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The Hon Peter McClellan AM KC
NSW Sentencing Council
Department of Communities and Justice

Via email:

Submissions of the Grace Tame Foundation to the NSW Sentencing Council's call for preliminary submissions regarding a review of s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*

1. Introduction

- 1.1 This submission has been prepared on behalf of The Grace Tame Foundation (**GTF**), in response to your invitation to provide feedback for the purposes of the above review. The Board of GTF is grateful for this opportunity. The writer is a member of the Board, and Marque Lawyers assists GTF with its work.
- 1.2 The mission of GTF is to campaign for and help fund initiatives which work to prevent and respond to child sexual abuse (**CSA**). Law reform is a key strategic interest for GTF, and one of the critical areas we have identified is that of sentencing approaches to CSA offenders. We are therefore keenly interested in this review.
- 1.3 This submission is made further to our review of section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* (**CSP Act**) of 27 October 2023 provided to the NSW Department of Communities and Justice, including **Appendix A** to this submission, which tables further decisions of New South Wales courts which have (or have not) applied the provision since October 2023.
- 1.4 It is GTF's position that section 21A(5A) fails to achieve the purpose for which it was implemented. Good character evidence misleads courts by applying an outdated understanding of who sexual offenders are, and furthers none of the sentencing objectives of the CSP. Section 21A(5A) must be amended to bar the application of evidence of good character and the absence of prior convictions as a mitigating factor in sentencing:
- (a) regardless of whether or not either factor "assisted" in the commission of the convicted offence, and
 - (b) in the sentencing of all sexual offences, whether the survivor is an adult or a child.

2. Summary

- 2.1 Section 21A(5A) was seemingly implemented in an attempt to prevent CSA offenders from using their ability to lead a “double life” (one where they are a respected community member, and the other where they perpetrate horrific and lasting abuse on children) to mitigate the severity of their sentence on the (rare) occasion that a conviction is secured.
- 2.2 If that is the case, the provision is abjectly failing, as revealed by the inconsistency in its application by courts, its purported narrowing to circumstances where sufficient evidence of good character *actively* facilitates the offending, and most recently, the absence of its application to CSA sentencing decisions.
- 2.3 The difficulties associated with its application can be understood, in part, through frequent misunderstandings of *who* perpetrates CSA. While section 21A(5A) might offer assistance in the context of sentencing institutional offenders, the bulk of perpetrators are family members, caregivers or persons known to the child survivor, who likely cannot tender evidence that the offender’s known good character or lack of convictions was what facilitated their being granted access to the child.
- 2.4 When assessed against the CSP sentencing objectives, the consideration of good character evidence in the context of CSA offending is demonstrably counterproductive.
- 2.5 Section 21A(5A) provides a guide to the misleading nature of good character evidence generally. The words “if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence” should be struck from section 21A(5A).

3. Difficulty of requirement that an offender’s good character or lack of previous convictions be “of assistance to the offender in the commission of the offence”

Drafting and introduction of section 21A(5A)

- 3.1 Section 21A(3) requires an offender’s “good character” and absence of prior convictions to be considered as mitigating factors in sentencing. The provision was brought into focus by the High Court’s decision in *Ryan v The Queen* (2001) 206 CLR 267, in which a majority of the Court ruled that a serial paedophile priest who led a “double life”, doing “good works” while “committing grave offences”, was still entitled to “some leniency for his otherwise good character”.¹

¹ At [34]-[35] (McHugh J).

