <p>[44] The offender has no prior criminal record and is of prior good character. Section 21A(5A) of the Crimes (Sentencing Procedure) Act states: "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."</p> <p>[45] Prior to the introduction of this legislative requirement, an offender's prior good character was held to be of less significance in child sex cases than in other types of offences: see <i>R v PGM</i> (2008) 187 A Crim R 152. <u>I am satisfied in the present matter that the good character and lack of previous convictions at the time of the commission of the offending conduct was of assistance in the commission of the offence by reason of the circumstance that had he lacked such good character or if he held previous convictions, such circumstance would likely have been known in the country town in which he resided and he likely would not have been placed in a repeated position of trust in the care of the child.</u></p> <p>[46] <u>However, his subsequent blameless conduct over the following 40-odd years and his good character during that time is a factor in respect of which the court affords him some credit.</u></p> |



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| 8.  | <i>R v Maguire (No 3)</i><br>[2022] NSWDC 359  | The offender was a foster parent of the children.  | <p>[92] The offender was born in 1953 and this year reached his 69th birthday. He has no prior offences recorded against his name and relied upon his antecedent reputation as a person of good character. He did so in the trial and he does so on the sentence.</p> <p>[93] This is tempered in this instance, however, because of the application of s 21A(5A) <i>Crimes (Sentencing Procedure) Act 1999</i> which provide that 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 considered as a mitigating factor if the Court is satisfied that it was of assistance to the offender in the commission of the offence.</p> <p>[94] <u>The offender's status as a foster carer rested upon the proposition that he was a person of good character, whereupon he was entrusted with these children and thereby had access to them. Moreover, the legislation as cited has long recognised that prior good character is often a feature of the perpetrators of sexual offences against children: R v TWP [2006] NSWCCA 141 and PB v R [2016] NSWCCA 258.</u></p> |
| 9.  | <i>Regina v Richards</i><br>[2021] NSWDC 603   | The offender was the child's League Tag coach and a Student Learning Support Officer at the child's school | <p>[54] The offender was born on 15 January 1980 and has no matters recorded against him. In other circumstances the offender would be entitled to leniency because of his lack of record.</p> <p>[56] Mr Fordham for the offender submitted that the offender was entitled to some consideration for his lack of record and further submitted to the effect that he was aware of persons who have successfully been given a clearance to work with children when they have had matters on their record such as drink driving offences. I accept that that may be the case.</p> <p>[57] In this matter the offender was employed as a Student Learning Support Officer at the High School the victim attended. He would have been required to undergo the usual working with children checks. <u>Clearly his lack of record would have been of assistance in this regard. The offender's employment enabled access to the victim. In those circumstances I am satisfied that the prior good character was of assistance to the offender in the commission of the offence.</u></p>   |
| 10. | <i>Greenaway v The Queen</i> [2021] NSWCCA 253 | The offender was an officer in the NSW juvenile justice system at the Parramatta Girls Training School.    | <p><i>(the sentencing judge found that s 21A(5A) applied sexual assault offences but not common assault offences against the children)</i></p> <p>[107] His Honour accepted the Crown submission that <u>the Court was precluded from taking into account the applicant's prior good character in respect of the child sexual offences by reason of s 21A(5A) of the Sentencing Procedure Act. In relation to the remaining counts to which s 21A(5A) did not apply, his Honour found that the applicant was entitled to 'some limited</u></p>  |

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|     |  |  | <p>leniency'. (The applicant contended that the character references described the applicant as a loving husband and a dedicated father and grandfather, and they all described the offences as being out of character.)</p> <p>[89] For the reasons given above, each of the applicant's grounds of appeal should be rejected. I accordingly propose the following orders:<br/> (1) Grant leave to the applicant to appeal against his convictions and sentence.<br/> (2) Dismiss the appeals.</p>   |
| 11. | <i>R v O'Toole (No 5)</i> [2021] NSWDC 64                                      | The offender was the school teacher of the children.   | <p>[128] Pursuant to s 21A(5A), 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. <u>Here, I am satisfied that the offender's good character, which led to his appointment as a teacher at the children's schools, and also as a boarder in their parents' homes, was of assistance to the offender in the commission of the offences, and thus his good character may not be taken into account as a mitigating factor here.</u>"</p>  |
| 12. | <i>Hall v R</i> [2021] NSWCCA 20   | The offender was the school teacher of the children.   | <p>[54] Section 21A (5A) and (5B) of the Crimes (Sentencing Procedure) Act applies to render prior good character a factor that does not mitigate this type of offending "if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence". <u>Mr Hall relied upon his position of trust to obtain access to the homes of some victims and gain the trust of their parents, which enabled him to offend for many years with impunity.</u> The Crown submitted that there is no legal error revealed in the remarks on sentence and that in all the circumstances of this case, the sentence is not manifestly excessive.</p>   |
| 13. | <i>Freeman v Director of Public Prosecutions (NSW) (No 2)</i> [2020] NSWDC 333 | The offender was related to the child's father. The child referred to the offender as "uncle". | <p><i>(it was found that the sentencing judge considered "good character" in error)</i></p> <p>[28] It is apparent that in the sentencing remarks, the learned Magistrate did place some significance on the appellant's good character evidenced by these references.</p> <p>[29] Although it is unnecessary to identify error since the sentencing discretion is to be exercised afresh, such reliance was, with respect, erroneous. Evidence of his good character or the absence of convictions for prior offences of this nature are not to be taken into account where the said good character assisted the appellant to commit the offence (s 21A(5A), read with s 21A(6)(b), of the CSP Act). <u>I agree with the Crown's submission that the appellant's good character did assist him to commit the offending conduct in a not insubstantial way, with the result that the prior good character should not be treated as a mitigating factor.</u> The legal representative for the appellant did not contend to the contrary.</p> |

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| <p>14.</p> | <p><i>R v GC</i> [2020]<br/>NSWDC 186</p>       | <p>The offender was the uncle of the children.</p>   | <p>[39] The offender pointed to the fact that other than for the offences which bring him before the Court, he was otherwise of good character. It was said that this factor should be considered a mitigating factor.</p> <p>[40] I do not accept that this is the case. I believe that the perception of his good character has assisted in the commission of the offending.</p> <p>[41] By this I mean to say that, <b><u>if the offender had not been a person perceived to be of good character, then notwithstanding the avuncular relationship, in my view it is doubtful he would have been left alone with his nieces to the extent which he was. His character, therefore, in my view, has assisted in the commission of these offences,</u></b> and is not available to him as a mitigating circumstance (s 21A(5A) Sentencing Act).</p> <p>[42] In any event, the authorities make clear that where the offender is a family member, sentences must be severe, and little leniency can be given, even though the family member has been otherwise of good character: <i>R v Evans</i> (unreported, 24/3/88, NSWCCA); <i>R v Hudson</i> (unreported, 30/7/98, NSWCCA).</p>   |
| <p>15.</p> | <p><i>R v Greenaway</i> [2020]<br/>NSWDC 97</p> | <p>The offender was employed at an institution that housed teenage girls by an order of a court.</p> | <ul style="list-style-type: none"> <li>• Some of the victims were 17 years old. Section 21A(5A) did not apply to offences committed against those victims but it did apply to offences committed against children that were under 16 years old.</li> </ul> <p>[33] The character references describe the offender as a loving and devoted husband, and as a dedicated and attentive father and grandfather who has raised children who have all made contributions to society. They all describe the offences as being out of character. Several do not accept the jury's verdicts.</p> <p>[34] The offender's wife stated that she knows the allegations to be false. She believes the offender is of impeccable character. The offender's daughter, Ms Tween says that her father came from humble beginnings to attain a Bachelor degree in Business Studies, a Bachelor of Legal Studies (after which he was admitted as a solicitor), a Graduate Diploma in Legal Practice, a Master of Laws and a Doctor of Juridical Science. She speaks of a close family unit which persists to this day. She describes the impact on her family who were "devastated and blindsided" by the jury's findings.</p> <p>[35] Ms Louise Greenaway, the offender's daughter-in-law says that the offender is the most law-abiding citizen she has ever met and that he shows great esteem for the law. Dr Ruth Greenaway, the offender's daughter, states that in spite of the jury's verdicts, she can attest to</p> |

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|     |                                    |   | <p>her father's good character. Mr Matthew Greenaway and Mr Timothy Greenway, the offender's sons, likewise speak highly of their father, the manner in which he raised them and of the many kindnesses he extended to them throughout their lives.</p> <p>[36] Other family members and friends who have known the offender for many decades speak highly of him.</p> <p>[63] The offender has no prior convictions. <u>The Crown submits that the court is precluded from taking into account the offender's prior good character in respect of some of the offences for which he is to be sentenced by reason of s 21A(5A) of the Sentencing Act.</u> This section covers special rules for child sex offences and states that: "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."</p> <p>[64] <u>In respect of the remaining counts to which s 21A(5A) does not apply, while the court may not be precluded from having regard to the offender's prior good character in that respect, the weight to be afforded to the offender's prior good character should be moderated given the nature, seriousness and length of his offending behaviour.</u> Hughes v R [2017] HCA 20 (at [337]). This is not a matter in which it could be reasonably suggested that the offending is an uncharacteristic aberration in an otherwise unblemished life. The offender committed a large number of serious offences against 5 young women (each 17 years of age or under) who had been entrusted into his care over some years.</p> <p>[65] The offender submitted that prior to the period of offending and for the 46 years since the offending, Mr Greenaway was, and has been, a person of good character. In my opinion, the offender is entitled to some limited leniency on account of his good character.</p> |
| 16. | <i>R v McIver</i> [2019] NSWDC 834 | The offender was the assistant manager of a boys home where the children resided. | <p>[334] As to mitigating circumstances, I acknowledge that the offender was necessarily a person of good character, that this must be seen in the context of the submissions made below as to good character pursuant to s 21A(5A) which provides special rules for child sexual offences.</p> <p>[338] Council for the Crown submitted that s 21A(5A) applied in circumstances of this case where the offender was working as the assistant manager of the Bexley Boys' Home. <u>It may be accepted that the offender's prior good character assisted him to hold the position of assistant manager which he abused by the offences committed against the victims.</u> See for example R v Lord [2013] NSWDC 16 at 158 and 160.</p>   |

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|     |   |  | [340] <u>With respect to s 21A(5A), I am of the view that the present case falls squarely within the terms of that provision. Accordingly, the offender's prior good character and lack of prior convictions are not to be taken into account at all as a mitigating factor.</u> See further R v Stoupe [2015] NSWCCA 175 at paras 183 and following.”   |
| 17. | <i>Thomas v The Queen</i> [2019] NSWCCA 265 | The offender was the primary school teacher of the children.                             | [31] Despite the character references the sentencing judge did not find the applicant to be a person of prior good character, based on the tendency evidence led at the trial. On a contingent basis, <u>her Honour found that s 21A(5A) of the Crimes (Sentencing Procedure) Act 1999 (NSW) would in any event apply to prevent prior good character from being taken into account as a mitigating factor.</u> The sentencing judge took into account the applicant's medical difficulties which would result in a degree of additional hardship from being in custody.   |
| 18. | <i>R v SH</i> [2019] NSWDC 889              | The offender was the children's uncle.   | [32] The offender pointed to the fact that other than for the offences which bring him before the Court, he was otherwise of good character. It was said that this factor should be considered a mitigating factor.<br><br>[33] In committing the offences, it was said on his behalf that it was his position of uncle living in the same premises as the victims, which assisted in his offending. In so submitting, <u>it was inferentially suggested that his perceived good character played no part in the offending. I do not accept that this is the case.</u> More precisely, I do not consider that the avuncular relationship negatives the fact that he was trusted with the care of his nieces, because inter alia, he was also considered to be of good character.<br><br>[34] Put another way, <u>if he had not been a person perceived to be of good character, then notwithstanding the avuncular relationship, in my view it is doubtful that he would have been left alone with his nieces. His character, therefore, in my view, has assisted in the commission of these offences, and is not available to him as a mitigating circumstance (s 21A(5A) Sentencing Act).</u><br><br>[35] In any event, the authorities make clear that <u>where the offender is a family member, sentences must be severe, and little leniency can be given, even though the family member has been otherwise of good character:</u> R v Evans (unrep, 24/3/88, NSWCCA); R v Hudson (unrep, 30/7/98, NSWCCA). |
| 19. | <i>R v DRM</i> [2019] NSWDC 495             | The offender was the uncle of one of the children. The other two children he abused were | <i>(the judge held that s 21A(5A) applied to offences perpetrated against the offender's niece. However, the section did not apply to his abuse of his son's friends)</i>  |

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|     |  | <p>friends of his son.</p>                      | <p>[34] In respect of mitigating factors, the Crown acknowledged, pursuant to s 21A(3)(e), that the offender had no previous criminal record, but noted that, pursuant to s 21A(5A), that good character or lack of previous convictions 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.</p> <p>[50] It was submitted that s 21A(5A) did not apply to the present offending, as the offender's good character had not enabled him to commit the offences. In the case of the victim RF, who was his niece, it was submitted that the offender's good character, or lack of previous convictions, had not led to the offending. In respect of the victims PE and HE, they merely attended the same school as his son and had become friendly with his son. The offender himself was not a teacher at the school and in no sense did his character or lack of previous convictions enable the offending to take place.</p> <p>[96] I have taken into account the fact that the offender had no previous criminal offences, had an excellent employment history and was otherwise of good character. However, <u>as far as the offending against RF was concerned, I am satisfied that his character was of assistance to the offender in the commission of the offences against her. He was her uncle in what was a very close family. The offending commenced when she was seven years of age, and under his authority when she was taken to the Opera House by him. Thereafter, he engaged in what can only be described as grooming conduct over a period of six years, which normalised the conduct that amounted to sexual offending by him, to her. Therefore, pursuant to s 21A(5A) of the CSPA, his previous good character and lack of convictions cannot be taken into account as a mitigating factor.</u></p> <p>[97] In respect of the offences against PE and HE (Counts 24, 26 and 27), <u>I am not satisfied that his good character was of assistance to him in the commission of that offending. Rather, it was opportunistic offending which occurred when those children were brought into his home. However, his lack of criminal convictions and good character could not be said to mitigate the offending in those counts, given his previous offending.</u></p> |
| 20. | <p><i>GG v The Queen</i><br/>[2018] NSWCCA 280</p> | <p>The offender was the child's stepfather.</p> | <p><i>(Payne JA held that s 21A(5A) did not apply while Schmidt J held that it did apply. Fagan J did not express an opinion on the matter)</i></p> <p><u>Payne JA</u><br/>[10] The offender's subjective case entitles him a degree of leniency. I accept that he had no prior record; that psychological testing had established that he had good prospects of rehabilitation and that he was unlikely to re-offend. I accept that the offender is entitled to be</p>  |

