

The Hon Peter McClellan AM KC
NSW Sentencing Council
Department of Communities and Justice

8 July 2024

Via email:

To the Hon Peter McClellan

Response to the NSW Sentencing Council's review of s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*

Introduction

Rape and Sexual Assault Research and Advocacy (**RASARA**) thanks you for the invitation to make a submission to the New South Wales Sentencing Council's call for preliminary submissions regarding a review of section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* (the **CSP**).

RASARA is an independent, not-for-profit charitable organisation established to build and hold the evidence base for survivor-centric rape justice reform. We advocate for best practice in legal responses to rape and sexual assault. More information about RASARA is available at: <http://rasara.org>.

These submissions are premised on our review of sentencing decisions of New South Wales courts made over 2023 to 2024 for convictions of sexual offences perpetrated against adults.¹ Those decisions speak to the irrelevant and misleading nature of evidence of good character or a lack of prior convictions as a mitigating factor when sentencing. As explained below, it is RASARA's view that these decisions, and the inefficacy of section 21A(5A) of the CSP in the context of child sexual abuse, speak to the need for a blanket limitation on the application of good character evidence as a mitigating factor when sentencing any offender convicted of sexual offences.

Summary

Rape and sexual assault offenders hide in plain sight. They are "fathers, co-workers, brothers, lovers, friends".² It is uncontroversial that their offending is significantly underreported and inflicts irreparable harm upon individuals, families, communities and society. The infrequency with which rape and sexual assault offences are successfully prosecuted means it is vital that, on the rare occasion when a conviction is secured, courts have the correct tools to impose a sentence which adequately reflects the severity of the offender's conduct, recognises the impact of offending and sends a strong message to the community that sexual violence is not acceptable.

¹ See Appendix A.

² Veronique Valliere, *Unmasking the Sexual Offender*, Chapter 3: Myth-Information, Our Misinformed Beliefs About Sexual Offenders, Taylor & Francis Group, 2023, 30.

To this end, RASARA makes the following submissions in response to the terms of reference of this review.

First, good character evidence offers no logical utility in mitigating the severity of a sentence. Sexual offenders are inherently capable of maintaining a Jekyll and Hyde persona of appearing to adhere to social and legal norms *whilst* engaging in despicable behaviour, which good character evidence enables the offender to utilise. With no basis in any sentencing purposes, good character evidence serves only to cloud decisions and further imbed misunderstandings of the nature of offenders.

Second, the inconsistency and difficulty with which courts have applied section 21A(5A), and particularly the question of whether an offender's good character or lack of convictions "assisted" their offending, demonstrates the impractical nature of the provision and the irrelevance of good character evidence generally, whether or not that good character can be *proven* to have facilitated the offence.

It is RASARA's position that good character evidence should not be considered at any stage of sentencing for any sexual offences.

Lack of utility of good character to sexual assault sentencing generally

"An offender needs to groom the audience as much as he needs to groom the victim ... The offender grooms the audience through his relationships, building currency he can exchange for denial and protection".³

Section 21A of the CSP provides a range of aggravating and mitigating factors which a court must take into account when sentencing persons convicted of an offence. Sections 21A(3)(e)-(f) require the court to consider the "good character" of the offender, and whether they have a record of prior convictions. An offender's absence of prior convictions and ability to furnish the court with a range of positive references speaking to "conduct or matters which reveal redeeming features of the offender's character" are applied as mitigating factors to reduce the severity of their sentence.⁴

This provision gives courts wide discretion to consider how an offender's "inherent moral qualities" should inform sentencing.⁵ Good character evidence is only expressly excluded from application to sentencing decisions where the offender's good character "assisted [them] in committing the offence" involving a child.⁶

For the following three reasons, it is RASARA's position that good character evidence has no role to play in sentencing rape and sexual assault, whether perpetrated against adults or children under the age of 16.

Misleading nature of good character in sexual assault sentencing

In hearing good character evidence, courts are susceptible to be groomed by offenders' "excellent capacity for presenting themselves in a prosocial way".⁷ That an offender has an excellent employment history, a clean slate of convictions, or family members who vouch for their compassionate nature is totally unrelated to their *demonstrated* capacity and willingness to engage in

³ Veronique Valliere, *Unmasking the Sexual Offender*, Chapter 4, "I know him – he's not like that", the struggle to believe, Taylor & Francis Group, 2023, 45.