- 3.2 Section 21A(5A) was introduced to the CSP Act in 2008,² following a review by the Sentencing Council of the penalties attaching to sexual offences and the impact of good character evidence as a mitigating factor on sentencing.³
- 3.3 The Sentencing Council's recommendations included that section 21A(3) of the CSP be amended to preclude a sentencing court from taking evidence of good general reputation, prior good character or prior convictions of offenders being sentenced for child sexual offences, "if and to the extent that any of those considerations have better enabled the offender to commit the offence".⁴
- 3.4 In the second reading speech for the bill implementing this provision, it was aptly noted that:
- 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. 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 sentencing.⁵
- 3.5 The provision was cited with apparent approval by the Royal Commission into Institutional Responses to Child Sexual Abuse, which included as a recommendation that all state and territory governments introduce legislation of a similar effect to section 21A(5A).⁶
- 3.6 However, the application of the provision (or the lack of its application) in practice in New South Wales and its actual effect on sentencing outcomes speaks to its inefficacy. It is not achieving the outcomes for which it was purportedly implemented, and if anything, speaks only to the fundamental illogic and detachment of good character evidence from sentencing objectives.

Application of section 21A(5A)

- 3.7 We refer to the review of New South Wales case law applying section 21A(5A) included in GTF's submission to the Department of Communities and Justice of 27 October 2023.

² By the *Crimes Amendment (Sexual Offences) Act 2008* (NSW).

³ *Crimes Amendment (Sexual Offences) Bill 2008* (Second Reading speech by the Hon John Hatzistergos, 26 November 2008, accessed at: [Legislative Council Hansard - 26 November 2008 \(nsw.gov.au\)](https://www.legislation.nsw.gov.au/details.nsw?doc=LCSHANSARD-26-NOV-2008)).

⁴ NSW Sentencing Council's review of [Penalties Relating to Sexual Assault Offences in New South Wales](#) (August 2008) at vol 1, page 26 (recommendation 38).

⁵ *Crimes Amendment (Sexual Offences) Bill 2008* (Second Reading speech by the Hon John Hatzistergos, 26 November 2008, accessed at: [Legislative Council Hansard - 26 November 2008 \(nsw.gov.au\)](https://www.legislation.nsw.gov.au/details.nsw?doc=LCSHANSARD-26-NOV-2008)).

⁶ Royal Commission, Criminal Justice Report: Executive Summary and Parts I to II (Report, 2017) 99 (recommendation 74).

- 3.8 That submission spoke to the inconsistent application of section 21A(5A) by courts and its lack of efficacy in applying to the bulk of CSA offenders who gain access to children through their familial or social relationship with the survivor's parents.
- 3.9 Since the time of that review, *one* District Court decision sentencing offenders for CSA has applied section 21A(5A), in circumstances where the offenders were friends of the survivor's father.⁷ The far greater number of instances where it has *not* been applied include – perplexingly – also where the offending was perpetrated by a friend of a child's father;⁸ a family friend who acted as a “father figure” to a child;⁹ and family members or neighbours.¹⁰
- 3.10 Otherwise, two decisions which *considered* the application of section 21A(5A) were consistent with the narrow interpretation of section 21A(5A) espoused by the Criminal Court of Appeal in **Bhatia v R**.¹¹ This decision remains the leading authority on s 21A(5A), and ruled that the Crown must establish an “active” use of good character to gain access to the child or commit the offence.
- 3.11 In *Bhatia*, the court's decision contemplated that the “language of [section 21A(5A)] is quite broad and is apt to catch a wider range of offenders”, including priests, politicians, teachers and community leaders, babysitters or carers who provide references attesting to their good character and reputation, or family friends and relatives. However, each require “evidence going beyond the fact of the relationship”.
- 3.12 Requiring such evidence entirely misses the point. Sexual offenders are inherently and implicitly Janus faced, masking their offending by their “*perceived* trustworthiness and honesty”.¹²
- 3.13 In light of the apparently high threshold of establishing that good character or an absence of prior convictions “assisted” the offender in the commission of the offence, it is unsurprising that the Crown is apparently reluctant to attempt to argue for the limitation of good character evidence. In the first of the two instances where it was considered, it was found that there was “no suggestion” that the offender had “used his prior good character to assist his offending” against his step-child.¹³ In the second, it was similarly found that there was no evidence that the

⁷ *R v Bamforth*; *R v Bamforth* [2024] NSWDC 45 at [698]. Notably, the offenders did not seek to rely on such evidence, and the decision made no reference to *Bhatia v R* [2023] NSWCCA 12, with which it is inconsistent.