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|     |  |   | <p>sentenced on the basis that prior to his offences he had contributed to the community. I accept the evidence that he enjoys the continuing support of his family. I have not found it necessary to reason by reference to s 21A(5A) of the Crimes (Sentencing Procedure) Act. <u>This is not a case where I am satisfied that the offender's good character or lack of previous convictions was of assistance to the offender in the commission of the offence.</u></p> <p><u>Schmidt J</u><br/> [97] The agreed facts establish not only that GG pursued a course of offending involving grooming and recording the victim, but he recorded the victim having unlawful sexual intercourse with others, as well as with himself. He did not draw this other offending to authorities, as he ought to have done as her stepfather, but instead kept the videos he produced, for his own sexual purposes.</p> <p>[98] In the result on this resentence, in accordance with s 21A(5A), <u>GG's prior good character and lack of previous convictions cannot to be taken into account as a mitigating factor.</u></p> <p>[99] That is because the agreed facts well establish that <u>GG's good character and lack of previous conviction were of real assistance to him in the commission of his offences, helping him to pursue the terrible breach of trust involved in him as the victim's stepfather, repeatedly videoing her as he did, then using those videos for his own sexual purposes and also taking advantage of her mother's absence, to commit the other serious offences to which he entered his pleas.</u></p> |
| 21. | <i>R v David Ford</i> [2018] NSWDC 183 | The offender was friends with the parents of the children.  | <p>[28] The offender is now almost 70. He will turn 70 in October this year. He has no criminal record. Whether or not it is open to treat him as a person of prior good character it seems to me is a moot point. Section 21A(5A) of the Crimes (Sentencing Procedure) Act as it currently applies would prevent that if in fact he had used his prior good character to enable him to commit these offences. The evidence currently before me would not allow me to make such a finding beyond reasonable doubt which, in my view, would be necessary but <u>it is not, in my view in this case, open to the offender to argue as a mitigating factor that he is a person to be treated as prior good character.</u></p>  |
| 22. | <i>R v Slattery</i> [2017] NSWDC 373   | The offender was the child's school teacher. He was a Marist Brother and the founder of St Mary's Primary School. | <p><i>(s 21A(5A) was found to apply to one of the offences but not the other even though both victims were brothers)</i></p> <p>[91] The Crown submitted that the <u>offender's previous good character can be taken into account in relation to the offence against TN, but not in relation to the offences against SN.</u> In</p>   |

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|     |   |   | light of the provision of s 21A(5A) of the 1999 Act no submission to the contrary was made on behalf of the offender.  |
| 23. | <i>Stanton v The Queen</i><br>[2017] NSWCCA 250     | The offender was a religious brother and a teacher at the school the children attended. | <p>[112] During the course of the hearing in this Court, an enquiry was made of counsel as to whether s 21A(5A) Crimes (Sentencing Procedure) Act 1999 applies to this Applicant so that his good character or lack of previous convictions ought not be taken into account as a mitigating factor if the Court is satisfied that the factor concerned was of assistance to him in the commission of his offences. It was accepted that this provision could apply to the Applicant if his offences fell within the definition of 'child sexual offence' in s 21A(6) of the Act. That definition appears to be an exhaustive one which nominates offences under particular sections as constituting the group of offences which are capable of being a "child sexual offence". It is the case that offences under ss 79, 80 and 81 Crimes Act 1900 are not included in that definition. Mr Odgers SC submitted that the section should not apply to the Applicant as his offences are not included in the relevant category. That said, Mr Odgers SC accepted that s 21A(5A), in effect, reflected the common law in any event (T11.19, 16.6, 3 May 2017). He submitted that the relevant evidence of good character in this case concerned the period since the commission of the offences in 1980-1981.</p> <p>[118] As Mr Odgers SC noted, there is no real difference between s 21A(5A) and otherwise applicable common law principles. <u>The fact that good character was a condition precedent to him holding the position of a school teacher with access to young children makes it difficult for the Applicant to rely in any meaningful way upon evidence of what is said to be his otherwise good character.</u></p> |
| 24. | <i>R v Robert James Hickman</i> [2016]<br>NSWDC 383 | The offender was a priest at the school the children attended.                          | [68] Sequences 1, 21, 22, 26 and 27 were all committed sometime during 1975. It is not clear which of those five offences was committed first. He had no convictions before 1975. However, by operation of subs 21A(5A) the Court is of the view that he is not entitled to the benefit of good character for any of the offences committed in 1975 because he exploited the trust the victims and their families had placed in him as a priest to commit the offences.  |
| 25. | <i>R v Chamseddine</i><br>[2015] NSWDC 233          | The offender was a taxi/bus driver for the children.                                    | <p>[76] Here, in my view, the applicant's lack of prior convictions was not a mitigating factor on the basis that "his good character was a factor which was of assistance to him in the commission of these offences".</p> <p>[77] That is because <u>he would not have been employed to be the driver of these children if he had a prior conviction of any kind involving children, as each driver is required to clear a "working with children" check with the Department of Transport (T 91 and 92).</u></p>   |



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|     |   |   | <p>[78] As was said in <i>O'Brien v R</i> [2013] NSWCCA 197 per Adamson J, a case involving the sexual abuse of a girl by an offender who had befriended her family, the offender's good character was not used favourably towards the offender, as he had "used his good character to gain access to the victim and to gain her trust". The offender in this case was not a friend of the family. However, <u>he had obtained the trust of her parents and Ms MP's school through his capacity as a taxi / bus driver for the students.</u></p>   |
| 26. | <p><i>R v Stoupe</i> [2015] NSWCCA 175</p>          | <p>The offender was a child care worker.</p>                  | <p>[86] Counsel for the Crown and the Respondent accepted in this Court that s 21A(5A) applied in the circumstances of this case where the Respondent was working as a childcare worker. It may be accepted that <u>the Respondent's prior good character assisted him to hold the position of childcare worker, which he abused by the offences committed against the victim</u>: <i>R v Lord</i> [2013] NSWDC 16 at [158], [160]. Although there may be circumstances where s 21A(5A) has no application (see, for example, <i>AH v R</i> [2015] NSWCCA 51), the present case falls squarely within the terms of that provision.</p> <p>[87] In these circumstances, the approach adopted by the sentencing Judge with respect to the Respondent's prior good character (see [56] above), was unduly favourable to the Respondent. The Respondent's prior good character and lack of prior convictions were not to be taken into account at all as a mitigating factor.</p> <p>[98] The Respondent's subjective circumstances were to be considered without regard to his prior good character: s 21A(5A) Crimes (Sentencing Procedure) Act 1999. He had significant health issues, including haemochromatosis. However, his health difficulties had not interfered with his capacity to hold down a responsible position as supervisor at the child care centre.</p> <p>[121] In having regard to the Respondent's subjective circumstances, I have not treated his prior good character not being a mitigating factor in compliance with s 21A(5A) Crimes (Sentencing Procedure) Act 1999.</p> |
| 27. | <p><i>O'Brien v The Queen</i> [2013] NSWCCA 197</p> | <p>The offender was friends with the child's grandparents</p> | <p><i>(although it was found that the sentencing judge applied "good character" in error, this was not rectified)</i></p> <p>[40] If his Honour made any error in fixing the total term, it was to take into account the applicant's good character and lack of previous convictions as a mitigating factor in the applicant's favour, when s 21A(5A) of the Act arguably precluded its being taken into account in that way since <u>his good character appears to have been of assistance to him in the commission of the offences. This provision was not raised at the sentence hearing. Accordingly I do not accept the applicant's submission that the sentencing judge must have been satisfied</u></p>   |

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|     |  |  | that it did not apply. However, as his Honour took into account these matters in the applicant's favour, it is not necessary to consider the provision further.  |
| 28. | <i>Director of Public Prosecutions (NSW) v KPB</i> [2013] NSWLC 12 | The offender worked for the child's parents. | <p>[31] Given the Offender's prior lack of criminal antecedents, his obvious work ethic and general reputation, the question of good character requires more than cursory attention - particularly given the understandable emphasis placed upon it by the Offender's Counsel.</p> <p>[32] The common law as to prior good character is clear. It is of less significance in cases involving sexual misconduct towards the young than otherwise would be the case: see <i>R v AEL</i> (2005) NSWCCA 148. <i>Ryan v The Queen</i> (2001) 206 CLR 267 is authority for the proposition that an offender's otherwise unblemished past is still deserving of some measure of leniency.</p> <p>[33] However, since the decision in <i>Ryan</i>, the New South Wales Legislature enacted section 21A (5A) and (5B) of the Crimes (Sentencing Procedure) Act 1999 which specifically provides that in child sexual offences, a Court is not to take good character or lack of previous convictions 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.</p> <p>[34] <u>There is no doubting the Offender's good reputation preceded him. He was well and respectably known generally, and, particularly, by AB's parents. The Offender was entitled to rely upon his standing and reputation. <b>Had it been otherwise he would not have been permitted to have the close contact with AB as he obviously did.</b></u></p> <p>[35] These charges do not, for example, arise out of a chance or casual encounter between strangers where the Offender, coincidentally, just happened to be of prior good character and that, perhaps, is where a distinction can be drawn. It may seem harsh, but the Parliament's intention is clear. If character and repute was "of assistance" in the commission of the offence - that character cannot be relied upon. I am satisfied that good character was, in the requisite sense, of assistance to the Offender in the commission of the offences and, as a consequence, I must not take that character into account as a mitigating feature.</p> <p>[36] It is not the case that the subject offences were unpremeditated, unplanned and opportunistic. Quite to the contrary. I have already made comment as to the actual character of the assaults, including the degree of physical contact involved and the gradual desensitising of a child to increased levels of sexual intrusiveness.</p> |

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| 29. | <i>R v Craig Andrew Woodley</i> [2013] NSWDC 14 | The offender was friends with the child's family.      | <p>[43] The testimonials tendered on behalf of the offender attest to the offender being previously of good character, of being a good neighbour and well respected in his workplace.</p> <p>[65] It was submitted that the offender, who is now aged 43 years, had worked hard all of his life, that he was well regarded by neighbours and friends, and that his character references, and particularly that of Mr Camilleri, were positive evidence of him otherwise being a person of good character who had lived a stable and lawful life. These offences were therefore out of character and he had paid a high price for them, having lost his employment as a consultant to the Department of Defence, having suffered a large financial cost, and having suffered a large emotional cost (as demonstrated by three suicide attempts).</p> <p>[72] I am mindful of the subjective factors put on behalf of the offender. The evidence demonstrated that he was a man of good character with no prior convictions. However, <b><u>I am satisfied that those matters were of assistance to the offender in the commission of the offences</u></b> and therefore pursuant to s 5A Crimes (Sentencing Procedure) Act, I have not taken them into account as mitigating factors pursuant to s 21A of the Act.</p> <p>[80] As outlined above, I have had regard to s 21A (5A) and that I have disregarded the offender's good character or lack of previous convictions as mitigating factors on the basis that I am satisfied that those factors were of assistance to the offender in the commission of each of the offences.</p> |
| 30. | <i>NLR v The Queen</i> [2011] NSWCCA 246        | The offender was the step grandfather of the children. | <p>[28] The sentencing judge did refer to the applicant's character in her remarks on sentence. Her Honour said:—</p> <p style="padding-left: 40px;">“The offender is said to be a person of otherwise good character. That does not entitle him to any degree of leniency. All too often these types of offences are committed by those who are of otherwise good character. <u>It is that good character which enables them to go about this evil practice without fear of detection, confident that if a child does come forward and complain the child will not be believed.</u> The helplessness of children in a family situation such as this is self-evident.”</p> <p>[30] It was submitted by counsel for the applicant on the hearing of this application that what the sentencing judge said in the part of the remarks on sentence which I have quoted did not amount to a finding within s 21A(5A) of the Act. It was submitted that, in order for a sentencing judge to make a finding within s 21A(5A), the sentencing judge is required to make an express statement of the judge's satisfaction that the factor(s) concerned had been of assistance to the particular offender in the commission of the offences for which the offender is being sentenced. Remarks of a general kind applying to offenders generally, such as were made by the</p>   |

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|     |  |                                     | <p>sentencing judge, do not amount to findings within s 21A(5A). Consequently, the sentencing judge was required to take into account the applicant's lack of a significant record of previous convictions and his good character and the sentencing judge's statement that the applicant's good character did not entitle him to any degree of leniency was erroneous.</p> <p><u>[31] I would accept that, in order for s 21A(5A) to apply, with the consequence that an offender's good character or lack of previous convictions is not to be taken into account as a mitigating factor, the sentencing judge should make an express statement of the judge's satisfaction that the factor concerned had been of assistance to the offender in the commission of the offence.</u></p> <p><u>[32] However, in the present case, I consider that any error on the part of the sentencing judge was merely procedural.</u> I am satisfied from a reading of the whole of her Honour's remarks on sentence that, if her Honour had adverted to the need to make an express finding specific to the applicant, her Honour would have made, and would have been entitled to make, such a finding in relation to both sentencing factors. Her Honour would hardly have made the general remarks I have quoted, unless she considered that they were applicable to the applicant. Elsewhere in her remarks on sentence her Honour noted that, after the applicant's offences were discovered, the applicant had been denied access to the complainants and to his own grandchildren.</p> <p><u>[33] In my opinion, any error on the part of the sentencing judge was merely a procedural error and had no effect on the sentences imposed.</u></p> |
| 31. | <i>DPP v Gumbleton</i><br>[2009] NSWLC 8 | The offender was the child's coach. | <p>The Offender has no criminal history. I have carefully read the many testimonials tendered on behalf of the Offender written by people who have known him well and favourably over many years. I note the utter disbelief of some of the authors that a person so well known to them could have been found guilty of such allegations. Included are references to his loyalty and unswerving enthusiasm to those he coached. He has earned both accolades and appreciation from the community.</p> <p>The common law as to prior good character is clear. It is of less significance in cases involving sexual misconduct towards the young than otherwise would be the case: see Regina v AEL (2005) NSWCCA 148.</p> <p>Ryan v The Queen (2001) 206 CLR 267 is authority for the proposition that an offender's otherwise unblemished past is still deserving of some measure of leniency. It can be readily</p>  |

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|  |  |  | <p>accepted the Offender devoted much time and effort to the cause of junior and senior athletics over many years and without financial charge.</p> <p>However, since the decision in Ryan, the New South Wales Legislature enacted Section 21A (5A) and (5B) which specifically provides that in child sexual offences, a Court is not to take good character or lack of previous convictions 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.</p> <p>The evidence of AR's father (whom I found to be a thoughtful and responsible parent) was that the Complainant played hockey and started sprint training. He thought an athletics coach would improve her other sporting endeavours. He was aware of Little Athletics and upon hearing of the Offender's reputation, she was put into his squad. He permitted the Offender to massage his daughter's legs.</p> <p>There is no doubting the Offender's good reputation preceded him. He was well and respectably known and regarded and the Offender was entitled to rely upon this. So were others in seeking his services. <b><u>It is difficult not to be satisfied that good character was "of assistance" to the Offender in that, without his character and reputation, it is unlikely AR would have been put in his charge.</u></b></p> <p>This is not to suggest for one moment that he used his reputation and character to lure or inveigle people to his squad so as to prey upon one or other for his own purposes. The Section simply requires the Court to be satisfied that good character was of assistance in the commission of the offence. This was not, for example, a chance or casual encounter between strangers where the Offender, coincidentally, just happened to be of prior good character and that, perhaps, is where a distinction can be drawn. It may seem harsh, but the Parliament's intention is crystal clear. If character and repute was "of assistance" in the commission of the offence – that character cannot be relied upon. <b><u>I am satisfied that good character was of assistance to the Offender in the commission of the offence and, as a consequence, I must not take that character into account as a mitigating feature.</u></b></p> |
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Cases where section 21A(5A) was not applicable

|    | Case name                           | Relationship of the perpetrator to the child/children  | Remarks on 21A(5A)   |
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| 1. | <i>R v Hodson</i> [2024] NSWCCA 238 | <p>The offender was:</p> <ul style="list-style-type: none"> <li>• In a relationship with the JH's mother.</li> <li>• Friends with CB's parents</li> <li>• In a relationship with RC's mother</li> <li>• Friends with KV's parents</li> </ul> | <p>[41] In terms of mitigating factors, the sentencing judge found that the respondent was of good character and had no previous convictions, and that s 21A(5A) of the Sentencing Procedure Act did not preclude her from taking those matters into account: at [92]-[93]. Her Honour was mindful that good character was of less significance in cases of child sexual assault, particularly those involving repeat offending: at [93]. However, having regard to the character evidence from family members and others, her Honour was satisfied on balance that the respondent's good character was a matter she could take into account in mitigation: at [97]. The respondent was also entitled to some leniency by reason of having no prior convictions: at [98].</p> <p>[42] The sentencing judge found that the respondent had good prospects of rehabilitation "with the right level of professional support, in combination with support upon his release and reintegration back into the community". On the basis of that support, her Honour also found that his risk of reoffending was low: at [103]. Her Honour took into account in this regard that the respondent's experience in prison to date, and his continuing fear of prison, would "continue to be a strong deterrent in the future": at [102]. Remorse was not a mitigating factor as the respondent maintained his innocence: at [104]."</p> <p>[61] The matters that were of most significance to the sentencing judge in this respect were the respondent's good character and the impact on his mental health from his experience on remand (the sentencing judge having made no finding of a causal connection between the respondent's prior mental health history and the offending). <u>The Crown did not challenge the evidence that the respondent tendered on sentence as to both factors, including evidence that the respondent was the victim of sexual assault; and submitted on sentence that the sentencing judge could treat the respondent's good character as a mitigating factor.</u></p> <p>[62] <u>It was appropriate to accord some weight to the respondent's good character and absence of prior convictions, nonetheless noting, as the sentencing judge did, that good character was necessarily of less significance in cases involving a pattern of repeated sexual offending against children over time: see, eg, <i>R v Kennedy</i> [2000] NSWCCA 527 at [21]-[22].</u> It was also necessary to reflect her Honour's finding, which is not challenged, that the need for specific deterrence was lessened by what the respondent had endured in prison whilst on</p> |

