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MAKE THEM PAY

PROPOSED SENTENCING REFORMS FOR FRAUD OFFENCES

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I. Summary of Recommendations

1. The objectives of the criminal justice system should be to ensure that incarceration is preserved for violent offenders and those who have perpetrated crimes of a sexual nature. The incarceration of low-risk, and non-violent offenders adds significant economic and social costs without delivering a benefit to the community in terms of improved safety outcomes.
2. The NSW government should recognize that the use of the prison system should be reserved for the most fearful and threatening offenders, those who must be incapacitated to reduce harms to society. By definition, white-collar criminals are non-violent who pose no physical threat to society. Incarceration should be a solution for only the most threatening to society. In the case of white-collar criminals, the aims of punishment can be equally achieved through other means, such as garnishing wages, severe financial penalties, and technological incarceration, which may be more effective at incapacitating white-collar criminals from recidivism.
3. In sentencing fraud offenders, courts should take into account three key considerations: (i) community protection; (ii) the principle of proportionality (the punishment should fit the crime); and (iii) the interests of victims, which is best promoted through reparation.
4. In setting penalties for fraud offenders, consideration should also be given to the cost of the sanction. It is self-defeating to punish the community by sending low risk offenders to prison. Prison exacerbates the harm caused by the offender because it costs New South Wales taxpayers more than $130,000 to house each prisoner per year. Plus there are also significant capital expenditure costs associated with needing to build new prisons to house more inmates, which could be better allocated to critical economic and social matters, such as health, education, and infrastructure. Rather than imposing sanctions which deplete public revenue, a key objective in dealing with fraud offenders should be to pay compensation to victims and the community. Imprisonment (particularly lengthy terms) should be reserved for serious violent crimes and serious sex crimes, as these types of offenders pose a significant risk to the community. The key reasons for this are that prison should be for offenders who scare and hurt people; not those that anger the community.
5. The other key sentencing objectives which are currently applied to all sentencing matters, including fraud offences, in the form of general deterrence, specific deterrence, retribution and rehabilitation should be either abolished or have less weight ascribed to them. This is because empirical evidence establishes that they do not work. It is unintelligent and disingenuous for law-makers to pretend to the contrary. This is especially the situation in relation to general deterrence, which is a key sentencing objective when it comes to fraud offenders.
6. The main aggravating factors for fraud offences should be: (i) large sum of money stolen; and (ii) where the victim is an individual– as opposed to a large company or the government.

7. The key mitigating factors should be reparation and absence of criminal history. Victims most want to have their money returned. The sentencing system should accommodate this by treating the amount stolen as an unforgiveable debt which the offender must pay off.
8. The public money saved from imprisoning fewer fraud offenders should be applied to training more police and other officials to detect and prosecute fraud offenders. This is the best way to reduce the incidence of these crimes.
9. New sanctions should be developed to deal with fraud offenders, which take into account the considerations set out in recommendations 1 and 2. The new sanctions should aim to limit the freedom of offenders within the community and to ensure that offenders repay their ill-gotten gains.

It is noted that the recommendations in this submission are contrary to the purpose of The Review. As noted below, it is clear that the subtext to the Review is to generate a catalyst and build momentum for introducing tougher sanctions for fraud offenders. This objective is intuitively appealing but logically flawed. People, of course, do not like criminals – including fraudsters. The purpose of this submission is to influence the government to make decisions in this area based not on their intuitive and feelings but instead on empirical facts and established bulwarks of justice.

This submission is divided into three main parts. The next part sets out the meta-background to the submission. This makes clear that the purpose of the Review is to justify sentencing changes to that will result in harsher penalties against fraudsters and why this aim if flawed. This Part also explains why it is flawed to make recommendations for reform to the sentencing of fraud offenders without contextualising these within the framework of the overall sentencing system.

Part III provides the substantive background to the submission. It defines fraud offences, their frequency and the manner in which fraud offenders are sentenced. This part relies heavily on information contained in the New South Wales Sentencing Council, Fraud, Consultation Paper (September 2022).[1] We refer to this document as the '*Consultation Paper*'. It is important to summarise the key aspects of the Consultation because some readers will read this submission as a stand-alone document without referring to the Consultation. Moreover, readers should not be required to read the Consultation report in order to understand this submission.

The recommendations in Part IV and are also contained in Parts V, VI and VII of this submission. The Review directed submissions to five specific questions. The answers to these are set out in the conclusion of this submission, which is set out in Part VIII. These are contained in the conclusion of this submission because the answers follow logically from the recommendations we set out earlier.

1 New South Wales Sentencing Council, 'Review of Fraud and Fraud-related Offences,' (Consultation Paper, 2022) https://www.sentencingcouncil.justice.nsw.gov.au/Documents/Current-projects/Fraud/CP%20Fraud.pdf.

II. Current Approach to Sentencing Fraud Offenders and the Subtext to The Review

A. *The Purpose of the Consultation – to make a case for harsher penalties – is misguided*

In making this submission, it is pertinent to note the subtext to the Review. This emerges from a reading of the media release. In that release, Attorney General Mark Speakman states that:

> This type of crime [fraud] can have a *devastating impact* on those who fall prey to fraudsters, whether they be businesses or individuals.... "Fraud can cause *great emotional distress*, hardship and a loss of confidence, especially for the elderly and more vulnerable in our society. ... Often fraud involves a victim sending money or personal information to an offender, which can make the victim feel *ashamed or embarrassed* as well as guilty or personally responsible ... In the case of romance fraud, the effect of betrayal combined with the embarrassment and shame that follows, *can be enormously damaging*, both psychologically and financially. ... Technology, the internet and booming online commerce have significantly changed how fraudsters prey on unsuspecting members of our community. ... It is essential that our laws are fit for purpose and strike the right balance between protecting the community, reducing crime, and punishing and rehabilitating offenders.[2] (Emphasis added)

The above passage focuses on the plight of victims and uses emotive language to describe the hardship endured by some victims. This is an important perspective and the most important consideration that should drive sentencing outcomes. However, to focus only on this consideration in a sentencing review signals the direction which the review is aimed at – mainly harsher sentences for fraud offences. Moreover, the negative impacts on victims from fraud offences are generally no worse (and often better) than for other offences.[3] Thus, it is evident the Review aims to elicit support for harsher penalties for fraud offenders – and indeed as noted in the Consultation Paper the weight of preliminary submissions to the Review make this recommendation.[4]

This submission rejects the contention that fraud offenders should be dealt with more harshly. Paradoxically, this is not because we take the view that the interests of victims should be subordinated to the other considerations. The opposite is true. The interests of victims in sentencing fraud offenders should be the paramount consideration. Their interests are best served, however, not through tougher penalties but through reparation and allocating criminal justice resources to measures that will reduce the incidence of fraud – hence reducing the overall number of victims. These are discussed below.

2 Mark Speakman (Attorney-General of NSW), 'Have your say on changes to fraud sentencing' (Media release, 27 September 2022) https://www.nsw.gov.au/media-releases/have-your-say-on-changes-to-fraud-sentencing#:~:text=In%20September%202021%2C%20Attorney%20General,for%20reform%20it%20considers%20appropriate.

3 See Part IV below.

4 Consultation Paper, 110-112.

Further, it costs New South Wales taxpayers over $130,000 annually to house each prisoner.[5] The community should not be made victims of bad criminal justice policy by having such large sums diverted from health and education to detain low-risk offenders.

