

Consultation
Paper

Fraud

New South Wales
Sentencing Council

SEPTEMBER 2022



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We seek your responses to this Consultation Paper. To tell us your views you can send your submission by:

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If you have questions about the process please email.

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www.sentencingcouncil.justice.nsw.gov.au

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Terms of reference

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:

- (1) provide sentencing statistics for convictions over a five year period;
- (2) provide information on the characteristics of offenders, sentence type and length; and
- (3) 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).

[Received 21 September 2021]

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1. Introduction

In Brief

The Attorney General has asked us to review sentencing for fraud and fraud-related offences. Fraud can capture a wide variety of conduct. A review is desirable because many people are affected by fraud and it can cause significant harm.

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- 1.1 On 21 September 2021, the Attorney General asked the Sentencing Council to review sentencing for fraud and fraud-related offences in NSW. The terms of reference are available at page ix.
- 1.2 This Consultation Paper outlines the key fraud and fraud-related offences in NSW, considers the needs of victims and the motivations of offenders, and describes sentencing principles and outcomes.
- 1.3 The Council seeks your views on whether the law relating to sentencing for fraud and fraud-related offences should change.

What is fraud?

- 1.4 The term “fraud” is applied to offences that involve an “intentional dishonest act or an omission done with the purpose of deceiving”.¹
- 1.5 In NSW, the most commonly used fraud offences apply where a person, by any deception, dishonestly obtains property, or obtains a financial advantage or causes a financial disadvantage.² The fraud and fraud-related offences in NSW are set out in more detail in chapter 2.

What are different types of fraud?

- 1.6 Fraud offences can capture a variety of conduct. In our review of case law, and consultations, we have identified three broad categories of fraud:
- white-collar crime, such as lawyers or accountants abusing a position of trust
 - sophisticated 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.
- 1.7 Some stakeholders generally agreed with these categories in consultations.³ One consultation did not and indicated that almost anything can be fraud, and almost anyone can do it.⁴
- 1.8 The term “white-collar crime” is sometimes used by courts when stating principles around sentencing for fraud. However, the Court of Criminal Appeal (CCA) has observed that:
- white collar crime itself is so various in its manifestations and nature that it is scarcely susceptible of precise definition or of defined sentencing principles.⁵
- 1.9 The CCA has noted that “[t]here does not appear to be discrimination between different categories of white collar crime”. However, the court did detect some discrimination in “a

1. *Encyclopaedic Australian Legal Dictionary*, “fraud” (LexisNexis, 2022) (retrieved 7 September 2022).

2. *Crimes Act 1900* (NSW) s 192E(1).

3. NSW Police Force, *Preliminary Consultation PFRC03*; NSW Office of the Director of Public Prosecutions, *Preliminary Consultation PFRC05*; NSW Young Lawyers Criminal Law Committee, *Preliminary Consultation PFRC10*.

4. A Steel, *Preliminary Consultation PFRC09*.

5. *R v Brown* (Unreported, NSWCCA, 1 August 1994) 4.

number of cases in which professionals have committed offences of dishonesty involving substantial amounts”.⁶

- 1.10 The following paragraphs outline some of the various types of fraud and their frequency.
- 1.11 However, any analysis of the prevalence of fraud offending needs to be treated with caution. Some of the most recent data we rely on, such as that contained in the 2013 NSW Bureau of Crime Statistics and Research (“BOCSAR”) study on fraud offending in NSW,⁷ is now somewhat dated and may not reflect technological changes. For example, cheque fraud amounted to 3% of fraud offences reported to NSW Police in 2013.⁸ The use of cheques in Australia has more than halved between 2015 and 2020 and, accordingly, so too has cheque fraud.⁹
- 1.12 We should also appreciate that the prevalence of particular types of fraud may not always be reflected in criminal justice system data. Fraud, if dealt with at all, may be addressed outside the criminal justice system, including informally or through civil debt enforcement mechanisms. Furthermore, some types or instances of fraud may not be reported as discussed in chapter 3.

Card fraud

- 1.13 Credit or debit card fraud can be divided into two major categories: “card not present” (CNP) fraud and “card present” (CP) fraud.¹⁰
- 1.14 CNP fraud occurs when an offender makes an unauthorised purchase on a victim’s card via a remote channel without the physical card being seen by the merchant, mainly online or by phone.¹¹ CP fraud occurs when a physical card is used fraudulently at ATMs or point-of-sale (POS) devices.¹²
- 1.15 In 2013, “card fraud” represented 35% of fraud offences reported to NSW police. This category includes CNP fraud, and the CP fraud categories of tap-and-go fraud,

6. *R v Pont* [2000] NSWCCA 419 [45], [46].

7. W Macdonald and J Fitzgerald, *Understanding Fraud: The Nature of Fraud Offences Recorded by NSW Police*, Crime and Justice Bulletin No 180 (NSW Bureau of Crime Statistics and Research, 2014).

8. W Macdonald and J Fitzgerald, *Understanding Fraud: The Nature of Fraud Offences Recorded by NSW Police*, Crime and Justice Bulletin No 180 (NSW Bureau of Crime Statistics and Research, 2014) 1, 5.

9. Australian Payments Network, *Australian Payment Fraud 2021* (2021) 14.

10. Australian Payments Network, *Australian Payment Fraud 2021* (2021) 15.

11. Australian Payments Network, *Australian Payment Fraud 2021* (2021) 15.

12. Australian Payments Network, *Australian Payment Fraud 2021* (2021) 15.

skimming fraud and card never received fraud.¹³ Australian cards were used to defraud \$468 million in 2020.¹⁴

Card not present fraud

- 1.16 The relevant offence for CNP fraud is fraud, rather than theft, because the merchant is deceived into believing the person with the card was authorised to make the payment.
- 1.17 CNP fraud has emerged as the dominant mode of card fraud, amounting to 90% of all card fraud in 2020.¹⁵ Moreover, CNP fraud continues to rise even as CP fraud falls.¹⁶ This is due to the accelerating migration, for example from in-store transactions to online shopping (especially during the pandemic), the increasing prevalence of large-scale data breaches and the continuing prevalence of identity theft.¹⁷

Card present fraud

- 1.18 There are various types of CP fraud, as outlined below.
- 1.19 “Counterfeit or skimming” fraud occurs when an offender attaches a skimming device to an ATM or POS terminal, or uses a standalone skimming device, to skim a card’s magnetic stripe. In turn, the offender creates a counterfeit card.¹⁸
- 1.20 The prevalence of counterfeit or skimming fraud declined from 11% to 2% in the five years to 2020, as the proliferation of chip technology has provided strong protection against skimming.¹⁹
- 1.21 “Lost or stolen” fraud occurs when an offender makes an unauthorised transaction on a card that has been reported by the cardholder as lost or stolen.²⁰
- 1.22 “Never received” fraud occurs when an offender steals a card before it is received by the owner and uses it.²¹
- 1.23 “Tap-and-go” fraud occurs when an offender makes an unauthorised purchase on a debit or credit card using contactless payment technology. As the machine is deceived into believing the person with the card had authorisation to make a payment, this is

13. W Macdonald and J Fitzgerald, *Understanding Fraud: The Nature of Fraud Offences Recorded by NSW Police*, Crime and Justice Bulletin No 180 (NSW Bureau of Crime Statistics and Research, 2014) 1, 5, 6.

14. Australian Payments Network, *Australian Payment Fraud 2021*(2021) 2, 9.

15. Australian Payments Network, *Australian Payment Fraud 2021* (2021) 6, 9.

16. Australian Payments Network, *Australian Payment Fraud 2021* (2021) 4.

17. Australian Payments Network, *Australian Payment Fraud 2021* (2021) 3, 10.

18. Australian Payments Network, *Australian Payment Fraud 2021* (2021) 15.

19. Australian Payments Network, *Australian Payment Fraud 2021* (2021) 4, 9.

20. Australian Payments Network, *Australian Payment Fraud 2021* (2021) 15.

21. Australian Payments Network, *Australian Payment Fraud 2021* (2021) 15.

considered fraud, rather than theft. This can be considered a type of lost fraud, stolen fraud or never received fraud (rather than a standalone type of fraud) because it is carried out using lost, stolen, or never received cards.²²

- 1.24 “Lost or stolen” fraud amounted to 6% of all card fraud in 2020. “Card never received” fraud amounted to 0.7%.²³ The prevalence of tap-and-go fraud is captured in these two categories.²⁴

“Fail to pay” fraud

- 1.25 “Fail to pay” fraud can take different forms. It typically involves the theft of petrol from service stations by an offender who fills a car with petrol with no intention of paying, before driving away.²⁵ These are sometimes referred to as “fuel drive-offs”. Another example involves the failure to pay for food and drink consumed at a restaurant.
- 1.26 This is a fraud offence, rather than a theft offence, because the business owner allows a person to consume goods or services, presuming they will be paid for before departure. When the person intentionally fails to pay, the owner has been deceived.²⁶
- 1.27 In 2013, “fail to pay” fraud made up 30% of all fraud cases reported to NSW police.²⁷ The recent spike in petrol prices may be linked to a rise in this type of fraud, with a 20% increase in NSW in the three months to April 2022.²⁸

Breach of trust by an employee

- 1.28 A breach of trust by an employee is where an employee obtains property or benefits contrary to the terms of their employment. This may involve, for example, embezzlement or misappropriation of funds.
- 1.29 In 2013, embezzlement made up 4% of all fraud cases reported to NSW police.²⁹

22. Australian Payments Network, *Australian Payment Fraud 2021* (2021) 10.

23. Australian Payments Network, *Australian Payment Fraud 2021*(2021) 9.

24. Australian Payments Network, *Australian Payment Fraud 2021*(2021) 10.

25. W Macdonald and J Fitzgerald, *Understanding Fraud: The Nature of Fraud Offences Recorded by NSW Police*, Crime and Justice Bulletin No 180 (NSW Bureau of Crime Statistics and Research, 2014) 9.

26. S Crosswell, “Fail to Pay (FTP)”, *Armstrong Legal* <www.armstronglegal.com.au/traffic-law/nsw/traffic-offences/fail-to-pay-ftp/> (retrieved 7 September 2022).

27. W Macdonald and J Fitzgerald, *Understanding Fraud: The Nature of Fraud Offences Recorded by NSW Police*, Crime and Justice Bulletin No 180 (NSW Bureau of Crime Statistics and Research, 2014) 1, 5.

28. S Meacham, “Petrol Thieves on the Rise in NSW as Fuel Prices Climb” *9News* (online, 28 April 2022) <www.9news.com.au/national/petrol-prices-nsw-fuel-thieves-rising/e1f7f44d-cc0f-4ade-b809-1f3f18c6b2d8> (retrieved 23 September 2022).

Phishing

- 1.30 Phishing is where the offender sends messages pretending to be from a reputable company or individual to induce someone to reveal personal identification information, which can then be used to defraud them and others.³⁰
- 1.31 Of the 286,602 reports of scams received by the Australian Competition and Consumer Commission's (ACCC) Scamwatch across Australia in 2021, 25% reported phishing.³¹ However, in 2013, phishing represented only 2% of fraud offences reported to NSW police.³²

Romance fraud

- 1.32 Romance fraud involves an offender using a false identity or information to form a romantic relationship with a victim, often through dating applications.³³ Offenders will use this relationship to obtain money, property and/or personal details.
- 1.33 Of the 286,602 reports of scams received by the ACCC's Scamwatch in 2021, 1% reported romance fraud.³⁴ Offenders made significant gains through romance scams, totalling over \$56 million.³⁵

Identity fraud

- 1.34 Identity fraud involves the use of personal identification information in stolen or falsified documents or through information that has been fraudulently obtained. This type of fraud is often employed in concert with other offences, such as other fraud offences, drug smuggling or money laundering.³⁶

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29. W Macdonald and J Fitzgerald, *Understanding Fraud: The Nature of Fraud Offences Recorded by NSW Police*, Crime and Justice Bulletin No 180 (NSW Bureau of Crime Statistics and Research, 2014) 1, 5.
30. R Johns, *Sentencing in Fraud Cases*, Monograph 37 (Judicial Commission of NSW, 2012) 2.
31. Australian Competition and Consumer Commission, *Targeting Scams: Report of the ACCC on Scams Activity 2021* (2022) 18.
32. W Macdonald and J Fitzgerald, *Understanding Fraud: The Nature of Fraud Offences Recorded by NSW Police*, Crime and Justice Bulletin No 180 (NSW Bureau of Crime Statistics and Research, 2014) 5.
33. NSW Office of the Director of Public Prosecutions, *Preliminary Consultation PFRC05*.
34. Australian Competition and Consumer Commission, *Targeting Scams: Report of the ACCC on Scams Activity 2021* (2022) 18.
35. Australian Competition and Consumer Commission, *Targeting Scams: Report of the ACCC on Scams Activity 2021* (2022) 18.
36. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 12 November 2009, 19507.

- 1.35 One variant of identify fraud is “catfishing”, which involves the use or production of false identification information on social media, usually to defraud or scam someone else.³⁷ Catfishing is often used to facilitate romance fraud.³⁸
- 1.36 In 2013, “identity theft” made up 5% of all fraud cases reported to NSW police.³⁹ Of the 286,602 reports of scams received by the ACCC’s Scamwatch across Australia in 2021, 22,354 (8%) reported identity theft.⁴⁰
- 1.37 The Australian Bureau of Statistics (“ABS”) estimates 154,300 people in Australia experienced identity theft in 2020–21.⁴¹

Investment fraud

- 1.38 Investment fraud involves a false investment opportunity, often promoted on a website,⁴² or a real investment opportunity with the money siphoned off elsewhere. These scams often use “promises of big payouts, quick money or guaranteed returns”.⁴³ There have been several high profile cases of investment fraud in NSW in recent times.⁴⁴
- 1.39 Of the 286,602 reports of scams received by the ACCC’s Scamwatch in 2021, 3% reported an investment scam.⁴⁵ Offenders made significant gains through investment scams, totalling \$177 million.⁴⁶

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37. Australian Government eSafety Commissioner, “Catfishing” <www.esafety.gov.au/young-people/catfishing> (retrieved 7 September 2022).
38. See Australian Government eSafety Commissioner, “Catfishing” <www.esafety.gov.au/young-people/catfishing> (retrieved 7 September 2022).
39. W Macdonald and J Fitzgerald, *Understanding Fraud: The Nature of Fraud Offences Recorded by NSW Police*, Crime and Justice Bulletin No 180 (NSW Bureau of Crime Statistics and Research, 2014) 1, 5.
40. Australian Competition and Consumer Commission, *Targeting Scams: Report of the ACCC on Scams Activity 2021* (2022) 18.
41. Australian Bureau of Statistics, “Personal Fraud” (23 March 2022) <www.abs.gov.au/statistics/people/crime-and-justice/personal-fraud/2020-21#key-statistics> (retrieved 23 September 2022).
42. R Johns, *Sentencing in Fraud Cases*, Monograph 37 (Judicial Commission of NSW 2012) 2.
43. Australian Competition and Consumer Commission, “Investment scams”, *ScamWatch* <www.scamwatch.gov.au/types-of-scams/investments/investment-scams> (retrieved 7 September 2022).
44. See, eg, “Melissa Caddick Convinced 72 Investors to Hand over \$23m to ‘Sham’ Business, Court Told” *The Guardian* (online, 29 June 2021).
45. Australian Competition and Consumer Commission, *Targeting Scams: Report of the ACCC on Scams Activity 2021* (2022) 18.
46. Australian Competition and Consumer Commission, *Targeting Scams: Report of the ACCC on Scams Activity 2021* (2022) 18.

Government fraud

- 1.40 Fraud on government directly affects public revenue.⁴⁷ Offenders may defraud government by using false information to obtain grants or other benefits. There have been numerous recent reports of fraudulent claims relating to COVID-19 grants, as well as bushfire and flood disaster relief grants in NSW.⁴⁸
- 1.41 Enforcement can be particularly difficult for government due to the time and cost involved in recovering the funds.

Why review the sentencing of fraud offences?

- 1.42 There are several reasons why a review of sentencing in relation to fraud and fraud-related offences is important and timely.

Many people, government agencies and businesses are affected by fraud

- 1.43 The ABS, based on a survey of 28,386 people, estimates that over 2.1 million or 11% of Australians aged 15 years and over experienced personal fraud in 2020–21.⁴⁹ The ABS says this has increased from an estimated 1.6 million or 8.5% in 2014–15. Personal fraud includes card fraud, identity theft, and scams (such as, phishing, romance, computer support, and financial advice).⁵⁰
- 1.44 In some cases, businesses and government agencies will be victims of multiple offenders, for example, petrol stations in relation to fuel drive offs, and government agencies that administer grants or emergency payments. In some cases, such as banks in relation to card fraud, businesses will be victims together with their customers.

Fraud causes significant harm

- 1.45 Fraud has a significant impact on its victims and the general community. Individual victims may experience financial losses, but also emotional, psychological, relational,

47. R G Smith, *Organisations as Victims of Fraud, and How They Deal With It*, Trends and Issues in Crime and Criminal Justice No 127 (Australian Institute of Criminology, 1999) 1.

48. See, eg, T Ibrahim, "Service NSW Calls in Police to Investigate Fraudulent Claims for COVID-19 Business Grants" *ABC News* (online, 9 November 2021); "First Person Charged by Strike Force Sainsbery after Alleged \$530,000 Grant Fraud Detected" *The National Tribune* (online, 17 December 2021); "Further Four Charged Following Investigations into Bushfire Grant Fraud, NSW" *The National Tribune* (online, 16 December 2021).

49. Australian Bureau of Statistics, "Personal Fraud" (23 March 2022) <www.abs.gov.au/statistics/people/crime-and-justice/personal-fraud/2020-21#key-statistics> (retrieved 8 September 2022).

50. Australian Bureau of Statistics, "Personal Fraud" (23 March 2022) <www.abs.gov.au/statistics/people/crime-and-justice/personal-fraud/2020-21#key-statistics> (retrieved 8 September 2022).

and social effects.⁵¹ As fraud may involve a victim sending money or personal information to an offender, many victims experience “shame and embarrassment” and a “corresponding sense of guilt and personal responsibility”.⁵²

- 1.46 Fraud on businesses can cause financial, commercial or reputational harm, and may also have wider impacts. For example, it has been said that frauds involving financial and banking systems can undermine public confidence in such systems.⁵³
- 1.47 Fraud also harms the provision of government services and funding programs, particularly in emergency situations, such as those outlined above, where government depends on the honesty of applicants in order to get funds to those in need.
- 1.48 The impact of fraud on victims is explored further in chapter 3.

Technology creates opportunities for fraud and makes it harder to police

- 1.49 The use of technology in fraud has become increasingly common.⁵⁴ The internet has made it easier for offenders to anonymously target and deceive victims anywhere in the world.⁵⁵ For instance, CNP fraud offences have become one of the most prevalent types of fraud as online and remote shopping become increasingly popular.⁵⁶
- 1.50 Technology has also made fraud more difficult to police.⁵⁷ Offenders can contact victims from anywhere in the world, which creates significant jurisdictional issues in terms of identifying and prosecuting offenders and recovering property.⁵⁸

51. M Button and others, “Online Fraud Victims in England and Wales: Victims’ Views on Sentencing and the Opportunity for Restorative Justice” (2015) 54 *Howard Journal of Criminal Justice* 193, 197; NSW Police Force, *Preliminary Submission PFR08*; C Cross, R G Smith and K Richards, *Challenges of Responding to Online Fraud Victimisation in Australia*, Trends and Issues in Crime and Criminal Justice No 474 (Australian Institute of Criminology, 2014) 1, 3.

52. C Cross, *Preliminary Submission PFR04*, 3.

53. *Thangavelautham v R* [2016] NSWCCA 141 [86], [104]–[105]; *R v Araya* [2005] NSWCCA 283 [96]–[98]; *R v Hannes* [2002] NSWSC 1182 [90]; *R v Rivkin* [2004] NSWCCA 7 [412]; *DPP (Cth) v Couper* [2013] VSCA 72, 41 VR 128 [105], [108]; P McClellan, “White Collar Crime: Perpetrators and Penalties”, (Keynote Address, Fraud and Corruption in Government Seminar, University of New South Wales, 24 November 2011) 24–25; *Stevens v R* [2009] NSWCCA 260 [79]. But see M Bagaric, R Edney and T Alexander, *Sentencing in Australia* (9th ed, Thomson Reuters, 2022) [1040.1600].

54. NSW Office of the Director of Public Prosecutions, *Preliminary Consultation PFRC05*.

55. C Cross, *Preliminary Submission PFR04*, 3, 4; A Steel, *Preliminary Consultation PFRC09*.

56. Australian Payments Network, *Australian Payment Fraud 2021* (2021) 3.

57. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 12 November 2009, 19507–19508; C Cross, *Preliminary Submission PFR04*, 3.

58. C Cross, *Preliminary Submission PFR04*, 3.

Outline of this consultation paper

- 1.51 In **Chapter 2 – Fraud and fraud-related offences in NSW**, we provide an overview of these various offences in NSW law.
- 1.52 In **Chapter 3 – The experiences of victims of fraud**, we explore the harms they suffer and whether their needs are being met by the criminal justice system, especially at sentencing. We ask whether the needs of victims can be better addressed, in particular by making their voices heard through impact statements and seeking redress through improvements to the current system of reparation orders.
- 1.53 In **Chapter 4 – Motivations of fraud offenders**, we outline the research on, and theories about, what motivates fraud offending.
- 1.54 In **Chapter 5 – Sentencing principles and factors**, we outline the sentencing law and practice that is relevant in determining appropriate sentences for fraud and fraud-related offences.
- 1.55 In **Chapter 6 – Fraud Sentencing Guidelines in England and Wales**, we look at the sentencing guidelines on fraud in England and Wales as an example of a non-legislative attempt to formulate a comprehensive approach to fraud and fraud-related offences in a comparable jurisdiction.
- 1.56 In **Chapter 7 – Sentencing outcomes**, we look at the sentencing outcomes for fraud offences in NSW in three broad groups (based on frequency of charging):
- the offence of dishonestly obtaining financial advantage or causing financial disadvantage by deception⁵⁹
 - the offence of dishonestly obtaining property by deception,⁶⁰ and
 - the other fraud and fraud-related offences in the *Crimes Act 1900* (NSW).
- 1.57 We also ask whether sentences for fraud are appropriate.
- 1.58 In **Chapter 8 – Options for reform**, we consider some options for reforming the legislative framework relating to sentencing for fraud and fraud-related offences. We seek your views on whether there should be:
- an adjustment to the maximum penalties
 - an indictable-only version of the offence

59. *Crimes Act 1900* (NSW) s 192E(1)(b).

60. *Crimes Act 1900* (NSW) s 192E(1)(a).

- further options for dealing with low-level offending, and/or
- reform to aggravating factors.

2. Fraud and fraud-related offences in NSW

In Brief

There are numerous fraud and fraud-related offences in NSW. The most frequently charged offences are those of dishonestly obtaining property by deception and dishonestly obtaining a financial advantage or causing a financial disadvantage by deception, each with a maximum penalty of 10 years' imprisonment. Other offences include some stealing and similar offences, identity offences and forgery offences, in the *Crimes Act 1900* (NSW) and in other legislation.

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- 2.1 Numerous fraud and fraud-related offences are contained in the *Crimes Act 1900* (NSW) (*Crimes Act*) and other legislation. Fraud-related offences include embezzlement, forgery and identity crime. The conduct captured, the maximum penalties and time limits for prosecution vary across fraud and fraud-related offences.
- 2.2 This chapter outlines some of these offences. A more comprehensive list of the offences in the *Crimes Act 1900* (NSW) can be found at appendix B.

Main fraud offences in the *Crimes Act*

- 2.3 Part 4AA of the *Crimes Act* contains the main fraud offences. These are set out in Table 2.1.

