

# NSW Sentencing Council Review of Character in Sentencing.

Full Stop Australia Submission, July 2024



## About Full Stop Australia

Full Stop Australia thanks the NSW Sentencing Council (**Sentencing Council**) for inviting submissions to its review of section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the **Act**), and other relevant sections, and the common law relating to the use of 'good character' in sentencing (the **Review**).

Full Stop Australia is a nationally focused not-for-profit organisation, which has been working in the field of sexual, domestic, and family violence since 1971. We perform the following functions:

- Provide expert and confidential telephone, online and face-to-face counselling to people of all genders who have experienced sexual, domestic, or family violence, and specialist help for their supporters and those experiencing vicarious trauma.
- Conduct best practice training and professional services to support frontline workers, government, and the corporate and not-for-profit sectors.
- Advocate for laws and systems that better respond to, and ultimately prevent, sexual, domestic and family violence.

Our advocacy is guided by the lived expertise of over 700 survivor-advocates in our [National Survivor Advocate Program \(NSAP\)](#). The NSAP gives victim-survivors of sexual, domestic and family violence a platform to share their experiences in order to drive positive change. We are committed to centring the voices of victim-survivors in our work and advocating for laws and systems that genuinely meet their needs.

## About this submission

The development of this submission was guided by the lived expertise and tireless advocacy of survivor-advocates Harri James and Jarad Grice—whose [Your Reference Aint Relevant campaign](#) provided the impetus for the Review. As set out above, Full Stop Australia is committed to centring the experiences of victim-survivors, and firmly believes it is only possible to end sexual, domestic and family violence by listening to the people impacted by it. We thank Harri and Jarad for their advocacy and vision.

This submission does not comment on the use of past character evidence in sentencing for all offences under NSW law. Rather, given Full Stop Australia's expertise as a sexual, domestic and family violence service, it focuses on the use of character in sentencing for gender-based crimes.

**Full Stop Australia** is working to put a full stop to sexual, domestic, and family violence through **support, education, and advocacy**.

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This submission was prepared by Emily Dale, Head of Advocacy at Full Stop Australia. Any questions can be directed to [emilyd@fullstop.org.au](mailto:emilyd@fullstop.org.au).

This submission has been endorsed by Domestic Violence NSW, the peak body for specialist domestic and family violence services in New South Wales.

## **Full Stop Australia supports legislative amendments to clarify evidence of an offender's character is inadmissible in sentencing for all child sexual offences**

Full Stop Australia supports the advocacy of the [Your Reference Aint Relevant campaign](#), which recommends legislative amendment to make evidence of an offender's character inadmissible in sentencing for *all* child sexual offences.

Currently, section 21A(5A) of the Act creates a double standard for sentencing perpetrators of child sexual abuse, depending on the setting of the abuse. This is inappropriate. There should be uniform standards that apply to consideration of past character in sentencing for all child sexual offences.

Clarifying past character is inadmissible in sentencing for all child sexual offences would increase the fairness and consistency of the sentencing process for child sexual offences, and do away with an aspect of that process currently retraumatising some victim-survivors.

## **The seriousness, prevalence, and unique dynamics of child sex offences means character should never mitigate sentencing**

Under section 21A(3) of the Act, an offender being 'a person of good character' (as shown by character references) is one of several 'mitigating' factors that can be considered when a judge sentences them for a criminal offence. Section 21A(5A) of the Act currently limits the use of character references in sentencing for child sexual offence matters, but only where the 'good character' of an offender 'was of assistance to the offender in the commission of the offence.'

We believe that the seriousness, prevalence, and unique dynamics of child sexual abuse mean 'good character' should never serve as a mitigating factor in sentencing.

Child sexual abuse is a pervasive issue in our society. In the latest Australian Child Maltreatment Study, which surveyed 8,500 Australians aged 16-65+, 28.5% of respondents

had experienced child sexual abuse.<sup>1</sup> The impact of such abuse is profound, encompassing not only the offense itself, but also the grooming process employed by offenders, the silence and shame endured by victim-survivors, and the complex dynamics that often exist between offenders and their victims.

