

NSW Sentencing Council

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**Submission to NSW Sentencing Council review of Section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)***

Thank you for the opportunity to comment on the review by the NSW Sentencing Council of section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*, and other relevant sections, and the common law relating to the use of “good character” in sentencing.

I have been advocating alongside other victim-survivors to ensure that so-called ‘good character’ is not considered relevant in the sentencing of convicted child sexual offenders in any circumstances. I note that this is a departure from the current position in jurisdictions across Australia, but I strongly believe that this change would bring our law into line with modern evidence-based understandings of child sexual assault, trauma and rehabilitation.

**‘Good character’ inappropriate in sentencing for child sexual offences**

At the heart of our current laws is the outdated notion that what goes on inside the home or within personal relationships is of less concern to society as a whole than what occurs outside of the home. The objective of protecting the community from crime and deterring criminal behaviour has historically taken priority over other policing and sentencing objectives such as rehabilitation of offenders or seeking justice for victims. Nowhere is this more obvious than when it comes to the circumstances in which ‘good character’ can be considered as a mitigating factor in sentencing offenders. By asking what a person’s behaviour is ordinarily like in the eyes of the community at large, we are effectively questioning what level of risk they pose to the community at large and, accordingly, how long their prison sentence should be.

Those crimes which are not personal in nature, and which typically occur outside of relationships, are the most obvious in which an offender’s pre-offending conduct can be considered relevant – for example, a person convicted of shoplifting for the first time. In the context of that person’s daily public life, their offence may validly be seen as ‘out of character’ by others who have direct experience of that person’s behaviour in similar contexts over a period of time. However, that question can not so validly be asked in relation to offences that occur in private or only in the context of certain relationships.

We know now that it is common for otherwise upstanding citizens to commit child sexual assault. Many of them use their community reputation to get away with committing the crime in the first place. By its very nature, a crime of sexual assault against a child ordinarily occurs in private, in a context that other people ordinarily interacting with the offender has no direct experience of. Unlike the crime of shoplifting, where a character reference might attest that the offender would not 'normally do something like that', it is hard to imagine a character reference credibly stating that in their direct experience a particular child sexual assault offender would not normally abuse a child behind closed doors.

It is on this basis that we must look at the damage being done to victim-survivors, and to the ability of our justice system to help and not further traumatise victim-survivors, by the current wording of section 21A(5A) of our Crimes Act.

### **Section 21A(5A) flawed in both text and application**

It is clear from the case law that there exists significant judicial disagreement as to the applicability of this limitation in case law. In many cases, the court has consistently deviated in its consideration as to what aspects of an offender did or did not assist the offender to commit the offence. In similar cases, judges have reached contrasting conclusions as to whether an offender's 'good character' assisted them to commit the offence, particularly in the case of community leaders, teachers and domestic circumstances. However, in cases where the offender was a relative or family friend, which constitutes the majority of child sexual offence cases, judges in most examples did not observe that this status assisted the offender to commit the offence and therefore s21A(5A) was applicable. This is a clear failure in law, which widely allows the consideration of character references in cases which reflect the majority of offending contexts.

It is notable that NSW has taken steps in attempting to reduce the application of good character references to child sexual offences, which exceeds the efforts of other states. However, despite the provision to disallow the consideration of good character references where the factor assisted the offender to commit the offence, character references have still been permitted for offenders in light of their post- or pre-offence behaviour. There are persistent examples where a judge has noted that, although the offender's status did assist them to commit the offence, character references were then still considered by the judge in light of other factors.

The current limitation placed onto s 21A(5A) is not operating as intended, with clear inconsistency as to its application in cases. Any revisions to the section which still permit the consideration of character references with respect to child sexual offences are also likely to fail to uphold justice. Justice would be better served by instead deleting the words "if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence" to ensure that 'good character' is never a relevant factor in relation to sentencing for child sexual offences.

**Convicted perpetrators of child sexual assault, by the very nature of their crimes, do not have a good character. Simply, character references should not be considered by a court in relation to child sexual offences.**

Survivors and their experiences must be at the forefront of our justice system. It is heartbreaking to think that victim-survivors of child abuse can, after everything they've experienced, finally get a conviction only to then see that perpetrator's sentence reduced for so-called 'good character'.

There has been some suggestion that the 'good character' terminology should be changed. The rebranding of 'good character' to prior character or pre-offending character does not negate the current legal inconsistencies and actual harm its application causes to victim-survivors. The current issue lies with its impact on victims who, after the courage of reporting, undergoing a long trial process and suffering ongoing trauma may finally see a perpetrator convicted, only for the sentence to be reduced due to the apparent personality or background of the offender. This wording change would simply sanitise the traumatic and lasting impact of child sexual offences, without addressing the fundamental wrong the consideration of character references causes. A rebrand without any real amendments would be a huge failure of the reform process.

In conclusion, courts should be prohibited from taking good character into account as a mitigating factor in all cases involving child sexual offences. The "Your Reference Ain't Relevant" petition was a huge step forward in achieving justice for survivors and implementing the change sought by the sector. We welcome the NSW Sentencing Council's consideration of this review, and will continue to lobby for changes to be made as soon as possible.

Regards,

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**Greens NSW Upper House MP and Spokesperson for Gendered Violence**