Table 2.1: Fraud offences in part 4AA, *Crimes Act 1900* (NSW)

Section	Description	Maximum penalty
s 192E(1)(a)	Obtain property by deception	10 years
s 192E(1)(b)	Obtain financial advantage or cause financial disadvantage, by deception	10 years
s 192F(1)	Intend to defraud by destroying or concealing accounting records	5 years
s 192G	Intend to defraud by false or misleading statement	5 years
s 192H(1)	Intend to deceive members or creditors by false or misleading statement of officer of organisation	7 years

Section 192E

2.4 The main fraud offences are found in s 192E of the *Crimes Act*. This provides that a person is guilty of fraud if they, by deception, dishonestly:

- obtain another’s property, or
- obtain a financial advantage or cause a financial disadvantage.

The maximum penalty is 10 years.¹

2.5 Section 192E is broad and intended to cover most fraud cases.² It is meant to be “technologically neutral” to “ensure that criminal conduct now and well into the future can be caught”.³

2.6 Section 192E accounts for the most charges and the most finalised charges for fraud and fraud-related offences. In 2019, 19,125 charges (for state and federal offences) were finalised in NSW courts in relation to fraud, deception and related offences.

2.7 The most frequently charged state offence in 2019 was the offence of dishonestly obtaining property by deception⁴ with 6824 charges. This was followed closely by the offence of dishonestly obtaining financial advantage or causing financial disadvantage by deception,⁵ with 6502 charges. These two offences represent 70% of all charges in 2019 (see appendix C).

1. *Crimes Act 1900* (NSW) s 192E(1).

2. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 12 November 2009, 19507. See also NSW Police Force, *Preliminary Consultation PFRC03*.

3. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 12 November 2009, 19507.

4. *Crimes Act 1900* (NSW) s 192E(1)(a).

5. *Crimes Act 1900* (NSW) s 192E(1)(b).

2.8 In 2021, of the 12,425 finalised charges in the Local Court for fraud and fraud-related offences in the *Crimes Act* (listed in appendix B), the majority (10,263) were for offences under s 192E. There were only 2,162 finalised charges for the other fraud and fraud-related offences.⁶

2.9 A wide range of conduct can be charged under s 192E, from serious fraud to low level offending. Reasons for charging a fraud under s 192E, rather than other offences, may be:

- The breadth of s 192E captures “creative” conduct and emerging technologies. It is also simple and easy to understand, with not too many elements to prove.⁷
- Section 192E carries a maximum penalty of 10 years, which is much higher than some other specific offences (see below).
- There is no time limit on commencing a prosecution under part 4AA, unlike for some other specific offences (see below). The short time limit for some summary offences often presents challenges, given that fraud can be difficult to identify and investigate.⁸

Other part 4AA offences

2.10 The other offences under part 4AA apply when:

- a person dishonestly destroys or conceals an accounting record with the intention of obtaining property or obtaining a financial advantage or causing a financial disadvantage – maximum penalty: 5 years’ imprisonment⁹
- a person dishonestly makes or publishes (or concurs in making or publishing) any statement (whether or not in writing) that is false or misleading, with the intention of obtaining property or obtaining a financial advantage or causing a financial disadvantage – maximum penalty: 5 years’ imprisonment,¹⁰ and
- an officer of an organisation, with the intention of deceiving the organisation’s members or creditors about its affairs, dishonestly makes or publishes (or concurs in making or publishing) a statement (whether or not in writing) that to their knowledge may be false or misleading – maximum penalty: 7 years’ imprisonment.¹¹

6. NSW Bureau of Crime Statistics and Research, reference 22-21092.

7. NSW Police Force, *Preliminary Consultation PFRC03*; Legal Aid NSW, *Preliminary Consultation PFRC06*; NSW Bar Association, *Preliminary Consultation PFRC07*.

8. NSW Police Force, *Preliminary Consultation PFRC03*.

9. *Crimes Act 1900* (NSW) s 192F.

10. *Crimes Act 1900* (NSW) s 192G.

11. *Crimes Act 1900* (NSW) s 192H.

Common features of the part 4AA offences

- 2.11 All offences under part 4AA are to be tried summarily unless the prosecutor or accused elects otherwise.¹² When finalised in the Local Court, the maximum penalty the court can impose for each offence is two years, and for multiple offences the total maximum is five years.¹³
- 2.12 There is time limit for commencing a prosecution under part 4AA.
- 2.13 All offences in part 4AA have an element of dishonesty, defined as:
- dishonest according to the standards of ordinary people, and
 - known by the defendant to be dishonest according to the standards of ordinary people.¹⁴
- 2.14 Case law on this definition has received criticism from academia and the courts.¹⁵
- 2.15 Another key element is deception, which means:
- any deception, by words or other conduct, as to fact or as to law, including:
 - (a) a deception as to the intentions of the person using the deception or any other person, or
 - (b) conduct by a person that causes a computer, a machine or any electronic device to make a response that the person is not authorised to cause it to make.¹⁶

The deception must be intentional or reckless.¹⁷

- 2.16 Part 4AA of the *Crimes Act* commenced in 2010.¹⁸ It replaced over 30 existing offences, which targeted specific fraudulent conduct.¹⁹

12. *Criminal Procedure Act 1986* (NSW) sch 1 cl 4A.

13. *Criminal Procedure Act 1986* (NSW) s 267(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 58(1).

14. *Crimes Act 1900* (NSW) s 4B(1) definition of “dishonest”.

15. *Peters v R* [1998] HCA 7; 192 CLR 493 [15]–[17], [125]; J R Spencer, “Dishonesty: What the Jury Thinks the Defendant Thought the Jury Would Have Thought” (1982) 41 *Cambridge Law Journal* 222, 224; D Elliott, “Dishonesty in Theft” [1982] *Criminal Law Review* 395, 397–399; G Williams, “The Standard of Honesty” (1983) 133 *New Law Journal* 636, 637–638; K Campbell, “The Test of Dishonesty in *R v Ghosh*” (1984) 43 *Cambridge Law Journal* 349, 350–359; E Griew, “Dishonesty: The Objections to Feely and Ghosh” [1985] *Criminal Law Review* 341.

16. *Crimes Act 1900* (NSW) s 192B(1) definition of “deception”.

17. *Crimes Act 1900* (NSW) s 192B(2).

- 2.17 The amendments were intended to bring NSW into line with the national approach to fraud, as set out in the Model Criminal Code.²⁰ Notably, the maximum penalty for the main fraud offences under s 192E was doubled from five to ten years. The maximum penalties for other offences, including fraudulently destroying or concealing records was also increased. This was intended to reflect the seriousness of fraud and its impact on victims.²¹
- 2.18 However, some aspects of the Model Criminal Code were not adopted, and NSW continues to rely on the common law for some elements of offences.

Other fraud and fraud-related offences in the *Crimes Act*

- 2.19 In addition to the main fraud offences in part 4AA, there are several other fraud and fraud-related offences in the *Crimes Act*.

Stealing and similar offences

- 2.20 One part of the *Crimes Act* covers stealing and similar offences, including larceny and embezzlement.²² There is some overlap between these offences and fraud.

Larceny

- 2.21 Larceny is a crime where a person takes and carries away another's property, with the intention of permanently depriving them of it.²³ A key element is "fraudulent intent", which means the person did not believe they had a legal right to the property.²⁴
- 2.22 A key difference between fraud and larceny is the element of deception:
- Fraud involves the offender deceiving the victim into transferring property to them. For example, an offender using fake information to trick the victim into sending them money.²⁵

18. *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009* (NSW) sch 1 [3], inserting *Crimes Act 1900* (NSW) pt 4AA.

19. R Johns, *Sentencing in Fraud Cases*, Monograph 37 (Judicial Commission of NSW, 2012) 5–6; NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 12 November 2009, 19507.

20. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 3: Theft, Fraud, Bribery and Related Offences*, Report (1995) 119–177.

21. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 12 November 2009, 19507–19509.

22. *Crimes Act 1900* (NSW) pt 4.

23. LexisNexis, *Halsbury's Laws of Australia*, IV Property Offences, "Elements of Offence" [130–5015] (retrieved 2 September 2022). See also *Ilich v R* (1987) 162 CLR 110.

24. LexisNexis, *Halsbury's Laws of Australia*, IV Property Offences, "Fraudulent Requirement Otiose" [130–5110] (retrieved 2 September 2022).

- Larceny involves the offender taking another person’s property without that person’s consent. For example, an offender taking money out of a victim’s wallet.²⁶
- 2.23 If a person is charged with fraud under s 192E of the *Crimes Act*, an alternative verdict is a conviction for larceny and vice versa.²⁷ The offence of fraudulent appropriation is an alternative verdict to a charge of larceny.²⁸

Other offences

- 2.24 There are several specific fraud and fraud-related offences in the part of the *Crimes Act* that covers stealing and similar offences.²⁹ Many of these offences are old and cover specific fraudulent conduct. For example, embezzlement, which involves the fraudulent appropriation of property by a person to whom it has been entrusted.
- 2.25 These offences include where:
- a person in temporary possession of property fraudulently takes or converts that property, for their own, or others’ use³⁰
 - a “clerk or servant” (that is, an employee) steals or embezzles property³¹
 - a “public servant” (that is, a person employed in the Public Service) steals or embezzles property³²
 - a person fraudulently brands or ear marks, or alters the brand or ear marks, of cattle,³³ and
 - a person corruptly takes a reward for recovering a stolen dog.³⁴
- 2.26 There are also several offences relating to interfering with a unique identifier (such as a number plate) on a motor vehicle, vessel or trailer.³⁵
- 2.27 The maximum penalties for these offences vary, and include 10 years’ imprisonment,³⁶ 5 years’ imprisonment,³⁷ and 1 year imprisonment.³⁸

25. A Steel, *Preliminary Consultation PFRC09*.

26. A Steel, *Preliminary Consultation PFRC09*.

27. *Crimes Act 1900* (NSW) s 192E(4).

28. *Crimes Act 1900* (NSW) s 124.

29. *Crimes Act 1900* (NSW) pt 4.

30. *Crimes Act 1900* (NSW) s 125.

31. *Crimes Act 1900* (NSW) s 155–157.

32. *Crimes Act 1900* (NSW) s 159–160.

33. *Crimes Act 1900* (NSW) s 131.

34. *Crimes Act 1900* (NSW) s 133.

35. *Crimes Act 1900* (NSW) s 154E(1) definition of “unique identifier”, s 154H–154J.

Identity offences

- 2.28 In addition to part 4AA, the *Crimes Amendment (Fraud, Identity and Forgery) Act 2009* (NSW) (*Fraud, Identity and Forgery Act*) inserted several new identity crime offences into the *Crimes Act*. These offences criminalise the misuse of a person's identification information.³⁹ Identification information includes a name or address, driver licence, passport, credit card or digital signature.⁴⁰
- 2.29 Making, supplying or using such identification information, with the intention of committing an indictable offence, carries a maximum penalty of 10 years. Possessing identification information for this purpose carries a maximum penalty of 7 years.⁴¹ The relevant indictable offence could be any offence and does not necessarily have to be a fraud or fraud-related offence.⁴²
- 2.30 There is also an offence of possessing equipment to make a document that contains identification information. The maximum penalty is 3 years' imprisonment.⁴³
- 2.31 Before 2009, identity crimes "would have been charged under general fraud or forgery provisions such as obtain benefit by deception or use false instrument".⁴⁴ The second reading speech for the *Crimes Amendment (Fraud, Identity and Forgery) Bill 2009* (NSW) shows that the Government was concerned about the significant increase in the misuse of personal identification information, including in the commission of serious crimes such as drug offences and money laundering. The introduction of these new identity offences was intended to give police powers to combat this growing problem.⁴⁵

Forgery offences

- 2.32 Forgery involves making or using false documents. The *Fraud, Identity and Forgery Act* replaced approximately 30 specific forgery offences with four general offences.⁴⁶
- 2.33 The main forgery offence is making a false document with the intention of inducing another person to accept it as genuine, and therefore obtain another person's property,

36. *Crimes Act 1900* (NSW) s 156–160.

37. See, eg, *Crimes Act 1900* (NSW) s 125, s 131, s 154I(1).

38. *Crimes Act 1900* (NSW) s 133.

39. *Crimes Act 1900* (NSW) pt 4AB.

40. *Crimes Act 1900* (NSW) s 192I definition of "identification information".

41. *Crimes Act 1900* (NSW) s 192I definition of "deal", s 192J–192K.

42. R Johns, *Sentencing in Fraud Cases*, Monograph 37 (Judicial Commission of NSW, 2012) 7.

43. *Crimes Act 1900* (NSW) s 192L.

44. R Johns, *Sentencing in Fraud Cases*, Monograph 37 (Judicial Commission of NSW, 2012) 6.

45. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 12 November 2009, 19507.

46. R Johns, *Sentencing in Fraud Cases*, Monograph 37 (Judicial Commission of NSW 2012) 5; NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 12 November 2009, 19507.

obtain financial advantage or cause financial disadvantage, or influence the exercise of a public duty. The maximum penalty is 10 years' imprisonment.⁴⁷ There are also offences of using or possessing a false document, knowing it is false, which also carry a maximum penalty of 10 years' imprisonment.⁴⁸

- 2.34 A further offence involves making or possessing equipment for making false documents, which carries a maximum penalty of 10 or 3 years, depending on whether the person intends to use the equipment to commit a forgery offence.⁴⁹
- 2.35 The forgery provisions use the same definitions of obtaining property, and obtaining financial advantage and disadvantage, as the main fraud offence, s 192E.⁵⁰

Other offences

- 2.36 The *Crimes Act* includes various other fraud and fraud-related offences, across different parts. Some of these include:
- making false or misleading statements to obtain an authority such as a licence, permit or registration, or in an application to obtain a benefit,⁵¹ and
 - producing false or misleading documents to comply with a state law.⁵²
- 2.37 There are also offences contained in the part of the *Crimes Act* that deals with crimes against property which may also be classified as fraud or fraud-related. The offence of dishonestly destroying or damaging property "with a view to making a gain" is subject to a maximum penalty of 7 years' imprisonment. When that offence is committed and the destruction or damage is caused "by means of fire or explosives", the maximum penalty is 14 years' imprisonment.⁵³

Fraud and fraud-related offences in other legislation

- 2.38 There are numerous fraud and fraud-related offences in legislation other than the *Crimes Act*. These relate to the many provisions that require statements, documents or other information to be supplied in order to obtain certain benefits, including, for example, a payment, grant or licence. This carries with it a risk of fraudulent conduct.

47. *Crimes Act 1900* (NSW) s 253.

48. *Crimes Act 1900* (NSW) s 254–255.

49. *Crimes Act 1900* (NSW) s 256.

50. *Crimes Act 1900* (NSW) s 252. See also *Crimes Act 1900* (NSW) s 192C–192D.

51. *Crimes Act 1900* (NSW) s 307A(1).

52. *Crimes Act 1900* (NSW) s 307C(1).

53. *Crimes Act 1900* (NSW) s 197(1).

- 2.39 Some of these statutes also cover the conduct of employees, employers, contractors and public officers. These people often have access to information or control of money or decisions, that they could fraudulently use for their, or others', benefit.
- 2.40 Some examples of fraud and fraud-related offences in other legislation include:
- making or giving a false or misleading statement or information on an application for a First Home Owner Grant⁵⁴
 - making a false or misleading statement to obtain public or community housing, a rental rebate or subsidy, or another advantage or concession⁵⁵
 - making a false or misleading statement to obtain a tow truck licence⁵⁶
 - a person who has knowledge of Sydney Olympic Park Authority proposals using that knowledge to gain an unfair advantage in a land dealing,⁵⁷ and
 - an employee of a mine removing or concealing a mineral with intent to defraud the owner.⁵⁸
- 2.41 These offences cover specific conduct and situations relevant to the subject matter of the statute. However, the conduct may also be captured by the broad fraud offence in s 192E, or one of the other fraud, stealing, identity or forgery offences in the *Crimes Act* (see above).
- 2.42 There is significant variation in the maximum penalties for fraud and fraud-related offences in other legislation. For example, some offences carry a maximum penalty of 5 penalty units (\$550).⁵⁹ Others have a maximum penalty of imprisonment for 5 years and/or 500 penalty units (\$55,000).⁶⁰
- 2.43 These offences also vary in terms of the time limit for commencing a prosecution:
- Some are summary offences, which means proceedings must be commenced within six months of the alleged date of the offence.⁶¹

54. *First Home Owner Grant (New Homes) Act 2000* (NSW) s 44.

55. *Housing Act 2001* (NSW) s 69(1).

56. *Tow Truck Industry Act 1998* (NSW) s 36.

57. *Sydney Olympic Park Authority Act 2001* (NSW) s 71.

58. *Mining Act 1992* (NSW) s 12C.

59. See, eg, *Fire and Rescue NSW Act 1989* (NSW) s 30(3); *Sporting Injuries Insurance Act 1978* (NSW) s 33.

60. See, eg, *State Owned Corporations Act 1989* (NSW) sch 10 cl 3(2), cl 9(11), cl 11(4); *Electricity Retained Interest Corporations Act 2015* (NSW) s 26(1), s 26(3)(a)–(b), s 26(4)(a)–(b).

61. See, eg, *Sydney Olympic Park Authority Act 2001* (NSW) s 71, s 77; *Fire and Rescue NSW Act 1989* (NSW) s 30(3), s 84. See also *Criminal Procedure Act 1986* (NSW) s 179(1).

- Others state a specific time for commencing proceedings, for example, three years,⁶² or two years,⁶³ from the alleged date of the offence.
- One offence specifies that proceedings must be commenced within 12 months of when the evidence of the offence came to the attention of a member of staff of the corporation or department.⁶⁴

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?

62. See, eg, *First Home Owner Grant (New Homes) Act 2000* (NSW) s 44, s 49.

63. See, eg, *Tow Truck Industry Act 1998* (NSW) s 36, s 87.

64. *Housing Act 2001* (NSW) s 69(1), s 69A(1), s 74(3).

3. The experiences of victims of fraud

In Brief

Fraud can cause significant harm to individuals, businesses and organisations. Issues surrounding the reporting and investigation of fraud can also impact a victim's experience. We seek your views on addressing the needs of victims in the sentencing process, including through victim and business impact statements, and improved avenues for reparation.

- Fraud can cause significant harm** **24**
 - Individual victims 24
 - Businesses and organisations as victims 26
- Issues with reporting and investigating fraud** **27**
 - Fraud is underreported 27
 - Fraud is hard to investigate and prosecute 29
- Addressing the needs of victims** **30**
 - Victim impact statements 30
 - Business impact statements 32
 - Reparation 33

- 3.1 This chapter outlines the experiences of victims of fraud and fraud-related offences. We explore the harms they suffer and whether their needs are being met by the criminal justice system, especially at sentencing.
- 3.2 We seek your views on certain reforms that could improve the experiences of victims. Namely, expanding the current statutory victim impact statement regime to victims of fraud offences, having business impact statements for business or organisational victims, and improvements to the current reparations scheme.
- 3.3 We talk further about how courts take victims into account in the sentencing process in chapter 5.

Fraud can cause significant harm

3.4 Victims of white-collar crime have been seen as the “neglected victims”, with some saying fraud is a “victimless crime”.¹ This section deals with the harm experienced by fraud victims, and in chapter 5 we explore the consideration of this at sentencing.

Individual victims

3.5 It is a “myth to think that fraud losses are only financial”.² The impact of fraud is often experienced as significant emotional, psychological, relational or social trauma.³

3.6 Studies suggest that fraud victims surpass the physical and emotional damage of street-level crime victims.⁴ 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”.⁵

3.7 Police liken this harm to the long-term effects of grooming in relation to sexual offences, as victims experience guilt or self-blame for the offence.⁶ This is explained as victims often “play an active role in victimisation, through the sending of money to an offender, or the sending of personal information”.⁷

3.8 Some types of fraud may be more likely to cause emotional or psychological harm. For example, victims of romance fraud often experience significant fear and emotional suffering.⁸

1. M Dodge, “A Black Box Warning: The Marginalization of White-Collar Crime Victimization” (2020) 1(1) *Journal of White Collar and Corporate Crime* 24, 25; M Button, C Lewis and J Tapley, “Not a Victimless Crime: The Impact of Fraud on Individual Victims and their Families” (2014) 27 *Security Journal* 36, 36; C Cross, R G Smith and K Richards, *Challenges of Responding to Online Fraud Victimization in Australia*, Trends and Issues in Crime and Criminal Justice No 474 (Australian Institute of Criminology, 2014) 4.

2. C Cross, *Preliminary Submission PFR04*, 4.

3. M Button and others, “Online Fraud Victims in England and Wales: Victims' Views on Sentencing and the Opportunity for Restorative Justice” (2015) 54 *Howard Journal of Criminal Justice* 193, 197; NSW Police Force, *Preliminary Submission PFR08*, 6; C Cross, R G Smith and K Richards, *Challenges of Responding to Online Fraud Victimization in Australia*, Trends and Issues in Crime and Criminal Justice No 474 (Australian Institute of Criminology, 2014) 3.

4. M Dodge, “A Black Box Warning: The Marginalization of White-Collar Crime Victimization” (2020) 1 *Journal of White Collar and Corporate Crime* 24, 29.

5. M Dodge, “A Black Box Warning: The Marginalization of White-Collar Crime Victimization” (2020) 1 *Journal of White Collar and Corporate Crime* 24, 29; C Cross, R G Smith and K Richards, *Challenges of Responding to Online Fraud Victimization in Australia*, Trends and Issues in Crime and Criminal Justice No 474 (Australian Institute of Criminology, 2014) 3; C Cross, *Preliminary Submission PFR04*, 4; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 5.

6. NSW Police Force, *Preliminary Submission PFR08*, 6.

7. C Cross, *Preliminary Submission PFR04*, 3.

8. C Cross, *Preliminary Submission PFR04*, 4.

- 3.9 The experiences of victims of online and offline frauds may also differ. For offline fraud, where the offender is known to the victim (such as in an intimate relationship or friendship), the victim may take on more intense feelings of shame and embarrassment, sometimes exacerbated by feelings of betrayal. Victims may internalise feelings of blame for trusting the person, and this can affect future intimate and/or social relationships where issues of trust arise.
- 3.10 For online frauds, where the victim typically does not know the offender, the emotional reaction may be more of anger, injustice and a feeling of hopelessness. These feelings occur more strongly in online matters because there is often no identifiable person or entity to blame.
- 3.11 Online fraud victims may also experience re-victimisation. For instance, personal information obtained from a fraudulent activity may be included on a “sucker’s list”.⁹ This list is then sold to other offenders who attempt to defraud the victim in another way. A second offender may offer to assist the victim in recovering the lost funds for a further fee and in turn, defraud the victim again.¹⁰ This may lead to chronic victims who are subject to multiple offences on multiple occasions.¹¹
- 3.12 The effects of fraud may also build on pre-existing vulnerabilities. Vulnerable victims are often more likely to fall prey to fraud offenders.¹²
- 3.13 Seniors Rights Service emphasises that the age of the victim and their vulnerability is an important factor in sentencing.¹³ Importantly, older victims are often in poor physical or psychological health, socially isolated, less familiar with technology, and more likely to experience abuse.¹⁴ The three elements of their vulnerability are often physical, financial and social.¹⁵

9. C Cross, R G Smith and K Richards, *Challenges of Responding to Online Fraud Victimisation in Australia*, Trends and Issues in Crime and Criminal Justice No 474 (Australian Institute of Criminology, 2014) 3.

10. C Cross, R G Smith and K Richards, *Challenges of Responding to Online Fraud Victimisation in Australia*, Trends and Issues in Crime and Criminal Justice No 474 (Australian Institute of Criminology, 2014) 3.

11. C Cross, R G Smith and K Richards, *Challenges of Responding to Online Fraud Victimisation in Australia*, Trends and Issues in Crime and Criminal Justice No 474 (Australian Institute of Criminology, 2014) 3.

12. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [38]; Seniors Rights Service, *Preliminary Submission PFR06*, 1, 2.

13. Seniors Rights Service, *Preliminary Submission PFR06*, 1.

14. Seniors Rights Service, *Preliminary Submission PFR06*, 1.

15. C Cross, “They’re Very Lonely’: Understanding the Fraud Victimisation of Seniors” (2016) 5 *International Journal for Crime, Justice and Social Democracy* 60, 64.