**Harrison James (Your Reference Aint Relevant Cofounder):** *'[Child sexual offenders] don't only groom the victim: they're grooming [victims'] families, their friends, their schools, their churches, their communities. It's part of their standard method. We can't separate good character from the evil they perpetrate on children, [who are] the most vulnerable victims of all.'*

Child sex offences are a unique form of criminal activity, in that:

- Perpetrators commonly rely on an outwardly good reputation to perpetrate heinous crimes behind closed doors.
- A person's public reputation has very little to do with their propensity to offend in private.

This dynamic makes it entirely inappropriate for past character to be considered in sentencing in all cases of child sex abuse (not just those captured by section 21A(5A)). In every case of child sexual abuse, the offender's public reputation either had no bearing on their propensity to offend, or in a worse case, was used to facilitate offending. The danger of considering character evidence in sentencing child sex offenders was succinctly expressed in submissions to the NSW Sentencing Council's 2007 review of penalties for these offences, which the Discussion Paper sets out:

*'Some stakeholders submitted to the Sentencing Council that good character could not be relevant to sentencing for child sexual offences because such offences are regularly committed by people of good character, and a person's good character therefore does not make them any less likely to commit offences of this type. Others submitted that it was misleading to characterise a child sexual offender as a person of prior good character, because such offences were generally committed in a secret and the person's bad character therefore would not come to light until they were detected for their offending.'*

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<sup>1</sup> Mathews B et al. (2023) 'The Prevalence of Child Maltreatment of Australia: Findings from a National Survey.' *Med J Aust.* 218 (6).

We acknowledge that case law requires prior character to be given 'limited weight'<sup>2</sup> in child sexual offence matters, and that section 21A(5) limits the extent to which character can be considered. It is our position, however, that any consideration of past character in sentencing for child sex offences is inappropriate—and the Act should be amended to make this clear.

### **Section 21A(5A) creates a double standard, which delivers different justice outcomes depending on the circumstances of offending**

The current drafting of section 21A(5A) creates arbitrary double standard. Depending on the circumstances of abuse—namely, whether a judge accepts the offender's character 'assisted' them to offend—sentences can differ greatly. This distinction doesn't serve a meaningful purpose.

NSW case law on sentencing for child sexual offences deals with offending by teachers, childcare workers, foster parents, family friends, family members, and others. Whether character evidence is admissible in these cases turns on whether the Court in each case considered the offender's character 'assisted' them to offend. For example, in *R v Scholz* [2023] NSWDC 222, the Court accepted that the offender was able to gain access to his victims due to his role as an RFS 'local hero' and by holding himself out to one victim's mother as having a Working With Children Check. Meanwhile, in *R v BQL* [2022] NSWDC 295, an offender who gained access to his victim by renting a room in her mother's house and commencing a relationship with her mother, was held not to have used 'good character' to facilitate offending.

We think the distinction being applied—how directly the offender's character assisted them to offend—is a false one. It seems to us that in cases in which section 21A(5A) was found to apply, as well as those in which it was not, the offender's character was undoubtedly used to gain access to, or a position of trust or authority over, the victim(s). This was the case regardless of how directly the offender's character facilitated offending. We see no reason to distinguish between cases where the impact of character was 'indirect' (e.g. where the offender relied on a 'good reputation' to foster a relationship with the victim's parents, and thereby gain access to the victim, as in *Bhatia v R* [2023] NSWCCA 12), and cases where the offender more 'directly' used good character to gain opportunities to offend (e.g. where the offender could not have obtained employment as a childcare worker without evidence of good character, as in *R v Stoupe* [2015] NSWCCA 175).

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<sup>2</sup> *R v Kennedy* [2000] NSWCCA 527.

