

REPORT ON PROCEEDINGS BEFORE

PORTFOLIO COMMITTEE NO. 5 - JUSTICE AND COMMUNITIES

**INQUIRY INTO CRIMES (SENTENCING PROCEDURE) AMENDMENT (GOOD
CHARACTER AT SENTENCING) BILL 2026**

CORRECTED

At Jubilee Room, Parliament House, Sydney, on Tuesday 31 March 2026

The Committee met at 9:00.

PRESENT

The Hon. Robert Borsak (Chair)

Ms Abigail Boyd

Ms Sue Higginson (Deputy Chair)

The Hon. Stephen Lawrence

The Hon. Natasha Maclaren-Jones

The Hon. Cameron Murphy

The Hon. Damien Tudehope

Ms SUE HIGGINSON: Welcome to the hearing for the inquiry into the Crimes (Sentencing Procedure) Amendment (Good Character at Sentencing) Bill 2026. I acknowledge the Gadigal people of the Eora nation, the traditional custodians of the lands on which we are meeting today. I pay my respects to Elders past and present, and celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of New South Wales. I also acknowledge and pay my respects to any Aboriginal and Torres Strait Islander people joining us today. My name is Ms Sue Higginson. I am the Deputy Chair of the Committee and acting in this role until the Hon. Robert Borsak joins us today.

I ask everyone in the room to please turn their mobile phones to silent. Parliamentary privilege applies to witnesses in relation to the evidence they give today. However, it does not apply to what witnesses say outside of the hearing. I urge witnesses to be careful about making comments to the media or to others after completing their evidence. In addition, the Legislative Council has adopted rules to provide procedural fairness for inquiry participants. I encourage Committee members and witnesses to be mindful of these procedures. I also advise and warn that the subject matter of this hearing may involve information of a sensitive nature.

Mr SCOTT FRASER, SC, Public Defender, Public Defenders Chambers, affirmed and examined

Mr ALEXANDER TERRACINI, Public Defender, Public Defenders Chambers, affirmed and examined

Ms SUE HIGGINSON: I welcome the witnesses in our first panel for the day. Thank you for making time to give evidence. Would either of you like to make a short opening statement?

SCOTT FRASER: Not from me. I note that there was a submission file on behalf of the public defenders that we rely on as our position.

ALEXANDER TERRACINI: I agree.

Ms ABIGAIL BOYD: Thank you very much for coming this morning and for giving us the benefit of your expertise. I wanted to go directly to the issue of child sexual assault offenders. If we could not include the others bits—I know that the bill does, but if we could just focus on that particular reform. Looking at your position and your support for including good character, none of them appear to really apply in the circumstances of the child sexual assault offender. For instance, in paragraph 14 of your submission you say:

"Good character" may support a finding that the offence was "... an isolated lapse representing human frailty."

We know that's not the case with child sexual assault offenders. From paragraph 16 in your submission:

"... there's more to every person than the single worst mistake they've made."

Again, we know that's not relevant to child sexual assault offenders. In the case of child sexual assault offenders in particular, what is your argument for allowing a good character reference to be made?

SCOTT FRASER: Our position is that the law, as it applies presently, is such that the courts very often, if not always, give very little weight to good character in those circumstances in any event. The position we have taken is that, to the extent that there is High Court authority that says that good character should nonetheless continue to have some sort of weight in those proceedings, we don't oppose—in fact, support—a change that would permit the court to disregard entirely any in that situation.

Ms ABIGAIL BOYD: Given that, as you say, it would seem pretty irrelevant in most cases, I'm really struggling to think of a case where it could be at all relevant. Given that child sexual assault is something that happens behind closed doors, ordinarily, it's something that most people would view as being out of character with the person that they know. If there are really no real circumstances we can think of where it would be relevant, why would you allow it to be put forward, not just re-traumatising victims but also acting against that message that child sexual assault can happen at the hands of anybody, regardless of how good you think they are?

SCOTT FRASER: I think the position would be that—well, firstly, if it can be said that there are degrees in terms of the severity of child sexual abuse cases, that's not to suggest any is not serious, but some are much more significantly prolonged courses of conduct over a period of time.

Ms ABIGAIL BOYD: That you know of.

SCOTT FRASER: In terms of what I see. In terms of what the courts are dealing with, there are instances where the courts are dealing with what is a one- or twice-off instance, and there are others, obviously, which are over many years and many generations. The point really is that the courts presently are, particularly in that type of matter and especially where there is a course of conduct, regularly saying that they are giving no weight to good character that is relied upon in that instance.

Ms ABIGAIL BOYD: If we get to the point where it's not really used anyway—and, again, this is where we say, "On balance, perhaps it would be better to not re-traumatise victims and actually to send that strong message to the community that no matter how good you think a person is, they may actually be an abuser and you should be talking to your kids."

SCOTT FRASER: Yes.

Ms ABIGAIL BOYD: The campaign that kicked all this off was called Your Reference Ain't Relevant. Given that balance, how is it really relevant to a person's culpability or to the punishment they should receive what other people think of them outside of the context of the situation in which they abused a child?

SCOTT FRASER: As I say, often it is taken by the courts of having very little, if any, relevance because it is so overbalanced by the course of conduct—that is, the offending that has to be sentenced. The type of evidence that has often led in that situation may still have some relevance or some bearing in respect of prospects of rehabilitation, likelihood of reoffending further down the track or ability to engage with treatment and so forth.

Often, though, the courts are saying when the course of conduct is so long and extensive, or the type of offending is so heinous, that it, even in those circumstances, has little weight at all. The blanket disallowing of the evidence disallows for a situation where there may well be some relevance to the particular sentencing exercise.

Our concern is that individualised justice requires that the offender at least is able to provide what they can to the court so the court can understand them and consider that in context of the offending. We're not suggesting that the re-traumatisation of victims is not real. We acknowledge that it is, and it's a concern. But it's something that we think—perhaps by using better terminology, perhaps by judicial education in terms of how these matters are approached by the bench in decisions that are handed down—that it is clear when a victim is in court or on screen listening to a judgement that they understand the way in which it was taken into account or not.

Ms SUE HIGGINSON: I've just got two questions. I might give them to you at the outset, if you could take them and answer them in order. One is, you've submitted that evidence pertaining to someone's character may interact with other mitigating factors such as duress and provocation. If you could, could you give some examples of some of the circumstances in which this may be the case? Then the second question I'm going to ask, which is quite different is, the Sentencing Council's dissenting report stated:

... a fundamental change such as complete removal of this principle is likely to result in extensive litigation over many years and in many unintended and unforeseen consequences.

I'm just curious about how you think that litigation may play out, the likelihood of that, and the impacts that may have on delaying justice. They're two very different questions. If you could start with the first, please, about provocation, duress and so forth.

ALEXANDER TERRACINI: In terms of provocation and duress, obviously, the relevant test requires that there be subjective aspects of the person's character which could therefore play into hands. For example, if there was a vulnerable domestic violence related female that had been part of an appalling marriage for an extended period of time, and after 20 years of otherwise crime-free life, she had snapped and done something criminally wrong, this bill, if passed, would deny her the opportunity, firstly, to defend herself properly and then, if she was convicted, it would deny her of that previous experience. That is why the aspect of provocation and duress was drafted by the public defenders. Because the bill, as it's currently expressed, is all encompassing when sentences and the notion of good character in the courthouse is not. It's individual.

Ms SUE HIGGINSON: On that point, can I just ask, is it in your experience, particularly in the case of perhaps that circumstance that you just portrayed—it may well be that a particular woman may actually have not a clean record, as we refer to, or a history of some sort of offending, because it is not necessarily the perfect clean record female victim that has been subjected to domestic violence that will come before the court. Is that the case?

ALEXANDER TERRACINI: Yes, but there's a whole gamut of people that come before so if—

SCOTT FRASER: In our submission, or in our letter to the Council, we draw attention to a case of Martin, which was a young female who had been subjected to domestic violence. In fact, she had been subjected to domestic violence on the day that she offended. Ultimately, it went before the Court of Criminal Appeal and that court was of the view that her character was very relevant in circumstances where ultimately there was an element of provocation that was enlivened in light of the domestic violence circumstances. That's an important consideration because when we are talking about concern about re-traumatising victims, she herself was a victim-survivor. It was the fact that she was a victim-survivor that was a contributing factor in her reaction leading to her one-off aberration offence. That's the concern we have when one blanket-removes this mitigating factor. It affects not just a particular targeted situation where it ought not be considered; it also affects those where it should probably be considered in their favour on sentence, such as Ms Martin and others that would be like her.

In terms of the second question, if I can address that? Without rewriting sentencing law completely, which would mean removing certain purposes of sentencing such as rehabilitating a person—prospects of rehabilitation are relevant, likelihood of reoffending is relevant and so forth. The bill, even as it is presently presented, does allow for what has been called good character evidence to be admitted for other purposes. The difficulty that we foresee, and we understand what's being spoken of in the dissenting view, is that there may be instances where a judge is not allowing evidence where it was relevant to another topic.

It may be a situation where a judge is not giving sufficient weight despite it being relevant to another topic. It also could be the case that a party, or the person representing an offender, may not introduce evidence, thinking it's not relevant to a particular topic. Later, when that person seeks advice on an appeal, it is determined that perhaps there was evidence that should have been put before the court that wasn't put before the court. There's a minefield of potential appeal avenues that arise through that, in particular as to how the evidence that might not be admitted or admissible in one context could have and should have been admitted in another context and how it might have been given weight by the court.

The Hon. STEPHEN LAWRENCE: Thanks to you both for coming along. It is much appreciated. My first question is assuming that the bill is passed—and I note that it's not proposed to change the law so that an account of a person's history is not going to be relevant to prospects of offending or prospects of rehabilitation. Those things will still be relevant. How will this practically change the handing up of material, including statements from third parties about what they know of a person? Do you think there will be any change to the language used in terms of reference or anything like that?

How do you think it will practically work in the court system? I ask the question because in terms of the threshold of admissibility, I would have thought that everything that is admissible now will likely be admissible under the regime. It will then be for the judge to unpick, in quite a potentially complicated exercise, what part of it is relevant only to character and what part of it is relevant to prospects of rehabilitation, prospects of offending et cetera. Could you talk us through how you see this practically working in terms of the evidence that lawyers are tendering?

ALEXANDER TERRACINI: The references—perhaps we won't call them character references anymore—will still be handed up. But to address the specific links that the bill would then require us to join, they would need to be perhaps more specific to the offences. The generic, "I've known him for 30 years. He's a nice bloke; he wouldn't have done these things. He's very sorry", frankly, should never really have been tendered in the first place, regardless of the bill, because what weight do you place on that anyhow? However, progressing, it would need to be far more offence targeting. For example, if you were playing rugby with somebody who had been involved in a number of squabbles on a football field and never reacted with violence, they've always been the pacifist on the football field, but then in the pub fight this one time they actually aren't the pacifist, then there would be a practical example with a pattern of behaviour that a Local Court judge now, or magistrate, or District Court judge could appropriately link that to another purpose of sentence that isn't simply just character.

The Hon. STEPHEN LAWRENCE: That's why I was curious why do you say it wouldn't be called a character reference anymore?

ALEXANDER TERRACINI: To make it abundantly clear to the decision-maker—try to make it easier for them—that the advocate is, in effect, handing up a reference that isn't on character.

The Hon. STEPHEN LAWRENCE: Except couldn't a person's prior good character as spoken to in a document be directly relevant, depending on the other evidence, to prospects of rehabilitation or offending?

ALEXANDER TERRACINI: A hundred per cent.

The Hon. STEPHEN LAWRENCE: I'll just give you this scenario: Say you've got a case where a person does a particularly brave act, acting with complete reckless disregard to their own safety, that would be considered an act of good character, but the person has a lengthy criminal record speaking to reckless behaviour. In those circumstances, that prior history is probably not going to speak to good character for them in a positive sense because everything that they've done that might be considered merit worthy from a societal point of view is clearly a product of underlying factors that are actually dangerous to the community.

ALEXANDER TERRACINI: Yes.

The Hon. STEPHEN LAWRENCE: But in a different situation where someone, say, has no criminal record, wouldn't their good character in those circumstances be relevant to prospects of rehabilitation or prospects of offending, even though it can't be taken into account only because of that?

ALEXANDER TERRACINI: Without a doubt.

The Hon. STEPHEN LAWRENCE: Couldn't you still tender a good character reference in effect named and titled as such, or not? What do you think?

ALEXANDER TERRACINI: The title doesn't matter as much as the substance in the reference.

The Hon. STEPHEN LAWRENCE: Except that isn't there an issue here about trauma and so forth, and people not wanting to hear someone who's offended against them described as a person of good character?

ALEXANDER TERRACINI: Yes, that's right.

The Hon. STEPHEN LAWRENCE: I just want to tease out how it's going to practically work.

ALEXANDER TERRACINI: There needs to be some education, either through the decision-makers themselves in how they address this aspect of sentence, but also through the Crown and the DPP, and the witness support officers that are designated social workers on behalf of the DPP that are there for victims, that they're appropriately preparing the victim for the sentencing exercise. Sentences in general are difficult for victims because it's no longer about them and it's about the perpetrator. That's the point of the sentence. There needs to be

greater emphasis on explaining those issues and that dynamic to victims outside the court, rather than simply just having them in the room and then hearing these aspects of the perpetrator's life for the first time. That, in our view, is unacceptable.

The Hon. STEPHEN LAWRENCE: Just going to you, Mr Fraser, on all of this. This reform, it's not a reform of evidence law, as I understand it. It's a reform of sentencing law.

SCOTT FRASER: Yes.

The Hon. STEPHEN LAWRENCE: I'm interested in your thoughts on how this will practically affect the admission of evidence. Particularly, do you agree that good character, as a factual proposition, will under this reform still be relevant and admissible insofar as it speaks to prospects of rehabilitation and prospects of offending?

SCOTT FRASER: The short answer is almost certainly, if not all times, then most times. That is right. That then of course highlights a difficulty with the bill—that the bill potentially isn't achieving one of its primary objectives. If the objective is that re-traumatisation comes from the courts receiving and considering evidence of good character, if it is going before the court in any event then the bill hasn't achieved its objective. That's where what Mr Terracini says is something that I would endorse, which is that education, and particularly judicial education, in terms of how judgements are written and prepared and how a judgement is supposed to explain not only to the offender but to the public the reasons for the decision made by the judge, including on an important aspect like this, why and how character is taken into account. I agree with your point that from a defence lawyer's perspective it may be that a reference no longer has "good character" or "character reference" as its heading, but the content of it is unlikely to change, provided—

The Hon. STEPHEN LAWRENCE: Why wouldn't it have that heading anymore if the bill is passed?

SCOTT FRASER: Just so that we're not waving a red flag to the judicial bull, so to speak.

The Hon. STEPHEN LAWRENCE: Isn't it important for this reason, that if people approach this reform on the basis that good character evidence is no longer admissible, then isn't there the potential for a series of miscarriages of justice, because if the bill is passed good character will still be relevant and admissible insofar as it speaks to one of those other considerations?

SCOTT FRASER: Yes.

The Hon. STEPHEN LAWRENCE: Wouldn't it actually be quite concerning if lawyers and judges adopted that approach because it risks that the threshold of entry into evidence—a sort of unlawful restriction on evidence?

SCOTT FRASER: That's the concern that was highlighted in the dissenting judgement in terms of the potential for further litigation, appeals and so forth. It then puts practitioners in a position of "What is admissible? What should we be relying upon?" and judicial officers in a position of "What was admissible? What is allowed to be relied upon?" and the potential for mistakes to be made in that process. The potential for relevant evidence to not be before the court, or irrelevant evidence to be considered in an improper way, is great once you start restricting the nature of the evidence in that way.

The Hon. STEPHEN LAWRENCE: Do you think it would be advisable to give some statutory guidance if the bill is passed, so that it's clear that good character evidence is not inadmissible, it just has to be relevant to one of those other objectives or relevant considerations, which is, for example, prospects of rehabilitation and offending? Would it be a helpful thing to have some clear guidance in the bill about that?

SCOTT FRASER: I definitely think that is so. The bill does, as I read it, whilst declaring such evidence inadmissible, have that proviso that if it's admissible for another purpose it is then admissible. As I say, we come back to if the evidence is in and a significant concern, and a real concern, is about re-traumatisation then education in the way in which this is presented and spoken about, in terms of addressing that issue, that's the way forward as we see it, rather than this reform. Because this reform is not only getting to that very difficult situation where character really shouldn't have much role to play at all, but it's affecting so many other persons who ought to be able to call upon it who have their one-off indiscretion.