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|    |  |   | remand. Although the precise nature of the assaults and sexual assaults was not specified in the reports of Mr Watson-Munro, it was clear from those reports, and the 2022 report of Dr Bertucen, that the respondent had been subjected to significant trauma in the custodial setting which, as her Honour found, would act as a personal deterrent to future offending.  |
| 2. | <i>R v Brown</i> [2024]<br>NSWDC 618     | The offender was the stepfather of both children. | <p>[115] There are some matters on Brown's criminal history, but nothing similar. He is not entitled to the leniency often given first offenders but in matters such as this, first offenders are rarely extended leniency for that reason. Once he began to offend against Emily, Brown was no longer of person of good character.</p> <p>[116] <u>It is not suggested that any prior good character was of assistance in committing the offences: Crimes (Sentencing Procedure) Act, s 21A(5A).</u></p> <p>[117] At common law, and now under s 21A(3)(f) Crimes (Sentencing Procedure) Act 1999, the prior good character of the offender is a matter that may be taken into account in mitigation of penalty. However, <u>there are some classes of offences where good character may carry less weight than others because they are frequently committed by persons of otherwise good character, including child sexual assault offences, where s 21A(5A) does not apply on the facts.</u></p>   |
| 3. | <i>R v NB (No 2)</i> [2024]<br>NSWDC 598 | The offender was the child's uncle.               | <p>[50] Several of the offender's aunts also gave evidence, testifying in effect, as a <u>man of good character; insofar as the care and love he had shown to family members.</u> Ms Arnold referred to him as presenting as caring and eager for connection with others. <u>There is little in the material I have read to indicate that he is violent in any way.</u></p> <p>[51] <b><u>It was not suggested that his reputation as a man of good character should be taken to have assisted the offender to commit his offences.</u></b> The Crown conceded that, although it maintains that the offender had been trusted, the exclusionary effect of s 21A(5A) of the CSP Act is not engaged in the circumstances of this case and thus, subject to what follows, <b><u>the Court can take into account his good character and lack of prior convictions as mitigating factors.</u></b> However, without being critical, there was little evidence to indicate manifestations of good character in a way that serviced the community. At any rate, it is notorious that for offending of the present kind, <u>prior good character has little weight in the sentencing exercise.</u></p> |
| 4. | <i>R v TK</i> [2024]<br>NSWDC 451        | The offender was the child's grandfather.         | [65] It was acknowledged that the offender had a limited criminal record although noted the provisions of s 21A(5A) of the CSP Act that the good character of the offender is not to be taken into account if the Court is satisfied that this factor was of assistance to the offender in the commission of the offence. It was contended that this provision did apply.   |

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|    |                                |  | <p>[88] Whilst the offender has a criminal record, it is limited to firearm offences committed in February 2022 for which the offender was dealt with under sections 10 and 10A of the CSPA. <u>I am not satisfied beyond reasonable doubt that the offender's lack of any substantial previous convictions was of assistance to the offender in the commission of the offence, and accordingly his general good character otherwise will be considered as a mitigating factor.</u></p>   |
| 5. | <i>R v RH</i> [2024] NSWDC 379 | The offender was a priest of the Catholic Church. Both children attended primary schools where the offender was an assistant priest. | <p>[45] Defence relies on the character references of XXXX and the offender's sister. Both of these references speak of the sense of regret the offender has for his actions. XXXX suggests that the offender has consistently maintained a strong sense of regret and has spoken of the impact his actions must have had on the victims of his crimes. The offender's sister again speaks of this regret and speaks of the offender acknowledging that he deserves punishments for his past failures.</p> <p>[46] Both letters also speak of the kindness the offender has shown when caring for various family members and his commitment and compassion towards members of the wider community.</p> <p>[47] It was stressed by counsel for the offender that the <u>letters I have just referred to are not relied upon for the purposes of asserting that the offender is a person of good character.</u> Such a submission would face obvious difficulties having regards to the offender's record of convictions of like offences and that <u>he used his position as a priest (and I infer its assumed character traits) to obtain access to his victims and commit the offending acts (see s 21A(5A) CSPA).</u> Rather, the letters again go to the remorse the offender expresses for his actions and on the steps he has taken in terms of rehabilitation and assisting others.</p> |
| 6. | <i>R v DW</i> [2024] NSWDC 380 | The offender was the grandfather of the children.  | <p>[71] The offender does not have any prior criminal record (see s 21A(3)(e)). He is also of prior good character (s 21A(3)(f)). Good character does not apply as a mitigating factor in child sexual assault matters where the court is satisfied that the good character was of assistance to the offender in carrying out the offences (for example in assisting him in access to the victims) - see s 21A(5A) Crimes (Sentencing Procedure) Act. <u>I do not consider the court could be so satisfied on the material, but I accept the Crown submission that good character is of less relevance in child sexual offence matters where there is a course of repeated sexual offending against young children: R v PGM [2008] NSWCCA 172 at [43]-[44].</u></p>   |



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| 7. | <i>R v RJ (No.5)</i> [2024] NSWDC 26 | Grandfather and grandchild (8 years old) | <p>[54] Lack of antecedents and prior good character<br/>At the trial, the offender relied upon the lack of any relevant or material criminal history and prior good character. The latter submission was supported from evidence of a family member who was clearly partial to the offender's cause.</p> <p>[55] In this sentencing hearing, written character references were given by the offender's wife and several (3) of his grandchildren and (2) cousins, which I have read. Notably the wife did not refer to his character; but assuredly, the grandchildren and friends spoke positively of his character. It is true, of course, that for virtually all of his adult life, he has led a blameless life.</p> <p>[56] By s 21A(5A) of the Crimes (Sentencing Procedure) Act 1999 (NSW) (the 'CSP Act'), the Court is enjoined against taking into account a lack of antecedents and good character as mitigating factors if the Court is satisfied that either factor assisted the offender to commit his offending. The Court of Criminal Appeal recently referred to this provision in <i>Bhatia v R</i> [2023] NSWCCA 12. There, it was observed that the Crown carried the onus of discharging an evidential onus of a connection between the offender's good character or lack of convictions and the offender having access to the complainant. In particular, in that case, it was found that the victim's father gave no evidence he had assessed the offender's character or history. No other evidence suggested that the offender actively used his good character or befriended the family to gain access to the victim.</p> <p>[57] In this case, there was no evidence from the victim's mother (or father). To the contrary, the evidence was such that the offender did not engage in any steps to try to procure the proximity of the victim to him.</p> <p>[58] However, the circumstance that the offender engaged in repeated sexual abuse of the victim over several years disentitles him from a finding of good character or any suggestion that the offences were isolated. They underscored the victim's vulnerability.</p> |
| 8. | <i>R v WD</i> [2023] NSWDC 542       | Step-father and daughter aged 14 years   | <p>[29] Relevant mitigating factors are: The offender does not have any record of previous convictions and is a person of good character (ss 21A(3)(e), (f) CSPA). This can be taken into account as there is no suggestion he used his prior good character to assist his offending (cf s 21A(5A) CSPA)...</p> <p>[42] I accept that the risk of the offender re-offending is low. That is based on his prior good character, the references provided in his favour and the assessment contained in the Sentencing Assessment Report. It is difficult to understand, in the circumstances where he was regarded as a stable father figure to his former partner's children (who authored one of the</p>  |

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|    |  |   | <p>references) and his prior good character, why the offender did what he did. He has experienced gaol since his arrest and seen institutionalised offenders. I am confident from the material that he does not want to return to prison after he has served his sentence for these offences and is unlikely to re-offend.</p> <p>[45] Thus, the Court finds itself with the task of sentencing this offender who has committed serious sexual offences, in breach of trust, against a young victim with understandable resultant and likely long-lasting trauma. At the same time, the offender is of prior good character, unknown to police and has shown remorse and has good prospects of rehabilitation. He is entitled to appropriate leniency.</p>  |
| 9. | <i>R v RM (No. 6) [2023] NSWDC 305</i> | The offender was the father of the child. | <p>[75] The offender had no prior record of criminal convictions.</p> <p>[76] The offender received a “good character” direction in my summing up to the jury; although that was based upon the absence of prior convictions and evidence from his brother and sister-in-law of his unremarkable dealings with teenage children. It was unrelated to good works or contributions performed for the community.</p> <p>[77] Nevertheless, as the Crown correctly acknowledged, this is not a case where good character or absence of prior convictions assisted the offender to commit the offences so as to exclude those matters as mitigating circumstances conformably with s 21A(5A) of the CSP Act (see <i>Bhatia v R [2023] NSWCCA 12</i>). By reason of his relationship to the victim, the offender had essentially unfettered access to her.</p> <p>[78] The offender relies upon character references from: “(a) His niece, Cristal Wrightman; (b) His mother, LM; (c) A self-described ‘close family friend’, Rebecca Marks-Rylewski; (d) A friend, Wayne Stoneman; (e) His older brother, PM.”</p> <p>[79] Those references have been considered. Particularly pertinent was the testimonial of Cristal Wrightman, who said that she herself was the object of child abuse herself (reportedly by her father) when she was aged between 5 to 9 years old and she was comforted by the offender and aside from the love he gave to her, provided other tangible benefits; including, amongst other things, loving attention to her own children. It is troubling, however, that Ms Wriighthman appeared to cavil with the jury’s verdicts.</p> <p>[80] Ms Marks-Rylewski also observed that aside from her own long association (throughout her 36 years) with him, but there was also the association of her own children with the offender.</p> |

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|     |   |   | <p>[81] The Crown contends that the Court could not find that the offender was of prior good character, in light of tendency evidence given at the trial by Ms Ludwig; although the Crown acknowledged that the Court could give weight to the offender's lack of antecedents.</p> <p>[82] In my view the first part of that submission should be rejected. It was unnecessary for the jury to determine beyond reasonable doubt whether Ms Ludwig's account of sexual abuse being perpetrated against her in 1996 or 1997 had occurred, when she was 11 or 12 years of age. It is also unnecessary for the sentencing court to determine that this conduct occurred and at any rate, I am not satisfied beyond reasonable doubt that this was so. Because of the way in which the allegation was raised at trial (as an uncharged act), the "tendency witness" was giving evidence of an event occurring in excess of 25 years before, without evidence of subsequent complaint or corroborating evidence. Whilst the evidence would likely have affected the jury's consideration of the offender's guilt on the counts, it was to be weighed (along with the victim's evidence on all of the charges) only on the balance of probabilities.</p> <p><b><u>[83] The offender's general good character and the absence of convictions therefore yields some leniency to him in the sentencing exercise.</u></b> There is, however, force in the Crown's submission that in view of the course of offending against the victim, over a period of 9 years, the weight to be ascribed, particularly, to prior good character, is limited.</p> |
| 10. | <i>R v Underwood (a pseudonym) [2023] NSWDC 309</i> | The offender was the cousin of the child. | <p>[95] I have the benefit of a report from Mr Gorham, a neuropsychologist and forensic psychologist. Mr Gorham Gave evidence this morning. I have a number of references from family members who all speak to Underwood's good character and how he has throughout his young life achieved much despite his intellectual difficulties: Exhibit 1.</p> <p>[110] Underwood has never been in trouble with the police or Courts before. Unless there is a statutory exception, a person's prior good character must be taken into account on sentence: Ryan v The Queen (2001) 206 CLR 267; [2001] HCA 21. That exception does not apply here: s 21A (5A) Crimes (Sentencing Procedure) Act 1999. For some types of offences, prior good character, while it must be taken into account, carries less weight than for others. Much will depend on the circumstances of the offending. For example, a pattern of repeat offending over a period during the course of an ongoing relationship between the offender and a child - a relationship which was deliberately fostered by him for his own sexual gratification: R v PGM [2008] NSWCCA 172 at [43] to [44].</p> <p>[111] This case is not as clear cut as PGM. There was a lot more than a singular desire to achieve sexual gratification in the interaction between the two young people here.</p>   |

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|     |  |   | <p>[112] The offender, although young, has been able to work and foster good relations with other family members. His referees speak of a man who has struggled since a child with learning and communications skills. He is described as loving and generous by nature, as a man who has tried always to do the right thing, sociable by nature, despite his disability, “a fine young man”.</p> <p>[113] While on bail he gave a lot of support to his grandparents. He gives his time to help others.</p> <p>[114] He has never broken the law before. His offending in the context of his living in the same home as the complainant and his wrong belief she was his girlfriend is unlikely to be repeated. <b><u>His prior good character requires some reduction in sentence.</u></b> Despite his conviction and the obvious disruption these events have caused, many family members offer their continuing support.</p>   |
| 11. | <i>R v Crawford</i> [2023] NSWDC 203                               | The offender was the child’s netball coach.   | <p>[86] <u>I am not satisfied that the good character and lack of previous convictions of the offender was of assistance to the offender in the commission of the index offences and therefore the offender’s good character may be taken into account as a mitigating factor.</u> I also take into account the onerous bail conditions imposed on the offender and his strict compliance therewith, including reporting to Police on over 350 occasions.</p>  |
| 12. | <i>Director of Public Prosecutions (NSW) v TH</i> [2023] NSWCCA 81 | The offender was the stepfather of the child. | <ul style="list-style-type: none"> <li>• Did not challenge primary judge’s finding that s 21A(5A) didn’t apply but found that the offender was not of good character</li> </ul> <p>[26] While this passage is not to be taken as an exhaustive description of the potential relevance of uncharged acts in the sentencing process it is sufficient to describe the relevance of the facts and circumstances of the uncharged acts (and the Form 1 offences) to the sentencing of the respondent in this case. <u>The fact that the respondent engaged in serious and continual sexual abuse of the victim over many years destroys any suggestion that he is to be treated as a person of good character and that any of these offences was an isolated incident.</u> Further, they emphasise the vulnerability of the victim and give context to the offending in reinforcing what the substantive offences suggest, namely, that for a sustained period the respondent sexualised the victim and treated him as a sexual object.</p> <p>[30] Second, her Honour was <u>not satisfied that the respondent’s lack of prior convictions and good character assisted him to commit the offences</u> (Sentencing Act, s 21A(5A); see <i>Bhatia v R</i> [2023] NSWCCA 12).</p> |

