



THE LAW SOCIETY  
OF NEW SOUTH WALES

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14 February 2025

The Honourable Peter McClellan AM KC  
Chairperson, NSW Sentencing Council  
GPO Box 31  
SYDNEY NSW 2001

Dear Mr McClellan AM KC

### **Consultation Paper: Good Character at Sentencing**

The Law Society welcomes the opportunity to contribute further to the work of the NSW Sentencing Council in reviewing the legislation and common law behind the use of good character to mitigate sentences (**'Review'**). This submission builds on the comments provided in our preliminary submission to the Review and has been informed by members of the Criminal Law Committee and Children's Legal Issues Committee.

#### **Supporting, and improving the experience of, victim-survivors**

The Law Society is concerned about the trauma and distress that the criminal justice system, including sentencing, causes victim-survivors. We support and regularly advocate for trauma-informed approaches to criminal justice, that is, approaches that do not harm or re-traumatise victim-survivors, and agree that there is clear scope to improve the criminal justice system to better support victim-survivors and improve their experience.<sup>1</sup>

In our view, to meaningfully and substantively improve victim-survivors' experience, action must be taken that is broader and more holistic than piecemeal legislative reform. Issues that affect the broader criminal justice system also significantly impact the victim-survivor experience of sentence proceedings, such as lengthy delays in proceedings (noting that as of June 2023, the median time for a defended case to be finalised in the District Court was just over two years (783 days) from the date of arrest<sup>2</sup>); underfunded legal assistance and victim support services including the NSW Victims' Services; and the involvement in sexual violence matters of personnel who have not undertaken trauma-informed training. We consider it essential that action is taken to meaningfully address these issues and deliver justice to victim-survivors in a timely, trauma-informed and supportive manner.

In developing holistic reform, consideration of existing evidence conducted in respect of complainants' experience of the criminal justice system is essential. One example of this kind of research is the NSW

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<sup>1</sup> Law Society of NSW, Submission to the Law Council of Australia: Australian Law Reform Commission Inquiry into Justice Responses to Sexual Violence, 16 May 2024, online: <https://www.lawsociety.com.au/sites/default/files/2024-07/Letter%20to%20Law%20Council%20of%20Australia%20-%20Australian%20Law%20Reform%20Commission%20Inquiry%20into%20Justice%20Responses%20to%20Sexual%20Violence%20-%2016%20May%202024.pdf>

<sup>2</sup> BOCSAR Criminal Court Statistics, July 2018 – June 2023, online: [https://www.bocsar.nsw.gov.au/Pages/bocsar\\_court\\_stats/bocsar\\_court\\_stats.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_court_stats/bocsar_court_stats.aspx)

Bureau of Crime Statistics and Research 2023 Report, ‘This is my story. It’s your case, but it’s my story’<sup>3</sup> and resultant recommendations. We also support the establishment of an Independent Victims Commissioner to advocate for the rights of victim-survivors in NSW.

Amongst these broader issues impacting victim-survivors’ experience of the criminal justice system, we recognise that a Judicial Officer acknowledging an offender’s “good character” in sentencing may be one aspect of the sentencing process that may cause harm and distress to victim-survivors. We consider it important to listen to the voices of people with lived experience and review the operation, including associated practice and procedure, of good character in sentencing and to reduce harm to victim-survivors caused by this aspect insofar as possible. As such we support the NSW Sentencing Council in undertaking this Review to scope options to reduce harm and improve sentencing processes where good character is involved.

To this end, we provide the following comments for consideration in improving victim-survivors’ experience of sentences involving good character evidence.

#### Improved terminology

We would support consideration of changing the term “good character” to a term that better reflects the substance, relevance and utility of the evidence that is currently considered “good character” evidence. Particularly having regard to the historical context of good character evidence, we note that the term is in some ways inaccurate or inappropriate in the context of modern sentence proceedings.

Despite significant evolution of sentencing practice and procedure throughout the 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> centuries, the terminology around good character evidence has remained largely stagnant. The term “good character” connotes moral judgment and adopts a binary of “good” and “bad”, which in our view, is inappropriate in the modern criminal justice system and does not accurately reflect the type, relevance and utility of the evidence to which it refers. It is possible that the term itself causes confusion in the broader community, as to consider the “good character” of a convicted child sex offender appears to be an oxymoron and carries adverse inferences that may be offensive and harmful to victim-survivors.

