THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC:JvdPrg151122

15 November 2022

The Hon Peter McClellan AM, KC
Chairperson
NSW Sentencing Council
GPO Box 31
Sydney NSW 2001

By email: sentencingcouncil@justice.nsw.gov.au

Dear Mr McClellan,

**Fraud consultation paper**

Thank you for the opportunity to comment on the consultation paper *'Fraud'*, which has been considered by the Criminal Law Committee of the Law Society of NSW.

The Law Society has responded to the questions raised by the Sentencing Council in the attached submission.

Yours sincerely,

Joanne van der Plaat
**President**

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Law Council
OF AUSTRALIA
CONSTITUENT BODY

## 2. Fraud and fraud-related offences in NSW

### 2.1: Fraud and fraud-related offences in NSW

**(1) Are specific fraud and fraud-related offences outside of part 4AA of the *Crimes Act 1900* (NSW) still useful? Are the lesser penalties for these offences justified?**

While Part 4AA of the *Crimes Act 1900*, and particularly s192E, is sufficiently broad to cover every type of fraud, the maximum penalty under s192E of ten years is high. There are numerous fraud and fraud-related offences in legislation other than the *Crimes Act 1900,* which cover specific conduct and situations relevant to the subject matter of the statute.
Many of the additional fraud offences appropriately have much lower maximum penalties e.g. 50 penalty units or 6 months imprisonment for making a false or misleading statement to obtain a tow truck licence,[1] and are therefore useful. We support retaining these additional fraud offences.

**(2) What other issues can be identified about the structure of fraud and fraud-related offences in NSW and their respective penalties?**

Any broad review of fraud offences should include the considerable number of Commonwealth fraud offences.

## 3. The experiences of victims of fraud

### 3.1: Victim impact statements (VIS)

**(1) Should victim impact statements under the *Crimes (Sentencing Procedure) Act 1999* (NSW) be extended to victims of fraud and fraud-related offences? Why or why not?**

Fraud and fraud-related offences are often dealt with in the Local Court. The Local Court has a very large workload and is required to deal with matters very efficiently. More VISs in the Local Court will likely result in an increase in adjournments, delays in sentencing and costs for justice agencies.

We note that the court can already receive additional evidence about the impact of fraud on victims outside of the VIS process. The facts sheet or indictment should provide the Court with a sufficient description of the impact of the fraud on an individual or business.

We consider the current provision that identifies eligible offences for a VIS is appropriate. We do not consider that fraud or fraud-related offences are a special category of offences that justify a VIS beyond the discretion to allow evidence of the impact on a victim that already exists at common law.

**(2) If so, under what circumstances and conditions should they be available?**

See 3.1.(1) above.

**Question 3.2: Business impact statements**
**Should there be business impact statements for fraud and fraud-related offences in NSW? Why or why not?**

No. See comments at 3.1(1) above.

[1] Section 36, *Tow Truck Industry Act 1998* (NSW)

**Question 3.3: Reparation**

**(1) Are reparation orders, as an adjunct to sentencing, appropriate or useful in fraud cases? Why or why not?**

See 3.3(2) below.

**(2) Should more use be made of reparation orders at sentencing? How should such use be encouraged?**

The existing law is in relation to sentencing is appropriate – failure to provide reparation is an aggravating factor (s21(2)(g)), and providing reparation is only considered a factor in mitigation in certain circumstances.

Avenues for reparation for victims of fraud are ancillary to the sentencing process. Any attempt to introduce a mandatory reparation regime as part of a sentence for fraud would have significant consequences for the sentencing process.

**(3) What changes could be made to make these orders more effective?**

One option would be to allow the Local and District Courts to make reparation orders in relation to values that exceed their civil jurisdictional limit if both parties agree to the quantum. This would assist victims in having compensation orders made in criminal proceedings without the need to initiate separate civil proceedings.

