

8 July 2024

The Hon Peter McClellan AM, KC
Chairperson
NSW Sentencing Council
By email: sentencingcouncil@dcj.nsw.gov.au

Dear Mr McClellan

Review of good character in sentencing

Thank you for the opportunity to provide a submission to the NSW Sentencing Council on the operation 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.

Our feedback is informed by the experience of our lawyers across our criminal, civil and family law divisions, including our experience representing defendants in criminal proceedings, and our experience assisting victims through our Domestic Violence Unit.

Legal Aid NSW acknowledges that this review is being conducted in response to a petition presented by victims¹ of child sexual abuse.² We acknowledge their lived experience and recognise that the legal system can be both disempowering and retraumatising to victims of crime.

Legal Aid NSW response to the terms of reference

1. whether the limitations 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

¹ Victim is used in this letter to denote a person who is the victim or complainant of sexual violence. Some people who experience sexual violence prefer the term 'victim' and others prefer the term 'survivor'. In this letter, the term 'victim' is intended to be inclusive of both victims and survivors. Legal Aid NSW acknowledges every person's experience is unique and individual to their circumstances.

² Harrison James, *Remove Good Character References For Paedophiles In The Sentencing Procedure Of Child Sexual Abuse Cases*, (NSW Legislative Council ePetition, 3 August 2023).

requirement that the offender's good character or lack of previous convictions, “was of assistance to the offender in the commission of the offence”;

Legal Aid NSW does not recommend extending section 21A(5A) to all sentencing proceedings for child sexual offending.

Section 21A(5A) of *Crimes Sentencing Procedure Act 1999* (NSW) (the Act) was introduced to recognise the role that good character may play in facilitating some instances of sexual offending against children, and rightly deny those offenders any benefit of their prior good character on sentence.

The common law recognises that child sexual offences are frequently committed by people who appeared to otherwise be of good character and gives less weight to good character evidence on sentencing.³ In our experience, the law generally prioritises general and specific deterrence in sentencing for these matters, and in cases where section 21A(5A) does not apply, and where the court does take into account good character evidence, that evidence has limited impact.

Despite the limited impact of good character evidence on sentencing in these matters, we do not consider that it should be altogether removed as a mitigating factor. In our view, it is important to preserve judicial discretion in sentencing for child sexual offending, where the spectrum of offending is broad, in terms of the seriousness of the conduct involved and the circumstances particular to the offender.

The area of law of child sexual offending covers the most serious crimes, but also extends to less serious offences, for example, young persons sharing photos of themselves in a state of undress.⁴ Given the breadth of conduct captured by the definition of “child sexual offence”, the most appropriate sentence will be one that delivers individualised justice which requires judicial discretion, and which we submit should not be fettered unless there is a clear evidence base to do so.

³ *R v PGM* [2008] NSWCCA 172 152, [43]–[44] and *Dousha v R* [2008] NSWCCA 263, [49].

⁴ This has been the subject of amendments to the NSW Crimes Act 1900 (NSW) but remains a crime at the Federal level, see ‘Crimes Amendment (Intimate Images) Act 2017’, *Legal Aid NSW* (Web page) < <https://www.legalaid.nsw.gov.au/for-lawyers/resources-and-tools/criminal-law-resources-and-tools/criminal-law-resources-summary-criminal-law/crimes-amendment-intimate-images-act-2017>>

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;

In our view, the common law offers sufficient guidance on good character and how it interacts with other mitigating facts on sentencing.

The courts have sensibly held that the weight to be given to good character evidence in mitigation must necessarily depend on the nature and circumstances of the offence committed. In some cases, courts will find that character evidence should have little or no bearing on the sentence given to the offender.⁵

When considering whether to give weight to good character evidence, the courts take into account the seriousness of the offence and the need for general deterrence,⁶ any role that the offender's perceived good character played in allowing them to commit the offence,⁷ and whether there was a pattern of repeat offending over a period of time.⁸

The courts have also recognised classes of offences that are frequently committed by persons of good character, where good character may carry less weight, including child pornography offences,⁹ and child sexual offences where s 21A(5A) does not apply on the facts.¹⁰

In our experience, where it applies, good character evidence assists the court to assess an offender's prospects of rehabilitation and to assess the emphasis to be placed on protection of the community.

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;

Legal Aid NSW recognises that character evidence may paint offenders in a light which is completely incongruent with the victim's experience with the offender. We acknowledge that this can add to victims' trauma through what they perceive as the

⁵ *R v Gent* [2005] NSWCCA 370, [53]-[55].

⁶ *R v Gent* [2005] NSWCCA 370, [64]-[66].

⁷ *Jung v R* [2017] NSWCCA 24, [58].

⁸ *R v Gent* [2005] NSWCCA 370, [53].

⁹ *R v Gent* [2005] NSWCCA 370, [64].

¹⁰ *R v PGM* [2008] NSWCCA 172 152, [43]-[44] and *Dousha v R* [2008] NSWCCA 263, [49].

offender's manipulation of the legal system, which they expected was there to denounce the offender.

We also acknowledge that characterisation of the offender as otherwise being of good character may send a message that the victim's experience of violence was a momentary aberration and is reductive of the offender's responsibility. For these reasons, Legal Aid NSW supports further consultation on more appropriate terminology that could be adopted to describe a lack of prior offending, or an offender's contributions to community outside of offending.

Legal Aid NSW acknowledges that a change in terminology for the purposes of child sexual offences would introduce into the law two slightly different concepts in relation to character. However, we consider it appropriate for the law to evolve and develop a more nuanced approach, which reflects wider society's understanding of sexual violence. Additionally, any confusion could be remedied with education.

Legal Aid NSW supports other changes to improve victims' experience, including: closer adherence to the Charter of rights of victims of crime¹¹ by police and Department of Justice Agencies; reform of the *Victims Rights and Support Act 2013 (NSW) 2013* to better support victims to apply to and access the scheme,¹² increased funding for specialist trauma-informed support services for victims of crime.

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

Legal Aid NSW does not recommend changes to the current procedures for receiving good character evidence in sentencing proceedings.

In our experience, there is some overlap between mitigating factors, and evidence of an offender's good character will also be relevant to the court's assessment of other mitigating factors, namely prospects of reoffending, rehabilitation and remorse.

We recognise that the presentation of character evidence at sentencing proceedings can cause distress to victims, and do not wish to minimise their experience. However, we do not think the correct response is to narrow sentencing discretion. Our view is that allowing judges and magistrates to consider the unique circumstances of each matter, including an offender's character, best satisfies the purposes of sentencing.¹³

¹¹ *Victims Right and Support Act 2013 (NSW)* div 3.

¹² Legal Aid NSW, Submission to Department of Communities and Justice, *Statutory review of the Victims Rights and Support Act 2013 (NSW)* (29 July 2022).

¹³ 'Purposes of sentencing', *NSW Sentencing Council* (web page, 1 November 2022) <<https://sentencingcouncil.nsw.gov.au/about-sentencing/sentencing-hearing.html>>

5. any other matter the Council considers relevant.

In our experience supporting victims of domestic violence, we have recognised instances where the police and prosecution may have been able to raise section 21(5A) but did not elicit evidence that the offender's good character allowed them access to the child. This particularly arises where an offender has entered into an intimate relationship with a parent of the child gaining, and subsequently abusing, their trust. We recommend further guidance and training for the police and prosecution on the dynamics of domestic and family violence in the context of child sexual offending.

Thank you again for the opportunity to provide a submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. Osborne', with a long horizontal flourish extending to the right.

Meredith Osborne
A/Chief Executive Officer