The Hon. DAMIEN TUDEHOPE: You've probably already dealt with this, and I agree with most of what you've put. One of the chief contentions is that the use of the expression "good character" re-traumatises victims who have experienced trauma as a result of some heinous act being done. How do you deal with that, as a notion?

SCOTT FRASER: Firstly, as a notion, I completely understand it, particularly a victim of systemic abuse over time, a child victim, but not even restricted to. To then have it said in court that this person is somebody

of good character, I can totally understand how that would have the effect of shocking and likely re-traumatising the victim. That's where Mr Terracini was referring to the prospect of using—

The Hon. DAMIEN TUDEHOPE: Different language.

SCOTT FRASER: —different language in order to describe these things, and, again, with judicial education, a judicial officer refer to this type of evidence in a different way, so it's not using a very jarring expression such as the person having good character. It's their capacity to otherwise be law-abiding, their capacity to perhaps engage with treatment and so forth, that's where the evidence is relevant, without needing it to be called good character and having that blunting traumatising effect.

The Hon. DAMIEN TUDEHOPE: We already do in some cases. Where a person, for example, has used their position for the purposes of facilitating or committing the offence, already we do limit the ability to call good character evidence in relation to that person.

SCOTT FRASER: Yes.

ALEXANDER TERRACINI: Yes.

The Hon. DAMIEN TUDEHOPE: Are there any other circumstances you would suggest where it could be used?

SCOTT FRASER: That's an instance where the mitigating factor, statutory mitigating factor, simply cannot apply, a special rule applies, where there has been—or where the good character has been used in order to facilitate the offending behaviour. The proposal from the dissenting chapter that we adopt, or endorse, is one whereby the courts should be given a position of regarding, and making clear it has regarded, that type of evidence as completely irrelevant in the appropriate case where it is just—

The Hon. DAMIEN TUDEHOPE: That's the no-weight argument?

SCOTT FRASER: That's right.

ALEXANDER TERRACINI: Yes.

SCOTT FRASER: The difficulty becomes if one places a blanket rule—there's good reason for the blanket rule in the special provision that is there presently, where it's used to facilitate the offence. Once it becomes a blanket rule otherwise, the difficulty is that cases in terms of severity will be on a sliding scale, and the difficulty we see is that although there will be clear cases where no weight should be given, there'll be other cases where some weight ought to be given, and if the evidence is inadmissible, then it's inadmissible in both those situations, and that's the difficulty.

The Hon. DAMIEN TUDEHOPE: Is it your position that all you do is create a situation where you will create more litigation by virtue of the fact that material which should have been before a judge wasn't allowed to be before a judge?

SCOTT FRASER: That's certainly the fear, yes.

ALEXANDER TERRACINI: Yes.

The Hon. DAMIEN TUDEHOPE: One of the arguments which has been put in relation to why this is important is that character evidence is often the province of the wealthy and well heeled. Is that your experience of the way good character evidence is facilitated before courts?

ALEXANDER TERRACINI: No.

The Hon. DAMIEN TUDEHOPE: Give me some examples.

ALEXANDER TERRACINI: It's difficult to actually give you some examples from my own matters, but good character or character in general is not only, or is not intrinsically, linked to privilege. Sure, there are the classic examples that garner media attention but, frankly, the concern of the defenders would be the underprivileged person that would be impacted by the passing of this bill, who is not privileged in any way but would not be able to go before a court, with the history of being underprivileged, and be able to talk to the judge and say, "This is my prior good character, despite the history."

The Hon. DAMIEN TUDEHOPE: It's a bit of a myth, is it, to say that—

ALEXANDER TERRACINI: It's not a myth, but it's not as black and white or as obvious as, "If you come from privilege, you have good character." That's just not a notion that is accepted in a courthouse.

The Hon. DAMIEN TUDEHOPE: You might have access to people who, potentially by their position in society, can give weight to aspects of your character.

ALEXANDER TERRACINI: One has to have trust in the judicial officer to understand how much weight they place on those references.

SCOTT FRASER: In my experience, the courts are more looking at the substance of any such reference, rather than the author of the reference. Sure, there are examples where people call for references like Prime Ministers or celebrities and so forth to attest to their good character. My experience is that the courts are looking at the substance, not the name. The average person, who might hold down a trade but who volunteers by coaching with their local junior football team on the weekend and does other beneficial things for the community and is generally helpful to their neighbourhood, that's attracting equal, if not more, weight than a name on a piece of paper that might have "former Prime Minister" after it and so forth.

I'm only using that as an example. It really demonstrates that it does cover the breadth of evidence that goes to what the person has shown in terms of their true character or how they otherwise conduct themselves day to day. As we said, the difficulty with the blanket bill, as it is presently, is that for the many offenders who will offend once in their life—it might be that deaths in family or the like meant that they had too many drinks and got into a fight on the weekend or drove home when they shouldn't have on the weekend—they can't call in, to support them, their otherwise good character over the rest of their life.

The Hon. DAMIEN TUDEHOPE: Let me put this position to you. We've had lots of representations about individual cases, and individual cases obviously give rise to their own difficulties, but say someone comes along, and I'm a victim of domestic violence. My partner is a war hero, and potentially a decorated war hero, but my circumstances at home are just shocking. When he comes home, I'm regularly the subject of domestic violence. Can you understand the position of that victim of domestic violence in a court, where evidence relating to the perpetrator's history of service in the armed forces and their potential heroic acts in other places are used for the purposes of trying to demonstrate their good character? That person is saying, "How does that help me at home, relating to what I'm experiencing in that domestic violence situation? Why should that history of their good character or their service overseas be relevant to what's happening to me, in my circumstances, at home?"

SCOTT FRASER: In that example—and I'm assuming it's an example where there is some history of this type of violence that has been perpetrated within the home—the experience says that the courts are seeing that as attracting little, if any, weight in the sentencing hearing. The difficulty is we have to then go to individual cases.

The Hon. DAMIEN TUDEHOPE: Do we have any way of measuring whether that's true or not?

SCOTT FRASER: Only by reference to how the judge will communicate that in the reasons on sentence as to how it has been considered. No judge is going to give a "I've given this a 5 per cent weight as opposed to a 95 per cent weight", or anything like that, but there ought to be, within the reasons, a clear indication of whether the judge has taken it into consideration and, if so, how.

The CHAIR: Thank you very much for coming today. We've come to the end of your period of questioning.

(The witnesses withdrew.)

Mr DOMINIC TOOMEY, SC, President, New South Wales Bar Association, affirmed and examined

Mr NICHOLAS BROADBENT, SC, Bar Councillor, New South Wales Bar Association, affirmed and examined

Ms JANE SANDERS, Chair, Criminal Law Committee, Law Society of New South Wales, affirmed and examined

The CHAIR: Thanks very much for coming. We will commence questioning.

DOMINIC TOOMEY: If it's convenient to the Committee, I did wish to make an opening statement. I think that Ms Sanders may then wish to supplement what I say, or may not. Firstly, I would like to thank the Committee for the invitation to appear today. The New South Wales Bar Association opposes the Crimes (Sentencing Procedure) Amendment (Good Character at Sentencing) Bill 2026. We oppose the bill because an offender's otherwise good character continues to be an important consideration at sentencing. Currently, the sentencing process involves an assessment of both the offending itself and the offender as a whole person, including any evidence of their otherwise good character. This assessment is key to ensuring fairness and individualised justice in the sentencing process for offenders from all backgrounds and from all walks of life.

The bill, in our view, would unreasonably limit the ability of the sentencing court to understand the offender as a whole person. Sentencing is undoubtedly a complex process. It requires careful consideration of a range of matters, including any aggravating and mitigating factors. Whether the offence is an aberration for a person who has otherwise made positive contributions to the community is—and should remain—an important consideration when a court is determining what is a just and appropriate sentence. That said, it is not our position that an offender's otherwise good character should, in every matter, lead to a reduction in sentence.

The law rightly excludes good character as a mitigating factor where it was of assistance to the offender in the commission of a child sexual offence. Further, we would support a legislative amendment that makes clear that a court can, after consideration of any evidence of otherwise good character, assign no weight to this evidence when assessing that evidence against the objective seriousness of the offence. We note that this legislative amendment was recommended by the NSW Sentencing Council if it were decided that good character should be retained as a mitigating factor at sentencing—the position for which we advocate.

Our members understand all too well that the sentencing process will often be traumatic for victims of crime. For a victim of a crime, hearing about an offender's otherwise good character can be seen as an attempt by a well-connected offender to minimise the harm they have caused. Recognising the harm caused to victims is—and must continue to be—an essential component of sentencing proceedings. This was referred to in the NSW Sentencing Council's report as a so-called privilege discount for well-connected or well-resourced offenders. This is, we acknowledge, a concern which warrants some consideration, but it is important not to overstate its significance.

We have heard from our members, including from Mr Broadbent, who is here to my left today, that every day in courts across the State, offenders from disadvantaged backgrounds rely on evidence of good character at sentencing. It can and does support disadvantaged people, where appropriate, to mitigate the harshness of sentencing. The solution, therefore, in our view, to any potential so-called privilege discount is not to abolish good character at sentencing entirely, but rather to ensure that it operates in a fair and equitable manner. We can achieve this by ensuring that those from disadvantaged backgrounds are able to access the legal support they need, including by significantly boosting government investment into critical services like Legal Aid NSW and the Aboriginal Legal Service. We welcome the opportunity to explore these issues with the Committee in more detail today.

JANE SANDERS: As Mr Toomey has given a succinct but I would say comprehensive opening statement, I don't have anything further to add from the Law Society's point of view. We are in agreement with the bar on almost everything, save that the Law Society acknowledges that the concept or the word "good character" may certainly be traumatising to victims or to members of the community. We are open to exploring whether there can be a new form of words used which is perhaps less traumatising. However, the term "character", far from being a nebulous concept, as I think is suggested in the Sentencing Council's report—it may be a broad concept, but it is well understood by the law and the courts. We wouldn't want to be lightly doing away with that concept. But certainly, the Law Society would be open to a change in language if that was thought to ameliorate some of the distress to victims. I'll leave it there for now.

Ms SUE HIGGINSON: Ms Sanders, how do you think this proposed change could impact on how children and young people would be dealt with in terms of their character before a court?

JANE SANDERS: I think in terms of children, I suppose when we're talking about quite young children, most of them probably haven't had a chance to—certainly not that they don't have character or personality, but maybe they haven't had a chance to build up a life full of achievements and contributions perhaps in the traditional way that we speak of character for adults. For those members of the Committee who are not aware, in my day job I run the Shopfront Youth Legal Centre, so we work with homeless and disadvantaged children and young adults. My experience is a lot of the young people that I appear for, particularly young adults, we can point to a number of factors that go to their good character.

They may be, for example, a young Aboriginal person or a young person from a refugee or migrant background who is doing an enormous amount for their family. It could be looking after younger siblings, it could be interpreting for their parents, it could be caring for elderly and sick relatives, and it could be providing a role model for other young people in their community. Those are all things that speak to good character—not privilege, but good character and positive contributions to their communities. I think it certainly is something that can apply to children and young people. That sort of evidence, admittedly—of course, if good character is abolished as a separate consideration, that kind of evidence can be taken into account as to rehabilitation prospects, but our view is that it is still a standalone consideration that should be able to be considered.

Ms SUE HIGGINSON: In your practice, if somebody has committed an offence and they're at the sentencing part of the process—and this is, say, a victimless crime; whether it's a personal drug offence or something of the like or if there is a victim involved but it is not related to a violent crime or an assault—is there a role where the individual, by going and talking to members of their community to ask them to support them through the provision of a reference—is there a component of restorative justice that takes place at that point or an accountability mechanism that anyone could speak to?

JANE SANDERS: That's a very good question, and I think, yes, there could be. Restorative justice, of course, traditionally involves an offender in some sort of conferencing process with the victim of their crime or possibly a representative from a victims organisation for offences without direct victims, such as traffic offences, for example. There could be somebody from a road safety organisation there to speak about the impact on road users and road trauma survivors et cetera. What we're talking about here is not quite restorative justice, but also some sort of accountability. If you are a young person, or really a person of any age, who has committed an offence and you are going to ask a community member or your boss or someone related to you in some way for a reference, you are going to have to tell them about the crime.

A lot of people do manage to go through court perhaps under the radar, particularly in local courts where it's very busy—thousands of cases are processed every week or even every day—and it is quite possible for somebody to just go under the radar without their family or their employer or their wider community knowing what they've done. If you are actually asking for a reference or a support letter, whether it be from your counsellor or your boss—members of your community—you are going to have to own up to what you've done. The best and the most useful references or support letters are ones where the writer can say, "I am aware of the charge before the court. Melissa has approached me. She has discussed it with me. She's deeply remorseful for her actions. She was embarrassed to disclose it to me, but she has. Notwithstanding that, I can say"—whatever. Yes, I think that can be a process of taking accountability separate from the actual court proceedings.

DOMINIC TOOMEY: I would only add to that that references in those circumstances will only have any weight if the person providing the reference also says that the offending was out of character for that person. If they believe that person to be prone to commit such offences in any event, whether or not they've previously been convicted of such an offence, then of course it has no weight at all. I think I can say that our universal experience at this table is that unless the person providing the character evidence in that case has been made aware of the nature and, indeed, the detail of the offending, then courts simply put it to one side.

Ms SUE HIGGINSON: You see, though, that there would be a loss in that step in the so-called justice system that has been operating for a long time—that that would no longer be present for a massive number of the people who are pleading guilty before the courts every day in New South Wales.

DOMINIC TOOMEY: Yes.

JANE SANDERS: I think there would be. Could I add that if this bill is passed as drafted and as intended, of course the bill will still protect that kind of evidence—evidence about a person's personal attributes, contributions et cetera. It will still allow that kind of evidence to be admitted for the purpose of other factors on sentencing, such as remorse, rehabilitation et cetera. However, I foresee that in busy local courts—which, it must be remembered, deal with over 90 per cent of criminal proceedings in New South Wales, the superior courts only a fraction. Busy Local Court magistrates—now judges since last Saturday. A Local Court judge's busy list would have a very high percentage of unrepresented defendants. I don't have up-to-date stats, but a few years ago it was

running at about 50 per cent of defendants in local courts were unrepresented—or people who might be represented by legal practitioners who don't practise full time in crime.

I fear that it will widely be disseminated, perhaps incorrectly, that courts can't receive character references anymore, which may strictly be true, but they can still receive this kind of evidence in another way. I foresee that perhaps people will stop seeking and providing this kind of evidence in an erroneous belief that it can't be accepted at all. Sometimes busy Local Court judges—and I hope not, but let's be real—I think, might say, "Character? This is not relevant. I'm not reading this," and they won't go through the exercise of considering how it may be relevant to other purposes of sentencing. So I'm worried, particularly if this bill is not accompanied by really good judicial education—education for the legal profession and the public—that something will really be lost.

Ms ABIGAIL BOYD: In the opening statements and in your evidence so far, we've been talking about whether or not someone's offence is an aberration or out of character, and whether or not they're prone to committing the offence. When we're talking about child sexual assault in particular, if you are giving character about a person, you're necessarily giving character about their behaviour outside of the context in which they would be assaulting a child. Unlike, for example, if someone has been accused of stealing and they come to me and say, "Can you give me a character reference?" I say, "I've never seen them do anything dishonest," that's relevant to that offence.

But if someone came to me and said, "I have been accused of abusing a child. Can you give me a good character reference?" obviously I wouldn't, but I think that the reason would be, if nothing else, "I don't know what you're like behind closed doors." I know that that is one of the reasons that so many children get abused, because people present as being good in every other context. Do you see in the context of child sexual assault that we might be dealing with something a bit different when we're talking about good character and whether a person's offence is an aberration or out of context?

DOMINIC TOOMEY: That is the rationale for section 21A (5A). That's what has already been recognised and that is already baked into the provision. That amendment was something that was supported both by the Bar Association and by the Law Society.

Ms ABIGAIL BOYD: Sorry, they're slightly different, though. You're talking about where it says if you've used your position. I think a lot of advocates for child sexual assault justice would say every abuser has used their good character in order to get access to a child, or they were of such bad character that no-one was going to give them a good character reference anyway. In those circumstances, if it's never relevant, why are we still allowing that opportunity for that evidence to come in?