B. *Sensible Changes to Sentencing Fraudsters Can Only be Make in the Context of the* Overall Sentencing System

In making sentencing reforms, it is imperative that they are implemented coherently. This means that any reforms need to be undertaken in the context of the overall sentencing system. Doctrinal coherency is essential in any system or institution. This is because the main consideration that informs the severity and duration of criminal sanctions is the principle of proportionality, which is the view that the seriousness of the crime of crime should be matched by the harshness of the punishment. This has an objective and subjective component.[6] In the objective sense (termed cardinal proportionality),[7] offenders should be punished commensurate with the harm they cause. This is impossible to discern with total accuracy because there is no clear criterion by which the pain caused by the crime can be matched to the hardship caused by the sanction. How many years in jail is equivalent to the pain or being raped or having one's life savings stolen?

Given the difficulty associated with achieving cardinal proportionality, the proportionality principle also has a subjective context. This is called ordinal proportionality.[8] While we do not know exactly many years of prison time equates to the hardship caused by the stealing of $100,000, we do know that there is an, albeit loose, hierarchy of offence severity. Thus, murder is more serious than rape which is more serious than burglary which is more serious than theft which is more serious than driving without a licence. These conclusions are obviously in the context of mid-level seriousness for the respective offences. If sentences are altered for one offence category, there is a significant risk that this will result in a violation of ordinal proportionality. If, for example, as a result of this Review, fraud sentences are increased to a point where they are harsher than for penalties received by armed robbers or rapists this would undermine the integrity of the sentencing system.

It is for that reason that it imperative the recommendations stemming from the Review are made against the backdrop of the framework of the overall sentencing system and with regard to penalties handed down for other offence categories. Thus, parts of this submission will refer to broader sentencing principles.

5 See Part V below.

6 A von Hirsch, *Censure and Sanctions* (Oxford University press, Oxford, 1993) ch 7.

7 Ibid.

8 A von Hirsch, *Censure and Sanctions* (Oxford University press, Oxford, 1993) ch 7.

III. Substantive Background to the Recommendations

A. *The Nature of the Offending Under Consideration*

At the outset, it is important to make clear the offence type under consideration in this submission. To this end, the Consultation Paper defines fraud offences as offences that involve an "intentional dishonest act or an omission done with the purpose of deceiving."[9] It further notes that fraud offences can be divided into three broad categories:

- white-collar crime, such as lawyers or accountants abusing a position of trust;
- frauds, such as a syndicate running a complex scam; and
- unsophisticated and/or opportunistic frauds, such as "tap-and-go" offences and low-level social security fraud.[10]

For the sake of clarity, we adopt this definition of fraud offence in this submission.

B. *The Frequency of Fraud Offences*

The Consultation Paper notes that the most common types of fraud are card fraud, failure to pay fraud, breach of trust by an employee, phishing, romance fraud, identity fraud, investment fraud and government fraud. Also, fraud is on the increase with 11% of Australians aged over 15 years of age being subjected to it 2020-21. Technology has increased the incidence of fraud.[11]

The Consultation Paper states that the main fraud offences are in section 192E of the *Crimes Act 1900* (NSW), namely, to obtain property by deception and obtain financial advantage or cause financial disadvantage, by deception. Both offences carry a maximum penalty of 10 years imprisonment. Most fraud offences are prosecuted under section 192E. It is noted that in 2019, 19,125 charges (for state and federal offences) were finalised in NSW courts in relation to fraud, deception and related offences. The most frequently utilised stated 2019 was dishonestly obtaining property by deception, which account 6824 charges. The offence dishonestly obtaining financial advantage or causing financial disadvantage by deception accounted for 6,502 charges.[12] Thus, a large number of offenders are sentenced each year for fraud and most sanctions are imposed in the context of two offences.

C. *Current Sentencing Factors*

The Consultation Paper notes that a key sentencing consideration in fraud matters is general deterrence. This is the theory that higher penalties will deter crime because potential offenders will desist from crime for fear of being subjected to harsh punishment. The Consultation Paper notes that the:

9 Consultation Paper, 2.

10 Consultation Paper, 3.

11 Consultation Paper.

12 Consultation Paper, 14.

> Court of Criminal Appeal ("CCA") has observed that weight should be given to general deterrence for a wide range of fraudulent activities. ... The principle of deterrence is important in fraud and fraud-related offences, partly because the circumstances surrounding some frauds make them difficult to detect and prosecute. Also, "white-collar offenders typically come before sentencing courts with evidence of good character and no prior convictions".... General deterrence has also been found to be necessary in cases where the fraudulent activity can be said to undermine the integrity of, and confidence in, financial and banking systems. ... The Supreme Court has observed that imprisonment may be necessary in cases of significant white collar crime to achieve general deterrence:
>
> > White-collar crime is a field in which, perhaps more than any other, offending is often a choice freely made by well-educated people from privileged backgrounds, prompted by greed rather than the more pernicious influences of poverty, mental illness or addiction that grip other communities. The threat of being sent to gaol, provided it is perceived as a real threat and not one judges will hesitate to enforce, is likely to operate as a powerful deterrent to men and women of business.[13]

It should be noted that while general deterrence is set out in the Consultation Paper in the section under the heading 'purposes of sentencing', it in fact operates as an aggravating factor given that when it applies it always increases sentence severity.

Factors that are expressly set out in the Consultation Paper as being relevant to assessing offence seriousness are:

- Amount of money involved;
- Whether loss is irretrievable;
- Motive; and
- Breach of trust.

Factors that are set out in the Consultation Paper as being aggravating in fraud offences are:

- Whether the offences is committed for financial gain (which in fact is nearly always the situation);
- Vulnerable victim; and
- Multiple victims or a series of acts.

Factors that are expressly set out in the Consultation Paper as being mitigating in fraud offences are:

- Previous good character;
- Remorse;
- Making reparation;
- Guilty plea;

13 Consultation Paper, 48.

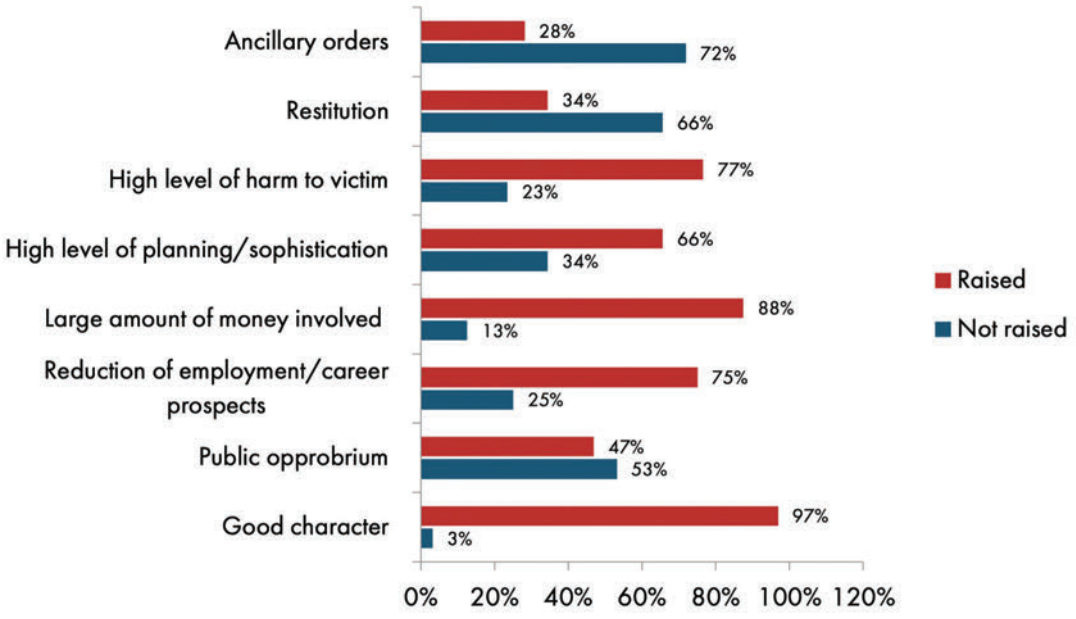
- Relevance of gambling;
- Duress; and
- Extra curial punishment (limited weight).

