THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Submission in response to the NSW Sentencing Council Fraud Consultation Paper

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New South Wales Sentencing Council

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The NSW Young Lawyers Criminal Law Sub-Committee (the Sub-Committee) makes the following submission in response to the NSW Sentencing Council's Fraud Consultation Paper (the Consultation Paper)

NSW Young Lawyers

NSW Young Lawyers is a Committee of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate Sub-Committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Sub-Committee is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Sub-Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and considers the provision of submissions to be an important contribution to the community. The Sub-Committee aims to educate the legal profession and the wider community about criminal law developments and issues. The Sub-Committee also facilitates events and programs that help to develop the careers of aspiring criminal lawyers, with the aim of providing a peer support network and a forum for young lawyers to discuss issues of concern. The Sub-Committee's members are drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Response to the Consultation Paper

Summary of recommendations

Question 2.1: Fraud and fraud-related offences in NSW

1. The Sub-Committee is of the view that the specific fraud and fraud-related offences outside of part 4AA of the *Crimes Act 1900* (NSW) are still useful, and refers to paragraphs 27 to 29 of its 7 February 2021 Preliminary Submission – NSW Sentencing Council Review of Sentencing for Fraud and Fraud related offences (**preliminary submission**) in relation to Question 2.1(2).

Question 3.1: Victim impact statements

2. The Sub-Committee is of the view that victim impact statements under the *Crimes (Sentencing Procedure) Act 1999 (NSW)* should be extended to victims of fraud and fraud-related offences, for the reasons set out in paragraphs 37 to 39 of its preliminary submission.

Question 3.2: Business impact statements

3. The Sub-Committee recommends that suitably qualified representative of a small business, or not-for-profit organisation be able to make a Business Impact Statement.
4. The Sub-Committee proposes that the use of a business impact statement be limited to indictable offences (as defined in the *Criminal Procedure Act 1986* s 3).

Question 3.3: Reparation

5. The Sub-Committee is not in favour of making either compensation or restitution orders mandatory.

6. The Sub-Committee supports the proposal in the Consultation Paper that restitution orders can be made in amounts which exceed the civil jurisdiction of the Local and District Courts when they are made as an ancillary order to the sentencing proceedings, and where both parties consent to the making of the orders in excess of the civil jurisdiction and the quantum is not in dispute.

Question 6.1: Sentencing guidelines for England and Wales

7. The Sub-Committee does not recommend introducing further Sentencing Guidelines such as those in place in England and Wales in relation to sentencing for fraud in NSW. The Sub-Committee submits that the current case law and sentencing principles that apply - including the aggravating and mitigating factors in s 21A of the *Crimes Sentencing Procedure Act (1999*) - are adequate.

Question 7.1: Sentences for fraud

8. The Sub-Committee refers to its answer to Question 2 (paragraphs 14 to 26) in its preliminary submission in relation to the appropriateness of the sentences imposed for fraud and fraud-related offences.

9. The Sub-Committee recognises that in circumstances where defendants are impecunious, fines are likely to have little or no effect in deterring the offender, denouncing their conduction, or effecting retribution, and may in fact encourage recidivism.

Question 8.1: Maximum penalties for fraud

10. The Sub-Committee refers to its answer to Question 3 (paragraphs 27 to 32) in its preliminary submission.

Question 8.2: Tiered maximum penalties

11. The Sub-Committee is not of the view that there should be tiered maximum penalties according to different values of the fraud.
12. The Sub-Committee submits that a practical middle ground is to recommend creation of different Law Part Codes for s 192E offences which relate to frauds of different values, in a similar way to the Law Part Codes that currently exist for larceny offences.

Question 8.3: Organised or continuing fraud offence

13. The Sub-Committee does not support the introduction of an aggravated fraud offence by way of organised fraud or a continuing criminal enterprise.