Notwithstanding these difficulties, it is important to note that the substantive material that is currently termed “good character” evidence can be an important factor in sentencing and should not be barred from consideration for categories of cases or all cases more broadly. As noted in our preliminary submission, such material can assist judicial officers to deliver individualised justice by meaningfully assessing other factors relevant to sentence, such as the offender’s prospects of rehabilitation and likelihood of re-offending. This in turn, can work to keep the broader community safe, and appropriately tailor the deployment of Corrective Services NSW resources.

As such we would support consideration of adopting a more precise term that removes the moral judgment of character, and better reflects the reality that evidence related to an offender’s general behaviour and social

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<sup>3</sup> BOCSAR, ‘This is my story. It’s your case, but it’s my story. Interview study: Exploring justice system experiences of complainants in sexual offence matters’, 31 July 2023, online: <https://apo.org.au/sites/default/files/resource-files/2023-08/apo-nid324114.pdf>

engagement is relevant to the sentencing exercise, including assessment of an offender's continuing risk to the community and amenability to rehabilitation.

### Procedural improvements

In addition, we support implementation of improvements to sentencing procedure to improve victim-survivors' experience and ensure they are well supported throughout their engagement with the criminal justice system, including through sentence proceedings.

To this end, we wish to highlight and confirm support for the following measures advanced by the Office of the Director of Public Prosecutions as options to better support victim-survivors in sentence matters involving good character:

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 remotely and has provided that the victim-survivor may read their VIS remotely in those proceedings, 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.<sup>4</sup>

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<sup>4</sup> Office of the Director of Public Prosecutions, Preliminary submission to the NSW Sentencing Council Review of good character in sentencing, 19 July 2024, online: <https://sentencingcouncil.nsw.gov.au/documents/our-work/good-character/PGC83.pdf>



In addition, we would also support consideration of the language used by judicial officers during sentencing and judgment. We suggest that if judicial officers use trauma-informed language to take into account the experience of victim-survivors in this part of the process, trauma and distress for victim-survivors may be reduced.' We acknowledge that the sentencing process is, by necessity, focused on the offender which, in itself, can alienate and distress victim-survivors. In our view, judicial language can be used as an effective tool to better acknowledge victim-survivors in the process, including to reassure them, particularly when judgment is reserved, that their experiences are important to the sentencing process and will be considered.

In addition to these comments, we also attach a table setting out responses in relation to specific questions raised in the Consultation Paper for your further consideration.

Yours sincerely,

**Jennifer Ball**  
President

Attachment

Question	Comment
<b>5.1: Use of good character generally</b>	
<p>(1) Should consideration of good character as a mitigating factor be abolished in all cases? Why or why not?</p> <p>(2) How could consideration of evidence of good character be limited?</p>	<p>We do not support abolishing consideration of good character as a mitigating factor in all cases.</p> <p>The “good character” evidence admitted as a mitigating factor can be important to a variety of sentencing considerations, including judicial assessment of prospects of rehabilitation, likelihood of reoffending and community protection. The considerable interaction of good character evidence with other sentencing considerations makes it difficult to isolate and excise, and would also, in our view, impinge on the ability for Judges to deliver effective and individualised justice.</p> <p>We consider the common law, including <i>PGM</i><sup>1</sup> and <i>Dousha</i><sup>2</sup>, to provide effective and sufficient guidance with respect to the appropriate treatment of good character evidence, including the weight (if any) to be given to it, as assessed against other factors including the objective seriousness of the offending.</p>
<b>5.2: Use of lack of previous convictions generally</b>	
<p>(1) Should consideration of lack of previous convictions also be abolished as a mitigating factor in all cases? Why or why not?</p> <p>(2) In what circumstances should the fact that the offender does not have a record of previous convictions not be used in mitigation?</p>	<p>We do not support abolishing consideration of a lack of previous convictions as a mitigating factor in all cases.</p> <p>Lack of previous convictions can be an important factor in sentencing, as it is relevant to judicial assessment of factors including recidivism, proportionality and the need for specific deterrence. We consider it appropriate for such assessments to be made by the judicial officer in view of the circumstances of the individual case, rather than introducing a blanket ban in legislation.</p>
<b>5.3: Use of good character for offenders who plead not guilty</b>	
<p>Under what conditions could good character not be available as a mitigating factor for offenders who plead not guilty?</p>	<p>We oppose removing the availability of good character as a mitigating factor for offenders who plead not guilty. We consider this proposal at odds with the fundamental principles that underpin our criminal justice system, including that defendants have the right to defend themselves against criminal charges and are innocent until proven guilty. We do not consider it appropriate to disentitle defendants the opportunity to provide good character evidence on sentence for the sole reason that they exercised their fundamental right to criminal defence.</p>
<b>5.4: Good character as an aggravating factor</b>	
<p>Under what conditions could use of good character in the commission of an offence be treated as an aggravating factor?</p>	<p>We do not support this proposal and agree with the view of the Royal Commission into Institutional Responses to Child Sexual Abuse that such reform is ‘unnecessary’ in view of other available aggravating factors ‘such as breach of trust or authority, or the special vulnerability of the victim-survivor.’<sup>3</sup></p>

<sup>1</sup> [2008] NSWCCA 172, 152 [43]-[44].