⁴ *Ryan v The Queen* (2001) 206 CLR 267, [32] (McHugh J); [102] (Kirby J); [142] (Hayne J).

⁵ As character evidence was described by the High Court in *Melbourne v The Queen* (1999) 198 CLR 1 [33].

⁶ CSP s 21A(5A).

⁷ Veronique Valliere, *Unmasking the Sexual Offender*, Chapter 4, "I know him – he's not like that", the struggle to believe, Taylor & Francis Group, 2023, 44.

rape or sexual assault. It is illogical to consider these factors as mitigating the severity of a sentence when these factors did not prevent commission of the offence in the first place.

The purported relevance of good character evidence has two elements which are reflected in rape and sexual assault sentencing decisions of New South Wales courts.⁸ One is the importance of the sentencing principles of rehabilitation, specific deterrence and protection of the community, for which the offender's character is theoretically relevant by speaking to the likelihood of recidivism.⁹ The other is "lapse theory", the notion that a person of otherwise good character can have a momentary lapse of judgement, when presented with an opportunity, that leads them to commit an offence opportunistically and "out of character";¹⁰ meaning that they are not likely to do it again.

Both justifications are evident in practice, with the paradoxical effect of offenders both distinguishing and relying on their character to reduce the severity of their sentence. Their conduct at the time of the offence is somehow compartmentalised from their conduct at all other times, with character evidence being assessed independently from the offence for which the sentence is being considered.¹¹ The High Court has expressly ruled that when assessing good character, the sentencing judge "*must not consider the offences for which the prisoner is being sentenced*".¹²

The perpetrator's offence is described as being "out of character", "unusual", and an "aberration".¹³ Yet, the offender attempts to use their character to plead for mitigation, by reference to their lack of previous convictions and references from friends, family members and associates who speak to their ability to engage in "normal healthy sexual relationships",¹⁴ community involvement including through religion,¹⁵ that they are "simply a very good person", "articulate", with "a great sense of humour";¹⁶ and their history of employment, even where the offending occurred in the course of that employment and involved serious breaches of trust,¹⁷ such as a youth worker assaulting a person in his care,¹⁸ and a masseuse assaulting a client during an appointment.¹⁹

An absence of previous convictions is a particularly concerning criteria used to assess character. A standing principle of sentencing practice is that an offender can only be punished for the crimes of which they have been convicted. When considering character, having no prior convictions is translated into a presumption that the offender has not committed any other offences at all. Concerningly, the absence of a criminal history has been used as a mitigating factor even in circumstances where an offender was sentenced for sexual offences spanning many years, where the absence of prior convictions flowed only from an absence of prior reporting.²⁰ Even where an offender does have a criminal record, courts will apply the absence of *relevant* convictions as a mitigating factor.²¹ This leads to two additional presumptions: that the offender has good character (otherwise) as a fact; and that their lack of previous convictions is because they have committed no other offences. The absence of proof either way is converted into a positive presumption to the benefit of the offender.

⁸ See appendix 1. See also N Stevens and S Wendt, The "good" child sex offender: Constructions of defendants in child sexual abuse sentencing, *Journal of Judicial Administration* Vol 24, No 2, 2014.

⁹ See, eg, *R v VR* [2024] NSWCCA 91 at [83].

¹⁰ *Ryan v The Queen* (2001) 206 CLR 267, [29] (McHugh J); [68] (Kirby J).

¹¹ *Aoun v The Queen* [2007] NSWCCA 292.

¹² *Ryan v The Queen* (2001) 206 CLR 267, [23] (McHugh J).

¹³ *Arizabaleeta v R* [2023] NSWCCA 217 at [12]; *Kramer v R* [2023] NSWCCA 153 at [148].

¹⁴ *R v VR* [2024] NSWCCA 91.

¹⁵ *R v VR* [2024] NSWCCA 91; *R v Jeremiah* [2024] NSWDC 206.

¹⁶ *R v VR* [2024] NSWCCA 91.

¹⁷ *R v Jeremiah* [2024] NSWDC 206.

¹⁸ *R v Jeremiah* [2024] NSWDC 206.