NICHOLAS BROADBENT: If I could attend to that aspect, as far back as cases such as Ryan, Justice Kirby in that case referred to the circumstances where the objective seriousness of the offence and other countervailing aspects militated against the use of good character in any particular way. That would not be something that would be appropriately taken into account by the court. We'd submit that that's already well and truly built into the existing common law insofar as where the circumstances of the offence were—such as, for instance, a child sexual assault, where one might have real doubts about where matters may have taken place behind closed doors. Often in an agreed statement of facts we have a situation where there's an indication that the offending is not isolated. In those circumstances the common law is amply clear. It has been repeated in cases such as Gent, as well, that it is not appropriate for a court to take those matters into account.

Where the difficulty arises is where is the line. We're clear about what the common law says about this. But the risk that this bill poses is that if there is an attempt to set some bright line, it removes the power of judges and courts to impose individualised justice—that is, where there is an appropriate case for those matters to be taken into account that they should be. Our submission is that under the existing common law, it is well established that there are types of offences and categories of offences where it may not be appropriate to take it into account, but that is not to say that that should apply in every case. There's a risk here that, in essence, a bill of this nature throws out good character in the appropriate case where, indeed, it should be taken into account.

The Hon. DAMIEN TUDEHOPE: Following from the question Ms Boyd was just asking, some of the other submissions seem to be suggesting that there may be cohorts of offences where—this bill provides a blanket removal of good character. Another alternative position is potentially to identify cohorts of serious offences—be they child sex offences or serious domestic violence offences—which may be categories of offences which would be subject to the exclusion of good character evidence. Mr Broadbent, I understand the position that you take is that the whole person should be a consideration in relation to the objective seriousness of the offence; no weight would be given to good character evidence, but it should be available anyway because courts should have before them the whole picture of the person for the purposes of sentencing. In terms of re-traumatising victims, do you accept that there is a position that in relation to the objective seriousness of the offences, the propensity to

re-traumatise victims is heightened? Potentially in those circumstances, should there be cohorts of offences excluded because of that possibility of re-traumatising victims?

NICHOLAS BROADBENT: The starting assumption needs to be treated with some care. The presentation of a subjective case for an offender is not, and should not be, treated as an exercise in sympathy. The purpose of the presentation of a subjective case for an offender is, as I've previously said, to ensure that there's an exercise of individualised justice. I was the public defender in Dubbo for six years. In the previous six years, I saw time and time again examples of people coming to court, victims and families of victims, who struggled with the process of sentencing. Can I say that where the primary issues arose was not necessarily their use of the language. Good, competent lawyers always ensure that it's only relevant material which is put before the court, so it wasn't necessarily the way in which the sentencing process proceeded. Where the difficulty came was a lack of understanding about why something was being put forward. It was not being put forward as an exercise, as I say, in sympathy for an individual. That plays no part in a process of individualised justice.

Where better outcomes were secured in very serious offences in regional areas, often in small communities and in people with limited formal education, was when time was taken to explain to those victims and to their families what the purposes of sentencing were and what the evidence was being used for. When that happened, almost uniformly, I can say the results appeared to be better. Now I am sitting on the other side of the bar table as a defender, so I am not speaking to these people directly. But I was dealing with people in the community and I knew who the various assistant services were. In my view, and from my perception, when it was dealt with well, much of that re-traumatisation was able to be ameliorated, certainly at a surface level. There's an element of real education, which is necessary and advisable in this context. That would have the effect of ensuring that courts can continue to apply an individualised approach to justice but at the same time ensure that victims of crime are appropriately heard, just as they are when they deliver victim impact statements and the like. There's an education aspect to this.

The Hon. DAMIEN TUDEHOPE: I think that's an excellent explanation. Ms Sanders, one of the things that you suggest is changing the language. Instead of using expressions like "good character", you would potentially hand up a "prospects of rehabilitation report". If you were turning your mind to a change in language, what would that look like?

JANE SANDERS: Prospects of rehabilitation is a separate factor in sentencing, a separate mitigating factor under 21A that the offender has good prospects of rehabilitation.

The Hon. DAMIEN TUDEHOPE: But good character?

JANE SANDERS: But good character could be re-conceptualised, I would think something along the lines of perhaps "personal attributes" or "contributions to the community". Obviously, the language would have to be tested to see that it didn't have unintended consequences. One problem with section 21A is that it is so binary. You've got your aggravating factors and your mitigating factors. Binary doesn't always work as an approach. If it was not expressed in such binary language, as in some other jurisdictions, but it was a list of factors to consider then it could be more neutral. It could be something like the person's "personal attributes" or "contributions to the community". That's perhaps not as jarring as asserting that a person is or was of good character. But getting back to the question about reports addressing rehabilitation prospects, I think very, very rarely, in my career as a defence lawyer over decades have I actually handed up something that could truly be said to be a character reference.

Mostly the reports I hand up on behalf of the young people I work with could be reports from professionals; they could be support letters—I would characterise them more as support letters than character references—so they are talking about the person, warts and all. They're not necessarily suggesting that this is out of character because she's been caught shoplifting before. But it is putting the offence in context. It is talking about the positive attributes of this person that, yes, although she has a propensity to steal from shops, this is against a background of poverty where she is also trying to raise two children as a single mum and she was just trying to steal some Christmas wrapping for their presents, which is actually a client that I saw yesterday. So yes, I think it's perhaps a myth or it's overstated, the use to which character references are put in court. I think sentencing is usually a lot more nuanced than just coming up with a few references from well-connected people saying, "Oh, look, this is a person of good character."

The Hon. DAMIEN TUDEHOPE: I take it you've read most of the other submissions, but one thing that is put is that it could create a circumstance where there is inconsistency, if this law was to pass as it currently is, between the application of sentencing relating to Commonwealth offences and New South Wales based offences. Do you make any observation in relation to that?

JANE SANDERS: There already is—for example, hardship to family. In Commonwealth law, that's permissible; in State law, it's got to be exceptional hardship to family. There are a few. Don't even get me started

on community safety and intensive correction orders. But there are a few anomalies between State and Commonwealth law. We don't really want to add to them.

The Hon. DAMIEN TUDEHOPE: Is that your view too, Mr Broadbent?

NICHOLAS BROADBENT: I think the concern is at all times that once things become too prescriptive in trying to deal with a concept that is, as Ms Sanders said, as broad as good character, invariably what will happen is that you will single out and remove those outlying cases where, in fact, good character may be very important, but is very difficult to adduce because of the overly prescriptive nature of the legislation. If I can give you an example of that, in a regional community, for instance, an older woman who is providing a substantial amount of care for perhaps her grandchildren in circumstances where perhaps the parents of those children have their own difficulties, either with drugs or the criminal justice system and the like, often in First Nations communities. The way that good character might be adduced is, I would submit, very important in a case of that nature because it is of a kind where this person is providing a community-positive thing. An overly prescriptive approach runs the risk of removing that as a mitigating factor in sentencing, which in my submission is against the interests of that individual and against the interests of that community. Again, the overly prescriptive approach, I would submit, removes the individualised nature of the justice.

The Hon. DAMIEN TUDEHOPE: Is the essential position that, if you were going to make any amendment, it would be to spell out that no weight should be available for the purposes of that evidence of good character in dealing with the individual cases?

DOMINIC TOOMEY: That is our position. Some read section 21A in its current form as requiring weight to be given.

The Hon. DAMIEN TUDEHOPE: Because of Ryan?

DOMINIC TOOMEY: Yes, 21A requires it to be taken into account. We would be happy for it to be made clear that, in the appropriate case, having taken it into account, no weight can be given to it. There will, I might add, be many such cases because good character evidence can never be taken to overwhelm the objective seriousness of the offence.

Ms ABIGAIL BOYD: I'm really curious about the difference between objective and subjective factors in good character, because in the examples you've given, the fact that a person is a carer, or even the fact that a person is contributing to the community in some way, that's quite different to a subjective statement of, "I think this person is a good person." Where is the line? Because I thought this was really trying to exclude those subjective references, not the provision of evidence that goes to all of those objective personal circumstances.

NICHOLAS BROADBENT: I think herein lies the risk, because good character evidence is so much more than simply a statement on a letter to "I think this person is a good person". The way that this bill is drafted removes the consideration of any of these matters, broader or otherwise, because the nature of good character, as we say, is an umbrella concept. It's a broad one. It's not simply a matter of an opinion of a person in the community as to that person's underlying attributes. I would submit that an opinion of that nature is the kind of good character evidence which is going to hold, in any event, the least weight with a judge. The evidence of good character which goes to community-positive contributions is material which is highly relevant, we'd submit, to the sentencing process, but which this bill has the effect of removing.

The Hon. STEPHEN LAWRENCE: Thanks to you all for coming along. It's much appreciated. Mr Broadbent, do you think that it's important for the operation of the theory of general deterrence that the community, insofar as they might become aware of a particular sentencing exercise, is aware, where it's the applicable circumstance, that a person is of prior good character?

NICHOLAS BROADBENT: From the perspective of general deterrence?

The Hon. STEPHEN LAWRENCE: Yes. Do you think it's important, for example, when someone's reading a newspaper article about a person who's being sentenced—do you think it's relevant to the operation of this theory that the community actually knows that this person is a person with a history of good deeds, a person who hasn't been in trouble before et cetera? Is that actually relevant to the operation of general deterrence? Because there could be wrongful assumptions in the community, for example, that good people, or people of prior good character, don't commit criminal offences when I'm sure you'd agree they do.

NICHOLAS BROADBENT: That's certainly correct. For many offences the law contemplates a circumstance where offences are committed by people in the ordinary course of things. Things like drink driving, for instance. Things like low-level frauds, matters of that nature. Often the fact of good character is a matter which, in those cases where it's something which is commonly committed, can carry with it a somewhat lower weight in the assessment of objective seriousness. Again from the perspective of general deterrence, drink driving is perhaps

a good example of that—the experience is almost certainly uniformly at this table that drink-driving offences are committed by members of the community that is far broader than other offences. From that perspective, if it's put before a sentencing court that that person is a person of good character, and that person is nonetheless punished appropriately, because invariably the law mandates that the objective seriousness of the offence is the consideration and a primary consideration in the sentencing exercise, then that's going to have a positive impact on general deterrence, I suggest.

The Hon. STEPHEN LAWRENCE: Ms Sanders, do you think that the provisions in the bill are intended to operate as a rule of admissibility or admission into evidence? I know the rules of evidence don't apply on sentence, but do you think it's intended to bar the admission or reception of particular evidence, or do you think it's more about the consideration of the material by the judge and what ultimately is given weight?

JANE SANDERS: I don't think it's intended to bar the admission or reception of certain evidence, more how it can be taken into account. However, I believe an unintended consequence may be that certain evidence is not received, either by a judge who perhaps has an erroneous approach or it's not even tendered by an unrepresented defendant or by a legal representative, perhaps, who thinks character references are out and doesn't see that it could be admitted another way. I don't think it's intended to prevent admission of particular evidence, but that might be the consequence.

The Hon. STEPHEN LAWRENCE: For example, if you're a judge starting a sentencing exercise—obviously evidence is adduced at the beginning, generally, of a sentencing exercise—and you get a document entitled "Good Character Reference", it would seem to me pretty difficult to conceive of circumstances where you would reject that document on that basis. You're going to need to hear submissions about the purposes of sentencing and the principles of sentencing. Such a document might end up being quite relevant to an assessment of risk, prospects of rehabilitation et cetera. Would you agree with that?

JANE SANDERS: I would agree.

The Hon. STEPHEN LAWRENCE: Mr Toomey, one of the criticisms of the current law expressed by the Sentencing Council was that it creates some system of moral accounting, where a person gets a mitigation on sentence because of extraneous prior good acts, and that sort of moral accounting, in their view, is not a legitimate part of the criminal law. I'm just wondering if you agree with that, or do you see circumstances where it might be artificial to not engage in moral accounting? I'm thinking, for example, of—Mr Tudehope talked about this—let's say a war veteran with a history of particularly distinguished service in recent times returns to Australia. Maybe they're a national hero because of it. They're in trouble, and they're in trouble in a circumstance where the evidence really isn't looking too good in terms of risk, and that could be on account of war service, even, so it would be difficult for the defence lawyer to rely upon their history of bravery or recklessness to advance a positive case. Should such a person in such a case have some mitigation on account of such valorous service to the country, or is that a form of illegitimate moral accounting?

DOMINIC TOOMEY: "Moral accounting" is a somewhat emotive term. The High Court has made plain that the sentencing process is one of instinctive synthesis, and one cannot readily place evidence of prior good character or community-mindedness or community contributions into what might be called a moral accounting category. One can always take an extreme case. Let's take another one, for example. Let's take the person who has worked as a surf lifesaver for five decades, free of charge, and has saved many people from drowning, and on a particular Saturday there's a drowning that they feel they might have been able to prevent and they didn't. They feel terrible about it. They go to the pub, they drink too much, they get in the car and they drive home. There's an accident. Most right-thinking people would say, particularly where that person's prior good character in those circumstances—that is, their enormous community contribution—has some connection to the commission of the offence, that it would be artificial simply to say all you're doing is morally accounting. And this, I would repeat—

The Hon. STEPHEN LAWRENCE: I suppose in that case, though, that's very linked in to the circumstances of the offending, so it's going to get through the gateway and it's going to be considered in terms of a whole range of things. Instinctive synthesis is more about the outcome, right? Instinctive synthesis is about, as I understand it, the sort of end process where you put all the legitimate things into the box and then you pull out the right outcome. Isn't this more about what considerations go into the mix? I suppose what I was leading up to was, if you've got a case where a particular factual matter goes to prospects of rehabilitation or prospects of offending—in those senses, it is not relevant to the sentencing exercise, and it's something about the person's prior good acts—why should it bear on the sentencing exercise if it's not relevant to an assessment of risk or reoffending and prospects of rehabilitation? It's extraneous to the circumstances of the offending, so it's unlike the circumstance that you talked about. Why are those extraneous matters legitimate in the sentencing exercise?

DOMINIC TOOMEY: Mr Broadbent is anxious to answer this question, so I think I'll allow him to.

NICHOLAS BROADBENT: If we accept that a significant element of sentencing law is to reflect the community's expectations and sentiments, which I'd submit is an uncontroversial submission, and if we put aside what I would agree with Mr Toomey to be the somewhat emotive expression of "moral accounting", then why shouldn't that person's good acts in other aspects of their life be considered? I would submit that that would form a natural part of the community's expectations as to the approach to sentencing.

The Hon. STEPHEN LAWRENCE: That's the justification for "moral accounting", if you want to call it that, on the basis that the sentencing process should accord with community expectations, and in some cases the community would expect that it would be taken into account.

NICHOLAS BROADBENT: That's so, but also with this very significant caveat, which is also rooted in community expectations, and that is that where the objective seriousness of the offence or other countervailing measures dictate that good character should be put to one side, that it is indeed put to one side, and it would be.

DOMINIC TOOMEY: It's the universality of the approach in this bill that we have a difficulty with.

The Hon. DAMIEN TUDEHOPE: Ms Sanders, one of the suggestions that I think was in your submission was that perhaps the exclusion that is contained in section 21A, relating to the circumstances of the offence, should be included for people who have a cognitive impairment—that good character evidence not be available in relation to offences against them or, alternatively, persons under special care. Do you want to explain how you would see that as a possible extension of where good character evidence would be excluded?

JANE SANDERS: As well as the current exclusion which operates for child sex offences, I think we would be suggesting broadening that out to include sexual offences against other extremely vulnerable people, such as adults with intellectual disabilities, or for special care offences, which means sexual intercourse with a child aged 16 or 17 under your special care—so if you're a teacher with a student. I think the proposal was perhaps for it to be extended out to sex offences against other particularly vulnerable groups, not just children. I think that was the only thing. Of course, in one of those special care offences, inherently your position allows you to commit the offence. They would probably also be appropriate offences where your good character allows you to perpetrate the offence and therefore it should not be taken into account.

The Hon. DAMIEN TUDEHOPE: A sexual offence potentially against an elderly person?

JANE SANDERS: Potentially an elderly person with dementia who is cognitively impaired, yes. I think it would need to be given thought. Children are of course the most vulnerable people in our community, but they are not the only vulnerable people, when you look at the vulnerabilities some adults have as well.