⁸ *R v PRATAP* [2024] NSWDC 221.

⁹ *R v Carey* [2024] NSWCCA 90.

¹⁰ *R v AS* [2024] NSWDC 54; *R v MacDonald* [2024] NSWDC 136.

¹¹ [2023] NSWCCA 12, [144] (emphasis added).

¹² *Crimes Amendment (Sexual Offences) Bill 2008* (Second Reading speech by the Hon John Hatzistergos, 26 November 2008, accessed at: [Legislative Council Hansard - 26 November 2008 \(nsw.gov.au\)](#)).

¹³ *R v WD* [2023] NSWDC 542 at [29].

offender took steps to gain access to the survivor (his grandchild).¹⁴ The one decision which applied s 21A(5A) provided no reasons for its inconsistency with *Bhatia*, and applied the provision despite no character evidence being led. In any case, it is difficult to envisage exactly what evidence could demonstrate that a caregiver or family member used their good character and lack of convictions to *gain* access to a child.

3.14 This begs the question – what is the point of section 21A(5A)?

CSA incidence not reflected by s 21A(5A) outcomes

3.15 The present application of section 21A(5A) is clearly falling short of its intended application. Any utility that the provision offers when sentencing institutional CSA offences falls away when the context of all CSA offences is considered. Over a third of sexual assaults are domestic or family violence related,¹⁵ and most are perpetrated by someone the survivor knows.¹⁶ CSA most frequently occurs in a residential location,¹⁷ with parents or caregivers in the home, or other known adults being the most frequent adult perpetrators.¹⁸

3.16 Section 21A(5A) fails to account for the fact that CSA offenders frequently possess behavioural characteristics that align precisely with the courts' understanding of "good character" and yet are also characteristics which are intrinsic to offending. CSA offenders are inherently capable of committing despicable offences whilst maintaining a guise of good character. Many offenders exhibit:

neither high levels of general impulsivity, offense histories, nor many typical criminogenic characteristics, which helps to explain why they were able to obtain positions of trust. Indeed, acquiring these positions of trust within institutions appears to be one of the enabling factors that helps them maintain secrecy and evade detection for extended periods.¹⁹

¹⁴ *R v RJ (No 5)* [2024] NSWDC 26 at [56].

¹⁵ Australian Bureau of Statistics, Recorded Crime - Victims 2022 (29 June 2023) ('ABS Victims 2022'). Recorded means offences which may have been reported by a victim, witness or other person, or detected by police. Sexual assault definition is based on ANZSOC classification 0311 and 0312).

¹⁶ Australian Institute of Health and Welfare, Sexual Assault in Australia, 2020, 8-9 ('Sexual Assault in Australia').

¹⁷ PSS 2021-22 (n 3) Sexual Violence (female experiences in PSS) - Incident characteristics.

¹⁸ Ben Mathews et al, 'Child sexual abuse by different classes and types of perpetrator: Prevalence and trends from an Australian national survey' *Journal of Child Abuse and Neglect* (147, January 2024).

¹⁹ S J Nicol and others, Evading Detection: What do we know about men charged with extrafamilial child sexual abuse following delayed detection?, *Journal of Child Sexual Abuse* 4 March 2022.