¹⁹ *R v Bao* [2024] NSWDC 200.

²⁰ *R v VR* [2024] NSWCCA 91 at [46].

²¹ *R v Jeremiah* [2024] NSWDC 206 at [89]; *R v Smith* [2024] NSWDC 103 at [29].

In a recent example, an offender who was convicted of raping three women on multiple occasions over a period of 17 years tendered good character evidence from an ex-partner upon sentencing. The offender was in a domestic or serious relationship with each survivor at the time of the respective offences. His ex-partner spoke to his ability to have “normal healthy sexual relationships” and that “he never coerced, humiliated or degraded her”.²² The offences being sentenced were described by the court as being “of an extreme nature”, involved “significant degradation and humiliation of the victims”, “twisted” and “cruel”. This good character evidence, and the offender’s lack of previous convictions, were considered as evidencing the offender’s prospects of rehabilitation, and were applied as a mitigating factor under the CSP.

Given that the offender’s lack of prior convictions or ability to engage in otherwise healthy intimate relationships did not prevent his offending against multiple women over a period of 17 years, it is not clear how this evidence could be construed as speaking to his prospects of rehabilitation, or be relevant to any leniency in sentencing. All that this good character evidence demonstrates is that the offender’s character involves *both* an ability to be perceived as abiding by legal and social norms, *and* simultaneously be capable of abhorrent treatment of those he is emotionally intimate with.

In our submission, it should only be more terrifying that an offender is capable of maintaining an outward appearance of good character from which he may *elect* to unmask on many occasions over many years.

Lack of relevance to sentencing purposes

With no basis in furthering any of the sentencing purposes articulated by section 3A of the CSP,²³ the amorphous nature of “good character” evidence tends to cloud, rather than clarify, sentencing decisions.

The justification of good character evidence as being relevant to an offender’s prospects of **rehabilitation** fails to acknowledge sexual offenders’ demonstrated ability to maintain a positive public façade: offenders “tell us what we want to hear” and “act in compliant ways” under observation.²⁴ Pleading that an offence was a moment of weakness or a lapse of judgement should speak to a lack of **accountability** for their actions and a terrifying lack of insight into why an offender broke from their “otherwise good character” to perpetrate an offence. If an offender is capable of “*being a valuable and contributing member of the community*”, of “*engaging in functional and healthy relationships*” and of “*being kind and affectionate*”,²⁵ then it should logically be aggravating, not mitigating, that they elected to commit a sexual offence.

Good character evidence waters down any message of **denunciation** otherwise delivered through a strong and cohesive approach to sentencing. The New South Wales community can hardly be said to denounce rape and sexual assault if their support is tendered as evidence to justify the application of a more lenient sentence. Where an offender is a person of good community standing and reputation, good character evidence may even deter survivors from reporting claims for fear of entering what appears to be a personality contest. Good character evidence suggests that committing these offences is more acceptable where an offender can establish certain redeeming qualities, therefore failing to deter either the offender or other persons from similar conduct. It fails to **recognise the**

²² *R v VR* [2024] NSWCCA 91 at [44].

²³ Punishment and rehabilitation of the offender, making the offender accountable for their actions, deterrence to the offender and other persons, denunciation of the offender’s conduct and protection of the community from the offender, and recognising the harm done to the victim of the crime and their family.

²⁴ Veronique Valliere, *Unmasking the Sexual Offender*, Chapter 3: Myth-Information, Our Misinformed Beliefs About Sexual Offenders, Taylor & Francis Group, 2023.

²⁵ *R v VR* [2024] NSWCCA 91 at [45], [83].

harm afflicted upon the survivor or their family by effectively rewarding the offender for being able to hide their conduct by adhering to social norms.

The only **punitive** purpose achieved by good character evidence is punishment of the survivor. After having their credibility attacked during cross-examination during the offender's trial, good character evidence risks further traumatising the survivor by requiring that they hear evidence of the good person and valuable community member they have accused.²⁶

Lack of clarity to sentencing decisions

Given the instinctive synthesis process of sentencing, the precise extent to which good character evidence acts as a mitigating factor is not usually clear on the face of a judgment. Its practical effect is seemingly to offer leniency to the offender such as by imposing a shorter term of imprisonment; imposing a non-custodial sentence; or suspending a sentence.

