



Our ref: CLC:BMcd080724

8 July 2024

Hon Peter McClellan AM KC
Chairperson
NSW Sentencing Council
GPO Box 31
Sydney NSW 2001

By email: sentencingcouncil@dcj.nsw.gov.au

Dear Mr McClellan,

Good character in sentencing

Thank you for inviting the Law Society to provide a preliminary submission to the Sentencing Council in respect of the operation of section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the use of 'good character' in sentencing. We are grateful for the opportunity to contribute to reform that improves sentencing processes, and offer the following comments relevant to the Terms of Reference for consideration.

1. Limitations under section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999*

We consider the current requirements related to the use of good character in sentencing for child sexual offences contained in section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to be appropriate, namely that the good character or lack of previous convictions of an offender cannot be taken into account as a mitigating factor in child sexual offence cases if the court is satisfied that the factor 'was of assistance to the offender in the commission of the offence.'¹

The current scope and drafting of section 21A(5A) in our view appropriately recognises that, as noted by the Honourable John Hatzistergos, former Attorney General, 'the simple fact of a person's clean record and good character may assist an offender to gain the trust of the child, or the child's parents, in order to commit a sexual offence against the child'² and should not be taken into account by the Court as a mitigating factor in sentencing the offender.

We consider it appropriate to continue to confine this bar on considering good character as a mitigating factor to child sexual offence cases, particularly in view of the Sentencing Council's recommendation to this effect contained in the 2008 report, 'Penalties Relating to Sexual Assault'.³ As part of an in-depth consideration of good character and the sentencing of sexual offenders, the Sentencing Council considered there to be no apparent need for a bar on the use of good character to be made in respect of cases where the victim is an adult, noting that existing sentencing principles including the common law 'are adequate for sentencing in such cases'.⁴ It was noted that, in contrast, such a bar may be appropriate in cases involving

¹ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(5A).

² Crimes Amendment (Sexual Offences) Bill 2008, [Second Reading](#).

³ Recommendation 38, p. xxvi.

⁴ Sentencing Council, 'Penalties relating to sexual assault', 2008, p 130.

children, as they constitute a 'special category', considering the increased 'ability of persons in authority, and of those who are in a position to win the confidence of the parents of children, to commit sexual offences against them.'⁵

Indeed, the Royal Commission into Institutional Responses to Child Sexual Abuse also commented on the prevalence of these dynamics in child sexual offence cases, stating that,

In many cases of institutional child sexual abuse that we have considered, it is clear that the perpetrator's good character and reputation facilitated the offending. In some cases, it enabled them to continue to offend despite complaints or allegations being made.⁶

We agree that, considering the special features involved in many child sexual offence cases including power dynamics and vulnerability, it is appropriate to differentiate this category of offending and apply section 21A(5A) only to offences involving children.

Further, we also hold the view that the bar on good character as a mitigating factor should be confined to circumstances in which the offender's good character assisted the offender to commit the offence. In our view the Court should otherwise be able to consider good character in sentencing as an important part of the 'instinctive synthesis'⁷ involved in reaching an appropriate sentence, as explored further below. This view is consistent with, and is informed by, the recommendations of both the Sentencing Council in the report, 'Penalties Relating to Sexual Assault' (2008)⁸ and recommendation 74 of the Royal Commission into Institutional Responses to Child Sexual Abuse.⁹

2. The utility of good character and its interaction with other aspects of sentencing

In child sexual offence cases, evidence of good character that was not of assistance to the offender in committing the offence can be an important factor in the sentencing exercise more broadly. This includes the role of good character evidence in assisting judicial officers to meaningfully assess other factors relevant to sentence, such as the offender's prospects of rehabilitation and likelihood of re-offending. Depending on the features of a particular case, informed assessment of these factors may well be critical to achieving relevant purposes of sentencing under section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), such as promoting the rehabilitation of the offender,¹⁰ or protecting the community from the offender.¹¹

