



# WIRRINGA BAIYA

## ABORIGINAL WOMEN'S LEGAL CENTRE INC

Wurringa Baiya provides free legal advice to Aboriginal and Torres Strait Islander women, children and youth who are or who have been victims of violence.

14 February 2025

NSW Sentencing Council

By email: [sentencingcouncildcj@nsw.gov.au](mailto:sentencingcouncildcj@nsw.gov.au)

Dear Chairperson and Council members,

### **GOOD CHARACTER AT SENTENCING: CONSULTATION PAPER**

Wurringa Baiya Aboriginal Women's Legal Centre (Wurringa Baiya) thanks the NSW Sentencing Council for the opportunity to provide input into the issues raised in the Good Character at Sentencing: Consultation Paper.

#### **Wurringa Baiya Aboriginal Women's Legal Centre**

Wurringa Baiya is a not-for-profit, state-wide community legal centre for Aboriginal women, children, and young people across New South Wales. The Centre's focus is assisting victims of violence, particularly those who have experienced domestic and family violence, sexual violence, and child sexual assault. We regularly provide legal advice to Aboriginal women who have experienced sexual violence in adulthood and childhood and provide casework support including victims support applications, redress applications, family law matters and child protection matters. Where resources allow, we also provide court support to Aboriginal women going through court processes.

Our Service is managed by Aboriginal women. Our Governing Committee is made up of entirely of Aboriginal women. Our CEO is an Aboriginal woman, and we have a number of Aboriginal identified positions.

We are a gender-specific service sensitive to the culturally diverse needs of Aboriginal and Torres Strait Islander women who have been victims-survivors of violence. We do not represent Aboriginal women in their criminal matters, but we do assist women in custody with their civil,

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Wurringa Baiya is a non-profit organisation managed by Aboriginal women.

**ABN:** 60 382 206 441

child protection and family law issues. For this reason, our submission will be focused on any legislative change might have for many victims, but specifically Aboriginal and Torres Strait Islander women and children. The submission will place particular focus on domestic violence and adult sexual offences, in addition to child sexual offences.

### **Terms of Reference**

1. Whether the limitations on the use of evidence concerning 'good character' or a lack of previous convictions in certain sentencing proceedings, as per s 21A(5A) of the Crimes (Sentencing Procedure) Act 1999, should be extended to all sentencing proceedings for child sexual offending by removing the requirement that the offender's good character or lack of previous convictions, "was of assistance to the offender in the commission of the offence";
2. The operation of good character as a mitigating factor in sentence proceedings in general, including the interaction between good character and other mitigating factors and the purposes of sentencing, the utility of good character evidence in sentence proceedings, and whether the use to which good character evidence is put in sentence proceedings remains appropriate, equitable, and fit for purpose;
3. The experience of victim-survivors in all sentencing proceedings involving the admission of evidence of good character and whether there are any legislative or other changes that could be made to improve their experience;
4. Procedures for receiving good character evidence in sentencing proceedings; and
5. Any other matter the Council considers relevant.

### **Introduction**

*What is 'good character'?*

What parameters govern the definition of 'good character' is broad and largely unprescribed, and lacks consensus amongst legal, philosophy or psychology spaces, as well as lack an empirical foundation.<sup>1</sup> As stated by Dr Gabrielle Wolf and Professor Mirko Bagaric:

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<sup>1</sup> Gabrielle Wolf and Mirko Bagaric, 'Nice or nasty?: Reasons to abolish character as a consideration in Australian sentencing hearings and professionals' disciplinary proceedings' (2018) 44(3) *Monash University Law Review* 567 ('Nice or nasty'), 567.

*“No evidence confirms that each individual has a distinctive, immutable morality that can be observed and measured, and that consistently dictates their behaviour. Evidence of people’s apparent reputation in the community, good deeds and prior criminal history have also been advanced as reflecting their character, but, like morality, they do not make the notion of character any clearer, objectively confirm that a person has inherent and/or unchanging traits or identify what those attributes are, or help to predict an individual’s future behaviour.”<sup>2</sup>*

Some judges have drawn attention to the illusory concept of ‘character’, yet assumptions about an individual’s character continue to be applied, and there exists a failure to recognise the possibility of one’s fluctuating moral character. In *Melbourne v The Queen*, Kirby J questioned whether “good character” existed at all, considering whether it is an “outmoded or antiquated notion of morality and human propensity which has been overtaken by psychological experimentation and understanding”.<sup>3</sup> Kirby and Gummow JJ go on to discuss the decision-maker’s characterisation of all people as either of ‘good character’ or ‘bad character’, arguing that such binary categories prevent a decision-maker from having a more nuanced and accurate understanding of human nature.<sup>4</sup>

In NSW, despite the existence of a lack of previous convictions as a stand-alone mitigating factor,<sup>5</sup> and a record of previous convictions a stand-alone aggravating factor,<sup>6</sup> the ambiguous nature of what is “good character” in sentencing means that “sometimes it refers only to an absence of prior convictions and has a rather negative significance, and sometimes it refers to something more of a positive nature involving or including a history of previous good works and contribution to the community”.<sup>7</sup> Some judges continue to draw a correlation between ‘good character’ and a lack of previous criminal convictions despite this, making such considerations in sentencing unclear and inconsistent.