Good character and a lack of prior convictions appear often applied as a single consideration which speak to each other.²⁷

Some judges have recognised that *"it is not at all uncommon for people to be otherwise of good character to commit [sexual] offences"*,²⁸ and have purported to apply "less weight" to an offender's evidence of good character on that basis. The utility of judicial discretion in this regard is limited by the subjective nature of "character". Providing courts with "lots of information about the person being sentenced" can be blinding, rather than clarifying, where the relevance and weight of that information is a subjective query influenced by individual perspective. Judges bring to their role unique beliefs and assumptions – legal knowledge and social prejudices alike, as moulded by their class, sex, gender, age, ethnicity, and religion.²⁹ This has enormous implications for generalisations made by judges about good character evidence in the context of sexual offending, particularly given that "[v]ery few of us understand deviance or understand what motivates someone to commit a sexual assault".³⁰ Further, even where a court has purported to apply "less weight" to that evidence, *some* weight has patently still been used.

Courts are presently tasked with synthesising the legislated requirement to consider character, the absence of clear precedent demonstrating exactly how good character should be applied, and pervasive misunderstandings of the nature of sexual assault offenders. The task of sentencing sexual offences would be better achieved by barring good character evidence from being considered at all.

Lack of utility of s 21A(5A)

Section 21A(5A) of the CSP, which bars consideration of good character evidence where the offender's good character "assisted" commission of the offence, offers no utility in remedying the inappropriate use of good character evidence.

Analysis of decisions applying section 21A(5A) demonstrates neither consistency nor coherence in how New South Wales courts have dealt with good character evidence since enactment of the

²⁶ Prosecutors are required by the Queensland *Director of Public Prosecution's Guidelines* to ask survivors to be present during sentencing and to immediately inform the prosecutor of any incorrect assertions regarding the offender's character, such that they can be challenged.

²⁷ *R v Levi* (unreported, NSWCCA, 15 May 1997) [5] (Gleeson J).

²⁸ *R v Matthews* at [67].

²⁹ Elisabeth McDonald, From "Real Rape" to Real Justice? Reflections on the efficacy of more than 35 years of feminism, activism and law reform (2014) 45 VUWLR 487, 498.

³⁰ Veronique Valliere, *Unmasking the Sexual Offender*, Chapter 3: Myth-Information, Our Misinformed Beliefs About Sexual Offenders, Taylor & Francis Group, 2023, 40.

provision. Specifically, courts have demonstrated confusion as to whether the provision requires an offender's "active" use of good character to commit the offence.

In the leading authority on the scope and application of section 21A(5A), *Bhatia v The King*,³¹ the Court of Criminal Appeal found that establishing that an offender's good character or lack of previous convictions "assisted" the commission of the offence required the adducing of sufficient evidence of a "causal threshold or material contribution" showing that the offender's good character or lack of prior convictions "played a role" in assisting them to commit the offence. It was found that an offender "misusing his or her perceived trustworthiness and honesty" would require "some active use of good character", as established by evidence led by the prosecution.

Divergent applications of whether good character "assisted" an offender include one decision where section 21A(5A) was held not to apply to an offender who assaulted his nephew, because "[the child] had access to his uncle because he was a relative, not because he was a person of good character."³² By contrast, in *R v Bamforth* [2024] NSWDC 45, section 21A(5A) was applied to two offenders who assaulted their friend's child, despite neither even purporting to tender or rely on evidence of good character – let alone evidence which established an *active* use of that character:

I do not understand Counsel for either offender to rely on good character.

Nonetheless, it is necessary to have regard to subsection (5A), which dictates that "In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of can 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." I find that both offenders' good character and lack of previous convictions of child sexual offending facilitated their access to the victim, and on that basis, **I decline to apply this as a mitigating factor** in respect of the child sexual abuse offences.³³

Other decisions have found that an offender's good character and lack of previous convictions at the time of the commission of the offence was of "assistance", because had the offender lacked such good character or held previous convictions, he likely would not have been placed in a repeated position of trust in the care of a child.³⁴ Equally confusing are various decisions where section 21A(5A) was not raised at all, in circumstances where it otherwise would seem to apply.³⁵

Regardless of how this distinction is treated by the courts, section 21A(5A) offers little practical use for the majority of sexual assault offences. The most common perpetrator of CSA is the survivor's parent or guardian,³⁶ being a person who seemingly cannot have evidence led that establishes they gained access to the child because of their good character. Similarly, the most common offender for a female survivor of sexual violence is their intimate partner.³⁷

³¹ [2023] NSWCCA 12, [144].