Question 8.4: Fraud committed in relation to other indictable offences

14. The Sub-Committee considers that current charging and sentencing practices sufficiently deal with fraud that is related to other indictable offences and submits there should not be an aggravated offence of this kind.

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

15. The Sub-Committee submits that an infringement notice system, analogous to that currently in place in relation to minor larcenies, should be available for low level frauds where the amount taken is less than $300.

16. The Sub-Committee submits that consideration should also be given to expanding the scope of restorative justice options to adults who have engaged in low level offending, particularly when that arises from a position of disadvantage and/or addiction.

Question 8.8 Aggravating factors

17. The Sub-Committee does not recommend any changes to the aggravating factors in s 21A of the *Crimes (Sentencing Procedure) Act 1999*.

2. Fraud and fraud-related offences in NSW

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?

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

1. The Sub-Committee is of the view that the specific fraud and fraud-related offences outside of part 4AA of the *Crimes Act 1900* (NSW) are still useful. These offences apply in particular circumstances and cover specific conduct. As s 192E is a broad offence with a substantial maximum penalty that can cover a broader range of fraudulent conduct, it is useful to retain more specific offences to enable different types of fraud related conduct to be differentiated.

2. The Sub-Committee refers to paragraphs 27 to 29 of its 7 February 2021 Preliminary Submission – NSW Sentencing Council Review of Sentencing for Fraud and Fraud related offences (**preliminary submission**) in relation to Question 2.1(2).

3. The experiences of victims of fraud

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?

3. The Sub-Committee is of the view that victim impact statements under the *Crimes (Sentencing Procedure) Act 1999 (NSW)* should be extended to victims of fraud and fraud-related offences, for the reasons set out in paragraphs 37 to 39 of its preliminary submission.

4. The Sub-Committee notes the additional considerations raised in the Consultation Paper in relation to victims of fraud experiencing feelings of guilt or self-blame, particularly in situations where victims may have taken action which facilitated the fraud, for example, sending money or personal information to an offender. Further, victims of romance fraud or frauds where an offender is known to the victim may experience particular harms, including embarrassment, shame, and betrayal, leading to trust issues in the long term.

5. The Sub-Committee views that victim impact statements should be available to victims of fraud and fraud related indictable offences. The Sub-Committee notes the breadth of fraud related offences considered in the Consultation Paper, particularly those relating to the making of statements, documents or other information to be supplied to government in order to gain certain benefits, and accepts that victim impact statements are unlikely to be made for such offences. This is because the "victim" of such crimes is not an identifiable individual. Therefore, if the Sentencing Council does not recommend the extension of victim impact statements to all fraud and fraud related offences, this may be an appropriate method of delineating eligibility.

Question 3.2: Business impact statements

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

6. In paragraph 40 of its preliminary submission, the Sub-Committee took the view that a sentencing court may receive assistance from receiving a victim impact statement from a suitably qualified representative of a small business, for whom being defrauded may have devastating impacts. The Sub-Committee also noted the uncertainties regarding the definition of "person" in the relevant provisions of the *Crimes (Sentencing Procedure) Act 1999.* The Sub-Committee reiterates its comments in this regard, and is also of the view that the making of such statements should be extended to not for profit organisations for the avoidance of doubt.

7. The Sub-Committee accepts that whilst there may not necessarily be interest from larger institutions such as banks in making such a statement, a smaller business or a not-for-profit organisation may find it more difficult to absorb the cost of fraud, and the impacts may be more profound on that business, both in terms of financial and non-financial impacts such as:
    a. loss of reputation;
    b. impact on services delivered by the business;
    c. exposure to further instances of fraud;
    d. loss in valuable funds from the Australian economy; and
    e. loss of recurring customers and new customers.