## **The law currently**

### *Purpose of sentencing*

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<sup>2</sup> Ibid 590.

<sup>3</sup> *Melbourne v The Queen* (1999) 198 CLR 1.

<sup>4</sup> Wolf and Bagaric, Nice or nasty, 591; *Melbourne v The Queen* (1999) 198 CLR 1, 23–4 [63].

<sup>5</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(e).

<sup>6</sup> Ibid s 21A(2)(d).

<sup>7</sup> *R v Gent* (2005) NSWCCA 370, [49].

Section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) outlines the key purposes of sentencing – including punishment, deterrence, community protection, rehabilitation, accountability, denunciation of the offender’s conduct and recognition of the harm done to the victim and community.<sup>8</sup>

As it stands, there are several aggravating and mitigating factors listed under s 21A of the Act that are considered in sentencing an offender – including if an offender’s has a (lack of) previous record or significant record of previous convictions (including for being sentenced for a serious personal violence offence as an aggravating factor), and if the offender was a person of good character.<sup>9</sup>

In considering ‘good character’ at sentencing, the court first determines whether the offender is of ‘otherwise good character’ and then determines the weight to be given to this consideration. The weight given to this varies “according to all of the circumstances.”<sup>10</sup>

#### *‘Good character’ in Aboriginal and Torres Strait Islander communities*

Australia’s legal system operates within a colonial western framework. This means that ‘good character’ evidence and the operation of the law in this capacity fails to pay attention to the nuances and cultural differences of what may be ‘good’ or ‘bad’ character within Aboriginal and Torres Strait Islander communities.

A family member may not rely on this western conception of ‘good character’ in the community, but rather their reputation or perception of ‘good character’ and trust within family and kin networks.

It is the view of our Aboriginal and Torres Strait Islander staff that in Aboriginal and Torres Strait Islander communities, a person of ‘good character’ is a safe person who contributes to community and kin networks in a positive way. This can be an Elder, someone who looks after community by feeding them or caring for them if they get hurt, or a safe person to yarn with. In community, family and kin goes beyond blood-relation, and many people play a role in sustaining cultural knowledge and creating a safe, healthy environment for the children. In the

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<sup>8</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

<sup>9</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3).

<sup>10</sup> *Ryan v R* [2001] HCA 21, 206 CLR 267 [23], [25], [31], [36].

inverse, those of ‘bad character’ can be people who have caused harm to others. This can lead to family or kin breakdowns and disrupt the community network.

It is well-established that Aboriginal and Torres Strait Islander people are grossly let down by the criminal legal system. There is ample empirical evidence to support the understanding that a vicious cycle of re-offending exists for those incarcerated, particularly Aboriginal people, who often are introduced to the criminal legal system and incarceration at a young age. Aboriginal women are the fastest-growing demographic in prisons across Australia, and experience rates of child sexual abuse, physical and sexual abuse and assault far higher than non-Aboriginal women. We also know that imprisonment is not always the most appropriate sentence for vulnerable communities, and there is a lack of sufficient investment in diversionary and restorative justice measures to address this over-representation.

There is a notable lack of pre-existing literature on how ‘good character’ evidence is applied when it comes to Aboriginal and Torres Strait Islander offenders, again speaking to the inappropriate and ineffective parameters of ‘good character’. With such disproportionate rates of incarceration and histories of trauma, Aboriginal and Torres Strait Islander people do not have the same access to ‘good character’ evidence as non-Aboriginal people do, and who is considered a person of ‘good’ or ‘bad’ character looks vastly different to the white and Western cultural construct of these terms. This means that their ‘good character’ and contribution to their community may not even be recognised or accepted as a mitigating factor within a legal system that systemically disadvantages Aboriginal and Torres Strait Islander people.

While accounting for an individual’s character may appear to be effective in delivering a fair and just sentence, it remains that the construct of ‘character’ evidence is in itself vague and unjust.<sup>11</sup> Its inconsistent definition and inability to apply equally across communities thus renders it a problematic and regressive way in which to determine a person’s sentence and the level of community protection that is really afforded.

### **Good Character in Child Sexual Assault Offences**

We refer the Council to our previous submission dated 19 October 2023, which provided an input to the discussion paper on the Review of Section s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (NSW) (Crimes (Sentencing Procedure) Act)*.

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<sup>11</sup> Wolf and Bagaric, Nice or nasty, 568.

When it comes to child sexual offences, a ‘special rule’ applies in NSW which dictates that good character evidence 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.’<sup>12</sup>

This has been particularly relevant in recent years as discussions of whether good character evidence should be taken into account in relation to child sexual offences have grown. Wurringa Baiya also considers the application and relevance of good character evidence in relation to domestic violence and adult sexual offences further in this submission.

The markers of ‘good character’ in Aboriginal and Torres Strait Islander cultural practice exists in part in the respect of Elders. In our experience, this position of trust has sometimes been exploited where the offender simultaneously discredits the child victim as being difficult or lying, and consequently not being believed when they attempt to disclose the abuse. Many of our clients additionally experience lateral violence in their communities when they do disclose the violence.

