

Preliminary Submission – NSW Sentencing Council Review of Sentencing for Fraud and Fraud related offences

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New South Wales Sentencing Council
GPO Box 31
Sydney NSW 2001
sentencingcouncil@justice.nsw.gov.au

Contact: **Olivia Irvine**
Vice-President, NSW Young Lawyers

Sarah Ienna
Chair, NSW Young Lawyers Criminal Law Committee

Contributors: Nathan Johnston, Sarah Ienna, Dr Ami-Lee Kelly, Tom Lee, Lucy Lester, Lauren Kavanagh,
Krishna Nand, Tingting Zhang

The NSW Young Lawyers Criminal Law Committee (the Committee) makes the following preliminary submission in response to the NSW Sentencing Council review of fraud and fraud-related offences (the Review)

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Committee is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and consider the provision of submissions to be an important contribution to the community. The committee aims to educate the legal profession and the wider community about criminal law developments and issues. The committee also facilitates events and programs that help to develop the careers of aspiring criminal lawyers, with the aim of providing a peer support network and a forum for young lawyers to discuss issues of concern. The Committee's members are drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Summary of Recommendations

Question 1: What factors should courts take into account when sentencing for fraud?

1. The Committee is not of the opinion that offences falling under the broad umbrella of 'fraud' meet the exceptional circumstances such that the statutory sentencing scheme ought to be altered in respect of those offences. Instead, the Committee is of the view that the most salient factors identified by the appellate courts, as discussed below, should continue to have particular relevance when it comes to sentencing for fraud offences.
2. A breach of trust often occurs in fraud cases, and victims are often vulnerable. There are appropriate aggravating factors on sentence. However, given the increasing prevalence of phone and email-based schemes designed to target unsuspecting consumers and technology users, the current typical and recognised categories of vulnerable victims may need to be re-examined, and perhaps expanded, by the courts.

Question 2: Are the purposes and principles of sentencing being applied appropriately in sentencing for fraud? Why or why not?

3. The Committee observes that there are a wide range of sentences imposed in relation to fraud offences. This is not necessarily surprising given there is no upper limit on the monetary amount which is the subject of the fraud, and these offences can be committed in a variety of circumstances.

4. While judgments surveyed by the Committee often noted the severity of the crime in relation to the maximum penalty, of all the District Court cases the Committee analysed, there were no instances in which the full sentence term was imposed. Although the maximum penalties for some fraud offences were increased as a result of legislative reform in 2009, which may provide some explanation. This issue invites further research and analysis.
5. The Committee is concerned by some observed disparities in the length of sentences given the complexity, extent, and amount of money which is the subject of the offending. However, in most of the cases reviewed, the application of the sentencing principles in individual cases was appropriate.
6. From its review of the case law, the Committee considers that there are instances where insufficient consideration has been given to the protection of the community from the offender and the impact of fraud offences on the community. In other cases, these factors and purposes of sentencing have been appropriately considered.
7. There were a number of cases in which delay was an issue raised in sentencing proceedings for fraud. The Committee suggests that the seemingly disproportionate feature of delay in fraud sentencing may warrant further research and investigation by the Council.

Question 3: Are the maximum penalties for fraud offences under Part 4AA or other fraud offences adequate? Why, or why not?

8. Generally, the Committee regards the maximum penalties for fraud offences as adequate. However, the difference in maximum penalties between the offence of forgery (s. 253), the offence of intention to deceive members or creditors by false or misleading statement of officer or organisation (s. 192H(1)), and intention to defraud by destroying or concealing accounting records (s 192F(1)), is of significance, and lacks justification. The Committee proposes this issue of disparity of maximum penalties requires further consideration.
9. The Committee would welcome the opportunity to assess sentences pre and post the 2009 reforms to ascertain any relevant differences in sentencing, including any relevant data that may be obtained by the Sentencing Council (noting the limitations on relying upon statistics alone). Such data may provide more insight into any difference caused by changes in maximum penalties on sentencing patterns.

Question 4: Are the sentences imposed by the courts for fraud offences under Part 4AA or other fraud offences adequate? Why or why not?

10. When reviewing statistics, those sentenced for fraud offences generally appear to have a lower rate of recidivism than other offenders (with one notable exception). Therefore, such sentences appear to be achieving specific deterrence, which is one of the purposes of sentencing.
11. Although the Committee has some concerns with the consistency in the length of sentences imposed, it is not of the view that the legislation should be more prescriptive. The range of fraud crimes committed is incredibly broad and judicial discretion is essential

Question 5: Does sentencing for fraud appropriately respond to the needs of fraud victims?

12. The Committee maintains that the categories of offences in which a victim impact statement ('VIS') can be made should be expanded to allow their use in sentencing proceedings for fraud offences.
13. The Committee is of the view that if victims' experience could be brought to the court's attention through a VIS, courts would be in a better position to assess the objective seriousness of the offending, for example, by having better insight into the vulnerability of the victim, or the extent of abuse of trust involved.
14. The Committee is in favour of enabling a suitably qualified representative of an organisation, business or firm that has been subject to fraud to be given the opportunity to make a VIS.

Committee Response

Question 1: What factors should the Court take into account when sentencing for fraud?