There is very little empirical data on the considerations that courts actually take into account when sentencing fraud offenders. The most extensive study of this nature was undertaken in the context of a PhD thesis by Dr Theo Alexander, who is an Associate Professor at Deakin University and a practising barrister at the Victorian Bar. The PhD was supervised by one of the authors of this submission (Mirko Bagaric) and is titled 'A Rational Approach to Sentencing White-Collar Offenders'.[14]

Dr Alexander examined sentencing decisions relating to one subset of fraud offenders, white-collar offenders who were charged with either Commonwealth or Victorian offences. White-collar crime involves the taking money or property (such as shares) or avoiding a legal obligation (such as a tax liability) without legal justification by an individual who is in a position of substantial influence regarding the relevant transaction. An analysis of 64 white-collar cases was taken over a 10-year sample period (2005 to 2015). The cases were dealt with in the higher courts.

The chart below[15] sets out the frequency with which each of the eight main sentencing considerations for white-collar offending was raised in the 64 cases. The sentencing considerations set out below are self-explanatory, except for ancillary orders. These are orders which may be made in addition to (or in substitution for) the sentence imposed by the court, such as compensation orders, forfeiture and confiscation orders, restitution orders, unexplained wealth orders, literary proceeds orders and reparation orders).

Figure 1: Frequency with which eight main sentencing considerations were raised in 64 white-collar criminal cases between 2005-2015



14 It is available at the Deakin University Library.

15 This is extracted from the thesis.

The table below[16] sets out how the sentencing considerations operated in the cases when they were raised.

Sentencing Variable	Observed result
Good character	Mitigating 82% of the time
Public opprobrium	Mitigating 70% of the time
Reduction of employment or career prospects	Mitigating 71% of the time
Large amount of money involved	Aggravating 59% of the time
High level of planning or sophistication	Aggravating 93% of the time
High level of harm to victim	Aggravating 73% of the time
Restitution	Mitigating 64% of the time
Ancillary orders	Mitigating 67% of the time

Thus, we see that for white-collar offenders, the key mitigating factors are good character, public opprobrium, diminution of career prospects, restitution and ancillary orders. High level of planning, serious harm to the victim and large sum of money involved operate often to increase penalty severity. It is assumed that these considerations would operation similarly for other category fraud offenders.

In the study, it was also observed that general deterrence was the main sentencing objective that influenced white-collar sentencing. The damage to the integrity of the market and loss of confidence in the market were also important considerations.[17]

D. *Sentencing Outcomes of Fraud Offenders*

Data set out in the Consultation Paper showed the fraud offenders are generally dealt with harshly:

> When the Local Court data for all fraud and fraud-related offences in the Crimes Act 1900 (NSW) is compared with the data for all offences, it shows a relatively high reliance on imprisonment in 18.2% of appearances, and a relatively low reliance on fines in 19.7% of appearances.[18]

In 2016–2021, the District Court sentenced offenders where the obtaining property offence was the principal offence on only 35 occasions. For these cases, the most common outcome was custodial sentence (48.6%) followed by a supervised community sentence (42.9%). The average prison term head sentence was 24.2 months. During the same period, District Court sentenced offenders on 144 for obtaining financial advantage offence as the principal offence. A custodial sentence (78.5%) was the most common outcome, followed by a supervised community sentence (16%). The average head sentence was 41.6 months.[19]

16 This is extracted from the thesis.

17 The appropriateness of this as a sentencing consideration is dealt with in Part VII below.

18 Consultation Paper, 80.

19 Ibid.

Thus, it is myth that fraud offenders are dealt with leniently. This is confirmed by data from Victoria. The most recent data from the Victorian Sentencing Advisory Council shows that for the period 2015-2016 to 2019-2020, 157 offenders were sentenced in the higher courts for obtaining a financial advantage by deception and of these 63% received a prison term.[20] Total effective imprisonment lengths ranged from five months to 11 years and the median principal imprisonment term was two years. As a ratio of the maximum possible sentence, the median principal sentence for the crime of obtaining a financial benefit by deception exceeded that for numerous sexual and violent offences, including recklessly causing injury, armed robbery, and indecent assault.[21]

E. *The Distinctive Profile of fraud offenders*

In order to ascertain how sentencing objectives and mitigating and aggravating factors should operate in the context of fraud offenders, it is productive to ascertain if their profile is generally different to the general offender cohort. There has been no wide-ranging analysis of the profile of fraud offenders. However, as noted above an important and considerable component of all fraud offenders are white-collar offenders. Research has established that these offenders have different traits to the majority of other criminal offences.[22] White-collar offenses can be committed by people with any characteristics, however, it emerges that generally white-collar offenders tend to have the following traits. They:

i. Are married;
ii. Are well-educated and have high-level skills;
iii. Are middle class and have assets;
iv. Have strong ties to their community and family;
v. Have no prior criminal history; and
vi. Are in their late thirties or early forties.[23]

These traits are different to that of most criminals. Data world-wide shows that most crime is disproportionately committed by young men from deprived socio-economic backgrounds, who have little education (generally they have not completed secondary school) and who often have prior convictions.[24] Thus, it is clear that white-collar offenders are considerably differently situated than other criminals. This is important for several reasons. First, the empirical data shows that offenders tend to age out of crime.

20 Sentencing Advisory Council (Vic), *Sentencing Snapshot 254: Sentencing Trends for Obtaining a Financial Advantage by Deception in the Higher Courts of Victoria 2015-16 to 2019-20*: https://www.sentencingcouncil.vic.gov.au/snapshots/254-obtaining-financial-advantage-by-deception.

21 Clinton Free, 'Let's be 'smarter' not 'harder' on white collar crime', *The Australian Financial Review*, 14 April 2021. https://www.afr.com/companies/financial-services/let-s-be-smarter-not-harder-on-white-collar-crime-20210330-p57fam.

22 W. S. Albrecht & M. B. Romney, *Surprising Profile of the White-Collar Criminal*, Prosecutor's Brief, NCJ no. 68966, 34 (1979), https://www.ojp.gov/ncjrs/virtual-library/abstracts/surprising-profile-white-collar-criminal.

23 Paul M. Klenowski & Kimberly D. Dodson, *Who Commits White-Collar Crime, and What Do We Know About Them?*, in The Oxford Handbook of White-Collar Crime (Shanna R. Van Syke et al. eds., 2016), https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199925513.001.0001/oxfordhb-9780199925513-e-6.

24 Mirko Bagaric, 'Rich Offender; Poor Offender: Why Economic and Social Status is Relevant to Sentencing' (2015) 33 *Law and Inequality* 1.

Thus, older offenders are less likely to reoffend.[25] Moreover, white-collar offenders are generally middle-class and have assets and financial resources available to them. This means that in terms of punishing them, one available option is to extract resources from them, which can be applied to important social endeavours, such as health and education, and to compensate victims. This is generally not the case with other offenders, whose typical lower-socio economic background means that it is not feasible to punish them by depriving them of any resources.[26]

The Consultation Paper also notes that in relation to fraud offenders generally, they have a higher level of representation of female offenders (approximately 34%), compared to approximately 22% for other offences.[27]

Thus, many white-collar (and fraud) offenders have a different profile to most other offenders. In addition to this, fraud offences are relevantly different to most other offenses. There are several factors which distinguish fraud offences from most other offense categories, namely:

- Fraud offences often cause no harm to any individual (especially if they are committed against government revenue or large companies);
- We can often precisely measure in dollar terms the benefit and loss from fraud offenses and can match this exactly with a proportionate response;
- Fraud offences are normally well planned or prolonged as opposed to spontaneous; and
- Fraud offences involve quantifiable losses which can be remedied through monetary restitution.