The power that such offenders have had and continue to hold has resulted in our clients being belittled, mocked and shunned from their community, thus discouraging other victim-survivors to disclose violence against them, and trivialising their experience.

Recent case law that has accounted for ‘good character’ as a mitigating factor speaks to offenders as having been a “good family man”,<sup>13</sup> leading a “blameless life”<sup>14</sup> and “kind, respectful and patient, with an appropriate understanding and respect for boundaries”.<sup>15</sup><sup>16</sup> Characterisations of offenders as such serves to not only disincentivise victim-survivors from reporting the violence for fear of being disbelieved, but it is clear that the provision is not serving its intended purpose.

#### *Issues with the construction of ‘good character’ for victim-survivors of child sexual abuse*

Despite a key purpose of sentencing to recognise the harm experienced by victims,<sup>17</sup> it is our experience, and well-documented, that the criminal legal system and sentencing can be a deeply

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<sup>12</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A).

<sup>13</sup> *R v Williams (No 2)* [2024] NSWDC 9, [37].

<sup>14</sup> *R v RJ (No 5)* [2024] NSWDC 26, [55].

<sup>15</sup> *R v Sme* [2023] NSWDC 618, [144].

<sup>16</sup> Grace Tame Foundation, PGC No 43, *Preliminary submissions regarding a review of s 21A(5A) of the Crimes (Sentencing Procedure) Act 1999 (NSW)* (8 July 2024) 6.

<sup>17</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g).

traumatic experience for victim-survivors. This is particularly the case when the offender's 'good character' is raised.

Perpetrators of child sexual abuse often use and rely upon their 'good' reputation amongst family or community to commit such insidious crimes. The majority of our clients who were sexually abused as children experienced this at the hands of perpetrators known to them, who were trusted by those around them. Increasingly, we are hearing about child sexual assaults perpetrated by adults working in the Juvenile Justice system. This can be a range of people, including Youth Officers, support workers or case workers. More often than not, we have seen these acts of violence to be an ongoing series of acts over a period of months or years, rather than an isolated incident. This is supported by established evidence.<sup>18</sup>

In these contexts, both as a trusted adult in the private sphere, or trusted adult in the Juvenile Justice system, it is precisely the offender's perceived 'good character' that was an essential part of their offending – that this 'good character' allowed them access to the child and to ensure the secrecy of their offence(s) and avoid earlier exposure.<sup>19</sup> Offenders expend a lot of time creating an environment and regime of fear to keep the abuse a secret. The environment is a complex web of manipulation and threats that a child victim finds almost impossible to escape.

It is well understood that childhood sexual abuse is extremely disruptive to a child's psychological development. And while the Act pays some regard to the trauma of sexual abuse on children,<sup>20</sup> the acceptance of an offender's 'good character' evidence, even if given little weight, is incredibly distressing. Given the dynamics of child sex offending, that is: the conscious selecting of victims, the grooming of victims and carers, the actual assaults (which are multiple), and then the maintenance of silence over long periods of time, any evidence of good character is particularly damaging to victim-survivors.

With such inconsistency of application of 'good character' evidence by judges, unclear understanding of what dictates 'good character', and its problematic application when it comes

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<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' (2024) 147 *Journal of Child Abuse and Neglect*.

<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?' (2022) *Journal of Child Sexual Abuse*.

<sup>20</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25AA, s 28.

to child sexual assault, we submit that good character evidence is irrelevant in sentencing offences of child sexual assault.

#### *The use of good character in child sexual assault offences in the United Kingdom*

In the United Kingdom jurisdiction, positive character and/or exemplary conduct may mitigate the sentence of offenders in child sexual abuse cases.<sup>21</sup> On the other hand, the UK Sentencing Council recognise that where an offender has used their positive character to facilitate or conceal the offending, it should be treated as an aggravating factor.<sup>22</sup> If the evidence is to be used as a mitigating factor, it needs to remain distinct from any mitigation given to the offender for having no previous or relevant convictions, and care should be taken to avoid double counting these factors.<sup>23</sup> In sentencing child sexual abuse cases, the UK courts have found that in the context of the offence, previous good character or exemplary conduct should not be given any significant weight.<sup>24</sup> The nature of child sexual abuse is so serious and the effect on the victim is so traumatic that the Judge cannot justify a mitigation of the sentence.<sup>25</sup> The court recognises that “The more serious the offence, the less weight which should normally be attributed to these factors.”<sup>26</sup> Child sexual abuse is often a very serious offence of which the victim suffers immensely. It is therefore inappropriate for any mitigation to be granted to the sentence of the accused based on their good character.

#### *The use of good character in child sexual assault offences in New South Wales*

The restriction provided by the NSW Act reflects the view that good character evidence is less relevant in the context of serious crimes, particularly when it comes to offences that have a significant impact on the victim and the community, such as child sexual offending. As child sexual offences are inherently grave, with profound and lasting impacts on victims, they are generally seen as serious breaches of trust, morality, and societal norms. The restriction for sentencing child sex offences can be justified by the seriousness of the offence. Further, it's justification also lies within preventing sentencing discounts and holding those who commit such egregious crimes to be held accountable. It also provides of general deterrence as per the sentencing purposes and for public confidence to be upheld. In cases involving egregious harm,

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<sup>21</sup> Magistrates Court, *Sentencing Guidelines: Sexual Assault of Child under 13*, 1 April 2014.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *R v JCW* [2023] EWCA Crim 666 [28]

<sup>25</sup> *Ibid* [38].