1. It is axiomatic that sentencing principles that apply to all criminal offences are also applicable in the context of sentencing for fraud offences. In particular, the statutory factors outlined in s. 21A of the *Crimes (Sentencing Procedure) Act 1999* ('CSP Act'), which are almost entirely offence neutral, apply to fraud offences as to any other offence. This is, of course, appropriate. Where the statutory context has been altered, this has been done for offences of particular scale and significance to the community, and in an attempt to deliberately change sentencing patterns recognised by the legislature to be insufficient (see e.g. the introduction of ss. 4A and 4B *CSP Act* in response to shifting community attitudes toward domestic violence). The Committee is not of the opinion that offences falling under the broad umbrella of 'fraud' are subject to sufficiently exceptional circumstances such that the statutory sentencing scheme ought to be altered in respect of those offences.
2. Instead, the sentencing principles specific to fraud offences have been developed in appellate decisions. The Committee is of the view that the below salient factors identified by the appellate courts should continue to have particular relevance to sentencing for fraud offences.

The amount of money involved or the loss suffered

3. While not determinative of the seriousness of fraud offences, it demonstrates the degree to which an "offender [is] ready to flout the law and to advance whatever are [their] own their purposes", as well as the scope and nature of the damage caused to the victims.¹ Whether the loss is irretrievable is also relevant.²

¹ *R v Hawkins* (1989) 45 A Crim R 430. See also *R v Mungomery* (2004) 151 A Crim R 376 at [40]; *R v Woodman* [2001] NSWCCA 310; *R v Finnie* [2002] NSWCCA 533 at [59].

² *R v Todorovic* [2008] NSWCCA 49 at [19].

The length of time over which the offences were committed³

4. The Committee notes that this factor is linked to others, as it may also be an indication of the sophistication of any operation, as well as the degree to which the offender was willing to 'flout the law'.

The motive

5. Section 21A(2)(o) of the *CSP Act* provides that it is an aggravating feature that an offence was committed for financial gain. However, the Committee notes that financial gain is almost always an element of the offence or an inherent characteristic of fraud-related offending. Sentencing for such offences should rarely, if ever, engage s. 21A(2)(o) as a statutory aggravation of the offence to avoid double counting.
6. The Committee notes Spigelman CJ's comments in the guideline judgment for armed robbery *R v Henry ('Henry')*,⁴ which expressly reject the proposition that an addiction to gambling is not, in and of itself, a matter in mitigation. This is so even when the addiction is pathological.⁵ This case, and other cases on this point, were reviewed and applied in *Johnston v R*⁶ (*'Johnston'*) in relation to fraud offences. In addition to confirming that the *Henry* approach applied in relation to gambling addiction and fraud offences, in *Johnston* at [38], it was further noted that a gambling addiction will not generally reduce the offender's moral culpability where the offence is committed over an extended period, because the offender has had a degree of choice as to how to finance their addiction. Consistently with these authorities, the Committee is of the view that gambling addiction should not generally be treated as a mitigating factor in sentencing for fraud offences. The Committee notes, however, that gambling addiction may often (and appropriately) be an important consideration in the assessment of the offender's prospects of rehabilitation and likelihood of re-offending.⁷

The degree of planning and sophistication⁸

7. This is assessed during the sentencing for all offences, but takes on greater salience in typical white-collar fraud offences which are less likely to be spontaneous and require careful planning to avoid detection.

Remorse and restitution

8. Section 21A(3)(i) *CSP Act* provides that remorse demonstrated by making reparations for loss is to be taken into account as a mitigating factor. Restitution may also be an indication of remorse.

³ *R v Pont* (2000) 121 A Crim R 302 at [74], [75]; *R v Mungomery* (2004) 151 A Crim R 376 at [40].

⁴ [1999] NSWCCA 111; 46 NSWLR 346 at [203].

⁵ *R v Molesworth* [1999] NSWCCA 43, cited with approval in *Assi v R* [2006] NSWCCA 257 at [27]. See also *Petrovic* 1998 VSCA 95; cited in *Regina v Koulouris* [2007] NSWDC 262 at [22] to [24].

⁶ [2017] NSWCCA 53.

⁷ *Luong v R* [2014] NSWCCA 129 at [23], [24]; *Hartman v R* [2011] NSWCCA 261 at [52].

⁸ *R v Mille* (unrep, 1/5/98, NSWCCA); *R v Pont* (2000) 121 A Crim R 302 at [43]–[44]; *R v Murtaza* [2001] NSWCCA 336 at [15]; *Stevens v R* [2009] NSWCCA 260 at [59], [78].