## 6. Fraud Sentencing Guidelines in England and Wales Question

**6.1: Sentencing guidelines for England and Wales**
**(1) What aspect, if any, of the principles and factors in the sentencing guidelines for England and Wales could be adopted to help guide sentencing for fraud in NSW?**

**(2) How could any such guidance be implemented?**

Sentencing guidelines of the type that exist in England and Wales are fundamentally at odds with the instinctive synthesis process used by sentencing courts in NSW, and judicial discretion.

In *R v Woodman* [2001] NSWCCA 310 at [22], [24]–[25], Wood CJ at CL stated 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 objective and subjective circumstances involved.

The introduction of the type of sentencing guidelines that exist in England and Wales would involve upending more than a century of jurisprudence concerning the proper approach to sentencing offenders, and in our view is not warranted.

## 7. Sentencing outcomes

**Question 7.1: Sentences for fraud**
**(1) Are the sentences imposed for fraud and fraud-related offences appropriate? Why or why not?**

We do not perceive any inappropriateness in sentencing outcomes. Again, fraud covers a broad scope of offending, and therefore it is appropriate that a broad range of sentences is imposed, and judicial discretion retained.

**(2) Are fines an appropriate sentence for fraud and fraud-related offences? Why or why not?**

In an appropriate case a fine may be an appropriate sentencing option.

## 8. Options for reform

**Question 8.1: Maximum penalties for fraud**
**(1) Is the maximum penalty for fraud under s 192E of the *Crimes Act 1900* (NSW) sufficient? Why or why not?**

Yes, the maximum penalty is sufficient. Ten years imprisonment is a significant penalty, and gives the court the discretion to impose appropriate sentences for the broad range of fraud crimes committed under s192E.

**(2) Are the maximum penalties for other fraud and fraud-related offences in the *Crimes Act 1900* (NSW) and other legislation sufficient? Why or why not?**

Yes, the maximum penalties are sufficient. We are unaware of any fraud offence that has an insufficient penalty. Where the prosecution considers that the particular conduct should be subject to a higher maximum penalty than the fraud or fraud-related offence carries, it will almost always be open to them to charge the accused under s192E.

**(3) Should the maximum penalties for any fraud or fraud-related offences be increased? Why or why not?**

No. See 8.1(2) above.

**Question 8.2: Tiered maximum penalties**
**(1) Should the maximum penalty for the fraud offences under s 192E of the *Crimes Act 1900* (NSW) be tiered according to the value of the fraud? Why or why not?**

The Law Society does not support tiered maximum penalties for fraud offences under s192E. A tiered approach based on the quantum of the fraud would give undue emphasis to one factor when determining an appropriate sentence. Again, the current maximum allows the judicial officer to impose a sentence taking into account the diversity of circumstances in which the offence of fraud is committed.

If the maximum penalty is tiered based on the quantum of the fraud, the current maximum penalty of 10 years imprisonment should not be increased.

**(2) If maximum penalties under s 192E of the *Crimes Act 1900* (NSW) were to be tiered depending on the value of the fraud what should the values and maximum penalties be?**

If a tiered approach is adopted, we would like to be consulted further regarding the values and maximum penalties.

**Question 8.3: Organised or continuing fraud offence**
**(1) Should there be an aggravated fraud offence for organised fraud or for a continuing criminal enterprise? Why or why not?**

No, such a reform is unnecessary. The *Crimes (Sentencing Procedure) Act 1999* already provides that if "the offence was part of a planned or organised criminal activity" it is considered an aggravating factor on sentence (s21A(2)(n)), although note our comments regarding s21A in 8.8 below.

**(2) If there is to be such an offence:**
**(a) what form should it take, and**
**(b) what maximum penalty should apply?**

See 8.3(1) above.

**Question 8.4: Fraud committed in relation to other indictable offences**
**(1) Should there be an aggravated offence of committing a fraud in a way that is related to another indictable offence? Why or why not?**

No. There are already sufficient ways to acknowledge the seriousness of the offending if it is associated with other indictable offences. When the court sentences an offender it will take into account the other indicatable offence when deciding the aggregate sentence in accordance with the principle of totality.