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| 13. | <i>R v Lincoln</i> [2023] NSWDC 68        | The offender was friends with the child's family.  | <p>[80] There is no issue that the offender was a person of good character who had no criminal convictions at the time of the offending. The Crown relies on the above section to submit that his good character should not be taken into account as a mitigating factor pursuant to s 21A(5A). To so find, the court must be satisfied beyond reasonable doubt that the offender's good character was of assistance to him in the commission of the offences.</p> <p>[81] The Crown relies on the evidence at trial that established the offender became friendly with the family of the victims through his involvement in the CYO, as a friend of their older brother and that he became a regular visitor to the S family home. In <i>Bhatia v R</i> [2023] NSWCCA 12, the Court of Criminal Appeal held that <u>in circumstances where the offender is a family friend, evidence must go beyond the fact of that relationship to establish that the commission of an offence was materially assisted by the offender's good character or reputation.</u> Notwithstanding the victims' evidence at trial that the offender was a family friend, there was no evidence, for example from their parents who were predeceased, that there had been any assessment of his character or history and no other evidence which suggested that the offender actively used his good character or befriended the family to gain access to the victims.</p> <p>[82] On the basis of the evidence at trial <u>I am not persuaded beyond reasonable doubt that s 21A(5A) applies so as to deprive the offender of relying upon his good character as a mitigating factor here.</u> I further take into account the character evidence referred to above in finding that <u>for a period of nearly 50 years since the offending the offender has led an exemplary life</u> and accept his counsel's submission that that is a factor which is favourable to his prospects of rehabilitation and his assessment as being at a low risk of recidivism.</p> |
| 14. | <i>Bhatia v The King</i> [2023] NSWCCA 12 | The offender was friends with the child's family. The child referred to the offender as "uncle". | <p>Beech-Jones CJ</p> <p>[13] <u>Generally, satisfaction that an offender's good character or lack of previous convictions was "of [some] assistance to the offender in the commission of the offence" is not an especially high causal threshold to overcome.</u> However, at the very least, it would involve the former making some material contribution to the latter. Presumably, in most cases in which the provision is invoked, the offender's good character or lack of convictions will have played some material part in the offender having access to the victim(s).</p> <p>[14] However, <u>for the provision to be engaged, the Court must be "satisfied" of the relevant connection. In the context of an accusatorial system of justice, that places a practical, if not evidential, onus on the Crown to point to evidence of the relevant connection.</u> In some cases, that evidence may have been adduced at the trial, although the fact that it might be relevant to sentence does not make such evidence relevant to proving guilt. Even if it is relevant to proving</p>  |

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|     |                                     |   | <p>guilt, circumstances can be readily envisaged where such evidence might not be adduced or might be rejected at a trial, given the risks to all concerned of adducing evidence about character and prior convictions. Regardless, the Crown may seek to adduce evidence that engages s 21A(5A) at the sentence hearing.</p> <p>[15] <u>In this case, there was no evidence capable of satisfying s 21A(5A). As noted by Hamill J, at its highest the evidence of GS's father was that he had known the applicant for 20 years and "trusted him". Beyond that, there was no evidence that GS's father made any assessment of his character or adverted to whether or not he had any criminal convictions. Moreover, <u>GS's father did not give evidence that, if he had believed the applicant was not of good character or knew the applicant had convictions for similar conduct or even for serious offences, then he would not have let him care for GS. If he had, then an issue would have arisen as to whether that evidence was sufficient to engage s 21A(5A). In the absence of such evidence it is not appropriate to address that issue in this case.</u></u></p> <p><u>Hamill J</u><br/>[141] In the present case, the applicant was a family friend for many years before the child was born. <u>There was nothing to suggest he befriended the family to gain access to the child. The child was yet to be born.</u> The mother's evidence (at trial) explained the nature of the relationship. She said she knew Mr Bhatia "back from my country" and met him on her wedding day in 2004. He was her husband's friend. She agreed in cross-examination that the applicant was "like a brother" to her and "like an uncle" to GS.</p> |
| 15. | <i>R v Farrell</i> [2022] NSWDC 695 | The offender was the child's uncle.                   | <p>[59] Ms Hughes [Solicitor Advocate for the DPP] took me to the facts derived from George's evidence, which the jury obviously accepted. She reviewed general principles in sentencing for matters such as this and she noted the abuse of trust and position of authority. In her submission, s 21A(5A) Crimes (Sentencing Procedure) Act is enlivened and less weight should be given to the offender's good character. <u>With respect, George had access to his uncle because he was a relative, not because he was a person of good character. I do not believe s 21A(5A) is applicable in these circumstances.</u></p>   |
| 16. | <i>R v Duncan</i> [2022] NSWDC 543  | The children were friends of the offender's daughter. | <p>[62] The Crown seeks a finding pursuant to s 21A(5A) of the Crimes (Sentencing Procedure) Act 1999 which would disentitle him to this finding, if the Court is satisfied that this good character or lack of previous convictions was of assistance to his committing the offences. <u>I do not make that finding in this case because of the lack of evidence to enable such a finding and the availability of positive evidence to the contrary.</u> The Crown submission that the offender's good character and position as a responsible member of the community was of assistance to</p>   |

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|     |   |   | <p>him in befriending the victim's families and in the commission of these offences lacks an evidentiary basis.</p> <p>[63] As I understand the evidence, SC's family had been family friends of the offender and his family for many years. <u>There is no evidence as to how and in what circumstances the offender came to know the families of OO and HU, and to the extent that there is any evidence at all it would appear that the fact that any of these victims was present in company with the offender came about as a result of their friendship with his younger daughter and the connection between the mothers of those children. There is no evidence from which I could make the findings sought.</u></p> <p>[64] As I referred to above, the offender is entitled to have his lack of significant convictions taken into account as a mitigating factor and I will do so when ultimately determining the appropriate sentence. <u>The impact of his prior good character in this case however <b>does not to any real extent operate as a mitigating factor</b> for these sentences in circumstances where he committed these offences on four separate occasions during 2019 against three separate victims.</u></p>   |
| 17. | <p><i>R v KH [2022]</i><br/>NSWDC 706</p> | <ul style="list-style-type: none"> <li>• The offender was the step grandfather of FF</li> <li>• The offender was the grandfather of AC</li> </ul> | <p>[24] The offender was born in June 1936, he is 86 years of age. He has no prior convictions. <u>He is entitled to a degree of leniency. I accept Mr Thorpe's submission that <b>there is no suggestion that the offender took advantage of his previous good character to facilitate the commission of the offence: s 21A(5A).</b></u></p> <p>[28] The trial earlier this year was vacated when the offender contracted COVID. The risk of catching COVID in the gaol setting is increased due to his age and ill health. His time in custody due to his health issues will be more onerous. Tendered on behalf of the offender were a number of testimonials from family members including CH, his grandson, who gave evidence in the Crown case. It would appear that the offending has created a schism within the family. The offender enjoys the support of his daughter, RE, her husband RE (referred to in error as RE's wife), HH, the wife of CH, CH, and LH, the son of the offender, AC who was the carer of the offender and his partner, MJ.</p> <p>[29] There was also a letter from LD, the niece of the offender. The testimonials speak highly of the offender and the devotion to his now deceased wife who had childhood polio, requiring callipers and walking sticks to walk, and in the latter part of her life, she was wheelchair bound. They unconditionally support him and have difficulty reconciling the jury's verdicts. The ongoing supports speak well for his prospects upon release from gaol. The offender presents with a strong subjective case, principally by reason of his age and health issues.</p> |

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| 18. | <i>Cheung v The Queen</i><br>[2022] NSWCCA 168 | The offender was the husband of the child's babysitter.     | <p><i>(the appeal judge upheld the sentence imposed by the sentencing judge)</i></p> <p>[144] As to mitigatory considerations, the sentencing judge found, pursuant to s 21A(3)(b) of the CSP Act, that the offence was not part of a planned activity. The applicant had no prior convictions and was a person of prior good character. Although the Crown did not seek to rely upon s 21A(5A) of the CSP Act, namely, that the applicant's status had assisted him in the commission of the offence, the sentencing judge found that, as noted, his behaviour involved a breach of trust. <u>Her Honour concluded, "In my view, it would not be appropriate additionally to deny [the applicant] the mitigation that flows from prior good character in the circumstances of this case"</u>.</p> <p>[167] I am not persuaded that the sentence imposed was manifestly excessive.</p> <p>[168] Accordingly, I would grant leave to appeal the sentence but dismiss the appeal.</p>  |
| 19. | <i>R v BQL</i> [2022]<br>NSWDC 295             | The offender was in a relationship with the child's mother. | <p>[59] I am satisfied that it was an aggravating factor pursuant to s 21A(2)(eb) of the CSP Act that all of the offences were committed in the home of the victim and further pursuant to s 21A(2)(k) that the offender was in a position of trust and authority throughout the whole period of the offending, given that he was in an intimate relationship with the victim's mother, and living in the same home.</p> <p>[60] <u>I accept that the offender was otherwise a person of good character, and I am not satisfied beyond reasonable doubt that the offender's good character was of assistance to him in the commission of the offence here so as to engage s 21A(5A) of the CSP Act.</u> The offender is therefore entitled to <b>some leniency</b> by reason of his prior good character and the absence of any prior conviction, however, the nature and circumstances of the offence for which the offender is being sentenced is a countervailing factor of the upmost importance, which means the offender's otherwise good character can only be a <b>small factor</b> to be weighed in the sentencing process (see: <i>Ryan v The Queen</i> per McHugh J at 278, and <i>R v PGM</i> (2008) 187 A Crim R 152; [2008] NSWCCA 172 at [43]).</p> |
| 20. | <i>Fenner v The Queen</i><br>[2022] NSWCCA 48  | The offender was the child's school teacher.                | <p><i>(the appeal judge held that sexual intercourse with a young person above the age of 17 years and under the age of 18 years under the offender's special care was not a child sexual offence)</i></p> <p>[50] Whilst it may be accepted that the applicant was unlikely to have been employed as a teacher at the school if he had a prior criminal record, by the time of the present offending he had been a schoolteacher for almost 10 years. <u>This was not a case involving an offender who deliberately set out to use the benefits of his apparent good character to obtain a trusted</u></p>  |



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|     |  |   | <p><u>position with the specific purpose of committing the offences in mind.</u> For the period he had been a schoolteacher he had demonstrated his actual good character in the course of his employment, as well as in other areas of his life outside of his employment. In that way, not to take these factors into account as mitigating was an error by reason of s 21A(3) of the Crimes (Sentencing Procedure) Act 1999 (NSW), and by reason of what was said in Ryan at [36].</p> <p>[51] <u>The offence contrary to s 73 is not a child sexual offence.</u> In that way, s 21A(5A) of the Sentencing Act does not operate to prevent the applicant's good character being taken into account. I would uphold this ground of appeal.</p>  |
| 21. | <i>BB v The Queen</i><br>[2021] NSWCCA 283 | The offender was the child's father.  | <p>[49] The sentencing judge found that, whilst the applicant had minimised his conduct when interviewed by police, he had come to accept full responsibility for his crimes and was remorseful. He was a man of good character with no prior criminal history. <u>His Honour declined to make a finding pursuant to s 21A(5A) of the Crimes (Sentencing Procedure) Act to the effect that the applicant's good character had aided him in the commission of the offences and could not be treated as a mitigating factor.</u></p> <p>[50] His Honour described the subjective case as "significant", noting that the applicant, a <u>man of excellent character, was "highly regarded by his peers in the legal profession"</u>. He was assessed as having good prospects of rehabilitation. The applicant's depression was treated as a mitigating feature, reducing the importance of both specific and general deterrence to "a certain extent", and causing any custodial sentence to weigh more heavily upon him. His Honour was not satisfied, however, that <u>the applicant's depression contributed to his offending conduct.</u></p> <p>[90] Having considered all of those matters raised by the applicant I do not regard the sentence imposed upon him to be unfair or unjust to him. Although I would grant leave to appeal, the appeal should be dismissed.</p> |
| 22. | <i>BR v The Queen</i><br>[2021] NSWCCA 279 | The offender was the father, stepfather and step-grandfather of the children. | <p>[153] I make the same findings as the sentencing judge in respect of the relevance of the applicant's criminal record not being an aggravating factor but denying him leniency. I add that, <u>even though s 21A(5A) of the CSP Act was not submitted to be applicable, good character is of little relevance in cases of repeat offending of child sexual assault over an extended period:</u> R v Van Ryn [2016] NSWCCA 1 at [286]."</p>   |

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| 23. | <i>R v Sanchez</i> [2021] NSWDC 561 | The offender was the uncle of the children.  | <p>[53] The offender submits that his good character but for the offending is a mitigating consideration (section 21A(3)(f) CSP Act). The fact that he has not previously been convicted of a criminal offence in Chile or Australia is not challenged. That he has maintained employment and been an adequate father is not challenged. The testimonial evidence adds little. The Crown on the other hand submits that the offender's good character and lack of previous convictions is not of mitigating effect because the Court would be satisfied that his good character was of assistance in the commission of his offending (section 21A(5A) CSP Act)."</p> <p>[54] <u>That his familiar relationship as uncle assisted his access to FV and SV, is not the same thing as good standing within the community assisting in his commission of the offending: AH v R [2015] NSWCCA 51 at [21] to [24]. His repeat offending with each of the victims and over a period spanning more than a decade, deprives the offender of his claim of good character, within the meaning of the sub-sub section and generally of a claim for leniency that might otherwise be available had the offending been spontaneous and only involved an isolated incident: AH v R supra at [23] and [24].</u></p> |
| 24. | <i>R v JK</i> [2021] NSWDC 502      | <p>The offender was the brother of the stepfather of KCW and ACW.</p> <p>The offender was friends with NM's parents.</p> | <p>[72] The offender is a 39-year-old male with no prior criminal history and, as I say, there are <u>a number of testimonials before me speaking of his good character.</u> The Crown accepted that <u>the offender was not assisted in the commission of the offences by the fact of his prior good character and lack of criminal convictions and that s 21A(5A) of the Crimes (Sentencing Procedure) Act was not engaged here.</u> The offender's prior good character is a mitigating factor that I am bound to have regard to in arriving at the appropriate sentence. However, given the nature of the offending, it is only a small factor to be weighed in the sentencing process.</p>   |
| 25. | <i>R v NK</i> [2021] NSWDC 275      | The offender was the stepfather of the child.  | <p>[37] The offender submitted that he had a strong subjective case. He was 36 at the time of the alleged offending, with no prior criminal history and was a person of prior good character. It was submitted there was no basis for the court to conclude, pursuant to s 21A(5A) of the Crimes (Sentencing Procedure) Act 1999 ( 'CSPA' ) that the offender's good character was of assistance to him in the commission of the offence. It was submitted the offender should be entitled to some leniency by reason of his prior good character and the absence of prior convictions, relying on <i>Ryan v The Queen</i> (2001) 206 CLR 267; [2001] HCA 21.</p> <p>[86] I accept the offender's submission that the good character of the offender, as outlined in the evidence of the character witnesses at trial, and in the testimonials tendered on his behalf on the sentence hearing, is a mitigating feature to be taken into account on sentencing. <u>I am not satisfied beyond reasonable doubt that the offender's good character was of assistance to him in the commission of the offence here so as to engage s 21A(5A) of the CSPA. The</u></p>   |

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|     |                                    |   | <p><u>offender is therefore entitled to some leniency by reason of his prior good character and the absence of any prior conviction.</u> The offender's good character and the lack of prior convictions are mitigating factors that I am bound to consider however the nature and circumstances of the offence for which the offender is being sentenced is a countervailing factor of the upmost importance, which means <u>the offender's otherwise good character can only be a <b>small factor</b> to be weighed in the sentencing process</u> - see Ryan v The Queen per McHugh J at 278, and R v PGM at [43].</p>   |
| 26. | <i>R v Hansen</i> [2021] NSWDC 457 | The offender engaged in sexual intercourse with children and produced child pornography in the Philippines. | <p>[396] S 21A(5A) of this Act applies to child sexual offences; it requires that good character or lack of previous convictions is not to be taken into account as a mitigating factor if the Court is satisfied that it was of assistance to the offender in the commission of the offence. On the material before me, <u>I do not believe that I can come to a finding in those terms and accordingly, to the <b>limited extent</b> I have observed, good character should be brought to account.</u>"</p>  |
| 27. | <i>R v Hovell</i> [2021] NSWDC 326 | The offender was the child's school teacher.  | <p>[134] The Crown submits that the offender's good character and reputation (he the teacher to the student) assisted the offender in the commission of the offences and therefore his good character cannot be taken into account in mitigation. The Crown submits that the prohibition of using good character in child sex offences is extended to historic offences prior to the enactment of subs (5A).</p> <p>[135] The Crown submit that good character can be taken into account pursuant to s 21A(g)(n), namely prospects of rehabilitation and assessment of likelihood of reoffending.</p> <p>[136] Mr English [legal representative of the offender] submits that in order for s 21A(5A) to apply the Court should make an express statement that it is satisfied that the offender's good character and lack of previous convictions has been of assistance to the offender in the commission of the offence: NLR v R [2011] NSWCCA 246 at [31]. He submits that the evidence of the offender's good character relates to the period after the commission of the offences and therefore a finding required to invoke s 21A(5A) is not open. He further submits that the evidence of good character relied on by the offender postdates the offending conduct and it must be said that the individual aspects of his character were of assistance to him - and it cannot be said that these individual aspects of his character were of assistance to him in the commission of the offences.</p> <p>[137] He points to the statutory construction where s 21A(3)(f) uses the words "was a person of good character" and s 21A(5A)"was of assistance to the offender in the commission of the offence".</p> |

