

# NSW Sentencing Council Review of Character in Sentencing.

Full Stop Australia Submission, February 2025



## About Full Stop Australia

Full Stop Australia thanks the NSW Sentencing Council (**Sentencing Council**) for inviting submissions in response to its discussion paper *Good Character at Sentencing* (**Discussion Paper**), which considers the appropriateness of considering character in sentencing under the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the **Act**).

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 NSW Sentencing Council's work. 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.

We note that the Discussion Paper raises a number of issues beyond the scope of the Your Reference Aint Relevant Campaign's original proposal for legislative reform. We have not responded to every one of these questions. Rather, we have focused on questions that call on our organisational expertise as a frontline service supporting victim-survivors of sexual,

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domestic and family violence. As a general point, as an early supporter of the Your Reference Aint Relevant Campaign, the key reform we hope this review will deliver is a change to NSW law so character references can no longer be used in sentencing for child sexual abuse. We see this as the driving force behind the Sentencing Council's work, and it is the key change we hope this review will deliver.

In addition to the points below, we have had the opportunity to review an early draft of DVNSW's submission in response to the Discussion Paper, and endorse that submission.

### **Question 5.5(1): Should the 'special rule' be extended to all child sexual offences?**

As set out in our preliminary submission to the Sentencing Council's review, we support the advocacy of the [Your Reference Aint Relevant campaign](#), which recommends legislative amendment to make evidence of an offender's character and lack of previous convictions inadmissible in sentencing for all child sexual offences.<sup>1</sup>

Our reasons for this position are set out in our preliminary submission, and we have repeated them here for your convenience.

#### **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

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<sup>1</sup> That is, we support the application of the 'special rule' to all child sexual offences, via removal of the condition at the end of section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), as proposed in paragraph [5.27] of the Discussion Paper.

had experienced child sexual abuse.<sup>2</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>2</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>3</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>3</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.’

### Question 5.5(2): What offences should be added to the definition of 'child sexual offences' for the purpose of the 'special rule'?

Full Stop Australia supports reform to clarify that past character and lack of previous convictions are not to be considered in sentencing for the following offences against children:

- Administering or encouraging the use of a digital platform for child abuse material, contrary to the *Crimes Act 1900* (NSW) ss 91HA and 91HB.
- Sexual assault by forced self-manipulation, contrary to the *Crimes Act 1900* (NSW) s 80A.

If adopted alongside our above recommendation in response to Question 5.5(1), this would ensure a consistent approach to the use of character in sentencing for sexual offences against children. It would also help send a strong message about the seriousness of child sexual offending, which may help to deter this form of offending.

### Question 5.6: Extending the 'special rule' to sexual offences against other vulnerable groups

Full Stop Australia supports reform to clarify that past character and lack of previous convictions are not to be considered in sentencing for sexual offences against other vulnerable groups. The Discussion Paper lists two such offences, which we support this approach being applied to:

- Sexual offences against a person with cognitive impairment, contrary to the *Crimes Act 1900* (NSW) s 66F.
- Sexual intercourse and touching against a young person (aged 16 and 17) under special care, contrary to the *Crimes Act 1900* (NSW) s 73.

We note that these offences attract a lot of the same considerations, regarding the value of considering past character, as child sexual offending. Like child sexual offences, they involve abuse of power and trust, and they are crimes for which the offender's character can contribute to them gaining access to their victim. For example, an offender under s 66F of the *Crimes Act* is responsible for providing care to persons with cognitive impairment in their home or an institutional setting. To be placed in such a role, an offender would first need to satisfy their employer, as well as perhaps the family of the person with cognitive impairment, that they're a person of good character.

In relation to Question 5.6(3), we do not think it's necessary to subject sexual offences against vulnerable groups to the condition that the offender's good character or lack of previous convictions was 'of assistance in the commission of the offence.' As set out above, case law on the application of the 'special rule' to child sexual offending has shown the variable application of this condition—resulting in an unhelpful double standard. We think it is unhelpful to replicate this double standard for sexual offences perpetrated against vulnerable groups, given the overlapping dynamics with child sexual offending set out above.

Providing that past character and lack of previous convictions cannot be considered for offending against vulnerable victims of sexual crimes would serve the following purposes:

- It recognises the seriousness of sexual offending against vulnerable groups.
- It recognises that misuse of ostensibly good character can be inherent to sexual offending against vulnerable groups.
- It would remove an aspect of the sentencing process many victim-survivors find harmful and retraumatising.
- This may lead to more victim-survivors of sexual violence from vulnerable groups coming forward to report, which is important, given low reporting and conviction rates for sexual offending.
- It recognises that, as acknowledged in the Discussion Paper, 'there does not appear to be a clear link between good character and a lower risk of sexual reoffending.' In the absence of such a link, considering character in sentencing is of limited utility in determining the offender's prospects of rehabilitation, likelihood of reoffending, or future risk to the community.

### **Question 5.7: Extending the 'special rule' to adult sexual offences**

Full Stop Australia supports reform to clarify that past character and lack of previous convictions cannot be considered in sentencing for adult sexual offences.