In light of the above description of nature of fraud offences, fraud offenders, and the manner in which they are dealt with by sentencing courts, we now discuss the reforms that are necessary in the sentencing of fraud offenders.

25 *Id.*

26 *Id.*

27 Consultation Paper, 41.

IV. Recommendations for Reform: The Overarching Objectives of Sentencing Fraud Offenders - Community Protection, Proportionality and Restitution

A. *Community Protection*

Sentencing has a number of objectives. The key ones are community protection, general deterrence, specific deterrence, rehabilitation, and retributivism. There is no strict hierarchy of these objectives. However, logically the main aim of the criminal justice system is to prevent harmful acts to protect individuals and the community. Thus, community protection has been recognised as the most important objective of sentencing. Brennan J stated in *Channon v The Queen:*

> The necessary and *ultimate justification for criminal sanctions is the protection of society* from conduct which the law proscribes. Punishment is the means by which society marks its disapproval of criminal conduct, by which warning is given of the consequences of crime and by which reform of an offender can sometimes be assisted. Criminal sanctions are purposive, and they are not inflicted judicially except for the *purpose of protecting society*; nor to an extent beyond what is necessary to achieve that purpose.[28] (emphasis added)

In a similar manner, a five-member bench of the New South Wales Court of Criminal Appeal in *R v Pogson* approved the following statement from *Vartzokas v Zanker:*[29]

> The object of the courts is to fashion sentencing measures designed to reclaim such individuals wherever such measures are consistent with the primary object of the criminal law which is the protection of the community.[30]

The other sentencing aims such as deterrence and rehabilitation are in fact means of achieving this community protection. The main manner in which sentencing law aims to protect the community is through incapacitation. In fact, incapacitation and community protection are often used interchangeably. The most effective means of incapacitation in prison. It has been noted that 'protecting the community from the danger posed by an offender is done by incapacitating them, which usually means removing them from society through the imposition of a custodial term.'[31] The advantage of incapacitation is that we can be sure that while offenders are in prison, the community will be safe from their harmful acts. Community protection through incapacitation, however, has its limitations.

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28 (1978) 20 ALR 1, 5 (emphasis added). This passage has been cited with approval in numerous cases, including *Boulton v The Queen* (2014) 46 VR 308.

29 (1989) 51 SASR 277, 279 (King CJ).

30 (2012) 82 NSWLR 60. See also *Colomer v The Queen* [2014] NSWCCA 51, [65] (Davies J).

31 See, Victorian Sentencing Manual, at https://resources.judicialcollege.vic.edu.au/article/669236.

First, logically incarceration as a means of community protection is excessive in relation to offenders who do not pose a genuine risk to the safety of the community. The second limitation of incapacitation as a means of community protection is that it only provides transient protection to the community, that is for the duration of time that an offender is in prison. This is a particularly important limitation given that the most recent empirical data on recidivism shows that most offenders who are released from prison reoffend within a short period of time. The Productivity Report on Government Services 2020 shows that the portion of adult offenders in New South Wales released from prison who returned to prison within two years of release was 50.6%, compared to the national rate of 46.4%.[32]

By contrast, fraud offenders are generally far less likely to reoffend. The Discussion Paper states that of adults who were convicted of fraud, deception, and related offences in 2010, 39% reoffended within 10 years. By contrast, 83% of adults who were convicted of convicted of break and enter offences reoffended within 10 years.[33]

It has been suggested that in the Consultation Paper, that the relatively low reoffending rates of fraud offenders 'could be an indication that sentencing is achieving specific deterrence'.[34] This is not the explanation.

Specific deterrence is the theory that subjecting offenders to harsh punishment will dissuade them from further offending because they want to avoid similar punishment in the future. Daniel Nagin, F T Cullen and C L Johnson provide an extensive literature review regarding specific deterrence.[35] They reviewed separately the impact of custodial sanctions versus non-custodial sanctions and the effect of the length of sentence on reoffending. The review examined six experimental studies where custodial versus non-custodial sentences were randomly assigned; 11 studies which involved matched pairs; 31 studies which were regression-based and seven other studies which did not neatly fit into either of those three categories, and included naturally occurring social experiments which allowed inferences to be drawn regarding the capacity of imprisonment to deter offenders. The last category included a study based on clemency granted to over 20,000 prisoners in Italy in 2006. A condition of release was that if those who were released reoffended within five years they would be required to serve the remaining (residual) sentence plus the sentence for the new offence. It was noted that there was a 1.24% reduction in reoffending for each month of the residual sentence. This observation can be explained on the basis that the threat of future imprisonment discouraged offending. However, it was also noted that offenders who had served longer sentences prior to being released had higher rates of reoffending, supporting the view that longer prison terms reduce the capacity for future imprisonment to shape behaviour. Nagin et al conclude that

32 Productivity Commission, Steering Committee for the Review of Government Service Provision, *Report on Government Services 2020* (2020) Part C, Table CA.4 <https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice>.

33 Consultation Paper, 43.

34 Consultation Paper.

35 D.S. Nagin, F.T. Cullen, and C.L Johnson, 'Imprisonment and Reoffending' (2009) 38 *Crime and Justice* 115 at 145. the main studies are summarised in Sentencing Advisory Council (Vic), Does Imprisonment Deter? A Review of the Evidence (Research Paper, 2011).

offenders who are sentenced to imprisonment do not have a lower rate of recidivism than those who are not and, in fact, some studies show that the rate of recidivism is higher. They conclude that:

> Taken as a whole, it is our judgment that the experimental studies point more toward a criminogenic rather than preventive effect of custodial sanctions. The evidence for this conclusion, however, is weak because it is based on only a small number of studies, and many of the point estimates are not statistically significant.[36]

The review suggests that not only do longer gaol terms not deter, but neither do tougher gaol conditions. Studies also show that offenders who are sentenced to maximum security prisons as opposed to minimum security conditions do not reoffend less. Accordingly, the weight of evidence supports the view that subjecting offenders to harsh punishment is unlikely to increase the prospect that they will become law-abiding citizens in the future. The studies also show that imprisonment may make it slightly more likely that imprisonment may increase recidivism, but this finding is not definitive.[37]

The answer to why fraud offenders recidivate less is probably because their crimes are less serious on the spectrum of destructive behaviour than most other criminal offences and hence they are less morally corrupted than other offenders in the first place. Thus, community protection through incapacitation is not a strong stand-alone sentencing consideration in relation to fraud offenders given that they generally reoffend less than other offenders.

B. *Proportionalism*

i. *Overview of the Proportionality Principle*

The key sentencing principle that determines how much punishment is appropriate is proportionality. This is the principle that the hardship imposed by the punishment should be matched by the harm caused by offence. In *Veen v The Queen [No 2]*, Mason CJ, Brennan, Dawson and Toohey JJ stated:

> [t]he principle of proportionality is now firmly established in this country. It was the unanimous view of the Court in *Veen [No.1]* that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender ...[38]

The principle of proportionality does not operate to set a precise penalty. There is no single correct sentence[39] but rather courts can impose a sentence within an 'available range' of penalties;[40] the spectrum of which is defined largely by the proportionality principle.[41] Thus, the principle of proportionality sets an upper limit regarding the extent to which an offender can be punished.

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36 Ibid.

37 Ibid.

38 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472.

39 *Boulton* (n 26) 316-17 [27] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

40 See *R v Creighton* [2011] ACTCA 13; *R v Hill* [2010] SASCFC 79.

41 *Bradshaw v The Queen* (2017) 269 A Crim R 67, 77 [40] (Kyrou and Redlich JJA) ('*Bradshaw*').