8. According to the Australian Competition and Consumer Commission's 2021 *Targeting Scams* Report, both Australian businesses and consumers reported losses of nearly $1.8 billion dollars to fraud in 2021, with the real cost (including unreported frauds) estimated to be over $2 billion.[1] Of this, $3.5 million dollars was

[1] Australian Competition and Consumer Commission, Targeting Scams, Report of the ACCC on Scams Activity 2021 (Report, July 2022) < https://www.accc.gov.au/system/files/Targeting%20scams%20-%20report%20of%20the%20ACCC%20on%20scams%20activity%202021.pdf>, 1.

lost in total by small businesses (defined as having 5 to 19 staff),[2] with a median loss per small business of $3,812, which was higher than the median loss of other businesses. Microbusinesses (with zero to 4 staff) had a median loss of $1,550 and total losses of $3.5 million.[3] Businesses reported the most losses to be false billing scams, which includes payment redirection scams, with $6.7 million total lost and a median loss of $4,200.[4] This figure is concerning, and, for smaller businesses may be the difference between staying in business and being forced to close.

9. The Sub-Committee accepts that often the impact of the fraud on a business or not-for-profit organisation may be well enough understood, as matters such as the quantum of the loss in comparison to the victim organisation's turnover, and whether the business shut down following the fraud, may be included in the facts and assist the court in understanding the impacts on the victim business.

10. However, some harms may not be readily apparent from the facts. For example, if a victim of a fraud offence is a small family business and provides the family's primary source of income, the impacts may be much more profound and might not be readily apparent to a sentencing court without the benefit of a victim impact statement.

11. The Sub-Committee proposes that the use of a business impact statement be limited to indictable offences (as defined in the *Criminal Procedure Act 1986* s 3). Whilst this is a low bar when compared to other offences ordinarily captured by the *Crimes (Sentencing Procedure) Act 1999* s 27, it is submitted that a sentencing court can properly consider the impact statement in context of the offending. The alternatives to this approach would, in the Sub-Committee's view be either: setting a minimum dollar amount to which the offending relates, for example "not less than $60,000"; or by reference to the income or turnover of a business, for example "not less than 25% of the business' quarterly turnover". The former has a real likelihood of excluding a not insignificant number of small businesses. Whilst the latter creates an unnecessary and additional assessment for the sentencing court to determine separately from considering the impact of the offending on the victim.

12. It is submitted that determining the degree of the impact on a business should be left to the sentencing court, without first requiring an exclusionary threshold regarding the proportion or quantum of the harm be met, provided that an offence is indictable per the *Criminal Procedure Act 1986* s 3.

13. The Sub-Committee also observes that if business impact statements were to be introduced, this does not necessarily mean that businesses *need* to make a business impact statement. Rather, the option is there should they choose to do so. In the experience of Sub-Committee members, there are many instances where victims who are entitled to make a victim impact statement under the current legislation choose not to do so. Nonetheless, the fact that the opportunity is there is an important part of upholding their rights as a victim of crime.

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[2] Ibid, p. 11.

[3] Ibid p. 42.

[4] Ibid, 42.

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?

14. When making reference to reparation orders, the Consultation Paper refers to the following orders:
    a) an order for restitution of property, pursuant to the *Criminal Procedure Act 1986* (NSW) s 43; and
    b) an order for compensation for any loss sustained as a result of the offence, pursuant to the *Victims Rights and Support Act 2013* (NSW) sections 94 and 97.

15. The Sub-Committee notes concerns about fettering the judicial discretion as to when such orders should be available, and is not in favour of making either compensation or restitution orders mandatory. However, the Sub-Committee submits that steps should be taken to ensure that the availability of those orders is well known to prosecutors and victims are informed of their rights to seek such orders. The examples provided at paragraph 3.58 of the Consultation Paper of the forms used in Saskatchewan and Alberta may be useful in this regard.