However, the application of this principle may be somewhat fraught in the context of fraud offences. In *R v Woodman*, Wood CJ at CL said:

*It is not the case that an offender found guilty of fraud offences can purchase mitigation by way of a voluntary repayment. While the degree of sacrifice involved can be taken into account it cannot be overlooked that an order for compensation, or reparation does no more than require the return of ill-gotten gains to which the offender had no entitlement.*⁹

9. Therefore, the degree of sacrifice involved in the offender making restitution payments may be particularly significant when considering the extent of remorse and contrition.¹⁰ Further, in addition to the question of remorse and contrition, the proportion of money paid off which had been originally obtained by fraudulent means may be relevant to sentencing by mitigating the harm suffered by the victim.¹¹
10. In the Committee's view, these are both appropriate principles when considering restitution and remorse in the fraud context. These principles balance the need to accurately assess the harm done to the individual at the time of sentence, without reducing the sentencing exercise and remorse to an equation. That is, fraud causes harm beyond its economic consequences and a blanket principle that treated harm, remorse and reparation as linearly related would fail to adequately recognise the non-economic dimensions of each of those factors.
11. Further, a Court may make a direction to pay compensation under s. 97(1) of the *Victims Rights and Support Act 2013*, however, such a direction is not a mitigating factor at sentence.¹² In the Committee's view, this is appropriate and consistent with the purpose of s. 21A(3)(i) *CSP Act* as interpreted by the case law, which is to consider only voluntary reparation payments made with an element of sacrifice as an expression of remorse.

Any accompanying breach of trust or vulnerability of the victim(s)

12. In the Committee's view, this is a particularly salient factor when sentencing for fraud offences.¹³ While fraud can be occasioned without involving a breach of trust or a vulnerable victim, in the Committee's anecdotal experience, fraud matters beyond simple credit card "Tap and Go" offences frequently involve an element of vulnerability or abuse of trust. Common circumstances involve defrauding clients or customers by virtue of misinformation, or an abuse of a privileged position of access to information or funds, and situations of elder abuse or abuse of those living with disability. Such a breach of trust can amount to an aggravating factor,¹⁴ and the vulnerability of the victim may also be taken into account as a matter of aggravation. In the Committee's view, these are appropriate aggravating factors and, where present, render the offending more serious. A breach of trust or preying upon vulnerability can also result in the victim finding it difficult to rebuild trust in similar

⁹ [2001] NSWCCA 310 at [32].

¹⁰ In obiter remarks, *Job v R* (2011) 216 A Crim R 521 (Hidden J, McClellan CJ at CL, and Grove AJ agreeing).

¹¹ *R v Fell* [2004] NSWCCA 235 at [29].

¹² *Upadhyaya v R* [2017] NSWCCA 162 at [9], [68].

¹³ See, eg, *R v El-Rashid* (unrep, 7/4/95, NSWCCA); *R v Pont* (2000) 121 A Crim R 302; *R v Hawkins* (1989) 45 A Crim R 430.

¹⁴ *R v Murtaza* [2001] NSWCCA 336.

situations in which they were defrauded, resulting in a loss of faith in important societal institutions, and occasioning greater moral culpability on the part of the offender.

13. These matters are already adequately covered by sub-s. 21A(2)(k) and (l) of the *CSP Act*, and it is expected that prosecuting officers direct attention to those statutory aggravating factors where they arise. However, given the increasing prevalence of phone and email-based schemes designed to target unsuspecting (and perhaps unsavvy) consumers and technology users,¹⁵ current typical and recognised categories of vulnerable victims may need to be re-examined, and perhaps expanded, by courts.

Question 2: Are the purposes and principles of sentencing being applied appropriately in sentencing for fraud? Why or why not?

14. The Committee reviewed a number of publicly accessible judgments concerning sentencing for fraud related criminal offences over the last 10 years, and in particular cases involving ss. 192E – 192H. This review was limited generally to District Court cases, with Local Court judgments not being readily available, despite the majority of fraud offences being finalised in that jurisdiction. A list of the cases reviewed in detail is at Annexure A to this submission. In addition, regard was had to the Public Defenders Sentencing Table for s. 192E(1) as at July 2021.¹⁶
15. The Committee observed, based on their review, that the case law generally dealt with sentences for offenders who have committed fraud by either dishonestly gaining a financial advantage by deception, or dishonestly causing financial disadvantage to another by deception (s. 192E). The Committee found that there were few publicly available cases which consider ss. 192G and 192H.
16. Based on this review, the Committee observed a wide range of sentences imposed. This is not necessarily surprising given there is no upper limit on the monetary amount which is the subject of the fraud in these sections, and these offences can be committed in a variety of circumstances. The Committee is concerned, however, that in some cases there appears to be disparity in the length of sentences given the complexity, extent, and amount of money which is the subject of the offending. Further observations are set out below.

Objective seriousness and range of sentences

17. While judgments surveyed by the Committee often noted the severity of the crime in relation to the maximum penalty of 7-10 years imprisonment (depending on the specific provision under which the offence occurs), of all the District Court cases analysed, there were no instances in which the full sentence term was imposed. Judicial Information Research System sentencing statistics indicate

¹⁵ Australian Competition and Consumer Commission, 'Scammers capitalise on pandemic as Australians lose record \$851 million to scams', Australian Competition and Consumer Commission (Webpage, 7 June 2021) < <https://www.accc.gov.au/media-release/scammers-capitalise-on-pandemic-as-australians-lose-record-851-million-to-scams> >.