<sup>26</sup> *R v Dibell* [2021] EWCA Crim 1795 [40].



such as child sexual offending, the weight given to good character may be minimal, with greater emphasis placed on the seriousness of the offence, the need for condemnation, and the protection of the victim and the community.

Ultimately, removing the requirement that good character or lack of previous convictions "was of assistance to the offender in the commission of the offence" could be a significant step toward aligning sentencing practices with the gravity of child sexual offending and ensuring that the protection of vulnerable individuals is prioritized in judicial decision-making.

**Our recommendation**

In line with our previous submission, we recommend that good character should not be taken into account as a mitigating factor for the sentencing of all child sexual offences, irrespective of whether an offender has plead guilty or was found guilty.

**Good Character in Domestic Violence offences**

We submit that it is also necessary that the good character of a perpetrator in domestic violence to not be a mitigating factor in domestic violence offences.

Domestic violence offenders largely rely on the power imbalance between themselves and the victims to enable them to commit offences and to ensure that their victim does not report the offending. The manipulation and power imbalance present in domestic violence relationships means that the presentation of the offenders' good character cannot be a mitigation to the offence.

*The use of good character in domestic violence offences in the United Kingdom*

The United Kingdom's Sentencing Guidelines Council recognises that the good character of a perpetrator in domestic violence offences can allow domestic violence to continue without detection.<sup>27</sup>

The Sentencing Guidelines Council state at 3.20:

As a general principle of sentencing, a court will take account of an offender's positive good character. However, it is recognised that one of the factors that can allow domestic violence to continue unnoticed for lengthy periods is the ability of the perpetrator to

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<sup>27</sup> Sentencing Guidelines Council, *Overarching Principles: Domestic Violence* (J277796, December 2006).

have two personae. In respect of an offence of violence in a domestic context, an offender's good character in relation to conduct outside the home should generally be of no relevance where there is a proven pattern of behaviour.<sup>28</sup>

Furthermore at 3.21 the Sentencing Guidelines Council outlines when good character can be a mitigation to the sentence:

Positive good character is of greater relevance in the rare case where the court is satisfied that the offence was an isolated incident.<sup>29</sup>

The UK jurisdiction recognise that an offender's good character can enable domestic violence offenders to continue their offending unnoticed by the wider community and authorities.<sup>30</sup> In these instances, the good character of a perpetrator can create two personae where one is presented to the community and the other is revealed to the victim. This means that if a victim was to come forward to report their perpetrator, they may not be believed by the people who see the perpetrator as a person of good character. The UK Sentencing Guidelines Council recognise that the perpetrators persona outside of the relationship should be of no relevance to the violent offending occurring inside of the relationship.<sup>31</sup> In the UK jurisdiction, the offender's good character should only be taken into account when the offence has occurred as part of an isolated incident.<sup>32</sup>

UK case law recognise the limitations of good character as a mitigating factor in domestic violence offences. In line with the Sentencing Guidelines Council, the decision of *R v JCW*<sup>33</sup>, recognise that it is not uncommon for someone who assaults their partner to present very differently to the outside community.<sup>34</sup> In this case, the action of the perpetrator displaying two personae may have enabled the domestic violence to continue as long as it did. The offending continued despite the "glowing" character references provided in support of the offender.<sup>35</sup> The court recognised that "It is the kind of offence where even a previous excellent character would pale compared to the gravity of the offending."<sup>36</sup> Similarly, the court recognised that it is the nature of the domestic abuse that may take the victim time and a considerable amount of

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<sup>28</sup> Ibid [3.20].

<sup>29</sup> Ibid [3.21].

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid [3.21].

<sup>33</sup> [2010] EWCA Crim 470.

<sup>34</sup> Ibid [25].

<sup>35</sup> Ibid [25].

<sup>36</sup> Ibid.

courage to come forward to report the offending.<sup>37</sup> The court states that when a victim does have the courage to speak out, their complaints should be taken seriously, and the Judge should sentence in accordance with the Guideline.<sup>38</sup> The current UK legislation allows the court to recognise the distinctive composition of domestic violence relationships. The court may view the offender's otherwise good character as having no relevance to the sentencing of their offences against a victim.

### *The use of good character in domestic violence offences in New South Wales*

The UK's limitation of good character references for domestic violence offences is in opposition to New South Wales courts. In *Taber v R*<sup>39</sup>, the District Court of New South Wales found the appellant to be of prior good character.<sup>40</sup> The court mitigated the sentence based on the appellants ability "to assemble an impressive set of references from a cross-section of the community."<sup>41</sup> The court heard submissions to the effect that the violence was a result of the pressures of the COVID restrictions, his wife's excessive drinking and his responsibility for the day-to-day care of his children.<sup>42</sup> These factors were presented as the cause of the offender to act in a way which departed from his otherwise good character.<sup>43</sup> The District Court of New South Wales found that the offender was unlikely to re-offend and had good prospects of rehabilitation.<sup>44</sup> These submissions and findings were accepted in the context of six charges of Assault Occasion Actual Bodily Harm in relation to domestic violence perpetrated against his wife and the mother of his children.<sup>45</sup> The sentence in *Taber v R* highlighted stark differences between sentencing in the District Court of NSW and the UK in relation to good character as a mitigating factor in domestic violence offences.

