



Our ref: DIV24/403

25 February 2025

The Hon Peter McClellan AM KC
Chair
NSW Sentencing Council
Locked Bag 5000
PARRAMATTA NSW 2124
By email: sentencingcouncil@dcj.nsw.gov.au

Dear Chair,

Consultation Paper - Good character at sentencing

1. The NSW Bar Association thanks the NSW Sentencing Council for the opportunity to make a submission in response to its **Consultation Paper** titled “Good character at sentencing”.
2. The Association understands that the NSW Attorney General, the Hon. Michael Daley MP, referred the issue of “Good character at sentencing” to the Sentencing Council for review due to concerns raised by a campaign titled “Your Reference Ain't Relevant”, and other stakeholders, regarding subsection 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA). Subsection 21A(5A) of the CSPA states:

Special rules for child sexual offences In determining the appropriate sentence for a child sexual offence¹, 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.

3. Subsections 21A(3)(e) and 21A(3)(f) of the CSPR provide that the absence of a “record (or any significant record) of previous convictions” and “good character” are mitigating factors to be taken into account in determining the appropriate sentence for an offence. Subsection 21A(5A) provides that, when sentencing for a child sexual offence, these mitigating factors are not to be taken into account “if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence”.² Although the term ‘good character’ can be ambiguous, it has been described as “a history of previous good works and contribution to the community” and is often referred to in conjunction with a lack of previous convictions.³

¹ A child sexual offence is defined in subsection 21A(6), *Crimes (Sentencing Procedure) Act 1999* (NSW).

² See: *R v Stoupe* [2015] NSWCCA 175; *AH v R* [2015] NSWCCA 51; *GG v R* [2018] NSWCCA 280; *Bhatia v R* [2023] NSWCCA 12.

³ *R v Levi*, Unreported, Court of Criminal Appeal of New South Wales, 15 May 1997, per Gleeson CJ at 5 in *Ryan v R* [2001] HCA 21 at [27]; NSW Sentencing Council, “Good character at sentencing”, Consultation Paper, December 2024, at 2.41-2.60, 4.26.



4. The Consultation Paper outlines the particular stakeholder concerns about the use of good character at sentencing in relation to child sexual offences, and offences more generally, including that its use: may diminish or undermine the gravity of the offence(s); re-traumatise victims; and is not fit for purpose.⁴ The “Your Reference Ain’t Relevant” campaign has recommended an amendment to subsection 21A(5A) of the CSPA, which would not permit courts, when sentencing for a child sexual offence, to take into account the offender’s otherwise good character or lack of previous convictions as a mitigating factor in any circumstances.
5. The Association acknowledges the immense harm caused by child sexual offences, and other offences, and the need for the sentencing process to respond appropriately.
6. The Association’s submission addresses particular questions included within chapter five of the Consultation Paper.

Question 5.13 – Law reform is not required

7. The Association is of the view that no change to the law is required as the just sentencing of offenders necessarily involves instinctive synthesis, discretionary judgment and consideration of the individual circumstances of each offender. Evidence of a person’s background including otherwise good character and a lack of prior convictions is capable of assisting a court, for example, in assessing the person’s prospects of rehabilitation, which is relevant to the purposes of sentencing.⁵
8. Moreover, good character is an appropriate matter to take into account in mitigation *in and of itself*, and not simply because it may bear upon other matters such as whether the offender is unlikely to reoffend (s 21A(3)(g)) or has good prospects of rehabilitation (s 21A(3)(h)). The proper exercise of the court’s sentencing discretion, and the principle of individualised justice, requires consideration of the offending and the offender as a whole person.⁶ Such an exercise requires consideration of good character, which has been inserted in subsection 21A(3) of the CSPA as a separate and distinct mitigating factor to be taken into account at sentence. Both good character and a lack of previous convictions are discrete mitigating factors in s 21A(3). These factors would not have been included as discrete factors if they were only relevant insofar as they might inform other matters such as whether the offender is unlikely to reoffend (s 21A(3)(g)).
9. Fundamentally, permitting offenders to raise past good character in mitigation is a matter of fairness. Past good character in the positive sense (rather than merely lack of prior convictions) is not necessarily limited to high profile community work or public service. It may have manifested itself in more commonplace acts of kindness and humanity, and this is often the subject of evidence from character witnesses. The common law also recognises that otherwise good character may be relevant in and of itself, and not only because it has a bearing on other issues, such as a person’s prospects of rehabilitation. In *R v Berg* [2004] NSWCCA 300, Howie J (Spigelman CJ agreeing) said at [35]: “...

⁴ NSW Sentencing Council, (n 3), 3.29-3.42; 4.19-4.55.

⁵ Section 3A, *Crimes (Sentencing Procedure) Act 1999* (NSW); NSW Sentencing Council, (n 3), 4.5-4.11.

