

19 July 2024

NSW Sentencing Council
GPO Box 31
Sydney NSW 2001

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

The Honourable Peter McClellan AM KC,

Preliminary submission: Good character in sentencing

Thank you for the opportunity to provide a preliminary submission to the Sentencing Council on issues relevant to the terms of reference for its review of the operation of s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (**the Act**) and the operation of the common law regarding 'good character'. I apologise for the delay in providing this submission.

The terms of reference for this review are as follows:

1. whether the limitation on the use of evidence concerning 'good character' or a lack of previous convictions in certain sentencing proceedings, as per s 21A(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";
2. 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 remains appropriate, equitable, and fit for purpose;
3. 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;
4. procedures for receiving good character evidence in sentencing proceedings; and
5. any other matter the Council considers relevant.

Office of the Director of Public Prosecutions

175 Liverpool Street
Sydney NSW 2000
Locked Bag A8
Sydney South NSW 1232
DX 11525 Sydney Downtown

Phone 02 9285 8888
Fax 02 9285 8601
TTY 02 9285 8646
odpp.nsw.gov.au

ABN 27 445 689 335

The Office of the Director of Public Prosecutions NSW (ODPP) conducts prosecutions for indictable offences in the Local, District and Supreme Courts. This includes the prosecution of all child sexual assault offences in both the summary and indictable jurisdiction, including sentences and on appeal, where the operation of s 21A(5A) frequently arises. The following submissions are informed by that experience.

This preliminary submission should be read in conjunction with our submission on this topic to the Department of Communities and Justice, dated 31 October 2023. This was provided in response to the review of s 21A(5A) in the context of child sexual offence proceedings being undertaken by the Department (**Annexure A**).

1. *Whether the limitation on the use of evidence concerning 'good character' or a lack of previous convictions in certain sentencing proceedings, as per s 21A(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";*

The ODPP does not support an absolute prohibition on taking good character into account in relation to child sexual offence matters. To prohibit its use could impede the sentencing court's role in providing individualised justice. There is a significant variation in the circumstances of each case of child sexual offending both as to the objective features of the offence and the offender's subjective circumstances. It is important that good character or a lack of previous convictions are able to be taken into account by a sentencing court where those characteristics are, as a matter of fact, unrelated to the offending conduct.

It is noted that the current NSW (and South Australian) legislation was specifically endorsed by the Royal Commission into Institutional Child Abuse, as the appropriate model to be implemented for all state and territory governments.¹

Nevertheless, the ODPP does have concerns about inconsistent judicial interpretation and application of the provision.² We refer to Annexure A as to the best approach to addressing this concern.³

2. *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 remains appropriate, equitable, and fit for purpose;*

Subject to the qualifications set out in Annexure A,⁴ the ODPP is of the view that good character remains a relevant factor in sentence proceedings. The operation and application of s 21A(3)(f) is appropriate and the section remains fit for purpose.

3. *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 ODPP acknowledges that some victim-survivors in matters involving sexual offending may be distressed by the appearance of a sentencing court taking good character into account in favour of an offender. Judicial acknowledgement of an offender's good character may cause the

¹ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, (2017) pp 98-99, see particularly Recommendation 74.

² See for example the case of *R v Hovell* [2021] NSWDC 326, where good character or an unblemished record was found not to have assisted a school teacher in committing sexual offences against his student.

³ Annexure A, pp 3-5.

⁴ *Crimes (Sentencing Procedure) Act 1999*, s 21A(3)(f).



victim-survivor to believe that the Court does not genuinely appreciate the seriousness of the offending conduct or accept the severity of the harm occasioned. This distress may be compounded where the victim-survivor has provided a Victim Impact Statement (VIS)⁵ which appears to them to receive limited acknowledgement in comparison.