Judicial discretion in these circumstances is particularly important when considering the notably broad range of offences, involving a range of objective seriousness, that fall within the definition of "child sexual offence"¹² and therefore the scope of section 21A(5A), from voyeurism offences (2-year maximum penalty)¹³ to sexual intercourse with a child under 10 years (life imprisonment).¹⁴ A significant variation of circumstances is encompassed, and as such, judicial discretion is a particularly important tool and safeguard to ensure appropriate weight is given to good character evidence, in view of the particular facts and circumstances of each case. Indeed, we note and agree with recent comments by the NSW Court of Criminal Appeal in *Bhatia*,¹⁵ that, in respect of section 21A(5A),

⁵ Sentencing Council, 'Penalties relating to sexual assault', 2008, p 133.

⁶ Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report VIII, p 299.

⁷ *Markarian* (2005) 228 CLR 357 [37].

⁸ Sentencing Council, 'Penalties relating to sexual assault', 2008, Chapter 5, pp. 115-138.

⁹ Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report VIII, p 299.

¹⁰ *Crimes (Sentencing Procedure) Act 1999*, s 3A(d).

¹¹ *Crimes (Sentencing Procedure) Act 1999*, s 3A(c).

¹² *Crimes (Sentencing Procedure) Act 1999*, s 21A(6).

¹³ *Crimes Act 1900*, s 91J.

¹⁴ *Crimes Act 1900*, s 66A.

¹⁵ [\[2023\] NSWCCA 12](#).

It should be stated emphatically that whether the section attaches to a particular sentencing exercise will turn on the facts and circumstances of the case. It is inappropriate to attempt to lay down prescriptive rules. The terms of the provision mean that, while some cases will clearly be caught by the section, and others clearly will not, there are many cases on the fringes where the issue may be difficult to resolve.¹⁶

In our view, introducing a complete bar on the ability for judicial officers to consider good character evidence in child sexual offence cases, regardless of whether the offender's good character assisted them to commit the offence, could compromise the sentencing process, and affect the capacity for sentences in child sexual offence matters to be effective, reflect the common law principle of proportionality, and reflect the purposes of sentencing under section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

3. Victim-survivors' experience of sentence proceedings involving good character

We recognise that, for many victim-survivors, experiencing sentencing proceedings that involve good character evidence is extremely difficult, and potentially traumatising. We support consideration of measures to better support victim-survivors through this experience, including:

- Improved resourcing to ensure that victim support services, including the ODPP Witness Assistance Service and NSW Victims Services, are funded to provide a high level of support to victim-survivors leading up to, during, and after sentence proceedings involving good character evidence.
- Support for all professionals involved in sentencing for sexual offending to receive trauma-informed training to ensure that proceedings are conducted, and judgment delivered, in a manner designed to avoid distress and re-traumatisation of victim-survivors.
- Measures to ensure victim-survivors have agency to decide the way in which they engage with sentence proceedings, including infrastructure to support a victim-survivor's choice to attend sentence proceedings via audio-visual link. Supporting victim-survivors in this way, including consideration of any legislative change to enshrine a right for victim-survivors to attend sentence proceedings remotely, should in our view be accompanied by improved funding for Courts to ensure all precincts are equipped with functional technology to support remote appearances.

Further, while we appreciate the narrow scope of this review, it is our view that, to realistically improve the victim-survivor experience of sentence proceedings involving good character evidence, meaningful investment in improving the broader justice response to sexual violence is required. This includes implementing meaningful measures to address issues that affect the overall justice process that can compound the trauma experienced by victim-survivors' in sentence proceedings, such as lengthy delays in proceedings, underfunded legal assistance services and the involvement in sexual violence matters of personnel who have not undertaken trauma-informed training.

Thank you for the opportunity to provide a preliminary submission in respect of this review. We look forward to further opportunities to provide feedback as this work progresses. If you have any questions in relation to this letter and attachments, please contact [REDACTED], Policy Lawyer on [REDACTED] or by email: [REDACTED].

Yours sincerely,

Brett McGrath
President

¹⁶ Ibid., [129].