

31 March 2025

The Hon. Peter McClellan AM KC
Chairperson
NSW Sentencing Council
By email: sentencingcouncil@dcj.nsw.gov.au

Re: Good Character at Sentencing

Dear Chairperson,

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (**ALS**).

The ALS is a proud Aboriginal Community-Controlled Organisation (**ACCO**) and the peak legal services provider for Aboriginal and Torres Strait Islander adults and children in NSW and the ACT. Our vision is to achieve social justice and equity for Aboriginal and Torres Strait Islander people, families and communities.

More than 350 ALS staff members based at offices in 21 communities support Aboriginal and Torres Strait Islander people through the provision of high quality and culturally safe legal assistance, including court representation in criminal law, children's care and protection law, and family law. We also deliver a variety of wrap-around programs including bail support, mental health referrals, family violence prevention, and child and family advocacy and support. We provide a Visiting Legal Service for Aboriginal children in youth detention centres, represent Aboriginal and Torres Strait Islander families in the NSW Coroner's Court, and deliver a variety of discrete civil law services including tenants' advocacy, assistance with fines and fine-related debt, and discrimination and employment law.

The ALS is the Justice Peak on the NSW Coalition of Aboriginal Peak Organisations and a key partner in Closing the Gap in NSW and the ACT. As an ACCO, we represent community interests in our advocacy for the reform and transformation of systems which impact the lives of Aboriginal and Torres Strait Islander people.

This submission is informed by the experiences and expertise of the clients and communities we serve, and the expertise of solicitors in our legal practice.

Overarching Comments on the Review

Supporting victim-survivors of sexual offences requires prioritising non-legislative reform

The ALS is supportive of, and plays an active role in, efforts to reduce and eliminate domestic, family, and sexual violence (DSFV), particularly against Aboriginal and Torres Strait Islander women and children who experience grossly disproportionate rates of violence. The latest Closing the Gap dashboard data shows Aboriginal and Torres Strait Islander children in NSW experience sexual abuse at a rate of 4.0 per 1,000 children compared to 0.8 per 1,000 for non-Indigenous children.¹ These numbers are based on reports made to child protection services. The ALS acknowledges that sexual

¹ Productivity Commission, Closing the Gap dashboard, table SE12m.1, available at: <https://www.pc.gov.au/closing-the-gap-data/dashboard/se/outcome-area12/rates-of-substantiation-by-type-of-abuse>

violence against Aboriginal and Torres Strait Islander people, including children, must be situated within the context of colonisation and its ongoing impacts. We highlight the continued failure of child protection, policing and the criminal legal system to address sexual abuse against Aboriginal children and the systemic racism embedded in these systems which drives rates of violence.²

Efforts to improve responses to victim-survivors of child sexual abuse, particularly Aboriginal and Torres Strait Islander victim-survivors, must centre Aboriginal and Torres Strait Islander-led solutions. The ALS draws the Council's attention to the commitments made by all Governments under the National Agreement on Closing the Gap. Increasing safety and protection for victim-survivors of sexual violence, particularly Aboriginal and Torres Strait Islander victim-survivors requires significant, sustained, needs-based and long-term investment in community-controlled organisations, including Aboriginal and Torres Strait Islander Legal Services (ATSILS). We caution against responses focused on criminal legislative changes which have the potential to cause further harm to communities, including victim-survivors, by disproportionately incarcerating Aboriginal and Torres Strait Islander women, men and children and risk increasing the known disproportionate misidentification of Aboriginal victim-survivors.

We refer the Council to our preliminary submission to this review.³ We reiterate that the ALS does not support the introduction of reforms that further limit the use of evidence concerning good character at sentencing, including extending s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* (*Crimes (Sentencing Procedure) Act*). We recognise the need to improve the experience of victim-survivors in the court system, noting that processes are frequently not trauma-informed or culturally safe and can be distressing and retraumatising for many victim-survivors, particularly Aboriginal victim-survivors. However, we do not consider that restricting judicial discretion and limiting the court's ability to holistically consider all aspects of a defendant's character is the right approach.