3.14 On the other hand, there are other strong stereotypes that perceive older victims as greedy or gullible and culpable for their own victimisation.¹⁶ This victim blaming can exacerbate the impact of fraud, prevent disclosure and serve as a barrier to accessing support.¹⁷

Businesses and organisations as victims

3.15 Generally, fraud can cause financial, commercial or reputational harm to businesses or organisations. According to a recent survey, fraud and corruption are seen as the greatest risks to businesses globally, with no downward trend over the last 14 years.¹⁸

3.16 Entities of all sizes are at risk of:

- misappropriation of commercial property, including client lists
- intellectual property fraud for example, logos or names
- invoicing and funds transfer fraud
- frauds involving the misuse of business information
- misrepresentation of instructions from executives concerning funds transfers, and
- business opportunities and investment scams.¹⁹

3.17 Other harmful effects include diminished faith in an organisation, loss of stakeholders' trust, loss of market value, and the erosion of public morality.²⁰ The impact of fraud on a

16. C Cross, "They're Very Lonely': Understanding the Fraud Victimisation of Seniors" (2016) 5 *International Journal for Crime, Justice and Social Democracy* 60, 61.

17. C Cross, "They're Very Lonely': Understanding the Fraud Victimisation of Seniors" (2016) 5 *International Journal for Crime, Justice and Social Democracy* 60, 61.

18. EY Forensic and Integrity Services, *Integrity in the Spotlight: The Future of Compliance*, Global Fraud Survey 15 (2020) 5; EY Forensic and Integrity Services, *Tunnel Vision or the Bigger Picture? How a Focus on Enhanced Governance can Help Reimagine Corporate Integrity*, Global Integrity Report (2022) 8.

19. C Franks and R G Smith, *National Identity Security Strategy: Estimating the Cost to Australian Businesses of Identity Crime and Misuse in Australia 2019*, Statistical Report 29 (Australian Institute of Criminology, 2020) vii; R G Smith, *National Identity Security Strategy: Estimating the Cost to Australian Businesses of Identity Crime and Misuse*, Research Report 15 (Australian Institute of Criminology, 2018) 6, 12–13, 20; R G Smith, *Organisations as Victims of Fraud, and How They Deal With It*, Trends and Issues in Crime and Criminal Justice No 127 (Australian Institute of Criminology, 1999) 2.

20. M Junger, V Wang and M Schlomer, "Fraud Against Businesses Both Online and Offline: Crime Scripts, Business Characteristics, Efforts, and Benefits" (2020) 9(13) *Crime Science Journal* 1, 1.

business can be so significant that a company is dissolved, leaving employees without employment and causing shareholders to lose their investment.²¹

- 3.18 Most frauds on organisations are perpetrated by employees rather than outsiders.²² Recently, the KPMG Fraud Survey found that 62% of businesses surveyed identified that employees were the single biggest source of risk.²³ This is due to their insider knowledge so they are best positioned to exploit corporate vulnerabilities.²⁴

Issues with reporting and investigating fraud

- 3.19 Many victims of fraud do not believe that the reporting and investigation processes meets their needs. As one submission observed:

In the large majority of circumstances, victims in New South Wales (and Australia) will be unable to lodge a complaint that leads to the investigation, arrest and successful prosecution of an offender. ...The majority will get no response, no outcome, and have no sense of justice afforded to them.²⁵

Fraud is underreported

- 3.20 We have heard that fraud is often underreported, and it “is known to have one of the lowest reporting rates of all crime[s]”.²⁶
- 3.21 Cross attributes this low reporting to the difficulties that victims have in reporting fraud to various agencies such as, police, financial institutions, consumer protection agencies, government and non-government organisations.²⁷
- 3.22 The various reporting options mean that victims are “forced to interact with several agencies unsuccessfully regarding their incident”, leaving victims subject to the “merry-go-round” effect”.²⁸ For instance, victims of fraud committed within an intimate relationship may be directed to seek family law advice rather than pursue prosecution.
- 3.23 Other reasons for low reporting rates may be that the victim:

21. R G Smith, *Organisations as Victims of Fraud, and How They Deal With It*, Trends and Issues in Crime and Criminal Justice No 127 (Australian Institute of Criminology, 1999) 1.

22. R G Smith, *Organisations as Victims of Fraud, and How They Deal With it*, Trends and Issues in Crime and Criminal Justice No 127 (Australian Institute of Criminology, 1999) 2.

23. KPMG, “Fraud Survey 2021” (21 March 2021) <home.kpmg/au/en/home/insights/2021/03/fraud-risk-survey-2021.html> (retrieved 13 September 2022).

24. KPMG, “Fraud Survey 2021” (21 March 2021) <home.kpmg/au/en/home/insights/2021/03/fraud-risk-survey-2021.html> (retrieved 13 September 2022).

25. C Cross, *Preliminary Submission PFR04*, 3.

26. C Cross, *Preliminary Submission PFR04*, 2; NSW Bar Association, *Preliminary Consultation PFRC07*.

27. C Cross, *Preliminary Submission PFR04*, 2.

28. C Cross, *Preliminary Submission PFR04*, 2.

- lacks awareness of their victimisation
 - believes the offence is trivial
 - has strong sense of shame and embarrassment about being a victim
 - lacks knowledge of who to report to, or
 - believes they will not receive an appropriate response.²⁹
- 3.24 Unconvincingly, there have been many other attempts to explain reporting rates through the demographics of victims, either through their age, income, marital status or the leading factor, education.³⁰ These studies have been criticised due to their small sample size.³¹
- 3.25 In 2020–2021, the Australian Bureau of Statistics (ABS) found that approximately 5% of card fraud victims and 8% of identity theft victims did not report their victimisation at all.³²
- 3.26 However, reporting rates may depend on the type of fraud. In the same ABS survey, approximately 50% of scam victims did not report their victimisation.³³ Similar results were found in an American study in 2000, where only 14% of free prize fraud victims reported their fraud, this is also referred to as “unexpected prize and lottery scams”.³⁴ The same survey found 68% of victims of telephone scams reported their fraud, and 63% of credit card fraud victims reported their fraud.³⁵

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29. R Ochoa Hernandez, R Simpson and G Gill, *The Human Impacts of Fraud*, Report (Macquarie University, 2021) 7; C Cross, *Preliminary Submission PFR04*, 2–3.
30. K R Kerley and H Copes, “Personal Fraud Victims and Their Official Responses to Victimization” (2002) 17 *Journal of Police and Criminal Psychology* 19, 23; H Copes and others, “Reporting Behavior of Fraud Victims and Black’s Theory of Law: An Empirical Assessment” (2001) 18 *Justice Quarterly* 343, 345, 354, 358.
31. H Copes and others, “Reporting Behavior of Fraud Victims and Black’s Theory of Law: An Empirical Assessment” (2001) 18 *Justice Quarterly* 343, 346.
32. Australian Bureau of Statistics, “Personal Fraud” (23 March 2022) <www.abs.gov.au/statistics/people/crime-and-justice/personal-fraud/latest-release> (retrieved 18 September 2022).
33. Australian Bureau of Statistics, “Personal Fraud” (23 March 2022) <www.abs.gov.au/statistics/people/crime-and-justice/personal-fraud/latest-release> (retrieved 18 September 2022).
34. K R Kerley and H Copes, “Personal Fraud Victims and Their Official Responses to Victimization” (2002) 17 *Journal of Police and Criminal Psychology* 19, 23; Australian Competition and Consumer Commission, “Unexpected Prize and Lottery Scams” *Scamwatch* <www.scamwatch.gov.au/types-of-scams/unexpected-winnings/unexpected-prize-lottery-scams> (retrieved 18 September 2022).
35. K R Kerley and H Copes, “Personal Fraud Victims and Their Official Responses to Victimization” (2002) 17 *Journal of Police and Criminal Psychology* 19, 23.

- 3.27 These surveys might support the assertion that victims struggle to report to different agencies. For example, both surveys showed that credit card fraud victims regularly report their frauds, in this instance it might be obvious for a victim to report a fraud to their bank, but a victim of a scam or free prize fraud might not know who to report to.
- 3.28 Fraud is not necessarily reported to police, and this means it will not be investigated, charged, and if proved, then sentenced.
- 3.29 The ABS survey showed that, of the estimated 1.4 million people who experienced card fraud in 2020–21, 5.1% did not report it at all. Only 6.4% reported to police while 88.7% reported to banks or financial institutions and 15.3% reported to credit card companies.³⁶ We note victims may be more likely to receive an immediate response and redress from banks or financial institutions.

Fraud is hard to investigate and prosecute

- 3.30 The complexities of the investigation and prosecution process is particularly challenging for victims of fraud offences.³⁷ Primarily because of the delays in the court process, and the broader difficulties with the inability for police to investigate, or the difficulties in prosecuting fraud.
- 3.31 These delays leave victims experiencing further trauma and suffering.³⁸ They occur when offenders have been granted conditional bail, meaning trials are given a lower priority.³⁹ We have even heard of some matters going through the court system for eight years without trial.⁴⁰
- 3.32 The delay or lack of action from the courts or police can leave victims feeling minimised and trivialised.⁴¹ This is particularly difficult for victims of online fraud as offenders often target victims outside their jurisdiction, leaving victims unable to seek assistance from police.⁴²
- 3.33 The Office of the Director of Prosecutions explained that prosecuting frauds can be challenging when the evidence does not meet the standard of proof.⁴³ This occurs

36. Australian Bureau of Statistics, “Personal Fraud” (23 March 2022) <www.abs.gov.au/statistics/people/crime-and-justice/personal-fraud/latest-release> (retrieved 19 September 2022).

37. NSW Young Lawyers Criminal Law Committee, *Preliminary Consultation PFR010*; NSW Bar Association *Preliminary Consultation PFR003*; NSW Police Force, *Preliminary Consultation PFR003*.

38. C Cross, *Preliminary Submission PFR04*, 4.

39. NSW Police Force, *Preliminary Submission PFR08*, 6.

40. NSW Police Force, *Preliminary Submission PFR08*, 6.

41. C Cross, *Preliminary Submission PFR04*, 4; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [26].

42. C Cross, *Preliminary Submission PFR04*, 3.

43. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 5.

particularly where evidence is a result of an internal investigation or audit by an agency.⁴⁴ This is significant as it may mean that pleas are accepted to lesser charges, or matters are finalised in the Local Court rather than being tried on indictment.⁴⁵ At sentencing it may mean that the evidence before the court does not reflect the objective seriousness of the offending behaviour.

Addressing the needs of victims

- 3.34 Individual victims want to be acknowledged and have their complaint taken seriously.⁴⁶ Many also want an outcome for their case, and a sense of justice.⁴⁷ This may involve compensation for their financial loss and suffering. They may also want to prevent other people from falling victim to the same offender.⁴⁸
- 3.35 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.⁴⁹
- 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.
- 3.37 In the following section, we raise questions about how sentencing process could better respect the wishes of fraud victims to be heard. We also consider the need for victims to receive reparation for fraud.

Victim impact statements

- 3.38 One of the purposes of sentencing is to recognise the harm done to the victim of the crime and the community.⁵⁰ At common law, the sentencing judge is entitled to consider the impact of the crime on the victim.⁵¹

44. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 5.

45. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 5.

46. C Cross, *Preliminary Submission PFR04*, 4–5; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [37]; NSW Police Force, *Preliminary Submission PFR08*, 6; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 5; NSW Bar Association, *Preliminary Consultation PFRC07*.

47. C Cross, *Preliminary Submission PFR04*, 5; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 5.

48. C Cross, *Preliminary Submission PFR04*, 4.

49. C Cross, *Preliminary Submission PFR04*, 4–5.

50. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g).

51. *Porter v R* [2008] NSWCCA 145 [54]; *Siganto v R* [1998] HCA 74, 194 CLR 656, 665–666. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(5).

- 3.39 For many offences, a victim impact statement (“VIS”) can be a useful tool for recognising the harm done to the victim of the crime and the community.⁵² It is the primary way a victim’s experience is conveyed to the court.
- 3.40 A VIS can also help the court to understand aggravating factors such as, “the injury, emotional harm, loss or damage caused by the offence was substantial”.⁵³
- 3.41 The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides a statutory framework for the use of victim impact statements by the courts. A court must accept and acknowledge a VIS prepared by an eligible victim, as long as it complies with relevant requirements.⁵⁴ An eligible victim also has the right to read out their statement before the offender is sentenced.⁵⁵ These rights for victims and obligations on courts are not available at common law.
- 3.42 The statutory VIS scheme in NSW extends only to certain offences involving physical harm, actual and threatened violence and sexual offences.⁵⁶ It does not extend to victims of fraud. It also imposes further limits on eligible offences in the Local Court,⁵⁷ which deals with most fraud offences.
- 3.43 Stakeholders strongly supported extending the statutory scheme to include fraud offences.⁵⁸ Some supported a right for a victim to tender a VIS in the case of serious fraud offences (such as those that would be dealt with in the District Court) while others supported allowing VIS for victims of any fraud offence (including those dealt with in the Local Court).⁵⁹
- 3.44 This would go beyond the current statutory position, as there is only a discretion at common law to admit a VIS. Integrating fraud victims in the statutory scheme would address the needs of victims who feel their experience goes unrecognised.⁶⁰
- 3.45 In 2018, the Sentencing Council recommended expanding the category of those entitled to tender a VIS by including victims of “any criminal offence”.⁶¹ This would extend the

52. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g).

53. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(g).

54. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30B.

55. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30D.

56. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(2), s 27(4).

57. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(4).

58. C Cross, *Preliminary Submission PFR04*, 4; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [37]; NSW Police Force, *Preliminary Submission PFR08*, 6; Commonwealth Director of Public Prosecutions, *Preliminary Submission PFR03* [24]; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 5.

59. NSW Police Force, *Preliminary Submission PFR08*, 6; NSW Office of the Director of Public Prosecutions, *Preliminary Consultation PFRC05*.

60. NSW Office of the Director of Public Prosecutions, *Preliminary Consultation PFRC05*.

61. NSW Sentencing Council, *Victims’ Involvement in Sentencing*, Report (2018) rec 2.1(a).

right to victims of fraud. The Government acknowledged support for this recommendation but stated further consultation and analysis would be conducted before adopting it.⁶² The Council also recommended the Department of Justice investigate ways of accommodating victims in the sentencing process in the high volume criminal jurisdiction of the Local Court.⁶³

3.46 Should the proposal to extend the statutory scheme be adopted, the ODPP noted that it routinely prepares VIS and does not anticipate any increase in resources necessary to support fraud victims.⁶⁴

3.47 The CDPP submitted that extending the VIS scheme to fraud victims would:

greatly increase the variety of appropriate responses to victims' needs in sentencing for fraud offences in NSW, resulting in the needs of such victims being dealt with more effectively in the sentencing process.⁶⁵

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?

Business impact statements

3.48 One submission suggested a representative of a corporate victim should be able to make a VIS.⁶⁶ This would inform the court about the impact suffered by a corporate entity.⁶⁷

3.49 However, others did not support this.⁶⁸ Reasons for this included that such a statement may not be appropriate or meaningful particularly from larger institutions such as banks.⁶⁹ However, while large businesses may be able to absorb the costs of fraud, a smaller business may find it more difficult to do so.⁷⁰

62. NSW Government, *Schedule of Government Response to Recommendations on Victims' Involvement in Sentencing* (C2018) [2.1].

63. NSW Sentencing Council, *Victims' Involvement in Sentencing*, Report (2018) rec 1.1.

64. NSW Office of the Director of Public Prosecutions, *Preliminary Consultation PFRC05*.

65. Commonwealth Director of Public Prosecutions, *Preliminary Submission PFR03* [24].

66. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [39].

67. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [39].

68. NSW Bar Association, *Preliminary Consultation PFRC07*; Commonwealth Director of Public Prosecutions, *Preliminary Consultation PFRC08*.

69. NSW Bar Association, *Preliminary Consultation PFRC07*.

70. NSW Young Lawyers Criminal Law Committee, *Preliminary Consultation PFRC10*.

- 3.50 Another view is that a VIS may not be relevant for an agency or add any value to the understanding of the impact on a corporate victim in the sentencing process.⁷¹ The amount and impact of the fraud on a business may already be well enough understood from the information in a statement of facts.⁷²
- 3.51 In England and Wales, the *Victim's Code* provides that all business or enterprises (such as charities) that are victims of criminal offences are entitled to make an Impact Statement for Business.⁷³ This is intended to explain how the offence has affected the business. The Impact Statement for Business covers:
- financial impact as a direct result of the crime (including assets lost or stolen, damage to buildings and property)
 - other indirect financial costs such as loss of custom, impact on consumer confidence, staff time, expenditure on security measures, medical expenses, costs of contractual staff, and
 - non-financial impact such as reputational damage.⁷⁴

Question 3.2: Business impact statements

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

Reparation

- 3.52 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”.⁷⁵ 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”.⁷⁶

71. Commonwealth Director of Public Prosecutions, *Preliminary Consultation PFRC08*.

72. NSW Office of the Director of Public Prosecutions, *Preliminary Consultation PFRC05*.

73. *Domestic Violence, Crime and Victims Act 2004* (UK) s 32, s 33; UK, Ministry of Justice, *Code of Practice for Victims of Crime in England and Wales* (2020) [7.6]–[7.8]; UK Police, “Impact Statement for Business” (2022) <www.police.uk/pu/impact-statement-for-business/> (retrieved 19 September 2022).

74. UK Police, “Impact Statement for Business” (2022) <www.police.uk/pu/impact-statement-for-business/> (retrieved 14 September 2022).

75. Seniors Rights Service, *Preliminary Submission PFR06*, 2.

76. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 5.

- 3.53 The ability to recoup losses caused by fraud is, therefore, important to victims. The Seniors Rights Service emphasised that older victims that have been defrauded of their assets or finances, particularly if retired, have a very limited capacity to recover from the fraud.⁷⁷ Another submission noted that restoration is an important outcome of a criminal justice process.⁷⁸
- 3.54 Several stakeholders emphasised the difficulty of enforcing reparation orders, particularly given that many offenders do not have any money left.⁷⁹
- 3.55 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.⁸⁰
- 3.56 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,⁸¹ and
 - an order for compensation for any loss sustained as a result of the offence.⁸²
- 3.57 These orders were introduced to allow victims to request compensation in the one court action without the need to initiate separate civil proceedings.⁸³ They are strictly ancillary to the sentencing process.⁸⁴
- 3.58 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. Saskatchewan is an example of a jurisdiction where the Ministry of Justice encourages victims to apply for compensation through a "Statement on Restitution" form that records details of financial loss and damage due to

77. Seniors Rights Service, *Preliminary Submission PFR06*, 1.

78. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [41].

79. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 5; Commonwealth Director of Public Prosecutions, *Preliminary Submission PFR03* [25].

80. *Victims Rights and Support Act 2013* (NSW) s 38(1).

81. *Criminal Procedure Act 1986* (NSW) s 43.

82. *Victims Rights and Support Act 2013* (NSW) s 94, s 97.

83. NSW, Attorney General's Department, *Sentencing Review 1994* (1994) 39.

84. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [3.21], [10.27]–[10.30]; *R v Forsythe* [1972] 2 NSWLR 951, 953; *R v C* [1982] 2 NSWLR 674, 691–692; *Criminal Procedure Act 1986* (NSW) s 43.

the fraud.⁸⁵ Similarly, in Alberta victims are encouraged to submit a “Statement on Restitution” to seek recovery of their losses.⁸⁶

- 3.59 Another option is to make restitution orders mandatory. One study of fraud victims in England and Wales found support for making obligatory restitution orders, although victims also recognised this may not be enough to address the full impacts of fraud (such as, the psychological and social impacts).⁸⁷
- 3.60 It may also be that jurisdictional limits present a barrier to the effective use of restitution orders. While a magistrate can order compensation for loss, the order is treated as a civil order and therefore subject to the Local Court’s jurisdictional limit of \$100,000.⁸⁸ This cannot be exceeded by more than 20%.⁸⁹ This amount is considerably less than some of the amounts associated with fraud offences prosecuted in the Local Court. A similar problem may arise in the District Court which has a jurisdictional limit of \$750,000.⁹⁰

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?

85. Government of Saskatchewan, “Victim Impact Statement and Restitution” <www.saskatchewan.ca/residents/justice-crime-and-the-law/victims-of-crime-and-abuse/victim-impact-statement-and-restitution#completing-a-statement-on-restitution> (retrieved 19 September 2022).

86. Government of Alberta, “Victim Restitution and Recovery” (2022) <www.alberta.ca/victim-restitution-and-recovery.aspx> (retrieved 19 September 2022).

87. M Button and others, “Online Fraud Victims in England and Wales: Victims’ Views on Sentencing and the Opportunity for Restorative Justice?” (2015) 54 *Howard Journal of Criminal Justice* 193, 204.

88. *Local Court Act 2007* (NSW) s 29(1).

89. *Local Court Act 2007* (NSW) s 31(1)(a).

90. *District Court Act 1973* (NSW) definition of “jurisdictional limit” s 4(1); *Victims Rights and Support Act 2013* (NSW) s 98(b); *Upadhyaya v R* [2017] NSWCCA 162 [4].

4. Motivations of fraud offenders

In Brief

Fraud offenders can have a combination of motivations. Understanding them can help to achieve deterrence, which is a purpose of sentencing. Motivations include greed, desire for social status, ego, need, gambling, duress or coercive control and seduction. Other relevant factors include gender, substance abuse and mental health disorders. Fraud offenders appear to have low rates of repeat offending.

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- 4.1 Fraud offences, particularly the main offences in s 192E of the *Crimes Act 1900* (NSW), cover a variety of offending behaviour (see chapter 2). This chapter outlines some motivations of offenders and other relevant factors. This is important as deterrence is one of the purposes of sentencing.¹

Theories of fraud offending

- 4.2 Scholars explain a number of conditions must be present for a person to commit fraud:²

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(b).
2. D R Cressey, *Other People's Money: A Study in the Social Psychology of Embezzlement* (The Free Press, 1953); Commonwealth Fraud Prevention Centre, "Explore the Fraud Problem" <www.counterfraud.gov.au/explore-fraud-problem#why-people-commit-fraud-and-the-drivers-for-

- **Incentive/Pressure:** the financial incentive to commit fraud (see motivations below).
- **Opportunity:** the circumstances that allow the fraudulent activity (for example, an offender may know a corporation's structural weaknesses and may not have attempted the fraud without that knowledge).
- **Rationalisation:** Offenders must be able to justify or rationalise the act of fraud for themselves. For example, "I'll pay it back later", "No one will even notice it's gone", "I deserve it", "I pay enough tax", and "I'm doing it for my family".³
- **Capability:** Some argue that there is a fourth condition, meaning an offender must be capable to commit a fraud, such as by having a certain level of intelligence or technical qualification.⁴ This may vary depending on the category of fraud.⁵

Motivations of offenders

- 4.3 Offenders are motivated to commit fraud for various reasons depending on their circumstances.⁶ Some fraud offenders are well-educated, employed and are generally in a position of privilege.⁷ Offenders may be motivated by a combination of greed, desire for social status, ego, need, gambling, duress or coercive control, and seduction. These motivations may vary depending on the type of fraud.

fraud> (retrieved 29 August 2022); A Schuchter and M Levi, "Beyond the Fraud Triangle: Swiss and Austrian Elite Fraudsters" (2015) 39 *Accounting Forum* 176, 178.

3. Commonwealth Fraud Prevention Centre, "Explore the Fraud Problem" <www.counterfraud.gov.au/explore-fraud-problem#why-people-commit-fraud-and-the-drivers-for-fraud> (retrieved 29 August 2022); N Desai, "Understanding the Theoretical Underpinnings of Corporate Fraud" (2020) 45 *Journal for Decision Makers* 25, 26–27; P Andon and C Free, *Strain, Coping and Sustained Fraud Offending*, Trends and Issues in Crime and Criminal Justice No 596 (Australian Institute of Criminology, 2020) 3.
4. D T Wolfe and D R Hermanson, "The Fraud Diamond: Considering the Four Elements of Fraud" (2004) 74(12) *CPA Journal* 38; J Goldstraw-White, *White-Collar Crime: Accounts of Offending Behaviour* (Palgrave Macmillan, 2012) 23–24; A Schuchter and M Levi, "The Fraud Triangle Revisited" (2016) 29 *Security Journal* 107, 112.
5. D T Wolfe and D R Hermanson, "The Fraud Diamond: Considering the Four Elements of Fraud" (2004) 74(12) *CPA Journal* 38, 39–40.
6. J Goldstraw-White, *White-Collar Crime: Accounts of Offending Behaviour* (Palgrave Macmillan, 2012) 69. See, eg, *R v Rousetty* [2008] VSCA 259; 24 VR 253 [45].
7. NSW Police Force, *Preliminary Submission PFR08*, 3.