- 3.17 In the recent cases we reviewed, evidence was led (and applied as a mitigating factor) that the respective offenders had led a “*blameless life*”²⁰ and were a “*good family man*”,²¹ “*known in the town as a good bloke*”, the “*best dad ... ever known*”,²² a “*man who has led an active life, has contributed to the community and raised a family*”,²³ an “*honest, down to earth character who they trust*”,²⁴ and who was “*kind, respectful and patient, with an appropriate understanding and respect for boundaries*”.²⁵

Lack of relevance to CSP sentencing objectives

- 3.18 Each of the sentencing objectives outlined by section 3A of the CSP are hindered by the provision of good character evidence as a mitigating factor.
- 3.19 That an offender can compartmentalise their offending conduct from the rest of their life fails to make the offender accountable for their actions. Their conduct is rendered “opportunistic”, “out of character” or “uncharacteristic” of the offender’s “true nature”.²⁶ Understanding such horrific (and intentional) offences as CSA as being caused by momentary lapses of character fails to adequately punish offenders for their conduct. Good character evidence has even been applied in circumstances where the offender “*expressed no remorse or any acceptance of responsibility*” for their conduct.²⁷
- 3.20 If the prior good character or absence of convictions did not prevent the commission of the offence in the first instance, it is unclear why it should speak to an offender’s prospects of rehabilitation. Of the cases we reviewed, only one of the offenders had a prior conviction (for a minor offence which was deemed “in effect, no criminal history”):²⁸ Some decisions seemingly purported to make findings of good character *premised in* the absence of prior convictions.²⁹ Applying evidence of good character or a lack of prior convictions as a mitigating factor ignores the fact that CSA offenders will usually lack prior convictions and are often rehearsed at grooming audiences to maintain a positive public façade.

²⁰ *R v RJ (No 5)* [2024] NSWDC 26 at [55].

²¹ *R v Williams (No 2)* [2024] NSWDC 9 at [37].

²² *R v Carey* [2024] NSWCCA 90 at [29].

²³ *R v AS* [2024] NSWDC 54 at [37].

²⁴ *R v MacDonald* [2024] NSWDC 136 at [64].

²⁵ *R v Smea* [2023] NSWDC 618 at [144].

²⁶ Eg, *R v Burns* [2024] NSWDC 173 at [96].

²⁷ *R v MacDonald* [2024] NSWDC 136 at [66].

²⁸ An offender with a record of minor offences was still considered to have “in effect no criminal history”: *R v AS* [2024] NSWDC 54 at [23].

²⁹ *R v PRATAP* [2024] NSWDC 221 at [33] and *R v WD* [2023] NSWDC 542 at [29].

- 3.21 Good character evidence also tends to suggest that engaging in CSA is more justifiable for certain types of offender who have “*led an active life, contributed to the community and raised a family*”.³⁰ The more an offender engages with their community, the more lenient a sentence shall be available to them, even where that community engagement is a method of accessing children. Community protection and deterrence or denunciation of the offence can hardly be achieved by this. Where an offender is a person of good community standing and reputation, good character evidence may even deter survivors from reporting claims for fear of entering what appears to be a personality contest. The lack of a cohesive approach in the courts’ interpretation of section 21A(5A) also fails to encourage a consistent and strong stance against CSA.
- 3.22 The only punitive purpose achieved by good character evidence is punishment of the survivor. After having their credibility attacked during cross-examination during the offender’s trial, the survivor is further traumatised by the very fact that the offender may seek leniency in sentencing because their offending was “uncharacteristic”. That the perpetrator of their assault was an otherwise law abiding and family minded community member makes no difference to the survivor’s experience of the assault and their resultant lifelong suffering. It is plainly insulting and retraumatising for courts to offer a more lenient sentence for a sexual offence conviction because of *who the offender is*.
- 3.23 Our previous submissions spoke to the Sentencing Council’s 2008 review of CSA penalties, which erred against giving good character evidence too much weight, lest it appear that a court is conceding to give a parent or caregiver “some right to use a child for sexual pleasure at will”.³¹ This is the most frightening effect of section 21A(5A) and its narrow application by the courts. We end these submissions with an extract from a recent District Court sentencing decision concerning a grandfather’s multiple counts of unlawful sexual intercourse with his 11 year old grandchild:

The offender is a man who has led an active life, has contributed to the community and raised a family. Some leniency will be extended as a result. With age and health he declined and sex was no longer available to him. **The victim I find ... was used as “a safe surrogate sexual partner”**.³²

³⁰ *R v AS* [2024] NSWDC 54 at [37].