Instead, we recommend consideration of changes that seek to improve the experience of participants in the court process through increased supports for victim-survivors, procedural changes which reduce re-traumatisation without infringing on the rights of the defendant or the judicial discretion of sentencing courts, programs which support victim-survivors in the criminal court process, and increased community education about the criminal legal system and the sentencing process. We recommend consideration of more appropriate terminology as opposed to 'Good Character' to describe a defendant's 'pro-social' behaviours or 'protective factors' and lack of prior offending. These proposals are discussed further below under question 5.14.

Current operation of the special rule in s 21A(5A) of the Crimes (Sentencing Procedure) Act

As above, we do not support extending the 'special rule' provided in s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999*:

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

We note that this exception was implemented after careful consideration by this Council following a comprehensive review into penalties for sexual assault offences.⁴ Recommendation 38 of the review was to amend the *Crimes (Sentencing Procedure) Act 1999* to preclude a sentencing court from taking

² For further discussion, see the Conversation (2023), A royal commission won't help the abuse of Aboriginal kids. Indigenous-led solutions will, available at: <https://theconversation.com/a-royal-commission-wont-help-the-abuse-of-aboriginal-kids-indigenous-led-solutions-will-216526>

³ Available here: <https://sentencingcouncil.nsw.gov.au/documents/our-work/good-character/PGC69.pdf>

⁴ NSW Sentencing Council, *Penalties Relating to Sexual Assault Offences in New South Wales, Volume 1*, (report, August 2008).

into account good character to the extent that it had enabled the defendant to commit the offence. In response to recommendation 38, the NSW Parliament passed the *Crimes Amendment (Sexual Offences) Act 2008* which, among other amendments, introduced sub-s 21(5A).⁵ In 2017, the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) recommended all state and territory governments across Australia implement the same exception.⁶

The ALS considers that the current exception, recommended by this Council and endorsed by the Royal Commission, strikes the appropriate balance and correctly recognises the role good character may play in aiding an offender in the commission of child sexual offences in certain cases and appropriately denies those offenders the benefit of relying on good character at sentencing.

Current operation of good character at sentencing

Judges and magistrates in NSW are required to synthesise a significant amount of information about the relevant offence, the impacts on the victim and the subjective circumstances of the defendant in arriving at a decision on the appropriate sentence. In the ‘instinctive synthesis’ of sentencing, no single factor has a decisive function, as set out by the High Court: “the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case”.⁷

As evidence of good character is one of many factors that courts must consider in exercising discretion at sentencing, it is unlikely on its own to be a decisive factor in mitigating a sentence. In NSW, sub-s 21A(1) *Crimes (Sentencing Procedure) Act 1999* requires sentencing courts to take into account numerous factors if relevant and known to the court, including up to 22 aggravating factors, up to 14 mitigating factors, and any other objective or subjective factor that affects the relative seriousness of the offence. The considerable interaction of good character evidence with other factors, such as prospects of rehabilitation, make it difficult to isolate and excise, and would impinge on the ability of courts to deliver effective and individualised justice.

Character evidence plays an important role in sentencing courts arriving at the appropriate penalty to give effect to the various purposes of sentencing in any given case. For example, evidence as to an accused person’s activities and standing in the community, whether before or after the offence, can be relevant to an evaluation of matters such as their prospects of rehabilitation and likelihood of reoffending, whether favourable or otherwise. However, it is important to note that the availability of evidence of good character does not guarantee a reduction in sentence.⁸

Even where s 21A(5A) does not apply, good character in sentencing proceedings is subject to judicial discretion and scrutiny. The common law provides considerable guidance as to how good character interacts with other mitigating factors on sentencing including where good character may carry less weight or have no bearing at all on sentencing.⁹

⁵ Crimes Amendment (Sexual Offences) Bill 2008.

⁶ Royal Commission into Institutional Responses to Child Sexual Abuse (Final Report: Recommendations, August 2017) 112 [74].

⁷ *Muldrock v The Queen* (2011) 244 CLR 120 at [26], quoting (with approval) *Markarian v The Queen* (2005) 228 CLR 357 at [51].