The principle of proportionality has received universal support and endorsement in the legal system but is observed only in theory. In practice it is not applied because the penalty is distorted by sentencing premiums or reductions which have been applied in order to pursue unattainable objectives (like general deterrence) and the operation of over one hundred aggravating and mitigating considerations (such as remorse and breach of trust).[42]

The second reason that proportionality is not applied in practice is because the legislatures and courts have not made any serious attempt to match the two limbs (the harm caused by the crime and the hardship inflicted by the sanction) of the principle: How many years of imprisonment correlate to the pain endured by a rape victim, for example? The main difficulty here is that the two currencies are different. The interests typically violated by criminal offences are physical integrity and property rights. When it comes to sanctions however, the main currency is (deprivation of) freedom - by imprisonment. Despite this disjunct there is a solution. Rigour and consistency can be injected into the proportionality principle if both aspects of the equation focus on the extent to which the interests and flourishing of victims and offenders are set back as a result of the crime and punishment, respectively.

ii. *Fraud victims suffer but not as much as victims of violent and sexual offences*

Research establishes that the interests and flourishing of victims of serious sexual and violent offences (based on quality of life indicators such as health, employment and relationship outcomes) are significantly diminished as a result of the crimes to which they have been subjected. In short, these offences significantly damage the lives of victims. Rochelle F Hanson et al reviewed the existing literature regarding the effects of violent and sexual crimes on key quality of life indices.[43] The crimes examined included rape, sexual assault, aggravated assault, and intimate partner violence. The key quality of life indicia examined were: role function (that is, capacity to perform in the roles of parenting and intimate relationships and to function in the social and occupational domains), reported levels of life satisfaction and well-being, and social-material conditions (physical and mental health conditions). The report demonstrated that many victims suffered considerably across a range of indicia, even long after the relevant crimes occurred. The report concluded:

> In sum, findings from the well-established literature on general trauma and the emerging research on crime victimization indicate significant functional impact on the quality of life for victims. However, more research is necessary to understand the mechanisms of these relationships and differences among types of crime victimization, gender, and racial/ethnic groups.[44]

The findings suggested that victims of violent crime and sexual crime in particular, have:

- Difficulty being involved in intimate relationships and higher divorce rates;

42 These are discussed further in the next Part of this submission.

43 Rochelle F Hanson et al, 'The Impact of Crime Victimization on Quality of Life' (2010) 23(2) *Journal of Traumatic Stress* 189.

44 Ibid 194–5.

- Diminished parenting skills for female victims of partner violence (although this finding was not universal);
- Lower levels of success in the employment setting (this applies especially to victims who had been abused by their partners) and much higher levels of unemployment;
- Considerable impairment and dysfunction in social and leisure activities, with many victims retreating from conventional social supports; and
- High levels of direct medical costs associated with violent crime.[45]

Chester L Britt, in a study examining the effects of violent and property crime on the health of 2,430 respondents, noted that '[v]ictims of violent crime reported lower levels of perceived health and physical well being, controlling for measures of injury and for sociodemographic characteristics'.[46]

Victims of property crime also reported reduced levels of perceived wellbeing. The Consultation Paper notes that 'studies suggest that fraud victims surpass the physical and emotional damage of street level crime victims.' This can mean that their 'physical and emotional wellbeing" may deteriorate, with some experiencing "anxiety, depression, distress, anger, helplessness, insecurity, betrayal, self-blame, suicidal ideation, and illness'.[47] The article cited in support of this proposition in fact focuses on white-collar crime, not fraud offences generally. Moreover, it only relies on a small data set. In any event, there is no doubt that fraud victims do suffer as a result of the crime, however as noted by Chief Justice Gleeson 'crimes of armed robbery usually constitute a far more serious breach of the peace and danger to the public' than crimes involving fraud.[48]

While, fraud offences do cause hardship to victims, this is generally less so than victims of other violent and sexual offences.

iii. *Fraud against government and large companies is less damaging*

In relation to fraud against organisations, the Consultation notes that 'fraud can cause financial, commercial or reputational harm to businesses or organisations. ... Other harmful effects include diminished faith in an organisation, loss of stakeholders' trust, loss of market value, and the erosion of public morality'.[49] These harms are vague and to some extent untestable. An 'erosion of public morality' cannot, for example, drive legal policy. To the extent that these claims are testable, for instance a reduction in market confidence and loss of market value, they are false. This is especially in relation to offences which are committed in the context of the stock market or against the public revenue.

A study published in 2017 examined the impact of high-profile white-collar offending on the stock market.[50] The study focused on 35 high-profile insider trading and market

45 Ibid 190-3.

46 Chester L Britt, 'Health Consequences of Criminal Victimization' (2001) 8(1) *International Review of Victimology* 63, 63.

47 Consultation Paper, 24.

48 Consultation Paper, 50.

49 Consultation Paper, 20.

50 Mirko Bagaric, Jean Du Plessis and Jacqueline Silver, 'Halting the Senseless Civil War Against White-Collar Offenders: The conduct undermined the integrity of the markets and other fallacies' (2016) *Michigan State Law Review* 1019-1090.

manipulation offenses in the United States and Australia. The cases that were selected were chosen because they received the highest penalties for cases of their type in the respective jurisdictions. It is assumed that, given that these cases involved the highest penalties, they would have attracted a considerable degree of publicity and hence become known to much of the investor community.

The cases were all post-2000, given that it was approximately around this time the internet had become commonplace and there was ample capacity to widely and instantly impart information relating to events, including sentences for serious criminal offenses. In terms of modelling trends in the fluctuation of the stock market, three time periods were examined. The first is the day of the case. The second is the business day after the sentence was imposed. The third reference point is a week after the sentence was imposed for the offense. These periods were selected because the information about the sentence would be most prominent at the time of the sentence. Presumably the decisions, judgements and behaviour of investors and potential investors would be most considerably impacted when the details of the sentence and the crime were most widely disseminated.

Taking an analysis of the 35 offences at three separate moments in time means that 105 'events' were examined in the study. On examining all 105 events, the study showed that the market rose on fifty-six of these occasions, or on 53% of the occasions. On any given day the market can obviously increase, decrease, or remain the same. During the period 2000 to 2015 both the Dow Jones Industrial Average and All Ordinaries stock market indices increased.[51] Thus, one would expect that there would be more days and weeks where the respective indices increased as opposed to decreased. There is no readily accessible data on this apart from a chart that notes the number of days that the Dow Jones increased as opposed to decreased during the period 2000 to 2015. This shows that from 2000 to 2015, the Dow Jones increased on 53% of trading days.[52] Interestingly, this is identical to the percentage of days and weeks described above in which the stock market indices rose around the time of sentencing for major stock market offending. Thus, on the basis of the above data the most tenable conclusion is that stock market offenses have no impact on the integrity of the markets or the level of confidence that investors have in the market.

The above data is supportive of the conclusion that there is no negative link between white-collar crime and investor confidence and market value. If the link regarding these two events was strong, presumably it could operate to negate at least some otherwise positive sentiment stemming from other favourable economic news that may have emerged on a relevant trading day. The most important observation to emerge from the above analysis is that an examination of stock market movements in the period shortly after sentences have been handed down in major stock market crime provides no support for the theory that major financial crime undermines the integrity of the market or investor confidence.

51 On January 1, 2000 the Dow Jones was 11,357.51 and this rose to 17,425.03 on December 31, 2015. During the same period, all the Ordinaries increased from 3,124.10 to 5,344.60.

52 Crestmont Research, 'Financial Market and Economic Research', www.CrestmontResearch.com [https://perma.cc/28KS-PESR] (last visited Oct. 24, 2016).

