



**Aboriginal  
Legal Service**  
(NSW/ACT) Limited

9 July 2024

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

Dear Chairperson,

**Re: Review of Good Character in Sentencing for Child Sexual Offences**

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (**the ALS**) regarding the review of the law that relates to the use of 'good character' in sentencing.

The ALS is a proud Aboriginal Community-Controlled Organisation and the peak legal services provider to Aboriginal and Torres Strait Islander adults and children in NSW and the ACT. More than 280 ALS staff members based at 27 offices 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. We represent Aboriginal and Torres Strait Islander families in the NSW Coroner's Court and provide a variety of discrete civil law services in 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. We represent community interests in our advocacy for the reform and transformation of systems which impact on the lives of Aboriginal and Torres Strait Islander people.

This submission is informed by the feedback and experiences of our solicitors who represent Aboriginal adults and children in criminal proceedings before courts of all levels in NSW.

Limitations on Good Character for Sentence Proceedings for Child Sexual Offending

The ALS opposes any further limitations on the use of evidence concerning good character in sentencing proceedings. Namely, we oppose the extension of s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (CSPA)* to all sentencing proceedings for child sexual offending.

The exception for good character in sentencing proceedings, as per s 21A(5A) of the Act, was implemented after careful consideration by this Council. In 2007, the NSW Sentencing Council undertook a comprehensive review into penalties relating to sexual assault offences. Recommendation 38 of the review was to amend the CSPA to preclude a sentencing Court from taking into account good character to the extent that it had enabled the defendant to commit the offence.<sup>1</sup>

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<sup>1</sup> NSW Sentencing Council, [Penalties Relating to Sexual Assault Offences in New South Wales, Volume 1](#), (report, August 2008) xxvi.

In 2008, the NSW Parliament passed the *Crimes Amendment (Sexual Offences) Act 2008* which, among other amendments, introduced sub-s 21(5A) in response to the Council's recommendation.<sup>2</sup> This amendment was later endorsed by the Royal Commission into Institutional Responses to Child Sexual Abuse, which recommended all state and territory governments across Australia implement the same exception (other than New South Wales and South Australia, which had already implemented the exception).<sup>3</sup>

We consider that the current exception, as recommended by this Council, implemented by NSW Parliament and endorsed by the Royal Commission into Institutional Responses to Child Sexual Abuse appropriately balances the relevance of good character in sentencing proceedings against the interests of the community.

#### Current Operation of Good Character in Sentence Proceedings

The sentencing exercise is complex and multi-faceted, with judges and magistrates in NSW required to synthesise a significant amount of information about the offence itself, the impact on the victim, and the subjective circumstances of the defendant in coming to a decision on the appropriate sentence.

The maximum penalty acts as the 'yardstick' for any sentencing exercise, as it reflects the legislature's assessment of the seriousness of the offence.<sup>4</sup> Sexual offences against children are some of the most serious offences under NSW law: this is reflected in the high maximum penalties for such offences. A sentencing court is required to consider the objective seriousness of the offending before the court separately from its consideration of subjective factors of the defendant. In the instinctive synthesis of sentencing, the presence of mitigating factors (such as good character) does not displace the central consideration of the maximum penalty and the objective seriousness of the offending in the sentencing exercise.

The High Court has clearly set out that, in the instinctive synthesis, no single factor has a decisive function: "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".<sup>5</sup> Across Australian law, there are over 200 aggravating and mitigating factors in sentencing.<sup>6</sup> Individual factors do not have a defined weight, nor do they have defined numerical value in the sentencing exercise.<sup>7</sup>

In NSW, sub-s 21A(1) 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.

Sentencing courts must consider *any* relevant factor, which for child sexual offences may include the following aggravating factors:<sup>8</sup>

- If the offence was committed in the home of the victim or another person;
- The injury, emotional harm, loss or damage caused by the offence was substantial;
- The offender abused a position of trust or authority in relation to the victim;
- The victim was vulnerable; and/or

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<sup>2</sup> [Crimes Amendment \(Sexual Offences\) Bill 2008](#)

<sup>3</sup> [Royal Commission into Institutional Responses to Child Sexual Abuse](#) (Final Report: Recommendations, August 2017) 112 [74].

<sup>4</sup> *Elias v The Queen* (2013) 248 CLR 483 at [27]; *Muldock v The Queen* (2011) 244 CLR 120 at [31].

<sup>5</sup> *Muldock v The Queen* (2011) 244 CLR 120 at [26], quoting (with approval) *Markarian v The Queen* (2005) 228 CLR 357 at [51].

<sup>6</sup> Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge & Kegan Paul, 1981) 55 (identified 229 factors).

<sup>7</sup> *Markarian v The Queen* (2005) 228 CLR 357 at [39].

<sup>8</sup> See CSPA s 21(2)(be), (g), (k), (l) and (m).

- The offence involved multiple victims or a series of criminal acts.