¹⁶ The Public Defenders, 'Fraud – s 192E(1) NSW Crimes Act', The Public Defenders (Webpage, July 2021) < <https://www.publicdefenders.nsw.gov.au/Documents/s192e-crimes-act-fraud.pdf> >.

that in the Local Court, the jurisdictional maximum of two years imprisonment (or 18 months assuming a 25% discount for a guilty plea) has been imposed on occasion. Although the maximum penalties for some fraud offences were increased as a result of legislative reform in 2009, which may provide some explanation, this is somewhat surprising given the time period surveyed and invites further research and analysis.

18. The monetary amount of fraud is an element considered in sentencing, yet, in the Committee's review, in some instances the quantum played little to no proportionate bearing on outcomes. The Committee observed cases in which offenders defrauded organisations or victims for six-figure sums and compared those cases with matters in which offenders had used stolen credit cards to spend much smaller amounts of money. In some instances, the sentences imposed (or indicated as the case often is) were not proportionately more serious in the former category. The Committee notes the contrast between the indicative sentences in the cases of *R v Kennedy*,¹⁷ *Holloway v R*,¹⁸ *Zhao v R*,¹⁹ and *Matthews v R*.²⁰
19. The Committee hypothesises that, to some extent, this comparison indicates that fraud causes harm beyond the immediate economic effect. The Committee also hypothesises that the inconsistency in sentences is at least partially explainable by the appropriate application of the totality principle, and the inappropriate effect of the likely relative socio-economic positions of offenders committing these different kinds of frauds. Finally, the effect of other factors in determining a sentence must always be considered. However, in the Committee's view, these potential factors would not entirely explain the disproportion, and further analysis and research may be needed. The lack of greater disparity between the indicative sentences in these different kinds of offending is more concerning when it is considered that 'white collar crime' often involves considerably more planning, pre-meditation and opportunity to cease the criminal conduct than the often opportunistic "Tap and Go" style of offending involving stolen credit cards.
20. The Committee is also of the opinion that further research or analysis may be required to determine the extent to which there are differences in the sentencing process between natural person victims and corporations.

Breach of trust

21. The Committee observed that harsher sentences were imposed for individuals in positions of trust such as solicitors, accountants and bank employees. The Committee is of the view that this is a principled approach, and one which gives appropriate weight to general deterrence for others in such positions of trust. It also reflects the gravity of such offending, given that the community needs to feel able to put their faith in persons in positions of trust. Moral culpability will also often be greater for offenders in these positions.

¹⁷[2019] NSWDC 359.

¹⁸[2017] NSWCCA 17.

¹⁹[2016] NSWCCA 179.

²⁰[2014] NSWCCA 185, particularly in relation to the first instance sentence imposed in the Local Court.

Subjective factors

22. The Committee observed that gambling addiction was a subjective factor that seemed to be particularly prominent in sentencing for fraud offences. A notable number of the cases reviewed for this submission were motivated by a need to fund a gambling addiction. Consistently with the principles set out above, this was generally not taken into account as a mitigating factor on sentence. In *R v Clarke*,²¹ the offender's efforts to overcome his gambling addiction were considered to be relevant to his prospects of rehabilitation, and also insofar as his gambling addiction and mental health condition led to a degree of moderation in relation to the need for general deterrence. In contrast, in *R v Douglass*²² the sentencing judge, although considering the decision in *Johnston*, determined that the nature and extent of the offender's "very significant" addiction to gambling provided some, although minimal, mitigation on sentence. In that case, the offender was nonetheless sentenced to full time imprisonment.

Purposes of sentencing

23. The Committee expressed some concern that, in some of the cases reviewed, insufficient consideration was given to the protection of the community from the offender and the impact of fraud offences on the community. In other cases, these factors and purposes of sentencing have been appropriately considered.²³
24. In the Committee's view, and as set out above, fraud has consequences well beyond the immediate economic effect to an individual victim. Even on a solely economic analysis, fraud is a crime that is expensive not only to victims but in terms of the overall cost to the Australian economy. A Senate Inquiry found that more than half of Australian organisations surveyed experienced white-collar crime in the past 2 years.²⁴ The Australian Federal Police estimates that serious and organised crime costs the Australian economy \$36 billion a year.²⁵ This is to say nothing of the moral cost to society and the emotional harm to victims.
25. The Committee notes that there are very different perspectives in the community about whether the current possible sentencing options, particularly incarceration, achieve rehabilitation. The Committee does not repeat that discourse here, save to note it would also apply to fraud offences.

Delay

26. There were a notable number of cases in which delay was an issue raised in sentencing proceedings for fraud. The Committee suggests that the seemingly disproportionate feature of delay in fraud sentencing may warrant further research and investigation by the Council. Whilst it is difficult to ascertain the reasons for the delay, one hypothesis is that fraud offences take longer to reach finality due to higher incidence of voluminous and/or complex evidence concerning the fraud. This is, of

²¹[2019] NSWDC 2.

²²[2019] NSWDC 202.

²³ See eg *PC v R* [2020] NSWCCA 147.

²⁴ Adele Ferguson, 'ASIC needs more power over white-collar criminals according to the Senate', *Australian Financial Review* (online, 26 March 2017) <<https://www.afr.com/companies/financial-services/asic-needs-more-power-over-white-collar-criminals-according-to-senate-20170326-gv6li2>>.