16. In terms of the effectiveness of the orders, the utility of making the order will of course vary from case to case. There will be some offenders who are simply not in a position to pay the money back. The Sub-Committee notes that in some cases fraud can be perpetrated by offenders in to fund a gambling addiction (see paragraph 22 of the Sub-Committee's preliminary submission). Further, lower-level fraud offences such as "tap and go" fraud may be perpetrated by impecunious offenders who have little ability to repay the money. In those circumstances, there may be little utility in imposing reparation orders and the Sub-Committee has concerns that the debt could encourage a cycle of recidivism for an offender. Nonetheless, the Sub-Committee acknowledges that there may be cases in which such an order is effective, and the orders should continue to be available to courts to make in appropriate cases.

17. The Sub-Committee supports the proposal in the Consultation Paper that restitution orders can be made in amounts which exceed the civil jurisdiction of the Local and District Courts when they are made as an ancillary order to the sentencing proceedings. This would avoid the need for separate civil proceedings, which could create difficulties for victims in bringing these proceedings, and offenders in responding to these proceedings, particularly in circumstances where Legal Aid funding may not be available. It would also remove any barrier to offences that are otherwise appropriate to be dealt with in the Local Court needing to be dealt with on indictment for the purposes of making a restitution order in the appropriate sum of money. However, the Sub-Committee submits that under such an amendment as a pre-condition for the suspension of the monetary limit of the civil jurisdiction of the District or Local Court to be exceeded, the mutual consent of parties should be required, and the quantum of the order should not be in dispute.

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?

18. In its preliminary submission, the Sub-Committee raised some concerns in relation to the applicablity of sentencing principles in certain respects and in certain cases. However, it concluded that in most of the cases reviewed, the application of the sentencing principles was appropriate (please see paragraphs 14 to 26 in the Sub-Committee's preliminary submission).

19. Further, in its previous submission, the Sub-Committee did not view that offences falling under the broad umbrella of 'fraud' meet the standard of exceptional circumstances such that the statutory sentencing scheme ought to be altered in respect of those offences. Instead, the Sub-Committee submitted that the most salient factors identified by the appellate courts were appropriate and should continue to have particular relevance when it comes to sentencing for fraud offences (please see paragraphs 1 to 13 in the Sub-Committee's preliminary submission).

20. As such, the Sub-Committee does not recommend introducing further Sentencing Guidelines such as those in place in England and Wales in relation to sentencing for fraud in NSW. The Sub-Committee submits that the current case law and sentencing principles that apply - including the aggravating and mitigating factors in s 21A of the *Crimes Sentencing Procedure Act (1999*) - are adequate.

Question 7.1: Sentences for fraud

(1) Are the sentences imposed for fraud and fraud-related offences appropriate? Why or why not?

21. The Sub-Committee refers to its answer to Question 2 (paragraphs 14 to 26) in its preliminary submission in relation to the appropriateness of the sentences imposed for fraud and fraud-related offences.

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

22. The Sub-Committee acknowledges that fines can be useful in fulfilling the purposes of sentencing in some circumstances, and certainly does not recommend that fines be removed as an available sentence. However, the Sub-Committee recognises that in circumstances where defendants are impecunious, fines are likely to have little or no effect in deterring the offender, denouncing their conduction, or effecting retribution, and may in fact encourage recidivism.

23. Further, it is not uncommon that offenders commit fraud to finance a gambling addiction.[5] Such offenders may come from a variety of socio-economic backgrounds. Imposing fines on offenders struggling with addiction may, to some extent, provide disincentive to commit crime, but it does not directly address the

[5] See *R v Atalla* [2002] VSCA 141; *R v Weir* [2003] NSWCCA 204; *R v De Stefano* [2003] VSC 68; *R v Johnston* [2017] NSWCCA 53; *R v Siwek* [2017] NSWCCA 178; . See also, Yuka Sakurai and Russell Smith, 'Gambling as a Motivation for the Commission of Financial Crime' (Research Paper No 256, Australian Institute of Criminology, June 2003).

cause of fraud. Literature suggests that rehabilitation is a more appropriate intervention to offenders' gambling behaviours and therefore, reduces the likelihood of re-offending.[6] In *R v Parker*, Higgins J acknowledged that addiction *per se* did not 'warrant leniency' but it made the question of rehabilitation of greater importance.[7] Where questions of rehabilitation loom large, fines may not be as effective sentencing option, although the more serious the offending, the more significance that should be given to general and specific deterrence and denunciation.