Greed

- 4.4 Financial gain will almost always be a factor in fraud offending. Many fraud offenders look for opportunities to commit fraud simply out of greed. That is, to obtain money for financial gain without any other motivation.⁸

Social status

- 4.5 Social status is often important to individuals – that is, how people are viewed by their families, peers, associates, and communities. Some offenders will commit fraud to increase their material success and individual wealth, with a view to bolstering their social status.⁹

Ego

- 4.6 Some offenders may be motivated because they take delight in the act itself, rather than simply the outcome (namely, the money or benefit obtained). This may be particularly prevalent in more complex, long term fraud where specialist skills are required.¹⁰

Need

- 4.7 Needy (or “desperate”) offenders will commit fraud to support their businesses, families, or other needs such as gambling or a gambling addiction.¹¹ Many offenders who are motivated by need commit opportunistic, low level frauds.¹²
- 4.8 Offenders who commit fraud to support a business sometimes feel “trapped” or pressured to do whatever it takes to support their business, even if this means engaging in criminal behaviour.¹³
- 4.9 Offenders may commit fraud to assist their families in adverse circumstances. For example, to support children who are in difficulties or if a family’s primary earner falls ill, it may lead another family member to offend to achieve financial security.¹⁴

8. J Goldstraw-White, *White-Collar Crime: Accounts of Offending Behaviour* (Palgrave Macmillan, 2012) 76; J Goldstraw, R G Smith and Y Sakurai, *Gender and Serious Fraud in Australia and New Zealand*, Trends and Issues in Crime and Criminal Justice No 292 (Australian Institute of Criminology, 2005) 3.

9. J Goldstraw-White, *White-Collar Crime: Accounts of Offending Behaviour* (Palgrave Macmillan, 2012) 87.

10. G Duffield and P Grabosky, *The Psychology of Fraud*, Trends and Issues in Crime and Criminal Justice No 199 (Australian Institute of Criminology, 2001) 2; E Stotland, “White Collar Criminals” (1977) 33 *Journal of Social Issues* 179, 186–7.

11. J Goldstraw-White, *White-Collar Crime: Accounts of Offending Behaviour* (Palgrave Macmillan, 2012) 90–97.

12. Women’s Legal Service NSW, *Preliminary Consultation PFRC01*; A Steel, *Preliminary Consultation PFRC09*.

13. J Goldstraw-White, *White-Collar Crime: Accounts of Offending Behaviour* (Palgrave Macmillan, 2012) 91.

Gambling

- 4.10 Some offenders are addicted to gambling and commit fraud to sustain their addiction.¹⁵
- 4.11 In one survey of 160 Australian fraud offenders, 48 (30%) reported that gambling motivated them to offend.¹⁶ In this sample, a higher proportion of offending gamblers were in positions of financial authority. This suggests that it is not only gambling but the opportunity to offend that determines whether gamblers will commit fraud offences.¹⁷

Duress and coercive control

- 4.12 Some offenders may commit fraud under duress. These offenders may report having little or no control over their offending behaviour, as they were responding to threats.¹⁸
- 4.13 In one UK example, a bank employee claimed to have been blackmailed (by threats to her parent and children) into passing on the personal details of her clients.¹⁹
- 4.14 Some offenders report being coerced into committing fraud as victims of domestic or family violence.²⁰ These offenders may be reluctant to disclose coercive control or duress as a factor that led to offending.²¹ This is explored further in chapter 5.

Seduction

- 4.15 Some offenders may commit fraud to please, or not lose favour with others.²² For example, fraud may become a way of life between partners. In that context, one partner may commit fraud out of fear of losing their partner and shared contacts.²³

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14. J Goldstraw-White, *White-Collar Crime: Accounts of Offending Behaviour* (Palgrave Macmillan, 2012) 97; J Goldstraw, R G Smith and Y Sakurai, *Gender and Serious Fraud in Australia and New Zealand*, Trends and Issues in Crime and Criminal Justice No 292 (Australian Institute of Criminology, 2005) 3.
15. See, eg, NSW Bar Association, *Preliminary Consultation PFRC07*; P Andon and C Free, *Strain, Coping and Sustained Fraud Offending*, Trends and Issues in Crime and Criminal Justice No 596 (Australian Institute of Criminology, 2020) 10; Y Sakurai and R G Smith, *Gambling as a Motivation for the Commission of Financial Crime*, Trends and Issues in Crime and Criminal Justice No 256 (Australian Institute of Criminology, 2003) 4.
16. E Dougherty and others, "A Comparison of Fraud to Fund Gambling with Fraud for Other Reasons" (2021) 28 *Psychiatry, Psychology and Law* 408, 410.
17. E Dougherty and others, "A Comparison of Fraud to Fund Gambling with Fraud for Other Reasons" (2021) 28 *Psychiatry, Psychology and Law* 408, 412.
18. J Goldstraw-White, *White-Collar Crime: Accounts of Offending Behaviour* (Palgrave Macmillan, 2012) 85, 97–99.
19. J Goldstraw-White, *White-Collar Crime: Accounts of Offending Behaviour* (Palgrave Macmillan, 2012) 97.
20. J Goldstraw, R G Smith and Y Sakurai, *Gender and Serious Fraud in Australia and New Zealand*, Trends and Issues in Crime and Criminal Justice No 292 (Australian Institute of Criminology, 2005) 2; Women's Legal Service, *Preliminary Consultation PFRC01*.
21. Women's Legal Service, *Preliminary Consultation PFRC01*.

Motivations vary

- 4.16 Offenders' motivations may vary depending on the type of fraud. For example, an employee who commits fraud against an employer commonly has two motives:
- resentment towards an employer (for example, because an employee has missed out on a promotion, or feels they are not being paid enough), and
 - to protect their territory (employees, especially within large organisations or government departments, may presume personal ownership or entitlement by virtue of occupation, position or space, or through regular use or access, for example, the resource becomes "my office", "my computer" and "my budget").²⁴

Other relevant factors

- 4.17 Fraud offending behaviour may also be explained through gender, and substance abuse or mental health disorders.

Gender

- 4.18 The 2016–2021 fraud data shows there is a higher representation of female offenders in comparison to other crimes:
- obtain financial advantage or causes any financial disadvantage by deception (36.4%),
 - obtain property by deception (32.5%).²⁵

That is, when compared to 21.8% of offenders in finalised criminal matters in NSW adult courts in 2021 being women.²⁶

- 4.19 These statistics are broadly consistent with statistics from other jurisdictions suggesting there is a higher representation of women for fraud than other offence types.²⁷
- 4.20 The representation of women in fraud offending has been increasing.²⁸ This may be attributed to the growth in female participation in the workforce, including in more

22. J Goldstraw-White, *White-Collar Crime: Accounts of Offending Behaviour* (Palgrave Macmillan, 2012) 99–102.

23. J Goldstraw-White, *White-Collar Crime: Accounts of Offending Behaviour* (Palgrave Macmillan, 2012) 101.

24. G Duffield and P Grabosky, *The Psychology of Fraud*, Trends and Issues in Crime and Criminal Justice No 199 (Australian Institute of Criminology, 2001) 4.

25. NSW Bureau of Crime Statistics and Research, reference 22-21286.

26. NSW Bureau of Crime Statistics and Research, reference 22-21387.

27. R Ameer and R Othman, "Gender, Fraud Opportunity, and Rationalisation" (2022) 55 *Journal of Criminology* 81, 82.

significant roles and positions.²⁹ Another explanation is the financial pressure dependent children can place on mothers.³⁰

4.21 We have also heard that the greater representation of women in fraud offences may be because:

- fraud doesn't involve violence and can be committed at a distance,³¹ or
- some women may be coerced into committing fraud, given that women are disproportionately victims of domestic violence.³²

Mental health and drug use

4.22 Psychiatric disorders and substance abuse disorders each appear to be both a cause and consequence of offending behaviour.³³

4.23 One Australian survey drawn from referrals to two psychiatrists suggests that fraud offenders are sometimes affected by psychiatric disorders. In this survey, 90% reported anxiety and depression, and 45% reported bipolar/other psychoses.³⁴ It also found that 90% of offenders experienced substance abuse disorders.³⁵

Repeat offending

4.24 Some fraud offenders appear to have low rates of repeat offending.

4.25 A study of long-term reoffending rates in NSW found that fraud, deception and related offences had some of the lowest reoffending rates. For example:

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28. R Ameer and R Othman, "Gender, Fraud Opportunity, and Rationalisation" (2022) 55 *Journal of Criminology* 81, 82; T Hilliard and P E Neidermeyer, "The Gendering of Fraud: An International Investigation" (2018) 25 *Journal of Financial Crime* 811, 812.
 29. R Ameer and R Othman, "Gender, Fraud Opportunity, and Rationalisation" (2022) 55 *Journal of Criminology* 81, 82; J Goldstraw, R G Smith and Y Sakurai, *Gender and Serious Fraud in Australia and New Zealand*, Trends and Issues in Crime and Criminal Justice No 292 (Australian Institute of Criminology, 2005) 6.
 30. T Prenzler, *Responding to Welfare Fraud: The Australian Experience*, Research and Public Policy Series No 119 (Australian Institute of Criminology, 2012) 11.
 31. A Steel, *Preliminary Consultation PFRC09*.
 32. Women's Legal Service NSW, *Preliminary Consultation PFRC01*; NSW Bar Association, *Preliminary Consultation PFRC07*.
 33. E Dougherty and others, "A Comparison of Fraud to Fund Gambling with Fraud for Other Reasons" (2021) 28 *Psychiatry, Psychology and Law* 408, 411–12.
 34. E Dougherty and others, "A Comparison of Fraud to Fund Gambling with Fraud for Other Reasons" (2021) 28 *Psychiatry, Psychology and Law* 408, 411.
 35. E Dougherty and others, "A Comparison of Fraud to Fund Gambling with Fraud for Other Reasons" (2021) 28 *Psychiatry, Psychology and Law* 408, 411.

- 39% of adults who were convicted of fraud, deception and related offences in 2010, were later re-convicted of an offence within 10 years. This is compared with, for example, 83% who were convicted of break and enter offences.³⁶
 - 12% of adults who were convicted of fraud, deception and related offences in 2010, were later re-convicted of the same offence within 10 years. This is compared with, for example, 42% who were convicted of theft and related offences.³⁷
- 4.26 This could be an indication that sentencing is achieving specific deterrence.³⁸ However, it could also be due to offenders, particularly white-collar offenders, being taken out of the situation where they can offend again.³⁹

36. A Pisani, *Long-Term Re-Offending Rates of Adults and Young People in NSW*, Bureau Brief No 162 (NSW Bureau of Crime Statistics and Research, 2022) 5.

37. A Pisani, *Long-Term Re-Offending Rates of Adults and Young People in NSW*, Bureau Brief No 162 (NSW Bureau of Crime Statistics and Research, 2022) 6

38. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [33]–[34]; Commonwealth Director of Public Prosecutions, *Preliminary Consultation PFR08*.

39. NSW Bar Association, *Preliminary Consultation PFR07*; NSW Young Lawyers Criminal Law Committee, *Preliminary Consultation PFR10*.

5. Sentencing principles and factors

In Brief

Purposes of sentencing that are of particular relevance to fraud offending are deterrence and recognition of harm to victims and the community. Factors that are important in assessing the seriousness of an offence include the amount of money involved, whether the loss is irretrievable, motive and breach of trust. The aggravating and mitigating factors that may be relevant to individual cases will vary significantly and contribute to a wide variety of outcomes.

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- 5.1 This chapter outlines the sentencing principles that are especially relevant in determining appropriate sentences for fraud and fraud-related offences. These considerations are also relevant to analysing the sentencing outcomes in fraud and fraud-related offences (see chapter 7).

The purposes of sentencing

5.2 The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that the court may impose a sentence on an offender for the following purposes:

- (a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,
- (c) to protect the community from the offender,
- (d) to promote the rehabilitation of the offender,
- (e) to make the offender accountable for his or her actions,
- (f) to denounce the conduct of the offender,
- (g) to recognise the harm done to the victim of the crime and the community.¹

5.3 These often apply uncontroversially in different ways to different circumstances. However, the purposes of deterrence and “recognising the harm done to the victim ... and the community” can raise complex issues in the context of fraud and fraud-related offences.

Deterrence

5.4 The Court of Criminal Appeal (“CCA”) has observed that weight should be given to general deterrence for a wide range of fraudulent activities, including:

- defrauding the public revenue (taxation)²
- social security fraud³ and other frauds involving the application of government funds, such as in relation to nursing homes⁴
- fraud by a public officer (for example, as an official receiver)⁵
- fraud by an employee in a position of trust⁶

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

2. *R v Kelvin* [2000] NSWCCA 190 [7]–[9].

3. *Johnsson v R* [2007] NSWCCA 192 [40]; *R v Medina* (Unreported, NSWCCA, 28 May 1990) 4–5; *R v Luu* (Unreported, NSWCCA, 7 December 1984) 5. See also *Ralph v Nawrojee* [2003] WASCA 5 [25]–[26].

4. *R v Boian* (1997) 96 A Crim R 582, 588.

5. *Studman v R* [2007] NSWCCA 263 [11], [39].

- fraud by a company director or executive⁷
 - fraud by professionals in a position of trust⁸
 - insider trading⁹
 - credit card fraud¹⁰
 - identity fraud¹¹
 - where trust accounts are involved¹²
 - offences involving exploitation of weaknesses in the electronic banking system,¹³ and
 - crimes involving the market or other forms of business dealings.¹⁴
- 5.5 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.¹⁵ Also, “white-collar offenders typically come before sentencing courts with evidence of good character and no prior convictions”.¹⁶
- 5.6 Deterrence also has a role to play, for example, in the case of social security fraud, where the introduction of “overly meticulous preliminary checks before benefits are paid could result in real hardship to persons whose need for benefits is urgent and

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6. *Pantano v R* (1990) 49 A Crim R 328, 330, 338–339; *R v El-Rashid* (Unreported, NSWCCA, 7 April 1995) 4; *R v Mungomery* [2004] NSWCCA 450 [41]; *R v Scott* (Unreported, NSWCCA, 7 November 1991) 6; *O’Keefe v R* (1992) 60 A Crim R 201, 203–204; *R v De Braun* (Unreported, NSWCCA, 12 December 1991) 5; *Itaoui v R* [2005] NSWCCA 415 [34].
 7. *R v Houghton* [2000] NSWCCA 62 [19]; *R v Glenister* [1980] 2 NSWLR 597, 616; *R v McKechnie* (Unreported, NSWCCA, 1 October 1987) 6; *R v Giam (No 2)* [1999] NSWCCA 378 [27].
 8. *R v Pont* [2000] NSWCCA 419 [47]–[48]; *R v Smith* [2000] NSWCCA 140 [15] (solicitor); *R v Hawkins* (1989) 45 A Crim R 430, 436–437 (solicitor); *Higgins v R* [2006] NSWCCA 38 [12]–[13] (investment advisor); *R v Rizk* [2005] NSWCCA 104 [15]–[16] (real estate agent); *R v Woodman* [2001] NSWCCA 310 [14] (real estate agent).
 9. *R v Rivkin* [2004] NSWCCA 7 [423].
 10. *Thangavelautham v R* [2016] NSWCCA 141 [86]; *Matthews v R* [2014] NSWCCA 185 [21]; *R v Araya* [2005] NSWCCA 283 [98]; *Yow v R* [2010] NSWCCA 251 [30].
 11. *Stevens v R* [2009] NSWCCA 260 [1]–[7]; *Krol v R* [2011] NSWCCA 175 [81]; *Thangavelautham v R* [2016] NSWCCA 141 [104]–[105].
 12. *R v Rizk* [2005] NSWCCA 104 [15].
 13. *Stevens v R* [2009] NSWCCA 260 [79].
 14. *R v Pogson* [2012] NSWCCA 225, 82 NSWLR 60 [142].
 15. *R v Wall* [2002] NSWCCA 42, 71 NSWLR 692 [89]; *R v Mungomery* [2004] NSWCCA 450 [41]; *R v Glenister* [1980] 2 NSWLR 597, 616; *Ralph v Nawrojee* [2003] WASCA 5 [25]; *R v Hannes* [2000] NSWCCA 503 [394]; *R v Pantano* (1990) 49 A Crim R 328, 330.
 16. Commonwealth Director of Public Prosecutions, *Preliminary Submission PFR03* [7]. See also NSW Police Force, *Preliminary Submission PFR08*, 3.

immediate”. Therefore, people who take advantage of the lack of checks “must expect to face heavy penalties”.¹⁷

5.7 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. This might arise, for example, in relation to credit card fraud,¹⁸ insider trading,¹⁹ and defrauding electronic banking systems.²⁰ However, some commentators suggest there is no evidence to support the view that frauds on large companies or government departments undermine public confidence in these institutions.²¹

5.8 The level of penalty required to achieve deterrence is another question. 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.²²

5.9 However, full-time imprisonment is not inevitable given the range of offending that can be described as white-collar crime.

5.10 The purposes of punishment may be best met by the imposition of full-time imprisonment rather than an intensive correction order in cases of “significant” white-collar crime.²³ The Commonwealth Director of Public Prosecutions (CDPP) noted courts are taking white-collar crime more seriously, which is “reflected in a general increase in the penalties being imposed, including offenders being more frequently sentenced to a period of imprisonment”.²⁴

17. *R v Luu* (Unreported, NSWCCA, 7 December 1984) 3.

18. *Thangavelautham v R* [2016] NSWCCA 141 [86], [104]–[105]; *R v Araya* [2005] NSWCCA 283 [98].

19. *R v Hannes* [2002] NSWSC 1182 [90]; *R v Rivkin* [2004] NSWCCA 7 [412]; *DPP (Cth) v Couper* [2013] VSCA 72, 41 VR 128 [105], [108], quoting P McClellan, “White Collar Crime: Perpetrators and Penalties” (Keynote Address, Fraud and Corruption in Government Seminar, University of New South Wales, 24 November 2011) 24–25.

20. *Stevens v R* [2009] NSWCCA 260 [79].

21. M Bagaric, R Edney and T Alexander, *Sentencing in Australia* (9th ed, Thomson Reuters, 2022) [1040.2100].

22. *R v Curtis (No 3)* [2016] NSWSC 866 [51].

23. *R v Hinchliffe* [2013] NSWCCA 327 [279]; *R v Glynatsis* [2013] NSWCCA 131 [71]–[74].

24. Commonwealth Director of Public Prosecutions, *Preliminary Submission PFR03* [21].

- 5.11 In sentencing white-collar cases, courts previously imposed a lengthy head sentence but with a substantially shorter non-parole period. This was an attempt to balance the need for deterrence with the fact the offender had no prior criminal history, was unlikely to reoffend and had good prospects of rehabilitation.²⁵ It is now suggested that such an approach is “quite out of step with current community standards” and that:

The community now views white collar crime very seriously, having regard to the fact that it is easy to commit and difficult and expensive to track down.²⁶

- 5.12 The High Court has also observed that, in serious tax fraud cases, the deterrent and punitive effects of sentences must be reflected in both the head sentence and the non-parole period.²⁷

Recognition of harm to victim and community

- 5.13 A sentencing court must “exercise a high degree of care when assessing the impact of a crime on a victim”.²⁸ For a crime like fraud, especially involving relatively large amounts of money, a court may be able to draw inferences about the effect of the crime on the victim.²⁹
- 5.14 Victim impact statements (VIS) are a useful tool for recognising the harm done to the victim of the crime and the community. The *Sentencing Procedure Act* limits the statutory right to make a VIS to certain offences, generally sexual offences or offences involving violence or threatened violence.³⁰ In chapter 3, we ask whether this should be expanded to include fraud and fraud-related offences.
- 5.15 However, the statutory scheme does not limit any other law by or under which a court may receive and consider “a VIS in relation to any other offence”.³¹ Accordingly, courts have received material that bears “upon the question of the emotional and financial impact” of fraud.³²

Factors in assessing seriousness

- 5.16 In determining the appropriate sentence for an offence, courts must assess its seriousness. Considerations of seriousness are sometimes difficult in relation to fraud

25. *R v Corbett* (1991) 52 A Crim R 112, 117.

26. *McMahon v R* [2011] NSWCCA 147 [83].

27. *Hilli v R* [2010] HCA 45, 242 CLR 520 [41], [63]; *McMahon v R* [2011] NSWCCA 147 [84].

28. H Donnelly “Assessing Harm to the Victim in Sentencing Proceedings” (2012) 24 *Judicial Officers’ Bulletin* 6, 6.

29. *R v Sellen* (1991) 57 A Crim R 313, 315–316.

30. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27.

31. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(5).

32. *Miller v R* [2014] NSWCCA 34 [156].

offences, given their wide scope. There is a very wide range of offending conduct covered by fraud offences, from small scale opportunistic frauds to complex schemes involving large sums conducted over long periods.³³

- 5.17 It is also difficult to compare the seriousness of fraud offences against other offences. Comparisons are sometimes made with other offences, in particular those involving violence. The maximum penalties are usually “substantially less” for fraud offences. In one case, Gleeson CJ observed:

If, instead of embezzling the amount of money involved in the present case, the respondent had obtained about one tenth of that amount at gunpoint from the bank, the maximum penalty would have been far far greater than the maximum penalty applicable to his offence.³⁴

- 5.18 Chief Justice Gleeson further noted that “crimes of armed robbery usually constitute a far more serious breach of the peace and danger to the public” than crimes involving fraud.³⁵

- 5.19 However, courts have recognised that fraud – and other “white-collar” crimes – can significantly affect victims. The CDPP submitted there is a “considerable body of appellate level case law which underscores the seriousness of white-collar crime ... and its impact on the community”.³⁶

- 5.20 Justice McClellan, speaking extra-judicially, observed:

White-collar crime also impacts upon victims, sometimes many, but usually lacks any physical violence. Although mostly confined to a loss of money, that loss may have a devastating consequence for the wellbeing of the individual. Identifying and weighing the harm may prove difficult. When a market is manipulated, the loss to a particular individual may be impossible to identify.³⁷

- 5.21 Common considerations that go to “seriousness” in fraud cases can include the amount of money involved, whether the loss is irretrievable, the length of time over which offences are committed, the degree of planning and sophistication, motive, and breach of trust.

33. See, eg, NSW Bar Association, *Preliminary Consultation PFR07*.

34. *R v El-Rashid* (Unreported, NSWCCA, 7 April 1995) 3.

35. *R v El-Rashid* (Unreported, NSWCCA, 7 April 1995) 3.

36. Commonwealth Director of Public Prosecutions, *Preliminary Submission PFR03* [7].

37. P McClellan, “White Collar Crime: Perpetrators and Penalties”, (Keynote Address, Fraud and Corruption in Government Seminar, University of New South Wales, 24 November 2011) 6–7, quoted in *DPP (Cth) v Couper* [2013] VSCA 72, 41 VR 128 [107].

- 5.22 Many of these factors will occur in combination.³⁸ Some of these factors will have different relevance depending on the scenario. For example, a fraud in relation to a relatively small amount may still be considered more serious because of the detrimental impact on a victim of small means.
- 5.23 There is also some overlap between these factors and with aggravating factors listed in s 21A(2) of the *Sentencing Procedure Act* (considered below).

