



Submission

Submission date:

26 October 2022

Submission Topic:

Sentencing fraud offenders

Expressions called for by:

NSW Sentencing Council

Closing date:

4 November 2022

Submission by:

Local Court of NSW

Submission:

The NSW Sentencing Council has been asked by the Attorney General to conduct a review of sentencing for fraud and fraud related offences in New South Wales and to make any resulting recommendations for reform.

Please find attached a table of submissions of the Local Court of NSW in response to each of the published questions asked by the Sentencing Council.

Thank you for the opportunity to comment.

Yours sincerely,

[Redacted signature area]

Theo Tsavdaridis

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Downing Centre Local Court | Level 4, 143 - 147 Liverpool Street, Sydney NSW 2000

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| Questions from consultation paper | Local Court of NSW Submission |
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| <p>Question 2.1 Fraud and fraud-related offences in NSW</p> <p>(1) Are specific fraud and fraud-related offences outside of part 4AA of the <i>Crimes Act 1900</i> (NSW) still useful? Are the lesser penalties for these offences justified?</p> <p>(2) What other issues can be identified about the structure of fraud and fraud-related offences in NSW and their respective penalties?</p> | <p>(1) Yes, (to both questions), given that they form part of the larger matrix of dishonesty related offences, for which provision should continue to be made to adequately address the wide range of offending conduct within NSW and for which there are synonymous interstate provisions elsewhere. The penalties prescribed by Parliament for either these or other offences is a matter for Government.</p> <p>(2) The Local Court is not concerned with the structure or statutory location of fraud and fraud related offences. This Court routinely deals with dishonesty offences which emanate from provisions found in a variety of Acts and subordinate legislation. In all cases, the elements of the offences and their maximum penalties, against which offending conduct is assessed, are able to be adequately gleaned from the relevant provision.</p> |
| <p>Question 3.1 Victim impact statements</p> <p>(1) Should victim impact statements under <i>the Crimes (Sentencing Procedure) Act 1999</i> (NSW) be extended to victims of fraud and fraud-related offences? Why or why not?</p> <p>(2) If so, under what circumstances and conditions should they be available?</p> | <p>(1)-(2) The Local Court is disinclined to support the extension of Victim Impact Statements ('VIS') to victims of fraud.</p> <p>The Local Court notes there is a need to consider the impact of VIS on the overall workload of the Local Court, given the additional time required for VIS to be read in court, and/or considered by the presiding magistrate.</p> <p>The jurisdiction and caseload of this Court increases each year and every change, no matter how small in isolation, has a cumulative effect which must be addressed. This Court cannot assess the impact of increased use of VIS in the absence of an estimate relating to the number of matters to which this change will likely apply. Data, regarding how often VIS are likely to be used for fraud offences, is necessary before an assessment of potential impact can be made. Given the likely high prevalence of these matters, the Local Court expects the impact to be significant.</p> |
| <p>Question 3.2 Business impact statements</p> <p>(1) Should there be business impact statements for fraud and fraud-related offences in NSW? Why or why not?</p> | <p>(1) See response to question 3.1.</p> |
| <p>Question 3.3 Reparation</p> <p>(1) Are reparation orders, as an adjunct to sentencing, appropriate or useful in fraud cases? Why or why not?</p> <p>(2) Should more use be made of reparation orders at sentencing? How should such use be encouraged?</p> <p>(3) What changes could be made to make these orders more effective?</p> | <p>(1) The Local Court is disinclined to comment on the usefulness of reparation orders, however these orders are regularly sought and are within the purview of the court's discretion pursuant to <u>s.97 of the <i>Victims Rights and Support Act 2013</i> (NSW)</u>. Additionally, it is submitted that it is entirely appropriate the Local Court has at its disposal the necessary power to make such orders, consistent with the need to take into account such reparations already made by an offender prior to sentencing, as a mitigating factor pursuant to <u>s.21A(3)(i) of the <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW)</u>.</p> <p>(2) The Local Court is disinclined to encourage or discourage the use of reparation orders. It is, however, but one of the many factors a presiding magistrate is required to consider in the exercise of its sentencing discretion.</p> <p>(3) The Local Court proposes that prosecuting authorities could prepare and submit details of losses sustained in advance of the sentence date. In general, the itemisation of loss is an afterthought to conviction and a requirement to impel the timely provision of this information would assist the court in making appropriate reparation orders.</p> |
| <p>Question 6.1 Sentencing guidelines in England and Wales</p> <p>(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?</p> | <p>(1) The Local Court queries on what basis it is said that the approach in England and Wales is more appropriate than what is available in New South Wales.</p> <p>Notwithstanding its origins, this jurisdiction has evolved independently from the jurisdiction of England and Wales and the Local Court submits that where a curtailment of judicial discretion may be in effect in that jurisdiction, it is not necessary, or relevant to the jurisdiction of NSW and possibly inconsistent with the separation of powers under the Constitution.</p> |