³¹ NSW Sentencing Council’s review of [Penalties Relating to Sexual Assault Offences in New South Wales](#) (August 2008) at vol 1, page 131 citing *Hermann v R* (1988) 37 A Crim R 440 at 448.

³² *R v AS* [2024] NSWDC 54 at [37].

4. Proposed reform

- 4.1 For the above mentioned reasons, GTF submits that section 21A(5A) of the CSP should be amended as follows.

(5A) **Special rules for child sexual offences** In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor ~~if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.~~

Yours sincerely

Michael Bradley
Managing Partner

Appendix 1: Review of further cases where s 21A(5A) was (or was not) applied

We found **one** sentencing decision of New South Wales courts made since October 2023 which applied section 21A(5A) when sentencing child sex offences, even where the circumstances of the offending plainly involved the offender gaining access to the child by virtue of the same characteristics which were then accepted as evidence of good character.

Decision		Relationship of perpetrator and survivor	Relevant extracts regarding s 21A(5A), good character and / or prior offences
1.	<u><i>R v PRATAP</i> [2024] NSWDC 221</u>	Friend of child's father who occasionally stayed overnight at the children's family home	In sentencing for four counts of sexual intercourse with two children under the age of 10, good character evidence was given limited weight as a mitigating factor (but apparently was given <i>some</i> weight). [33] <i>The offender ... has nothing recorded on his criminal history and accordingly is of prior good character. However, there is clear authority for the proposition that that factor does not have the same significance with this kind of offending as it might in other cases.</i> [39] <i>... It would seem that the offender has a good work ethic and a good work history...</i>
2.	<u><i>STB v R</i> [2024] NSWCCA 36</u>	Step-siblings (20-22 years and 9-12 years old)	In an appeal of a sentence for three counts of sexual intercourse with a child under the age of 10 to 14 in breach of ss 66A(1) and 66C(1) of the <i>Crimes Act 1900</i>, the appeal court assessed whether the sentencing judge erred by failing to make a finding in relation to the applicant's lack of previous convictions. It is not clear why s 21A(5A) was not applied by the primary or appeal court. The offences (being multiple counts of sexual intercourse with a child) occurred in New South Wales between 2018 to 2020. [17] <i>... The mitigating factor of (otherwise) good character of the offender was "noted to be taken into account", although how it was taken into account and what effect that had on the sentence imposed was not specified.</i> [52] <i>... in the remarks on sentence at [53], the sentencing judge made reference to the fact that the good character of the offender is a matter that can be taken into account in mitigation under s 21A(3)(f) of the Sentencing Act. She did so under the heading "Mitigating Factors". This is an unambiguous acceptance of the submissions made about the absence of any criminal record. There is no basis to doubt that this was considered by her Honour to be a mitigating factor given where it is placed in the remarks on sentence. Because of that placement under that heading, its role and relevance can easily be inferred as having been taken into account as a mitigating factor.</i>
3.	<u><i>R v Carey</i> [2024] NSWCCA 90</u>	Family friend who acted as "father figure" to child	Appeal of sentence for manifest inadequacy for six counts of sexual intercourse and indecent assault with a child aged between 10 and 16 in breach of ss 66M(1) and 66C(2) of the <i>Crimes Act 1990</i>. The sentencing judge expressly applied the absence of prior convictions as a mitigating factor, and good character evidence was seemingly applied as same. The appeal court did not disturb this approach.