Amount of money involved

- 5.24 The CCA has noted that the amount of money involved in premeditated fraud and deception offences can be significant. It is an important factor in determining the degree of criminality since it can indicate the extent to which an offender is prepared “to be dishonest and to flout the law” and advance their own purposes.³⁹ In one case of fraud involving around \$4 million, the CCA observed that:

The very statement of the amount involved demonstrates the grossest criminality, irrespective of what the maximum penalty for the particular offence was.⁴⁰

- 5.25 The CCA noted in another case that the amount of money is “relevant to a degree”, particularly where other factors are present, even if it is not “determinative of the seriousness of the criminality”.⁴¹
- 5.26 In other cases, the CCA has been prepared to give an offender the benefit of the fact that the amounts involved were “relatively small”.⁴²
- 5.27 However, the CCA has also observed that the amount is “only one of the relevant considerations in determining the seriousness of the offences and it is not necessarily decisive”.⁴³ In a case where the amount defrauded was not as substantial as other cases, other facts were particularly relevant in determining seriousness. These facts included repeat offending and the offender holding themselves out to be a trusted member of the legal profession.⁴⁴
- 5.28 The amount can be relevant in determining the level of a deterrent sentence. In one case, the CCA dealt with offences involving a relatively small amount of money (just over \$1200). The offences related to unsophisticated credit card fraud that involved very

38. See, eg, *Abellanoza v R* [2021] NSWCCA 4 [3], [144]; *R v Carr* [2002] NSWCCA 434 [31]; *R v Mungomery* [2004] NSWCCA 450 [40].

39. *R v Hawkins* (1989) 45 A Crim R 430, 435.

40. *R v Hawkins* (1989) 45 A Crim R 430, 435.

41. *R v Finnie* [2002] NSWCCA 533 [59].

42. *R v Howard* (Unreported, NSWCCA, 28 March 1995) 22.

43. *Assi v R* [2006] NSWCCA 257 [28].

44. *Assi v R* [2006] NSWCCA 257 [28].

little planning. The Court observed that, while a custodial sentence was required to reflect adequately the need for deterrence in relation to credit card fraud, “[s]ending messages of general deterrence does not involve the imposition of sentences disproportionate to the criminality involved in the particular offence”.⁴⁵

- 5.29 While measures of the amount of a fraud are generally “profit gained”, or “loss caused”, in some cases such measures may not adequately reflect criminality. For example, in cases of investment fraud, the amount invested or placed at risk might be a better indicator of the extent of criminality than the amount gained or lost by the enterprise.⁴⁶

Whether loss is irretrievable

- 5.30 Generally, the fact that the victim recovered any amount is irrelevant. The amount fraudulently obtained is used to assess the seriousness of the offence.⁴⁷

- 5.31 However, there is some limited authority to the effect that:

- an apparently irretrievable loss may make an offence more serious,⁴⁸ and
- the return of fraudulently-obtained property after a short time may make the offence less serious.⁴⁹

Motive

- 5.32 In fraud cases, discussion of motive sometimes centres on the question of greed. The CCA has observed that there is a real distinction between offences committed for motives of personal greed and those committed for the benefit of another. However, this does not mean the latter circumstance “is exculpatory, rather it can indicate a less serious level of criminality”.⁵⁰

- 5.33 Greed may be a relevant consideration in some cases, for example, social security fraud. However, this may need to be balanced with considerations of the offender’s economic and financial background.⁵¹

Breach of trust

- 5.34 Breach of trust is an important factor in assessing the degree of criminality involved in a fraud offence.⁵² Some stakeholders considered that breach of trust is an important factor in sentencing for fraud.⁵³

45. *Matthews v R* [2014] NSWCCA 185 [21].

46. *R v Doff* [2005] NSWSC 50 [31]; *R v Glynatsis* [2013] NSWCCA 131 [51], [54].

47. *Stevens v R* [2009] NSWCCA 260 [69].

48. *R v Todorovic* [2008] NSWCCA 49 [19].

49. *Whiley v R* [2014] NSWCCA 164 [39].

50. *R v Glynatsis* [2013] NSWCCA 131 [48].

51. *R v Mears* (1991) 53 A Crim R 141, 145.

- 5.35 However, care must be taken in approaching this factor. There is a risk of overlap and double counting with respect to the aggravating factors under s 21A(2) of the *Sentencing Procedure Act*⁵⁴ and the need for general deterrence in relation to breach of trust.
- 5.36 The Young Lawyers Criminal Law Committee observed that the general experience of its members is that “fraud matters beyond simple credit card ‘tap and go’ offences frequently involve an element of vulnerability or abuse of trust”.⁵⁵
- 5.37 White-collar crime is closely linked to situations involving a breach of trust. Breach of trust can be committed by professionals in a variety of positions that involve an element of trust, including accountants,⁵⁶ company directors,⁵⁷ real estate agents,⁵⁸ senior employees,⁵⁹ and bank employees.⁶⁰
- 5.38 The CCA has observed that breach of trust exacerbates cases where:
- the victim of the offence has imposed that trust, such as an employer defrauded by an employee or a solicitor appropriating funds to their own use, or
 - the offender breaches that which they were engaged or undertook to do, such as where a customs officer employed in investigations had conspired to import heroin and cannabis.⁶¹
- 5.39 Courts have highlighted particular examples, such as real estate agents whose business depends on their client’s trust, since agents regularly receive money on their behalf from tenants and purchasers.⁶²
- 5.40 Breaches of trust by legal practitioners have long been treated as particularly serious forms of fraudulent offending. As long ago as 1974, the CCA stated that the court is

52. *R v Murtaza* [2001] NSWCCA 336 [15]; *Itaoui v R* [2005] NSWCCA 415 [34]. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(k).

53. Legal Aid NSW, *Preliminary Consultation PFR06*; NSW Bar Association, *Preliminary Consultation PFR07*; Seniors Rights Service, *Preliminary Submission PFR06*, 2.

54. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(k); *R v Martin* [2005] NSWCCA 190 [40].

55. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07*, 6.

56. *R v Sellen* (1991) 57 A Crim R 313, 315.

57. *R v Houghton* [2000] NSWCCA 62 [19].

58. *R v Woodman* [2001] NSWCCA 310 [14]–[15].

59. *R v Pantano* (1990) 49 A Crim R 328, 338; *R v Scott* (Unreported, NSWCCA, 7 November 1991) 6; *R v Pont* [2000] NSWCCA 419 [78].

60. *R v Halabi* (Unreported, NSWCCA, 17 February 1992) 4; *R v Phelan* (1993) 66 A Crim R 446, 448; *R v El-Rashid* (Unreported, NSWCCA, 7 April 1995) 4.

61. *R v Stanbouli* [2003] NSWCCA 355 [34].

62. *R v Woodman* [2001] NSWCCA 310 [15].

“entitled to express, on behalf of the community, its disapproval” of defaulting solicitors, observing:

It is not possible for the courts to regard lightly the defaulting solicitor whose actions tend to undermine the security of ordinary people and the fabric of a profession on which and on whose integrity the public are to such an extent dependent.⁶³

5.41 The CCA has also observed:

Any solicitor who misappropriates clients' funds for whatever reason, great or small, arguably good or arguably bad, commits a serious offence, not only in terms of contravening the relevant particular provisions of the Crimes Act, but in terms of the betrayal of public trust and confidence which such behaviour represents.⁶⁴

5.42 In the past, cases involving a breach of trust by a solicitor, or another professional in a similar position of trust, the CCA has stated that “a full time custodial sentence will be imposed except in cases involving some special or unusual features or circumstances”.⁶⁵

5.43 The seriousness of a breach of trust will depend on the circumstances of the case, particularly where, for example, non-professional employees are involved. The CCA has observed that, in such cases, references to the need for general deterrence and condign punishment are unhelpful in determining the appropriate level of punishment.⁶⁶

5.44 A breach of trust has also been found to make an offence more serious in cases where government funds are obtained by fraud and the government is dependent on “a system of honesty by the receivers of the funds”. This was found in one case where the operator of a nursing home had committed frauds over a lengthy period which were only discovered by an audit.⁶⁷ Similar observations have been made in Victoria in relation to frauds upon an insurer committed by a panel beater falsely claiming to have done repairs.⁶⁸

63. *R v Cole* (Unreported, NSWCCA, 10 May 1974) 2.

64. *Marvin v R* (Unreported, NSWCCA, 1 November 1995) 3.

65. *R v Boland* (Unreported, NSWCCA, 13 October 1998) 2. See also *R v Pantano* (1990) 49 A Crim R 328, 330; *R v Halabi* (Unreported, NSWCCA, 17 February 1992) 4; *R v Law* (Unreported, NSWCCA, 7 October 1993).

66. *R v Pont* [2000] NSWCCA 419 [76].

67. *R v Giallussi* [1999] NSWCCA 56 [12]–[14]. See also *R v Boian* (1997) 96 A Crim R 582, 586.

68. *Tringas v R* (Unreported, VCCA, 18 April 1985) 10–11; R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford, 2nd ed, 1999) [12.704].

Other considerations

- 5.45 Other relevant considerations include:
- the length of time over which the offences are committed,⁶⁹ and
 - the degree of planning and sophistication of an offence⁷⁰ (noting that general deterrence is also an important sentencing purpose in such cases).⁷¹

Aggravating factors

- 5.46 When determining the appropriate sentence for an offence, courts are also required to consider the aggravating factors set out in s 21A(2) of the *Sentencing Procedure Act*.⁷² However, courts are not to have regard to any specified aggravating factor that is an element of the offence.⁷³
- 5.47 Some aggravating factors particularly relevant to fraud and fraud-related offences are summarised below.

Financial gain

- 5.48 One relevant aggravating factor is that “the offence was committed for financial gain”.⁷⁴
- 5.49 In fraud offences, at least those that involve obtaining a “financial advantage”, the fact that they have been committed for financial gain is an inherent characteristic of the offence. This cannot be taken into account as an aggravating factor under s 21A(2) “unless its nature or extent was unusual”.⁷⁵

Victim was vulnerable

- 5.50 The *Sentencing Procedure Act* lists as an aggravating factor:

69. *R v Mungomery* [2004] NSWCCA 450 [40]; *R v Mears* (1991) 53 A Crim R 141, 145; *R v Woodman* [2001] NSWCCA 310 [29]–[30]; *R v Murtaza* [2001] NSWCCA 336 [15].

70. *R v Murtaza* [2001] NSWCCA 336 [15]; *Stevens v R* [2009] NSWCCA 260 [59], [78]; *R v Araya* [2005] NSWCCA 283 [96]. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(n).

71. *R v Pont* [2000] NSWCCA 419 [43].

72. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1)(a).

73. *Clinton v R* [2018] NSWCCA 66 [39].

74. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(o).

75. *Clinton v R* [2018] NSWCCA 66 [20]–[22]. See also *Whyte v R* [2019] NSWCCA 218 [31]–[35], [44]–[45].

the victim was vulnerable, for example, because the victim was very young or very old or had a disability, because of the geographical isolation of the victim or because of the victim's occupation.⁷⁶

5.51 This is concerned with the vulnerability of a particular class of victim, and not with the threat posed by a class of offender. The CCA has observed that the fact that people generally in the community may be vulnerable to a proficient fraudster does not give rise to this circumstance of aggravation.⁷⁷

5.52 In relation to this factor, the Young Lawyers Criminal Law Committee observed that:

given the increasing prevalence of phone and email-based schemes designed to target unsuspecting consumers and technology users, the current typical and recognised categories of vulnerable victims may need to be re-examined, and perhaps expanded, by the courts.⁷⁸

Multiple victims or series of criminal acts

5.53 A further aggravating factor identified in the *Sentencing Procedure Act* is that “the offence involved multiple victims or a series of criminal acts”.⁷⁹ It is concerned with situations where “a single offence contains a number of allegations of criminal acts that are part and parcel of a single course of criminal conduct”, such as in “cases of fraud or dishonesty perpetrated against a single victim”.⁸⁰

5.54 A significant proportion of fraud cases involve multiple offences.⁸¹ This can cause problems when dealing with sentencing statistics that may involve a mixture of single and multiple offences.⁸²

5.55 A court should not treat the multiple offences as an aggravating factor but should fix an appropriate sentence for each offence and then have regard to totality.⁸³ Uncharged criminal acts involved in the fraud offences cannot be taken into account as an aggravating factor.⁸⁴

76. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(l).

77. *R v Tadrosse* [2005] NSWCCA 145, 65 NSWLR 740 [26].

78. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07*, 2.

79. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(m).

80. *R v Tadrosse* [2005] NSWCCA 145, 65 NSWLR 740 [29].

81. K Warner, *Sentencing in Tasmania* (Federation Press, 2nd edition, 2002) [12.210]; R G Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford, 2nd ed, 1999) [12.701].

82. *Tweedie v R* [2015] NSWCCA 71 [47].

83. *Stratford v R* [2007] NSWCCA 279 [29].

84. *Clinton v R* [2018] NSWCCA 66 [37]–[39].

Mitigating factors

- 5.56 A court is to consider mitigating factors, including those set out in s 21A(3) of the *Sentencing Procedure Act*. The following factors may be particularly relevant in fraud cases.

Absence of criminal record and previous good character

- 5.57 One mitigating factor to be considered under the *Sentencing Procedure Act* is that “the offender does not have any record (or any significant record) of previous convictions” and that “the offender was a person of good character”.⁸⁵
- 5.58 These mitigating factors are of much less significance where the offender uses a position of trust obtained because of their good character.⁸⁶ This is because prior good character may be the “factor which enables the offence by allowing the white-collar offender to obtain and exploit a position of trust”.⁸⁷ The CCA has observed that white-collar crime is rarely committed by people who have a criminal history because they do not usually find themselves with the opportunity to commit such offences.⁸⁸
- 5.59 In cases involving multiple fraud offences, committed over a period of time, prior good character is also afforded less weight.⁸⁹ It has been noted that the offender may be of good character when they commit the first offence, but they are not from the time they commit the second offence.⁹⁰ In one case, the CCA likened such a situation to a case of multiple sexual offences where an offender cannot rely on good character after the first offence.⁹¹

Remorse

- 5.60 Another of the mitigating factors to be considered under the *Sentencing Procedure Act* is:

the remorse shown by the offender for the offence, but only if—

- (i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and

85. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(e)–(f).

86. *R v Rivkin* [2004] NSWCCA 7 [410]; *R v Gentz* [1999] NSWCCA 285 [12]; *R v Houghton* [2000] NSWCCA 62 [18]. See also Commonwealth Director of Public Prosecutions, *Preliminary Submission PFR03* [7], [10].

87. Commonwealth Director of Public Prosecutions, *Preliminary Submission PFR03* [7].

88. *R v El-Rashid* (Unreported, NSWCCA, 7 April 1995) 3.

89. *R v Phelan* (1993) 66 A Crim R 446, 448; *R v Chan* [2000] NSWCCA 345 [20]; *R v Giallussi* [1999] NSWCCA 56 [20].

90. *R v Smith* [2000] NSWCCA 140 [21]; *R v Houghton* [2000] NSWCCA 62 [18].

91. *R v Smith* [2000] NSWCCA 140 [22].

- (ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both).⁹²

Making reparation

- 5.61 Voluntary repayment of the amount involved in the fraud may act in mitigation in some cases.⁹³ The fact that the repayment involved a substantial degree of sacrifice may properly be taken into account in mitigation.⁹⁴ For example, where the offender funds repayments by the sale of properties that were unrelated to the fraud.⁹⁵
- 5.62 While voluntary repayment may justify some mitigation, the CCA has observed that it “does not, of itself, necessarily entitle an offender to a less than full time custodial sentence if such sentence is otherwise warranted”.⁹⁶
- 5.63 In terms of the statutory reference to reparation “made”, the CCA has observed “that mitigating factor is directed to reparation already made by the offender as at the time of sentence”.⁹⁷ In one case, the CCA observed that it was an error for a sentencing judge to reject out of hand an offender’s willingness to make reparation (involving some hardship), although its “significance may well have been diminished by the fact that no payment had yet been made”.⁹⁸ However, the courts have been careful to clarify that it would be wrong to interpret those cases as suggesting that an offender can purchase mitigation.⁹⁹
- 5.64 Voluntary reparation should be distinguished from restitution or compensation that the court has ordered as part of sentencing, which we discuss in chapter 3. The CCA has observed that “an order for compensation, or reparation does no more than require the return of ill-gotten gains to which the offender had no entitlement”.¹⁰⁰
- 5.65 The courts have also rejected the possibility of a non-custodial penalty, or a deferral of imprisonment, to allow the offender to repay the amount defrauded, either voluntarily or in accordance with an order.¹⁰¹

92. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(i).

93. *R v Woodman* [2001] NSWCCA 310 [32]. See also *Upadhyaya v R* [2017] NSWCCA 162 [65].

94. *R v Phelan* (1993) 66 A Crim R 446, 448; *R v Giallussi* [1999] NSWCCA 56 [21]; *R v Woodman* [2001] NSWCCA 310 [32]; *R v Strano* [2002] NSWCCA 531 [76].

95. *Subramaniam v R* [2013] NSWCCA 159 [53]–[54].

96. *R v Boland* (Unreported, NSWCCA, 13 October 1998) 4.

97. *R v Cage* [2006] NSWCCA 304 [34].

98. *Job v R* [2011] NSWCCA 267 [47]–[49].

99. *R v Phelan* (1993) 66 A Crim R 446, 448; *R v Woodman* [2001] NSWCCA 310 [32].

100. *R v Woodman* [2001] NSWCCA 310 [32]. See also *Upadhyaya v R* [2017] NSWCCA 162 [65].

101. *R v Medina* (Unreported, NSWCCA, 28 May 1990) 4–5.

Guilty plea

- 5.66 A court is also to consider a plea of guilty as a mitigating factor.¹⁰²
- 5.67 This is especially important for certain white-collar crimes where the “difficulty of detection and the difficulty and expense of investigation and proof” justify a greater discount to someone who pleads guilty.¹⁰³

Relevance of gambling

- 5.68 As discussed in chapter 4, sometimes a fraud offender may have a gambling addiction.
- 5.69 The fact that fraud offences were committed to satisfy a gambling addiction will generally not be a mitigating factor.¹⁰⁴ In one case, the CCA observed that although an offender’s:

gambling habit may explain his fall into such serious criminal conduct and give some hope of rehabilitation in the future, it has been held to be a rare case where an offender can seek mitigation of penalty based upon an addiction to gambling, even where it is pathological.¹⁰⁵

- 5.70 Circumstances where gambling addiction is not treated as a mitigating factor (particularly in light of the need for general deterrence) include where the frauds were:
- “perpetrated and skilfully executed over an extended period”,¹⁰⁶ and
 - numerous as well as “premeditated and calculated to deprive people of substantial sums of money”.¹⁰⁷

- 5.71 The CCA has observed that offenders with a gambling addiction may appropriately be the subject of general deterrence, having regard to:

the nature of gambling addiction and to the fact that fraud, involving substantial sums of money, by gambling addicts in positions of trust is not uncommon.¹⁰⁸

- 5.72 The CCA has considered the rare circumstances that might justify a gambling addiction being taken into account in reducing moral culpability:

102. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(k).

103. *Halabi v R* (Unreported, NSWCCA, 17 February 1992) 7. See also *R v Bateson* [2011] NSWSC 643 [31]–[32].

104. *Johnston v R* [2017] NSWCCA 53 [36]; *R v Molesworth* [1999] NSWCCA 43 [24].

105. *Assi v R* [2006] NSWCCA 257 [27].

106. *Johnston v R* [2017] NSWCCA 53 [38].

107. *Assi v R* [2006] NSWCCA 257 [27].

108. *R v Todorovic* [2008] NSWCCA 49 [62].

A better understanding as to the susceptibility of an individual to addictive behaviour and a better understanding of the changes to personality and indeed the physical symptoms which can accompany addictive behaviour may satisfy a court in a particular case that the offence is not one which provides an appropriate vehicle for general deterrence or retribution, to the full extent that such an offence might otherwise call for such a response.¹⁰⁹

Duress

- 5.73 Whether “the offender was acting under duress” is a further mitigating factor identified in the *Sentencing Procedure Act*.¹¹⁰ This also goes to the assessment of the objective seriousness of an offence.
- 5.74 It can be found, for example, where an offender is subject to domestic violence and coercion. In one District Court case, which concerned theft and dishonestly obtaining property by deception by means of stolen cards, the judge observed:

I am satisfied that the offender was acting under duress as a result of the circumstances of her relationship in which she was a victim of domestic violence. This is relevant to the objective seriousness of the offences because she was committing the offences as a result of the psychological manipulation and threats of physical violence that had been acted on in the past. The extent of the abuse led to her relapse into illicit drug use, which reduced her ability to resist the duress being applied to her and led to the commission of the offences.¹¹¹

- 5.75 However, Women’s Legal Service told us that duress in the context of domestic and family violence is often not recognised or acknowledged by practitioners or the courts, and courts may not be taking it into account as a mitigating factor in appropriate cases.¹¹²

Extra-curial punishment

- 5.76 Extra-curial punishment, such as removal from the roll of solicitors because of a conviction for fraud, may be a relevant factor in mitigation.¹¹³ However, the effect is often limited. For example, the CCA has observed that an accountant who facilitated the operation of a tax fraud for seven years ought to have anticipated that the discovery and

109. *R v Jafari* [2017] NSWCCA 152 [93].

110. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(d).

111. *R v Longbottom* [2018] NSWDC 351 [54].

112. Women’s Legal Service NSW, *Preliminary Consultation PFRC01*.

113. *Oudomvilay v R* [2006] NSWCCA 275 [19].

successful prosecution of his offending would inevitably lead to his removal from the roll of chartered accountants.¹¹⁴

Identifying an appropriate sentence for fraud offences

- 5.77 This chapter has identified ways courts have applied sentencing principles when determining appropriate sentences for fraud and fraud-related offences. However, we understand that determining appropriate sentences for these offences may present certain challenges.
- 5.78 For example, statistics or schedules of fraud cases are of limited value to sentencing courts because of the “enormous variation in objective and subjective circumstances involved”.¹¹⁵ As discussed, fraud can involve quite different objective and subjective considerations, differing sums of money, offenders who hold fiduciary office or positions of trust or employees of no great seniority, relatively simple offences of short duration or complex and prolonged cases.¹¹⁶

114. *R v Zerafa* [2013] NSWCCA 222 [92].

115. *R v Woodman* [2001] NSWCCA 310 [22]; *R v Martin* [2005] NSWCCA 190 [56]; *R v Hawker* [2001] NSWCCA 148 [17]–[18]; *R v Swadling* [2004] NSWCCA 421 [29].

116. *R v Hawker* [2001] NSWCCA 148 [17].

6. Fraud Sentencing Guidelines in England and Wales

In Brief

The sentencing guidelines for England and Wales provide an example of an attempt to formulate a comprehensive sentencing model for fraud offences in a comparable jurisdiction. We ask whether any aspects of the guidelines could assist with sentencing for fraud offences in NSW.

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- 6.1 England and Wales have taken a different approach to determining sentences for fraud and fraud-related offences. Offenders are sentenced in accordance with definitive sentencing guidelines produced by the Sentencing Council for England and Wales (the Council).¹ The Council produces separate versions of sentencing guidelines for use in

1. *Coroners and Justice Act 2009* (UK) s 120. For general principles to be considered when sentencing young offenders, see Sentencing Council for England and Wales, "Sentencing Children and Young People" (1 June 2017) <www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/> (retrieved 26 September 2022).

the Magistrates' courts and the Crown Court.² These guidelines outline the decision-making process a court must follow when imposing a sentence and the relevant factors it should consider.

- 6.2 There are six main sentencing guidelines dealing with fraud, bribery and money laundering offences for individual offenders, and one for corporate offenders ("Fraud Guidelines").³ The Fraud Guidelines help courts navigate the wide range of conduct constituting fraud by identifying the range of sentences that appropriately reflects the seriousness of the individual offence.
- 6.3 This Chapter looks to the sentencing guidelines as an example of an attempt to formulate a comprehensive sentencing model for fraud and fraud-related offences in a comparable jurisdiction. We focus primarily on the Magistrates' Court Fraud guideline which deals with offences under s 1 of the *Fraud Act 2006* (UK) (*Fraud Act*) and s 17 of the *Theft Act 1968* (UK) (*Theft Act*).
- 6.4 These examples raise questions over whether a more structured approach, specifically targeted to fraud offending, is needed in NSW. Or is the existing approach, which is flexible enough to accommodate different forms of offending, still appropriate? There may also be other lessons to be drawn from the way certain sentencing principles and considerations are framed and applied.