³² *R v Farrell* [2022] NSWDC 695. This was a disturbing reversal of the statutory test, suggesting that it was not the offender's acts but those of the victim that matter for the purposes of s 21A(5A).

³³ At [698] (emphasis added).

³⁴ *R v Rose* [2022] NSWDC 705.

³⁵ See Appendix 1, and *Cheung v The Queen* [2022] NSWCCA 168; *BR v The Queen* [2021] NSWCCA 279; *R v A* [2021] NSWDC 232; *R v H* [2021] NSWDC 107; *R v Hamilton* [2019] NSWDC 382; *R v Mollel* [2017] NSWDC 36; *R v ND* [2016] NSWCCA 103; *R v van Ryn* [2016] NSWCCA 1.

³⁶ Ben Mathews et al, 'Child sexual abuse by different classes and types of perpetrator: Prevalence and trends from an Australian national survey' *Journal of Child Abuse and Neglect* (147, January 2024).

³⁷ Australian Bureau of Statistics, Statistics about sexual assault and childhood sexual abuse, including characteristics of victim-survivors, victimisation rates, and police reporting, 24 August 2021, at [Sexual Violence - Victimisation | Australian Bureau of Statistics \(abs.gov.au\)](https://www.abs.gov.au/sexual-violence-victimisation).

Limitations on good character evidence where that good character “assisted” the offender are more easily applied within the context of institutional abuse, and the provision speaks to a fundamental misunderstanding – or denial – of who sexual offenders are. The Royal Commission identified four “typologies” of male perpetrators of sexual abuse, only one of which was “professional” perpetrators who use their workplace and employment to conceal their targeting and sexual abuse of children.³⁸ It is a common misconception that sexual assault usually happens in public and is committed by strangers – it is not. Nearly 70% of assaults occur in a residential location, and of these, nearly a third occur inside a survivor’s home.³⁹ In nearly *all* cases of rape and sexual assault, the offender weaponises their ability to appear sufficiently trustworthy and safe to marry, parent, teach, care for, befriend or work with the survivors they eventually assault.

Proposed reform: amendment of s 21A(5A)

Restricting the use of good character evidence would help courts to consistently decide sentences which adequately reflect the nature of an offence, without considering information which offers offenders undeserved leniency.

Despite the best of intentions which may have led to the implementation of section 21A(5A), it has proven problematic and impractical in sentencing. More fundamentally, the issues in its application demonstrate the illogic of considering evidence of an offender’s good character or lack of prior convictions when sentencing *any* sexual assault offence. An offender’s “good character” or absence of prior convictions should not translate into a less severe sentence when neither prevented the commission of the offence in the first place – both existed simultaneously with their capacity and willingness to engage in sexual offending.

To that end, RASARA submits that section 21A(5A) be amended as follows:

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 in the commission of the offence.~~

Thank you for the opportunity to provide this response. We welcome the opportunity to discuss our recommendations further.

Regards,

Dr Rachael Burgin (CEO, RASARA)

On behalf of the Board of RASARA

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³⁸ Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report Volume 2: Nature and Cause (Report 2017) 128-130.

³⁹ Australian Bureau of Statistics, 2021-22 Personal Safety Survey (Catalogue No 4906.0, 15 March 2023) (‘PSS 2021-22’), Incident characteristics.

Appendix 1: Decisions of New South Wales courts

We reviewed the following decisions of the New South Wales District Court and Court of Criminal Appeal spanning 2023 to 2024 which referred to good character evidence when sentencing sexual assault offences afflicted upon adult survivors.