Thus, the fraud offences generally cause less pain and hardship than violent and sexual offences. Fraud victims suffer less than other victims. This is especially the case, when the victim is a government institution or large company. From a purely loss perspective, fraud against the government is no more damaging than a loss of the same magnitude caused by government mismanagement and waste. There is a high tolerance for this, given that governments that rarely held accountable for financial inefficiency or mismanagement. To a lesser degree the same applies to very large companies. Many of these companies, such as banks, build losses from fraud into their financial forecasting and the likelihood of fraud and its magnitude into the cost/benefit decisions regarding the facilities they provide. Thus, banks were aware that the tap and go credit card facility would result in more credit card fraud, however, this did not offset the provision of this service given that it would presumably result in more use of credit cards and the increased profits to the banks would outweigh the increased amount of fraud. None of this is to suggest that fraud against government and large companies is not serious. Ultimately, losses incurred by government and large companies are felt and distributed among individuals – either taxpayers or shareholders or customers of the companies – but these losses are diluted when they are distributed down to the individual level. The manifest reality is that fraud against the government and large companies causes less suffering than fraud against individuals.

In relation to the other side of the proportionality equation: the hardship caused by sanctions, it emerges that prison is burdensome, and in fact to a greater extent than is manifest from the nature of the sanction. Prisoners have a lower life expectancy and their lifetime income levels are greatly reduced compared to individuals with a similar profile who have not been imprisoned.[53] Prison is a considerable deprivation.

The default position is that the harshest sanctions should be reserved for the most damaging crimes. In short, this means that prison should be mainly reserved for sexual and violent offenders are sentenced to imprisonment. Fewer other types of offenders should be sentenced to imprisonment. Prison should only be contemplated for the most serious types of frauds. Alternatives to prison, discussed below, should be developed for most fraud offenders.

C. *Restitution*

As noted above proportionality principle prescribes that seriousness of the wrongdoing should be matched by the hardship of the sanction. This is a difficult formula to implement in relation to most sanctions because the sanctions are utilised are normally not of the same nature as the crime inflicted. Thus, it is not tenable to break the nose of the mugger as punishment for him breaking the nose of his assailant. Financial crime is one of the few offences, where we can match – and precisely – the seriousness of the crime with the hardship of the penalty. Moreover, we can apply this is a manner whereby the pain of the immediate victim is remedied.

53 Mirko Bagaric, Sandeep Gopalan and Marissa Florio, 'Mitigating the Incarceration Crisis: Redefining Excessive Imprisonment as a Human Rights Abuse' (2017) 38 *Cardozo Law Review* 1663-1725.

In addressing the interests of victims, the Consultation Report states that 'individual victims want to be acknowledged and have their complaint taken seriously'.[54] And that 'on one hand, it could be said that the needs of victims are met when the offender is sentenced. The offence has been recognised, the offender has been located, prosecuted and held to account.'[55]

This is false. Victims gain nothing tangible from offenders being sentenced. It is legal fiction that victims benefit meaningfully from offenders being subjected to state-imposed punishment. Most of all, victims want to have their loss remedied. This is a matter acknowledged in the Consultation Paper:

> 3.36 Another view is that sentencing procedures do not adequately recognise the needs of victims, particularly the need to be heard and the need to have their loss made good. ... Reparation, whereby fraud victims can recover some of their losses arising from an offence, has emerged as a concern. For example, the Seniors Rights Service has observed that in frauds that impact older people, "ensuring restitution for the older person of what they have lost would be a huge improvement on the current situation where there is almost no recourse". The ODPP has observed that victims "typically feel strongly that offenders should be held accountable for their actions" and this "attitude is particularly prevalent in cases where the victim(s) have not been reimbursed or compensated for their loss.[56]

While reparation is cardinal to victims, the Consultation Report notes that the criminal justice is poor at meeting this objective.

> Several stakeholders emphasised the difficulty of enforcing reparation orders, particularly given that many offenders do not have any money left. Even where the losses can be retrieved, the avenues for doing so are limited. Initiating a civil action for recovery would be an unsuitable option for many victims as it involves the investment of further time and resources without a guaranteed return. The system of victim support payments and recovery of victims' support payments from offenders administered by the Commissioner of Victims Rights does not apply to victims of fraud. ... There are two avenues for reparation for victims of fraud, that are available as an adjunct to sentencing proceedings. A criminal court, when sentencing an offender, may make: · an order for restitution of property an order for compensation for any loss sustained as a result of the offence... These orders were introduced to allow victims to request compensation in the one court action without the need to initiate separate civil proceedings. They are strictly ancillary to the sentencing process.... However, we understand that such orders may not be made often. One possible reason for the infrequent use of such orders is that victims may not be aware of the option to request reparation at sentencing. Another option is to make restitution orders mandatory.[57]

54 Consultation Paper, 30.

55 Consultation Paper, 30.

56 Consultation Paper, 30.

57 Consultation Paper, 34-35.

It is self-evident that victims of fraud want to have their money returned. It is a fundamental dereliction of the criminal justice system that orders are not automatically made for this as part of the sentencing process. A part of every sentence against every fraud offender should be a court order requiring the offender to compensate the victims every cent that has been stolen from the victim. There is no excuse for this not to occur. The victims are by definition blameless. Offenders are totally culpable for the loss. They need to repay the victim.

Of course, some offenders will not have the means to repay the amounts stolen. This should not be a barrier to the making of these orders. Most offenders are of working age and will at some point derive income. When they do, a portion of their income must go towards repaying the amounts stolen from the victims. This debt to the victims should *never* be forgiven. It should be a debt that stays with them for their entire lives until it is repaid.

The criminal justice system should put in place mechanisms to pursue these debts to victims with the same degree of vigour, tenacity, and sophistication as debts to the government such as for unpaid tax or HECS debts. Further, offenders should be given additional incentive to repay this debt prior to the sentence. The incentive should be a pre-determined sentencing discount – which is discussed further below. It would not be tenable to provide this discount for reparation paid after sentence given that this would require re-sentencing of the offender – which is too administratively burdensome.

V. Appropriate Aggravating and Mitigating Considerations

The above considerations set out the main factors that should determine the sentence for fraud offenders. The base penalties for fraud offenders should then be adjusted according to applicable aggravating and mitigating factors. There are over 200 aggravating and mitigating factors. All of them are potentially applicable to fraud offenders. However, given the unique nature of fraud offences, some aggravating and mitigating factors apply more frequently or acutely to fraud offenders. This is the focus of this part of the review.

A. *The Empirical Failure of General Deterrence*

As noted above, the cardinal sentencing consideration regarding fraud offences is general deterrence.[58] This is the theory that harsh penalties will discourage potential offenders from committing criminal offences. General deterrence seeks to dissuade potential offenders with the threat of anticipated punishment from committing similar offenses by illustrating the harsh consequences of offending. Courts impose harsh penalties on fraud offenders in order to send a message to potential offenders that they should desist from crime because it does not pay.

There are two forms of general deterrence. Marginal general deterrence is the view that severe penalties reduce the incidence of crime. It contends that imposing increasingly harsh penalties will reduce crime. Absolute general deterrence is the more modest claim. It concerns the threshold question of whether there is any connection between criminal sanctions, of whatever nature, and the incidence of criminal conduct. Absolute general deterrence does not require or support the imposition of harsh sanctions. In order for it to be effective, any sanction which people find unpleasant (such as a fine) is sufficient. The evidence suggests that marginal deterrence is a flawed theory, while absolute general deterrence does work. There is a large body of literature devoted to this issue.