In NSW the acceptance of good character evidence only extends to the first act of violence, as the offenders' good character ceases at the commission of the first violence.<sup>46</sup> The NSW courts recognise that is "it is not uncommon for people who appear to be otherwise good character to

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<sup>37</sup> Ibid [27].

<sup>38</sup> Ibid.

<sup>39</sup> [2021] NSWDC 60.

<sup>40</sup> Ibid [67]-[68].

<sup>41</sup> Ibid.

<sup>42</sup> Ibid [70].

<sup>43</sup> Ibid.

<sup>44</sup> Ibid [93].

<sup>45</sup> Ibid [1].

<sup>46</sup> *R v RX; MX* [2008], [58]; *R v AM* [2024] NSWDC 546, [51].

commit offences such as these.”<sup>47</sup> The good character considerations are then weighed against the extent and seriousness of his offending.<sup>48</sup> In NSW courts, there is some recognition that domestic violence occurs as an abuse of a relationship of trust and the exploitation of that relationship.<sup>49</sup> Despite this, domestic violence offenders are still receiving mitigated sentences based on their good character.

### **Our clients’ experiences**

At Wirringa Baiya many of our clients struggle with reporting domestic violence offences. Some only do so years after the offending has occurred and did not tell anyone at the time it was happening. Our experience only solidifies that domestic violence victims requires extreme courage to come forward to authorities or even to friends or family. When a victim does exhibit this courage, the courts should recognise that the violence may have been enabled by his status of good character. Whilst all survivors of domestic violence face barriers in reporting their offenders, we submit that Aboriginal women face more significant barriers. This is due to the intergenerational lack of trust in police and systemic discrimination that exists in the police force. In addition to this, our clients may experience issues within their own communities when they report domestic violence by an Aboriginal man.

Wirringa Baiya submits that once an offence is reported, the courts should not reinstate the power imbalances that exist within the relationship. The offender should not be given the opportunity to present himself as a good character once determined he is guilty of a domestic violence offence. NSW legislation should follow the example of the UK Sentencing Guidelines Council on domestic violence<sup>50</sup> and legislate for judicial recognition that an offender can maintain two personae. The good character of a person and the manipulation of their image to their friends or colleagues, should have no relevance to the crimes they have committed against their partner. Victims of domestic violence should not have to face yet another barrier to justice as enabled by good character submissions.

### **Misidentification as the offender**

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<sup>47</sup> *R v Mathews* [2023] NSWDC 611, [67].

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid* [47].

<sup>50</sup> Sentencing Guidelines Council, *Overarching Principles: Domestic Violence* (J277796, December 2006).

A common issue that our clients at Wirringa Baiya experience is being misidentified as the perpetrator of the violence, when they are in fact the victim. Although this focuses on police powers and operations more so than it does judicial sentencing, it is important to note the misunderstandings that may arise from relying on someone's good character in the entirety of the criminal legal process. The sentencing procedures which involve good character as a mitigating factor, continue to judge the violence based on their personal character. If an Aboriginal woman is identified as the offender, due to substantial disadvantage, inequality and discrimination, she may have limited avenues to rely on good character to mitigate the offence. Many of our clients distrust the police due to underlying racism and discrimination that exists in the police force. Even when an Aboriginal woman reports domestic violence, there is a larger risk that police will misidentify her as the instigator of the violence. In these situations, the victim may be judged on their character, rather than on their account of the incident. We consider the judgement a person's character outside of an incident, allows structures and systems to be reinforced of which Aboriginal women do not benefit.

**Our recommendation**

We recommend that good character should not be taken into account as a mitigating factor for the sentencing of all domestic violence offences, irrespective of whether an offender has plead guilty or was found guilty.

**Good Character in Adult Sexual Offences**

Good character reflects the idea that an individual's history of law-abiding behaviour and moral integrity can provide some basis for leniency, as it suggests that the individual may have a lesser degree of culpability or a greater capacity for rehabilitation.

The application of good character is embedded within a vague legislative framework that provides whomever exercising discretion to determine what 'good character' stands to be. Ultimately this has led to an inconsistent application of good character in the sentencing process for sexual offences.

*Use of good character used in sentencing sexual offences currently*

*R v Smith (a pseudonym)*,<sup>51</sup> concerned sexual assault by a father on his daughter (17 years of age). The judge referred to his lack of previous convictions speaking to his character when considering mitigating factors, *'Although the offender has one matter on his record from Chile, I will treat him as a first offender. The commission of this offence had nothing to do with his lack of criminal antecedents. His lack of criminal antecedents is one indication of his prospects for the future. Despite the matters to which I will soon refer, he has never offended while he has been in Australia, he will not have the opportunity of offending against his daughter again. He is entitled, to the extent that it is possible in a matter such as this, to have his good character taken into account. But it is not a significant mitigating factor given the nature of the offending'*. The judge appears to have given weight to the risk the offender would have posed to the daughter specifically rather than the general public when determining his prospects of rehabilitation.