⁸ See *Ryan v The Queen* [2001] HCA 21 per McHugh J at [25].

⁹ See for example *R v PGM* [2008] NSWCCA 172, 152 [43]–[44]; *Dousha v R* [2008] NSWCCA 263 [49]; *Ryan v The Queen* (2001) 206 CLR 267 [29]; *R v Smith* [2000] NSWCCA 140 [21] – [22] and *R v Gent* [2005] NSWCCA 370 [64].

Consultation Paper Questions

| Question | ALS response |
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| 5.1: Use of good character generally | |
| <p>(1) Should consideration of good character as a mitigating factor be abolished in all cases? Why or why not?</p> <p>(2) How could consideration of evidence of good character be limited?</p> | <p>For the reasons outlined and discussed above, the ALS strongly opposes abolishing good character as a mitigating factor in all cases.</p> <p>In the absence of an evidentiary basis, such as statistical data, demonstrating the need for this reform, we consider that a blanket prohibition on defendants placing favourable material before a court on sentence would undermine the fundamental principle of procedural fairness in criminal proceedings and impermissibly fetter judicial discretion.</p> <p>Good character evidence can assist a sentencing court in assessing the weight to be afforded to each of the statutory purposes of sentencing, such as prospects of rehabilitation (including where the evidence weighs against the likelihood of rehabilitation). As the courts have frequently observed, the purposes of sentencing often pull in opposite directions, and the presentation evidence of good character does not guarantee any reduction in sentence in the context of the instinctive synthesis.</p> <p>Evidence of ‘bad character’ is already available to sentencing courts, in the form of criminal histories and criminal antecedents. The presentation of good character evidence in court proceedings is a crucial aspect of procedural fairness that ensures a person can present all aspects of their subjective case to the court.</p> |
| 5.2: Use of lack of previous convictions generally | |
| <p>(1) Should consideration of lack of previous convictions also be abolished as a mitigating factor in all cases? Why or why not?</p> <p>(2) In what circumstances should the fact that the offender does not have a record of previous convictions not be used in mitigation?</p> | <p>As discussed above, the ALS strongly opposes abolishing consideration of lack of prior convictions as a mitigating factor.</p> <p>The common law already provides sufficient guidance on where a clean criminal record should have limited mitigating effect.</p> |

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| 5.3: Use of good character for offenders who plead not guilty | |
| Under what conditions could good character not be available as a mitigating factor for offenders who plead not guilty? | <p>We do not support preventing the use of good character as a mitigating factor for offenders who plead not guilty.</p> <p>We consider this proposal at odds with the presumption of innocence, a fundamental tenet of the criminal law, including that defendants have the right to defend themselves against criminal charges and are innocent until proven guilty.</p> |
| 5.4: Good character as an aggravating factor | |
| Under what conditions could use of good character in the commission of an offence be treated as an aggravating factor? | <p>We do not support reform to this area and note that the Royal Commission into Institutional Responses to Child Sexual Abuse did not consider that such reform is necessary in view of other available aggravating factors ‘such as breach of trust or authority, or the special vulnerability of the victim-survivor.’¹⁰</p> |
| 5.5: Extending the special rule to all child sexual offences | |
| <p>(1) Should the special rule be extended to all child sexual offences? Why or why not?</p> <p>(2) What offences, if any, should be added to the definition of “child sexual offences” for the purposes of the special rule?</p> | <p>We do not support extending the special rule to all child sexual offences.</p> <p>We consider that the current exception, recommended by this Council and endorsed by the Royal Commission strikes the appropriate balance between the relevance of good character in sentencing and the interests of community.</p> <p>We also highlight, as discussed above, that the common law provides considerable guidance on where good character should carry less weight or have no bearing at all on sentencing for child sexual offences.</p> |
| 5.6: Extending the special rule to sexual offences against other vulnerable groups | |
| <p>(1) What other vulnerable groups or offences against vulnerable groups could be subject to the special rule?</p> <p>(2) How could they be identified?</p> <p>(3) Should any of these offences be subject to the condition that the offender’s good character or lack of previous convictions was of</p> | <p>We do not support extending the special rule to other vulnerable groups.</p> <p>As discussed above, we note that this exception was implemented after careful consideration by this Council following a comprehensive review into penalties related to sexual assault offences.</p> <p>We also highlight that the vulnerability of the victim is taken into account as an aggravating factor (<i>Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(2)(l)</i>).</p> |

¹⁰ Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report: Parts VII –X (2017) 299.

