

SENSITIVE: OFFICIAL



NSW Police Force

Submission

**NSW Sentencing Council's review into
sentencing for fraud and fraud-related
offences**

February 2022

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Introduction

The NSW Police Force welcomes the opportunity to contribute to NSW Sentencing Council's review into sentencing for fraud and fraud-related offences in New South Wales.

We note that the Terms of Reference state:

- The Sentencing Council is asked to conduct a review of sentencing for fraud and fraud related offences in New South Wales, especially but not limited to offences in Part 4AA of the Crimes Act 1900 (NSW), and make any recommendations for reform that it considers appropriate.
- In undertaking this review, the Sentencing Council should:
 - provide sentencing statistics for convictions over a five-year period;
 - provide information on the characteristics of offenders, sentence type and length; and
 - provide background information, including:
 - the key sentencing principles and reasoning employed by sentencing judges;
 - the mitigating subjective features of offenders; and
 - any other significant factors considered in sentencing decisions that explain how courts come to their final decision on sentence (which may be done using case-studies or collation of predominate themes across cases).

The NSW Police Force includes a range of comments related to the Terms of Reference in this submission. These are set out in the following chapters:

1. What factors should courts take into account when sentencing for fraud?
2. Are the purposes and principles of sentencing being applied appropriately in sentencing for fraud? Why or why not?
3. Are the maximum penalties for fraud offences under Part 4AA or other fraud offences adequate? Why, or why not?
4. Are the sentences imposed by the courts for fraud offences under Part 4AA or other fraud offences adequate? Why or why not?
5. Does sentencing for fraud appropriately respond to the needs of fraud victims?

We trust the information contained in this submission is of assistance to the Sentencing Council.

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

The aggravating factors in relation to the sentencing of fraud related matters are:

1. Breach of trust
2. Class of victim
3. Multiple victims or a series of criminal acts
4. Part of planned or organised criminal activity
5. The offence was committed for financial gain

In the majority of fraud investigations, the offenders are well educated, have good employment and are generally in a position of privilege. The factors of offending for financial gain, lifestyle and general greed should be carefully examined when sentencing for fraud. This is particularly relevant when it is established why the offending stopped. If the offending has been detected by a third party, whistle-blower or auditor, this needs to be highlighted at sentencing. However, for this detection, the offending more than likely would have continued and in fact escalated.

2. Are the purposes and principles of sentencing being applied appropriately in sentencing for fraud? Why or Why Not?

Section 3A(b) *Crimes (Sentencing Procedure) Act* 1999 outlines that one of the purposes of sentencing is to prevent crime by deterring the offender and other persons from committing similar offences. The courts have held that general deterrence is a particularly important sentencing factor for fraud offences. Such crimes frequently involve a serious breach of trust and are usually only able to be committed because of the previous good character of the person who has been placed in the position of trust: Gleeson CJ in *R v El-Rashid* (unrep, 7/4/95, NSWCCA).

Statistics provided by NSW Bureau of Crime Statistics and Research (BOSCAR) between September 2018 until March 2021 show that:

- In the Local Court, only 16% of sentences imposed for 192E offences involved imprisonment
- In the District Court, only 68% of sentences imposed for 192E offences involved imprisonment

This overall view by the courts does not appear to send a consistent message of general deterrence. While there have been some strong comments made by the Court in particular cases, it does not appear to be reflected in the statistics, particularly in the Local Court.

For example, McCallum J said in *R v Curtis (No 3)* [2016] NSWSC 866 at [51]:

punishment by a sentence of imprisonment has real bite as a deterrent to others in the case of white-collar crime. 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.

3. Are the Maximum Penalties for Fraud Offences under Part 4AA or other fraud offences adequate? Why or why not?

The maximum penalties for Part 4AA offences are outlined below, showing that the maximum penalty for any Fraud Offence is 10 years imprisonment.

| Section | Offence | Max penalty (yrs) |
|--------------|--|-------------------|
| s 192E(1)(a) | Obtain property belonging to another by deception | 10 |
| s 192E(1)(b) | Obtain financial advantage or cause financial advantage by deception | 10 |
| s 192F(1) | Intention to defraud by destroying or concealing accounting records | 5 |

| Section | Offence | Max penalty (yrs) |
|-----------|---|-------------------|
| s 192G | Intention to defraud by false or misleading statement | 5 |
| s 192H(1) | Intention to deceive members or creditors by false or misleading statement of officer of organisation | 7 |
| s 192J | Deal with identification information with intent to commit or facilitate indictable offence | 10 |
| s 192K | Possess identification information with intent to commit or facilitate indictable offence | 7 |
| s 192L | Possess equipment to make identification document or thing with intent to commit or facilitate indictable offence | 3 |
| s 253 | Make false document | 10 |
| s 254 | Use false document | 10 |
| s 255 | Possess false document | 10 |
| s 256(1) | Make or possess equipment for making false document with intent to commit forgery | 10 |

The maximum penalty is manifestly inadequate, particularly when there is no provision for increasing the maximum in circumstances of aggravation.

Knowingly Dealing with Proceeds of Crime legislation has been strengthened to increase the maximum penalty to 15 years (knowingly) and 20 years (Knowingly and with intent to conceal). These offences often are either a part of fraud investigations or are linked into the movement of funds fraudulently obtained. Increasing the penalties for fraud offences in line with this would send a strong message of deterrence to potential offenders and the community generally.

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

See point 3 above.

5. Does Sentencing for Fraud appropriately respond to the needs of fraud victims?

The delay in the court process continues to be the biggest issue for fraud matters, which does have an impact on the victim and their experience with the legal system. This can be attributed to the following factors:

- The offenders have usually been granted conditional bail, which sees any trials be given low priority, thereby delaying the process
- The briefs are usually complex, voluminous and difficult for the ODPP to prosecute or the Defence to respond to
- Some matters within this unit have been going through the court system for eight years, without being heard at trial

Although not specifically related to sentencing, it is a general observation about the court process when it comes to fraud matters.

In addition to these factors, it should be considered an amendment to the *Crimes (Sentencing Procedure) Act 1999* be made, to allow for Victim Impact Statements to be allowed for the more serious offences dealt within the District Court Jurisdiction.

The psychological effects of deception related offences, particularly when the victim is vulnerable, or the offender is in a position of trust or power can't be understated. It can be likened to the long-term effects of grooming in which the victim experiences guilt for the offending or blames themselves for allowing the offences to occur. This is especially true when the offenders are in professional roles such as Company Directors, Accountants or Bank employees.

It is critical that the victim is able to articulate to the Court the full impact of the offending on their lives and financial situations. This ensures that the Court appreciates the long-term effects on the victims and factors this into their sentencing process.