*R v MacDonald*<sup>52</sup> was regarding a neighbour and two children whom had been sexually assaulted. It was said at [63], *'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'*. Further, at [65] it was highlighted that *'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'*.

In *R v Bao*,<sup>53</sup> where there was a charge of sexually touching a client without consent against the masseuse, the presiding judge found that, *'The offender was a person of good character prior to the offending pursuant to s 21A(3)(f) of the CSP Act. I do not give that much weight in the sentencing exercise as it was by reason of his good character that he was able to engage in the business of performing massages on members of the community'*.

Good character evidence was discussed in the case of *R v VR*,<sup>54</sup> in the context of 12 counts of sexual assault by a man on three previous domestic partners. At [45] the presiding judge noted that previously, *'the sentencing Judge was clearly impressed by the character evidence and*

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<sup>51</sup> [2024] NSWDC 103 [29].

<sup>52</sup> [2024] NSWDC 136.

<sup>53</sup> [2024] NSWDC 200 [42].

<sup>54</sup> [2024] NSWCCA 91.

*acknowledged the courage of both PB and Mr Gupta in providing their evidence to the Court in light of the seriousness of the allegations against their friend. His Honour noted that a person's life "is not to be solely defined by the criminal conduct that brings them before a sentencing judge". However, his Honour said its "effect in the present case must be limited" referring to the fact that the offending spread over a period of 17 years. Even so his Honour gave "some weight to the finding of prior good character" and noted that the respondent "was capable of being kind and affectionate" in his relationships with women although in the case of the three victims this was "completely overshadowed by the offender's tendency to control and to escalate in abuse" and cruelty'. At [83], it was stated that, 'his prior good character is not a matter of great weight in all of the circumstances, but it is relevant to his prospects of rehabilitation and is a mitigating factor under the Sentencing Act'.*

Across these cases, there is pattern that the more serious the offence—especially sexual offences involving significant harm to vulnerable victims—the less weight good character evidence is given. The courts in NSW may apply this on the basis that good character, while relevant, cannot overshadow the gravity of crimes that involve exploitation, breaches of trust, or prolonged abuse. In such cases, the focus shifts towards punishment, deterrence, and protection of the public.

On the other hand, the courts' consideration of good character, even when done minimally, raises important questions about the overall impact on victims. The judicial focus on individualized justice for offenders may, at times, come at the cost of victims' rights to individualized justice. Sexual offences, by their very nature, involve significant harm to victims—psychologically, emotionally, and socially. By allowing good character to be a factor, however limited, the courts risk giving offenders a narrative of partial redemption that may minimize the lasting trauma experienced by the victims. Moreover, good character evidence can create the perception that offenders past good deeds can somehow offset the severity of the crimes they have committed. In cases of sexual assault, especially where trust is breached (as in familial or professional settings), good character should arguably have no role in mitigation because the offence itself negates the very values that good character is meant to represent. A focus on the offender's prior good conduct, even briefly, can shift attention away from the central issue: the harm done to the victim and the need for a justice system that unequivocally condemns sexual violence. Hence, while good character evidence is often relevant in less serious crimes, in sexual offence cases it risks undermining the principles of victim-centred justice. The more severe and harmful the offence, the less relevant good character becomes. By giving even minimal weight to

good character, the courts may inadvertently detract from the focus on the victims' experiences and suffering, which should be paramount in these cases. The legal system should ensure that victims of sexual violence are the central consideration in sentencing decisions, without diluting the severity of the crime through a focus on the offender's past positive behaviour.

#### *How is good character and other mitigating factors balanced in sentencing*

The interaction between good character and other mitigating factors such as no previous convictions, likelihood of re-offending and prospects of rehabilitation can influence the sentencing outcome, as the court considers the totality of the offender's life and behaviour. Case law suggests that an offender with a long history of good character who expresses genuine remorse may be given a less severe sentence than an individual who lacks remorse or has a history of offending.

Good character as a mitigating factor interacts with the purposes of sentencing, particularly with retribution, rehabilitation, and deterrence. An offender with good character may be seen as more capable of rehabilitation, warranting a less severe sentence. However, the extent to which good character can mitigate punishment is balanced against the seriousness of the offence. For example, good character alone is unlikely to significantly reduce the sentence for a serious crime like child sexual abuse or murder, where the need for denunciation, deterrence, and protection of the community may outweigh the mitigating effects of good character.

*In R v McAlister*,<sup>55</sup> it was said that 'In making that comment I recognise that rehabilitation is not the only purpose of sentencing. Those other purposes are reflected in the authorities to which I have been referred, and my own sentences for these matters, I accept custodial sentence are almost invariably imposed. There is an expectation that sex offenders will suffer severe punishment as the penalty should, if at all possible, reflect the court's view of the seriousness of the crime and let other wrongdoers know the retribution which will fall upon them if they commit similar offences. Mitigating factors can be given full weight, but they cannot be allowed to lead to the imposition of a sentence which is disproportionate to the gravity of the offence committed'.

