The Chief Judge of the District Court & President of the Dust Diseases Tribunal of NSW

Submissions on Fraud and Fraud-Related Offences
NSW Department of Communities and Justice
Sentencing Council
sentencingcouncil@justice.nsw.gov.au

Dear NSW Sentencing Council,

Thank you for your email of 27 September inviting the Court to make submissions concerning sentencing for fraud and fraud-related offences in New South Wales. Below is the collated response on behalf of the Judges of the District Court of NSW who have contributed submissions.

CONSIDERATION OF FRAUD AND FRAUD RELATED OFFENCES BY THE NSW SENTENCING COUNCIL

1. I have read and considered the Consultation Paper published by the NSW Sentencing Council in September 2022 and wish to offer my observations upon some of the questions raised.
2. My views for the most part are drawn upon my 17 years as a judge of the District Court of New South Wales and in large measure are premised upon anecdotal considerations rather than research other than as required in consideration of the matters that were before me, but The Consultation Paper I believe provides a sound analysis of considerations relevant to the current style of offences covered by the description "Fraud and Fraud Related Offences" with recognition of the broad spectrum of misconduct upon which perpetrators of these crime engage.

    Question 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?

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

3. I have considered the specific fraud and fraud related offences discussed in the Paper. They are appropriate for the specific conduct for which the provisions are intended, without the need to explore broader facts and circumstances that might attract the provisions with Part 4AA of the Crimes Act.
4. I believe that the penalties specified for those offences ought to be re-assessed however considering the evolving methodologies through advanced technology against which it is difficult to provide protection. General deterrence is a significant consideration.

Question 3.1: Victim impact statements

(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?

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

5. Victim Impact Statements should be extended to those who suffer fraudulent activity. Considerations synthesised in the determination of sentences include consequences flowing from the misconduct. Substantial injury, emotional harm, and loss are aggravating factors for the assessment of sentence.[1] Recognition of the harm caused to the victim and the community is a one of the purposes for the imposition of sentence.[2]
6. Ideally these are matters that would be the subject of evidence or agreement between the parties. Nonetheless the court is permitted to consider the victim impact statement in proceedings in which they are presently admitted as part of the material upon which to assess sentence.
7. Importantly in my opinion, they provide the opportunity for the victim of crimes to confront the person who caused their harm, to have a voice in the proceedings beyond the mere presentation of the objective facts and

[1] S 21A(2)(g) *Crimes (Sentencing Procedure) Act 1999.*
[2] S 3A(g) *Crimes (Sentencing Procedure) Act 1999.*

circumstances and allowing the court the opportunity to appreciate the impact of the crime upon the victim and more generally.

8. There are principles providing against the misuse of victim impact statements where the victim's subjective perception of their injury, emotional harm and loss is beyond what might be expected and is unsupported by other evidence, to ensure that any such representations are not brought to account in aggravation of the objective serious of the offence or the sentence that is otherwise proportionate to it.
9. If the victim of crime wishes to provide a Victim Impact Statement they ought to be permitted to do so.

Question 3.2: Business impact statements

Should there be business impact statements for fraud and fraud-related offences in NSW? Why or why not

10. Victim Impact Statements ought to be available for businesses who for the most part were the victims in the fraud offences in which I was called upon to determine sentence. The harm suffered will vary between victim businesses which are in truth the alter ego of the principals engaged upon the enterprise, and larger entities which one would expect to defray the costs of fraud to the detriment of the broader community. Specific examples are increased insurance costs, and in the case of fraud against government agencies the impact upon those legitimate clients who must confront increased scrutiny because of the risks created by the perpetrators of fraud in this context.
11. Such considerations are relevant to the assessment of sentence.

Question 3.3: Reparation

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

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

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

12. Reparation orders are sought by the Commonwealth regularly in fraud prosecutions, and for the most part in my experience have been effective when attached to conditions imposed upon conditional release after a custodial component is served.
13. Not all cases will be appropriate however, and where such an order will impose significant hardship on the extended family of the perpetrator it is not appropriate in my view to make one. Thus, it ought to be left to the discretion of the court, to be exercised where it is shown that there is scope for the order to be fulfilled without an inappropriate burden upon those who are innocent of any wrongdoing.

> 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

14. I do not favour a guideline in the form of or comparable to this example.
15. First, it is inconsistent with the approach to sentencing in this jurisdiction which is undertaken upon the synthesis of objective and subjective material before the court, with reference to the purposes of sentencing articulated in s. 3A, *Crimes (Sentencing Procedure) Act 1999,* the aggravating and mitigating factors specified in s 21A of the Act where they are relevant, and other considerations that are required or permitted to be brought to account. The example appears to be rather more arithmetical than intuitive.
16. Moreover, the broad range of fraudulent activity does not lend itself to such a restrictive approach to the assessment of sentence in fraud offences, particularly as they are presently structured in Part 4AA, *Crimes At 1900.*
17. I leave aside for the moment the various other offences provided in the Act which might be charged in respect of specific actions in perpetration of the fraud.
18. In *R v Ponfield* (1999) 48 NSWLR 327, the Court of Criminal Appeal considered the prevalence of break and enter offences involving larceny, and whether the inconsistency of sentences imposed warranted a guideline judgment. The court

declined to specify a sentencing range or starting point for sentences because of the great diversity of circumstances in which the offence is committed, and was unable to identify a useful typical scenario, unlike in the armed robbery guideline of *R v Henry* (1999) 46 NSWLR 346