**(2) If there was such an aggravated offence: (a) what offences should it apply to (b) how should these offences be related to the fraud offending, and (c) what maximum penalties should apply?**

See 8.4(1) above.

**Question 8.5: Other aggravated fraud offences**
**(1) Should there be any other aggravated forms of the main fraud offences? Why or why not?**

No. Section 192E is sufficiently broad, and sentencing practices adequately robust, to deal with a variety of fraud crimes that courts have to deal with.

The aggravating factors in s21A of the *Crimes (Sentencing Procedure) Act 1999* are adequate, and a sentencing judge is best placed to weigh up and take into account the different aggravating factors of an offence. We agree with the concerns raised in the consultation paper that the need to prove individual elements of an aggravated offence may also present difficulties for prosecutors and lead to more complex trials.

**(2) If any aggravated forms of the main fraud offences were to be introduced:**
**(a) what forms of aggravation should be included, and**
**(b) what maximum penalties should apply?**

See 8.5(1) above.

**Question 8.6: Indictable only offence**
**(1) Should there be an indictable-only version of s 192E of the *Crimes Act 1900* (NSW)? Why or why not?**

No. The prosecution can elect to have the matter tried on indictment. We are unaware of any issues relating to the exercise of this discretion by the DPP.

**2) If there were to be an indictable-only version of s 192E of the *Crimes Act 1900* (NSW):**
**(a) how might it be identified, and**
**(b) what maximum penalties should apply?**

See 8.6(1) above.

**Question 8.7: Low level offending**
**What alternative approaches could deal appropriately with low level fraud offending?**

The Law Society strongly supports low-level fraud offending being dealt with by way of Criminal Infringement Notices (CINs). We note that low-level larceny offences (i.e. where the value of the goods does not exceed $300.00) can already be dealt with by the issue of a CIN and we suggest that a similar approach ought to be adopted for fraud offences. Adoption of this approach would have several advantages:

- It would avoid the risk that offenders who commit minor fraud offences will incur a criminal conviction, which can in turn have consequences for the offender's career prospects and advancement in life disproportionate to the gravity of minor offending.

- Diverting minor fraud offences away from the court system would reduce the burden placed on the Local Court and the criminal justice system generally, thereby allowing more resources to be devoted to dealing with more serious crime.

- It is likely to positively impact on the over-representation of Indigenous Australians, as well other disadvantaged social groups in the criminal justice system, both directly and indirectly by avoiding the criminalisation of vulnerable persons who commit fraud offences out of desperation.

- It could be achieved with minimal legislative change, by simply adding low level fraud offences to the table in Schedule 4 of the *Criminal Procedure Regulation 2017*.

For those offences which are prosecuted through the courts, the Law Society is supportive of a broader approach to restorative justice practices. We consider that restorative justice practices should be available at any stage of the sentencing process. Restorative justice practices should be available where the victim expresses a wish to participate and the matter is evaluated as suitable.

**Question 8.8: Aggravating factors**
**What amendments, if any, are required to the aggravating factors in s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) in order to reflect aggravating factors that are relevant to fraud offences?**

The Law Society's long-standing position is that s21A should be repealed.

All of the factors in s21A are to be read in conjunction with the common law. The s21A factors were routinely taken into account by application of the common law principles prior to the enactment of s21A. This renders s21A superfluous and creates unnecessary complexity. The repeal of s21A would simplify the sentencing process.

The use of s21A as a checklist can result in courts attempting to apply factors where they are not relevant to the particular case. The checklist approach can result in the aggravating and mitigating factors assuming a disproportionate importance above the overall sentencing exercise, which should involve an instinctive synthesis approach.

That notwithstanding, we note that s21A sufficiently covers aggravating factors relating to fraud, and is not exhaustive. No further amendments to s21A are required.