			[29] On the other hand, the respondent presented with positive references which Judge Williams described in his remarks on sentence: "22 There are two references provided by counsel on behalf of the offender, one from his partner [redacted], who says that they have been in a relationship since 2014. She says he has treated her and their five children with nothing but respect and kindness. He was known in the town as a good bloke, and a decent man who loved his family and was always there to lend a hand to everyone. Obviously, his extradition to New South Wales to face these charges has negatively affected her and her children greatly. She describes him as the best dad she has ever known and that their boys are growing up without a father. 23 There is a further reference from a Year 2 teacher named [redacted] who has known the offender since he enrolled his boys at her school in 2020, and she has taught three of his children. She is aware of the allegations that have been made against him, and says that type of behaviour does not reflect his character and the person that he is. She said he was devoted to his children's learning and supporting them." [34] The sentencing Judge accepted that the respondent's lack of previous convictions was a mitigating feature and found that he had good prospects of rehabilitation and was unlikely to re-offend.
4.	<u>R v Burns [2024] NSWDC 173</u>	Unspecified family member and five children aged between 7 to 13 years of age	Sentencing for ten counts of sexual intercourse with a child, sexually touching a child and producing child abuse material in breach of ss 66C(1), 66DB(a), 91G(1)(a) of the <i>Crimes Act 1900</i>. The court accepted the offender was of "prior good character" and this was seemingly applied as a limited mitigating factor. [60] A handwritten letter of apology from the offender was also tendered without objection, together with a number of character references and his health records from Justice Health. [96] A letter from the offender's sister, Ms Gabrielle Burns, was also tendered. She indicated that she believed it to be important to share her perspective of the offender's character and conduct. She described her brother having a large and committed support system both in her and the entire family. She expressed the firm belief that the charges against him were uncharacteristic of his true nature. She indicated her willingness to assist him in positively contributing to the community in the future and said that she will be there for him when he is released. [149] I accept that the offender is a person of prior good character. That factor is of but small moment in the circumstances of the offending.
5.	<u>R v AS [2024] NSWDC 54</u>	Grandfather (77 years of age) and grandchild (11 or 12 years of age)	Sentencing of six counts of sexual intercourse with a child, sexual touching of a child, attempted grooming of a child and inciting a child to carry out a sexual offence in breach of ss 66C(2), 66DB(a), 66EB(3), 66EB(3) and 66DD(b) of the <i>Crimes Act 1990</i>. Leniency in sentencing was expressly applied because of good character evidence tendered.

			[23] <i>The offender has in effect no criminal history with his record showing one PCA offence in 1973 for which he was fined \$100 and disqualified for one month.</i> [24] <i>The offender relies on a psychologist's report dated 6 February 2024 of Sarah Campbell. The history given is of a pro social life prior to this offending.</i> [37] <i>The offender is a man who has led an active life, has contributed to the community and raised a family. Some leniency will be extended as a result. With age and health he declined and sex was no longer available to him.</i> The victim I find, accepting the view of Ms Campbell was used as "a safe surrogate sexual partner".
6.	<u><i>R v MacDonald</i></u> <u>[2024] NSWDC</u> <u>136</u>	Neighbour and two children (under 14 years of age)	Sentencing for multiple counts of sexual assault and non-consensual sexual intercourse with two children under 14 years of age in breach of historic sections of the <i>Crimes Act 1900</i>. Good character evidence was expressly applied to reduce the severity of the sentence. [52] <i>The offender has no criminal record. He comes before the Court as a person who was, until he started committing these offences, a person of good character. I am sure if people knew his true character he would not have been trusted with their children or allowed contact with them. He had not offended in any other way, apart from the matters before the Court. Prior good behaviour is one indication of future good behaviour. I will have more to say about this is a minute.</i> [53] <i>Since the offending ceased, there is no evidence he has offended again. Those matters go to my assessment of his future risk of offending. Of course, he will be much older on release. He will also be a convicted sex offender. Anyone having an association with him, especially a parent would obviously have concerns.</i> [63] <i>The references must be taken into account. The fact that people speak to his good character does not excuse his crimes. Their references are put forward there to inform the Court about the man for sentence. Each sentencing exercise involves proper consideration not just of the crimes, but of the person to be sentenced. Courts try, so far as is practical, to engage in individualised justice.</i> [64] <i>His referees who have known him most of his life speak of an honest, down to earth character who they trust. They say that their knowledge of his offending is out of character with the Ken MacDonald they know. I accept that, but given the evidence of the trial, most of the people who were part of his close friendship circle at the time also felt the same thing. But he was not honest with them, he was not trustworthy, and for the period of this offending, he was not a person who deserved their trust.</i> [65] <i>His children still support their father. He also has, as the material before me indicates, support from prosocial members of the community. That is one important factor that has to be taken into account when I consider his risk of reoffending, as ultimately, he must be reintegrated into the community. Despite the wishes of Dawn, these are not matters that require a life sentence.</i>