Accepting the reality of this experience for some victim-survivors, the ODPP also acknowledges the right of an offender to a fair sentencing process. The Court has an obligation to consider the multivalent and often conflicting purposes of sentencing,⁶ and deliver individualised justice in each case. The prosecution in turn is duty-bound to assist the court to achieve fairness and a just outcome.

Drawing on the experience of ODPP staff, including Witness Assistance Service Officers, there are some measures which could be adopted and may serve to improve the experience of victim-survivors.

Firstly, consideration should be given to ensuring that judicial officers and legal practitioners engaged in sentencing for sexual offending receive trauma-informed training, in order to ensure that sentence proceedings are conducted, and judgment is delivered, in a manner designed to minimise unnecessary distress for victim-survivors.

Secondly, courts should also be properly funded to ensure that sentence proceedings are held in a manner designed to avoid re-traumatisation. The ODPP is aware that a number of court precincts, particularly in regional areas, are unable to accommodate requests from victim-survivors to deliver a VIS and observe sentence proceedings remotely. Moreover, there is no legislative entitlement for a victim-survivor to attend sentencing proceedings via AVL. The legislature has recognised that complainants in sexual assault matters should be permitted to give evidence remotely⁷ and has provided that the victim-survivor may read their VIS remotely in those proceedings,⁸ but attendance at the sentencing proceedings is not covered.

In our experience, and perhaps unsurprisingly, victim-survivors who wish to attend the sentencing proceedings may balk at the prospect of being in the court room with the perpetrator. This is due to the strong emotional reaction provoked by the close presence of the perpetrator and their corresponding desire to avoid having their reactions and appearance witnessed by that person. They are also often fearful of receiving a hostile reception from an offender or, as is sometimes the case, their supporters.

Court precincts should therefore be better equipped to ensure that victim-survivors are able to participate in sentence proceedings in a manner that minimises the risk of re-traumatisation, and the legislation should enshrine the right of victim-survivors wishing to observe the sentencing proceedings to do so remotely.

Finally, and although not matters that necessarily permit of an obvious legislative or practical remedy, we note the following matters concerning good character evidence which may lead to further distress and trauma for victim-survivors during sentencing proceedings:

- The volume of character references relied upon by an offender;
- The qualities of the offender identified in some references as supporting a good character finding can seem trivial compared to the seriousness of the offending, and

⁵ *Crimes (Sentencing Procedure) Act 1999*, Part 3, Division 2.

⁶ *Crimes (Sentencing Procedure) Act 1999*, s 3A.

⁷ *Criminal Procedure Act 1986* s 294B(3) for sexual assault complainants, s 294I(1) for child sexual assault complainant, s 306ZB for vulnerable witnesses.

⁸ *Crimes (Sentencing Procedure) Act 1999* s 30J.



- The fact that the judicial officer does not make any findings concerning good character until judgment is delivered.

These are difficult issues to address and the ODPP acknowledges that an offender has the right to robustly advance their case at sentence. It is perhaps unavoidable that this will negatively impact victim-survivors to some degree. In order to facilitate the efficient administration of justice and out of fairness to offenders, the ODPP frequently does not challenge the number and quality of the references tendered on sentence, other than where there is some aspect which undermines the references reliability or value (such as a referee not being properly acquainted with the nature of the offending).

The Sentencing Council may wish to consider whether some parameters can fairly and appropriately be implemented to address these concerns of victim-survivors.

4. Procedures for receiving good character evidence in sentencing proceedings;

The ODPP maintains the position advanced in Annexure A concerning the procedure for receiving and assessing good character evidence in child sexual offence proceedings.

In relation to good character in other proceedings, the burden remains on the offender to establish the mitigating factor on the balance of probabilities.⁹ The ODPP does not suggest legislative reform is required in this area.

Thank you for the opportunity to make this preliminary submission. Please contact Anne Whitehead on [REDACTED] or [REDACTED] if you would like to discuss these submissions further.

