

Sentencing Council

Preliminary submissions relating to the use of “good character” in sentencing

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Preliminary submissions on the Terms of Reference, giving consideration to the following:

- **Whether the limitations on the use of evidence concerning ‘good character’ or a lack of previous convictions in certain sentencing proceedings, as per s21A(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”;**

Craig’s experience as a survivor of child sexual abuse who has been the main prosecution witness in two criminal trials and my experience as a community lawyer of nearly thirty years, working in legal centres in Darlinghurst/Kings Cross, Campbelltown and more recently as the former Principal Lawyer of knowmore Legal Service, enables SAMSN to bring practical knowledge and experience to this issue.

I am currently the Policy, Advocacy and Stakeholder Relations Manager at SAMSN. In my years of working with survivors of child sexual abuse, the one constant has been the offender gaining the trust of the victim/survivor and their family to assert power and authority enabling the sexual abuse of the child to occur. The offender, whether in an institutional setting or within the family had been of ‘good character,’ someone to be trusted.

As is now known from the research commissioned by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission), the enablers of child sexual abuse are:

- the good character of the offender which facilitated the contact with the child; and
- being in a position of trust and authority over a child and often their family.

The legislation in question is

S 21(5A) Special rules for child sexual offences. In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender.

This legislation prevents good character references or lack of previous convictions of an offender from being used as a mitigating factor where the court is satisfied that was a factor providing assistance to the offender. This would include situations for example within a church, school, scouts or a community organisation. It would exclude the situation of a family where the access to the child arose from the relationship to the child for example the child’s grandfather.



However, it is our submission that making this distinction between the situations where the offence has occurred is flawed, leading to inconsistencies in applying the law and causing distress to victims/survivors and their families. We believe the flaws in the current legislation are:

- its failure to acknowledge that grooming is a criminal offence in NSW.
- it allows for two classes of victims/survivors – those abused by someone who was a community member/leader compared to someone who was abused within a family, where it was the relationship to the offender that was allegedly the enabler of the abuse.
- it allows for two classes of offenders – those who offended within an institution or community context and those who abused within a family or family like relationship (eg a neighbour).
- it also allows for inconsistency where the same set of facts may see a Magistrate or Judge allow a good character reference in one situation but not in another.

The current law lacks certainty in its application.

While it continues to allow good character references to be used in some situations, it will foster a dual system of law for victims/survivors and for offenders and will fail to provide certainty.

The current law fails to understand the enablers of child sex offending. The current law creates an artificial distinction between an offence that occurs in an institutional context and an offence that occurs within a family.

- **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 remain appropriate, equitable, and fit for purpose;**

As outlined above, it has been the good character of the offender whether within a community or family setting that has enabled the offence to occur. Following logically from this is the conclusion that good character is always of assistance to the offender in the commission of the offence, making the use of good character evidence in sentence proceedings is no longer fit for purpose.



- **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;**

The benefits of amending the legislation to remove the use of good character references, have been set out in the answers above. However, more importantly by amending the legislation, victims/survivors would see just outcomes. What victims/survivors are looking for is:

- validation – that they are believed; and
- vindication – the condemnation of the Court of what has happened.

We now know as a result of the Royal Commission, that grooming can often make survivors of child sexual abuse, feel complicit in the offending, even though they were children at the time and not responsible in any way for the criminal behaviour of the offender.

Under the current law where good character is allowed by courts, where the court is satisfied that the good character of the offender was not of assistance in the offence, the victim/survivor must hear what a ‘good person’ their offender otherwise was, reinforcing the feelings of somehow being complicit in the commission of the crime.

At SAMSN we have heard from many survivors who have been through the criminal justice system and who have listened to good character references being read out at court. They have felt that the severity of the crime has been diminished by these references; they have felt on listening to these references, humiliated and insulted, after all the offender had been found guilty of the most serious of offences against a child.

- **Proceedings for receiving good character evidence in sentencing proceedings;**

SAMSN acknowledges that there is a proposal to use the terms such as ‘prior character’ or ‘pre-offending’ character on the basis those terms are far less emotionally charged than using the term ‘good character.’ However, SAMSN’s position is that it still fails to take into account that many offenders have no prior convictions, have no ‘pre-offending’ history thus allowing defence counsel to highlight this lack of any prior history to imply good character to reduce the sentence. We know that most child sex offenders are never caught and brought before the courts. The fact there is no prior offending history should not be seen as a factor in mitigation.



Concluding remarks

Not taking into account good character or the lack of prior convictions as mitigating factors in all cases of child sex offences, would create good law. However, more importantly, it would validate and vindicate the experiences of all victim/survivors – they have been believed, the crime against them has not been diminished.