24. The Sub-Committee notes that due to the financial impacts of fraud on victims, restitution and compensation orders may be of more practical utility to victims, where an offender has the capacity to pay the relevant amount. If a large fine may impact the offender's ability to fulfil a restitution or compensation order, this may result in a worse outcome for victims of fraud.

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?

25. The Sub-Committee refers to its answer to Question 3 (paragraphs 27 to 32) in its preliminary submission.

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?

26. On balance, the Sub-Committee is not of the view that there should be tiered maximum penalties according to different values of the fraud. Whilst the value or quantum of the fraud is an important factor, it is only one indicator of the seriousness of the offences. Other important factors include the length of time over which the fraud was perpetrated and whether it involved sophisticated planning or organisation, the extent

[6] Alex Blaszczynski and Derrick Silove, 'Pathological Gambling: Forensic Issues' (1996) 30 *Australian and New Zealand Journal of Psychiatry* 35, 359. See also Penny Crofts, 'Gambling and Criminal Behaviour: An Analysis of Local and District Court Files' (Research Papers, Sydney Institute of Criminology, 2002) 168, 170; Yuka Sakurai and Russell Smith, 'Gambling as a Motivation for the Commission of Financial Crime' (Research Paper No 256, Australian Institute of Criminology, June 2003) 5.

[7] *R v Parker* [2000] ACTSC 68 [15]-[16].

of the breach of trust (if any), including whether the perpetrator was a registered professional, and the vulnerability of the victim. To elevate one factor over another may create an imbalance in the sentencing process.

27. As the Sub-Committee is of the view that the current maximum penalties and sentencing patterns in relation to fraud and fraud related offences are generally appropriate, it has concluded that these factors can be adequately captured by way of the application of the existing s 21A factors in the *Crimes (Sentencing Procedure) Act 1999* and the exercise of judicial discretion in sentencing proceedings.

28. The Sub-Committee acknowledges that there would be some utility in being able to ascertain from reading a person's criminal history the seriousness of any s 192E fraud offences, given the broad range of conduct that could be captured by such an offence. It also may assist in collecting statistics and other information to take a tiered or differentiated approach to s 192E offences in particular. The Sub-Committee is of the view, however, that these benefits are not outweighed by the difficulties which could eventuate by elevating one factor relevant to the sentencing exercise (the value of the fraud) over others. Further, the relative value of money changes over time with factors such as inflation. If the value of the fraud is not a basis of legislative differentiation for conduct constituting a fraud offence under s 192E, sentencing judges can more flexibly adapt to the changing values of money in assessing the seriousness of the fraud.

29. The Sub-Committee submits that a practical middle ground is to recommend creation of different Law Part Codes for s 192E offences which relate to frauds of different values, in a similar way to the Law Part Codes that currently exist for larceny offences. This would allow data about sentences being imposed for various different frauds to be categorised more easily into the value of the fraud to allow for comparison and analysis. The amounts for different Law Part Codes could be differentiated into the following categories:

    a. fraud value less than or equal to $300 (with a penalty infringement notice being an available option as per the above recommendation);
    b. fraud value less than or equal to $10,000;
    c. fraud value more than $10,000 but less than $100,000;
    d. fraud value more than $100,000 but less than $500,000; and
    e. fraud value greater than $500,000.

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?

30. The Sub-Committee does not support the introduction of an aggravated fraud offence by way of organised fraud or a continuing criminal enterprise. The Sub-Committee views that those factors are often inherent

in the means by which fraud is committed, and the extent to which those features increase the criminality of offending beyond that of similar offending is capable of being recognised – and is being recognised – in an appropriate manner under current sentencing law (both as statutory factors of aggravation and matters informing objective seriousness under the general law). The Sub-Committee does not consider those features, particularly "organised fraud", are able to be reduced to abstract definitions that provide the appropriate level of certainty required of an element of liability.