Yours faithfully

Frank Veltro SC
Acting Director of Public Prosecutions

⁹ *Olbrich v The Queen* (1999) 199 CLR 270; HCA 54 at [27].



31 October 2023

Mr Mark Follett
Executive Director
Policy Reform and Legislation Branch
Department of Communities and Justice

Dear Mr Follett

Review of section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999*

Thank you for the opportunity to provide a submission in relation to the review of section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999*.

The Office of the Director of Public Prosecutions ('ODPP') prosecutes a significant number of child sexual assault offences in both the summary and indictable jurisdiction. Given the nature of child sexual offending, it is not uncommon for these offences to be committed by individuals who have no prior record of convictions or who, except for the offences for which they are being sentenced, may be said to be people of 'good character'. As such, the ODPP often engages with s 21A(5A) in the course of sentencing proceedings for these offences.

The following responses to the questions raised in the consultation paper are informed by the ODPP's experiences with s 21A(5A) and sentencing for child sexual offences generally.

What issues have you experienced with the operation of s 21A(5A), which currently aims to ensure that good character cannot be relied on as a mitigating factor in sentencing in cases involving child sexual offences where the factor assisted the offender to commit the offence?

- a) Inconsistency in the determination of whether an offender's prior good character assisted them in the commission of an offence

Whether an offender's prior good character was of assistance to them in the commission of an offence is a factual matter for determination by the sentencing court. However, there appears to be a degree of inconsistency in how sentencing courts have approached this issue.

In *R v Hovell* [2021] NSWDC 326, the offender was a high school teacher and the victim his student. The offender commenced a sexual relationship with the victim when she was 13 years old which continued for three years. In finding that s 21A(5A) did not apply in the circumstances of the case, the sentencing judge stated the following:

Office of the Director of Public Prosecutions

175 Liverpool Street
Sydney NSW 2000
Locked Bag A8
Sydney South NSW 1232
DX 11525 Sydney Downtown

Phone 02 9285 8888
Fax 02 9285 8601
TTY 02 9285 8646
odpp.nsw.gov.au

"I am not satisfied that the role of a teacher/student necessarily is one of good character assisting in the commission of the offences invoking the operation of s 21A(5A). A school teacher with prior convictions that did not disentitle him or her to be a teacher could still commit the offences due to the role of teacher/student. It does not follow that a teacher with an unblemished record, that that unblemished record assists in the commission of the offences."¹

The ODPP does not consider that the approach taken in *Hovell* is consistent with the intent of the provision. Teachers in NSW are required to satisfy a Working with Children Check. While it is conceivable that a person with a minor criminal record (for example, traffic convictions only) may still be employed as a teacher, it is difficult to conceive of anyone who is genuinely not a person of good character (in the sense envisaged by s 21A) being permitted to hold a position as a school teacher.

In the decision of *R v NC* [2020] NSWDC 547, the offender was sentenced for a number of sexual offences committed in circumstances where the offender was a foster parent to the victim. In submitting that s 21A(5A) applied, the Crown relied upon evidence adduced from the offender at sentence indicating that he was required to undergo background checks before the victim was placed in his care. In declining to apply the provision, the sentencing judge relied on the second reading speech to conclude s 21A(5A) was not intended to capture situations where the offences were committed by a parent or foster parent in the house. Instead, the sentencing judge considered that those circumstances could be taken into account as an aggravating factor concerning the abuse of a position of trust.²

The ODPP does not consider that the approach taken by the sentencing judge in *NC* is consistent with the intention of the legislature. The relevant portion of the second reading speech relied on by the sentencing judge states:

"The bill also makes important changes to the Crimes (Sentencing Procedure) Act 1999 to ensure that when sentencing an offender for a child sexual offence the court is not to take into account the offender's prior good character or lack of previous convictions if that factor was of assistance to the offender in the commission of the offence. The simple fact of a person's clean record and good character may assist an offender to gain the trust of a child, or the child's parents in order to commit a sexual offence against the child. Any offender who has misused his or her perceived trustworthiness and honesty in this way cannot use his or her good character and clean record as a mitigating factor in sentence..."³

There is nothing in the second reading speech that supports a reading of s 21A(5A) that disapplies it to classes of offender such as foster parents (who are in a substantially different position to natural parents). Insofar as the provision is being applied to exclude certain categories of offenders from its ambit, regardless of how the person's prior good character may have assisted them to commit the offence, the provision is not operating as intended.