Marginal general deterrence seems to be flawed in relation to all penalty types – even the threat of capital punishment does not reduce the incidence of crime. The most wide-ranging recent analysis of the impact of the death penalty on crime is by the National Research Council of the National Academies, which was released in 2012. The report concluded:

> The committee concludes that research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Consequently, claims

58 *Director of Public Prosecutions (NSW) v Hamman* (Unreported, New South Wales Court of Criminal Appeal, Shellar JA, 1 December 1998) 6.

> that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate should not influence policy judgments about capital punishment.[59]

More broadly, a 2011 study, *Prisons do not reduce recidivism: the high cost of ignoring science*, Cullen et al observed that the rates of recidivism were not affected by the custodial or non-custodial nature of punishment.[60] Notably, the authors observed that not only did prisons fail to reduce recidivism, they also had a 'criminogenic effect' whereby inmates grew more connected to crime ultimately making society less safe. By the same token, the Victorian Sentencing Advisory Council observed the futility of increasing prison terms in pursuit of increasing deterrence.[61]

Theoretically, it would seem that in the case of fraud offenses, general deterrence would be more effective because the offences are always planned and offenders are better placed to undertake a cost-benefit analysis of their conduct.[62] Yet, there is no evidence to show that even white-collar offenders are influenced by the heavy penalties imposed on others.[63] To this end, Mary Kreiner Ramirez notes that in relation to economic crime, general deterrence is difficult to measure given that most people do not make their decision to avoid illegal conduct publicly known and hence empirical analysis of this issue is difficult to undertake.[64]

While there does not seem to be a link between higher penalties and less crime, it seems that people are not totally irrational when they contemplate committing crime. The evidence shows that to the extent that people make a cost/benefit decision about committing crimes, they generally only weigh up the risk of being caught, not what will happen when they are apprehended. There is a connection between lower crime and the perception in people's minds that if they commit an offense they will be apprehended and subjected to some form of criminal sanction.[65]

Thus, it is incontestable that general deterrence cannot justify harsh sanctions. This is a legal fiction, which seemingly no amount of evidence will dissuade courts and parliaments from rejecting. On rare occasions the courts have expressed scepticism with the principle. In *Yardley v Betts* the court stated: 'the courts *must assume*, although evidence is wanting, that the sentences which they impose have the effect of deterring

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59 National Research Council of the National Academies, *Deterrence and the Death Penalty* (The National Academies Press, 2012).

60 Cullen et al. 'Prisons do not reduce recidivism: the high cost of ignoring science' (2011) 91(3) *The Prison Journal* 48S, 48S, 53S. See also, Mirko Bagaric, Theo Alexander and Athula Pathinayake, 'The fallacy of general deterrence and the futility of imprisoning offenders for tax fraud' (2011) 26(3) *Australian Tax Forum* 511. See also Mirko Bagaric and Theo Alexander, 'The capacity of criminal sanctions to shape the behaviour of offenders: specific deterrence doesn't work, rehabilitation might and the implications for sentencing' (2012) 36 *Criminal Law Journal* 159.

61 Donald Ritchie, 'Does Imprisonment Deter? A Review of the Evidence' (Paper, Sentencing Advisory Council, 2011) 2, 11.

62 See Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. Ill. U. L.J. 485, 493-94 (1999).

63 See, Mirko Bagaric et al., *The Fallacy of General Deterrence and the Futility of Imprisoning Offenders for Tax Fraud*, 26 Austl. Tax F. 511 (2011).

64 Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 Loy. U. Chi. L.J. 359, 414-15 (2003).

65 Mirko Bagaric, 'From Arbitrariness to Coherency in Sentencing: Reducing the Rate of Imprisonment and Crime While Saving Billions of Taxpayer Dollars' (2014) 19 *Michigan Journal of Race and the Law* 349.

at least some people from committing crime (emphasis added)'.[66] In *Pavlic v The Queen*, Green CJ stated that:

> [G]eneral deterrence is only one of the factors which are relevant to sentence and must not be permitted to dominate the exercise of the sentencing discretion to the exclusion of all the other factors which the law requires a judge to take into account. Secondly, although a court is entitled to proceed on the basis that there is a general relationship between the incidence of crime and the severity of sentences, there is no justification for the view that there exists a direct linear relationship between the incidence of a particular crime and the severity of the sentences which are imposed in respect of it such that the imposition of heavier sentences in respect of a particular crime will automatically result in a decrease in the incidence of that crime.[67]

In *DPP (Vic) v Russell*, the court took a somewhat more critical view about the efficacy of sentencing to achieve the goal of general deterrence and noted that in order for punishment to deter, minimally this requires that sentences are publicised to the community. As noted above, this is in reality still insufficient for deterrence to be effective in the sense of marginal general deterrence.[68]

Ultimately, no matter of empirical repudiation discourage courts from invoking the concept of general deterrence to aggravate the severity of sanctions. In *DPP (Cth) v El Karhani*,[69] the Court stated that general deterrence is one of "the fundamental principles of sentencing, inherited from the ages". In *Fern*, King CJ held that 'courts are *obliged to assume* that the punishments which Parliament authorises will have a tendency to deter people from committing crimes. The administration of criminal justice is based upon that assumption'.[70] This is fundamentally wrong. There are many reasons to impose criminal sanctions without invoking general deterrence. It is unintelligent and unethical to send people to jail on the basis of dogma that is empirically flawed. Courts will not change the approach to general deterrence, but government can and should. This review should recommend the abolition of marginal general as a sentencing consideration for fraud offenders.

In short, the theory of absolute general deterrence is valid. Marginal general deterrence is not. It follows that the keys to reducing crime are (i) the existence of criminal sanctions (such as imprisonment and fines); and (ii) putting in place systems and investigative processes that will make prospective offenders believe that if they do offend there is a high chance that they will be detected and prosecuted. In short, more police on the street is the best way to reduce crime. Higher, even draconian penalties, will not reduce the incidence of crime, including fraud offences.

66 (1979) 22 SASR 108; 1 A Crim R 329.

67 (1995) 5 Tas R 186; 83 A Crim R 13.

68 [2014] VSCA 308.

69 (1990) 21 NSWLR 370.

70 *R v Fern* (1989) 51 SASR 273 at 274.

B. *Appropriate Aggravating Factors*

There are three aggravating factors which are appropriate for fraud offenders.

The first is where a large sum of money is stolen. This follows from the principle of proportionality – the hardship caused by the offending is greater.

The second is where the victim is an individual – for reasons set out above.

The third is where the offence involved a high degree of planning and sophistication. This because this indicates a higher level of culpability.

As noted in Part III above, these are already established aggravating factors in the context of all fraud offenders.

C. *Appropriate Mitigating Factors*

There are also three mitigating considerations that apply in relation to fraud offences. The first is the payment of restitution – for reasons set out above.

The other key mitigating factor that should apply is the absence of a criminal history. This is because offenders who have transgressed only once are less likely to reoffend again.

The third mitigating factors that should apply is severe impact of incidental punishment, such as loss of employment and career.

As noted in Part III above, these already established mitigating factors in the context of all fraud offenders.

VI. The Societal Burden from Imprisoning Fraud Offenders

In addition to considering the direct consequences of the offence and the impact on the offender in determining the appropriate sentence for fraud offenders, a wide perspective should also be taken. This relates to the burden on the community of the available sanctions. To this end, imprisonment is by far the most expensive sanction.

The cost to the New South Wales taxpayer of each prisoner per year is $383 per day ($139,795 annually) – the average in Australia is $375 per day.[71] Many NSW inmates are sentenced for fraud offences: 218 of the 84013 sentenced prisoners as of 31 December 2021, with a mean prison term for fraud offences of 3.3 years.[72]

Thus, it is a myth that fraud offenders are dealt with leniently. This is confirmed by the most recent data from the Victorian Sentencing Advisory Council showing that for the period 2015-2016 to 2019-2020, 157 offenders were sentenced in the higher courts for obtaining a financial advantage by deception and of these 63% received a prison term.[73] Total effective imprisonment lengths ranged from five months to 11 years and the median principal imprisonment term two years.