Additionally, there seems to be room for uncertainty in decision making, with very similar facts often returning different results. For example:

- In *R v Hovell* [2021] NSWDC 326, the prior character of the offender—the victim’s high school teacher—mitigated his sentencing because ‘the relationship of student and teacher is not necessarily one in which the offender’s good character could be said to assist in the commission of the offence.’ Meanwhile, in *R v Stoupe* [2015] NSWCCA 175, the Court accepted that ‘the offender’s prior good character assisted him to hold the position of childcare worker, which he abused by committing the offences.’ Both involve educational figures, who—to be engaged to perform their roles—needed to show themselves to be persons of good repute, who could be trusted to work with children and young people. And yet, in one case character evidence was admissible, and in the other it wasn’t.
- *R v Rose* [2022] NSWDC 705, *R v JK* [2021] NSWDC 502 and *Bhatia v R* [2023] NSWCCA 12 all involved child sexual abuse by family friends. Nevertheless, character evidence was dealt with differently. In *R v Rose*, the Court found the offender’s character had assisted in offending, because, ‘had he lacked such good character or had he had previous convictions, this would likely have been known in the country town in which he lived, and he likely would not have been placed in a repeated position of trust in the care of the victim.’ Whereas, in *R v JK* and *Bhatia v R*, the Court found the offenders’ character did not assist them to offend—even though the perpetrators in those cases were able to trade off their relationship with their victims’ parents to stay overnight at the victim’s house (in *R v JK*) and babysit the victim (in *Bhatia v R*).

Amending section 21A(5A) to clarify that character evidence is inadmissible as a mitigating factor for all child sexual offences would establish a more consistent approach to sentencing, which recognises the insidious role all child sexual offenders’ reputations play in allowing them to gain access to their victims.

**Harrison James (Your Reference Aint Relevant Cofounder):** ‘Law sets the precedent for how society operates, and if we have law that allows convicted child sex offenders to utilise good character references, that really sets the tone for the conversations that happen in our workplaces, in our schools, with our families.’

## Full Stop Australia supports legislative amendments to make character evidence inadmissible in sentencing for sexual, domestic and family violence offending

Full Stop Australia also supports preventing character evidence from being used as a mitigating factor in sentencing for adult sexual offending and domestic and family violence-related offending.

The perceived 'good' character of sexual offenders, and domestic and family violence perpetrators, often assists them to offend—with many perpetrators relying on an outwardly good reputation to gain access to, or the trust of, their victims. This might be because they are able to hold themselves out as a person of 'good' character in the workplace, at school or university, on a dating app, at a bar, club or other social setting, or through relationships with mutual friends.

In some cases, abuse of trust or power is a feature of adult sexual offending and domestic and family violence-related offending. Some offenders abuse a position of trust or authority in relation to their victims—for example, in relation to a person with disability in a care setting or intimate relationship. In these relationships and situations, the offender's character will often contribute to them gaining access to their victim. For example, someone applying for a role as a carer for a person with disability or a person requiring aged care might need to satisfy that person's family that they're a person of good character.

The use of character evidence in these matters can also lead to lenient sentences, which are out of step with community expectations and the seriousness of these crimes. For example, the recent sentencing in the ACT of Thomas Earle, a convicted rapist, shows how character references can be used to enable sexual offenders to avoid custodial sentences—with the judge sentencing Earle to 300 hours' community service (and no jail time), and commenting on his 'good character' based on several character references.<sup>3</sup> This is clearly out of step with community expectations for the sentencing of a convicted rapist. This is especially galling, given the well-established link between sexual, domestic and family violence and severe, often lifelong, health and wellbeing impacts for victim-survivors. According to research by VicHealth, intimate partner violence is responsible for more preventable ill-health and premature death in women under the age of 45 than any

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<sup>3</sup> See Roberts, Georgia. 'Canberra rapist Thomas Earle avoids jail time, sentenced to 300 hours of community service.' *ABC*. 29 April 2023. Available at: <https://www.abc.net.au/news/2023-04-29/rapist-thomas-earlesentenced-to-three-years-ico/102278630>.



other of the well-known risk factors, including high blood pressure, obesity and smoking.<sup>4</sup> Women who have been exposed to violence are at greater risk of developing a range of health problems, including stress, anxiety, depression, pain syndromes, phobias and somatic and medical symptoms, and report poorer physical health overall.<sup>5</sup>

Preventing character evidence from being used in the sentencing of adult sexual offences and domestic and family violence-related offences would give survivors more faith that the justice system recognises the harm caused by those forms of violence. It would also remove a retraumatising element of the Court process for survivors of these crimes, many of whom report they find it incredibly painful and retraumatising to hear reviews of their offender's 'good character' during sentencing.