The Hon. STEPHEN LAWRENCE: I have a general question. It seems to me that, in the criminal justice system, social advantage operates to the benefit of offenders in lots of quite legitimate ways. For example, you're more likely to come before the court if you're socially disadvantaged, and lots of types of offending correlate to varying levels of advantage or disadvantage in different ways. Those things are quite legitimate, I think, in the operation of the system. I mean, how often do you think people are coming before courts—and obviously those things are going to be considered if they're a person who has a low risk of reoffending or high prospects of rehabilitation on account of their background circumstances. Those things are going to be considered. But how often do you think that socially advantaged people are getting some mitigation of sentence on account of that sort of extraneous history of quite good acts? They might have donated to charities a lot because they're advantaged, or they might have done all sorts of things that you're more likely to be able to do if you're advantaged, but which don't speak particularly to reoffending or rehabilitation. How often is it really working that way in the system?

NICHOLAS BROADBENT: I think it's probably very difficult to quantify in any concrete way. I would suggest probably nowhere near as often as perhaps what might be otherwise suggested, and that is because my experience has been that judges of the Local Court and the higher courts will always consider, first and foremost, the objective seriousness of the offence. Once that occurs, this is just one of numerous factors which are taken into account, as Mr Toomey described, in the instinctive synthesis of sentencing. But, equally, people of disadvantaged backgrounds are not inherently criminal.

People of disadvantaged backgrounds often are able to call upon evidence of their good character. As I say, the danger that we run—in Gent it's made very, very clear that good character may only be an absence of prior convictions, but it sometimes refers to more positive history in the community and a history of good works. If we restrict good character to simply the letters that are written, that, I would submit, is not the correct way of approaching the issue of good character. Good character is a very broad umbrella of evidence and that is, I would submit, a very important point for this Committee to bear in mind in considering this bill.

The Hon. STEPHEN LAWRENCE: I'm thinking of George Pell; I don't remember exactly how many character references he had but I remember there was a lot of high-profile people. Do you think courts have sort of let us down a bit by allowing the admission of really big quantities of statements from very high-profile people which, at some kind of degree of volume maybe start to suggest that there's some relevance to the status of these people, or some relevance to the volume of material? Is this something that is a legitimate criticism of the existing system, do you think—maybe Mr Toomey?

DOMINIC TOOMEY: I don't want to comment particularly on the Pell case, but it needs to be borne in mind that evidence of good character can be received as to criminal liability as well. Every case has to be approached on its own facts. There would come a point where a court would take the view that it doesn't matter how many references you give me or how much evidence you call of good character, the objective seriousness of the offence is so overwhelming that this is an exercise in futility. But one can also conceive of a case where a person has been so community minded and performed so many good acts for so many people that it would be desirable for the court to receive the evidence. It's very difficult to make any universal statement about that. Our position—which I think is plain—is that we have to place trust in the judicial arm of government in the sentencing process. Judges are experienced at it. Most of the people who are engaged in it have come from deep experience of criminal practice. They are capable of distinguishing between evidence which has weight and evidence which should be given no weight. That is really our position: that you do not want to be throwing out the baby with the bathwater.

NICHOLAS BROADBENT: There's an important distinction between admissibility and weight. Classically, the sentencing exercise admits a lot, but doesn't necessarily afford equal weight to everything.

The Hon. STEPHEN LAWRENCE: That's why I was making that point about it not being an admissibility provision. It concerns me that maybe those concerned with the interests of the accused and also the system more generally, in their criticism of this bill—and that's an understandable attempt to put a position—might create an effect if it's passed that it's interpreted as being a departure from existing practice that it's actually not. If this is passed and if something is headed "Good character reference", if a court rejects that, I think the court's probably going to be in error, because it might well be that the statement of good character is relevant to some other purpose or principle. But the criticism and the very understandable putting of concerns might feed this idea that gives it a bit of an unintended operation. It's really something that's going to the end process of consideration rather than the evidentiary procedural stuff.

The CHAIR: Thanks very much for coming. There were no questions on notice.

(The witnesses withdrew.)

(Short adjournment)

Mr ISAAC MORRISON, Solicitor Advocate, Port Macquarie Legal Aid NSW, sworn and examined

Ms JANET FRASER, Convenor, Feminist Legal Clinic Inc, affirmed and examined

Ms ANNA KERR, Principal Solicitor, Feminist Legal Clinic Inc, affirmed and examined

The CHAIR: Thank you very much for coming. Would any or all of you like to give a short, two-minute opening address?

ANNA KERR: Feminist Legal Clinic supports a proposal to remove consideration of character references, but only in relation to child sexual offences, sexual offences generally and domestic violence offences generally—all of which are on the rise and are offences which are often committed by serial offenders who are often able to escape detection due to the private nature of their crimes, which also have notoriously low rates of conviction and lenient sentencing. The focus of the victims groups campaigning for this change is on these kind of offences and not on property offences, public order offences or victimless crimes.

The proposed bill is therefore way too broad in its ambit and should be replaced by a far simpler amendment. The current section 21A (5A) applies only to child sexual offences, but could be easily amended to apply to sexual offences generally and domestic violence offences. The current caveat is also too difficult to satisfy. The words "if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence" should simply be removed. I began my career as a defence lawyer with the Aboriginal Legal Service and have worked for other places including Shopfront Youth Legal Centre, so I have a lot of sympathy for the submissions made by the ALS and other groups largely representing the interests of defence lawyers. However, they are somewhat over-represented, I think, in the inquiry today.

Since founding Feminist Legal Clinic I have specialised in domestic violence advocacy on behalf of women, and I share the concerns about the widespread problem of female victims of domestic violence being misidentified as perpetrators. However, this is an issue that should be itself addressed separately as a matter of urgency, and I support DVNSW's call for a systemic review of the Crimes (Domestic and Personal Violence) Act 2007 as a separate matter.

JANET FRASER: I would just like to quote a couple of words from *Veen v The Queen (No 2)*: "Sentencing is not a purely logical exercise." Our submission is that we are deeply cognisant of balancing rights and interests with the community's need for justice to be done, and acknowledge there is no easy way to devise sentencing for diverse crimes and diverse offenders. Many submissions underscored the need for a level playing field in justice, yet we consider a level playing field does not include character references where the rich may provide luminaries to attest to their character and the poor may not.

We acknowledge the sentencing of sex offences against children comes with the proviso that character may not be included where it led to abuse of a position of trust. However, we think, in general, a serious crime threshold might be considered, past which character references will be forfeit. We acknowledge our colleagues' concerns about women being misidentified as perpetrators of violence as a serious systemic issue but consider it better managed by police training and social change. Finally, as section 3A sets out the seven purposes of sentencing, I draw your attention to denunciation, particularly as articulated by His Honour Justice Kirby, who said in *Ryan v The Queen*:

A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also communicate society's condemnation of the particular offender's conduct.

We would suggest that the denunciation of serious offending is incompatible with the use of character references.

ISAAC MORRISON: Legal Aid has provided a written submission, and I'm content to rely on that.

Ms SUE HIGGINSON: I would like to go to your submission, Mr Morrison. The view of the commission at this point is that you noted the persuasive and strong dissent views of the dissenting members of the Sentencing Council. One of the things that you have put in your submission is that you acknowledge the need to address the concerns raised by victims of child sexual abuse, and you suggest that this inquiry should be exploring and adopting more appropriate other mechanisms, including appropriate terminology to describe an offender's lack of prior offences or positive community contributions outside of their offending behaviour. Can you just extrapolate on that a little bit for us?

ISAAC MORRISON: Yes, certainly. I'd agree that compassion for victims should be a feature of the sentencing exercise. But Legal Aid's position is that that should be balanced with fairness to offenders. In terms of how the sentencing processes could be adapted to appropriately providing for that, there are two things that

probably need to be considered. The first is the language that is sometimes adopted or used in sentencing remarks. Phrases like referring to someone particularly who's being sentenced, for example, for a child sexual offence as a pillar of the community or someone of otherwise good character is understandably something that can bring harm to victims.

Having said that, judicial officers overall are very sensitive to these issues, and that's something that I have found in my practice as a solicitor and a solicitor advocate. Perhaps providing for further education, both for judicial officers and also solicitors, is something that could be used to combat these harms if and where they arise in the sentencing process. That's something that Legal Aid does engage in, in terms of our provision of programs, both for solicitors in house and more generally, opening up this conversation to speak about how we can address this in the way that we present cases. In my experience, the most effective way to present and argue cases is one that acknowledges or is empathetic to the experiences of victims, both in the offence itself but also in the sentencing process.

Ms SUE HIGGINSON: This is for both Legal Aid and the Feminist Legal Clinic. Sentencing Council member Felicity Graham, a barrister who worked for the ALS for many years—actually, I just want to note the ALS is one of the only bodies that is not able to be here today because, of course, they just don't have the capacity to be here. They've provided a really helpful submission that is very consistent with Legal Aid's submission. Felicity Graham, a barrister who worked for the Aboriginal Legal Service, submitted that the most profound concern about use of character references arises from sexual offences and serious offending, rather than the 90 per cent of summary offences and victimless crimes such as drug offences and other forms of offences. Your evidence so far is consistent with that—you don't necessarily oppose the continuation of consideration of character for crimes in those other categories. Is that confirmed in all of your advice—your evidence?

ANNA KERR: Yes, that's right. We're not asking for a blanket removal of consideration of character in sentencing. In fact, we think the bill is far too far reaching in that regard.

Ms SUE HIGGINSON: In that sense—perhaps for you, Mr Morrison—if the bill was to pass in its current form, can you already, in your practice, see that there will be consequences that would not assist in the administration of justice as we know it in the public interest in New South Wales?

ISAAC MORRISON: Yes, certainly. Legal Aid, along with the Aboriginal Legal Service, would represent a significant portion of those 90 per cent of offenders that come before the court and are dealt with at Local Court level. One of the major things perhaps that might be lost would be the sense of connection that the offender feels with the justice system and the process as a whole, which is also beneficial to the community. Anecdotally, one of the first things that a person who comes before the court will tell their lawyer is—it might be "I have a boss" or "I have a friend" or "I have someone that I've been doing community service work for or with", perhaps before they've even entered a plea. That's something that's relevant to them and that they want to be known for the court.

When the court is sentencing the whole person, rather than just a de-identified offence, that's something that's very important for the court to take into account, both in terms of its understanding and the information they have about that person, but also when exercising the prerogative of mercy. Because, in my experience and the experience of many of my colleagues, people don't come to court with character references asking for their conduct to be excused when they're being sentenced, but they come asking for mercy. When a person comes to the court in that respect, it's vital that the court has information not just about their prospects of rehabilitation, not just about whether they might be a risk to the community, but about who they are and what their circumstances are.

Ms ABIGAIL BOYD: Could I ask you, Mr Morrison, about that point that the original campaign and call for sentencing reform was in relation to child sexual offences. In your submission you set out the main reasons why you might want to keep good character. Do you see any of them as applying to child sexual assault, or do you view that as being in a different category of offence?

ISAAC MORRISON: I think the important thing to recognise is that in terms of sentencing, a court will have to sentence a wide range and diversity of offences, as well as a wide range of offenders. It's not easy to categorise all people who are convicted of a particular offence in a certain way. For example, Legal Aid represents a lot of people who are convicted of serious offences, who might be young people, who are at varying stages in their development and their moral character, as well as other vulnerable people—for example, people who are suffering from a cognitive impairment, acquired brain injuries or extreme levels of social disadvantage. Yes, Legal Aid's submission is that to remove good character from sentencing across the board could have very profound impacts for people who are at the extremes or the edges, who might be convicted of more serious offences.

Ms ABIGAIL BOYD: But in relation specifically to child sexual assault, if we have still got the ability to put in evidence that goes to rehabilitation and evidence that goes to reoffending, what is it that should be relevant to still be captured in that general good character section of the Act?

ISAAC MORRISON: It's a good point that those two categories are going to be particularly relevant in sentencing for those offences. To ask the question, "What else is it that could be significant for sentencing"—those kinds of questions resolve at the individual level. It depends on a case-by-case basis. The examples I have given of people that are in those categories, who might not be considered as the target of this kind of legislation, aspects of their background could be missed because "good character" is prevented from even being considered.

Ms ABIGAIL BOYD: So we've got the rehabilitation evidence, we've got the reoffending evidence—that's all still there. We're talking here purely about this general nebulous concept of "good character". If all of those objective factors are still taken into account, at what point does it become relevant that you have a subjective opinion from somebody that somebody is a "good person", despite the fact they have gone and done what they've been found guilty of? They have been found guilty of a child sexual assault and then you've got all of that other evidence still there, what is it that we're trying to protect in that little sliver of what's left that would justify keeping it for child sexual assault offences?

ISAAC MORRISON: First of all, I wouldn't necessarily agree that good character is a nebulous concept. It is a term that people would use in the community and would understand quite well.

Ms ABIGAIL BOYD: I don't.

ISAAC MORRISON: Certainly when talking about a sliver that's left, if the law prohibits any kind of evidence about a person's character being admitted, other than for the purposes of rehabilitation and prospects of reoffending, then good character would encompass everything that is left. It is Legal Aid's, and my experience, that in representing people who come from disadvantaged, vulnerable backgrounds—or who might suffer from cognitive or intellectual difficulties—aspects of their character that go to their resilience, through their ability to maintain conduct even through adversity, is something that could be relevantly considered by a court and may in fact impact on the sentencing exercise. The court has the discretion—

Ms ABIGAIL BOYD: In child sexual assault offences, though?

ISAAC MORRISON: Again, that's a matter that I think would be resolved at the level of individual cases.

The Hon. STEPHEN LAWRENCE: For Ms Fraser and Ms Kerr, I noticed in your submission it says:

Threshold

... Sentencing for sexual assault, child sexual assault, domestic violence and other violent offences should not be lightened by supporters attesting that the convicted person also performed previous good deeds.

Is that statement accepting that there's an aspect of what's called good character in proceedings before courts that is not about good deeds but is about a person not engaging in like conduct in the past? I'm curious just to tease out what you see as the difference between the two.

It seems to me that evidence that goes to good character is generally either evidence of really good things that might be extraneous to the offending—history of volunteering in the community and things like that—and then evidence that goes directly to the question of not engaging in that behaviour before. So you might lead evidence, for example, from someone's previous partners to say, "That person never abused me. I always found them to be calm and not angry" et cetera. That seems to me to be two different types of good character. I'm interested in the type that relates to not acting in a like way before. Is that still a legitimate part of sentencing, do you think?

ANNA KERR: I think it might be legitimate in other areas, but for child sexual abuse it's extremely problematic and I'd suggest even for domestic violence it's extremely problematic, in the scenario that he can bring along a previous partner, for instance. You don't know what coercion she might be under. In those discrete areas of domestic violence and sexual violence, the idea that you'd be able to bring along someone who said, "Well, look, he hasn't done it to me" I don't think should be allowed in. Obviously, their previous criminal record will be considered in any case and that's a separate matter. But they may have a very strong veneer of respectability, and that's the whole issue—and that is then reflected sometimes in lenient sentencing. There's a lot of material to indicate that that's a problem. Do you have anything to add?

JANET FRASER: No. That's our position.

The Hon. STEPHEN LAWRENCE: The rationale in respect of domestic violence was something that I was particularly interested in in asking that question. Is your view that the rationale for a special rule for domestic

violence so that character is not considered—is that in principle, or is it because of the realities of the world and sentencing that mean that it's unlikely to be accurate, or do you think it's more of a conceptual thing as well?

ANNA KERR: It's a bit similar to the sexual things in that it's very private. The victims are often ashamed and don't want to speak out about it. It's kind of different from a lot of other areas of offending, like drink driving or something. I mean there's a question whether character should come up there. But I think it's got particular characteristics that we all should be concerned about. These are offences which are rising in frequency and yet there is a pattern of low charging, low conviction and lenient sentencing. There's a concern, I know, within victims groups that members of the judiciary may have a particular personal bias against heavy sentencing for those particular offences. We've talked about judicial training, but I don't know whether that's sufficient because, if the concerns of some victims groups are valid, it doesn't matter how much training you have—I don't want to scandalise any court here, but if you've got members of the judiciary, for instance, who are themselves perpetrators, which would not be known to the public, that may be reflected in lenient sentencing.

The Hon. STEPHEN LAWRENCE: Do you think courts generally operate on a sometimes unspoken assumption that, if a person has no prior convictions, they have not offended before?

ANNA KERR: Yes. I think that that's an obvious concern. There's no evidence that they've offended before and then, if they have good character witnesses saying that they're of good character, yes. I think in fact you will hear statements of that type. We know, of course, that it tends to be a pattern of offending over many years before these individuals are identified as perpetrators and brought to justice. That's very hurtful for the victims who are sitting and listening to that.

The Hon. STEPHEN LAWRENCE: If you're talking about crimes that are unintentional, for example, traffic offences that are strict liability—there's a whole range of different things—why is there a greater rationale for considering character in respect of those as opposed to domestic violence, for example?