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| <p>(2) How could any such guidance be implemented?</p> | <p>(2) The proposed approach is inconsistent with the NSW approach, whereby sentencing guidelines are based on decisions of the Court of Criminal Appeal, not an agency of the executive arm of Government.</p> <p>More generally, it is the submission of the Local Court that the most just outcomes are achieved where greater discretion is afforded to judicial officers. A judicial officer is better placed to synthesise a unique factual matrix, apply the law and impose the sentence most appropriate, over the application of a set of guidelines. Judicial decision making requires broad discretion. Where that discretion is narrowed, the implementation of a guideline becomes an administrative act, similarly offending the distinction between the judicial and executive branches of Government.</p> |
| <p>Question 7.1 Sentencing for fraud</p> <p>(1) Are the sentences imposed for fraud and fraud-related offences appropriate? Why or why not?</p> <p>(2) Are fines an appropriate sentence for fraud and fraud-related offences? Why or why not?</p> | <p>(1) The Local Court is confident that sentences imposed for fraud and fraud-related offences are appropriate and properly address the manifold purposes of sentencing outlined in <u>s 3A of the Crimes (Sentencing Procedure) Act 1999 (NSW)</u>.</p> <p>(2) The Local Court submits that the full suite of sentencing options ought to be available to a judicial officer imposing a sentence for fraud and fraud-related offences, the presence of which enables due regard to be had to the various aggravating and mitigating factors pertinent to each matter, assessed on the merits of each case and according to law.</p> |
| <p>Question 8.1 Maximum penalties for fraud</p> <p>(1) Is the maximum penalty for fraud under s 192E of the <i>Crimes Act 1900</i> (NSW) sufficient? Why or why not?</p> <p>(2) Are the maximum penalties for other fraud and fraud-related offences in the <i>Crimes Act 1900</i> (NSW) and other legislation sufficient? Why or why not?</p> <p>(3) Should the maximum penalties for any fraud or fraud-related offences be increased? Why or why not?</p> | <p>(1)-(3) The Local Court notes that 94.7% of all Table 1 offences are finalised in the Local Court, while 99.7% of all Table 2 offences are finalised in the Local Court. The Local Court's jurisdictional limitation of two years' imprisonment for a single offence, or 5 years for multiple offences, means that the only practical use to which the maximum statutory penalties are put is the backdrop against which objective seriousness is assessed, in accordance with the decisions of <i>R v Doan</i> (2000) 50 NSWLR 115 and <i>Park v The Queen</i> [2021] HCA 37.</p> <p>Any consideration given to the suitability of statutory maximum sentences would, it is submitted, benefit greater from a focus on whether or not a matter is strictly indictable, rather than the statutory maximum.</p> <p>The Local Court is disinclined to comment on the sufficiency of maximum penalties or any perceived need to increase maximum penalties. The Local Court notes that fraud and fraud-related offences were the subject of a significant increase in the maximum penalty from 5 to 10 years' imprisonment by virtue of the <u><i>Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009 (NSW)</i></u> which commenced on 22 February 2010.</p> |
| <p>Question 8.2 Tiered maximum penalties</p> <p>(1) Should the maximum penalty for the fraud offences under s 192E of the <i>Crimes Act 1900</i> (NSW) be tiered according to the value of the fraud? Why or why not?</p> <p>(2) If maximum penalties under s 192E of the <i>Crimes Act 1900</i> (NSW) were to be tiered depending on the value of the fraud what should the values and maximum penalties be?</p> | <p>(1) See response to question 6.1.</p> <p>Magistrates are well experienced in considering objective seriousness without additional constraints on discretion. The current, broad approach is preferred over 'tiered' maximum penalties, so as to retain the necessary discretion required to ensure individualised justice.</p> <p>(2) The determination of penalties prescribed by Parliament is a matter for Government.</p> |
| <p>Question 8.3 Organised or continuing fraud offence</p> <p>(1) Should there be an aggravated fraud offence for organised fraud or for a continuing criminal enterprise? Why or why not?</p> | <p>(1)-(2) The creation of new offences is a matter for Government. The Local Court notes that an added offence of aggravation would require additional resources, lead to lengthier hearing times and would likely signify an increase to this Court's jurisdiction.</p> |

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| <p>(2) If there is to be such an offence: (a) what form should it take, and (b) what maximum penalty should apply?</p> | |
| <p>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? (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?</p> | <p>(1)-(2) See response to question 8.3.</p> |
| <p>Question 8.5 Other aggravated fraud offences (1) Should there be any other aggravated forms of the main fraud offences? Why or why not? (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?</p> | <p>(1)-(2) See response to question 8.3.</p> |
| <p>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? (2) If there were to be an indictable-only version of s 192E of the <i>Crimes Act 1900</i> (NSW): (a) how might it be identified, and (b) what maximum penalties should apply?</p> | <p>(1)-(2) The Local Court is disinclined to comment on whether there ought to be an indictable only version of s 192E of the <i>Crimes Act 1900</i> (NSW). Additionally, it is submitted that the decision as to whether to elect to proceed on indictment, as opposed to summarily, ought be one which vests in the independence of the prosecuting authority, here, the Office of the Director of Public Prosecutions.</p> |
| <p>Question 8.7 Low level offending (1) What alternative approaches could deal appropriately with low level fraud offending?</p> | <p>(1) The Local Court submits that preserving judicial discretion and allowing experienced judicial officers to determine an appropriate sentence in the circumstances of each case, provides for low-level fraud offending to be dealt with appropriately.</p> |



Question 8.8 Aggravating factors

(1) 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?

(1) The Local Court submits that amendments to the list of aggravating factors for fraud offences are unnecessary. The factors contained in s 21A(2) are routinely applied with such necessary adaptations as are required so as to properly exercise the sentencing discretion available to magistrates, on a case-by-case basis, and according to law.

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