			[66] MacDonald has expressed no remorse or any acceptance of responsibility. He told the author of the Sentence Assessment Report that he did not care about the impact of the offending. He is entitled to his view. He cannot be punished for maintaining his innocence, that is his right, but he gets no advantages that often follow an early guilty plea or expressions of remorse.
7.	<u>R v RJ (No.5) [2024] NSWDC 26</u>	Grandfather and grandchild (8 years old)	Sentencing for 12 counts of sexual intercourse and indecent assault against a child in breach of ss 66A(2) and 61M(2) of the Crimes Act 1900. The Court found that good character evidence was available in the absence of evidence that it facilitated the offence, though ultimately refused to make findings of good character on the basis of the offending. [54] Lack of antecedents and prior good character At the trial, the offender relied upon the lack of any relevant or material criminal history and prior good character. The latter submission was supported from evidence of a family member who was clearly partial to the offender's cause. [55] In this sentencing hearing, written character references were given by the offender's wife and several (3) of his grandchildren and (2) cousins, which I have read. Notably the wife did not refer to his character; but assuredly, the grandchildren and friends spoke positively of his character. It is true, of course, that for virtually all of his adult life, he has led a blameless life. [56] By s 21A(5A) of the Crimes (Sentencing Procedure) Act 1999 (NSW) (the 'CSP Act'), the Court is enjoined against taking into account a lack of antecedents and good character as mitigating factors if the Court is satisfied that either factor assisted the offender to commit his offending. The Court of Criminal Appeal recently referred to this provision in <i>Bhatia v R</i> [2023] NSWCCA 12. There, it was observed that the Crown carried the onus of discharging an evidential onus of a connection between the offender's good character or lack of convictions and the offender having access to the complainant. In particular, in that case, it was found that the victim's father gave no evidence he had assessed the offender's character or history. No other evidence suggested that the offender actively used his good character or befriended the family to gain access to the victim. [57] In this case, there was no evidence from the victim's mother (or father). To the contrary, the evidence was such that the offender did not engage in any steps to try to procure the proximity of the victim to him. [58] However, the circumstance that the offender engaged in repeated sexual abuse of the victim over several years disentitles him from a finding of good character or any suggestion that the offences were isolated. They underscored the victim's vulnerability.
8.	<u>R v Williams (No.2) [2024] NSWDC 9</u>	Family friend and child aged 6-7 years of age	In sentencing for multiple counts of indecent assault contrary to a historic provision of the Crimes Act 1900, limited weight was given to good character evidence as a mitigating factor. [21] The Crown asserted two statutory aggravating factors. The first was that the offender was in a position of authority over the