ANNA KERR: Because I think they can be considered. There can be situations where they constitute mistakes. People have made mistakes. Maybe they're under some sort of pressure. Normally they act in a law-abiding fashion, but on this occasion they were suffering under various other factors. And then you can bring character evidence to say this was out of character; they wouldn't normally do this. With child sexual abuse, how can you do that? I mean they're always going to say it was the only time, "It was the only time I touched a child." No-one's going to be able to—

The Hon. STEPHEN LAWRENCE: It's very rare in respect of all types of offending, though, for either a person on their own admission or a court in sentencing to admit that they've done it before or a court to accept they've done it before in the absence of prior convictions.

ANNA KERR: That's true. But I think there's something particularly traumatic for victims to have to sit there and listen, because often there is, from the victim's perspective, copious evidence of other offending. But because of the particular peculiar difficulties of bringing, for instance, child sexual abuse to justice, they will then have to sit through this talk of good character. I think that section 21A (5A) tries to pick up the veneer of respectability that actually allows the offender to keep offending. That's kind of unique as well. That's true for both domestic violence and child sexual abuse—that they are able to continue because they are so respected that no-one's going to believe these allegations. I think these crimes are a bit different from—like, for instance, drug offences and things like that are very different. I think close family members are aware of it. There could be similarities, but we've got a particular problem with child abuse and domestic violence in terms of bringing those people to justice.

The Hon. STEPHEN LAWRENCE: In terms of domestic violence matters, for example, are you saying that a court should be prohibited from making a finding that a person is, in truth, a first offender?

ANNA KERR: I think they're just making a finding about the offence before them.

The Hon. STEPHEN LAWRENCE: I know, but let's say the lawyer says, "Look, we want you to go further in this matter"—unusually, perhaps—"and we want you to make a positive finding."

ANNA KERR: Trying to get no conviction?

The Hon. STEPHEN LAWRENCE: It could be seeking a particular outcome or just to prove it, but they say, "Look, we actually want you to make a finding that this person has never done it before."

ANNA KERR: That would be inappropriate, I would have thought. The court can't make a finding on something that they have not got evidence before them about. That would be an inappropriate exercise, I would have thought, by any court. I guess in the local court or something, you could be asking for a section 10A or something. It's pretty inappropriate in domestic violence and child abuse. I don't think they give those.

The Hon. STEPHEN LAWRENCE: You might, for example, have someone who was in a long relationship their whole adult life, then that marriage ended, they got into a new relationship and an incident of domestic violence occurred in particular circumstances. They seek to call their former partner and everyone else who lived with them, the children and whatnot. There's a dramatic difference in the two relationships. Why would it not be legitimate to seek a finding that this is a one-off?

ANNA KERR: I can see lots of red flags.

The Hon. STEPHEN LAWRENCE: I can too.

ANNA KERR: Lots of previous partners are still under duress from their—

The Hon. STEPHEN LAWRENCE: I'm very aware, as a former prosecutor of DV, exactly what you're talking about.

ANNA KERR: "I won't pay the school fees if you don't come to court and give evidence."

The Hon. STEPHEN LAWRENCE: I know, but you can't apply those very important understandings as a categorical rule either, because you can then risk injustice. In theory, why shouldn't a court be able to make that finding?

JANET FRASER: Because that wasn't the offence before them and they won't have evidence to back it up. Absence of evidence is not evidence.

The Hon. STEPHEN LAWRENCE: I know, but the scenario that I just raised is where it's a pretty complete evidentiary picture, if you choose to accept it and you have a lot of caution. I suppose what I'm leading up to is courts are called upon to make findings as to risk of reoffending and prospects of rehabilitation, so in the case of domestic violence, even through putting in a special rule, it's not going to operate to prevent a court from making findings about an absence of similar conduct, is it?

ANNA KERR: No, but we can at least stop this practice of putting volumes of material of good character. I think the George Pell example is a good one as to why the community has really had enough of this. But it happens to a lot of very ordinary people, not just those of very high profile, that they have to sit through good character evidence being led. It's a charade.

The Hon. STEPHEN LAWRENCE: Would you accept that a special rule for domestic violence would have as its objective not allowing consideration of evidence of extraneous good acts, rather than preventing consideration of an absence of similar conduct?

ANNA KERR: I don't know how they could bring evidence of an absence of similar conduct. A couple of people have given examples of war heroes. I think it would be extremely inappropriate to bring evidence that this person is a war hero and therefore the court should be somehow lenient in their sentencing of them for domestic violence or child sexual abuse. I think that sort of thing does happen in the courts. It's completely inappropriate and very traumatic to the victims.

The Hon. STEPHEN LAWRENCE: Sure, because that's extraneous meritorious conduct that has nothing really to do with the offending. What I'm talking about more is an absence of similar conduct in the past. You're not seeking to say that's not relevant, are you?

ANNA KERR: No, of course, if they have no criminal record, that's a factor that will be considered in sentencing—no previous record.

The Hon. STEPHEN LAWRENCE: That's a separate consideration, though, right? That's said to go to moral culpability, because you've never stood before a court before and then gone on to reoffend after that. I'm talking about something that goes squarely to that question of just not having done it before.

ANNA KERR: I think that would be an inappropriate exercise.

The Hon. STEPHEN LAWRENCE: Except it's relevant to risk of reoffending, isn't it, surely, which has to be a central consideration in domestic violence matters.

Ms ABIGAIL BOYD: Psychologically.

ANNA KERR: Usually when you have domestic violence victims, they outline not just one incident. If it was just one incident then that would be part of the facts—that he lost his temper and did something. It depends on the type of case, actually.

The Hon. STEPHEN LAWRENCE: It does, indeed.

ANNA KERR: Sometimes there is just one incident, in which case you can say, "There's one incident. Even the victim is saying there was one incident." Whereas often with child sexual abuse, as well as domestic violence, there's a long train of events over a number of years. In that case, yes, it would be inappropriate to say, "Oh, this is the first time", because obviously there's been a—

The Hon. STEPHEN LAWRENCE: A hundred per cent.

ANNA KERR: It depends on the individual case. I think often there's been a long history.

The Hon. DAMIEN TUDEHOPE: Perhaps I would just continue with that. One of the things that you've heard is it does depend on each individual case. Why isn't it that the appropriate potential amendment which we would seek is, rather than ruling out good character evidence, adopting the position that we give it no weight, as the proportionate response to ensuring that we are looking at each individual case on its own facts? There would be some cases where you would give the so-called good character evidence no weight.

ANNA KERR: Judges have that discretion already. They could already do that—give it no weight. But this would make them have to not give it weight. There's a difference. One's mandatory and one is discretionary.

The Hon. DAMIEN TUDEHOPE: But to the questions which Mr Lawrence was just putting to you, you would accept that there are some cases where potentially it should be given some weight, based on the individual circumstances, would you not?

ANNA KERR: Are we talking about child sexual abuse and domestic violence?

The Hon. DAMIEN TUDEHOPE: No, even domestic violence.

ANNA KERR: I'm perfectly happy for character references to continue for the run-of-the-mill summary offences. I've represented many people, and being able to bring, "The soccer coach says that most of the time he's well behaved and a polite young man, and he doesn't generally do this"—I can see that there's situations where that's very helpful. It isn't just for the wealthy. I agree with what has been said by other people today—that disadvantaged people can get some small help from character references. But not in these sorts of offences—not in child sexual abuse. It's completely inappropriate to be bringing "the soccer coach says he's a good bloke" or "he was a war hero". It's very inappropriate to even be going down that path.

The Hon. DAMIEN TUDEHOPE: In those circumstances, you would expect it to be given no weight. Because there is a role, is there not, for judges to hear victim impact statements before they get to the point where they're assessing character evidence or other evidence relating to sentencing process. As part of sentencing, the judges are already taking into account victim impact statements, are they not?

ANNA KERR: One would hope so, but looking at some of the very lenient sentencing that we're seeing for child abuse, for instance—

The Hon. DAMIEN TUDEHOPE: Can you give me some examples?

ANNA KERR: No, but I can take that on notice and get some to you. I'd be happy to do that.

The Hon. DAMIEN TUDEHOPE: In circumstances where potentially you say weight has been given to character for the purposes of sentencing where it was inappropriate.

ANNA KERR: I'll take that on notice and we'll do some research for you and send you something after today. I don't have those references off the top of my head.

JANET FRASER: But I would suggest that a trial is about the State versus the accused, the offender, and the victim impact statement comes at the end of that very long process. It was devised in order to allow victims to feel that they had some kind of voice in the proceedings, because they don't really. They're cut out. They just become a witness to what happens between the State and that accused person. I think it's not on a par to have character references with the victim impact statement. Those aren't similar.

The Hon. DAMIEN TUDEHOPE: But the victim impact statement would go to the weight which a judge would give to the character evidence, would it not?

JANET FRASER: It's definitely open to the court to find that, but there's no onus on the court to add that into the deliberation.

The Hon. DAMIEN TUDEHOPE: If, in fact, the legislation included, as part of what it required judges to do on sentencing, that they give no weight to character evidence, as opposed to excluding character evidence, isn't that the balancing act which judges should be asked to do, and which they do?

JANET FRASER: Our position is that it really depends on the severity of the crime, so it depends on the offence. It becomes relevant to people who are engaged in lower level offending because, as my colleague says, and my other colleague, we want that for lower level offending in our case. It's a different ball game.

The Hon. DAMIEN TUDEHOPE: Where does it click in that you take it out?

ANNA KERR: I think there is a difference. I've often thought that, as a society, we do not distinguish between, for instance, crimes of violence—one concern I have—that are done for the gratification of the offender, as opposed to someone losing their temper or a spontaneous thing. I think child sexual abuse is particularly concerning, because it's a crime that indicates a lack of conscience and therefore it's very hard to detect. It's very different from, for instance, a pub fight or an assault happening in that context. You've got a different type of offender that you're dealing with. I think the impacts on the victims varies because you're dealing with someone—it's not a situation where, "I've made a mistake and I'm sorry." Regardless of what they say their real feelings are, they're hiding behind a veneer.

ISAAC MORRISON: If I could just add to that, one of the concerns that we have about the bill is that it prevents any evidence of character being presented by an offender on sentence, which means, as you point out, that person is prevented from even raising or arguing that good character is relevant. When we consider that one of the purposes of the court is to sentence the whole person—and what's particularly important is individualised justice in particular cases—preventing judges from exercising their discretion to, as you say, give some weight or no weight is something that represents a harm to not just the individual but also the community.

The Hon. DAMIEN TUDEHOPE: One of the things you say in your submission is:

... good character is not synonymous with social privilege and has not operated as something from which people of lower socioeconomic backgrounds are excluded. In our experience, good character can be demonstrated through lawful behaviour, community service, family responsibility, selflessness, and honesty, qualities found across all socioeconomic strata.

Do you recall saying that? The Attorney General argues for the total abolition of good character considerations, partly on the grounds that such considerations inherently favour the well-to-do at the expense of the underprivileged, including Aboriginal offenders. That's not your experience, is it?

ISAAC MORRISON: No, it's certainly not our experience.

The Hon. DAMIEN TUDEHOPE: He expresses surprise that the Aboriginal Legal Service is opposed to the abolition of good service. You no doubt have crossover with the Aboriginal Legal Service in your experience.

ISAAC MORRISON: Yes, I do.

The Hon. DAMIEN TUDEHOPE: How do you see the benefit of character evidence in relation to dealing with Indigenous offenders?

ISAAC MORRISON: There are two things. Firstly, character evidence is democratic in the sense that everybody has the opportunity to live a life that demonstrates that they have made a positive contribution to the community or their sphere of influence, and this applies to the wealthy, middle-class white man, but it also applies to someone that has grown up in difficult circumstances in an Indigenous community in regional Australia. For example, I have, and many of my colleagues would have had, clients that have grown up with parents who have been incarcerated, who have suffered extreme kinds of disadvantage and who have been surrounded by drug use, but they have nonetheless demonstrated character in completing their education and looking after younger siblings in that context, and in finding housing and the ability to even attain a level where they might be an Elder in their community or a support to others who are going through difficult circumstances. It's something that a defence lawyer can present to a court to show that this person's not just someone who has committed this offence, but this person has a background, they have a character, and they've been able to make a contribution even despite the circumstances in which they found themselves.

The Hon. DAMIEN TUDEHOPE: Would you favour the idea of abolishing good character evidence for sexual offences and domestic violence offences?

ISAAC MORRISON: That's not Legal Aid's position and there are reasons for that. One thing that Legal Aid is concerned about, and has been addressed even here, is the misidentification of domestic violence offenders. For example—and this is a case that I've represented in the past—a woman may be charged with wounding her partner and that might have happened in the context of many years of abuse at the hands of that partner.

The Hon. DAMIEN TUDEHOPE: Being defensive.

ISAAC MORRISON: That person may be able to say, "I've got no previous offences", or they may not be able to say that. That person may be able to say, "I'm a low risk of reoffending", but that's not the point because that person may have raised children, shielded them from harm in the context of a very difficult life circumstance. That speaks to her character and that should be available for the court to consider and maybe something that is prevented if there is a blanket ban on character being considered on sentence.

Ms SUE HIGGINSON: In relation to misidentification, clearly that's a matter in the front of everybody's mind and we've been pressuring the system in so many different places in regards to fix it, to stop it, to work it out and to get better at dealing with this when police have those interactions, but the change is not coming and it's not coming quick enough. You only have to speak with the ALS or Legal Aid to say, "No, it's in the courts right now. It's happening all the time." What do you suggest in the circumstances? Your position is quite clear in terms of the commission, the same as Legal Aid and a bunch of other submissions. I'm interested in your perspective from the Feminist Legal Clinic because you actually acknowledge this; you take this full throttle. Yet you're suggesting that there are references that go to character—I'm not going to call them "good character" ever again—you're saying that they're no longer appropriate, or they shouldn't be. Can you just extrapolate on that a bit more?

ANNA KERR: Although the number of women who are now being charged with domestic violence offences is becoming sizeable and extremely significant, but I think the issue is there that many more of those cases need to be defended and they're not being defended. Women are often consenting to AVO orders because it's much easier and quicker to do so. There's a whole lot of systemic problems, which I can address—another whole inquiry. What we've got is a whole lot of people—it's like saying because there will be some people who are falsely convicted, we shouldn't make this change. Because there will be.

Occasionally, there'll be someone who's been convicted of a terrible offence, whether it's child sex abuse, and then of course they will—but I think that the change we should be designing the legislation for is the scenario where the court has done its job appropriately and the person has been appropriately convicted, and this is a sentencing consideration. If we start thinking about what about the innocent person who's been convicted when they shouldn't have been, that's a whole different issue. Those women who shouldn't have been convicted as offenders because they're actually acting in self-defence or have been falsely accused, that's its own issue.

Ms SUE HIGGINSON: We don't have a post-conviction review system in New South Wales that's efficient, or effective or works, so what do we say to these women? "Oh, well, sorry it didn't work for you. Sorry about that. You weren't able to bring any material."

ANNA KERR: Providing legal representation to them would be—I mean, at the moment it's very, very difficult to get legal representation for some of these cases for women who are defending these matters. There's quite a bit of pressure to just consent without admissions because that's just so much quicker and easier. Practitioners who take on these cases and have to take them to hearing, the amount that you are reimbursed by Legal Aid, for instance, for doing those cases is not very high. I think there are a lot of practitioners who would much rather get the client to consent. The rate that you get paid for doing a quick mention where you consent to the orders is reasonable, but if you take the matter to hearing and you do it conscientiously, I can tell you that with multiple adjournments, the amount that you're being paid by Legal Aid to run those kinds of cases can be completely inadequate. I don't know if I've answered the question.

The CHAIR: Our time for questioning has come to an end. Ms Kerr, you've got a question you took on notice. The secretariat will be in contact with you. You'll only have 24 hours to respond, given the short time span, once you receive a copy of your evidence. Thanks very much for coming.

(The witnesses withdrew.)

Ms RHIANNON COOK, Acting Deputy Chief Executive Officer, Domestic Violence NSW, affirmed and examined

The CHAIR: Would you like to make a short opening statement?