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|     |                                 |  | <p>[138] He says s 21A(3)(f) has application because the good character postdates the commission of the offences and relies upon the words “was of good character”.</p> <p>[139] Such a submission is consistent with what James J said in <i>NRL</i> (supra) at [25]. His Honour said:<br/> “Section 21A(5A) of the Crimes (Sentencing Procedure) Act, which is referred to in this ground of appeal, is to be read with s 21A(3)(e) and (f) of the Act. Section 21A(3) provides that the mitigating factors are to be taken into account in determining the appropriate sentence for an offence include (e) the offender does not have any record (or any significant record) of previous convictions; and (f) the offender is of good character.”</p> <p>[140] I am not satisfied that the role of a teacher/student necessarily is one of good character assisting in the commission of the offences invoking the operation of s 21A(5A). A school teacher with prior convictions that did not disentitle him or her to be a teacher could still commit the offences due to the role of teacher/student. It does not follow that a teacher with an unblemished record, that that unblemished record assists in the commission of the offences.</p> |
| 28. | <i>R v A</i> [2021] NSWDC 232   | The offender was the great uncle of the child. | <p>[62] The Crown made no submission in relation to section 21A(5A) of the 1999 Act applied and accepted that there was <u>no evidence indicating that the Offender's prior good character was of assistance to him in the commission of the offence.</u> The Offender in his case presented a number of testimonials. Those references are from members of his family and others. It is apparent that he is an Aboriginal elder whom is highly regarded. I am satisfied on the basis of the material before me that prior to the offending (subject of the offence for which he is to be sentenced); he was a person of good character. However, <u>in assessing the weight that I can give to that good character, I bear in mind the comments of Howie J in <i>R v Kennedy</i> and give this matter <b>limited weight.</b></u>”</p>   |
| 29. | <i>R v DSM</i> [2021] NSWDC 283 | The offender was the child's grandfather.      | <p>[21] He is supported by a number of character referees who say that the offences are out of character and that he is generally a hardworking man and a supportive friend who is otherwise a useful member of society. I accept these things, although of course they do not diminish the seriousness of the offences and can have little impact on the overall penalty. That is in part because of the seriousness with which these types of offences must be regarded and the importance of general and personal deterrence.</p> <p>[22] Section 21A(5A) prevents the Court from taking into account as a mitigating factor an offender's prior good character if the Court is satisfied that that factor was of assistance in the commission of the offence. However <u>I agree with the Crown submission that this provision is</u></p>  |

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|     |   |  | <p><u>not called into operation in this case as the offender's access to the victim arose from a familial relationship rather than as a result of his then good character. I accept therefore that the offender's prior good character is a factor to be taken into account in his favour.</u> Prior good character however is not a matter that carries a lot of weight in sentencing for offences of this kind.</p>   |
| 30. | <i>R v H</i> [2021] NSWDC 107           | The Offender was a half-brother of the child's mother. | <p>[30] The Crown accepted that at the time of the offending, the Offender was of prior good character, a mitigating factor under s 21A(3)(f) of the 1999 Act and <u>the Crown did not argue that s 21A(5A) of the 1999 Act applies.</u> His criminal antecedent displayed that he had no prior convictions which is a mitigating factor under s 21A(3)(e) of the 1999 Act.</p>   |
| 31. | <i>R v Cannon</i> [2020] NSWDC 901      | The offender was friends with the child's mother.      | <p>[50] <u>I pause to note that I do not find that the prior good character that the offender has to draw upon was a factor that enabled him in the commission of the offence in each instance, although it must be observed that in the circumstances in which these offences occurred he was extended a significant measure of trust, particularly by the victim's mother,</u> which, as events progressed and before the matter was given into the hands of the police she sought to confront with a direct instruction to the offender to desist in his persistent efforts to be in contact with the victim.</p>  |
| 32. | <i>BG v The Queen</i> [2020] NSWCCA 295 | The offender was the child's stepfather.               | <ul style="list-style-type: none"> <li>• Bellew J and Simpson AJA were in favour of reducing the offender's sentence on the basis that while the sentencing judge found that the applicant was of "good character" he neglected to specify the weight he gave to this consideration per the second step of McHugh J's formulation of "good character" in the sentencing process in <i>Ryan v The Queen</i>.</li> <li>• Wilson J dissented and found that the offender's sentence should not be reduced.</li> </ul> <p><u>Bellew J</u><br/>[19] In terms of evidence of character, the applicant has a criminal history which contains two entries for driving offences, and an entry for the possession of an unregistered firearm which was dismissed. <u>He is entitled to the benefit of the fact that he has no significant history of prior offending.</u> However in my view, the weight that can be attached to that factor is necessarily limited. This is so, firstly because of the limited nature of the character evidence itself, and secondly because of the characteristics of the offending to which I have referred.</p> <p><u>Wilson J</u><br/>[148] The passage cited by his Honour from <i>R v Kennedy</i> [2000] NSWCCA 527 is an important one. Each of the features listed by Howie J applies to the offences committed by the applicant: general deterrence is a significant feature in child sexual assault sentencing; the offences are</p> |

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|     |                                |  | <p>serious and frequently committed by persons of good character; and the applicant's prior good character assisted him in placing him in a position where it was possible for him to commit the offences, since, it need hardly be stated, <u>if the applicant was a person with a history of sexually assaulting teenage boys, the complainant's mother would not have permitted her teenage son to spend a night with him unsupervised.</u></p> <p>[149] Although it is of no relevance here, <u>since the sentencing judge made no relevant finding,</u> there is also a statutory rule to similar effect. Section 21A(5A) of the Crimes (Sentencing Procedure) Act provides that good character may not be taken into account in mitigation on sentence for a child sexual assault offence where the court is satisfied that the factor was of assistance to the offender in the commission of an offence.)</p> <p>[150] <u>On that basis, the weight to be given to good character in the applicant's case ought to have been diminished.</u></p>  |
| 33. | <i>R v NC</i> [2020] NSWDC 547 | The offender was a foster parent of the child. | <p>[46] The Crown further submits that s 21A(5A) of the Crimes (Sentencing Procedure) Act, 1999 applies in that as the victim was a foster child the offender had to undergo various background checks before the child was placed with the offender and his partner. Under cross-examination to the Crown at the sentence hearing the offender conceded that he did have to undergo such background checks.</p> <p>[48] As I understood the Crown's submission, s 21A(5A) is enlivened because his good character was of assistance in the successful completion of the background checks. Not surprisingly, Mr King on behalf of the offender opposes this. It was apparent from the somewhat offhand remark of the Crown's representative when I inquired whether he had the Second Reading Speech that he had not read that speech. Yet again this court is apparently expected to research a point when the Crown makes a bold or robust submission. The then Attorney-General, The Honourable John Hatzistergos said in the Crimes Amendment (Sexual Offences) Bill 2008 Second Reading Speech on 26 November 2008:</p> <p>“ ...The bill also makes important changes to the Crimes (Sentencing Procedure) Act 1999 to ensure that when sentencing an offender for a child sexual offence the court is not to take into account the offender's prior good character or lack of previous convictions if that factor was of assistance to the offender in the commission of the offence. The simple fact of a person's clean record and good character may assist an offender to gain the trust of a child, or the child's parents in order to commit a sexual offence against 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 sentence ... ”</p> |

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|     |  |   | <p>[49] It seems to me that <u>a fair reading of the Second Reading Speech indicates that s 21A(5A) was not intended to cover the situation as in the matter under consideration where the offending is committed by the parent or foster parent in the house. As indicated above the fact that the child is a foster child goes to the weight attributed to the factor of abuse of the position of trust.</u> It is not as if that factor is not relevant or is ignored in the sentencing process.</p> <p>[52] In the matters presently under consideration there is the matter of the conduct in 2003. <u>The offender is entitled to some <b>small degree of leniency</b> because of his record, but I emphasise the word "small".</u></p>  |
| 34. | <p><i>WG v R; KG v R</i><br/>[2020] NSWCCA 155</p>   | <p>The offenders were the parents of the child.</p> | <p>[1492] Having made a positive finding that s 21A(5A) of the Crimes (Sentencing Procedure) Act was not enlivened (that section makes express provision in appropriate cases for the good character or lack of previous convictions of an offender to be disregarded for sentencing purposes where the sentencing court is satisfied that the claim of good character was of assistance to the offender in the commission of the offence), the only issue her Honour was obliged to determine was the weight which was to be afforded the evidence of good character.</p> <p>[1493] In my view, the passage in the sentencing reasons upon which counsel relied as demonstrating error should not be construed as reflecting either a failure on the part of the sentencing judge to take good character into account or a refusal to allow WG any leniency whatsoever for that evidence. Properly understood, her Honour should be taken to have found that despite the fact that WG had no record of previous convictions, and that evidence from a range of character witnesses supported the fact that that he was a person of good character prior to his offending against JG in 1997, qualified by the fact that they were either unaware or unprepared to accept that he was convicted of 73 offences of the utmost gravity after that date, her Honour resolved to give the evidence no weight in mitigation. The language her Honour used is expressive of an assessment of the weight that might be afforded evidence in mitigation and a determination, in the exercise of discretion, to afford it no degree of leniency in all circumstances.</p> |
| 35. | <p><i>Scott v The Queen</i><br/>[2020] NSWCCA 81</p> | <p>The offender was the child's grandfather.</p>    | <p>[146] While the sentencing Judge referred to the Prosecutor's submission that "less weight is given to an offender's good character where there has been sexual offending against young children", that principle has greater resonance in a case where the offender has used their position or good character to commit the offence: Crimes (Sentencing Procedure) Act, s 21A(5A), <i>AH v R</i> [2015] NSWCCA 51 at [22]-[25] and, see generally as to the position at common law, <i>R v PGM</i> [2008] NSWCCA 172; 187 A Crim R 152. <u>The applicant did not use his good character or his position in the community to commit the offences. It was his position of trust as a grandfather that was abused and this was taken into account as an aggravating</u></p>   |

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|     |                                   |  | <p><u>feature in assessing the objective seriousness of his offending. Mr Scott's good character, and more importantly his history of charitable works and substantial contributions to the community, were matters entitled to <b>substantial weight</b> in a determination of the appropriate sentence:</u> Ryan v The Queen (2001) 206 CLR 267; [2001] HCA 21.</p>  |
| 36. | <i>R v PG</i> [2020]<br>NSWDC 144 | The offender was friends with the child's father. He was also charged with child pornography offences. | <p>[7] In a similar vein there was argument concerning the application of section 21A(5A). The question here is whether the good character of the offender assisted in the commission of the offending.</p> <p>[8] In support of his argument Mr Behan for the offender relied upon AH v R [2015] NSWCCA 51. In that case the offender was the de facto partner of the mother of the victim. It was not a case of the standing in the community of the offender that had aided in enabling the offending. <u>The argument here for the offender is that for reasons not detailed in any way in the facts the offender was a friend of the victim's father and invited to the church. The reasons for the friendship and the invitation to the church are not known. In my view they could plainly be reasons unassociated with the character of the offender and indeed in a church situation it may be a person's lack of good character that forms part of the motivation for the invitation. It is not necessary to take the hypothesising that far. <b>It suffices to say that there is nothing on the facts that supports the view that the offending of the offender was assisted by his good character.</b></u> I accept the submission of the offender in this regard.</p> |
| 37. | <i>R v JM</i> [2020]<br>NSWDC 140 | The offender was the child's grandfather.  | <p>[22] As to mitigating factors there was argument concerning the application of section 21A(5A). The question here is whether the good character of the offender assisted in the commission of the offending.</p> <p>[23] In support of his argument Mr Behan for the offender relied upon AH v R [2015] NSWCCA 51. In that case the offender was the de facto partner of the mother of the victim. In our present case it was not the standing in the community of the offender that aided in enabling the offending. <u><b>Rather it is his standing as the victim's grandfather, unassociated (at least on these facts) with his good character.</b></u></p> <p>[33] For the reasons discussed above I take into account the fact that this offender has no criminal history at the age of 55. There is a lack of testimonials of people who have known him prior to his imprisonment that seems to me understandable in circumstances where his family have turned away from him and it is perhaps the case that so too have others that he may otherwise have called friends. <u>On one view this is a regrettable approach for it discounts entirely the worthwhile things a person may have done before their offending and those pre-</u></p>                            |



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|     |   |  | <u>offending matters are matters which if evidenced can assist an offender.</u> Here however there is no such evidence beyond the clear criminal record which I take into account  |
| 38. | <i>R v Grimmer</i> [2020]<br>NSWDC 63     | The offender was acquainted with the grandmother and a family friend of the child. The child described the offender as being a father figure to her. | [44] The offender has no criminal history for all intents and purposes. The Crown did not submit that s 21A(5A) of the Crimes (Sentencing Procedure) Act 1999 (the Sentencing Act) applies in the present case, in the sense that the offender's good character assisted him in the commission of the offences. <u>For the purposes of this sentence I accept that the offender is entitled to <b>some limited leniency</b> because of his lack of prior criminal history.</u>   |
| 39. | <i>R v Shackfield</i> [2020]<br>NSWDC 939 | The offender was the child's uncle.  | [44] I take into account the offender's good character, both before and after the offence, and the other mitigating factors to which I have referred: his absence of any record of convictions; that he is unlikely to reoffend; that he has good prospects of rehabilitation; that his remorse is indicated by evidence of an acceptance of responsibility for his actions, an acknowledgement of the injury he has caused and his guilty plea; and that his full and detailed acknowledgment of his offence has assisted law enforcement authorities in circumstances where the victim no longer is involved in the matter. <u>I do not regard s 21A(5A) of the Crimes (Sentencing Procedure) Act as having effect to extinguish good character as relevant in this case as Mr Shackfield's good character was not of assistance with the commission of the offence.</u> In accordance with s 21A(5AA), I do not take into account any level of self-induced intoxication of the offender. |
| 40. | <i>R v CG</i> [2020]<br>NSWDC 107         | The offender was the children's uncle.   | [56] The Offender has no prior criminal history and I take that into account.<br><br>[57] The Crown submitted that notwithstanding the offences are not included in the range of offences encapsulated by s 21A(5A) of the 1999 Act, the Offender's prior good character should be given little weight. The Defence submitted, notwithstanding this, that some weight should be afforded to the Offender's prior good character. Whilst I would accept that the Offender's prior good character is to be afforded some weight, bearing in mind the time over which the various offending acts occurred this has been progressively and substantially eroded.   |
| 41. | <i>R v DS</i> [2020]<br>NSWDC 66          | The offender was the child's uncle.  | [22] As stated, the offender was aged 45 at the time of the offending and is now aged 46. The evidence establishes that he has a clear criminal record and, indeed, has never been charged with a criminal offence.  |