<sup>2</sup> [2008] NSWCCA 263, [49].

<sup>3</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report: Parts VII –X (2017) 299.

5.5: Extending the special rule to all child sexual offences	
<p>(1) Should the special rule be extended to all child sexual offences? Why or why not?</p> <p>(2) What offences, if any, should be added to the definition of “child sexual offences” for the purposes of the special rule?</p>	<p>We do not recommend extending section 21A(5A) of the <i>Crimes (Sentencing Procedure) Act 1999</i> to all sentence proceedings for child sexual offending.</p> <p>Our members report that currently, particularly with the benefit of common law such as <i>Ryan</i><sup>4</sup>, evidence of good character is given little to no weight on sentencing for child sexual offences.</p> <p>We note, and support, the view put forward by Legal Aid NSW that, ‘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.’<sup>5</sup></p> <p>As put forward in our preliminary submission, our view is that judicial discretion is particularly important in this context, there are a broad range of offences, involving a range of objective seriousness, that fall within the definition of “child sexual offence”, from voyeurism offences (2-year maximum penalty) to sexual intercourse with a child under 10 years (life imprisonment). A significant variation of circumstances is encompassed, and as such, judicial discretion is a particularly important tool and safeguard to ensure that all material can be considered in view of the particular facts and circumstances of each case.</p> <p>This includes consideration of good character evidence, which can assist judicial officers to make informed assessments in respect of other factors relevant to sentence, including prospects of rehabilitation and risk of reoffending, to properly achieve purposes including protecting the community.</p>
5.6: Extending the special rule to sexual offences against other vulnerable groups	
<p>(1) What other vulnerable groups or offences against vulnerable groups could be subject to the special rule?</p> <p>(2) How could they be identified?</p> <p>(3) Should any of these offences be subject to the condition that the offender’s good character or lack of previous convictions was of assistance in the commission of the offence?</p>	<p>We would not oppose consideration of extending the special rule, in the terms currently legislated under section 21A(5A), to sexual offences where the victim-survivor is a vulnerable person.</p> <p>We recognise that other vulnerable groups may also be disproportionately subject to the specific power dynamics and vulnerability contemplated by the Royal Commission, where an offender’s ‘good character and reputation facilitated the offending’ and in some cases, may enable them to continue to offend.<sup>6</sup> Examples could include a young person under special care or a person with cognitive impairment in an institutional environment.</p> <p>We note that in other areas of criminal law and procedure, such as Part 6 and section 306M of the <i>Criminal Procedure Act 1986</i>, it is recognised that children and cognitively impaired persons have a</p>

<sup>4</sup> (2000) 118 A Crim 438.

<sup>5</sup> Legal Aid NSW, Preliminary submission to the NSW Sentencing Council Review of good character in sentencing, 8 July 2024, online: <https://sentencingcouncil.nsw.gov.au/content/dam/dcj/sentencing-council/documents/our-work/good-character/PGC68.pdf>

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

	level of similar or equivalent vulnerability. Such provisions could be reviewed and used as a basis to inform the identification of vulnerable groups that may be captured by the provision.
<b>5.7: Extending the special rule to adult sexual offences</b>	
(1) What adult sexual offences, if any, should be subject to the special rule (2) Should any of these offences be subject to the condition that the offender's good character or lack of previous convictions was of assistance in the commission of the offence?	<p>We do not support extending the special rule to adult sexual offences, particularly in view of the Sentencing Council's recommendation to this effect contained in the 2008 report, 'Penalties Relating to Sexual Assault'. As highlighted in our preliminary submission, in the 2008 report, 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'.<sup>7</sup></p> <p>The Sentencing Council noted that, in contrast, such a bar may be appropriate in cases involving 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.'<sup>8</sup></p> <p>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.</p>
<b>5.8: Extending the special rule to domestic violence offences</b>	
<b>5.9: Extending the special rule to other serious offences</b>	
<b>5.10: Extending the special rule where there is a breach of trust of authority</b>	
<b>5.11: Extending the special rule to all offences</b>	
<p>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 <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) to be appropriate and should not be extended to domestic violence offences, other serious offences, where there is a breach of trust or authority or to all offences.</p> <p>Reasons for this position are contained below, in response to questions under '5.13: No change to the current law.'</p>	
<b>5.12: Exempting under 18-year-olds from the special rule</b>	
Under what conditions should offenders who are under 18 be exempt from the application of the special rule?	<p>We query whether, under the current law, such amendment is necessary as it would likely not be invoked in many cases.</p> <p>However, in principle, we agree that under 18-year-olds should be exempted from the special rule, as is the case in Victoria under section 5AA(2) of the <i>Sentencing Act 1991</i> (Vic). Such exclusion would in our view appropriately recognise that the position of privilege, trust or authority that the special rule seeks to address would be less pronounced in cases involving a child offender.</p>
<b>5.13: No change to the current law</b>	
(1) What justification is there for courts continuing to take good character into account in sentencing for:	As advanced in our covering letter, we would support a number of changes to improve the experience of sentences that involve good character evidence for victim-survivors. This includes changes to the terminology of evidence currently categorised as "good