²⁵ Australian Federal Police, Submission to the Senate Standing Committee on Economics – References Committee, *Inquiry into penalties for white-collar crime*, April 2016, p. 3.

course, more likely in white collar crimes than the simple “Tap and Go” scenarios described above. The Committee is concerned about the consequential impacts of delay on sentencing and how to account for it in the sentencing process.

Question 3: Are the maximum penalties for fraud offences under Part 4AA or other fraud offences adequate? Why, or why not?

27. There have been changes to the maximum penalties for certain fraud offences in recent years as identified in the colour-coded in the table below (‘Table A’). There are notable differences in maximum penalties pre and post 2009 reform as outlined in Table A. In the Committee’s opinion, the most significant variations are as follows:

- a) The offence of forging a will or bank note used to have a maximum penalty of 14 years. This has been absorbed into the offence of forgery - making false document (s. 253), which has a maximum penalty of 10 years.
- b) The maximum penalty for director or officer making false statement is now 7 years rather than 10 years, this offence having been absorbed into intention to deceive members or creditors by false or misleading statement of officer or organisation (s. 192H(1)).
- c) The reduction of the maximum penalty by 5 years for ‘intention to defraud by destroying or concealing accounting records’ (s. 192F).
- d) The maximum penalty has increased to ten years for the following (subsequently repealed) offences, through the consolidation of these offences into s. 192E:
 - Section 179: obtain property by false pretences;
 - Section 178A: fraudulent misappropriation;
 - Section 178BA: obtain money by deception;
 - Section 178C: obtain credit by fraud;
 - Section 178A: fraudulent misappropriation; and
 - Section 184: fraudulent personation.

28. The Committee notes the contrast between the maximum penalty for an offence contrary to s. 192G (intention to defraud by false or misleading statement, the maximum penalty for which has remained unchanged at 5 years) in contrast with s. 192H (intention to deceive members or creditors by false or misleading statement of officer of organisation, with a maximum penalty of 7 years). As noted in the Second Reading Speech introducing the 2009 reforms, the higher penalty can be justified by the position of trust and responsibility that an officer of an organisation holds towards members or creditors.²⁶

²⁶ New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2009, 19508 (John Hatzistergos, Attorney General).

29. However, in the Committee's preliminary view, the justification for the difference in maximum penalties between the offence of forgery (s. 253), the offence of intention to deceive members or creditors by false or misleading statement of officer or organisation (s. 192H(1)), and intention to defraud by destroying or concealing accounting records (s. 192F(1)), is not immediately apparent. Unlike s. 192E, these offences do not require property or a financial advantage to actually be obtained, or a financial disadvantage to be caused. Rather the offences (along with s. 255 possess false document) focus on the *intention* of the person in forging the document, making the false or misleading statement, or destroying or concealing accounting records to cover up a fraud offence. In the Committee's view, the difference between the 10 year maximum penalty for the forgery offences, in comparison with the 7 and 5 year maximum penalty for ss. 192H(1) and s. 192F(1) respectively, and the lack of differentiation between the *creation* of documents and the *use* of documents, appears to lack justification and requires further consideration.
30. The Committee would welcome the opportunity to assess sentences pre and post the 2009 reforms to ascertain any relevant differences in sentencing, including any relevant data obtained by the Sentencing Council (noting the limitations on relying upon statistics alone). Such data may provide more insight into any difference caused by changes in maximum penalties on sentencing patterns.
31. Aside from the observations made above, the Committee is of the preliminary view that the maximum penalties for fraud offences are generally sufficient. The further tables ('Table B' and 'Table C') show that even after the changes resulting from the 2009 reforms, by way of comparison to other common offences, Part 4AA offences generally sit within the middle of the maximum penalties. Notably, the maximum penalty for s. 192E is double that for the offence of larceny simpliciter (5 years), but the same as larceny by clerks or servants or embezzlement by clerks or servants (10 years). Larceny is an alternative verdict to a charge of the offence of fraud (s. 192E(4)). Break and enter offences carry a much higher maximum penalty than the maximum penalty for fraud offences, however, the Committee notes that the former offences all involve a physical incursion into the premises of another, and often carry the risk of a (possibly violent) confrontation with those persons inside. Money laundering offences, when the conduct was carried out knowingly, also attract a higher penalty than s. 192E offences, however, involve conduct in relation to money that is already the proceeds of crime in the first instance.
32. Finally, as noted above, judicial decision-makers rarely approach the maximum penalty for any of the Part 4AA offences in passing sentence. Whilst the reasons for this may be an area for further research and analysis, this indicates that the current maximum penalties are sufficient.

Question 4: Are the sentences imposed by the courts for fraud offences under Part 4AA or other fraud offences adequate? Why or why not?

33. Recidivism reduction targets are not necessarily set by each state or territory government in Australia, however, historically these targets typically aim for 10% below the current recidivism rate. The twelve-month recidivism rate in NSW in 2019 for all adult prisoners leaving custody was 42.4%, and 21% for

those sentenced to penalties other than imprisonment.²⁷ From the statistics in the table below ('Table D'), it is clear that, with the exception of cases involving offences contrary to s. 192E(1)(a) dealt with in the District Court, the percentage of persons who were sentenced for fraud offences contrary to ss. 192E – 192H and subsequently offended within 12 months falls below the general recidivism rate for offenders sentenced to prison in NSW. The exception for s. 192E(1)(a) offences in the District Court is notably higher than the state average (at 53%) and invites further research and analysis. However, based on these statistics alone, the sentences for fraud offences in other contexts appear to be achieving specific deterrence, which is one of the purposes of sentencing.