			victim. Emphasis was placed here on the offender being a close friend of the victim's father as well as being a family friend of the victim's foster father. The Crown says that the offender had been entrusted with the victim's care. The Accused accepts that, to a minor degree, there was an 'atmosphere' of a position of authority [37] The offender tendered a written reference from his son, Mr Wasiak. The offender's son spoke of his father as being a good family man and indicated his continued personal support of his father; whilst acknowledging the seriousness of the offences for which his father is to be sentenced. [38] The Crown does not suggest that the offending occurred because he used his good character (or absence of convictions). Thus there is no impediment to me giving some weight to these circumstances. Nevertheless little weight should be accorded to them for offences of the present kind.
9.	<u><i>R v Bamforth; R v Bamforth</i> [2024] NSWDC 45</u>	Husband and wife who assaulted a friend's child (14 years old)	Sentencing for multiple counts of sexual intercourse with a child, indecent assault of a child, sexually touching a child, using a child to make child abuse material (and other offences) in breach of ss 91G, 66C, 61M of the <i>Crimes Act 1900</i>. The offenders did not seek to rely on good character, but the court found it was excluded by s 21A(5A). [698] I do not understand Counsel for either offender to rely on good character. Nonetheless, it is necessary to have regard to subsection (5A), which dictates that "In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence." I find that both offenders' good character and lack of previous convictions of child sexual offending facilitated their access to the victim, and on that basis, I decline to apply this as a mitigating factor in respect of the child sexual abuse offences.
10.	<u><i>R v Smees</i> [2023] NSWDC 618</u>	Acquaintances (survivor 15 years of age)	Sentencing for one count of non-consensual sexual intercourse with a person under 16 years in breach of 61J(1) of the <i>Crimes Act 1900</i>. Good character was applied as a mitigating factor. [144] After the proceedings were adjourned, from the hearing date to today for the imposition of sentence, further material was forthcoming on behalf of the offender, consisting of documents speaking to his character and qualities. These were provided by his partner. There is no need for me to announce her name onto the record. There is no controversy that they are in a relationship and it has been ongoing and, by all accounts, is likely to be a permanent relationship. She speaks of him as kind, respectful and patient, with an appropriate understanding and respect for boundaries. She is aware of the charges and has been so since January 2021, and has first hand witnessed according to her writing his emotions and the effect of the mental toll brought by these proceedings and his need to travel to New South Wales for the prosecution of the trial. [145] Her mother provided a reference for the offender and again speaks of him in the highest terms, as a person of good character. It is obvious that she would welcome him into her family as her

			daughter's partner. Once again, there is no need for me to include the particulars of that person on the record of this judgment. [151] All of that said, I accept that but for this misconduct, the offender is a person of good character, and that the risk of reoffending can be accepted to be demonstrably low.
11.	<u>R v WD [2023] NSWDC 542</u>	Step-father and daughter aged 14 years	Sentencing for three counts of sexually touching a child under 16 years in breach of s 66DB(a) of the <i>Crimes Act 1990</i>. Leniency was granted on the basis of good character. [29] Relevant mitigating factors are: The offender does not have any record of previous convictions and is a person of good character (ss 21A(3)(e), (f) CSPA). This can be taken into account as there is no suggestion he used his prior good character to assist his offending (cf s 21A(5A) CSPA)... [42] I accept that the risk of the offender re-offending is low. That is based on his prior good character, the references provided in his favour and the assessment contained in the Sentencing Assessment Report. It is difficult to understand, in the circumstances where he was regarded as a stable father figure to his former partner's children (who authored one of the references) and his prior good character, why the offender did what he did. He has experienced gaol since his arrest and seen institutionalised offenders. I am confident from the material that he does not want to return to prison after he has served his sentence for these offences and is unlikely to re-offend. [45] Thus, the Court finds itself with the task of sentencing this offender who has committed serious sexual offences, in breach of trust, against a young victim with understandable resultant and likely long-lasting trauma. At the same time, the offender is of prior good character, unknown to police and has shown remorse and has good prospects of rehabilitation. He is entitled to appropriate leniency.
12.	<u>R v BH [2023] NSWCCA 278</u>	Father and daughter aged 6-8 years	Appeal of sentence for multiple counts of historic child sexual abuse for manifest inadequacy. The respondent's good character evidence was accepted as entitling him to limited leniency. [22] The respondent's evidence in relation to his subjective matters consisted of a report from the psychologist, Jason Borkowski and 13 character references. [89] The respondent's prior good character, attested to in the references put forward on his behalf, and his lack of offending entitle him to a measure of leniency, but that leniency is limited because the offending extended over almost a two year period.