⁶ See: *Ryan v The Queen* [2001] HCA 21 at [108] and [110].



in such a case as this, an offender is entitled to call upon the bank of credit arising from his community welfare support that has mounted over the years by way of mitigation.”⁷

10. As noted by the Consultation Paper, otherwise good character, if established, may be qualified, or given no weight, as a mitigating factor on sentence depending upon the circumstances.⁸ There are many cases in which the sentencing court, having accepted that the offender has no prior convictions or is otherwise of good character, declines to give any weight to the matter in mitigation of the sentence.⁹
11. In *R v Hausman; Hausman v R; R v Rostankovski; Rostankovski v R* [2022] NSWCCA 24, Hamill J (Fullerton and Adamson JJ agreeing) discussed at [241] the classes of case in which the weight given to otherwise good character might generally be reduced, including:
 - “Cases of such seriousness, or prevalence, that certain objectives of punishment – general deterrence, denunciation, retribution and the like – must play a more dominant role in the balancing exercise”; and
 - “Cases where the heinousness of the offence is so extreme that there is little or no scope to mitigate the punishment to be imposed.”
12. Offenders are not necessarily entitled to leniency based on otherwise good character as sentencing courts need not give the matter any particular weight. It is sufficient for judges and magistrates merely to take it into account and give it as much or as little weight (including no weight at all) as they see fit in the proper exercise of their discretion.
13. Moreover, an offender’s otherwise good character is a subjective consideration. It is a factor relating to the offender’s personal circumstances rather than the objective circumstances of his or her offence. Even in the cases in which otherwise good character is established and given weight by the sentencing court in mitigation of the sentence, it cannot be allowed unduly to overshadow the objective seriousness of the offending.¹⁰ The sentence imposed must be proportionate to the objective gravity of the offence.
14. The court should be able to continue to consider these mitigating factors when sentencing for child sexual offences, within the limitations of subsection 21A(5A) of the CSPA, and when sentencing for other offences. The court should also continue to have the discretion to assign some or no weight to these factors depending upon the circumstances.
15. The Association considers that the use to which good character evidence is put in sentence proceedings remains appropriate, equitable and fit for purpose.

⁷ See also: *Elomar v R* [2018] NSWCCA 224 at [116].

⁸ NSW Sentencing Council, (n 3), 2.61-2.77.

⁹ See, for example: *WG v R; KG v R* [2020] NSWCCA 155, per Fullerton J (Bathurst CJ) and Fagan J relevantly agreeing) at [1493].

¹⁰ *TP v R* [2018] NSWCCA 140 at [27]; *R v Van Ryn* [2016] NSWCCA 1 at [280].



Potential clarifying amendment

16. Although the Association is of view that no amendments to section 21A of the CSPA are required, the NSW Sentencing Council may wish to consider whether good character should be referred to as “otherwise good character”. This would make it clear that when considering the issue of good character, the sentencing court is not considering the offences for which the offender is being sentenced.

Question 5.5 - Extending the special rule to all child sexual offences

17. The Association understands that the Your Reference Ain't Relevant campaign, and other stakeholders support an amendment to subsection 21A(5A) of the CSPA, which would remove the words “if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence”.¹¹ The amended subsection would state the following:

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.

18. The consequence of this amendment would be that when sentencing for child sexual offences, as defined in subsection 21A(6) of the CSPA, courts would not be permitted to take into account the offender's otherwise good character or lack of previous convictions as mitigating factors in any circumstances.
19. While the Association understands the reasons for this suggestion, we do not believe that such an amendment is justified. Subsection 21A(5A) was inserted into the CSPA in 2008¹² following a comprehensive process of review resulting in a recommendation from the NSW Sentencing Council.¹³ Section 21A(5A) was later endorsed in 2017 by the Royal Commission into Institutional Responses to Child Sexual Abuse, which recommended that all State and Territory governments across Australia enact the same provision (excluding New South Wales and South Australia which had already done so at the time).¹⁴
20. The existing subsection 21A(5A) of the CSPA appropriately balances the desirability of allowing offenders to call upon their otherwise good character as a factor in mitigation against the need to ensure that no mitigation is afforded to offenders whose good character assisted them in the commission of the offence.
21. For offenders whose good character (or lack of prior convictions) had no connection with their offending, the proposed restriction on the use of good character as a mitigating factor would have

¹¹ NSW Sentencing Council, (n 3), 5.27-5.28.

¹² Schedule 2.4 [1], *Crimes Amendment (Sexual Offences) Act 2008* (NSW).

¹³ NSW Sentencing Council, “Penalties Relating to Sexual Assault Offences in New South Wales”, Volume 1, August 2008, pp 128-137.

¹⁴ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII–X*, 2017, recommendation 74.



the potential to operate unfairly. Such a restriction would prevent sentencing courts from taking into account matters that may be relevant to the imposition of a just and appropriate sentence.

Question 5.14 - Adjusting procedures for tendering evidence

22. The Association considers that the procedures for receiving evidence of otherwise good character are adequate and do not call for any reform.
23. Like most other evidence in sentence proceedings, the admission of evidence of otherwise good character is not subject to the *Evidence Act 1995* (NSW) unless a direction is made under section 4 of the Act. As a consequence, it is common for evidence such as character references from family, friends, and other persons with knowledge of the offender, to be admitted without objection and without the author of the reference being required for cross-examination.
24. In the experience of members practising in this area, it is common for judges and magistrates to give little or no weight to character references which disclose that the author of the reference is not familiar with the facts of the offending. This approach is fair and goes some way to ensuring that the court is not acting on unreliable evidence as to the offender's character. A person who is speaking about a person's character ought to know what wrong the person has done in order to be taken seriously on the subject.

Question 5.15 - Place the evidential burden on offenders

25. The Association does not support the suggestion that the burden should be placed on offenders to establish that their good character did not assist them in the commission of the relevant offence.
26. This would be a very difficult exercise given the potential effluxion of time and lack of defence resources, and the notoriously difficult requirement to prove a 'negative'. In addition, the proposal may necessitate the calling of the victim to give evidence and be the subject of questioning, which may in some cases be re-traumatising or distressing.

Conclusion

27. Thank you for the opportunity to make a submission in response to the Consultation Paper and for your consideration of the issues raised.
28. If you would like any further information, please do not hesitate to contact Edward Clapin, Senior Media and Policy Officer at [REDACTED] in the first instance.

Yours sincerely,

Dr Ruth Higgins SC
President