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| assistance in the commission of the offence? | |
| 5.7: Extending the special rule to adult sexual offences | |
| <p>(1) What adult sexual offences, if any, should be subject to the special rule</p> <p>(2) Should any of these offences be subject to the condition that the offender’s good character or lack of previous convictions was of assistance in the commission of the offence?</p> | <p>We do not support extending the special rule to sexual offences against adults.</p> <p>Again, we highlight that the current exception was the result of this Council’s review which considered that limits were not necessary on the use of good character for sexual offences against adults.</p> |
| 5.8: Extending the special rule to domestic violence offences | |
| <p>(1) Should domestic violence offences be subject to the special rule? Why or why not?</p> | <p>We do not support expanding the special rule to domestic violence offences.</p> <p>We particularly highlight the risk this proposal poses to Aboriginal victim-survivors, who are routinely and disproportionately misidentified and criminalised under current system settings.</p> <p>In our criminal law practice, contravention of an Apprehended Violence Order is the offence most frequently charged against Aboriginal women we represent. The top five offences charged against Aboriginal women in our practice are all DFV-related charges. This accords with statewide data from the NSW Bureau of Crime Statistics and Research (BOCSAR):</p> <ul style="list-style-type: none"> • Of the 14,050 charges police laid against adult women for DV offences in 22/23, 36% were against Aboriginal women.¹¹ • Between 2014 and 2023 the annual number of Aboriginal women proceeded against by NSW Police more than doubled from 8,446 to 17,079 (up 102.2%). The increase in Aboriginal women accounts for 62.1% of the total rise in women proceeded against.¹² • In 2023, 27.1% of Aboriginal people proceeded against were female – higher than the overall proportion of women proceeded against by 5.2 percentage points (21.9%).¹³ |

¹¹ NSW Bureau of Crime Statistics and Research, Reference: ac24-23547.

¹² NSW Bureau of Crime Statistics and Research, Reference: nc25-24290.

¹³ NSW Bureau of Crime Statistics and Research, Reference: nc25-24290.

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| | <ul style="list-style-type: none"> • Three of the top five offences contributing most to the increase in Aboriginal women charged by police were DV offences.¹⁴ |
| 5.9: Extending the special rule to other serious offences | |
| <p>(1) What other serious offences, if any, should be subject to the special rule?</p> <p>(2) Should any of these offences be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence?</p> | <p>We do not support extending the special rule to other serious offences.</p> <p>The proposal in the consultation paper to extend the special rule to all serious indictable offences is of particular concern, noting such an expansion would capture a wide range of offences without any evidentiary basis for this proposal.</p> |
| 5:10: Extending the special rule where there is a breach of trust of authority | |
| <p>(1) What offences, if any, involving breach of trust or authority should be subject to the special rule?</p> <p>(2) Should any of these offences be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence?</p> <p>(3) Should a finding that an offender abused a position of trust or authority in relation to the victim of the offence make the offender subject to the special rule? Why or why not?</p> | <p>We do not support extending the special rule where there is a breach of trust or authority.</p> <p>As discussed above, a breach of trust or authority is already treated as an aggravating factor under legislation¹⁵ and the common law confirms that good character may be given less weight in such cases or none at all.¹⁶</p> |
| 5.11: Extending the special rule to all offences | |
| <p>(1) Should all offences be subject to the special rule? Why or why not?</p> <p>(2) If yes, should the special rule be subject to the condition that the offender's good character or lack of previous convictions was of</p> | <p>For the reasons discussed and outlined above, we strongly oppose this proposal.</p> |

¹⁴ NSW Bureau of Crime Statistics and Research, Reference: nc25-24290.

¹⁵ Crimes (Sentencing Procedure) Act 1999, s 21A(2)(k).