<sup>7</sup> Sentencing Council, 'Penalties relating to sexual assault', 2008, p 130.

<sup>8</sup> Sentencing Council, 'Penalties relating to sexual assault', 2008, p 133.

(a) sexual offences against children, and (b) other offences?	character” evidence, improved resourcing and procedural change. In our view these measures would more meaningfully support improved and safer experiences of the criminal justice system for victim-survivors, including in sentencing procedure.
(2) How should courts inform themselves of good character in these cases?	We also consider that the evidence currently termed “good character” evidence can be an important factor in sentencing and should not be barred from consideration for categories of cases or all cases more broadly.
(3) Why should courts not take good character into account in sentencing for: (a) sexual offences against children, and (b) other offences?	<p>As noted in our preliminary submission, it is our view that the current scope and drafting of section 21A(5A) 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’<sup>9</sup> and should not be taken into account by the Court as a mitigating factor in sentencing the offender. A limited amendment to extend the special rule to sexual offences against similarly vulnerable groups may be appropriate and continue to align with this intention, as noted above at 5.6.</p> <p>In our view the Court should otherwise be able to consider good character in sentencing as an important part of the ‘instinctive synthesis’.<sup>10</sup> 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 <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW).</p> <p>We note that our view is consistent with, and is informed by, the recommendations of both the Sentencing Council in the report, ‘Penalties Relating to Sexual Assault’ (2008)<sup>11</sup> and recommendation 74 of the Royal Commission into Institutional Responses to Child Sexual Abuse.<sup>12</sup></p>
<b>5.14: Adjusting procedures for tendering evidence</b>	
What changes could be made to the procedures surrounding the tendering and use of evidence of good character in sentencing proceedings?	<p>We support procedural changes to improve victim-survivors’ experience and ensure they are well supported throughout their engagement with the criminal justice system, including through sentence proceedings.</p> <p>This includes measures such as:</p> <ul style="list-style-type: none"> <li>• Ensuring that judicial officers and legal practitioners involved with sentencing for sexual offending have undertaken trauma-informed training, and proceedings are conducted using trauma-informed principles to minimise distress for victim-survivors.</li> </ul>

<sup>9</sup> Crimes Amendment (Sexual Offences) Bill 2008, [Second Reading](#).

<sup>10</sup> *Markarian* (2005) 228 CLR 357 [37].

<sup>11</sup> Sentencing Council, ‘Penalties relating to sexual assault’, 2008, Chapter 5, pp. 115-138.

<sup>12</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report VIII, p 299.



	<ul style="list-style-type: none"> <li>• Ensuring that Courts are equipped to enable victim-survivors to observe sentence proceedings and/or deliver their Victim Impact Statement remotely.</li> <li>• Potential amendments to the Bench Book to clarify the relevance and utility of good character in the sentence, making clear for victim-survivors and the community that it does not detract from the objective seriousness and impact of the offending.</li> <li>• Trauma-informed judicial language to better acknowledge the victim-survivor’s experience during sentencing, including to confirm that their experience is an important part of the sentencing process.</li> </ul>
<p><b>5.15: Placing the evidential burden on offenders</b></p>	
<p>In relation to what offences, if any, should the burden be placed on an offender, in a sentencing hearing, to establish that their good character did not assist in committing the offence?</p>	<p>We do not consider it appropriate to place the burden on the offender to establish that their good character did not assist in committing the offence. In accordance with <i>Olbrich</i><sup>13</sup>, we consider that this matter must be proved by the Prosecution beyond a reasonable doubt, as it is a matter adverse to the offender.</p>

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<sup>13</sup> (1999) 199 CLR 270.