### The use of character references in sentencing impacts victim-survivors' experience of the justice system

In cases where character is used to mitigate an offender's sentence, two of victim-survivors' key justice needs—validation and vindication—are often not met. The Victorian Law Reform Commission (VLRC), in its report on Improving the Justice System Response to Sexual Offences, describes these needs:

- **Validation.** This involves victim-survivors 'hav[ing] their story believed as well as just heard,' and being treated with 'empathy for the injustice they have experienced.'<sup>6</sup> As the VLRC notes, 'the justice system has a special and respected status in acknowledging harm.'<sup>7</sup>
- **Vindication.** This means 'clearly condemn[ing offending] and [ensuring] those responsible face consequences.'<sup>8</sup> It requires 'a response from the community or the law that denounces the violence and stands with the victim. This can include the punishment of the person responsible for the violence.'<sup>9</sup> It requires perpetrators to be held to account, by 'facing consequences for their actions, undertaking treatment and accepting responsibility for their actions and making amends.'<sup>10</sup>

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<sup>4</sup> VicHealth. (2008). *Violence against women in Australia as a determinant of mental health and wellbeing*. Victorian Health Promotion Foundation. [https://www.vichealth.vic.gov.au/sites/default/files/ResearchSummary\\_VAW.pdf](https://www.vichealth.vic.gov.au/sites/default/files/ResearchSummary_VAW.pdf).

<sup>5</sup> World Health Organization. (2000). *Women and Mental Health: An Evidence Based Review*. World Health Organisation, Geneva.

<sup>6</sup> Victorian Law Reform Commission (VLRC), *Improving the Justice System Response to Sexual Offences*, September 2021, available at: [https://www.lawreform.vic.gov.au/wp-content/uploads/2023/08/VLRC\\_Improving\\_Justice\\_System\\_Response\\_to\\_Sex\\_Offences\\_Report\\_web.pdf](https://www.lawreform.vic.gov.au/wp-content/uploads/2023/08/VLRC_Improving_Justice_System_Response_to_Sex_Offences_Report_web.pdf).

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.



Where character is used to mitigate sentencing, victims often feel retraumatised, hurt and let down by the justice system. Survivor-advocates in Full Stop Australia's NSAP have reported feeling distressed at hearing evidence of an offender's good character, and identified this as a source of harm in the justice system. Victim-survivors have told us this contributed to them feeling systemically disbelieved and unprotected in the Court system.

Barring the use of character evidence in sentencing for sexual, domestic and family violence-related offending would also go towards improving victim-survivors' experience of the criminal system.

### **Replacing the term 'good character' in the context of sexual, domestic and family violence offending**

Finally, we note that sections 21A(3)(f) and 21A(5A) of the Act currently use the term 'good character.' We support replacing this term with 'prior character.' The neutral term 'prior character' is preferable to the value-laden term 'good character.' Words matter: many victim-survivors find the tendering of 'good character' evidence—the assertion that their offender is a person of good character, despite their crimes—to be 'a kick in the guts.'<sup>11</sup>

This is especially the case for victim-survivors of child and adult sexual offences, and domestic and family violence-related offences. Survivor-advocate and RASARA Director of Advocacy Saxon Mullins recounts: 'In my case at sentencing for the first trial where this person had been found guilty, the character reference said: "Oh he's not the type of person who could do this." What's the purpose of saying that? Are we trying to discredit what the survivor said happened?'<sup>12</sup> Using the term 'good character' minimises survivors' experiences, which many find incredibly retraumatising. For this reason, Mullins has noted the importance of victim-survivors' wellbeing being 'front of mind in how character references are presented in court.'<sup>13</sup>

To reduce retraumatisation, we suggest changing the term 'good character' to 'prior character' throughout the Act.

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<sup>11</sup> Ross, Isabella, 'Mamamia Investigates: We have questions around the use of character references in court cases,' *Mamamia*, 12 September 2023, available at: <https://www.mamamia.com.au/character-references-in-court/>.

<sup>12</sup> Saxon Mullins, quoted in Ross, above n 11.

<sup>13</sup> Ibid.