31. Members of the Sub-Committee have observed that fraud is a protean offence, capable of being committed in a myriad of ways. It follows that the manner in which it may be organised or continued is also capable of expression in many ways. For example, the Sub-Committee notes that simple fraud offences may be frequently committed in the following diverse ways: by the use of another's bank card, the misuse of funds held in trust, purporting to be a different person/institution/body to obtain funds, obtaining access to someone's electronic device, or monitoring ATMs to obtain information.

32. However, while fraud is committed in different ways, very few means of committing the offence can truly be called "spontaneous". It is an offence which, intrinsically, requires a level of forethought, planning and organisation. It is rarely a crime of passion or fuelled by spontaneous motivation. Save for the use of another person's "tap and go" bank card, most of the typical means of committing fraud require somewhat time-consuming steps to evade detection, often by way of impersonating another in a convincing manner. The level of believability or surreptitiousness required in most frauds is, of course, attributable to proper fraud-prevention systems and processes used across sectors and is to be applauded.

33. However, the natural corollary is, in Sub-Committee members' experiences, few instances of fraud lack planning or organisation. Creating an aggravated form of organised fraud would, in the Sub-Committee's view, capture most means of offending beyond simple "tap and go" fraud which, of course, is often continuing in nature.

34. The purpose of aggravated offences is to recognise offending that is particularly serious above that of the typical offending of that kind. Where a feature (or features) of offending is inherent in many or most instances of the commission of the offence, it is inappropriate to codify that feature as an element of increased liability.

35. Rather, the appropriate response is to permit the wide discretion engendered in sentencing to capture particularly organised, particularly planned, or particularly ongoing offending in the appropriate sentence to be meted out. In the Sub-Committee's view, the flexibility of the sentencing exercise, with the safeguard of the rule against double-counting, are the best mechanisms by which to appropriately recognise the increased criminality in offending that is particularly organised or ongoing.

36. In any event, given the protean nature of the offence, the Sub-Committee does not have confidence that the proposed element of "organisation" could be expressed with sufficient certainty. It is undoubtedly important that an element of liability is not vague, uncertain or flexible. What constitutes organised identity fraud will differ markedly to what constitutes organised welfare fraud. This would require the element of

liability to be undefined, or defined in very abstract terms. This can be contrasted with current, well-defined and well-understood aggravating circumstances in respect of other offences. For example, the distinction between assault occasioning actual bodily harm and a wounding is distinguished in a precise definition turning on the layers of skin broken. Similarly, while the distinction between actual bodily harm and grievous bodily harm is less objectively defined, it imports a readily-understandable community standard to distinguish between the two offences ("really serious")[8]. Particularly organised fraud is neither objectively capable of definition, nor a matter that the community is well-equipped to judge, most members of the community not having intimate knowledge of fraud. It is for this reason that the Sub-Committee is concerned about the ability to usefully and concretely define this element of aggravation.

37. In contrast, the sentencing discretion is wide and permits a level of flexibility in understanding what "organisation" means in any given individual case.

38. It is inappropriate, in the Sub-Committee's view, that the community would not have a certain understanding of when an aggravated form of the offence would be committed. The Sub-Committee is particularly concerned as to how juries would be guided on the element being satisfied in any given context.

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?

39. The Sub-Committee considers that current charging and sentencing practices sufficiently deal with fraud that is related to other indictable offences. In particular, fraud associated with the supply of prohibited drugs and fraud associated with money-laundering are capable of being recognised by the imposition of distinct charges and are matters appropriately taken into account in sentencing. Therefore the Sub-Committee does submits there should not be an aggravated offence of this kind.

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?