In contrast to the decisions of *Hovell* and *NC*, the Court of Criminal Appeal in *R v Stoupe* [2015] NSWCCA 175 accepted that the offender was assisted in securing a position as a child care worker by his good character, and therefore that s 21A(5A) applied with respect to offences committed in the context of that role. There is no obvious reason why the provision should apply to a

¹ *R v Hovell* [2021] NSWDC 326 at [140]

² *Crimes (Sentencing Procedure) Act 1999*; Section 21A(2)(k)

³ New South Wales, *Parliamentary Debates*, Legislative Council, 26 November 2008, John Hatzistergos



childcare worker, but not to a schoolteacher or foster parent, all of whom are required to undertake a Working With Children Check, and all of whom occupy a position of trust in relation to children by virtue of their roles.

b) The burden of establishing whether s 21A(5A) applies in a particular case

Pursuant to *Bhatia v R* [2023] NSWCCA 12 at [13], for a court to apply to s 21A(5A), it must make a finding that the offender's good character made 'some material contribution' to the commission of the offence. This creates a 'practical, if not evidential, onus on the Crown to point to evidence of the relevant connection'.⁴

Other than in cases where offenders hold particular positions of authority (e.g., teachers, priests, childcare workers), it is ordinarily the parent or guardian that is responsible for granting access to their child. The practical effect of *Bhatia*, as reflected in the circumstances of that case, is that the Crown will ordinarily be required to adduce evidence capable of establishing that the parent or guardian relied on the offender's good character in deciding to allow them access to the child.

The difficulty posed by this situation is that questions of good character will ordinarily not be relevant to the issues in a criminal trial and therefore will not be adduced at that stage. The issue may not have been addressed at all by investigators. Indeed, such evidence may not be readily available, given that it will often involve the negative proposition that the responsible person would not have left the child with the offender had they known that the offender was not of good character.

While it may be possible for further evidence to be called on sentencing (whether or not there has been a plea of guilty) this can have several practical adverse consequences. Notably, where the application of s 21A(5A) is in dispute (as it often will be), witnesses may be required to attend court to give evidence. Where this involve parents or other family members, it may result in re-traumatisation, particularly where it may be suggested that their decision means that they bear some responsibility for the commission of the offence. It may also add to inefficiency and complexity in sentencing proceedings and, where substantial court time is spent on the issue, may reduce the utility of a plea of guilty.

It can readily be accepted that in the vast majority of cases, a parent or guardian would not allow an offender to have access to their child if they did not believe that the person was of good character. While there may be exceptions to this rule, these would be rare. It should therefore not be necessary for the Crown to take the additional step of adducing evidence to establish what should not be a controversial proposition.

What are the benefits and risks associated with the following potential approaches to amending s 21A(5A):

- a. Expressly stating that a court may infer from all the circumstances that, when sentencing an offender for a child sexual offence, the offender's prior good character assisted them to commit the offence.

We consider that this option will do little to advance the objectives of s 21A(5A). This is because as presently formulated it does not provide the courts with any facilitative mechanism to apply s 21A(5A) without receiving evidence of some sort, consistent with the current position under

⁴ *Bhatia v R* [2023] NSWCCA 12 at [13]-[14]



Bhatia. Indeed, courts are already required to consider all the relevant circumstances of a case in determining the appropriate sentence, including through the application of s 21A.

- b. Imposing a burden on offenders who are to be sentenced for child sexual offences to establish that their good character did not assist them to commit the offence.