RHIANNON COOK: Yes, please. I'm here today representing Domestic Violence NSW. I'd like to start by acknowledging that I'm on Gadigal land. This land was, is and always will be Aboriginal land. I'd like to pay respects to Elders past, present and emerging. Our resident subject matter expert is on leave at the moment, so I'm here on behalf of DVNSW. I'll do my best to answer your questions, but also happy to get back to you if there are any questions I'm unable to answer. DVNSW represents the specialist domestic and family violence sector, and we have approximately 200 members across New South Wales. I wanted to start my opening remarks with gratitude to survivor advocates Harrison James and Jarad Grice, whose leadership of Your Reference Ain't Relevant campaign has brought about this proposed legislative change.

I want to acknowledge the tremendous amount of strength it has taken to get to this point and the immense personal weight that comes with this work. Advocating in this space often means carrying not only your own experiences but the stories, injustices and realities faced by so many others. That kind of leadership isn't easy. It takes courage, resilience and an ongoing commitment to speaking truth even when the system is slow to respond. DVNSW supports the campaign's recommendation that good character should not be a mitigating factor in sentencing for child sexual abuse cases, regardless of whether or not that good character played a role in enabling the perpetrator to commit the offence. We also support broadening the range of offences for which good character references should be disallowed, including adult sexual violence offences.

As we represent the specialist DVF sector, our focus today is on the experiences of victim-survivors of domestic and family violence. We recognise that sentencing processes can be an additional site of coercive control and re-traumatisation and we agree that, as a general principle, victim-survivors should not be subject to hearing evidence of an offender's good character. We hold concerns, however, that the proposed changes could have an unintended impact on victim-survivors who have been misidentified as the person using violence and charged with an offence. Misidentification of the person most in need of protection continues to occur across New South Wales—there was discussion about that before—and it has been well documented by frontline specialist services. The consequences of misidentification can be profound. They can impact someone's ability to access safety, housing, parenting, employment, community connection and wellbeing. We recognise that this is particularly common in coercive control relationships, and that Aboriginal women are more frequently misidentified as perpetrators of violence than other women. We are concerned that without safeguards that go towards addressing this issue, these amendments risk reinforcing systemic inequities in the justice system.

We acknowledge the Government is starting to engage on misidentification and there is a lot of work to be done. We need to reduce the likelihood of misidentification and ensure that where it does occur, it is identified and addressed early in criminal proceedings. Our feedback to this inquiry made three key recommendations to this end. They include a comprehensive review of the Crimes (Domestic and Personal Violence) Act 2007 to align the law with contemporary evidence and lived experience; mandatory training for judicial officers and court staff so that there is a better understanding of misidentification, victim-survivor resistance and coercive control patterns; and procedural safeguards to identify and address misidentification early in DVF-related proceedings. We submit that legislative reform must proceed alongside a commitment to address the misidentification of those most in need of protection and ensure that victim-survivors are not inadvertently further criminalised or disadvantaged. Thank you for the opportunity to be here today, and thank you again to Harrison James and Jarad Grice for their incredible advocacy.

Ms ABIGAIL BOYD: Thank you very much for coming and giving your evidence. Thank you for your acknowledgement of the amazing work that Harrison and Jarad have done on the Your Reference Ain't Relevant campaign. From your opening statement, I understand that DVNSW supports the reform in relation to child sexual assault and adult sexual assault. I want to focus on the misidentification piece, which we can all agree is a major problem, and is born out of, I think many of us would agree, systemic sexism as well as racism when it comes to Aboriginal people, particularly Aboriginal women.

I wanted to look at Wirringa Baiya's submission to the Sentencing Council's process, where they do support good character reference being taken away as a mitigating factor for DV. In relation to misidentification they actually talk about, notwithstanding all of those issues that you've mentioned in your opening statement, but because a lot of what is judged as good character is itself often subject to a racist lens, they quote, "We consider the judgement of a person's character outside of an incident allows structures and systems to be reinforced, of which Aboriginal women do not benefit." In other words, they talk about how, often, Aboriginal women are more likely to be misidentified by police because of the assessment of good character being lacking in an Aboriginal

women. That is the basis of their submission. Why does DVNSW take a different view to Wurringa Baiya on this one?

RHIANNON COOK: I think it's important to acknowledge that there are different views in the domestic violence sector, but I think where we share a view is concern for those misidentified women. The difference is, what is the outcome for those women as a result of being able to consider good character at sentencing? Other members have told us that it has been useful in making sure a conviction hasn't been recorded. I think, in our response, we would like to see a greater level of confidence in making sure those victims aren't reaching that point of the criminal justice system. But in the absence of being confident about that, we're worried about that unjust outcome for those women, and we think that more attention and research is needed there before a good decision can be made about whether or not this should be removed.

Ms ABIGAIL BOYD: It's tricky, isn't it, because we're dealing with a system that is inherently not working for many women, who are being misidentified. Not because we love the idea of good character references but because it might actually help some women in those circumstances, we're not wanting to take that last salve away, I guess. Is that a fair—

RHIANNON COOK: Yes. One of the factors that contributes to misidentification is an incident-based policing system, where things are seen in isolation and taken out of context. The broader context isn't visible, and this reform does that even more. It takes away some of the court's ability to look at the broader context.

Ms ABIGAIL BOYD: The Wurringa Baiya submission makes reference to the UK position. Obviously the UK is a very different place, particularly when it comes to First Nations communities and the overlaying aspects that we have here in our justice system. However, they have made reference to it in their submission. In the UK, the sentencing legislation, effectively, gives judicial recognition to the fact that an offender can maintain two separate personae—they can have a different persona to their colleagues and to their friends than they can within the home. That reform has that educational aspect as well as a legal one. Do you see in the future, perhaps if we can get to a position where we don't have the misidentification issues to such an extent, that we could consider this reform as a way to make it very clear that you can be a so-called good bloke and still be someone who abuses your partner?

RHIANNON COOK: Yes, definitely. Our concern is very much about the high levels of misidentified women who are still part of this process. But if you could increase the confidence that that is not happening or is happening to a much lesser degree, then you could be more confident that the removal of that good character provision would achieve the outcome that it's meant to achieve.

Ms SUE HIGGINSON: This is incredibly helpful. Women who are victims, who do offend and have offended and are objectively guilty, are the ones perhaps most in need of that reference as to character. Would you agree?

RHIANNON COOK: Yes.

Ms SUE HIGGINSON: This is the difficulty in terms of navigating that path. We've heard evidence today—and the stats bear out; you only have to look at BOCSAR—that women are being charged and charged in relation to domestic violence or violence offences. This is what our courts right now, I would be willing to say, are actually quite overwhelmed with, compared to where things were some years ago. Without that interface of that capacity to obtain references, we are likely to see more women going through sentences that are more severe than what they otherwise would be able to be, with the benefit of a reference as to their character.

RHIANNON COOK: Yes, that's right. There are so many flow-on impacts from that that it can make it harder for a woman to then find safety, be confident that she'll be able to find a job, be independent or leave a relationship.

Ms SUE HIGGINSON: The other thing in your submission which I thought was a really important point—and again, we have heard a bit of evidence going to this—is you raise that many of your members report that many victim-survivors will plead guilty to things such as common assault for really, really good reasons, i.e. it's too traumatising, it's too costly, it's too uncertain, and there are too many risks to children, housing stability and so forth. I'm interested really in relation to that, again, if this bill is left unamended, what we might see in those circumstances.

RHIANNON COOK: If the bill isn't changed, I think we would still continue to see women who plead guilty for a wide range of barriers that you just mentioned. I think it might have been Wurringa Baiya submission that also spoke to some of the most effective solutions sit outside legislative change. For us, one of the big things would be about a wider review of the Crimes (Domestic and Personal Violence) Act, but also training for police and judicial officers. We did some work on how our services interact with police a couple of years ago. We did a

survey and almost half of the 93 services that responded couldn't agree with a statement that said that police are able to accurately identify the perpetrator and the victim, so I think there's a lot of work to be done right at that end to make sure the policing response is more effective and stops things from getting to this point.

Ms SUE HIGGINSON: Elsewhere, you have pointed out—in very effective means—that the New South Wales Government cannot commit even just 0.1 per cent of the State budget toward frontline domestic violence support services, even during this crisis of violence against women. Would you say that fully funding the front line would have a more significant benefit for victim-survivors of domestic violence right now, rather than reform to character at sentencing?

RHIANNON COOK: Yes, absolutely.

The Hon. DAMIEN TUDEHOPE: I think the summary of where you've got to, of course, is that the best solution in relation to a lot of this is for less women to be before the courts in relation to domestic—rather than remove the good character. Did you hear the evidence of Isaac Morrison before? Were you sitting here?

RHIANNON COOK: I heard part of it, yes.

The Hon. DAMIEN TUDEHOPE: He made a reference to the fact that you can potentially have a woman charged with a domestic violence offence who has been the carer of her grandchildren and in circumstances where she has potentially prevented other domestic violence offences being perpetrated to others in that household. I think the substance of it was why would you say that that evidence shouldn't be before a judge who is dealing with an allegation or a plea by that woman?

RHIANNON COOK: When we know that there are women who've used violence in retaliation or self-defence who are coming before the courts, the ability to use that information so that there can be a better decision about whether or not the person who's being charged is the person most in need of protection or the main user of violence, given we know that often it is the person in most need of protection who is being charged—at the moment, that information can be helpful.

The Hon. DAMIEN TUDEHOPE: But even on a plea in relation to offending by that person, why wouldn't it also be important to know the actual life history of that person or the contributions that person has made to their own family?

RHIANNON COOK: Sorry, could you say that again?

The Hon. DAMIEN TUDEHOPE: Why wouldn't it also, if on a plea in relation to offending by that person—that we also know what the contribution of that person has been to the total circumstances of her family?

RHIANNON COOK: I think I'm agreeing with you that it is relevant at the moment given the high number of misidentified women who are coming before the court.

The Hon. DAMIEN TUDEHOPE: The Attorney General, when the evidence was put before him that you put today, seemed to think it was an anomaly not to include domestic violence offences for the purposes of excluding good character and yet to include sexual assault offences as part of a cohort of offences which would, in fact, attract no good character evidence. Do you agree with that as a sentiment—that you can distinguish between the two?

RHIANNON COOK: There's a difference between offences that can be done in retaliation or self-defence or under extreme duress, and there are some offences that sit outside of that. One of the people who presented evidence before talked about a line somewhere that clicks in. At the moment we don't know where that line is, but more work needs to be done to better understand and do some quantitative research around the number of women who are being misidentified and what they've been charged with. At the moment there's no authoritative source of that evidence in New South Wales. Without that understanding, it's hard to know where you can draw the line between the different types of offences.

The Hon. DAMIEN TUDEHOPE: You would have heard some of the evidence given previously by some of the lawyers who were involved in this process. They seem to have fallen on the side of the view that, potentially, more consideration needs to be given to an outcome where the education process understands that no weight could be given to good character evidence. Do you support the notion that we actually educate that—sure, receive this material but, for the purposes of sentencing the whole person, sometimes it will be given weight, but on other occasions judges won't give it any weight whatsoever.

RHIANNON COOK: Yes, education is important. The problem that the Your Reference Ain't Relevant campaign has identified is what that experience is like for victim-survivors to sit there in the courtroom and hear that evidence. So I still think it shouldn't be allowed in certain circumstances because, even if you have an

increased level of understanding and education around how much weight it can be given, the experience of having it presented is still traumatic.

The Hon. DAMIEN TUDEHOPE: Do you accept the notion that some witnesses have provided that maybe what needs to occur is a change in the language—as Ms Higginson refers to, if you no longer call it good character but just have a notion of some sort of character evidence. The re-traumatising of victims generally occurs against a background where evidence is being presented about things that they have done in the community, and that re-traumatises on the basis that it's painted as them being a good person, against their lived experience that they're not a good person at all. That's the re-traumatising event, and certainly the facts of the circumstances that they've been exposed to belie what they are now hearing about the person's contributions. Is language part of the problem?

RHIANNON COOK: I think that that would be an improvement but it's, again, not the solution.

The Hon. DAMIEN TUDEHOPE: In your view, is the solution to abolish good character evidence for a range of offences?

RHIANNON COOK: Yes.

The Hon. DAMIEN TUDEHOPE: How do you decide which ones they are?

RHIANNON COOK: There are some where it's clearly inappropriate. There are some where there is no victim, so it's more likely to be appropriate. There are some in the middle, which are the ones that we were talking about, where it's unclear at the moment and more evidence and research is needed to work out where it is and isn't appropriate. Until that evidence is available, we've argued that there's a risk in removing it.

The Hon. DAMIEN TUDEHOPE: Is it premature to pass this legislation today?

RHIANNON COOK: In its current form, but we are supportive of removing the good character reference for those child sexual abuse, adult sexual offences.

The Hon. DAMIEN TUDEHOPE: How do you categorise adult sexual offences—all adult sexual offences?

RHIANNON COOK: We're coming at it from the perspective of victim-survivors of DV who've been misidentified and, typically, they are not charged with adult sexual offences.

The Hon. DAMIEN TUDEHOPE: When you're talking about adult sexual offences, how would you categorise those adult sexual offences—when there is violence attached to them?

RHIANNON COOK: I don't think I have the expertise to answer that question, sorry.

The Hon. STEPHEN LAWRENCE: Thanks so much for coming along, Ms Cook. In your submission you talk about misidentification. Are you talking about people who are accused of committing criminal offences when in fact they're innocent and they have been the victim of criminal offences, or are you talking about people who may have committed criminal offences, but in the context of an abusive relationship where they're primarily the victim, if I can put it that way?

RHIANNON COOK: Yes, the latter.

The Hon. STEPHEN LAWRENCE: In respect of that sort of person—someone who may have committed a criminal offence in a domestic context, for example, a woman who commits an offence against her male partner but she's normally the victim, if I can put it that way, and there might be circumstance such as provocation but not that reduces liability or eliminates liability—do you think that person should have good character considered?

RHIANNON COOK: Yes.

The Hon. STEPHEN LAWRENCE: Is that, in your view, a thing that should be considered in terms of what prior good acts they've committed—things that aren't relevant to the offence at all—and/or should there be consideration also of the fact that they haven't committed those sorts of offences in the past, that is, they haven't engaged in violent conduct before, or both?

RHIANNON COOK: Our position and our research don't go to that level of detail, but it's around being able to consider the context in which that offence occurred. I think that's more than just prior history; it also goes to character.

The Hon. STEPHEN LAWRENCE: Would you say that the person who is the victim in that sort of situation but is also a perpetrator—indeed, in the context of that relationship, the primary perpetrator—should have good character considered as well?

RHIANNON COOK: In a situation where they've been charged or where they are the victim?

The Hon. STEPHEN LAWRENCE: Where they've been charged out of that relationship and they're the primary aggressor in that relationship.

RHIANNON COOK: No.

The Hon. STEPHEN LAWRENCE: So the basis for distinguishing who should get it and who shouldn't get it is who's the primary aggressor, if I can put it that way?

RHIANNON COOK: Yes.

The Hon. STEPHEN LAWRENCE: Is there any other basis for distinguishing between those two situations, do you think?

RHIANNON COOK: No, I don't think so. I think if the principle is an improvement to make the sentencing process less traumatic for people who really are the victims, then removing it makes sense, but you have a court system where the victim is also sometimes, or often, the person being charged.

The Hon. STEPHEN LAWRENCE: In terms of trauma for victims, could you explain to us what you think in the current system is the cause of that trauma? I'm talking about trauma arising from the use of character evidence.

RHIANNON COOK: I think trauma is really complicated and it can be caused by all manner of things. But I think one of the characteristics of victim-survivors of both sexual assault and domestic violence is often a feeling that it's all in their head, that they're imagining it, that this isn't really a problem, and that reinforces that perception and that belief. Also just hearing people say good things about the person that has done bad things to you is traumatic.

The Hon. STEPHEN LAWRENCE: This is obviously impossible to quantify, but do you think that part of that trauma is arising because if you've been victimised by someone you would very often have the view that they're not a first offender, in fact, and that they've actually done it to other people as well? That obviously depends on the context but from my experience working in criminal law it's very often the case that people have that view: "I'm definitely not the first or definitely not the only one who has been victimised by this person." Is part of that trauma the person hearing these assertions of good character that sort of jar against their own view about this person's real history?

RHIANNON COOK: I'm sure that would be the case in some situations, yes.

The Hon. STEPHEN LAWRENCE: For the purpose of the way that a court considers character, do you see a distinction between a person leading evidence of prior good acts that have nothing to do with the offending and a person leading evidence of not having engaged in the conduct before?

RHIANNON COOK: As different or—

The Hon. STEPHEN LAWRENCE: Yes.