Sentencing courts must also consider the presence and nature of any prior convictions (as an aggravating factor) or conversely, the absence of any prior convictions and evidence of otherwise good character (as mitigating factors). The presence of prior convictions has been read down as relevant to the purpose of sentencing, specifically whether a harsher sentence is warranted to give greater effect to retribution, deterrence and protection of the community.<sup>9</sup>

In considering the proposed reform, it is important to note that the availability of evidence of good character does not guarantee a reduction in sentence. The weight given to prior good character will vary according to all of the circumstances of the case and all the all of the information available.<sup>10</sup>

Sub-section 21A(5A) will prevent sentencing courts from taking good character into account where it is found that the defendant's good character or lack of convictions was "of *some* assistance to the offender in the commission of the offence". The NSW Court of Criminal Appeal has observed this is not an especially high threshold to overcome but requires "the former making some material contribution to the latter".<sup>11</sup>

However, even where s 21A(5A) does not apply, good character in sentencing proceedings is subject to judicial discretion and scrutiny. Good character has been found to carry lesser weight in child sexual assault offences where the conduct involves repeat offending over the course of months, as this suggests the conduct was not out-of-character.<sup>12</sup> Where child sexual abuse occurs over a series of acts, a defendant may not benefit from the lack of a prior criminal record from the second criminal act.<sup>13</sup> Good character will typically carry less weight in child pornography offences due to the need for general deterrence, the fact that such offences are frequently admitted by persons of otherwise good character and that such offences are necessarily committed in secret.<sup>14</sup> A review of recent caselaw provides ample illustration of this discretion, such as the case of *WG v R*; *KG v R*.

***WG v R*; *KG v R* [2020] NSWCCA 155**

*WG and KG were convicted at trial for numerous sexual offences committed against their daughter, the complainant. WG was convicted of 73 counts in total, 66 of which involved sexual intercourse with the complainant.*

*At sentence, s 21A(5A) was found not to be enlivened and the sentencing judge heard evidence of good character from eight references who knew WG in his capacity as a colleague, coach and friend. Despite this, the sentencing judge noted the character evidence had "far less weight" for offending of its type and that its weight was "substantially diminished" by reason of the fact that so many offences were committed over such a lengthy period of time. The sentencing judge afforded him no leniency for his claim to good character. WG was sentenced to an aggregate sentence of 48 years with a non-parole period of 36 years.*

*WG appealed to the NSW Court of Criminal Appeal on grounds relating to conviction and sentence, including that the sentencing judge erred in not giving weight to WG's good character. The NSWCCA dismissed this ground of appeal, noting at [1493]:*

<sup>9</sup> *Veen v The Queen (No 2)* (1988) 77 ALR 385, 393.

<sup>10</sup> See *Ryan v The Queen* [2001] HCA 21 per McHugh J at [25].

<sup>11</sup> *Bhatia v R* [2023] NSWCCA 12 [13].

<sup>12</sup> *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].

<sup>13</sup> *R v Smith* [2000] NSWCCA 140 [21] – [22].

<sup>14</sup> *R v Gent* [2005] NSWCCA 370 [64].

*"The language her Honour used is expressive of an assessment of the weight that might be afforded evidence in mitigation and a determination, in the exercise of discretion, to afford it no degree of leniency in all circumstances."*

Judicial discretion plays a significant role as a check on the potential benefit of prior good character or lack of convictions, notably, in whether the evidence is accepted and how much weight it is given in the sentencing exercise.

Additionally, character evidence can assist sentencing courts in arriving at the appropriate penalty to give effect to the various purposes of sentencing in a given case. For example, evidence as to a defendant's activities and standing in the community can be relevant to an evaluation of matters such as their prospects of rehabilitation, whether they be favourable or otherwise.

In the absence of an evidentiary basis 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 needlessly fetter judicial discretion. We consider s 21A(5A) as it currently stands remains appropriate, equitable and fit for purpose.

#### Community Views and Experiences of Victim-Survivors

We acknowledge the serious harm that sexual offences cause to individuals and the community and acknowledge the range of views within the community regarding the use of good character in sentencing for sexual offences against children. We consider, however, that it is imperative that policy and law reform only be undertaken if it is justified by a strong evidence base in support of the need for reform, and there has been fulsome assessment of the potential impacts of the proposed reform, including any unintended consequences which may flow.

We recommend in its review that the Council consider: options for increased support and information for victim-survivors; procedural reforms which reduce traumatisation of victim-survivors without infringing upon the rights of the defendant or the judicial discretion of sentencing courts; and procedural practices and programs in other jurisdictions which support victim-survivors in the criminal court process. We also recommend that consideration be given to increased community education about the criminal legal system and the sentencing process.

We observe that there do not appear to be any other Australian jurisdictions which so broadly restrict the use of good character evidence in sentencing for sexual offences against children, and that implementing this amendment would render NSW an outlier.

We welcome the opportunity to provide feedback to the Council on any specific law reforms or programs being considered. If you have any questions or require further feedback, please do not hesitate to contact our organisation at [policy@alsnswact.org.au](mailto:policy@alsnswact.org.au).

Sincerely,

**Nadine Miles**  
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Aboriginal Legal Service (NSW/ACT) Limited