This then brings into question the operation of good character within other sexual offences. As the severity of sexual offences can range, it requires a thorough analysis on the consideration of the overlap between good character with other mitigating factors. The trauma faced by sexual

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<sup>55</sup> [2024] NSWDC 357 [43].



assault survivors are significant and to 'merely dismiss' or 'minimise' the culpability of an offender based on some character references and/or the prospects of reoffending or their history can be detrimental to the healing process of a survivor. Case law has not been able to adequately provide a regime in which a distinguishment has been made between different mitigating factors, rather, it addresses mitigating factors as an umbrella term, '*his prior good character is not a matter of great weight in all of the circumstances, but it is relevant to his prospects of rehabilitation and is a mitigating factor under the Sentencing Act*'.<sup>56</sup> As seen by this statement, it is difficult to discern the balance between good character evidence and other mitigating factors when good character speaks to the prospects of rehabilitation, but the prospect of rehabilitation is expressly addressed in the Sentencing Act. It stands to be a contradictory practice in ascertaining relevant mitigating factors for sentencing purposes.

#### *International models on the use of good character in sentencing sexual offences*

Good character evidence is used in sentencing for sexual offences across various legal systems internationally, though its application seems to differ based on jurisdictional legal traditions, sentencing guidelines, and societal views on sexual crimes.

#### United Kingdom

In the UK, good character evidence is one of many factors considered during sentencing, but its weight can vary significantly depending on the nature of the offence. UK courts typically take into account the seriousness of the crime, the harm caused to the victim and the victims' circumstances (i.e. being a child or having a disability) in the administration of good character.

Notably, they have definitive guidelines for the sentencing of sexual offences and have provided guidance on how to take sentence an offender across various types of sexual offences. The guidelines also provide direction on sentencing for child victims, victims with disabilities and even for offenders under the age of 18.

As to a general understanding of good character, the Sentencing Council has outlined that, '*previous good character/exemplary conduct is different from having no previous convictions. The more serious the offence, the less the weight which should normally be attributed to this factor. Where previous good character/exemplary conduct has been used to facilitate the offence, this*

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<sup>56</sup> *R v VR* [2024] NSWCCA 91.

*mitigation should not normally be allowed and such conduct may constitute an aggravating factor'.<sup>57</sup>*

### Canada

In Canada, the consideration of good character in sexual offence sentencing is also present, but it is balanced against the severity of the crime. Canadian courts place significant emphasis on the seriousness of sexual offences, particularly the impact on the victim, stating their 'low probative value'. There seems to be reluctance on taking into consideration good character evidence. Generally, in Canadian case law, sentencing for sexual assaults have considered mitigating factors such as the age of an offender, guilty plea, prior record or genuine remorse. However, there is far more extensive list for aggravating factors and many factors that would be considered good character in NSW appear to form an aggravating factor within Canadian case law standards.

Canadian case law provides a rigid approach to sentencing sexual assault offences. Case law has recognised that sexual offenders tend to appear 'upstanding and productive' as they do not want others to see what they do in private. Therefore, making the nature of such offences even more sinister. Hence, judges have blatantly rendered character evidence as 'not helpful' and having 'low probative value' in sexual offence cases. The common law has recognised that people from various backgrounds commit such crimes unbeknown to the eyes of the closest people to them and on that basis has justified its irrelevant use as a mitigating factor. Such an approach portrays how Canadian law has enshrined current societal views into the administration of justice. This is seen in the recent case of *R v Chung*,<sup>58</sup> the judge referred to previous case law to determine the significance of good character evidence as being a mitigating factor.

### Northern Ireland and New Zealand

There seems to be a growing shift towards minimising the use of good character evidence in sexual offences, particularly offences against children. In Northern Ireland, a judge upon considering the character references on behalf of the defendant, speaking to his good standing in the community, had stated that '*these also serve to highlight the often-secret nature of domestic*

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<sup>57</sup> Sentencing Council, *Sexual Offences: Definitive Guidelines* (1 April 2014) 11.

<sup>58</sup> [2023] ABKB 372 [159].

*violence*'.<sup>59</sup> The case concerned the sexual assault of the defendant's partner and her son. A petition has begun in New Zealand to stop the use of good character in sentencing when sentencing for child sexual offences.

It is apparent that while good character evidence is a mitigating factor in sentencing for sexual offences across different jurisdictions, its weight is often limited by the severity of the crime, the vulnerability of the victim, and changing societal views. An example can be seen through the push from Northern Ireland and New Zealand to diminish the use of good character evidence similarly to NSW. In serious sexual offences, particularly those involving violence, abuse of trust, or vulnerable victims, good character evidence may slightly reduce the sentence, but it is unlikely to result in a substantial decrease. Nevertheless, the UK's model of approaching sentencing for sexual offences provides an approach that would allow for more consistency in sentencing, that recognises the experience of victim-survivors while allowing offenders to be sentenced according to the crimes they have committed.