RHIANNON COOK: I'm trying to think how that would apply to the people that we're here speaking on behalf of. I think the person who spoke before me spoke about evidence of a woman who has cared for her children, protected her children, as being relevant. I'd agree with that. So I think that goes to evidence of good character as opposed to lack of evidence of prior offending.

The Hon. STEPHEN LAWRENCE: If someone is able to prove that something is a one-off, would you agree that's very likely to be relevant to the risk of the person doing it again?

RHIANNON COOK: Not in every circumstance.

The Hon. STEPHEN LAWRENCE: No, it's going to depend. I accept that.

RHIANNON COOK: Yes.

The Hon. STEPHEN LAWRENCE: But very often, as they say, the best predictor of future behaviour is past behaviour.

RHIANNON COOK: Yes. I think when you think about the dynamics of domestic and family violence, an actual physical act of violence might only occur when the risk has really escalated, but there would be a whole

lot of patterns of coercive behaviour that would lead up to that. In that circumstance I don't think that isolated violent incident would necessarily tell you very much information about the likelihood of future offending at all.

The Hon. STEPHEN LAWRENCE: Whereas evidence of particular good acts in the past, even if they've been quite sustained—it seems to me they would very often really have nothing to do with the question of what the person is likely to do in the future. It just seems to me to be totally extraneous. Would you agree with that?

RHIANNON COOK: Good acts in the past—I think the answer is it depends.

The Hon. STEPHEN LAWRENCE: Yes.

RHIANNON COOK: Again if you're talking about the good acts being a mum who has protected her children in a violent relationship, and stayed in the relationship because she feels like that's the best way to continue to protect her children, then would you define that as a good act? In which case, yes, I do think that kind of information is relevant to making a decision about the consequences for that person.

Ms ABIGAIL BOYD: In a world where misidentification doesn't exist, just imagine, would you still be opposing this reform for DV offences?

RHIANNON COOK: No. And we're not opposing it. Rather, we're saying that it shouldn't be removed for all offences, that more work needs to be done to work out which ones it is removed for and which ones it isn't.

Ms ABIGAIL BOYD: Just on that line of questioning, my colleague was asking—imagine we have the stereotypical DV kind of offence, and as the victim, you've gone to all this trouble to go and actually finally get safety. The perpetrator has been brought to account. They've been found guilty. What do you think the impact would be at that moment if there was some evidence adduced of their good behaviour in previous relationships? Do you think that could be ever relevant and worth the trauma that would cause to the victim?

RHIANNON COOK: I think that there are enough other ways. I think we would be comfortable in those circumstances that that's not available information that's considered at sentencing.

Ms ABIGAIL BOYD: Can you maybe explain why, based on kind of the broader—we haven't really talked about the psychology of a lot of these offenders in relation to child sexual assault or in relation to DV. But do you think that even if you could adduce evidence that a person had never done this before in a previous relationship that would be good evidence of whether or not they would even reoffend, if it was evidence for that sort of purpose? Do you think it could ever be relevant to rehabilitation or reoffending, even?

RHIANNON COOK: I don't know that I am able to comment on that, but coming at it from the principle about the impact that has on the victim in those cases, I don't think that should be evidence that's presented when making a decision.

The CHAIR: I think we're done with questions. Thanks very much for coming today.

(The witness withdrew.)

(Short adjournment)

Mr CRAIG HUGHES-CASHMORE, Chief Executive Officer and Co-founder, Survivors and Mates Support Network, sworn and examined

Ms PRUE GREGORY, OAM, Policy, Advocacy and Stakeholder Relations Manager, Survivors and Mates Support Network, sworn and examined

Mr HARRISON JAMES, Co-founder, Your Reference Ain't Relevant, affirmed and examined

HARRISON JAMES: I appear today as a victim-survivor of childhood sexual abuse. I welcome the opportunity to give evidence to the Committee in support of this important reform and to speak on behalf of survivors who have been directly harmed by this practice.

The CHAIR: Thanks very much for coming. Would any or all of you like to make an opening statement?

PRUE GREGORY: I'd like to begin by saying that our expertise in this amending legislation is restricted to victim-survivors of child sexual abuse, so that's going to be section 21A (3) (f) and the amendment to 21A (5) (a) and the additional clauses. We are particularly concerned by the law as it currently stands, in that section 21A (5) (a) currently provides two classes of victims and offenders—those that have been abused within an institutional context and those who haven't. The current law benefits middle-class offenders with strong community ties but, really importantly, fails to take into account the impact of hearing the statements being read out at sentencing proceedings, especially on the victim-survivors of non-institutional offending. By preventing the use of good character references in mitigation on sentencing, the amending legislation will overcome a lot of the objections that SAMSN has to the current law.

CRAIG HUGHES-CASHMORE: I'll just say that I'm also a survivor of child sexual abuse. About 20 years ago I went to the police and reported my three offenders, and that resulted in two criminal trials.

HARRISON JAMES: For me, this issue is not about hypotheticals or whataboutery. I know what it is to live with the aftermath of child sexual abuse, and I know how easily legal processes can deepen harm for survivors rather than relieve it. I am here today in strong support of this reform, and in complete support of the recommendations made by the NSW Sentencing Council, including the abolition of good character references at sentencing. The Your Reference Ain't Relevant campaign has spent years advocating for this change, because victim-survivors should not have to sit in courtrooms and listen to the person who harmed them be described as "a good person" or "a pillar of the community" or as someone whose offending was supposedly "out of character".

We now know from the evidence base that underpins this reform that a perpetrator's perceived good character is in fact central to how they facilitate and conceal abuse. Good character references are not a minor feature of sentencing. They are deeply harmful. They re-traumatise survivors and they shift the focus away from the harm inflicted and back onto the reputation, status and social standing of the convicted offender. The NSW Sentencing Council undertook an independent expert-led review in a 126-page report informed by public consultation, stakeholder engagement and significant legal and community input over a period of years. Despite all of that scrutiny, it's recommendation still stood: Abolish good character as a mitigating factor in sentencing. As a campaign, we stand firmly by that review, by its thoroughness and by its findings.

The question before this Committee should not be what's easiest for the system to absorb, but what is just, evidence based and fair. Victim-survivors have already waited long enough, and every delay has very real world consequences. Every extra day that this reform is stalled is another day that offenders convicted of child sexual abuse, rape, domestic violence and other serious crimes are being praised as good people in court. It is also important to be clear about what this reform does and does not do. It does not prevent judges from considering the whole person in front of them. Courts will still be able to have references submitted that consider prior history, remorse, rehabilitation prospects, youth, background, psychological evaluations and all other relevant sentencing factors. What it does remove is the purely subjective weight given to so-called good character references which too often reflects privilege, influence and social standing rather than accountability.

This reform does not remove fairness from sentencing. It removes one of the clearest ways that privilege enters it. Thousands of survivors across New South Wales and beyond are looking to this reform as a sign that the legal system may finally be prepared to centre their harm rather than the character of the perpetrator. I strongly urge this Committee to support the NSW Sentencing Council's recommendation in full. I look forward to answering your questions. Thank you very much.

The Hon. DAMIEN TUDEHOPE: I start in relation to the SAMSN position. Your focus, primarily, has been on survivors of sexual abuse, has it not?

PRUE GREGORY: That's correct.

The Hon. DAMIEN TUDEHOPE: I take it that the submission that you would make is for the removal of good character references in relation to child sex offences.

PRUE GREGORY: That's where our expertise lies, yes. But having also looked at the Sentencing Council report, we can see the benefit of removing good character references per se.

The Hon. DAMIEN TUDEHOPE: Did you read the dissenting submissions in relation to that report?

PRUE GREGORY: No, I didn't.

The Hon. DAMIEN TUDEHOPE: The dissenting submissions, by and large, dispel the idea that good character evidence is the main province of the privileged and upper middle class people. If I put that to you, would you agree with that?

PRUE GREGORY: No, I would disagree with that, having worked in community legal centres for many, many years in disadvantaged areas of Sydney. I would have been struggling for any of my clients to have been able to get a good character reference.

The Hon. DAMIEN TUDEHOPE: Legal Aid and the Aboriginal Legal Service both oppose removing good character as something which they would say is important for the people which they represent. Do you disagree with the submissions that they make?

PRUE GREGORY: I wouldn't disagree with that. I'm talking about my personal experience as a principal lawyer in community legal centres where it was often very difficult to find someone who would give a good character reference for the offenders that I was seeing.

The Hon. DAMIEN TUDEHOPE: But certainly the evidence we've heard this morning has been that a cohort of very seriously underprivileged people benefit significantly by some form of character evidence on sentencing.

PRUE GREGORY: I would accept that, but I also think that this legislation doesn't prevent that evidence coming before the magistrate or the judge in sentencing.

The Hon. DAMIEN TUDEHOPE: Would you agree with the position that if the bill was confined to removing good character evidence in relation to sexual offences, that would be something you would support?

PRUE GREGORY: It would be, given the cohort of clients that we see.

The Hon. DAMIEN TUDEHOPE: Domestic Violence NSW is also opposed to the removal of good character considerations for domestic violence offences due to what they say is a significant issue with women—especially Aboriginal women—being misidentified as the predominant perpetrator.

PRUE GREGORY: That is something that's not our expertise to comment on.

The Hon. DAMIEN TUDEHOPE: To the extent that they have that concern, would you—

PRUE GREGORY: I would accept what they're saying.

The Hon. DAMIEN TUDEHOPE: The Advocate for Children and Young People and other stakeholders have also opposed removing good character considerations for all child offenders. Do you have a position on children who commit child sex offences? And, secondly, on children who commit other offences?

PRUE GREGORY: I come back to the point that I made earlier, which was that there are other ways of bringing that evidence into the sentencing without relying on good character being the sole mitigating factor in sentencing.

The Hon. DAMIEN TUDEHOPE: One of the things that has been put by the Bar Association in relation to this offending is that no weight be given and that the Act be amended so that it is clear that, in relation to a proposal of good character evidence, judges have the ability to give no weight to the good character evidence. Would you support that as an amendment?

PRUE GREGORY: No, I wouldn't because I think it's making it overly complex, in that what is the point of introducing good character evidence if there's no weight being given to it?

The Hon. DAMIEN TUDEHOPE: Because the High Court said in Ryan that it should be taken into account. So if you made it clear in relation to dealing with the Ryan decision that no weight would be given to that evidence, would you agree with that as a proposition?

PRUE GREGORY: Given what you've just told me, yes.

The Hon. DAMIEN TUDEHOPE: Mr James, I accept the passion with which you've advocated for this reform. I must say that your contribution has probably been at the forefront of where we are today. You would have read the submissions of the Bar Association, the Law Society, Legal Aid, the Aboriginal Legal Service and Domestic Violence, and none of them are at the point that you're at, are they?

HARRISON JAMES: I think it's entirely predictable that defence-facing organisations would oppose the removal of a recognised mitigating factor. Their role is to protect every argument that may reduce sentence severity for their clients.

The Hon. DAMIEN TUDEHOPE: Yes, but they also reject a number of the notions put by you that good character evidence is the province of the privileged, don't they?

HARRISON JAMES: I reject that claim flatly. For example, with the Aboriginal Legal Service, I take concerns about disproportionate incarceration extremely seriously. But I do not accept that preserving good character is the answer. The Sentencing Council found that good character is unequally available and can privilege those with status, networks and respectability. If we want a less biased system, removing the subjective and status-based mechanisms is one step towards that.

The Hon. DAMIEN TUDEHOPE: When you say that there is a status-based mechanism for the purposes of using character, on what basis do you say that's the case? Is there a body of evidence that you can point to? Because the evidence we heard from them is quite the contrary.

HARRISON JAMES: The NSW Sentencing Council report. They've established an evidence base.

The Hon. DAMIEN TUDEHOPE: Contrary to what Legal Aid are telling us, contrary to what the Public Defenders Office is telling us and contrary to what the Bar Association is telling us. They say that that doesn't exist.

HARRISON JAMES: I don't agree with that, wholeheartedly. As a victim-survivor of child sexual abuse, I understand the dynamics and how abuse is carried out.

The Hon. DAMIEN TUDEHOPE: I don't downplay that at all.

HARRISON JAMES: I'm not suggesting you are, sir. But I think the defence-facing organisations—as I said, it is entirely predictable that they would oppose this, because their role is to protect every argument that may reduce sentence severity for their clients. That is a legitimate professional role, but it is not a neutral one. It is a position shaped by the interests of the defence system, and it should not be treated as though it were the same as an objective public interest view on what sentencing requires.

The Hon. DAMIEN TUDEHOPE: You'd have to say, though, would you not, that probably Legal Aid represent the most underprivileged people who are potentially facing a court process.

HARRISON JAMES: Look, I'm increasingly concerned that much of the resistance to this reform is not actually about whether good character remains justified in principle, but rather about what its removal means for the convenience of existing actors within the system. Defence-focused stakeholders lose a recognised mitigating tool, corrections-facing stakeholders worry about pressure on remand and custody, and system managers worry about flow-on strain. Those may be genuine concerns from their institutional standpoint, but they are not sufficient reasons to preserve a practice that the NSW Sentencing Council found has no sufficient justification, is vague and uncertain, and risks re-traumatising victim-survivors. That is the core of why we are here today, sir.

The Hon. DAMIEN TUDEHOPE: I accept that that is the analysis which you bring. Would you agree with a process which sought to limit the offences for which good character evidence would be available?

HARRISON JAMES: No, I stand by the NSW Sentencing Council's findings.

The Hon. DAMIEN TUDEHOPE: Even in relation to a circumstance where you have someone charged with an offence—potentially a driving offence—in circumstances where there is an impact on a victim but the person has otherwise led a life which is exemplary, and where the court is charged with a process of judging the whole person or sentencing the whole person in relation to that offending?

HARRISON JAMES: Sentencing should respond to the offence and the harm caused. It should not operate as a reward system for social standing, and that's apparently what it's doing. Sentencing Council found that good character takes a very simplistic view of an offender, rewards irrelevant good deeds and reputation and adds nothing of value that cannot be addressed by other mitigating factors. So, to put it bluntly, people should not be sentenced more favourably because they are respectable, well liked, powerful or well connected. Equality before the law demands more than that.

The Hon. DAMIEN TUDEHOPE: But we heard from the Legal Aid representative, who told us that we had a grandmother who was charged with a domestic violence offence where she has been the carer for her family and potentially the protector of her family, who potentially themselves have been the subjects of abuse over a period of time. Why wouldn't that be relevant in relation to the sentencing of the whole person?

HARRISON JAMES: Because, as the Sentencing Council established, we can look at prospects of rehabilitation, remorse—there's a myriad of factors than can be taken into account. Good character is entirely subjective. The role of sentencing is to look at the objective factors as to how this offender should be sentenced. This is only happening in sentencing at the back end, post-conviction.

Ms ABIGAIL BOYD: Thank you so much, all of you, for coming and for your advocacy. Mr James, if I could start with you. There has been a lot made of the people who have attended today predominantly having one view, I guess. But particularly in relation to child sexual abuse, I note that your position also has the support of Wirringa Baiya Aboriginal Women's Legal Centre, SAMSN, obviously, the Survivor Hub, the Grace Tame Foundation, Blue Knot, Bravehearts, Fighters Against Child Abuse Australia, Life Without Barriers, NAPCAN, Domestic Violence Crisis Service and National Women's Safety Alliance. It goes on, so you're certainly not alone. The Rape Crisis Centre, Victims of Crime Commissioner—there are a lot here—and, as you say, the vast majority of the Sentencing Council. I'd say you're on pretty strong ground. Perhaps one of the issues that keeps coming up is this focus on "We can't". I think some of the comments that read, if you are a victim of child sexual abuse, reading and thinking about it in that context is a little bit offensive, the idea that we are just looking at re-traumatisation for victims. Can you explain why the so-called good character of a perpetrator of child sexual abuse is just not relevant and perhaps how it re-traumatises because it's not relevant to hear that information?

HARRISON JAMES: Of course. I think the thing with good character in the specific context of child sexual abuse is that it is not a mitigating—if anything, it should be an aggravating factor because it provides more evidence as to how they were able to facilitate and carry out the abuse concealed for so many years. It's the same thing with domestic violence and the same thing with adult cases of rape as well. I think there's a broad, consistent theme of how these crimes actually operate. To allow that in sentencing is essentially giving these convicted offenders a discount for the very thing that allowed them to facilitate the abuse in the first place.

Ms ABIGAIL BOYD: Looking at this from the perspective of child sexual assault survivors and advocates for reform, one of the major hurdles has been getting society to understand that it doesn't matter what a person looks like on the outside; they may well be abusing your child. We saw that definitely in the child education and the early childhood space where these perpetrators are seen as being really decent people, but that doesn't mean that your child is at any less risk with those people. From that educational perspective, can you explain what this reform would achieve?