34. The Committee acknowledges the limits of relying on statistics, such as those set out below, to attribute causality between the deterrent effect of sentences and rates of recidivism. All of the crimes specified in Table D could encapsulate offending by both educated professionals and people of lower socio-economic status. For those offenders who abused an organisational position of trust, a conviction for fraud type offences could prevent those persons from obtaining such a position of trust in future, reducing opportunities of re-offending. It is further recognised, for example in *R v Woodman*, that in sentencing offenders in relation to fraud offences, far greater assistance is gained from general sentencing principles rather than by reference to statistics or "schedules of fraud appeals" because of the enormous variation in the objective and subjective circumstances involved.²⁸ However, the Committee considers that in the development of policy or law reform, the statistics provided may provide some useful consideration for this term of reference.
35. From the Committee's review of sentences for fraud offences, the Committee has formed the view that the sentences generally involved a careful consideration of individual circumstances and aggravating/mitigating factors. Although the Committee has some concerns with the consistency of the assessment of objective seriousness and comparisons of the length of sentences imposed, it is not of the view of the Committee that the legislation should be more prescriptive. The range of crimes committed is incredibly broad and judicial discretion is therefore essential.

Question 5: Does sentencing for fraud appropriately respond to the needs of fraud victims?

36. By operation of ss. 26 and 27 of the *CSP Act*, the ability to make a victim impact statement ('VIS') does not apply to fraud and related offences, as sub-s. 27(2), (4) and (4A) specify certain categories of offending, generally of a violent nature, that do not include fraud and fraud-related offences.
37. Consistently with a preliminary submission made to the NSW Sentencing Council on 4 August 2017 in its review into Victim's Involvement in Sentencing, the Committee maintains that the categories of offences in which a VIS can be made should be expanded to allow their use in sentencing proceedings for fraud offences. Despite the non-violent nature of these offences, they can often involve an abuse of trust, serious breaches of privacy (such as identity theft offences), and have

²⁷NSW Bureau of Crime Statistics and Research, 'Re-offending statistics for NSW', *NSW Bureau of Crime Statistics and Research* (Webpage, 14 May 2021) < https://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Re-offending.aspx>.

²⁸[2001] NSWCCA 310, Wood CJ at CL at [22], [24]–[25].

devastating direct financial impacts, as well as indirect and long-term impacts on victims. Sentencing proceedings for fraud offences may also involve multiple victims. The extent of these impacts may not always be readily apparent to the sentencing court without the assistance of a VIS. Nor may the particular abuse of trust or vulnerability of the victim(s) be immediately apparent, such is the nature of this broad species of offending. Further, it may be significant to the victims that they are able to convey to the sentencing court, in their own words, the impacts of fraud related crimes. The Committee's view is that including the victims' voices in the sentencing process through the provision of a VIS would assist in enabling sentencing for fraud to respond to the needs of victims.

38. In respect of the utility of VIS in assisting the sentencing court to better understand the abuse of trust or vulnerability involved in fraud offending, the Committee notes *R v XX*.²⁹ This was a recent case regarding offences contrary to s. 192E committed by a solicitor against the solicitor's clients involving large sums of money. The District Court recognised the fact that vulnerable victims were more likely to fall prey to offenders who engaged in s. 192E offences. Many of these victims, who were retained by XX as clients, were made more vulnerable due to their circumstances as below:

- Ms Godfrey, a client, sought assistance on matters relating to her former husband on an apprehended violence order, divorce proceedings and a property settlement. She was misappropriated a total of \$802,727.50.
- Mr Larry Mervin retained XX to complete wills for himself and his terminally ill wife, Patricia. XX advised Mr Mervin that he needed to sell assets in his late wife's name in order to avoid tax. Consequently, Mr Mervin transferred the proceeds from the sale of his shares, in the sum of \$56,248.83, into what he understood was the trust account. The same day, XX transferred that amount into a business account and, thereafter, withdrew almost all of that money.
- A couple, Ms Melrose and Mr Fenech, the latter who had developed a brain injury, were deceived into selling business premises to set up a vendor finance scheme. XX received the settlement proceeds from the discharge of the mortgage, representing the sum of \$1,207,023.36, into his trust account. Although XX transferred a sum of \$1,100,000 to Ms Melrose upon an investigation conducted by the NSW Law Society, this sum was derived from the funds of another couple who were also clients.
- Mr David Munro, a former serving member of the Royal Australian Air Force, was discharged due to a medical condition and was due to receive compensation from the Department of Veteran Affairs ('DVA'). Mr Munro sought advice from XX on a property transaction. After receiving \$302,000 from the DVA, Mr Munro transferred the sum of \$290,000, along with a deposit of \$2,500, into accounts as directed by XX. The same day, XX transferred the entire sum out of the account, leaving it with a negative balance. Mr Munro drove to XX's place of practice, but was unable to reach XX, just a day before the contracts were due to be exchanged.