Overview of the Sentencing Guidelines

- 6.5 In NSW, guidelines are based on decisions of the Court of Criminal Appeal.⁴ In contrast, the sentencing guidelines for England and Wales are produced by the Council following extensive research and public consultation.⁵
- 6.6 Most of the Council members are judges (including the Lord Chief Justice as President) with expertise in sentencing.⁶

2. See, eg, Sentencing Council for England and Wales, "Sentencing Guidelines for use in magistrates' courts" <www.sentencingcouncil.org.uk/the-magistrates-court-sentencing-guidelines/> (retrieved 26 September 2022); Sentencing Council for England and Wales, "Sentencing Guidelines for use in Crown Court" <www.sentencingcouncil.org.uk/crown-court/> (retrieved 26 September 2022).

3. Sentencing Council for England and Wales, "Fraud, bribery and money laundering offences", <www.sentencingcouncil.org.uk/sentencing-and-the-council/about-sentencing-guidelines/about-published-guidelines/fraud-bribery-and-money-laundering/> (retrieved 26 September 2022).

4. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 4.

5. *Coroners and Justice Act 2009* (UK) s 120. See, eg, Sentencing Council for England and Wales, *Research to Support the Development of Revised Fraud Sentencing Guidelines* (2014) 3–4; Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences: Corporate Offenders*, Response to Consultation (2014) 9–10.

- 6.7 When developing guidelines, the Council is required to consider:
- the sentences imposed by courts in England and Wales
 - the need to promote consistency in sentencing
 - the impact of sentencing decisions on victims
 - the need to promote public confidence in the criminal justice system
 - the cost of different sentences and their relative effectiveness in preventing re-offending, and
 - the results of any relevant monitoring of its sentencing guidelines.⁷
- 6.8 Sentencing guidelines can relate to a specific offence, category of offence or category of offender.⁸ The Council also produces general guidelines on overarching sentencing principles which may be used with other more specific guidelines.⁹
- 6.9 Most, if not all, offence specific guidelines set out different levels or “categories” of sentence based on the culpability of the offender and the harm caused to the victim. The guidelines then provide a corresponding range of sentences for each offence category, and indicate the factors that might serve to either reduce or increase the final sentence.¹⁰
- 6.10 Courts must sentence offenders according to the relevant guideline unless it would be unjust to do so.¹¹ This means that courts have a statutory obligation to follow the procedure set out in the guideline, however there is nothing in the legislation that requires courts to consider every listed factor.

6. Sentencing Council for England and Wales, “Sentencing Council Members” <www.sentencingcouncil.org.uk/sentencing-and-the-council/about-the-sentencing-council/sentencing-council/> (retrieved 21 September 2022); *Coroners and Justice Act 2009* (UK) sch 15.

7. *Coroners and Justice Act 2009* (UK) s 120(11), s 128.

8. *Coroners and Justice Act 2009* (UK) s 120(2).

9. Sentencing Council for England and Wales, “General Guideline: Overarching Principles” (1 October 2019) <www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/> (retrieved 26 September 2022).

10. Sentencing Council for England and Wales, “About Sentencing Guidelines” <www.sentencingcouncil.org.uk/sentencing-and-the-council/about-sentencing-guidelines/> (retrieved 22 September 2022).

11. *Sentencing Act 2020* (UK) s 59(1).

- 6.11 According to the Council, this allows for a consistent approach to sentencing, with “some variation in outcomes for offences that on the face of it appear to be very similar”.¹²
- 6.12 The range of sentencing outcomes under each guideline typically falls short of the relevant statutory maximum penalty.¹³ Courts retain the discretion to move outside the category range or even impose the maximum penalty if the circumstances of a particular case demand it.¹⁴

The fraud guidelines

- 6.13 In 2012, the Lord Chancellor requested the Council prepare a sentencing guideline on corporate fraud and bribery as part of wider efforts to address the problem of corporate involvement in financial crime.¹⁵ The Council decided to widen the scope of the request to consider sentences for both individuals and corporations.¹⁶
- 6.14 The Council’s aim in developing the Fraud Guidelines “was to improve consistency of sentencing, but not to cause changes in the types of sentences passed overall”.¹⁷ The Fraud Guidelines were also designed to emphasise, in the sentencing process, the effects of fraud on victims.¹⁸
- 6.15 After extensive consultation, seven guidelines on fraud, bribery and money laundering offences came into force on 1 October 2014. Table 6.1 sets out the content of these guidelines.

12. S Poppleton and others, *A Review of Consistency in Sentencing* (Sentencing Council for England and Wales, 2021) 5.

13. See, eg, Sentencing Council for England and Wales, “Magistrates courts sentencing guidelines: Fraud” (1 October 2014) <www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/> (retrieved 26 September 2022).

14. Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences, Response to Consultation* (2014) 19; *Sentencing Act 2020* (UK) s 60.

15. Sentencing Council for England and Wales, *Final Resource Assessment: Fraud Offences* (2014) [2.1].

16. Sentencing Council for England and Wales, *Final Resource Assessment: Fraud Offences* (2014) [2.2].

17. Sentencing Council for England and Wales, *Assessing the Impact of the Sentencing Council’s Fraud, Bribery and Money Laundering Definitive Guideline* (C2018) 1.

18. UK, Ministry of Justice, *Post-Legislative Assessment of the Fraud Act 2006: Memorandum to the House of Lords Select Committee for the Fraud Act and Digital Fraud*, CP 680 (2022) 11.

Table 6.1: Offences covered by the fraud, bribery and money laundering guidelines in England and Wales

Guideline	Offences covered
Fraud (General Fraud guideline)	<p>§ fraud by false representation, fraud by failing to disclose information, fraud by abuse of position</p> <p>§ false accounting, and</p> <p>§ conspiracy to commit the above offences.¹⁹</p>
Possessing, making or supplying articles for use in fraud	<p>§ possession of articles for use in frauds, and</p> <p>§ making or supplying articles for use in frauds.²⁰</p>
Revenue fraud	<p>§ fraud by false representation, fraud by failing to disclose information, or fraud by abuse of position</p> <p>§ false accounting</p> <p>§ fraudulent evasion of Value Added Tax (VAT) or false statement for VAT purposes</p> <p>§ fraudulent evasion of income tax, and</p> <p>§ fraudulent evasion of excise duty, or improper importation of goods.²¹</p>
Benefit fraud	<p>§ dishonest representations for obtaining benefit</p> <p>§ tax credit fraud</p> <p>§ false accounting, and</p> <p>§ fraud by false representation, fraud by failing to disclose information, or fraud by abuse of position.²²</p>
Money laundering	<p>§ concealing, disguising, converting, transferring, or removing criminal property from England and Wales</p> <p>§ entering arrangements concerning criminal property, and</p> <p>§ acquisition, use and possession of criminal property.²³</p>
Bribery	<p>§ bribing another person</p> <p>§ being bribed, and</p> <p>§ bribery of foreign public officials.²⁴</p>
Corporate offenders	All of the offences listed above.

19. *Fraud Act 2006* (UK) s 1–4; *Theft Act 1968* (UK) s 17.

20. *Fraud Act (2006)* (UK) s 6–7.

21. *Fraud Act 2006* (UK) s 1–4; *Theft Act 1968* (UK) s 17; *Value Added Tax Act 1994* (UK) s 72; *Taxes Management Act 1970* (UK) s 106A; *Customs and Excise Management Act 1979* (UK) s 50, s 170, s 170B.

22. *Social Security Administration Act 1992* (UK) s 111A, s 112; *Tax Credits Act 2002* (UK) s 35; *Theft Act 1968* (UK) s 17; *Fraud Act 2006* (UK) s 1–4.

23. *Proceeds of Crime Act 2002* (UK) s 327–329.

24. *Bribery Act 2010* (UK) s 1–2, s 6.

- 6.16 In the following sections, we focus on the General Fraud guideline, which covers s 1 of the *Fraud Act* and false accounting under the *Theft Act*.²⁵ However, there is a great deal of overlap between all the Fraud Guidelines.
- 6.17 We focus on the General Fraud guideline because it covers offences most comparable to those in s 192E of the *Crimes Act 1900* (NSW). The principal fraud offence can be committed in three ways: by false representation; by failing to disclose information; and by abuse of position.²⁶ The offence operates as a “catch-all” for most fraudulent activity. In 2015, 6700 offenders were sentenced under this offence in England and Wales.²⁷
- 6.18 All six guidelines set out the same sequence of steps that courts must follow when sentencing individual offenders for fraud. These are set out in Figure 6.1.

Figure 6.1: Sequence of steps to be followed in sentencing for fraud in England and Wales



25. *Theft Act 1968* (UK) s 17.

26. *Fraud Act 2006* (UK) s 1–4.

27. Sentencing Council for England and Wales, *Assessing the Impact of the Sentencing Council's Fraud, Bribery and Money Laundering Definitive Guideline* (C2018) 7–8.

6.19 Below, we outline how the General Fraud guideline deals with the first two steps identified above; assessing seriousness, and considering aggravating and mitigating factors. We concentrate on these aspects as they may provide some insight or comparison with the sentencing principles discussed in chapter 5.

Assessing the seriousness of the offence

6.20 The first step in the guideline is to determine the “offence category” which reflects the seriousness of the offending conduct.²⁸ To assess seriousness, the court looks to:

- the culpability of the offender, and
- the harm or intended harm caused to the victim (financial and other impact).

6.21 Based on this assessment, the guideline identifies a starting point (or provisional sentence) within the range of outcomes relevant to each offence. These ranges and starting points are contained in Table 1 within the General Fraud Guideline.²⁹

Table 6.2: Table 1 within the General Fraud guideline for England and Wales

Harm	Culpability		
	A	B	C
Category 1 £500,000 or more	Starting point 7 years' custody	Starting point 5 years' custody	Starting point 3 years' custody
Starting point based on £1 million	Category range 5 - 8 years' custody	Category range 3 - 6 years' custody	Category range 18 months' – 4 years' custody
Category 2 £100,00-£500,000	Starting point 5 years' custody	Starting point 3 years' custody	Starting point 18 months' custody
Starting point based on £300,000	Category range 3 – 6 years' custody	Category range 18 months' – 4 years' custody	Category range 26 weeks' – 3 years' custody

28. Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences: Definitive Guideline* (2014) 6.

29. Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences: Definitive Guideline* (2014) 8.

Harm	Culpability		
	A	B	C
Category 3 £20,000 - £100,000	Starting point 3 years' custody	Starting point 18 months' custody	Starting point 26 weeks' custody
Starting point based on £50,000	Category range 18 months' – 4 years' custody	Category range 26 weeks' – 3 years' custody	Category range Medium level community order – 1 years' custody
Category 4 £5,000 - £20,000	Starting point 18 months' custody	Starting point 26 weeks' custody	Starting point Medium level community order
Starting point based on £12,500	Category range 26 weeks' – 3 years' custody	Category range Medium level community order – 1 years' custody	Category range Band B fine – High level community order
Category 5 Less than £5,000	Starting point 36 weeks' custody	Starting point Medium level community order	Starting point Band B fine
Starting point based on £2,500	Category range High level community order – 1 years' custody	Category range Band B fine – 26 weeks' custody	Category range Discharge – Medium level community order

Assessing culpability

6.22 The General Fraud guideline distinguishes three levels of culpability: high, medium, and lesser. The level of culpability is decided after weighing the factors of the case to determine the offender's role, the extent to which the offending was planned, and the sophistication with which it was carried out.³⁰

High culpability

6.23 According to the General Fraud guideline, high culpability is demonstrated by one or more of the following:

- the offender had a leading role where their offending was part of a group activity
- the offender involved others through pressure, or influence
- the offender abused a position of power, trust or responsibility
- the offence was sophisticated or involved significant planning

30. Sentencing Council for England and Wales, "Magistrates courts sentencing guidelines: Fraud" (1 October 2014) <www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/> (retrieved 26 September 2022).

- the fraudulent activity was conducted over a sustained period of time
- there was a large number of victims, or
- the victim was deliberately targeted on the basis of their vulnerability.³¹

6.24 All of these factors are already considered by courts in NSW when assessing the seriousness of fraud offences (see chapter 5). Serious criminality in England and Wales can be demonstrated by just one of these circumstances.

6.25 The decision of the Court of Appeal for England and Wales in *R v Gray* provides an example of “high culpability”. The Court noted the offending occurred over three and a half years while the offender occupied a position of responsibility:

This was a sophisticated fraud with cunning steps taken by the appellant to cover his tracks. He fraudulently used an elaborate accounting methodology to conceal the fact that cash was missing, inflating costs on numerous transactions. It was a calculated methodology used pro-actively to hide his deceit. The appellant was on a good salary of over £65,000 a year as at 2017. His offending was driven by pure greed... There is no, nor could there be any, complaint about placing the offending in high culpability.³²

Medium culpability

6.26 An offender falls into the medium culpability category if they played a significant role where the offending is part of a group activity, or in all other cases where the characteristics under high and lesser culpability are not present.³³

Lesser culpability

6.27 Lesser culpability is said to be demonstrated through the presence of one or more of the following characteristics:

- the offender was involved because of coercion, intimidation or exploitation
- the offender was not motivated by personal gain
- the offender had a peripheral role in an organised fraud
- it was an opportunistic one off offence, with very little or no planning, or

31. Sentencing Council for England and Wales, “Magistrates courts sentencing guidelines: Fraud” (1 October 2014) <www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/> (retrieved 26 September 2022).

32. *R v Gray* [2022] EWCA Crim 1095 [18].

33. Sentencing Council for England and Wales, “Magistrates courts sentencing guidelines: Fraud” (1 October 2014) <www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/> (retrieved 26 September 2022).

- the offender had limited awareness or understanding of the extent of fraudulent activity.³⁴

An example of “limited awareness” is where an offender committed a fraud involving large amounts but they were “unaware of the scale of the fraudulent activity”.³⁵

Assessing harm

- 6.28 In the General Fraud guideline, harm is measured by the amount of money defrauded and the impact on any victims or others.

Amount of harm

- 6.29 The court must determine the actual, intended or risked financial loss arising from the offence.

- 6.30 The guideline identifies the following categories of harm based on the amount of money defrauded or intended to be defrauded:

- **category 1:** £500,000 or more
- **category 2:** £100,000 – £500,000 or risk of category 1 harm
- **category 3:** £20,000 – £100,000 or risk of category 2 harm
- **category 4:** £5000 – £20,000 or risk of category 3 harm, or
- **category 5:** Less than £5000 or risk of category 4 harm.³⁶

These categories correspond with a potential sentence range (see Table 6.2 above).

- 6.31 Where the offence has caused a risk of loss but no (or much less) actual loss, the normal approach is to move down a category. In cases where the risk of loss is less than £5000 the court should move down the sentencing range for category 5.³⁷

- 6.32 The guideline provides that consecutive sentences for multiple offences may be appropriate where large sums of money are involved.³⁸

34. Sentencing Council for England and Wales, “Magistrates courts sentencing guidelines: Fraud” (1 October 2014) <www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/> (retrieved 26 September 2022).

35. Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences*, Response to Consultation (2014) 8.

36. Sentencing Council for England and Wales, “Magistrates courts sentencing guidelines: Fraud” (1 October 2014) <www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/> (retrieved 26 September 2022).

37. Sentencing Council for England and Wales, “Magistrates courts sentencing guidelines: Fraud” (1 October 2014) <www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/> (retrieved 26 September 2022).

Impact on any victims or others

- 6.33 The court is then required to assess the impact of the offence on any victims or others:
- If the impact is high, the court should move up a category (see Table 6.2).
 - If the impact is medium, the court should move further along the relevant category range.
 - If the impact is lesser, no adjustment should be made.³⁹
- 6.34 If the fraud has a “serious detrimental effect on the victim” (whether financial or otherwise), this will increase the seriousness of the offence. If the victim was particularly vulnerable, this will also make the offence more serious and warrant moving the sentence up a category. The General Fraud guideline considers vulnerability can be based on age, financial circumstances, and mental capacity, but this is not an exhaustive list.⁴⁰
- 6.35 During consultations on the development of the Fraud Guidelines, several participants supported the emphasis on victim impact at step one. They observed that victims, especially vulnerable ones, can suffer significant financial and psychological harm over the loss of relatively small sums.⁴¹
- 6.36 The nature and extent of the harm caused to the victim is usually established through personal impact statements. The Court of Appeal observed, in relation to personal impact statements admitted in *R v Gray*, that:

They spoke of their deep shock, distress and confusion upon discovery of what was a profound abuse of trust. [One of the victims] spoke of the untold stress that had been caused to them as the evidence became pieced together ... [the trial] judge considered victim impact to be medium. That was in our judgment arguably generous to the appellant ... [the trial judge] would have been entitled to assess victim impact as high ...

38. Sentencing Council for England and Wales, “Magistrates courts sentencing guidelines: Fraud” (1 October 2014) <www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/> (retrieved 26 September 2022).

39. *R v O’Neill* [2021] EWCA Crim 1427 [21].

40. Sentencing Council for England and Wales, “Magistrates courts sentencing guidelines: Fraud” (1 October 2014) <www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/> (retrieved 26 September 2022).

41. Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences*, Response to Consultation (2014) 10.

These events placed (understandably) an enormous strain on the ... [victims'] marriage. They had championed the appellant's career. They had placed so much trust in him. They lost their belief in trusting people.⁴²

Considering aggravating and mitigating factors

6.37 In step two of the General Fraud guideline, the court considers whether a combination of aggravating and mitigating factors warrant an adjustment to the provisional sentence (which was determined at step one).

6.38 The aggravating factors contained in the General Fraud guideline are a mixture of factors that apply to criminal offences generally, some that apply in other similar areas, such as money laundering, and some that have a specific application to fraud.

6.39 Some factors that aggravate the seriousness of the offence include:

- the offender had recent previous convictions that relate to the present offence
- the offender took steps to prevent the victim reporting or obtaining assistance and/or from assisting or supporting the prosecution
- the offender attempted to conceal or dispose of evidence
- the offender failed to respond to warnings about behaviour
- the offences were committed across borders, and
- the offender wrongly blamed others.⁴³

6.40 The court will need to attribute appropriate weight to each factor.⁴⁴

6.41 The Fraud Guidelines have been drafted in such a way which removes overlap between factors demonstrating seriousness, and factors serving to aggravate or mitigate seriousness. The aggravating and mitigating factors in the guidelines are not intended to be exhaustive.⁴⁵

42. *R v Gray* [2022] EWCA Crim 1095 [23]–[24].

43. Sentencing Council for England and Wales, "Magistrates courts sentencing guidelines: Fraud" (1 October 2014) <www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/> (retrieved 26 September 2022).

44. Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences Guideline*, Consultation (2013) 37.

45. Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences Guideline*, Consultation (2013) 20.

- 6.42 Courts may consider other relevant factors, including those listed in other guidelines. For instance, an aggravating factor in the Benefit Fraud guideline is applied by courts to a variety of offences where the proceeds of fraud are used to fund a “lavish lifestyle”.⁴⁶ This was included to distinguish between fraud committed out of greed or need.⁴⁷
- 6.43 In the General Fraud guideline, factors which reduce the seriousness or reflect personal mitigation include:
- no previous convictions or no relevant or recent convictions
 - remorse
 - good character and/or exemplary conduct
 - the offence was planned in a way that had little or no prospect of success
 - serious medical conditions requiring urgent, intensive or long-term treatment
 - being the sole or primary carer for dependent relatives
 - mental disorder or learning disability
 - age and/or lack of maturity where it affects the responsibility of the offender
 - delay in proceedings through no fault of the offender
 - cooperation with investigation, early admissions and/or voluntarily reported offending
 - demonstrated or determined steps taken to address addiction or offending behaviour, or
 - the fraudulent activity was originally legitimate.⁴⁸
- 6.44 A common factor in the draft guidelines was remorse “particularly where evidenced by voluntary repayment”.⁴⁹ However, several non-government organisations responded that often fraud offenders are already struggling financially and may be genuinely

46. Sentencing Council for England and Wales, “Magistrates courts sentencing guidelines: Fraud” (1 October 2014) <www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/> (retrieved 26 September 2022). See also *R v Green* [2016] EWCA Crim 1888 [10].

47. Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences: Response to Consultation* (2014) 10.

48. Sentencing Council for England and Wales, “Magistrates courts sentencing guidelines: Fraud” (1 October 2014) <www.sentencingcouncil.org.uk/offences/magistrates-court/item/fraud/> (retrieved 26 September 2022).

49. Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences Guideline*, Consultation (2013) 39.

remorseful but unable to make repayments.⁵⁰ The Council agreed with this argument and amended the factor to simply state “remorse” in the definitive Fraud Guidelines.⁵¹

6.45 The combination of mitigating factors in a particular case can result in a significant reduction in sentence. For instance, the Court of Appeal observed in one case:

the appellant had no previous convictions and only a very old caution for motoring offences... aside from this serious lapse, the appellant was of positive good character, devoting himself to the care of the vulnerable in a commendable way... [H]e suffered from a combination of medical conditions which were bound to have an impact on his time in custody ... and in our view importantly, he is or would be his wife’s primary carer.⁵²

6.46 Based on these substantial mitigating factors the Court decided to impose a new term of 26 months’ imprisonment rather than the original sentence of 33 months.⁵³

Responses to the guidelines

6.47 Below we outline the benefits and concerns around the Fraud Guidelines in an effort to reflect on whether courts in NSW would benefit from more detailed guidance when imposing sentences for similar offences.

Guidelines can help judges determine an initial range

6.48 The Fraud Guidelines can help courts navigate the broad spectrum of conduct of fraud by identifying an initial range of sentences that appropriately reflects the seriousness of the offence.

The Fraud Guidelines draw attention to the harm experienced by victims

6.49 The Fraud Guidelines ensure that the impact on the victim is a consistent consideration of the court. As a result, fraud victims are able to express the full spectrum of the harm they have suffered to the court.

6.50 Guidelines also create a more transparent sentencing process for victims and offenders.

Opinions differ on whether the Fraud Guidelines allow sufficient flexibility

6.51 At first glance, the Fraud Guidelines could restrict judicial discretion. There is some uncertainty over the extent to which judges can, and do, depart from the guidelines.⁵⁴

50. Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences: Response to Consultation* (2014) 18.

51. Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences: Response to Consultation* (2014) 18.

52. *R v Blake* [2022] EWCA Crim 1062 [34].

53. *R v Blake* [2022] EWCA Crim 1062 [36].

6.52 One commentator considers:

Advisory guidelines can be useful and acceptable. Mandatory guidelines can be an irritating mechanical straightjacket. Most of the stipulated factors are obvious. Consistency is a virtue, but flexibility for the individual case is also a virtue.⁵⁵

6.53 Others disagree, with one study finding that:

broad sentencing ranges, alongside a substantial degree of judicial discretion within the guidelines, grants judges considerable autonomy when sentencing.⁵⁶

Concerns about increased sentence length may not be well-founded

6.54 There is a concern that guidelines may lead to an increase in sentence length and disproportionately affect certain groups. For instance, the Prison Reform Trust expressed concerns that standardising the decision-making process could drive up sentences for benefit fraud.⁵⁷ This could disproportionately impact women and their dependents.⁵⁸

6.55 To prevent this, the Prison Reform Trust recommended that culpability in step one be reordered.⁵⁹ In its view, courts should start by considering factors indicating lesser culpability “and satisfy themselves that the offender does not fall within this band before moving on to consider the medium and where relevant, high culpability factors”.⁶⁰ The Council did not adopt this suggestion.

54. R Rist, “Greed vs Need: Does the Sentencing of Tax and Benefit Fraud at the Crown Court in England and Wales Represent Differential Treatment of Classes by the Criminal Justice System?” (2022) 2 *Leeds Student Law and Criminal Justice Review* 108, 113, 132.

55. A Samuels, “Sentencing after Conviction for Benefit Fraud”, (2014) 220 *Criminal Lawyer* 2, 2.

56. R Rist, “Greed vs Need: Does the Sentencing of Tax and Benefit Fraud at the Crown Court in England and Wales Represent Differential Treatment of Classes by the Criminal Justice System?” (2022) 2 *Leeds Student Law and Criminal Justice Review* 108, 110.