19. It was also significant that the Crown elects to have most of those offenders dealt with in the Local Court, where the maximum penalty is two-years' imprisonment. The court outlined appropriate matters to be considered on sentence for break, enter and steal, a course approved *Wong v The Queen* (2001) 207 CLR 584 at [60].
20. The array of conduct to which Part 4AA, *Crimes Act 1900* might apply, and the nature of the victims of such offences, and range of the losses and detriment that might be caused, are beyond the more limited scope considered in *R v Ponfield* ibid. I am persuaded by the reasoning of that court that this proposal is not desirable for these offences.

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

21. I do not believe that the maximum penalty specified presently for s.192E, *Crimes Act 1900* is adequate to address the more seriousness of the misconduct contemplated by the provision. Moreover, the guide post set by the maximum penalty ultimately has the most significant impact for determination of the sentence identified upon the synthesis of relevant considerations. Fraudulent conduct leading to a conviction for an offence contrary to this provision covers a broad range as clearly described in the Consultation Paper describing the various types of misbehaviour contemplated. The means by which the fraud might be perpetrated often include significant intrusion into the affairs of the victims or other entities to provide the means of gaining advantage

or causing detriment. The range of conduct satisfying the elements of deception, the obtaining of property, financial advantage and financial disadvantage could be many and varied. In the present era the frequency of sophisticated 'scamming' by which it has become known, and to which all members of our community are subject from those within and without the Commonwealth of Australia, require a range of sentencing option that will with the certainty of detection provide a foundation for the purpose of general deterrence.

22. It is topical that institutions were recently attacked by those who must have nefarious purposes, putting at risk information which ought to have been protected.

23. Whether the provisions to punish specifically the conduct upon which these offenders engaged, or more general provisions as found in Part 4AA, *Crimes Act 1900,* those identified do not in my opinion currently provide adequate maximum penalties.

> 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?
>
> (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?

24. This would be useful to provide demarcation between the levels of the crimes committed by these means. The benefits derived through this approach in the Drug Misuse and Trafficking Act 1985 persuades me that this option should be given consideration.

25. The value of the frauds against which the penalties should be tiered I would defer to those who have access to current trends in the crimes and the level of the frauds pursued by the offenders.

> 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?

(2) If there is to be such an offence:

(a) what form should it take, and

(b) what maximum penalty should apply?

26. I do not see this as necessary considering s 21A(2)(n) *Crimes (Sentencing Procedure) Act 1999* providing as an aggravating factor that the offence was part of planned or organised criminal activity, subject to the difficulties that might be identified from the principle that where such is an element of the offence or implicit in the nature of the offending it is not be considered in aggravation of the offending, however, the nature and extent of the planning or the

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?

27. There is merit in this. It would be an alternative to increasing the maximum penalties to the offences as they stand, with a measure of certainty as to what should be contemplated in the assessment of the more severe level of punishment. I suggest that the other indictable offences to which the fraud is related should be confined to the examples that are offered in the Paper beginning at paragraph 2 as examples of fraudulent conduct, which are inextricably bound to the fraudulent goal. I would not see larceny as such an offence.

28. I have insufficient material upon which to comment further to this question.

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?

29. I do not have sufficient material to offer meaningful assistance in response to this question.

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 Crimes Act 1900 (NSW):

(a) how might it be identified, and

(b) what maximum penalties should apply?

30. I agree that there should be an indictable-only version of this offence:

a. Where the benefit obtained, or sought, or the financial detriment caused or sought, falls above an appropriate value. I defer to others with the benefit of additional research for the value at which this should be set.
b. Where the fraudulent conduct involves additional criminal misconduct made punishable by other provisions, for example those providing for identity theft.

31. The specification of maximum penalties requires consideration of additional material without which I do not believe I can meaningfully assist.

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

32. Low level offending should be left for determination in the Local Court. I do not favour alternative processes outside of the criminal justice system. Fraud is per se serious criminal behaviour and requires curial disposition in public,

regardless of the value of the benefit or detriment sought or achieved.

SUBMISSIONS 1.1

I have read the Consultation Paper on fraud published by the NSW Sentencing Council in September 2022. I have also read the submissions published in response to the call for submissions.

As a judge who sentences offenders for fraud offences, I only seek to respond to some of the questions raised in the Consultation Paper.

1. Is the maximum penalty for fraud under s.192E of the *Crimes Act* 1900 (NSW) sufficient?

[Question 8 of the Consultation Paper].

As noted in the Consultation Paper, s.192E is broad and was intended to cover most fraud cases. Its maximum penalty is 10 years' imprisonment which is an ample offence to capture a range of fraudulent offending.

It might be observed, however, that sentencing in fraud cases often involves consideration of many individual charges against the one offender. That is because the sentencing exercise often contemplates a course of conduct comprised of multiple acts.