The ODPP considers that this is the most appropriate option for reform. It would provide a fair and pragmatic solution to the current difficulties with s 21A(5A) and would reflect the reality that in the vast majority of cases, an offender's good character materially contributes to their ability to sexually offend against children.

As discussed above, in our view it is not controversial that (i) a parent or guardian would not allow an offender who is not of good character to have unrestricted access to their child and (ii) individuals who are placed in positions of authority over children rely on their good character to obtain those positions. These are propositions that, in the absence of contrary evidence, a court should be permitted to assume are accurate.

This option also strikes a fair balance between the current position and the more robust option of disallowing good character to be relied in all child sexual offence matters. It recognises that, in some rare or exceptional cases, a person's good character may have played no role in allowing them to commit the offence. In such cases, it is appropriate that an offender has an opportunity to establish that they should be permitted to rely on their good character on sentencing.

- c. Creating a presumption of inadmissibility of good character evidence in sentencing proceedings for child sexual offences that may be displaced, for example in exceptional cases only.

As a preliminary point, the ODPP notes that the issue of "admissibility" is inapt in this context. The issue is not the admissibility of the evidence, but whether the factor may be taken into account on sentencing other than in exceptional circumstances.

However it is appropriately framed, this option may also address the concerns raised regarding the application of s 21A(5A). It would reflect the reality that it is only in rare or exceptional cases that a person's prior good character will not have been a factor that assisted them in the commission of a child sexual offence. It would streamline proceedings and allow courts to take a principled and pragmatic approach to sentencing for child sexual offences.

The ODPP considers that this option involves the risk that the concept of "exceptional cases" may introduce unnecessary complexity in sentence proceedings, and lead to the development of caselaw concerning what does and does not constitute exceptional circumstances in individual cases. For this reason, the ODPP considers the previous option of imposing a burden on offenders to establish that their good character was not of assistance in the commission of the offence to be preferable.

- d. Imposing a requirement for leave to be granted before evidence of good character can be adduced in sentence proceedings for child sexual offences.

The ODPP considers that this option would add unnecessary complexity to sentencing proceedings, and that it is unlikely to improve the operation of s 21A(5A).

It is unclear what factors would be relevant to the grant of leave under this provision. Were this option pursued, the ODPP submits that it would be appropriate to also incorporate a list of factors which the court must consider in deciding whether to grant leave. These factors would need to be sufficiently robust to ensure that leave was only granted in appropriate cases.

While this option may provide courts with a governed restraint on the admission of evidence of good character in sentencing for child sexual offences, the ODPP considers that imposing a



burden on offenders to prove that good character did not assist them in the commission of the offence provides a more appropriate and effective means to achieve that objective.

Acknowledging the dynamics and nature of child sexual abuse, should 'good character' in the context of sentencing for a child sexual offences instead be referred to be a different term, for example 'prior character' or 'pre-offending character'?

The ODPP provides qualified support for amending the term 'good character' to 'prior character' or 'pre-offending character'. Consistent with submissions made to the Royal Commission into Institutional Responses to Child Sexual Abuse,⁵ the ODPP has received feedback from victims who are distressed when made aware of an offender calling in aid or receiving benefit for their 'good character'. The ODPP defers to the views of victim-survivor stakeholders as to the desirability of this proposal.

Should courts be prohibited from taking good character into account as a mitigating factor in all cases involving child sexual offences?

The ODPP does not support an absolute prohibition on taking good character into account as a mitigating factor in all child sexual offence matters. There is significant variation in the nature, seriousness, and circumstances of child sexual offences, as well as considerable variation of offenders' subjective factors. It is important that sentencing courts are permitted sufficient discretion to provide individualised justice in the range of cases they hear.

Yours faithfully

Sally Dowling SC
Director of Public Prosecutions

⁵ Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report, August 2017), Part VIII, p 296