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|     |                                       |  | <p>[23] He is therefore a person of good character and I have taken this into account in his favour, although it is well established that <b>evidence of good character carries less weight with the type of offences</b> presently under consideration: <i>Dousha v R</i> [2008] NSWCCA 263 at [49].</p> <p>[24] In relation to this aspect, it was common ground that s 21A(5A) of the Crimes (Sentencing Procedure) Act <u>did not apply to the current matter as it could not be said that the offenders prior good character or lack of previous convictions was of assistance to the offender in the commission of the offence.</u></p>   |
| 42. | <i>R v Mirigliani</i> [2020] NSWDC 21 | The offender committed child pornography offences                                    | <p>[44] I accept that I should, to an extent, take account of the Offender's prior good character and the absence of previous convictions. The Defence accepted that in matters of this nature, good character and the absence of prior antecedents carry less weight. The Crown did not submit that the s 21A (5A) of the 1999 Act applied so as to disentitle consideration in respect of the State offence.</p>  |
| 43. | <i>R v Threlkeld</i> [2019] NSWDC 695 | The offender was a relative of the victim.   | <p>[90] The Crown accepts that the <u>offender did not use his good character to assist the offender in the commission of the offences.</u> That being so, I am not restrained by s 21A((5A) from weighing evidence of the offender's good character in the sentencing assessment.</p> <p>[91] Counsel for the offender did not overstate the significance of this consideration, recognising that it usually carries less weight than usual for offences of this kind.</p> <p>[92] There were some written testimonials placed before the Court. Two of them were from the offender's family; another from his current partner. It has to be said that they were brief in nature and Counsel for the offender acknowledged that the referees did not appear to evince a clear appreciation of the serious nature of the offences to which the offender pleaded guilty to.</p> <p>[93] Nevertheless, I accept that the offender was depicted as being caring and considerate and, as a qualification to what I have just referred to above, his current partner attended in Court during the sentencing hearing and remains supportive of the offender.</p> |
| 44. | <i>R v JP</i> [2019] NSWDC 700        | The offender was the grandfather of one child and the step grandfather of the other. | <p>[29] There is also no dispute that the offender has no criminal history and is now presently 73 years of age. Due to the offences in question section 21A(5A) needs to be considered. That section provides that a lack of previous convictions 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. This section is plainly aimed at those circumstances where an offender takes advantage of his/her good standing in the community to facilitate the offending whether by gaining access to a victim in isolation or otherwise by gaining a position</p>  |

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|     |   |   | <p>of authority and therefore opportunity to offend by reason of being of good character. Other circumstances to which this section applies can no doubt arise. <b><u>In the present case the position of authority is gained by reason of being the grandfather of the victims, not by reason of the grandfather's good character.</u></b> That is had this offender had a criminal record of some kind the probability is that he would still have been left in charge of the children, thus facilitating his ability to offend, though the position might one would hope be different if it was a criminal history of sex offending against children. The section however is not so specific and I am not satisfied that the offender's good record was a factor that assisted in the offending so that the good record and the good character of the offender will be taken into account in determining sentence. <u>Not only is this offender of good character by reason of not having a criminal history but he has also bravely served his country in wartime and he has suffered since then as a result through the affliction of PTSD. These matters I take into account.</u></p> |
| 45. | <i>R v JA</i> [2019] NSWDC 641                  | The offender was in a relationship with the child's mother.                   | <p>[40] I accept the offender's submissions that the following mitigating factors apply pursuant to s 21A(3):</p> <ul style="list-style-type: none"> <li>“(b) The offence was not of a planned or organised criminal activity.</li> <li>(e) The offender does not have any record of previous convictions for sexual assault.</li> <li>(f) The offender was a person of otherwise good character with limited criminal history; and</li> <li>(h) the offender has good prospects of rehabilitation by reason of his age and absence of prior offending.”</li> </ul> <p>I note that good character has <b>little weight</b> in the sentencing process for sexual offending by adults upon children and cannot be taken into account as a mitigating factor pursuant to s 21A(5A) of the CSPA if the court is satisfied that that factor was of assistance to the offender in the commission of the offence. <u>On the evidence before me I am unable to make a finding that would enliven s 21A(5A).</u> I am also unable to make any finding as to the offender's prospects of rehabilitation, given his continuing denial of the offences.</p>   |
| 46. | <i>O'Sullivan v The Queen</i> [2019] NSWCCA 261 | The offender was a teacher and principal at the school the children attended. | <p>[24] Her Honour had before her a number of testimonials as to his good character. However, because the applicant's behaviour was facilitated by his position and good character, <u>her Honour had regard to the provisions of s 21A(5A) of the Crimes (Sentencing Procedure) Act 1999 (NSW).</u> Even though that provision did not apply to historical sexual offence cases, <u>her Honour was satisfied that the applicant's good character was of assistance to him in the commission of the offences. As a result, she gave the applicant's previous good character <b>little weight.</b></u>”</p>  |

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| 47. | <i>R v Curran</i> [2019] NSWDC 460           | The offender was a family friend who the child regarded as a father figure.  | [88] <u>The Crown abandoned a submission that the offender's prior good character and lack of previous convictions could not be taken into account as a mitigating factor</u> by reason of s 21A(5A) Crimes (Sentencing Procedure) Act 1999, which provides that in sentencing for child sexual offences, good character and lack of previous convictions are not to be taken into account if those factors were of assistance to the offender in the commission of the offences: AH v R [2015] NSWCCA 51.  |
| 48. | <i>R v Stevenson (No 2)</i> [2019] NSWDC 611 | The offender was a youth leader with the Church of England Boys Society.   | [69] So far as Ms Hughes' submission regarding s 21A(5A) Crimes (Sentencing Procedure) Act, it is important to note that the offender was a child when he started his offending behaviour. He had never previously been in trouble before, and <u>I would suspect that CEBS would not have allowed him to be a youth leader had he had an extensive criminal history. But there is no evidence before me that he used his good character, as such, to commit these offences.</u> That is not to say that he did not abuse the trust that everyone put in him, a matter I have already alluded to. |
| 49. | <i>R v Hamilton</i> [2019] NSWDC 382         | The offender was the father of the children.   | [22] In the Crown case on sentence, victim's impact statements have been provided by KB, MB and HB2. The statements of KB and MB were read to the Court. They are taken into account in the way suggested by Basten JA in R v Thomas [2007] NSWCCA 269 for the purpose of bearing in mind the harm done to the victim as provided by s 3A of the Crimes (Sentencing Procedure) Act. <u>The Crown specifically does not assert that they lead to any aggravating factor being taken into account, nor that s 21A(5A) applies in the present case.</u>  |
| 50. | <i>R v PJD</i> [2019] NSWDC 45               | The offender was the child's brother in law.   | [91] The following mitigating factors are relevant pursuant to s 21A(3), namely, that the offender has no criminal history and is otherwise a person of good character (S 21A(3)(e) and (f)). I accept the Crown's submission, however, that the good character of the offender here, given the type of offending, must be afforded less weight. I am not satisfied that the offender's good character and lack of previous convictions were of assistance to the offender in the commission of the offences so as to enliven s 21A(5A).  |
| 51. | <i>R v DER</i> [2018] NSWDC 98               | The offender abused multiple children. The offender was the uncle of two of the children. One of the victims was friends with the offender's children. | [76] The Offender had no prior criminal history, a matter I take into account.<br>[77] The Defence submitted that the Offender was a person of prior good character pursuant to s 21A(3)(f) of the 1999 Act.<br>[78] The Crown however submitted that, <u>notwithstanding the fact that the offences are not included in those referred to in s 21A(5A), the Offender's prior good character would be given little weight,</u> given the lengthy time over which the offending took place, being that the good  |

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|     |                                       |   | <p>character which he had prior to the commission of the present offences was substantially eroded.</p> <p>[79] I bear in mind the time period over which the offending occurred. <u>I accept the Offender's prior good character is to be afforded <b>relatively less weight</b> over the time the offending occurred.</u></p>  |
| 52. | <i>R v Mollel</i> [2017] NSWDC 36     | The offender was friends with the child's family.   | <p>[33] The offender has no prior antecedents. In the course of the trial evidence as to his good character were given by his wife and other witnesses called on his behalf.</p> <p>[34] The Crown submitted that although the offender was a person of prior good character, this had limited weight. <u>The Crown did not submit that s 21A(5A) of the 1999 Act applied, but did submit that the offender's prior good character should be given less weight as the offending occurred in the context of the offender having access to the victim as a result of being a trusted family friend and the principles of general deterrence would be of significant consideration in the Court's sentencing exercise.</u></p> <p>[35] I accept that this is so.</p>  |
| 53. | <i>R v YY (No 3)</i> [2016] NSWDC 364 | The offender was the child's grandfather.   | <p>[45] YY is respected by friends and family. He was considered to be of good character. Two granddaughters spoke of it to me. Tendered as exhibit 2 were a number of testimonials. His sisters spoke of a man who one described as "one in a million", someone who was always there for them. His granddaughters spoke of him being caring and respectful, always good and supportive. Other friends spoke of the support he had given his wife and later partner and them when they were sick. The solid support he has had, as evidenced by the people in court and those who still believe in him gives me some hope that those pro social supports will continue while he is in custody and will assist him in adjusting to normal community life, reducing hopefully his risk of re-offending.</p> <p>[57] His good character is relevant. This is not a matter where s 21A(5A) applies however the crimes involved repeated offending over years that lessens the significance of prior good character: PGM [2008] NSWCCA 172.</p> |
| 54. | <i>R v DJH</i> [2016] NSWDC 211       | The offender abused multiple children. He was a cousin of LF, a babysitter to TB, the uncle of MH, SH and JH, a | <p>[104] The offender has no criminal record, however, given the nature of the offending that matter assumes less significance than it might otherwise; Counsel for the offender conceded as much. Mention was made in submissions of s 21A(5A) of the Crimes (Sentencing Procedure) Act. According to a note I made at the time, Mr Nash submitted that that provision does not preclude some consideration being given to the offender for his lack of record. In the</p>  |

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|     |                                       | family friend of EH and KB'.                                       | matter presently under consideration I could not find that the offender's character assisted him in the commission of the offences. This is particularly so given the familial connection with the offender and the victims. I also note in this regard the decision of AH v The Queen [2015] NSWCCA 51 at [20]-[25] per Hidden J. <u>Although of less weight, some consideration must be given to the offender for his lack of record.</u>  |
| 55. | <i>R v ND</i> [2016]<br>NSWCCA 103    | The offender was the child's uncle                                 | <p>[44] The respondent's subjective features were important matters to be weighed in the balance as matters of mitigation. He was responsible for the financial support of his family, and the care of his wife. That is not an uncommon feature of offenders coming before the courts. He could properly be regarded as a person of prior good character. There were no other features of the respondent's subjective case which warranted leniency.</p> <p>[45] We note, on the question of the respondent's good character, that <u>the Crown did not submit that s 21A(5A) of the Crimes (Sentencing Procedure) Act, which prevents good character being taken into account in mitigation in child sexual assault cases, applies. Whilst arguably it does apply here, given the absence of submissions addressed to its application, the preferable course is to not apply it.</u> It is well recognised in existing authority that good character is of less significance in cases of repeated sexual offending: see PGM v R [2008] NSWCCA 172 at [43]-[44]; Dousha v R [2008] NSWCCA 263 at [49]. As this is not a case of multiple offending, and the Crown did not submit that the principles were directly applicable, we will put these authorities to one side.</p>   |
| 56. | <i>R v Van Ryn</i> [2016]<br>NSWCCA 1 | The offender was friends with all nine of the children's families. | <p>[285] A number of subjective mitigating factors legitimately identified by the primary judge should be brought to bear on the assessment of sentence. In this regard I have in mind the 25 per cent reduction of sentence for each individual offence on account of the respondent's early pleas of guilty. I also have in mind his otherwise prior good character (I agree that the 1981 indecent exposure offence is too removed in time to have significance). His charitable and other community engagements are significant matters.</p> <p>[286] No submissions were made as to whether or not s 21A(5A) of the Crimes (Sentencing Procedure) Act, which prohibits good character and a lack of previous convictions being taken into account in child sexual assault cases, should apply. It applies if either of those factors was of assistance to the offender in committing the offences. <u>Arguably it does apply but the situation is not entirely clear and in the absence of the Crown raising it I would not apply it.</u> I bear in mind, however, that <u>good character is of less significance in cases such as this involving repeated sexual offending against children over a lengthy period of time: see, for example, PGM v R [2008] NSWCCA 172; 187 A Crim R 152 at [43]-[44]; Dousha v R [2008] NSWCCA 263 at [49].</u></p> |

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| 57. | <i>R v P</i> [2015] NSWDC 262           | The offender downloaded and possessed child pornography involving approximately 1,000 children. | <p>[18] <u>The offender is entitled to have his otherwise good character taken into account. The Crown in her written submissions suggested that s 21A(5A) of the Crimes (Sentencing Procedure) Act 1999 applied but withdrew that submission after considering a recent decision of the Court of Criminal Appeal in which a judge who applied that section, admittedly in a dissimilar situation, was found to be in error.</u></p> <p>[19] These are the offender's first offences, I will take that into account in his favour.</p>  |
| 58. | <i>KAB v The Queen</i> [2015] NSWCCA 55 | The offender was the stepfather of the children.  | <p>[51] Whilst the applicant complains that her Honour was not entitled to rely upon s 21A(5A) of the Crimes (Sentencing Procedure) Act 1999 because not all of the offences before the court were "child sexual offences" as defined by the Act, and because she made no express finding in that regard, it is not certain that her Honour was in fact referring to the operation of that provision, which provides,</p> <p style="padding-left: 40px;">"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."</p> <p>[52] <u>Since she made no reference to the section, it seems likely that her Honour was doing no more than balancing the applicant's good character against the countervailing factors relevant to the exercise of her discretion in determining the weight to be given to character evidence.</u> Those factors included the repeated nature of the offences, the length of time over which the offences had been carried out, the fact that there were two children who had been exploited and abused, and that the commission of the offences represented a grave breach of trust.</p> <p>[53] Having considered those features, her Honour concluded that the absence of criminal convictions was a matter of no significant weight in the circumstances of the case. That was a conclusion available to her in the exercise of the sentencing discretion.</p> |
| 59. | <i>AH v The Queen</i> [2015] NSWCCA 51  | The offender was in a relationship with the child's mother.                                     | <p>[21] In the present case, applying that subsection, her Honour found that the applicant's lack of prior convictions was not a mitigating factor on the basis that "his good character was a factor which was of assistance to him in the commission of these offences." However, the basis of that finding is not explained.</p> <p>[22] Mr Hunt submitted that the applicant's good character played no part in his obtaining access to the victim. <u>He was not exercising a role in the community which might have afforded him access to children, such as a teacher, sports coach or pastor.</u> He also contrasted the present case with <i>O'Brien v R</i> [2013] NSWCCA 197, a case involving the sexual abuse of a girl</p>  |

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|     |  |  | <p>by an offender who had befriended her family. Adamson J, with whom Latham J and I agreed, noted at [25] that he had been a responsible and helpful member of his community, and observed at [39] that he had “used his good character to gain access to the victim and to gain her trust.”</p> <p>[25] <u>Mr Hunt's argument on this ground should be accepted. Whatever be the ambit of subs (5A), it is not applicable to the present case. Obviously, his relationship with the victim's mother and the trust which that engendered created an environment in which the offences could be committed. It does not appear to me, however, that his good character could be said to have assisted his commission of the offences. This ground is made out.”</u></p>  |
| 60. | <i>R v Flax</i> [2014] NSWDC 268           | The offender was in a relationship with the child's grandmother.   | <p>[32] Mr Flax is entitled to the benefit of the fact that he has had no prior convictions whatsoever. I accept both Mr Fitzhardinge's and Mr Fitzgerald's submissions that <u>I should not be satisfied that his good character “was of assistance to the offender in the commission of the offence” so that s 21A(5A) does not apply.</u> So, as Mr Fitzhardinge fairly conceded, “the offender is entitled to have his prior good character taken into account in mitigation of his sentence”.</p>  |
| 61. | <i>Cross v The Queen</i> [2012] NSWCCA 114 | The offender operated an organisation that provided after school sporting activities that the child attended. The offender was also convicted of producing and possessing child pornography. | <p>[44] The Applicant is entitled to a discount of 25% for an early plea. Taking into account the low level of seriousness of the offence (whilst not ignoring the fact that the Applicant established the child care arrangements which enabled him to engage in the conduct concerned), <u>the fact that there was only the one incident as a result of that childcare arrangement, the fact that the Applicant had at the time no prior convictions (there being no evidence in relation to s 21A(5A) Crimes (Sentencing Procedure) Act 1999 either before the Sentencing Judge or this Court) and the strong subjective case arising out of the Applicant's background,</u> an appropriate starting point for the sentence is a non-parole period of two years. By reason of the 25% discount that will result in a sentence of an 18 month non-parole period, with an additional term of 6 months.</p> |





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27 October 2023

Mark Follett  
Executive Director  
Policy Reform and Legislation Branch  
Department of Communities and Justice

By email only: [policy@dcj.nsw.gov.au](mailto:policy@dcj.nsw.gov.au)

Dear Mr Follett

**Review of s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (CSPA)*  
Submission by The Grace Tame Foundation**

1. This submission has been prepared by us on behalf of The Grace Tame Foundation (**GTF**), in response to your invitation to provide feedback for the purposes of the review. The Board of GTF is grateful for this opportunity. The writer is a member of the Board, and Marque Lawyers assists GTF with its work.
2. The mission of GTF is to campaign for and help fund initiatives which work to prevent and respond to child sexual abuse (**CSA**). Law reform is a key strategic interest for GTF, and one of the critical areas we have identified is that of sentencing approaches to CSA offenders. We are therefore keenly interested in this review.