Decision	Circumstances of offence	Remarks regarding prior convictions / good character
1 <u><i>R v Jeremiah</i></u> <u>[2024]</u> <u>NSWDC</u> <u>206</u>	Youth crisis accommodation worker and 17 year old resident	<p>In sentencing for one count of sexual intercourse with person under care between 17 and 18 years contrary to s 73(2) <i>Crimes Act 1900</i>, the following considerations were applied as “mitigating factors”:</p> <p>[89] <i>The offender does not have a significant record of previous convictions: s 21A(3)(e) Crimes (Sentencing Procedure) Act 1999. The offender is presently 35 years of age. He has some convictions for driving matters which are irrelevant.</i></p> <p>[90] <i>The offender was a person of good character: s 21A(3)(f) Crimes (Sentencing Procedure) Act 1999. The offender has a good work history, supports his family and is an active volunteer at his Church. The weight to be afforded to good character for this type of offending must be reduced to some extent because the offender relied on his good character to become a carer for vulnerable people, such as the victim.</i></p>
2 <u><i>R v VR</i></u> <u>[2024]</u> <u>NSWCCA</u> <u>91</u>	Man and three domestic or serious partners	<p>In an appeal for the asserted inadequacy of a sentence for twelve counts of sexual assault without consent in breach of ss 611 and 61N(2) of the <i>Crimes Act 1900</i>, the following considerations were upheld as mitigating circumstances.</p> <p>[43] <i>Satendra Gupta provided a positive character reference which detailed the work the respondent had done with a religious and cultural organisation. The respondent was a “pioneer” of that organisation and had served in various positions and contributed to it financially as well as being an active participant and organiser. Mr Gupta said “he is simply a very good person”, and described the respondent as “respectful, courteous and measured in all his dealings with other members of the [organisation].” He is softly spoken and very articulate and a person with a great sense of humour. He is well versed in the relevant scriptures and teaching of the religion practiced by members of the organisation. Mr Gupta said, “I cannot fault him as an individual both in personal and official capacity.”</i></p> <p>[44] <i>A woman (“PB”) provided an affidavit that was read on sentence. She also gave evidence of the respondent’s good character at the trial. She was in a relationship with the respondent between 2007 and 2009 and remained close friends with him. She said they had a normal healthy sexual relationship and he never coerced, humiliated or degraded her. The respondent told PB about the allegations when they first emerged, and she was aware the case involved serious allegations made by three different complainants. The respondent supported her during a divorce and encouraged her in her career by assisting her with her studies, job applications and interviews. She had travelled with the respondent overseas and introduced him to her parents. She said he was “a trusted, caring and supportive friend for the last 17 years of my life.” She had never known him to be controlling, coercive or abusive.</i></p> <p>[45] <i>The sentencing Judge was clearly impressed by the character evidence and acknowledged the courage of both PB and Mr Gupta in providing their evidence to the Court in light of the seriousness of the allegations against their friend. His Honour noted that a person’s life “is not to be solely defined by the criminal conduct that brings them before a sentencing judge”. However, his Honour said its “effect in the present case must be limited” referring to the fact that the offending spread over a period of 17 years. Even so his Honour gave “some weight to the finding of prior good character” and noted that the respondent “was capable of being kind and affectionate” in his relationships with women although in the case of the three victims this was “completely overshadowed by the offender’s tendency to control and to escalate in abuse” and cruelty.</i></p>