[8] *Swan v The Queen* [2016] NSWCCA 79 (6 May 2016).

The Sub-Committee does not seek to be heard on this question.

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

30. The Sub-Committee would be open to an infringement notice system, analogous to that currently in place in relation to minor larcenies, to be available for low level frauds where the amount taken is less than $300. Both fraud and larceny involve an element of dishonesty, and obtaining property (or causing a financial advantage or disadvantage). For offenders with no, or a limited, criminal history who are able to pay (whether in one payment or through a payment plan which involves a pro rata payment, whether from Centrelink money or wages), this could assist in promoting rehabilitation by avoiding an entry on their criminal record for conduct of low objective seriousness, in circumstances where such a conviction could impact future employment prospects and encourage further offending.

31. Whether such an offence should be dealt with in this manner would remain a matter of police discretion, and the Sub-Committee expects the exercise of this discretion would be based on factors such as the nature of the fraud, the circumstances in which it was perpetrated and the offender's circumstances. For example, a fraud which involves a breach of trust may not be appropriately dealt with in this way, notwithstanding that the amount obtained was relatively small, however, the Sub-Committee expects that such a scheme would be particularly applicable to "tap and go" style frauds.

32. Consideration could also be given to expanding the scope of restorative justice options to adults who have engaged in low level offending, particularly when that arises from a position of disadvantage and/or addiction. Empirical evaluation in relation to adult restorative justice programs in Australia produces mixed results.[9] Nevertheless, there is a large amount of research which shows that traditional sentences fail to acknowledge the impacts on victims in fraud offences – for example a change in life attitude, loss of trust, self-questioning, anxiety, increased rate of committing suicide.[10] Therefore the Sub-Committee recommends, in appropriate cases, replicating the restorative approach taken in *Young Offenders Act 1997* which requires an offender to make an apology and reparation to the victim and participate in an educational program.[11] The restorative justice approach may also improve satisfaction and healing of victims and induce a more profound change to the attitude of offenders.[12]

Question 8.8 Aggravating factors

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[9] Shelby Sewak et al, *Youth Restorative Justice: Lessons from Australia: A Report for HAQ Centre for Child Rights* (Report, Macquarie University, July 2019) 118 <https://haqcrc.org/wp-content/uploads/2019/07/restorative-justice-in-australia.pdf>.

[10] Tim Pascoe et al, *Identity Fraud: What About the Victim?* (Report, Perpetuity Research & Consultancy International, March 2006); Cassandra Cross, Kelly Richards and Russell Smith, 'The reporting experiences and support needs of victims of online fraud' (Trends & Issues in Crime and Criminal Justice No 518, Australian Institute of Criminology, August 2016) 4-6; Australian Rolando Ochoa, Alex Simpson and Gary Gill, *The Human Impacts of Fraud* (Report, Macquarie University, October 2021) 8.

[11] *Young Offenders Act 1997* (NSW) s 52.

[12] Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 28.

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

33. The Sub-Committee does not recommend any changes to the aggravating factors in s 21A of the *Crimes (Sentencing Procedure) Act 1999*.

34. In its preliminary submission, the Sub-Committee raised, at paragraph 13, that "given the increasing prevalence of phone and email-based schemes designed to target unsuspecting (and perhaps unsavvy) consumers and technology users, current typical and recognised categories of vulnerable victims may need to be re-examined, and perhaps expanded, by courts". After further discussion, the Sub-Committee accepts that this may be a strained interpretation of the existing legislation.

35. Further, the Sub-Committee does not support an expansion to this category through a legislative amendment to s 21A. The Sub-Committee observes that any changes to s 21A would apply more broadly to all offences (unless otherwise specified), so considerable care should be taken to avoid unintended consequences for sentencing for other types of offences should those categories be expanded.

Concluding remarks

36. NSW Young Lawyers and the Sub-Committee thank the Sentencing Council for the opportunity to make this Submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

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