²⁹ [2020] NSWDC 771.

- Mr and Mrs Elis were retired pensioners who wished to sell their suburban home so that Mrs Elis could move into a Uniting Care retirement complex. Mr and Mrs Elis entered a contract for the sale of their home for a purchase price of \$1,038,000. The contract provided that on settlement, \$985,557.44 would be paid by the purchasers into XX's trust account. This sum was paid into a personal account in XX's name.

39. The above case is an illustration of the type of persons who may be the victims of fraud offences. The Committee is of the view that if such victims' experience could be brought to the court's attention through a VIS, courts would be in a better position to assess the objective seriousness of the offending by having better insight into the vulnerability of victims, or the extent of abuse of trust involved. The Committee notes the difficulties in relation to the voluntary nature of a VIS, and that some victims may not wish to make a VIS. However, without the ability for victims of fraud to submit a VIS, sentencing courts may not be made aware of the nature of the losses suffered by both individual and corporate victims.

40. Further, it is uncertain whether the use of the word "person" in relation to the definition of victim in s. 26 of the *CSP Act* would extend to a corporation. While s. 21 of the *Acts Interpretation Act 1987* presumably applies to enlarge the definition of "person" to a corporation, the Committee is of the view this should be made explicit in the legislation and prosecuting officers should be encouraged to facilitate access to VIS by organisations. Accordingly, the Committee is in favour of providing the opportunity for a suitably qualified representative of an organisation, business or firm that has been subject to fraud to make a VIS. In particular, the Committee recognises the assistance a sentencing court may receive from considering a VIS from a small business for whom being defrauded may have more devastating impacts, both for the survival of the business, and the wellbeing of the small business owner(s) and their immediate families. That is, the VIS mechanism enables the Court to better understand the human effects of defrauding organisations.

41. A direction to pay compensation under s. 97(1) of the *Victims Rights and Support Act 2013* may have particular relevance in fraud cases. The Committee notes that there are limits to such orders – for example, in the matter of *R v Chia* an order to pay compensation was made despite the judge's comments that "I note that it is probably an entirely useless order. That is, it will never be paid".³⁰ Despite these challenges, the Committee is of the view that such orders should continue to be available in appropriate cases to assist victims in recovering money that was fraudulently obtained, and procedures for victims to recover their money need to be as streamlined as possible. Further, these orders represent the importance of restoration as an outcome of a criminal justice process, despite not being a purpose of punishment itself.

³⁰[2019] NSWDC 813.

Concluding remarks

42. NSW Young Lawyers and the Committee thank the Council for the opportunity to make this Preliminary Submission, and would welcome the opportunity to participate further in the next stages of the Council's review.
43. If you have any queries or require further submissions, please contact the undersigned at your convenience.

Contact:



Olivia Irvine

Vice-President

NSW Young Lawyers

Email:

Alternate Contact:



Sarah Ienna

Chair

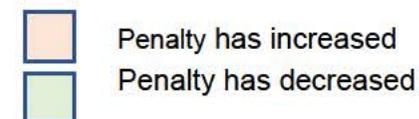
NSW Young Lawyers Criminal Law Committee

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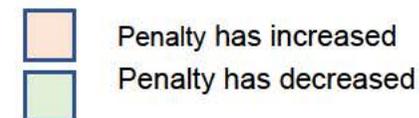
Annexure A – list of cases reviewed

R v Wu [2021] NSWDC 627
Ming v R [2021] NSWDC 223
R v Dargin [2021] NSWDC 179
R v Mark Leo O'Brien; R v Therese O'Brien [2021] NSWDC 67
R v Coe, R v Singh [2020] NSWDC 828
R v XX [2020] NSWDC 771
R v Bazouni [2020] NSWDC 61
PC v R [2020] NSWCCA 147
R v Duncan [2019] NSWDC 852
R v Chia [2019] NSWDC 813
Grierson v R [2019] NSWDC 669
R v Egar [2019] NSWDC 445
R v Kennedy [2019] NSWDC 359
R v Douglass [2019] NSWDC 202
R v Khan [2019] NSWDC 185
R v Woods [2019] NSWDC 21
R v Clarke [2019] NSWDC 2
R v Miles [2017] NSWDC 411
R v Vitale; R v Scalia [2016] NSWDC 223

Table A – changes to offences and maximum penalties – 2009 reforms



Crimes Act 1900					
New offences			Selected corresponding repealed offences		
Section	Offence	Max penalty (yrs)	Section	Offence	Max penalty (yrs)
Pt 4AA (Fraud)					
s 192E(1)(a)	Obtain property belonging to another by deception	10	s 179	Obtain property by false pretences	5
			s 178A	Fraudulent misappropriation	7
			s 184	Fraudulent personation	7
			s 176A	Director cheat or defraud	10
s 192E(1)(b)	Obtain financial advantage or cause financial advantage by deception	10	s 178BA	Obtain money by deception	5
			s 178C	Obtain credit by fraud	1
			s 178A	Fraudulent misappropriation	7
			s 184	Fraudulent personation	7
			s 176A	Director cheat or defraud	10