			<p>[46] Based on the respondent's lack of criminal convictions, the periods during which the offender committed no offences, the contributions to the community he had made and the evidence of the character witnesses, Judge Craigie found the respondent's prospect of rehabilitation to be "fair, at best". His Honour thought those prospects would depend on his engagement with programmes in custody.</p> <p>[83] ... the affidavits tendered on sentence demonstrate that the respondent is a man who is capable of being a valuable and contributing member of the community. As the sentencing Judge found, the evidence of PB shows the respondent is also capable of engaging in a functional and healthy relationship. His prior good character is not a matter of great weight in all of the circumstances, but it is relevant to his prospects of rehabilitation and is a mitigating factor under the Sentencing Act.</p>
3	<u>R v Bao [2024] NSWDC 200</u>	Masseuse and client	<p>In sentencing for four counts of sexually touching another person without consent in breach of s 61KC(a) of the <i>Crimes Act 1900</i>, the following considerations were applied as "statutory mitigating factors":</p> <p>[41] I note the offender does not have any record of previous convictions which entitles him to some leniency. I therefore accept this as a mitigating factor pursuant to s 21A(3)(e) of the CSP Act.</p> <p>[42] The offender was a person of good character prior to the offending pursuant to s 21A(3)(f) of the CSP Act. I do not give that much weight in the sentencing exercise as it was by reason of his good character that he was able to engage in the business of performing massages on members of the community.</p>
4	<u>Rawat v R [2024] NSWCCA 64</u>	Acquaintances at social gathering	<p>In an appeal for a sentence for one count of sexual touching in breach of s 61KC(a) of the <i>Crimes Act 1900</i>, the appeal court upheld the sentencing judge's consideration of good character evidence as a mitigating factor.</p> <p>[66] Fourthly, to the extent that the applicant's submissions sought to emphasise a range of matters that essentially went to the applicant's subjective case (eight were set out in the applicant's submissions at [34]), each of them was specifically considered by the sentencing judge: the applicant was accepted to be a "first offender" (J [34]); the applicant was "a person of good character" (J [34]); ...</p>
5	<u>R v Smith (a pseudonym) [2024] NSWDC 103</u>	Father and daughter (17 years of age)	<p>In sentencing for one count of aggravated sexual assault in breach of s 61J(1) of the <i>Crimes Act 1900</i>, the following was applied as a mitigating factor.</p> <p>[29] Although the offender has one matter on his record from Chile, I will treat him as a first offender. The commission of this offence had nothing to do with his lack of criminal antecedents. His lack of criminal antecedents is one indication of his prospects for the future. Despite the matters to which I will soon refer, he has never offended while he has been in Australia, he will not have the opportunity of offending against his daughter again. He is entitled, to the extent that it is possible in a matter such as this, to have his good character taken into account. But it is not a significant mitigating factor given the nature of the offending.</p>
6	<u>R v Matthews [2023] NSWDC 611</u>	Domestic partners	<p>In sentencing for multiple convictions including three counts of sexual intercourse without consent in breach of s 61I of the <i>Crimes Act 1900</i>, good character evidence was applied as a mitigating factor.</p> <p>[67] Matthews has a criminal record. Neither of those matters were particularly serious and were dealt with by way of fines. He comes before the Court effectively as a first offender. But as the submissions made clear, it is not at all uncommon for people who appear to be otherwise of good character to commit offences such as these. While he is entitled to that good character to be taken into account, that has to be weighed with the extent of his offending and the seriousness of his offending.</p>
7	<u>Arizabaleta v R [2023] NSWCCA 217</u>	Survivor unknown to offender	<p>Appeal of sentence for manifest excess for three counts of non-consensual sexual intercourse in breach of s of the <i>Crimes Act 1900</i>. The findings of good character made by the sentencing judge were undisturbed.</p> <p>[12] However, most of the events giving rise to the prosecution were unusual. One is that the appellant was a person of otherwise good character who, on his own account, committed a serious sexual assault upon a</p>

			<p><i>sleeping woman he had not hitherto met. Two witnesses, including his wife from whom he was separated, attested to his honesty and generosity, knowing of the offence to which he had pleaded guilty...</i></p> <p><i>[262] ...Such a high level of inebriation is entirely consistent with disinhibited conduct including brief acts of cunnilingus and penile vaginal penetration from a sexually aroused man of otherwise good character...</i></p>
8	<p><u><i>Kramer v R;</i></u> <u><i>R v Kramer</i></u> <u>[2023]</u> <u>NSWCCA</u> <u>153</u></p>	Parties acquainted by social media	<p>Appeal of sentence for manifest inadequacy (and appeal against conviction) for one count of sexual intercourse without consent. Good character was applied by sentencing judge as a mitigating factor and was undisturbed on appeal.</p> <p><i>[148] As to the respondent's subjective case, the sentencing judge found that he was a person of prior good character, for whom this conduct was an "aberration" ... He had been employed as a glazier and retained his employment despite his employer being aware of the allegations...</i></p> <p><i>[149] Whilst he had not expressed remorse, the sentencing judge found the respondent's prospects of rehabilitation were solid, on the basis that he had strong family support, full-time employment and had not re-offended whilst on strict conditional bail. There were 15 character references which were highly supportive of the respondent despite the referees knowing the nature of the charge...</i></p>