HARRISON JAMES: This reform would achieve—it would establish within the courts the understanding that this is how child sexual abuse operates in that specific context. More broadly, it's not only a practical piece of legislation that's trying to be altered here; it's also a symbolic reform. In terms of what this Parliament does by establishing this and passing it through the Parliament, it's sending a message to the wider community that if we're confronted with the harm of child sexual abuse or any other violent crime, we should not reach for that very loaded language of good character—"pillar of the community" or, "He was a good bloke. I never saw anything like that"—because it diminishes the severity of the harm that has been caused to victims, and it's essentially a gaslight of what they've experienced.

Ms ABIGAIL BOYD: We've talked a lot about the need for our justice system to be more trauma informed, both for DV victims and particularly for sexual assault victims. If we have a situation where after you've gone through all of the hurdle of actually making the complaint to police, having it believed, going through all of that, going through court and the person is found guilty, what message does it send to other people thinking about going through that process to get justice when—

HARRISON JAMES: It tells them not to bother. It tells them not to even try. The thing with the system and why survivors are so apprehensive to report in the first place is because there are all those hurdles that you mentioned. To think that you would go through the motions of reporting the crime, going through a tumultuous court case or a trial where you are hearing all these factors and you are being questioned over whether your abuse occurred or not, which is incredibly devastating in and of itself, to then secure that conviction—this person has been unequivocally found guilty of child sexual abuse or whatever crime. Then to come back at sentencing and you think you have this feeling as if you've completed it and you've been vindicated, and then to have these good character references read aloud is deeply traumatising and harmful, as the Sentencing Council established. Mind you, it is based in evidence that this is what occurs. Good character is a vague and uncertain concept. It rewards irrelevant good deeds and reputation and it's not a reliable predictor of future behaviour. Courts have themselves acknowledged its poor predictive value. That's what the NSW Sentencing Council concluded.

Ms SUE HIGGINSON: Thank you very much for being here. Mr James, I just wanted to ask you about the fact that one of the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse is that victim-survivors of child sex abuse are five times more likely to face criminal charges than those who have not been victims of child sexual abuse. Is this something that you have seen in terms of the people that you support?

HARRISON JAMES: That's outside my—I'm not familiar with that particular issue.

Ms SUE HIGGINSON: Would you necessarily oppose a circumstance in which a victim of child sexual abuse who later commits an offence, whether it be a traffic offence or a drug offence, is prevented from providing evidence to court about their character? I acknowledge the fact that you are of the view that you would still be able to present certain material. But in relation to character, if we can take away the term "good character" but "character".

HARRISON JAMES: With respect, I don't think we can take away the term "good character" because that's how the courts are currently operating.

Ms SUE HIGGINSON: Sorry, assuming if we were to reform that.

HARRISON JAMES: As a hypothetical, yes. I think that there is a myriad of different options for the courts to consider that specific case. I'm still in support of the reform as it stands.

Ms SUE HIGGINSON: Justice Health data suggests 60 per cent of women and 37 per cent of men in prison reported that they had experienced childhood sexual abuse. Again, would you have concerns that victims of child sexual abuse are ending up in prison because of punitive laws as it stands? If we were to remove completely this ability for them to provide material that would try to show their character based on their history, their experience, the sexual offences that they have experienced and the abuse, does that provide any concern to you?

HARRISON JAMES: With great respect, I don't know how this is relevant to the actual call to action here with the reform. Courts aren't dismissed from prospects of rehabilitation. All those things still are retained.

Ms SUE HIGGINSON: No, I'm talking about character—somebody's character.

PRUE GREGORY: If I can answer that. Certainly, in a prior life, I was the principal lawyer of Knowmore Legal Service, which was attached to the royal commission into institutional responses. We visited every prison in Australia and took statements of people who'd been in prison for various offences. Mainly they were property offences to feed a drug habit and it's why they ended up in prison. If they were coming to me in my other life as a community legal solicitor and they'd been charged with those offences, what I would be wanting to do would be to talk about the impact of the trauma.

The good character is not something that I would actually be referring to. I'd want to go back to look at how has the trauma of being sexually abused as a child, how has that played out in your life? Interestingly, when I visited someone in Long Bay prison—a young Aboriginal person who was telling me his life, which was pretty awful in terms of what he'd done, but he then talked to me about what he'd experienced as a child. I drew the attention of him to that abuse and his subsequent behaviours. He hadn't drawn that connection. As a defence lawyer representing him, I would definitely want to be able to draw that attention to the impact of the trauma, not the good character.

Ms SUE HIGGINSON: Your premise, Mr James—and I'm not sure if the other witnesses hold this same premise—that the idea that everyone from a defence-facing organisation such as the Public Defenders Office, such as the Aboriginal Legal Service, such as Legal Aid would somehow be looking at the—I think your evidence was the main "objective" is to lessen sentence. Do you at all entertain the view that, as officers of the court, their primary and principal role is to ensure that the sentence received is the one that is most fit for purpose in the administration of justice? Or is that something that you don't hold or acknowledge? I'm happy, Ms Gregory, if you wanted to—

PRUE GREGORY: Obviously, you would want that to be the case. I would agree. But there are other ways of reaching that and probably more successful ways of looking at what rehabilitation that person has gone through, what their community connections are, what support they've got beyond just being "of good character". I would think that good character of itself is such an ephemeral notion that to be able to get the evidence of a social worker or a probation and parole officer as to what they've undertaken, either in prison or in the community, whether they volunteer—that could be brought in.

Ms SUE HIGGINSON: What about unrepresented people, which is a massive cohort in the Local Court and what happens there?

PRUE GREGORY: In my experience, most of the defendants at Downing Centre have duty lawyers present and so someone would be presenting their case.

Ms SUE HIGGINSON: I'm from the regions, I'm thinking about the rest of New South Wales, which is quite large.

PRUE GREGORY: I'm at a loss to see how they would be able to introduce good character references by themselves in a proceeding.

HARRISON JAMES: The evidence before this Committee is that good character is vague, arbitrary, unequally available and re-traumatising to victims. Courts will still be able to consider the offenders full circumstances. I don't accept that preserving this particular mitigating factor of good character is necessary to achieving genuine justice for victim-survivors.

The Hon. STEPHEN LAWRENCE: Thanks to all for coming along. It's much appreciated. A question for you first, Mr James. In criminal proceedings, character arises commonly in two circumstances, as I'm sure you're aware. The first is in the trial on the question of guilt or not guilty. Normally, when it's led in that context, it's in the trial. There is normally cross-examination of the person who is asserting the accused's good character. I've seen it myself. A person who gets in the witness box in the trial and says, "This person has always been a great person", is often subjected to cross-examination along the lines of, "Well, have you seen them in this particular context?"

The second circumstance is in the sentence phase. I've noticed in the sentence phase that cross-examination on references is extremely rare—they are normally just handed up. All sorts of things can be said in references and generally goes through to the keeper. I am just wondering if you think that the courts, and practitioners in the courts, have in a sense created this situation by not testing assertions in the sentence phase and letting all sorts of material go before the judge under the rubric of good character—that in a real sense is untested opinions, evidence of general reputation and things that just are not that probative on any real question?

HARRISON JAMES: I can't speak to that directly. No-one on this table or the NSW Sentencing Council is suggesting that we remove good character evidence from a trial, because that's an important factor to remain to establish the evidence before a conviction has resulted. We're only advocating to remove the arbitrary and irrelevant notion of good character in sentencing post-conviction. It's also important to note that written references can still be given to the court in that sense; they just can't attest to their good character.

The Hon. STEPHEN LAWRENCE: Sometimes in the sentence phase, evidence is led as to whether a person has engaged in like conduct before. Similar to what is led at trial in terms of the type of character. That can sometimes be in a psychological report. So you might get a psychologist who sat down with the person and they'll give an expert opinion on how likely this conduct is to have occurred prior, why it occurred in the circumstances of the case. That psychologist or psychiatrist can then be cross-examined in the sentence phase. Are you concerned about evidence like that, or is your concern more about untested assertions as to reputation, prior good acts that are totally irrelevant?

HARRISON JAMES: As a victim-survivor of child sexual abuse and someone who has attended courts and sentencing hearings alongside victim-survivors because of my advocacy, my concern remains purely on the subjective. Imagine being a victim-survivor who has experienced sexual abuse, gone through a tumultuous trial, and you have to hear that the person that raped you is a good fellow. It's absolutely devastating to sit in that courtroom and hear that. That is all I'm concerned about getting rid of, that victim-survivors don't feel gaslit in the sentencing process.

The Hon. STEPHEN LAWRENCE: I have a question for you, Ms Gregory, following on from Ms Higginson's questions about victim-survivors who become perpetrators. As I'm sure you're aware, there's a line of case law that the courts have developed about how that matter is considered in sentencing. It's used as a mitigating factor in sentencing because there's an acceptance that, in some cases—obviously a minority of cases—there can be a relationship in terms of the role that trauma plays in someone being a victim and then becoming a perpetrator. That's something that the courts understand as relevant. I'm just wondering how you would see this new rule operating in terms of a person who has been subjected to that trauma, has otherwise had a blameless life and might have engaged in lots of good deeds? Their lawyer might want to argue that their prior history of good deeds and good character illuminates the role that the trauma has played in producing the offending. How would you see this sort of rule applying in that sort of case?

PRUE GREGORY: I think I understand where you're going with the question. I just want to clarify, when you're talking about a perpetrator, you mean an offender, not a perpetrator of sexual violence?

The Hon. STEPHEN LAWRENCE: I'm talking about, for example, a person who's been a victim of childhood sexual assault who then might have gone on, whether as a young adult or an older adult, to offend in a like way and is then seeking, on sentence, to explain the causative role of the trauma through illuminating other aspects of their life to then tie it to the trauma. That's something that I've seen in criminal proceedings. I'm just wondering how you would see this sort of rule operating in that situation.

PRUE GREGORY: Again, I'm assuming what you're talking about is the first proposed amendment, which is to get rid of (3) (f), which is reliance, using that good character?

The Hon. STEPHEN LAWRENCE: Yes.

PRUE GREGORY: I would be still very happy with the fact that subsection (3) gives a raft of other alternatives that you could talk to apart from good character.

The Hon. STEPHEN LAWRENCE: Okay. I'll just go back to you, Mr James. Something that I explored with witnesses this morning was accepting that evidence about a person's prior life and history is often going to be relevant in multiple ways. At the moment it's relevant to good character, but it's often relevant to prospects of rehabilitation, might be relevant very directly on the risk of reoffending and might also illuminate their moral culpability sometimes. How do you see the system operating, if the bill is passed, when people will still seek to tender written documents that come from people they know, speaking to their past life? Accepting that the court will have to carefully work out whether it's relevant to something other than just good character—but I'm sure there will be many cases where it is relevant to an assessment of risk, for example, relevant to rehabilitation—how will the system work to somehow minimise the trauma that's caused by these sorts of documents going in, while still accepting relevant material that goes to things other than just good character?

HARRISON JAMES: It will be far more objective and it will not use that loaded language that does harm victim-survivors. Good character is not a neutral resource. It is one of the easiest ways to mobilise support if you are well connected, if you're institutionally legible, professionally supported and able to gather persuasive referees. This reform removes one of the clearest ways privilege enters sentencing while leaving in place genuinely relevant mitigating factors.

The Hon. STEPHEN LAWRENCE: For example, you might get a person charged with an offence, let's say, of street violence—so an adult offending in a violent way against an adult—who then gets a statement from their friends which is titled something to do with character or background or something. Their friend in that document talks about what they've known of the person, their impressions of the person, how they've seen the person in like circumstances, so not react violently before. How do we better ensure that document when it's referred to in the remarks and all that sort of stuff is not understood as just relying on a "good bloke" defence? It's going to look and sound pretty similar to what you might have at the moment, but it's just going to go to something different.

HARRISON JAMES: I reject that. For a victim-survivor to hear those loaded terms—and also if, or when, I should say, this bill passes the Parliament, it will send a message to the community as well, and that's part of the process in informing how the process will work out now. We shouldn't reach for that language when we're confronted with violent harm and crime.

The Hon. STEPHEN LAWRENCE: Do you reject that the documents will still look pretty similar or do you reject something else?

HARRISON JAMES: I do. I think it'll be far more objective. In fact, I know it will be far more objective because the evidence points to that from the NSW Sentencing Council's report.

The Hon. STEPHEN LAWRENCE: That there'll be a change in the way these documents are drafted and so forth?

HARRISON JAMES: No, but it will establish that good character cannot be mentioned within these written references.

The Hon. STEPHEN LAWRENCE: The scenario I was posing this morning to people was that good character will no longer be a standalone mitigating factor, so it won't be something that you can rely on to reduce sentence, but a pattern of behaving in a law-abiding way and of not committing the offence before will be relevant to prospects of rehabilitation and prospects of offending, for example. Those things are just so closely related, and I'm just wondering—

HARRISON JAMES: I disagree; I don't think they are. I don't think that they're that closely related as you're suggesting. I think that they are genuine mitigating factors that should be looked at, like the other ones that have been mentioned today—the prospects of rehabilitation, someone's remorse. They're circumstances that

genuinely call to be valued. But I don't accept the proposition that we should preserve a vague and unequal sentencing factor for all offenders, including perpetrators of child sexual abuse, rape and domestic violence—some of the worst crimes that can be committed—because of hypothetical cases. Courts already have more than enough tools to distinguish a serious violent offender.

The Hon. STEPHEN LAWRENCE: The reason I say they're closely related, Mr James, is it's often said the best indicator of future behaviour is past behaviour, and good character evidence generally is concerned with the past behaviour bit. When you assess someone's risk of reoffending, and risk assessment is a key part of sentencing, you're looking at past behaviour, so that's the sense in which I say they're closely related. What I'm really getting at is do you have any suggestions for the Committee that we could recommend in terms of other additional ways that, if the bill is passed, the system could minimise trauma? Bearing in mind that much of the evidence that—and I'm not talking about a lot of what you're talking about in terms of completely baseless, mere opinions of reputation and things like that. But a lot of evidence that at the moment goes to character will still go in in relation to prospects. Is there ways the system can manage that and reduce trauma in addition to this bill?

HARRISON JAMES: Again, I state that they're two very different things, because good character is talking to the subjectivity of a reference. The suggestions that you're making here are talking to the objectivity, which those things should reflect. They're two completely separate things. That's why I don't think they align in any way.

The Hon. STEPHEN LAWRENCE: Yes, I think a lot of references that I've seen in the criminal law are a mixture of the subjective and the objective. There's not necessarily a dichotomy between the two. There's a dichotomy, but not in terms of what you actually get.

Ms ABIGAIL BOYD: Can you make that crystal clear? For example, if someone said, "I've been in the footy team with this guy and he donated to this and he did, blah, blah, blah,"—if they said all of that but they just didn't say, "And I reckon he's a good guy," could you still have that objective bit?

The Hon. STEPHEN LAWRENCE: Yes, you might get references that have all of the objectionable things that you've talked about, Mr James, but then also have in them some valid observations from a behavioural point of view about the person. It's sort of a mixture, and I think in the future we're probably going to continue to get a mixture of things because, as much as we might set down these rules about this quite complex thing, the courts are going to have to manage it. I'm just wondering whether there is additional guidance that could be given on a procedural level to impact this trauma question.

HARRISON JAMES: I think that guidance is established in the NSW Sentencing Council's report.

Ms SUE HIGGINSON: Mr James, when you set out on this incredible campaign, which has shone such an incredibly important light and which I have no doubt will make systemic change from here on—and you have already, across the country—was it your ambition at the beginning to remove it completely, or were you focused initially and foremost on the heinous circumstances that led you to the campaign initially?

HARRISON JAMES: The original intent of the campaign was to abolish good character references for child sexual abuse cases, because that was our lived experience. We understood that child sexual abuse offenders often utilise their good character to play out the abuse, as I've stated today, but once there were conversations with the Attorney General when reviews were established, it just started opening up more and more questions that extend into other crime types. Then in the final report, the NSW Sentencing Council obviously found that good character references are arbitrary and serve no real purpose by any means, so it's just grown into this next thing. To answer your question, the original intent was to advocate for this change because of our lived experience.

The CHAIR: Questioning has come to an end. I don't think there were any questions taken on notice. Thanks very much for coming today.

(The witnesses withdrew.)

The Committee adjourned at 13:15.