As set out in our preliminary submission, the perceived 'good' character of sexual offenders 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.

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The use of character evidence in these matters can 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>4</sup> As acknowledged in paragraphs [4.50] to [4.51] of the Discussion Paper, this can undermine the legitimacy or credibility of the justice system, by giving rise to the perception that offenders will not be held fully accountable for their actions (which weakens both general and specific deterrence).

This also worsens victim-survivors' experience of the justice system, and diminishes their belief that it is a system capable of recognising the harm caused by sexual violence. The use of character references in sentencing is a retraumatising element of the Court process for sexual violence survivors, many of whom report they find it incredibly painful to hear reviews of their offender's 'good character' during sentencing.

The use of character references in sentencing for sexual violence can also cause the following systemic harms, which are identified at paragraph [4.53] of the Discussion Paper:

- Perpetuating a harmful culture (of misconceptions around sexual offending and the encouragement of victim-blaming).
- Discouraging disclosure of offences.

The latter is especially concerning, given low reporting and conviction rates for sexual offending:

- The latest ABS data on sexual violence shows that only 8% of women who were sexually assaulted by a male perpetrator in the ten years leading up to the survey ever reported to police.<sup>5</sup>
- NSW Bureau of Crime Statistics and Research (**BOCSAR**) analysis of all sexual assault incidents reported to NSW Police in 2018 found that only 15% of matters

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<sup>4</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>.

<sup>5</sup> Australian Bureau of Statistics. (2021, August 24). Sexual Violence - Victimization. ABS. <https://www.abs.gov.au/articles/sexual-violence-victimisation>.

resulted in charges laid, and only 7% of historic sexual assaults and 6% of contemporary sexual assaults resulted in a conviction.<sup>6</sup>

Addressing these conditions serves the public interest of ensuring that those who use sexual violence are held accountable for their actions, and that victims of violence are supported to come forward.

Finally, as set out above, in the absence of a clear link between good character and a lower risk of sexual reoffending, taking character into account in sentencing for sexual offences is of questionable value in determining prospects of rehabilitation, likelihood of reoffending, or future risk to the community.

### **Question 5.8: Extending the 'special rule' to domestic violence offences**

Full Stop Australia supports DVNSW's submission in relation to the application of the 'special rule' to domestic violence offences.

We recognise the importance in some cases of allowing character reference to be considered in sentencing for domestic violence offences, to address issues like misidentification of the primary victim of domestic violence. We also support DVNSW's call for a comprehensive review of the *Crimes (Domestic and Personal Violence) Act 2007*.

### **Question 5.10: Extending the 'special rule' where there is a breach of trust or authority**

Full Stop Australia recognises the value of taking a principle-based approach to the use of past character and lack of previous convictions in sentencing. This might involve limiting consideration of these matters in a broader range of offences where the appearance of good character helped facilitate offending—for example, in cases of fraud.

We are not opposed to a principle-based approach that subjects non-sexual offences involving breach of trust or authority to the 'special rule' (in addition to reform explicitly providing that character and lack of past convictions are not to be considered in child and adult sexual offending, as recommended above). But as non-sexual offences involving

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<sup>6</sup> Gilbert, Brigitte. (2024). Attrition of sexual assaults from the New South Wales criminal justice system. NSW Bureau of Crime Statistics and Research. [https://www.bocsar.nsw.gov.au/Pages/bocsar\\_publication/Pub\\_Summary/BB/BB170Summary-attribution-sexual-assaults.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_publication/Pub_Summary/BB/BB170Summary-attribution-sexual-assaults.aspx).

breach of trust or authority are outside our organisational expertise, we have not commented on the application of the 'special rule' to them.

### **Question 5.11: Extending the 'special rule' to all offences**

We acknowledge the value of taking a principle-based approach to sentencing law, which might involve disallowing consideration of past character and prior convictions where those matters assisted the offender to offend. However, we haven't commented on this question as it raises issues beyond our organisational expertise as a sexual, domestic and family violence service.

### **Question 5.13: No change to the current law**

We oppose this approach. See our responses to Questions 5.5, 5.6 and 5.7 above.

### **Question 5.14: Adjusting procedures for tendering evidence**

Paragraph [5.68] of the Discussion Paper recognises that reframing character references used in sentencing:

*'As a "statement addressing factors that address the risk of reoffending" (or similar) could address concerns by some preliminary submissions around the impact of the expression "good character" on victim-survivors and others. This could reduce the distress caused to victim-survivors and give all participants a better understanding of the purpose of the evidence contained in such statements.'*

As we said in our preliminary submission to this review, the term 'good character' can be 'a kick in the guts'<sup>7</sup> to victims of crime.

As set out above in response to Questions 5.5, 5.6 and 5.7, we support reform explicitly providing that character and lack of past convictions are not to be considered for child and adult sexual offending. However, for other offences for which character may be considered, we support the language change proposed in paragraph [5.68] of the Discussion Paper. This would help to clarify the purpose for which statements about the offender are considered in sentencing, which may reduce the retraumatising impact of such statements on victims of crime.

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<sup>7</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/>.