¹⁶ *Ryan v The Queen* (2001) 206 CLR 267; *R v Jung* [2017] NSWCCA 24, [59].

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| assistance in the commission of any or all offences? | |
| 5.12: Exempting under 18-year-olds from the special rule | |
| Under what conditions should offenders who are under 18 be exempt from the application of the special rule? | <p>We strongly support the proposal to exempt children from the application of the special rule.</p> <p>We consider that an exemption is necessary and appropriate to account for the unique developmental stage, vulnerability and maturity of children proceeded against criminally.</p> |
| 5.13: No change to the current law | |
| <p>(1) What justification is there for courts continuing to take good character into account in sentencing for:</p> <p>(a) sexual offences against children, and</p> <p>(b) other offences?</p> | <p>As outlined above, we do not support the introduction of reforms that further limit the use of evidence concerning good character at sentencing.</p> <p>We support consideration of procedural changes, discussed below, that seek to improve the experience of participants in the court process, including victim-survivors and witnesses.</p> |
| <p>(2) How should courts inform themselves of good character in these cases?</p> | |
| <p>(3) Why should courts not take good character into account in sentencing for:</p> <p>(a) sexual offences against children, and</p> <p>(b) other offences?</p> | |
| 5.14: Adjusting procedures for tendering evidence | |
| <p>What changes could be made to the procedures surrounding the tendering and use of evidence of good character in sentencing proceedings?</p> | <p>We support consideration of measures to improve victim-survivors' experience in the criminal justice system more broadly and in sentence proceedings, including:</p> <p><u>Terminology</u></p> <p>We recommend consideration of more appropriate terminology than 'Good Character' to describe a defendant's 'pro-social' behaviours or 'protective factors' and lack of prior offending.</p> |

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| | <p>We recommend further consultation on this point, particularly with victim-survivors, legal stakeholders and the judiciary. Possible alternatives for consultation may include:</p> <ul style="list-style-type: none">• ‘prior conduct’• ‘character evidence’• ‘pro-social behaviour’• ‘protective factors’ <p>We consider that the above suggestions would require consideration of the same types of material on sentence as currently considered in an evaluation of ‘good character’ evidence, but would remove the moral connotations implied by the word ‘good’.</p> <p><u>Trauma-informed training and cultural safety training</u></p> <p>We recommend ongoing training for judicial officers and legal practitioners to ensure that proceedings are undertaken in a manner which minimises distress and re-traumatisation for victim-survivors.</p> <p>To provide an example of a minimal procedural change that may improve experiences for victim-survivors: a sentencing court may hear evidence of good character and then adjourn for weeks or months before handing down sentence. Prior to adjourning, courts could be required to provide information to a complainant in relevant cases about how and why good character evidence may be taken into account and, if a Victim Impact Statement (VIS) has been provided, acknowledge the VIS and how this will also be considered. This is a small step that judicial officers could take to reduce the distress caused to victim-survivors by the impression that a sentencing court is placing significant weight on good character and comparatively less weight on a VIS.¹⁷</p> <p>We also recommend that all court jurisdictions in NSW mandate ongoing judicial education on trauma-informed practice and Aboriginal and Torres Strait Islander cultural safety in court proceedings. This training should be developed in partnership with, and delivered by, ACCOs wherever possible to support self-determination and give effect to the commitments made in the National Agreement on Closing the Gap that policies and programs impacting Aboriginal and Torres Strait Islander people will be designed in partnership with Aboriginal and Torres Strait Islander people.</p> |
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¹⁷ See also, The Office of the Director of Public Prosecutions NSW (ODPP) Submission, 19 July 2024, available here: <https://sentencingcouncil.nsw.gov.au/documents/our-work/good-character/PGC83.pdf>