As a ratio of the maximum possible sentence, the median principal sentence for the crime of obtaining a financial benefit by deception exceeded that for numerous sexual and violent offences, including recklessly causing injury, armed robbery, and indecent assault.[74]

The dividend of prison is small. In 2020-21, 45.2% of prisoners released from prison after serving a sentence in 2018-19 returned to prison within two years of release.[75] Thus, prison often only provides a transient form of protection from offenders.

71 This comprises $272 per day in real net operating expenditure and $103 in capital costs. Productivity Commission Report (the annual cost in net operating expenses alone is $99,280 per year): https://www.pc.gov.au/research/ongoing/report-on-government-services/2022/justice/corrective-services#downloads. Table 8A.19. See also, Table 8A.1 and 8A.2. This is for the financial year 2020-21. The report was issued on 28 Jan 2022.

72 ABS, *Prisoners in Australia*, https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#data-download, released 9 December 2021.

73 Sentencing Advisory Council, *Sentencing Snapshot 254: Sentencing Trends for Obtaining a Financial Advantage by Deception in the Higher Courts of Victoria 2015-16 to 2019-20*: https://www.sentencingcouncil.vic.gov.au/snapshots/254-obtaining-financial-advantage-by-deception.

74 Clinton Free, 'Let's be 'smarter' not 'harder' on white collar crime', *The Australian Financial Review*, 14 April 2021. https://www.afr.com/companies/financial-services/let-s-be-smarter-not-harder-on-white-collar-crime-20210330-p57fam.

75 Productivity Commission , 'C: Justice' in *Report on Government Services 2022* (28 January 2022) Table CA.4 The rate of prisoners returning to prisoners within two years of release increased from 44.1% in 2015-16.

VII. Re-designing Fraud Sanctions: Technological Incarceration and Super Tax Offender Levy

An important aspect of reforming the sentencing of fraud offenders is imposing sentences that are fit for purpose. As noted in the Consultation Paper, fraud offenders are motivated by greed.[76] The proceeds from this motivation can be diverted in a community-enhancing manner by compelling them to make additional contributions to the community. This can be achieved by developing two new criminal sanctions.

The first new sanction is an offender super-taxation levy. The levy would operate so that two-thirds of all income derived by the offender would be payable as taxation. The total payable would be double the amount wrongfully obtained by the offender.

In addition to this, the offender would be required to pay a one-off fine equal to the amount wrongfully obtained by the offender. This would be repaid to the victim. This would mean that in effect the offender would be required to pay back three times the amount taken by him or her.

Thus, by way of example, if a person defrauds Revenue NSW in the sum of $100,000, he or she would be required to pay back immediately $100,000 and then pay an additional $200,000 through the offender taxation levy. The amount of taxation that would be attributable to paying off this is sum if two thirds of the income earned minus the normal tax that would have been payable by the offender (the current top marginal rate is 47%).

In addition to this, offenders who commit serious fraud offences would be subjected to technological incarceration/monitoring. The key feature of this sanction is the use of modern monitoring and sensor technology, which can be used to physically confine the movements of offenders to precise locations while monitoring their actions in real-time to greatly diminish the prospect of offending. The sanction would build on the design features of home detention orders, which use GPS tracking and are already used in many parts of Australia.

Technology has already been developed that can monitor the movements of people and other moving objects and is in use in a number of contexts including detecting if a patient falls in hospital and in directing driverless cars. Tamper-proof sensor equipment and visual recording equipment could be attached to the bodies of offenders to monitor their movement. This would supplement GPS technology that monitors the location of offenders. The equipment would detect if offenders engaged in suspicious movement (for example if they picked up a sharp implement or applied force to another person) and all the offender's electronic communications would be monitored to ensure that he or she did not engage in irregular transactions.

76 Consultation Paper, 38.

This sanction would have significant advantages beyond merely reducing the harm that an offender would cause if his or her actions were not monitored. Empirical data shows that the greatest deterrent to crime is not the severity of the possible punishment but the belief by offenders that if they commit a crime that they will be detected. Thus, the mere imposition of this sanction would greatly reduce the incidence of reoffending. Moreover, when offenders who are undergoing the monitoring sanction do offend, the sensor equipment will provide cogent evidence regarding their involvement in the offence.

The sanction can be operationalised in a number of different ways so that it is tailored to match the severity of the crime. Not only can the length of the monitoring obviously be varied (from say six months to ten years) but the area of confinement can also be controlled. Thus, for example, offenders who have committed relatively serious fraud offences would have their movement confined to two kilometres from home (except for their workplace) and within this zone be precluded from places such as restaurants and bars. It is acknowledged that implementing technological incarceration and monitoring there is a need for government investment to develop the sanction.[77] Unless and until this occurs, offenders should be subjected to GPS monitoring and their movements should be confined to home and their workplace during the duration of the sanction.

The combination of the offender tax levy and technological incarceration would significantly curtail the freedom of fraud offenders while at the same time ensuring that they pay back their ill-gotten gains and hence meaningfully contribute to society.

In terms of appropriate penalties examples are as follows:

- Fraud (greater than $10,000) from an institution – two years' technological monitoring and an offender taxation levy.
- Fraud (greater than $10,000) from an individual – three years' electronic monitoring and offender taxation levy for 5 years.

77 Mirko Bagaric, Dan Hunter and Gabrielle Wolf, 'Technological Incarceration and the End of the Prison Crisis' (2018) 108 *Journal of Criminal Law and Criminology* 73.

VIII. Conclusion

There are more intelligent, evidence-based approaches to dealing with fraud offenders. The objectives for dealing with these offenders should be:

- To impose penalties that are proportionate to the seriousness of the crimes;
- To ensure that the sanctions do not unnecessarily burden taxpayers; and
- To compel offenders to contribute ill-gotten gains back to the community.

The proceeds from greed-motivated offenders can be diverted in a community-enhancing manner by compelling them to make additional contributions to the community and paying full reparation to victims. This should be achieved by developing two new criminal sanctions. The combination of the offender tax levy and technological incarceration would significantly curtail the freedom of fraud offenders while at the same time ensuring that they pay back their ill-gotten gains and hence meaningfully contribute to society.

The Review has set out five specific questions upon which it seeks comment. The answer to those questions in light of the above discussion are now set out.

i. *What factors should courts take into account when sentencing for fraud?*

In sentencing fraud offenders, courts should take into account three key considerations: (i) community protection; (ii) the principle of proportionality (the punishment should fit the crime); and (iii) the interests of victims, which is best promoted through reparation. In setting penalties for fraud offenders, consideration should also be given to the cost of the sanction and hence imprisonment is not an appropriate sanction, except in the absolute most serious instances of fraud.

ii. *Are the purposes and principles of sentencing being applied appropriately in sentencing for fraud? Why or why not?*

No, in particular too much weight is accorded to general deterrence; maintaining confidence in the market and there is insufficient focus on compensating victims.

iii. *Are the maximum penalties for fraud offences under Part 4AA or other fraud offences adequate? Why, or why not?*

This is a distraction. Maximum penalties are only one sign post for sanctions that are ultimately imposed. If they are to be changed, they should be reduced. It is untenable that any fraud would justify a 10-year prison term.

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

They are too harsh because they violate the principle of proportionality.

v. Does sentencing for fraud appropriately respond to the needs of fraud victims?

No. It is farcical that the state government puts in place more extensive processes to ensure payment of government taxes than it does not enforce compensation to victims of fraud.

MAKE THEM PAY: PROPOSED SENTENCING REFORMS FOR FRAUD OFFENCES

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