57. G Brown, “Time to Update the Sentencing Guidelines on Benefit Fraud” (2021) 172 *Criminal Law Bulletin* 2, 5; Prison Reform Trust, Submission to Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences Guideline Consultation* (2013) 3.

58. G Brown, “Time to Update the Sentencing Guidelines on Benefit Fraud” (2021) 172 *Criminal Law Bulletin* 2, 6; Prison Reform Trust, Submission to Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences Guideline Consultation* (2013) 4–5.

59. Prison Reform Trust, Submission to Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences Guideline Consultation* (2013) 3.

60. Prison Reform Trust, Submission to Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences Guideline Consultation* (2013) 3.

- 6.56 Although sentence severity has increased in England and Wales, recent studies determined this was due to changes in prosecution policy for fraud offences rather than the Fraud Guidelines.⁶¹
- 6.57 In 2022, an analysis of the sentencing guidelines found that “tax frauds are being punished more severely than benefit fraud” as was established by the Revenue Fraud guideline.⁶²

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?

-
61. J Pina-Sánchez and others, “Have the England and Wales Guidelines Affected Sentencing Severity? An Empirical Analysis Using a Scale of Severity and Time Series Analyses” (2019) 59 *British Journal of Criminology* 979, 995; Sentencing Council for England and Wales, *Assessing the Impact of the Sentencing Council’s Fraud, Bribery and Money Laundering Definitive Guideline* (C2018) 7.
62. R Rist, “Greed vs Need: Does the Sentencing of Tax and Benefit Fraud at the Crown Court in England and Wales Represent Differential Treatment of Classes by the Criminal Justice System?” (2022) 2 *Leeds Student Law and Criminal Justice Review* 108, 130.

7. Sentencing outcomes

In Brief

In the Local Court, the sentencing for fraud offences showed a relatively high reliance on imprisonment and a relatively low reliance on fines when compared with general sentencing data. The District Court had a much greater reliance on imprisonment for fraud offences than the Local Court. There is over-representation of Aboriginal offenders generally.

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- 7.1 In this chapter we look at the sentencing outcomes for 2016–2021 for fraud offences in NSW in three broad groups (based on frequency):
- the two versions of the main fraud offence:
 - the offence of dishonestly obtaining financial advantage or causing financial disadvantage by deception in s 192E(1)(b) of the *Crimes Act 1900* (NSW) (*Crimes Act*) (“obtaining financial advantage offence”)
 - the offence of dishonestly obtaining property by deception in s 192E(1)(a) of the *Crimes Act* (“obtaining property offence”), and
 - the other fraud and fraud-related offences in the *Crimes Act*.¹
- 7.2 The data is arranged according to court level, as well as by gender and Aboriginal status of the offenders. These two demographic characteristics display some difference in sentencing patterns. Aboriginal men represent 3.5% of the resident male population in NSW.² Aboriginal women represent 3.4% of the resident female population in NSW.³
- 7.3 Finally, we ask the question whether sentences for fraud are appropriate.

Summary of data

- 7.4 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.
- 7.5 There is an over-representation of Aboriginal offenders generally and a greater over-representation among those sentenced to imprisonment. The over-representation in each case was greater for those convicted of the obtaining property offence when compared with those convicted of the obtaining financial advantage offence.
- 7.6 Generally, in the District Court there is a much greater reliance on imprisonment than in the Local Court. This is consistent with the more serious offending dealt with in the indictable jurisdiction. In relation to Aboriginal offenders, the numbers may not be sufficient for a proper comparison. However, it seems that, while there is some over-representation of Aboriginal people generally among those convicted of the obtaining

1. See Appendix B.

2. Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (Catalogue No 3238.0.55.001, June 2016).

3. Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (Catalogue No 3238.0.55.001, June 2016).

property offence, in the case of those convicted of the obtaining financial advantage offence, there was no over-representation of Aboriginal people at all.

- 7.7 When comparing the two versions of the main fraud offence, there is a slightly greater proportion of male offenders convicted of the obtaining property offence. When imprisonment is imposed, the average sentence is longer for those convicted of the obtaining financial advantage offence.
- 7.8 In this chapter, we note declines over 2016–2021 in the number of cases involving fraud or fraud-related offences and reductions in average sentences imposed over the same period. These changes may not represent long-term trends because restrictions and behaviour change related to the COVID-19 pandemic may have resulted in fewer court finalisations and reduced opportunities for offending in some cases.
- 7.9 We have adopted the classifications of supervised and unsupervised community sentences because the sentencing reforms introduced in the final quarter of 2018 mean we are unable to compare particular non-custodial sentencing orders before and after the reforms.

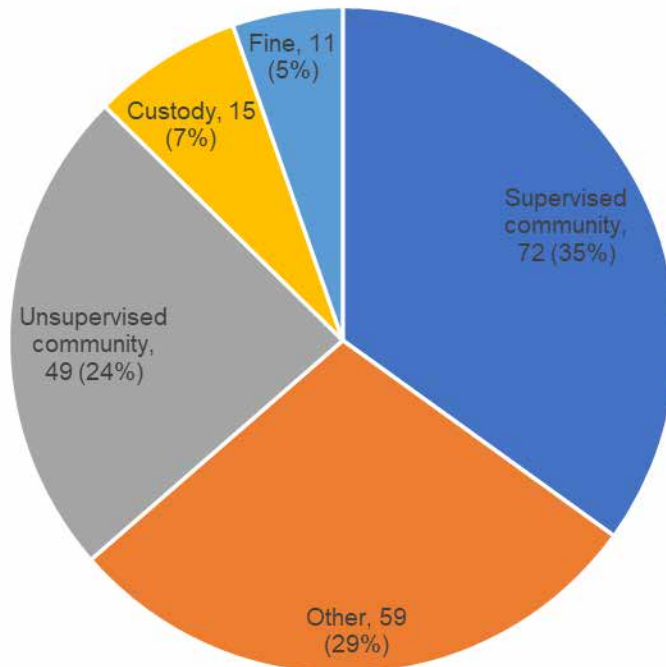
The obtaining financial advantage offence

- 7.10 The following figures and tables set out the sentencing outcomes for the obtaining financial advantage offence. The maximum penalty for this offence is 10 years' imprisonment.

Children's Court

- 7.11 Figure 7.1 shows the sentencing outcomes in the Children's Court where the obtaining financial advantage offence was the principal offence. The data reflects the specialist nature of the children's jurisdiction which is likely to result in fewer custodial penalties and more diversions.
- 7.12 Of the 206 sentences, the most common was a supervised community sentence (35%), followed by "other" (28.6%). The "other" category includes outcomes such as dismissed after Youth Justice Conference, Juvenile offence proved, and dismissed. A custodial sentence was imposed in only 7.3% of cases and a fine imposed in only 5.3% of cases.

Figure 7.1: Sentencing outcomes in the Children's Court, where obtaining financial advantage was the principal offence, 2016–2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

- 7.13 Of the 206 sentences, 149 (72%) involved male offenders and 57 (28%) involved female offenders. Of the 149 male offenders, 54 (36%) were identified as Aboriginal. Of the 57 female offenders, 30 (52%) were identified as Aboriginal. Although the numbers are small, Aboriginal offenders in the Children's Court are over-represented to a greater degree than in the Local Court for the same offence.

Local Court

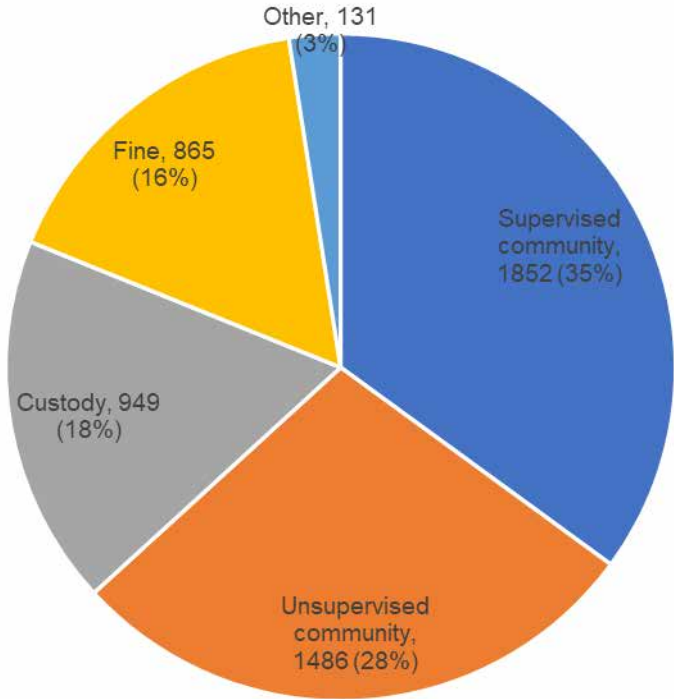
- 7.14 In 2016–2021, the Local Court sentenced those convicted of the obtaining financial advantage offence as the principal [or most serious] offence on 5283 occasions. Men were sentenced on 3358 (63.6%) of these occasions, and women were sentenced on 1925 (36.4%).
- 7.15 Of the 3358 men, 716 (21.3%) were Aboriginal. Of the 1925 women, 498 (25.9%) were Aboriginal.

General sentencing outcomes

- 7.16 Figure 7.2 shows the sentencing outcomes in the Local Court where the obtaining financial advantage offence was the principal offence. The data reflects the summary jurisdiction of the Local Court which involves the prosecution of a greater number of less serious matters.

- 7.17 Of the 5283 sentences, the most common was a supervised community sentence (35.1%), followed by an unsupervised community sentence (28.1%). A custodial sentence was imposed in 18% of cases and a fine imposed in only 16.4% of cases.
- 7.18 The 18% of cases receiving a custodial sentence can be compared with the percentage of custodial sentences imposed in each of the years 2017–2021 for all offences in the Local Court which ranged from 8.2% to 8.9%. The 16.4% of cases involving a fine can be compared with the 35% to 39.6% of cases where fines were imposed in relation to all offences in the same period.⁴

Figure 7.2: Sentencing outcomes in the Local Court, where obtaining financial advantage was the principal offence, 2016-2021

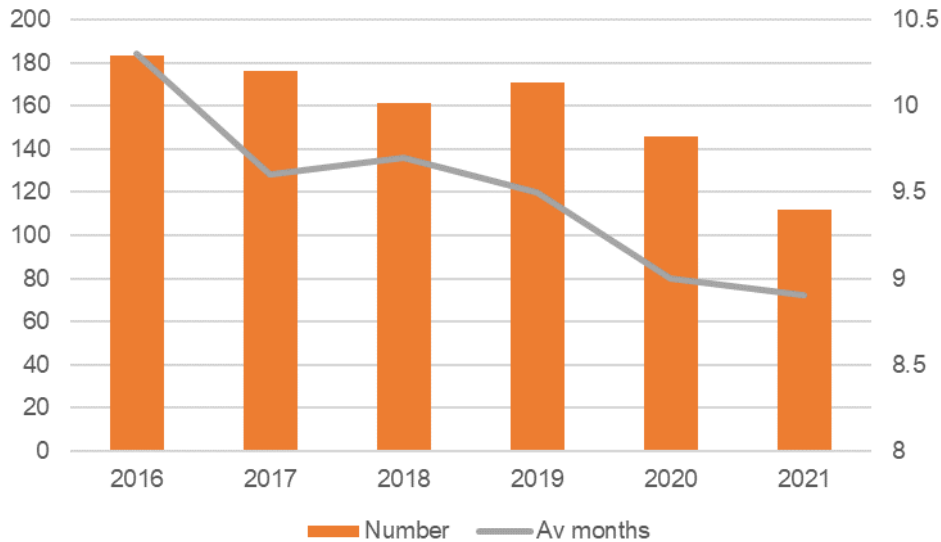


Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

- 7.19 Figure 7.3 shows the number of cases in the Local Court resulting in a custodial sentence together with the average head sentence for the principal offence. It shows a decline in both the number of cases (from 183 in 2016 to 112 in 2021) and the duration of the average head sentence (from 10.3 months in 2016 to 8.9 months in 2021). The decline was particularly noticeable in 2020 and 2021.

4. NSW Bureau of Crime Statistics and Research, “NSW Adult Criminal Sentencing, 2017 to 2021” <sentencingtool.bocsar.nsw.gov.au/> (retrieved 20 September 2022).

Figure 7.3: Number of cases and average head sentence of imprisonment (months) in the Local Court, where obtaining financial advantage was the principal offence, 2016-2021



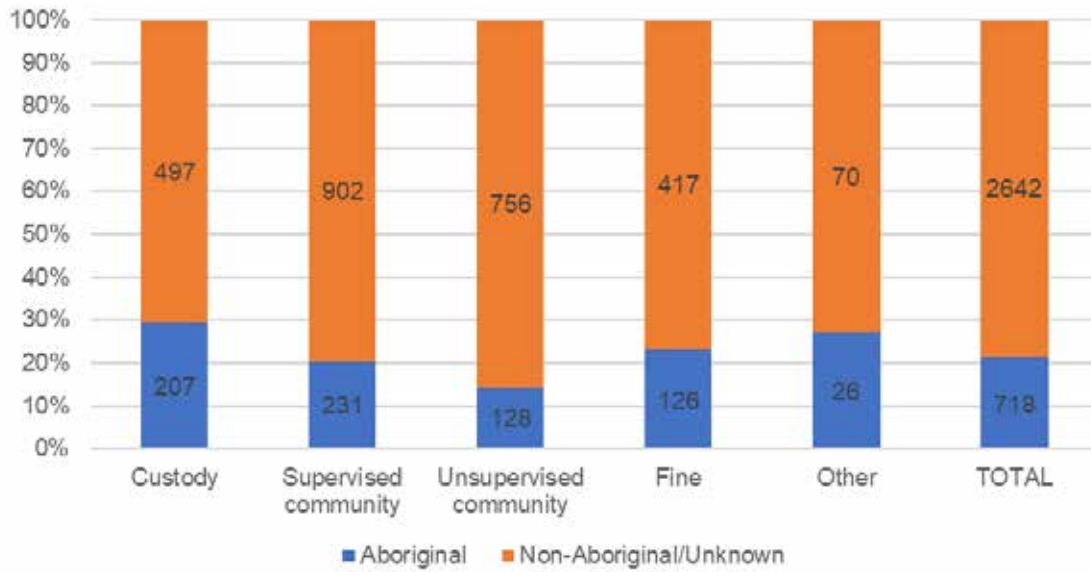
Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

Outcomes by gender and Aboriginal status

7.20 Figures 7.4 and 7.5 show that, while Aboriginal men make up 21.3% of male offenders, they represent 29.4% of those receiving a custodial sentence and only 14.5% of those receiving an unsupervised community sentence. This is broadly consistent with the generally higher incarceration rates for Aboriginal men compared with offenders who are not Aboriginal or their Aboriginality is not known.⁵

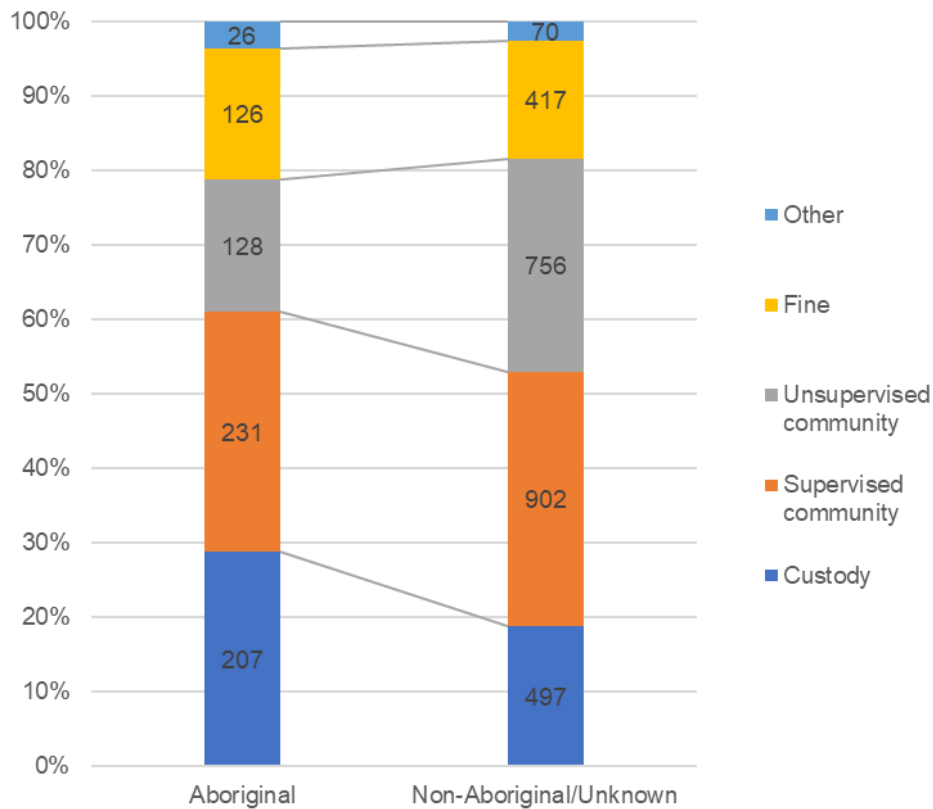
5. See, eg, NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2020 (2021) [4.12]–[4.17].

Figure 7.4: Local Court sentencing outcomes for men by Aboriginality where obtaining financial advantage was the principal offence, 2016–2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

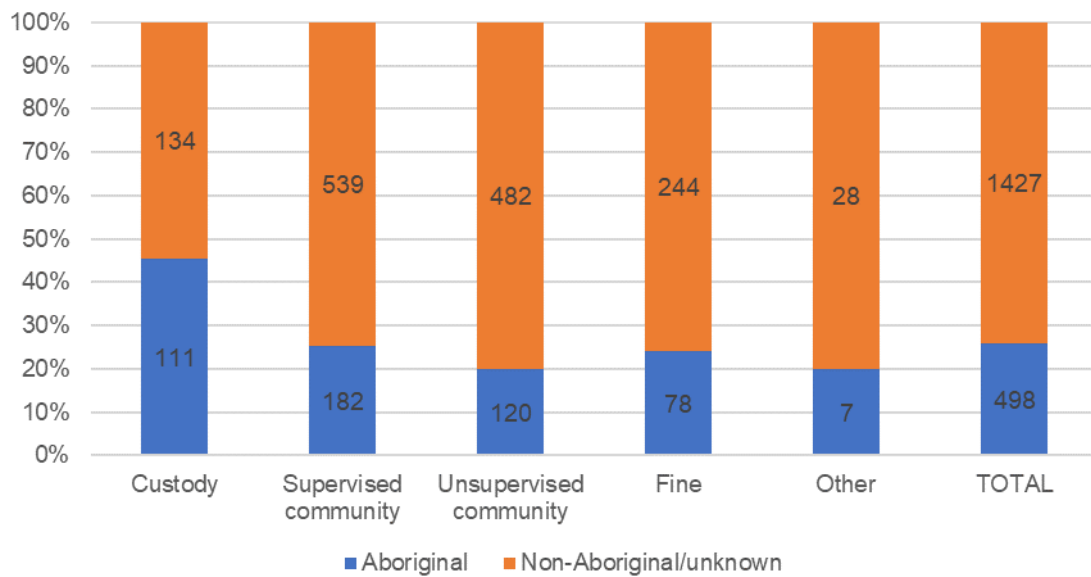
Figure 7.5: Local Court sentencing outcomes for men by Aboriginality where obtaining financial advantage was the principal offence, 2016–2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

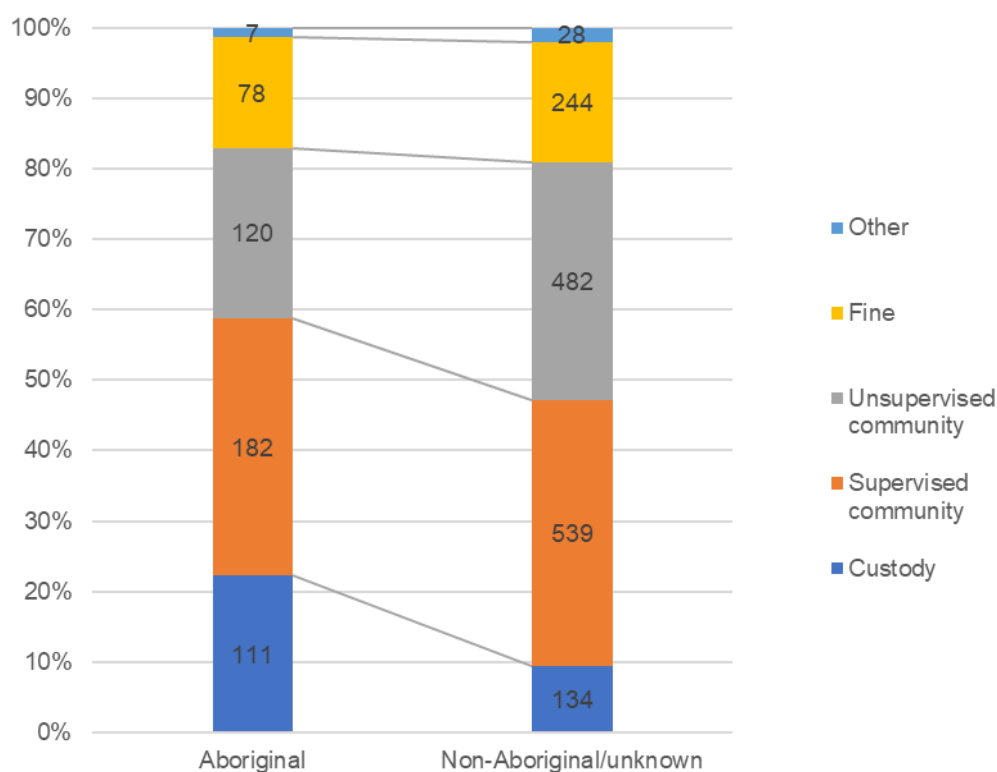
7.21 Figures 7.6 and 7.7 show that, while Aboriginal women make up 25.9% of female offenders, they represent 45.3% of those receiving a custodial sentence and only 19.9% of those receiving an unsupervised community sentence.

Figure 7.6: Local Court sentencing outcomes for women by Aboriginality where obtaining financial advantage was the principal offence, 2016–2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

Figure 7.7: Local Court sentencing outcomes for female offenders by Aboriginality where obtaining financial advantage was the principal offence, 2016–2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

District Court

7.22 In 2016–2021, the District Court sentenced offenders on 144 occasions where the obtaining financial advantage offence was the principal offence. Men were sentenced on 98 (68.1%) of these occasions, and women were sentenced on 46 (31.9%).

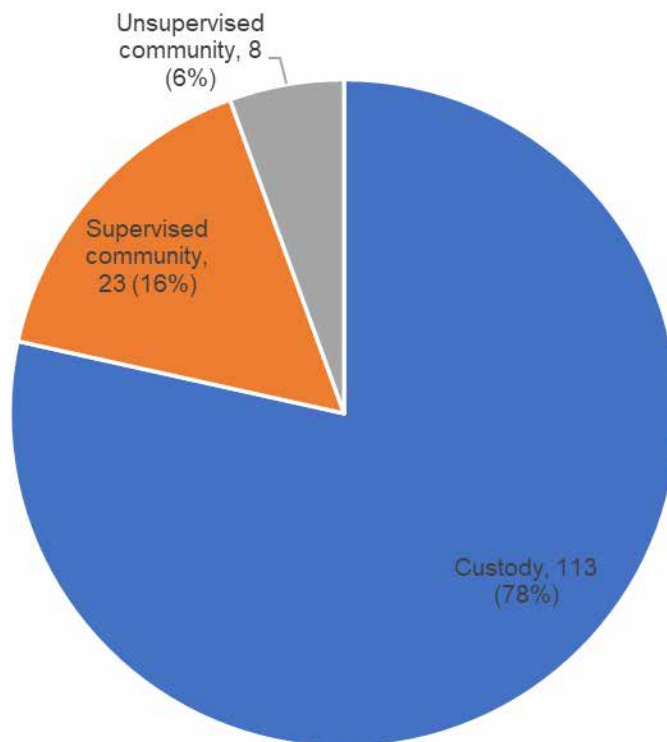
7.23 In contrast to the Local Court, Aboriginal men were sentenced on only 3 (3.1%) of the 98 occasions involving men. No Aboriginal women were sentenced on the 46 occasions involving women.