In the submissions made by the Director of Public Prosecutions on 3 February 2022, it is stated:

> "It is the position of this Office that, in appropriate cases, the enterprise-type offenced at trial as considered in *Moussad v R* [1999] NSWCCA 337 and *Calleija v R* [2012] NSWCCA 37, (decisions which draw on the reasoning applied in NSW drug supply enterprise matters such as Hamzy [1994] 74 A Crim R 341), can properly be applied to offences under s.192E (1)."

The Director further recommends that, to avoid doubt as to the availability of such a course, considerations should be given to a facilitative provision for fraud offences similar to that which exists for proceeds of crime offences under s.193FA of the *Crimes Act* 1900. Arguably, subsection 192E(3) acknowledges an ability to roll-up "any

number of particular sums of money or items of other property that were obtained over a period of time".

From a sentencing perspective, an ability to "roll-up" fraudulent transactions, amounts or items of property into a single charge bears attraction, provided questions of fairness and totality appropriately can be accommodated, (see *Knight v R* [2004] NSWCCA 145 at [27]). Advantages would include:

(a) the facilitation of sensible plea negotiations.

(b) efficiency in trials; and

(c) more straight forward sentencing proceedings.

In recognition of the potential benefits in facilitating 'rolled-up' offences, it could be argued that a greater maximum penalty is warranted to accommodate more extensive fraudulent conduct within one charged offence.

It also is observed that fraudulent activity increasingly uses phone, e-mail and social media accounts. For some victims, this involves a terrible invasion of privacy deserving of an emphasis of the sentencing purpose of general deterrence. This is akin to the invasion of privacy experienced by victims of break and enter offences under s.112 of the *Crimes Act* which, for the standard offences under sub-section (1), bear a maximum penalty of 14 years' imprisonment.

2. Should victim impact statements under the *Crimes (Sentencing Procedure) Act* 1999 (NSW) be extended to victims of fraud and fraud-related offences, including business victims?

[Question 3 of the Consultation Paper].

The receipt of a victim impact statement can assist a sentencing judge in several ways. It can provide a voice to a victim who is not a party to the proceedings. It can also assist the sentencing judge better explain the particular harm caused by the offence. This importantly enhances the educative role of the sentencing exercise and can better focus expressions of remorse from an offender. Furthermore, where appropriate, a victim impact statement might also provide evidence of 'substantial loss' under s.21A (2)(g) of the *Crimes (Sentencing Procedure) Act* 1999.

With respect to business victims of fraud, it might be difficult to identify who is entitled to provide a victim impact statement. However, if a person or group of people have experienced loss as a result of fraud, then that alone might render them appropriate to provide a victim impact statement. An advantage of permitting a business victim to provide a victim impact statement is to overcome a common response made by offenders that they thought it was a 'victimless' crime when a fraud was committed against a business or financial institution.

3. Should there be sentencing guidelines in New South Wales as there are in England and Wales?

[Question 6 of the Consultation Paper].

Section 192E as stated previously, was intended to be a general fraud offence. It is sufficiently broad to capture fraudulent activities that employ new technologies, methods and schemes.

Section 21A of the *Crimes (Sentencing Procedure) Act* 1999 together with legal principles arising from the common law provide ample scope for relevant matters to be taken into account in the sentencing exercise. Sentencing guidelines, however, presume a standard set of factors such as considered in *R v Henry* [2007] NSWCCA 90. Any such standard set of factors in fraud offences might not provide much assistance in light of the breadth of s.192E.

SUBMISSIONS 1.2

I agree there should be statutory recognition of the entitlement to give a VIS for individual victims of crime – in my experience they often lose not only their life savings, business, house but also their confidence, pride and even their family. I do not believe; however, it is appropriate for corporate victims [e.g. Banks] to have the same entitlement – even if the flow on effect from the crime is to the mums and dads it just does not seem appropriate for NAB, CBA or multinationals to be able to utilise such a procedure.

I also am not a big supporter of a guideline judgement – fraud is a difficult crime to narrow down to a few common characteristics – there are so many variables within

the crime of fraud such as the way it is committed, methodology used, type of fraud committed e.g. is it card fraud, identity fraud, phishing, government fraud etc. that it would seem somewhat futile to have any guideline to sentencing that could possibly relate to all. It also stymies a sentencing judge's discretion and flexibility in sentencing the perpetrator. I do not think it is necessary – if the sentence is too high or too low there is the avenue of appeal.

The vast majority of fraud that I have presided over has been prosecuted as 'obtaining property/financial advantage by deception. This only carries 10 years maximum penalty – regardless of the amount of money or victims involved in the fraud. Often the prosecution roll up the course of conduct [i.e., 40 credit card frauds] into one count on the indictment. It does not give a sentencing judge much scope to sentence appropriately to reflect the objective seriousness and prevalence of the offending. I support the increase in the maximum penalty and/or aggravating forms of the offence in order to properly reflect the increased sophistication of the frauds being committed and the significant increase in the number of frauds being committed in such a variety of ways.

Acting Chief Judge James Bennett SC

District Court of New South Wales

03 November 2022