#### *How are victim impact statements taken into account in sentencing*

The inclusion of evidence of good character in sentencing proceedings can have a significant impact on victim-survivors, particularly in cases involving serious offences such as sexual assault, domestic violence, or child abuse. For victim-survivors, the focus of sentencing should ideally be on the harm they endured, the accountability of the offender, and ensuring that justice is served. However, the introduction of evidence regarding an offender's good character can sometimes lead to a perceived or real shift in focus away from the impact on the victim and the seriousness of the offence, which may exacerbate the trauma experienced by the survivor. For instance, consideration of good character can minimise the harm caused to the victim, undermine the sense of justice, potentially re-traumatise a victim-survivor, and establish a sense of disparity.

In *R v McAlister*<sup>60</sup> the judge stated that *'I accept a victim is entitled to say, "well the gaol door should shut on him because of what he did to me". I accept that she may have that sentiment but if a short custodial sentence would achieve very little, and would expose someone to harm, and if it can be avoided; it should be. The community interest is in fostering the offender's progress to*

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<sup>59</sup> Radio Telefis Éireann, 'Man jailed for 12 years for rape and sexual assault of partner and her son' (29 July 2022).

<sup>60</sup> [2024] NSWDC 357 [51].

*rehabilitation, already shown by this offender, must be recognised. This serious crime appears to have been a one-off offence which is unlikely to be repeated. He has already suffered significant harm by; the way he has responded to the offence, his loss of employment, and the psychological damage arising from a recognition of what he did to his former friend’.*

*In R v McDonald<sup>61</sup> it was discussed how, ‘the Victim Impact Statements attest to the personal harm suffered by each woman as a direct result of the offences. I have no difficulty in accepting what was set out in them. Those statements served a very practical purpose of drawing to the offenders, the courts and the community’s attention the personal harm and general harm to the families caused by his crimes’.*

The inclusion of good character evidence in sentencing proceedings can have a significant emotional and psychological impact on victim-survivors. If misused or overemphasized, it can diminish the seriousness of the offence and exacerbate the trauma experienced by the victim-survivor.

#### **Our recommendation**

We recommend that good character should not be taken into account as a mitigating factor for the sentencing of all adult sexual assault offences, irrespective of whether an offender has plead guilty or was found guilty.

#### **Our work with Aboriginal and Torres Strait Islander women in custody**

A critical part of our service is working with Aboriginal and Torres Strait Islander women in custody to advise and assist them with civil, family and child protection legal issues. The overwhelming majority of our clients in custody have experienced serious domestic and sexual violence, often by multiple offenders, over many years, in both childhood and adulthood. Many of them were in the care system as children and have lost care of their own children to the care system. Our clients often identify the causal link between their histories of complex trauma and any behaviour which has led to their incarceration. Many of our clients were criminalised at a young age, often as teenagers. They describe constant surveillance by police, and being treated as ‘criminals’ from the outset, rather than as a young person or young woman needing support. Aboriginal women are the fastest growing demographic in prisons across Australia. As of September 2024, Aboriginal women make up 41.5% of the adult female population in custody in

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<sup>61</sup> [2024] NSWDC 136 [61].

NSW.<sup>62</sup> This appalling statistic shows that the criminal legal system is failing Aboriginal women. It begs the question what difference does the good character provision make to the rates of incarceration of Aboriginal and Torres Strait Islander women.

Wirringa Baiya's experience working with Aboriginal and Torres Strait Islander Women and children has shown that many of the criminal matters our clients have, are dealt with in the Local Court. Notably, as many have experienced significant social and economic disadvantage and marginalisation, they would have less opportunities to have mitigating circumstances considered in their sentencing as they would be unable to provide 'powerful' good character references. This creates another dichotomy within the legal system in which non-marginalised community members and groups of people are held in a 'higher regard'.

What is more relevant to our clients is the court's understanding of their life, their trauma and significant disadvantage, to contextualise the circumstances of their offending behaviour with a Bugmy Justice Report.<sup>63</sup> To this end we advocate that service providers in the criminal legal system be adequately resourced to provide comprehensive Bugmy Justice Reports as early as possible for all matters in all courts.

## **Conclusion**

We recommend that the use of good character should be abolished as a mitigating factor in the sentencing of all child sexual assault offences, all adult sexual offences and all domestic violence offences, irrespective of whether the offender plead guilty or was found guilty.

At this stage we do not hold a position about the use of good character as a mitigating factor for any other offence. In any event we note the limitations of its use and the difficulty in utilising this provision, as many of our clients have been over policed and criminalised from a young age, and experienced significant marginalisation and disadvantage.

We are interested in the concept of treating the use of good character in the commission of the offence as an aggravating factor in sentencing. However, due to time pressures we have not been able to explore this concept in any great detail, and make no firm recommendation at this stage.

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<sup>62</sup> <https://bocsar.nsw.gov.au/statistics-dashboards/custody/custody-dashboard.html>

<sup>63</sup> <https://www.judcom.nsw.gov.au/judicial-education/ngara-yura-program/bugmy-bar-book>; *Bugmy v The Queen* (2013) CLR 571

We would welcome the opportunity to discuss our submission and have any further discussions about the options for reform.

If you would like to discuss our submission, please contact Rachael Martin, principal solicitor [REDACTED] or Christine Robinson, CEO [REDACTED] or by calling [REDACTED].

Yours faithfully,

**Wirringa Baiya Aboriginal Women's Legal Centre**

**Per: Rachael Martin**

**Principal Solicitor**