Crimes Act 1900					
New offences			Selected corresponding repealed offences		
Section	Offence	Max penalty (yrs)	Section	Offence	Max penalty (yrs)
s 192F(1)	Intention to defraud by destroying or concealing accounting records	5	s 174	Director or officer wilfully omit to make entry in records of property received	10
			s 175	Director or officer wilfully destroy, alter, etc, records of company	10
s 192G	Intention to defraud by false or misleading statement	5	s 178BB	Obtain money by false or misleading statement	5
s 192H(1)	Intention to deceive members or creditors by false or misleading statement of officer of organisation	7	s 176	Director or officer publish false statement	10
Pt 4AB (Identity)					
s 192J	Deal with identification information with intent to commit or facilitate indictable offence	10	N/A		
s 192K	Possess identification information with intent to commit or facilitate indictable offence	7	N/A		

 Penalty has increased
 Penalty has decreased

Crimes Act 1900					
New offences			Selected corresponding repealed offences		
Section	Offence	Max penalty (yrs)	Section	Offence	Max penalty (yrs)
s 192L	Possess equipment to make identification document or thing with intent to commit or facilitate indictable offence	3	N/A		
Pt 5 (Forgery)					
s 253	Make false document	10	s 300(1)	Make false instrument	10
			s 271	Forge will	14
			s 265	Forge bank note	14
s 254	Use false document	10	s 300(2)	Use false instrument	10
s 255	Possess false document	10	s 302	Custody of false instrument	10
s 256(1)	Make or possess equipment for making false document with intent to commit forgery	10	s 302A	Make or possess implement for making false instrument	10

Table B – other fraud related offences (All referenced sections are sections of the Crimes Act 1900 unless otherwise stated)

False or misleading

Section	Offence	Maximum penalty (years)
s 24 <i>Pawnbrokers and Second-Hand Dealers Act 1996</i> (NSW)	False or misleading information	50 penalty units ('units')
s 325 <i>Heavy Vehicle National Law Act</i> (NSW)	False or misleading entries	\$10000

Larceny

Section	Offence	Maximum penalty (years)
s 125	Larceny by bailee	5
s 156	Larceny by clerks or servants	10
s 157	Embezzlement by clerks or servants	10

Deceptive business or government practices

Section	Offence	Maximum penalty (years)
s 546D	Impersonation of police officers	2 or 7 (aggravated)
s 11 <i>Motor Dealers and Repairers Act 2013</i>	Unlicensed motor dealers	1000 units, 1 year, or both.
s 5 <i>Home Building Act 1989</i>	Seeking work by or for unlicensed person	1000 units (corporate), 200 units (individual) 500 units or 1 year (re-offend)
s 203 <i>Police Act 1990</i>	Wearing or possession of police uniforms by others	100 units, or 2 years, or both
s 116 <i>Health Practitioner Regulation National Law</i> (NSW)	Claims by persons as to registration as health practitioner	\$60000, or 3 years or both (individual) \$120,000 (corporate)

Table C – Comparison of fraud related offences with other property and public order offences

Crimes Act 1900		
Section	Offence	Maximum penalty
s 192E(1)(a)	Obtain property belonging to another by deception	10 years
s 192E(1)(b)	Obtain financial advantage or cause financial advantage by deception	10 years
s 192F(1)	Intention to defraud by destroying or concealing accounting records	5 years
s 112(1)	Breaking etc into any house etc and committing serious indictable offence	14 years (Aggravated – 20 years) (Specially aggravated – 25 years)
s 117	Larceny	5 years
s 93C	Affray	10 years
s 195(1)(a)	Destroying or damaging property	5 years
154F	Stealing motor vehicle, vessel or trailer	10 years
193B	Money Laundering	20 years (knowing proceeds of crime and intending to conceal proceeds of crime) 15 years (deals with proceeds of crime knowing that it is proceeds of crime) 10 years (recklessly deals with proceeds of crime)

Table D - information derived from Judicial Information Research System Sentence Statistics since 2018 reforms

Offences dealt with by the Local Court

Offence	Local Court			District/Supreme Court		
	# of Cases	# of Cases with prior records of similar offending	% repeat offending	# of Cases	# of Cases with prior records of similar offending	% repeating offending
192B Deception	0	N/A	N/A	0	N/A	N/A
192C Obtaining property belonging to another	0	N/A	N/A	0	N/A	N/A
192D Obtaining financial advantage or causing financial disadvantage	0	N/A	N/A	0	N/A	N/A
192E (1)(a) – dishonestly obtain property by deception	2275	836	37%	17	9	53%
192E (1)(b) – dishonestly obtain financial advantage by deception	2372	787	33%	71	21	30%
192F Intention to defraud by destroying or concealing accounting records	1	0	0%	0	N/A	N/A
192G (a) - publish, etc false/misleading statement to obtain property	8	2	25%	0	N/A	N/A
192G (b) public, etc false misleading statement to obtain financial advantage	41	6	15%	2	0	0
192H Intention to deceive members or creditors by false or misleading statement of officer of organisation	0	N/A	N/A	0	N/A	N/A