**Introduction**

3. It must surely be uncontroversial to assert that child sexual abuse is a crime more serious than any other, one for which we should have no tolerance and the incidence of which we should meet with a systemic response that recognises the outrageous and irreparable harm it does to its victims, that reflects our disgust at its perpetrators, and that is designed to have a material impact on its incidence.
4. If that is right, then our system – in the way that it assesses the appropriate punishment that CSA perpetrators should receive - is failing its imperatives comprehensively. These outcomes

do not reflect seriousness; they are consistent instead with a societal blindness to the realities of CSA incidence and consequence.

5. In June 2023, Peter Albert Crawford was sentenced in the District Court of New South Wales.<sup>1</sup> He had been convicted by a jury of 13 counts of sexual touching and indecent assault against four different female victims aged between 11 and 19 years. He had pleaded not guilty to all charges. Eleven of the crimes carried a maximum sentence of 10 years' imprisonment, the other two carried a maximum of five years.
6. Judge Mahoney in the District Court imposed a non-custodial sentence on Crawford: a Community Corrections Order for a period of 18 months.
7. Crawford was a pillar of his church and the netball community. He was in his 60s when he committed the offences, all of which occurred in circumstances where he had direct access to the victims solely as a result of his positions of trust and authority in the church or as a netball coach (and president of the district netball association). The offences involved touching the victims on the outside of their clothing, either on/around the vagina or on the bottom. He had denied the allegations entirely, claiming they had been fabricated by all four victims.
8. The sentencing judge found that Crawford "has led an otherwise exemplary life both in respect of his own career in the public service and his voluntary work carried out over decades, both for his local church, his local netball club and ultimately as president of the district netball association. I accept the testimonials which state that the index offending is out of character for him."
9. The Crown had submitted that the court should apply s 21A(5A), but the judge found that he was "not satisfied that the good character and lack of previous convictions of the offender was of assistance to the offender in the commission of the index offences and therefore the offender's good character may be taken into account as a mitigating factor." He concluded: "I am cognizant that subjective factors should not outweigh principles of deterrence and denunciation when sentencing for serious criminal offences. However given the low objective seriousness of most of the index offending...I am satisfied that the fact of the conviction and a community based sentence will, in this case, satisfy the purpose of sentencing set out in s 3A of the CSPA."
10. Objectively, the facts of the case disclose that Crawford was a serial paedophile predator, who repeatedly and avidly exploited the opportunities that his positions of trust and authority and his general standing afforded him, to commit gross violations on the bodies of female children. The court's finding that he was a low risk of reoffending may raise an eyebrow, but even accepting that, how the sentence handed to him achieved any purpose of general deterrence or genuinely reflected the supposed seriousness with which our society views the behaviour he engaged in,

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<sup>1</sup> *R v Crawford* [2023] NSWDC 203

is mystifying to us. We believe, with good reason, that it would be equally mystifying to most members of the community.

11. There is nothing exceptional about Crawford’s case; we selected it more or less at random from the 61 cases in the District Court of NSW or Court of Criminal Appeal that have considered the application of s 21A(5A). Importantly, it offers a very recent illustration of what we believe is incoherence and irrationality in the way the courts are approaching the use of “good character” evidence in sentencing and particularly the application of s 21A(5A), leading to wildly inconsistent and frankly arbitrary results.

### Current legislative environment

12. The purposes of sentencing are set out in s 3A of the CSPA. It is settled law that the principle of “general deterrence is a paramount consideration for offences involving child abuse/child pornography material”<sup>2</sup>.
13. It has also been stated many times that CSA offences are a category of offence where good character should generally be given less weight as a mitigating factor on sentencing, both at common law and under statute.<sup>3</sup>
14. S 21A(5A) was introduced in 2008 in direct response to the High Court’s decision in *Ryan v The Queen*<sup>4</sup>, where by majority the court ruled that it was an error to state that an offender’s (in that case a paedophile priest) “unblemished character and reputation” should not be taken into account as a mitigating factor.
15. S 21A(5A) provides:

“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” (emphasis added).
16. The critical words are “of assistance to the offender” – these have, in our submission, been the root cause of much unhelpful judicial confusion and mixed messaging conveyed by sentencing

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<sup>2</sup> NSW Sentencing Bench Book, [17-541]

<sup>3</sup> eg *R v Gent* [2005] NSWCCA 370, at [51]-[52]; *R v Kennedy* [2000] NSWCCA 527, at [21]-[22]; *BG v The Queen* [2020] NSWCCA 295, at [148] – the offence “is one frequently committed by persons of good character”

<sup>4</sup> [2001] HCA 21

decisions that have drawn and continue to draw distinctions that have no basis in evidence or logic.

17. The current state of NSW law is that, unless s 21A(5A) is found to apply, the sentencing judge is bound to treat good character and lack of previous convictions as a mitigating factor, although the authorities largely confirm that it will usually be appropriate to give it very little weight.
18. A standing principle of sentencing practice is that an offender can only be punished for the crimes of which they have been convicted. That is translated in practice into a materially different presumption: that they have not committed any other offences at all. This in turn leads to two additional presumptions: that they have good character (otherwise) as a fact; and that their lack of previous convictions is because they have committed no other offences. Thus, an absence of proof either way is converted into a positive presumption to the benefit of the perpetrator.

#### **What the evidence says**

19. In 2023, the Australian Child Maltreatment Study (**ACMS**), the first nationally representative study of child maltreatment rates, found that 28.5% of Australians had experienced child sexual abuse. Girls experience child sexual abuse at two times the rate that boys do (37.3% of girls compared to 18.8% of boys). The ACMS found that almost 1 in 4 Australians experienced one or more types of contact child sexual abuse (23.7%), while almost 1 in 5 experienced non-contact child sexual abuse (18.1%). Almost 1 in 10 Australians experienced forced sex in childhood (8.7%).<sup>5</sup>
20. By comparison, the rates of reporting of CSA offences are extremely low and reporting is generally long-delayed. The finding by the Royal Commission into Institutional Responses to Child Sexual Abuse, that the average time it takes for a CSA survivor to disclose is 23.9 years (20.6 years for females, 25.6 years for males), is well-known and not doubted. Many victims never disclose, many never make a police complaint, and only a small proportion of cases ever reach a criminal court. As a consequence, what the courts encounter is only the smallest tip of an unimaginably large iceberg.
21. The majority of CSA remains undetected. Most research in relation to offenders' perpetration and recidivism has focused on those who are known (mainly, convicted offenders). However, "detected and convicted CSA perpetrators may not be representative of the wider population of individuals who commit CSA, rendering our available knowledge on the topic biased and incomplete. One research study found that more than 70% of CSA offences remain undetected

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<sup>5</sup> B Mathews, *The Australian Child Maltreatment Study: National prevalence and associated health outcomes of child abuse and neglect*, Med J Aust 2023: 218 (6): S1-S51. See also NSW Government summary at [https://www.facs.nsw.gov.au/\\_data/assets/pdf\\_file/0009/846783/The-Australian-Child-Maltreatment-Study-shows-a-large-proportion-of-Australians-experience-maltreatment-as-children-June-2023-FACSIAR-Summary.pdf](https://www.facs.nsw.gov.au/_data/assets/pdf_file/0009/846783/The-Australian-Child-Maltreatment-Study-shows-a-large-proportion-of-Australians-experience-maltreatment-as-children-June-2023-FACSIAR-Summary.pdf)

among convicted perpetrators alone, which says nothing about perpetrators who have never been caught.”<sup>6</sup>

22. Recent research has identified subsets of CSA offenders who abuse multiple victims but do not share common characteristics with the better-known class of institutional recidivist offenders of the type exposed by the Royal Commission (eg priests): “Many individuals exhibited 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.”<sup>7</sup>
23. Similarly, a study<sup>8</sup> that compared CSA offenders with long detection lags (LDL) against those with short detection lags (SDL) (long detection lag meaning that they evaded detection by authorities for a long time), found that “the LDL offenders “had more psychopathic traits, more pre-pubescent child victims, more often in professional employment and have less antisocial and criminogenic indicators than the comparative SDL group”.
24. The study concluded that these LDL men “tended to be in professional, often child-related occupations. They also often specialise in sexual offending across their criminal career and lacked criminal versatility. They often targeted young boys and demonstrated a high degree of manipulation and conning, as well as superficial charm used to access victims, often through the children’s primary caregivers and families. They were neither impulsive nor led irresponsible lives and did not often interact with police. These characteristics contributed to not only facilitating the sexual abuse, but also their evasion from detection.”
25. The above statement could be comfortably repackaged as a definition of “otherwise good character and lack of previous convictions”. There is an entire cohort of CSA offenders, of unknown size, who operate undetected for long periods or altogether, who possess behavioural characteristics that align precisely with the courts’ understanding of “good character” and yet are intrinsic to their offending.
26. The point is that what the evidence, limited as it is, shows is that much of the assumed knowledge about CSA offenders, on which sentencing practice is based, is unsupported and

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<sup>6</sup> S J Nicol and others, *Evading Detection: What do we know about men charged with extrafamilial child sexual abuse following delayed detection?*, Journal of Child Sexual Abuse 4 March 2022

<sup>7</sup> Ibid.

<sup>8</sup> S J Nicol and others, *Dodging Justice: characteristics of men with multiple victims who evade detection for long periods*, Journal of Sexual Aggression, 26 December 2022

unsustainable. In many respects, it leads the courts in the opposite direction from where they should be heading.

### **The concept of “good character” in a CSA context**

27. We draw your attention to an article written by Nicole Stevens and Dr Sarah Wendt in 2014, which focused on the construction of “good character” wielded by CSA offenders and their lawyers in sentencing submissions.<sup>9</sup>
28. The rationale behind taking “good character” into account as a mitigating factor has two related elements. One is the importance of the sentencing principles of rehabilitation, specific deterrence and protection of the community, for which purpose the offender’s character is theoretically relevant. 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 a CSA offence opportunistically and “out of character”; meaning that they’re not likely to do it again.
29. As the article notes, in the way a defence approaches its submissions on mitigation, often “good character was used paradoxically, with the defence first separating character from the offence, citing the crime as being ‘out of character’, before using the defendant’s character proactively to gain leniency in the sentence.” This construct, according to the authors, “avoids, minimises and silences child sexual abuse, and potentially represents another negative experience victims of child sexual abuse could encounter when proceeding through the criminal justice system”.
30. We can only adopt and endorse the entirety of the Stevens/Wendt article. It is solidly based in analysis of case studies in South Australia’s courts, and its conclusions are compelling.
31. The Royal Commission considered this issue closely, noting that “allowing good character as a mitigating factor can be highly problematic...In particular, offenders may use their reputation and good character to facilitate the grooming and sexual abuse of children and to mask their behaviour...In many of the cases of institutional child sexual abuse that we have considered, it is clear that the perpetrator’s good character and reputation facilitated the offending, In some cases, it enabled them to continue to offend despite complaints or allegations being made.”<sup>10</sup>
32. The Royal Commission noted three particular concerns: that the use of good character is based on assumptions for which there is no or empirical support (specifically, that prior good character suggests a low risk of reoffending and that a lack of prior convictions means a lack of prior offending); that accepting otherwise good character may belittle the harm done by the offending;

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<sup>9</sup> N Stevens and S Wendt, *The “good” child sex offender: Constructions of defendants in child sexual abuse sentencing*, Journal of Judicial Administration Vol 24, No 2, 2014

<sup>10</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report Executive Summary p.98

and that the presence of good character didn't make the offending more likely to have taken place (when the opposite is patently the case).

33. The Royal Commission recommended that all jurisdictions adopt the NSW model by enacting a similar provision to s 21A(5A). It did not recommend any reform designed to broaden the application of s 21A(5A), despite recognising its problematic aspects. Of course, the Royal Commission's terms of reference restricted it to examining CSA in institutional contexts, where s 21A(5A) has been given the most play. It did not consider non-institutional offending, such as by family members or family friends. As will be seen, it is in this latter area that the provision has failed most profoundly.
34. The Victorian Sentencing Advisory Council considered this issue in 2016.<sup>11</sup> It pointed to the generic problems that the application of ordinary sentencing principles to CSA cases have caused: "The conflict between these appellate statements and the authorities...shows that the appropriate impact of an offender's previous good character in cases of child sexual abuse is currently unsettled and unsatisfactory".
35. The NSW Sentencing Council looked at CSA sentencing practice in 2008.<sup>12</sup> It picked up an important statement from the common law which has become overlooked:
 

"To give an applicant's 'previous good character' much weight in such circumstances is to give an appearance that the court is conceding to a parent or a person in loco parentis or within the family unit some right to use a child for sexual pleasure at will."<sup>13</sup>
36. The Council noted that "good character" may be the critical factor that enables offences to be committed. In *Ryan*, the offender had multiple victims over decades, gaining access to them via their parents' trust in his character – "the fact that they never suspected him of his crimes because of his position was a significant factor in enabling him to continue offending for over 20 years".
37. The Council noted that "there is a good deal of empirical research concerning the resistance of sexual offenders to participate in sexual offending rehabilitation programs, and concerning the limited success of those who do participate." Again, this factor has tended to be overlooked by the courts, replaced by an operating assumption that rehabilitation is directly connected to "good

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<sup>11</sup> Dr S Krasnostein, *Sentencing of Offenders: Sexual Penetration with a Child under 12*, Sentencing Advisory Council, June 2016, p 96ff

<sup>12</sup> *Penalties relating to sexual assault offences in New South Wales*, Vol 1, NSW Sentencing Council, August 2008, [5.49]ff

<sup>13</sup> *Hermann v The Queen* (1988) 37 A Crim R 440, 448 per Lee J

character” (when in our view it clearly is not, or at least there is no evidence that it is, in the context of CSA).

38. The Council recommended the enactment of what became s 21A(5A). It does not appear to have anticipated much difficulty with its interpretation by the courts.