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| | <p>It should address the disproportionate burden of experiences of trauma borne by First Nations communities; the likely impacts of trauma on the evidence of First Nations court participants, including victims, witnesses and accused persons; the sociolinguistic features of First Nations people that may influence the way that they give evidence and respond in the context of investigative and legal processes; and other cultural considerations, such as protocols around death and norms around men’s and women’s business.</p> <p>This would benefit all court participants, including witnesses and complainants, defendants, court staff, members of the legal profession, prosecutors and judicial officers.</p> <p><u>Entitlement of victim-survivors to appear via AVL</u></p> <p>We recommend consideration be given to ensuring that victim-survivors in child sexual offence proceedings have the right to appear via AVL if they wish to observe the sentencing proceedings remotely. Currently, victim-survivors can give evidence remotely and may read their VIS remotely, however this does not extend to a right to attend the sentencing proceedings remotely.</p> <p>The ALS acknowledges that courtroom dynamics frequently exacerbate the trauma and distress experienced by victim-survivors during court proceedings. This trauma and distress is compounded for Aboriginal and Torres Strait Islander victim-survivors due to the specific trauma Aboriginal and Torres Strait Islander people experience when encountering the legal system.</p> <p>The right to appear via AVL would be an important step towards making participation for victim-survivors of child sexual abuse in the court process more trauma-informed and culturally appropriate. We refer to the ODPP’s preliminary submission to this review for further discussion of this proposal.¹⁸</p> <p>We caution that the use of AVL, like any technology, must be accompanied by appropriate safeguards and training for users in the operation of the technology. For example, we are aware that there have been instances where the court has muted itself during an AVL where both the defendant and the complainant are appearing via AVL. This has resulted in the defendant being able to speak directly to the victim-survivor which understandably has the potential to cause significant distress and harm for victim-survivors.</p> |
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¹⁸ The Office of the Director of Public Prosecutions NSW (ODPP) Submission, 19 July 2024, available here: <https://sentencingcouncil.nsw.gov.au/documents/our-work/good-character/PGC83.pdf>

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| | <p><u>Arrangements for persons at court</u></p> <p>In line with our recommendation above, steps must be taken to increase the availability of rooms at court for remote witness facilities and these rooms must be designed in a manner to reduce re-traumatisation where possible. We are concerned that in a number of locations, our staff have reported reduced access to meeting rooms due to the same rooms being used for remote witness facilities. It is unacceptable that courts are having to choose between already disadvantaged clients having access to their lawyers and victim-survivors having access to AVL arrangements.</p> <p><u>Availability of witness intermediaries and interpreters, particularly for Aboriginal victim-survivors</u></p> <p>We consider there to be a clear need for continuous, culturally appropriate support for victim-survivors at all stages of engagement in the criminal legal system. We recommend that all victim-survivors of sexual offending be provided access to intermediaries from the police interview stage, throughout preparation for trial, at trial and during sentencing proceedings. Aboriginal and Torres Strait Islander victim-survivors should have the choice of accessing specific Aboriginal and Torres Strait Islander intermediaries.</p> <p><u>Community Education about the criminal legal system and sentencing process</u></p> <p>We consider that some of the public advocacy in favour of removing the availability of good character evidence in child sexual offences arises because of a lack of public awareness and education about the existence of the special rule and its operation.</p> <p>We recommend investment in increased community education about the sentencing process and the criminal legal system more generally. This should include specific investment in ACCOs, especially Aboriginal and Torres Strait Islander Legal Services (ATSILS) where appropriate, to design, develop and deliver community education programs to Aboriginal communities. Within our current resourcing, we do not have capacity to meet demand for community legal education in the communities we serve.</p> |
| <p>5.15: Placing the evidential burden on offenders</p> | |
| <p>In relation to what offences, if any, should the burden be placed on an offender, in a sentencing hearing, to establish that their</p> | <p>We oppose placing the burden on the defendant at sentence to establish that their good character did not assist in committing the offence. We highlight the limited resources of most criminal defendants before the courts, particularly ALS clients and self-represented defendants, compared with</p> |

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| good character did not assist in committing the offence? | the comparatively infinite resources of the State in running criminal prosecutions. |
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Thank you for the opportunity to provide a submission. Please contact [REDACTED] if you would like to discuss our submission further.

Yours faithfully,

Nadine Miles
Principal Legal Officer
Aboriginal Legal Service (NSW/ACT) Limited