#### **A fool’s errand**

39. Notably, the NSW Sentencing Council’s recommendation was that the amendment that became 21A(5A) should provide for exclusion of good character or lack of prior convictions from mitigatory consideration where the offender “*used* these factors to commit the offence”.<sup>14</sup> As noted earlier, s 21A(5A) provides that the exclusion applies where the factor was “*of assistance to the offender in the commission of the offence*”.
40. In the United Kingdom, the sentencing practice is governed by guidelines rather than legislation. Good character is available as a mitigating factor, but may be treated as an aggravating factor instead “where an offender has used their good character or status to *facilitate or conceal* the offending”.<sup>15</sup>
41. These different choices reflect, in our view, the central confusion around the mechanisms and dynamics of CSA offending. The reality is that CSA is by definition a conscious choice; nobody sexually abuses a child by accident or negligence. Whether it is considered (problematically) as opportunistic, or calculated, it is always consciously chosen as the diametrical opposite of doing the right thing. We do not distinguish between physical offences and child pornography offences in this regard; they all cause the same harm and involve conscious choice.
42. CSA is an offence of abuse of power; its victims cannot consent by law, which merely reflects the scientific and cultural reality. It is the ultimate breach of trust, regardless of why or how it transpires.
43. Given these truths, it can be readily seen that parsing the motivations of a CSA offender and the details of how they managed to do it is a fool’s errand. It misses the point entirely. By focusing attention, for the purposes of determining the degree of culpability, on “why and how he did it”, instead of the fact that he did it, the fact that it was *per se* an indefensible and intolerable crime against every standard of human decency, and the fact that it necessarily caused immense and irreparable harm to its victim/s, the law take us off on a meaningless tangent. In a sense, who cares why and how he did it? Do we have zero tolerance for child sexual abuse, or do we not?

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<sup>14</sup> Op cit [5.60]

<sup>15</sup> <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/abuse-of-position-of-trust-sexual-activity-with-a-child/>



Through the tedious quest to find reasons to excuse or mitigate the offender's guilt, we play right into his hands: we minimise, deflect and risk victim-blaming.

44. It makes no meaningful difference whether the dividing line between one CSA offender and another is drawn by reference to whether they "used" their good character, were "assisted by" their good character, or their good character "facilitated or concealed" their offending. The line will fall in different places because these terms have subtly different meanings, and because the courts will (as they must) seek to give them coherent meaning. Either way, the distinctions thus drawn will give some CSA perpetrators a discount off their sentence, perhaps a large one, while others will miss out or even have the same material used to increase their sentence. These distinctions are, given what we know about CSA perpetrators and their behaviour, meaningless.
45. That is the theory. In the next section we explore the practice, to see whether our theory is supported by evidence.

#### **NSW case law analysis**

46. As noted above, the operation of s 21A(5A) has been considered so far in 61 reported NSW cases.<sup>16</sup> We have conducted an analysis of all of these cases, to the extent practically possible within the time we have had available. It is not as comprehensive as we would like. We would encourage those conducting this review to carry the analysis to a much deeper level; the 61 cases present the best evidence of whether the system is really delivering on its imperatives.
47. Critically, the sentences handed down by criminal courts should be relatively consistent and coherent. It should be possible to derive, from all the precedents, a clear and consistent set of principles and to observe that those principles are producing coherent outcomes.
48. Regrettably, what stands out most obviously from our analysis is that there has been neither consistency nor coherence in the way that NSW courts have dealt with good character evidence and the application of s 21A(5A) since its enactment.
49. These are the high-level statistics from our analysis:
  - (a) of the 61 cases, s 21A(5A) was found to be applicable in 22 and found to be not applicable in 39;
  - (b) in the 22 cases where s 21A(5A) was found to apply:
    - 7 offenders were the victim's school teacher

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<sup>16</sup> We have not accessed or included unreported District Court cases in our analysis, but would also encourage that the review looks at these as well.

- 5 offenders were family members
- 4 offenders were friends of the victim's family
- 2 offenders were in positions of authority in facilities where the victims resided
- 1 offender was the victim's foster parent
- 1 offender was a child-care worker
- 1 offender was the victim's teacher in an extracurricular activity
- 1 offender was in another position of authority and care over the victim

(c) in the 39 cases where s 21A(5A) was found not to apply:

- 18 offenders were family members
- 7 offenders were friends of the victim's family
- 3 offenders were the victim's school teacher
- 3 offenders were in a relationship with the victim's mother
- 3 offenders were the victim's teacher in an extracurricular activity
- 2 offenders were convicted of child pornography charges
- 2 offenders were in other positions of authority and care over the victim
- 1 offender was the victim's foster parent

50. Our detailed analysis is attached as an appendix to this submission. It includes a table identifying the cases that fall within each of the above categories, as well as a listing of all the cases with extracts regarding how s 21A(5A) was dealt with by the sentencing judge or appeal court.
51. We have genuinely attempted to find common threads of sentencing principle in the 61 cases, but failed. As the summary above shows, there is no consistency or coherence to be found in the categorisation of the offenders' positions relative to their victims.
52. One of the first things one notices is how few of the cases could be classed as "institutional". We expect that that is because, in the vast majority of criminal cases against CSA offenders who perpetrated in traditionally understood institutional contexts (such as paedophile priests), on sentencing their lawyers have not bothered seeking mitigation for good character or lack of

previous convictions, on the basis that s 21A(5A) would inevitably be applied to exclude that material anyway.

53. Consequently, the field of contention regarding s 21A(5A) has not been the category of CSA cases with which the Royal Commission was concerned, but largely “non-institutional” cases. It is important to recognise this, because the largest bulk of CSA offenders (as well as the most unreported/undetected class) are offenders within family contexts – not just immediate family members, but extended family, family friends and others who gain access to family environments through their relationship with their victims’ parents. By far the largest single class of offenders in the cases are uncles of the victims.
54. It is also obvious that the cases are all over the place in their application of s 21A(5A). A close reading of the sentencing reasons, including appeal decisions, reveals that this incoherence is far greater than can be explained by the ordinary variations of judicial discretion when applied to fact-specific contexts.
55. The leading authority at present is *Bhatia v The King*, decided by the Court of Criminal Appeal earlier this year.<sup>17</sup> The following statement of principle by Hamill J reflects the current state of play in NSW:

“The language of the section is quite broad and is apt to catch a wider range of offenders than those who trade on their trusted position and good reputation to gain access to unsuspecting children because the child or parent is misled into believing the perpetrator is a person of good character. Some obvious examples would include priests and other members of the clergy, politicians, teachers and community leaders. The section would also apply to offenders, with no other connection to the family, who act as babysitters or carers by providing references attesting to their good character and reputation. It may also apply, in some instances, to family friends and relatives, but only where there is evidence going beyond the fact of the relationship and which suggests that the offender’s good character or reputation played a role in assisting them to gain access to the child or to commit the offence. As I said at the outset, it would be wrong to be prescriptive and the application of the section turns on the facts of the individual case.”<sup>18</sup>

56. The Attorney-General’s language in the second reading speech when s 21A(5A) was enacted, included the following passage:

“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 the child. Any offender who has misused his or her perceived trustworthiness and honesty in this

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<sup>17</sup> [2023] NSWCCA 12

<sup>18</sup> *Id.*, [144]

way cannot use his or her good character and clean record as a mitigating factor in sentencing”.

57. Hamil J noted the above passage and concluded that “the reference to an offender ‘misusing his or her perceived trustworthiness and honesty’ suggests that there should be some active use of good character.”<sup>19</sup>
58. Another way of reading the Attorney-General’s words would be to note the inconsistency between the two quoted sentences and conclude that the “use” and “misuse” were being applied interchangeably in that context. Nevertheless, the courts have generally assumed that they must make a positive finding, beyond reasonable doubt, that the offender took some active steps to use their position to assist with their offending.
59. The facts in *Bhatia* were that the offender was a close family friend of the victim’s parents, and had been well before the victim was born. The victim referred to the offender as “Uncle”. When the victim was aged six, the offender committed two acts of rape on him. He had been routinely caring for the victim in the parents’ home, while they were at work.
60. The trial judge had found that s 21A(5A) applied, but the appeal court reversed that, on the basis that there was no evidence that the offender had actively used his good character in his offending. This was a case where there was no evidence “going beyond the fact of the relationship and which suggests that the offender’s good character played a role in assisting them to gain access to the child or to commit the offence.”<sup>20</sup>
61. Another example of the same reasoning can be found in *R v Farrell*.<sup>21</sup> The offender was the victim’s uncle, and was convicted of six counts of aggravated sexual assault and indecent assault. The sentencing judge found that s 21A(5A) did not apply because “George [the victim] had access to his uncle because he was a relative, not because he was a person of good character.” This was an interesting and 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).
62. In *Scott v The Queen*<sup>22</sup>, the victim was the offender’s 8-year-old grandchild, on whom he had perpetrated gross acts of indecency. He was convicted of three counts of indecent assault and one of raping a child under 10 years. The appeal court found that “The applicant did not use his good character or his position in the community to commit the offences. It was his position of trust as a grandfather that was abused...Mr Scott’s good character, and more importantly his

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<sup>19</sup> Id, [145]-[146]

<sup>20</sup> Id, [144], [146]

<sup>21</sup> [2022] NSWDC 695

<sup>22</sup> [2020] NSWCCA 81, [146]

history of charitable works and substantial contributions to the community, were matters entitled to substantial weight in a determination of the appropriate sentence”.

63. By contrast, in other cases where the offender was a relative or family friend, the courts have found that s 21A(5A) applies. For example, in *R v Rose*<sup>23</sup>, the offender was a friend of the victim’s mother. The judge applied s 21A(5A) because “the good character and lack of previous convictions at the time of the commission of the offending conduct was of assistance in the commission of the offence by reason of the circumstance that had he lacked such good character or if he held previous convictions, such circumstance would likely have been known in the country town in which he resided and he likely would not have been placed in a repeated position of trust in the care of a child.”<sup>24</sup>
64. Similar logic has been applied in other cases, for example *R v SH*<sup>25</sup>, *R v Pethybridge (No 3)*<sup>26</sup>, *R v Maguire (No 3)*<sup>27</sup>, *R v O’Toole (No 5)*<sup>28</sup>, *BG v The Queen*<sup>29</sup>. In the last case, the Court of Criminal Appeal noted that “it need hardly be stated, if the applicant was a person with a history of sexually assaulting teenage boys, the complainant’s mother would not have permitted her teenage son to spend a night with him unsupervised.”<sup>30</sup>
65. In *R v SH*, the offender was the victims’ uncle., who was living with the victims’ family. The sentencing judge noted that “it was inferentially suggested that his perceived good character played no part in the offending. I do not accept that this is the case...if he had not been a person perceived to be of good character, then notwithstanding the avuncular relationship, in my view it is doubtful that he would have been left alone with his nieces.”
66. This reductive logic – that the offender’s good character must have been of assistance because otherwise they would have been denied access to their victims – runs completely counter to other authorities that require a positive finding of active use of position or character by the

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<sup>23</sup> [2022] NSWDC 705

<sup>24</sup> *Id.*, [45]

<sup>25</sup> [2019] NSWDC 889, [33]-[34]

<sup>26</sup> [2022] NSWDC 520, [96]

<sup>27</sup> [2022] NSWDC 359, [94]

<sup>28</sup> [2021] NSWDC 64, [128]

<sup>29</sup> [2020] NSWCCA 295

<sup>30</sup> *Id.*, [148]

offender, as per *Bhatia*. The inconsistency is present not just at sentencing judge level, but goes all the way to the Court of Criminal Appeal.

67. A case that illustrates the confusion even at appellate level is *GG v The Queen*<sup>31</sup>, in which the offender was the victim's stepfather. The offending involved grooming the victim and recording her being raped by him and by others. He kept the videos he produced, for his own gratification. In the CCA, Payne JA held that s 21A(5A) did not apply, Schmidt J held that it did apply, and Fagan J did not express an opinion on that question.
68. Payne JA found that it was not a case where he was satisfied that the offender's good character or lack of previous convictions was of assistance to him.<sup>32</sup> By contrast, Schmidt J held that s 21A(5A) should be applied "because the agreed facts establish that GG's good character and lack of previous conviction were of real assistance to him in the commission of his offences, helping him to pursue the terrible breach of trust involved in him as the victim's stepfather, repeatedly videoing her as he did, then using those videos for his own sexual purposes and also taking advantage of her mother's absence, to commit the other serious offences to which he entered his pleas."<sup>33</sup> Judges disagree, of course, as must be accepted. However, when different judges can take the same uncontroverted facts and reach such radically opposed determinations (bearing in mind the application of s 21A(5A) is not discretionary but a question of law), there is self-evidently a problem with the legal test.
69. Finally, we should note that in many cases the Crown has not even raised s 21A(5A) with the court, in circumstances where we would argue it should have done.<sup>34</sup> Again, in our submission this reflects the confusion that is rampant regarding the sub-section's application, and contributes to the inconsistency and incoherence of outcomes.
70. We are not critical of the courts or judges for this inconsistency and incoherence. Those problems do not reflect judicial error, but the impossibility of the judicial task that has been set by the combination of three factors: the principle from *Ryan* that good character is a mandatory mitigating factor; the ambiguous language of s 21A(5A); and the underlying misunderstanding of CSA offending.
71. Another anomaly some cases demonstrate is the distinction drawn between "good character" that predates or coincides with the offending, and "good character" that postdates it. S 21A(5A) only applies to the former type, because of its requirement that the good character was of assistance in the offending. There are cases where the sub-section is applied to exclude good

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<sup>31</sup> [2018] NSWCCA 280

<sup>32</sup> *Id.*, [10]

<sup>33</sup> *Id.*, [99]

<sup>34</sup> *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

character in that context, but where the offender's so-called good character after the offending is accepted as a mitigating factor. Examples where this has occurred are *R v Rose*<sup>35</sup> and *Richards v The King*<sup>36</sup>. This is, in our view, perverse and non-evidence based.

72. The cases demonstrate that s 21A(5A) is not serving its intended purpose; rather, it is leading to inconsistent and arbitrary outcomes, and serving to undermine public confidence in the criminal justice system's response to the endemic problem of CSA perpetration.

### Conclusion and recommendation

73. Grace Tame has often been quoted saying that the gaps in the law are the natural habitat of CSA perpetrators; they exploit every loophole and ambiguity to facilitate and conceal their predation. The issues addressed in this submission are a classic example of this phenomenon.
74. Altering the wording of s 21A(5A) will not make a material difference. It is trying to solve the wrong problem, because it seeks to draw a dividing line where none properly exists.
75. The evidence shows that CSA is endemic and radically under-reported; that there is a high probability that CSA offenders are usually serial and that most of their offending remains undetected; that the most insidious offenders take much longer to detect and display characteristics that perfectly suit them to use their so-called "good character" as a tool and weapon for their conscious offending; and that rehabilitation for CSA offenders is largely a myth.
76. CSA offending is always a conscious choice, to commit an act which we all agree is indefensible and deserves the strongest condemnation.
77. The notion that a CSA offender can have a "good character" at all is, by definition, a nonsense. A person of good character does not rape children, or commit child pornography offences. There is no warrant for artificially separating an offender's "character" from their consciously chosen criminal acts; doing so only leads to abstraction, minimisation and further compounding harm to victims.
78. We believe that there are no circumstances in which a person who has been convicted of a CSA offence (including child pornography offences) should have the benefit of mitigation in sentencing on the basis of either so-called "good character" or absence of previous convictions. That does not mean they will be punished for crimes of which they have not been convicted; but

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<sup>35</sup> [2022] NSWDC 705

<sup>36</sup> [2023] NSWCCA 107

it does mean that they will not be given the benefit of a doubt that has no basis in reality or morality.

79. Consequently, we advocate for s 21A(5A) to be amended to provide as follows:

“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.”

80. We are grateful for the opportunity to contribute to this critically important legislative review and we will be delighted to make any further contribution that is considered helpful.

Yours sincerely

**Michael Bradley**  
Managing Partner