General sentencing outcomes

7.24 Figure 7.8 shows the sentencing outcomes in the District Court where the obtaining financial advantage offence was the principal offence. The data reflects the jurisdiction of the District Court where more serious matters are prosecuted.

7.25 Of the 144 sentences, the most common was a custodial sentence (78.5%), followed by a supervised community sentence (16%). An unsupervised community sentence was imposed in only 5.6% of cases.

Figure 7.8: Sentencing outcomes in the District Court, where the obtaining financial advantage was the principal offence, 2016–2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

7.26 When the District Court imposed a sentence of imprisonment for the principal offence, the average head sentence was 41.6 months (that is, approximately 3 years and 6 months).⁶

Outcomes by gender and Aboriginal status

7.27 Aboriginal men make up 3% of male offenders, and they represent 3.9% of those receiving a custodial sentence. The proportions are quite different when compared with the Local Court outcomes. However, the numbers in the District Court may be too small for a meaningful comparison to be drawn.

7.28 None of the 46 women sentenced in the District Court were identified as Aboriginal.

6. NSW Bureau of Crime Statistics and Research, reference 22-21286.

The obtaining property offence

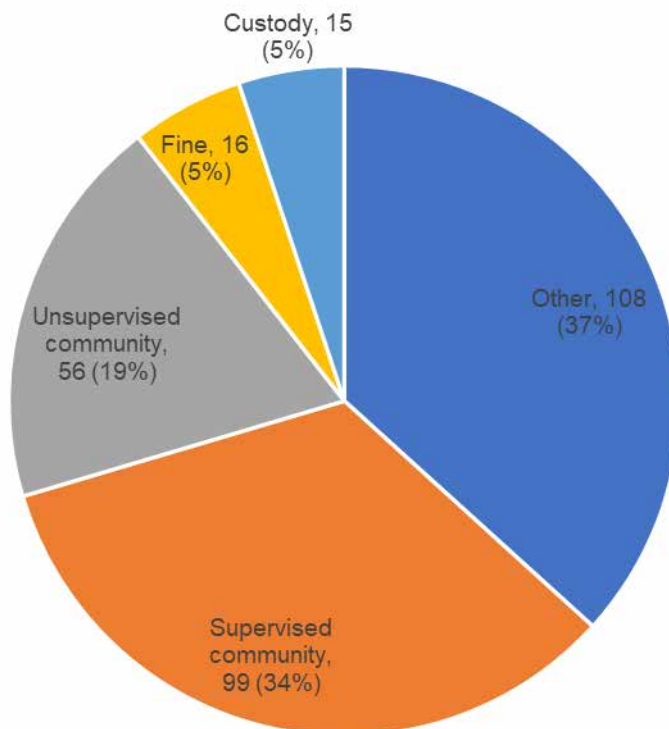
7.29 The following figures set out the sentencing outcomes for the obtaining property offence. The maximum penalty for this offence is 10 years' imprisonment.

Children's Court

7.30 Figure 7.11 shows the sentencing outcomes in the Children's Court where the obtaining property offence was the principal offence. The data reflects the specialist nature of the children's jurisdiction which is likely to result in fewer custodial penalties and more diversions.

7.31 Of the 294 cases, the most common outcome was "other" (36.7%), followed by a supervised community sentence (33.7%). The "other" category includes outcomes such as dismissed after Youth Justice Conference, Juvenile offence proved, and dismissed. A custodial sentence was imposed in only 5.1% of cases and a fine imposed in only 5.4% of cases.

Figure 7.11: Sentencing outcomes in the Children's Court, where obtaining property was the principal offence, 2016–2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

7.32 Of the 294 cases, 233 (79%) involved male offenders and 61 (21%) involved female offenders. Of the 233 male offenders, 107 (46%) were identified as Aboriginal. Of the 61 female offenders, 31 (51%) were identified as Aboriginal. Although the numbers are

small, Aboriginal offenders are over-represented to a greater degree in the Children's Court than in the Local Court for the same offence.

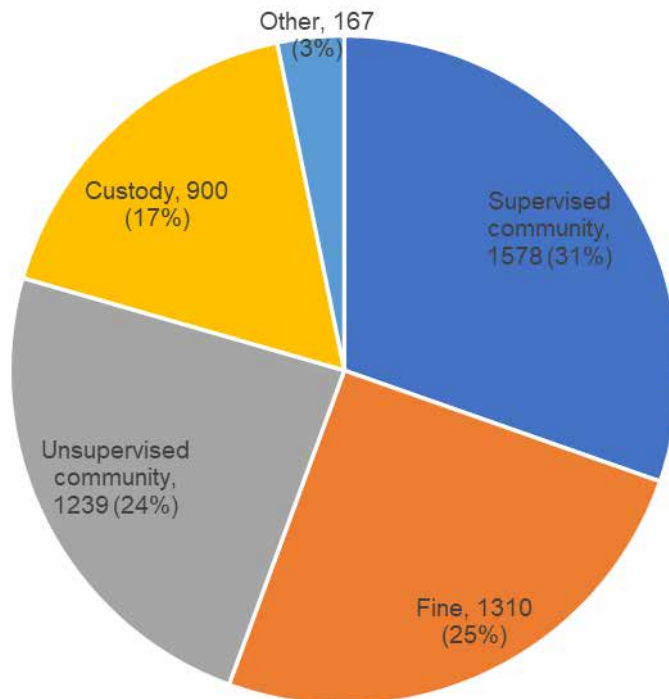
Local Court

- 7.33 In 2016–2021, the Local Court sentenced offenders where the obtaining property offence was the principal offence on 5194 occasions. Men were sentenced on 3505 (67.5%) of these occasions, and women were sentenced on 1689 (32.5%).
- 7.34 Of the 3505 men, 1012 (28.9%) were Aboriginal. Of the 1689 women, 595 (35.2%) were Aboriginal.
- 7.35 Compared with the obtaining financial advantage offence, the obtain property offence involves:
- a slightly lesser proportion of female offenders (32.5% for the obtaining property offence compared with 36.4% for the obtaining financial advantage offence), and
 - a slightly greater proportion of Aboriginal offenders (28.9% of men for the obtaining property offence compared with 21.4% for the obtaining financial advantage offence; and 35.2% of women for the obtaining property offence compared with 25.9% for the obtaining financial advantage offence).

General sentencing outcomes

- 7.36 Figure 7.12 shows the sentencing outcomes in the Local Court where the obtaining property offence was the principal offence. The data reflects the summary jurisdiction of the Local Court which deals with a greater number of less serious matters.
- 7.37 Of the 5194 sentences, the most common was a supervised community sentence (30.4%), followed by a fine (25.2%). A custodial sentence was imposed in 17.3% of cases.
- 7.38 There is a greater reliance on fines when compared with 16.4% for the obtaining financial advantage offence.

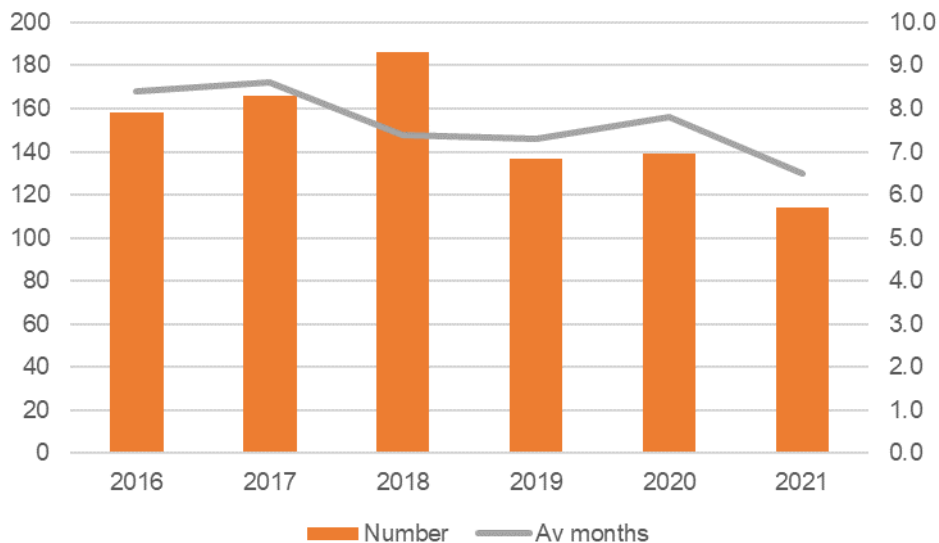
Figure 7.12: Sentencing outcomes in the Local Court, where obtaining property was the principal offence, 2016–2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

7.39 Figure 7.13 shows the number of cases in the Local Court resulting in a custodial sentence for the principal offence together with the average head sentence. It shows variability in both the number of cases (ranging from 186 in 2018 to 114 in 2021) and the duration of the average head sentence (from 8.6 months in 2017 to 6.5 months in 2021). This range is substantially lower than the range of sentences in the same period for the financial advantage/disadvantage version of the offence (which ranged from 10.3 months to 8.9 months).

Figure 7.13: Number of cases and average head sentence of imprisonment (months) in the Local Court where obtaining property was the principal offence, 2016–2021

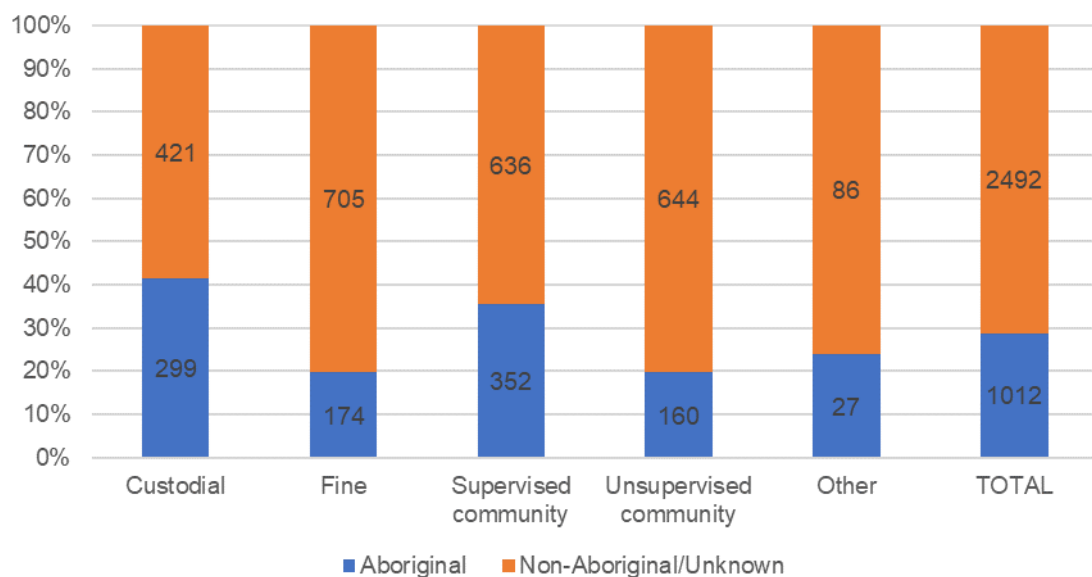


Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

Sentencing outcomes by gender and Aboriginal status

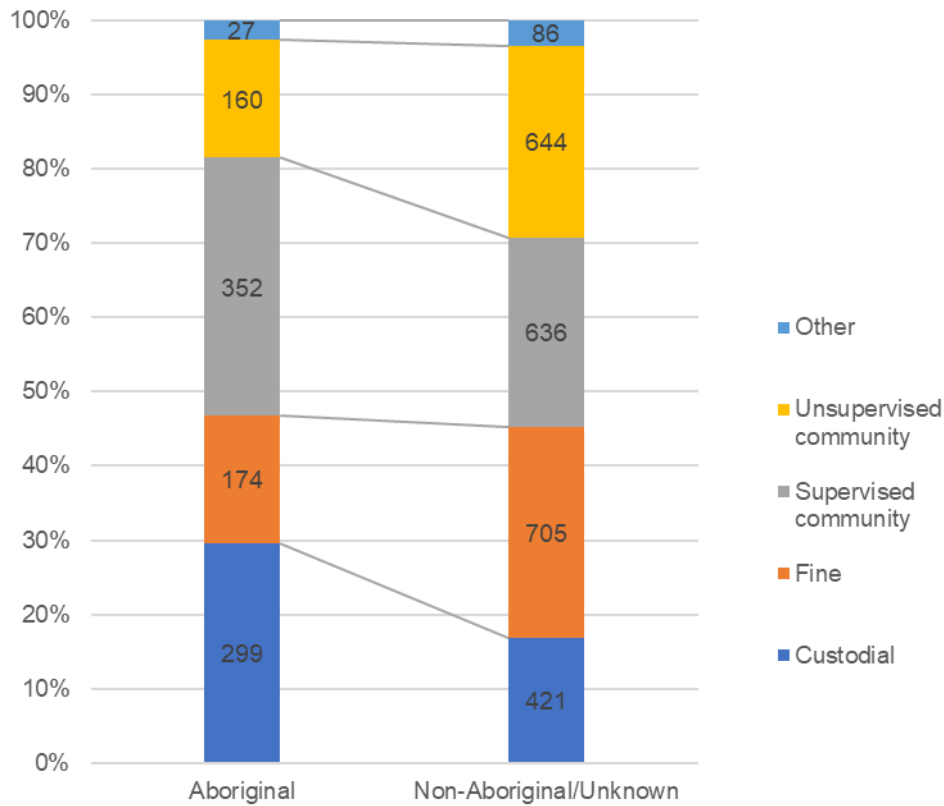
7.40 Figures 7.14 and 7.15 show that, while Aboriginal men make up 28.9% of male offenders for this offence, they represent 41.5% of those receiving a custodial sentence and only 19.9% of those receiving an unsupervised community sentence.

Figure 7.14: Local Court sentencing outcomes for men by Aboriginality where obtaining property was the principal offence, 2016–2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

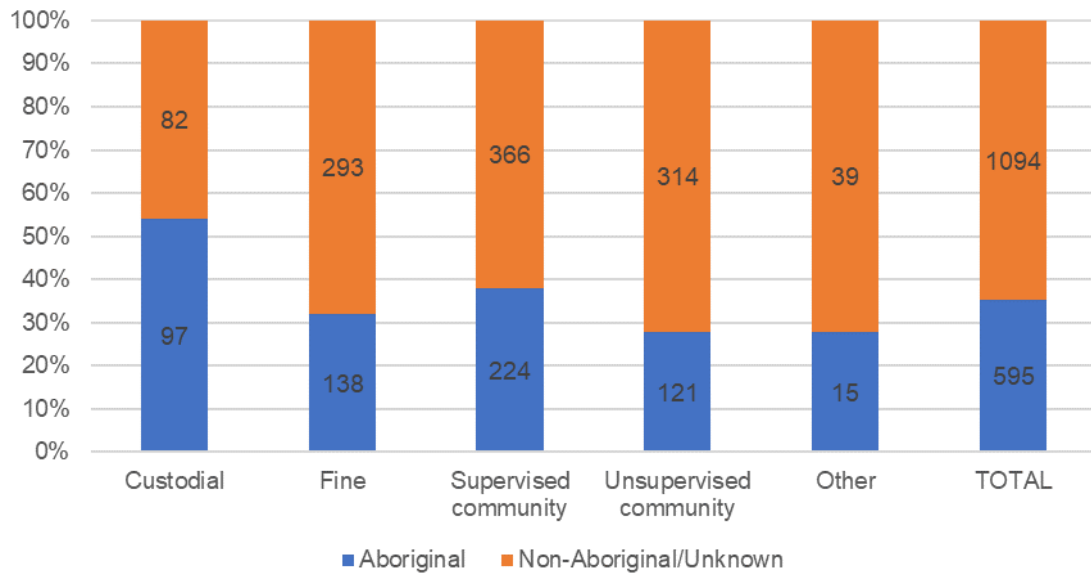
Figure 7.15: Local Court sentencing outcomes for men by Aboriginality where obtaining property was the principal offence, 2016–2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

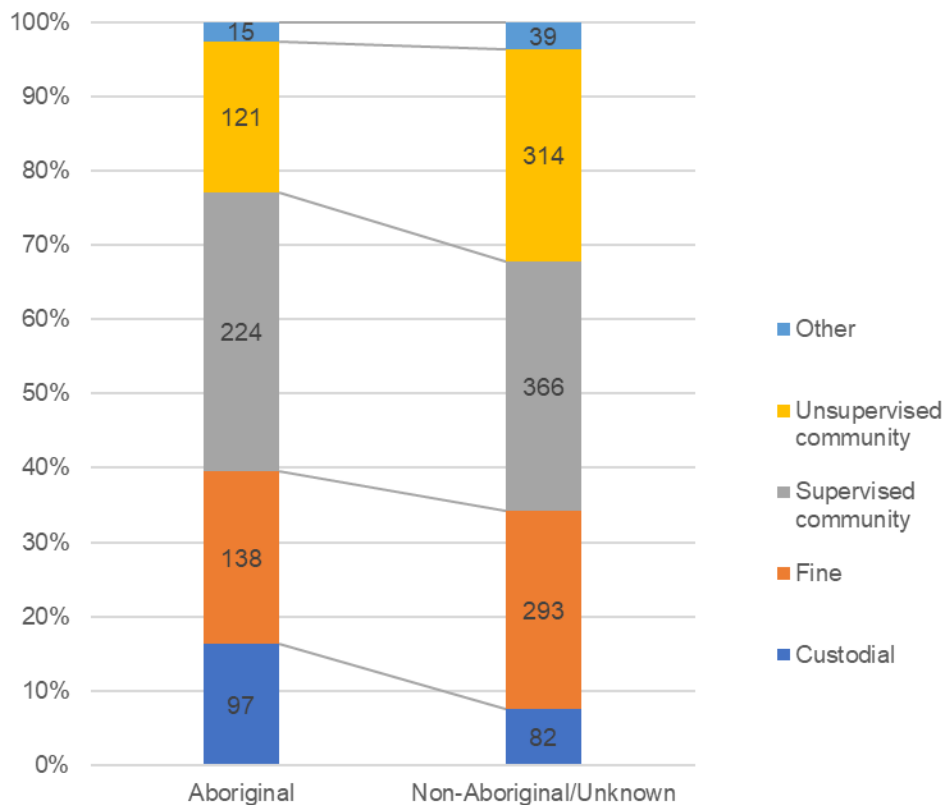
7.41 Figures 7.16 and 7.17 show that while Aboriginal women make up 35.2% of female offenders, they represent 54.2% of those receiving a custodial sentence and only 27.8% of those receiving an unsupervised community sentence.

Figure 7.16: Local Court sentencing outcomes for female offenders by Aboriginality where obtaining property was the principal offence, 2016–2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

Figure 7.17: Local Court sentencing outcomes for female offenders by Aboriginality where obtaining property was the principal offence, 2016–2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

District Court

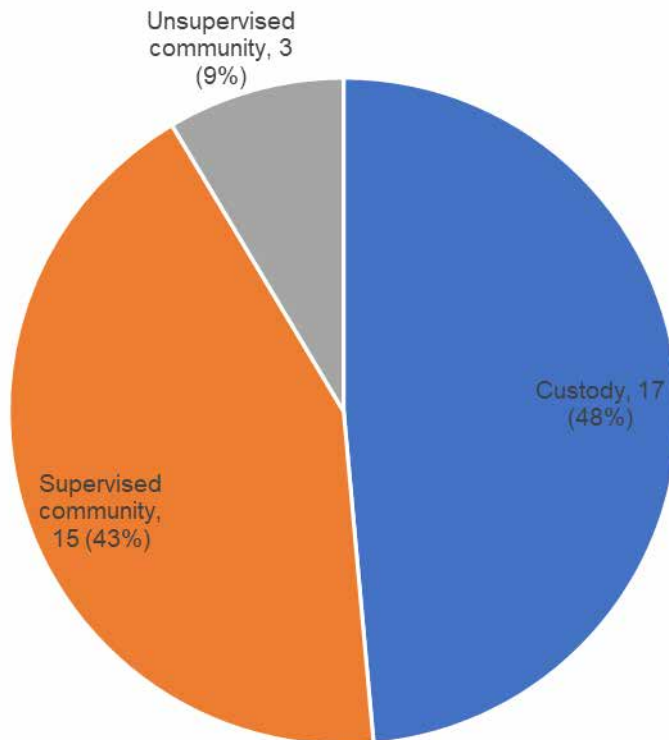
- 7.42 In 2016–2021, the District Court sentenced offenders where the obtaining property offence was the principal offence on only 35 occasions. Men were sentenced on 25 (71.4%) of these occasions, and women were sentenced on 10 (28.6%).
- 7.43 Of the 25 men, 7 (28%) were Aboriginal. Of the 10 women, 5 (50%) were Aboriginal.

General sentencing outcomes

- 7.44 Figure 7.18 shows the sentencing outcomes in the District Court where the obtaining property offence was the principal offence. The data reflects the jurisdiction of the District Court which deals with more serious matters.
- 7.45 Of the 35 sentences, the most common was a custodial sentence (48.6%) followed by a supervised community sentence (42.9%). An unsupervised community sentence was imposed in only 8.6% of cases. This indicates the District Court deals with a smaller number of cases involving the obtaining property offence (35 compared with 144 cases involving the obtaining financial advantage offence). It also suggests the court treats the obtaining property offence less seriously in sentencing, by imposing a greater proportion of community sentences. This is also reflected by the fact that when the District Court imposed a sentence of imprisonment, the average head sentence was 24.2 months (approximately 2 years).⁷

7. NSW Bureau of Crime Statistics and Research, reference 22-21286.

Figure 7.18: Sentencing outcomes in the District Court where obtaining property was the principal offence, 2016–2021

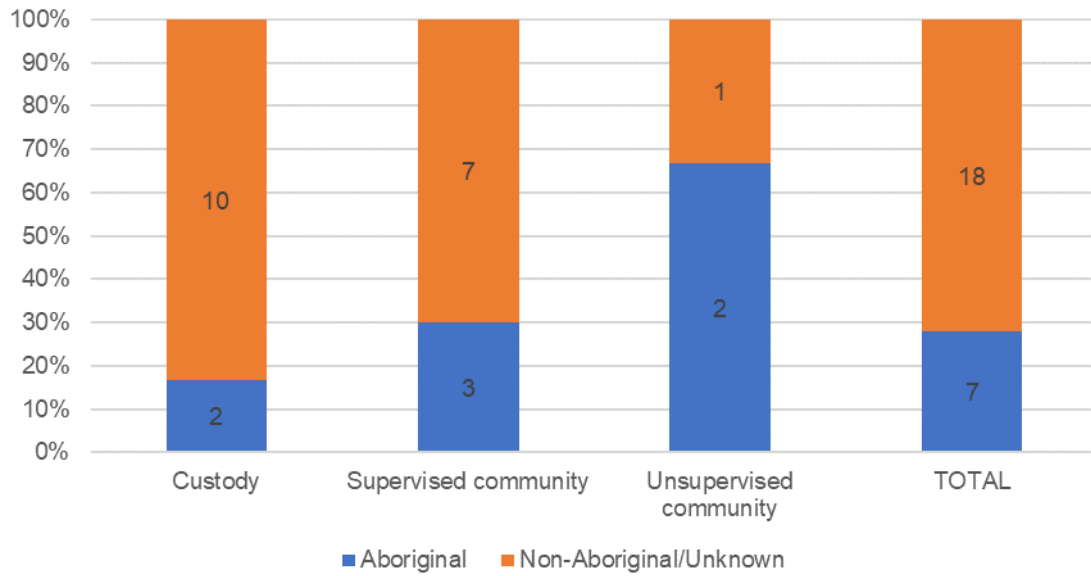


Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

Outcomes by gender and Aboriginal status

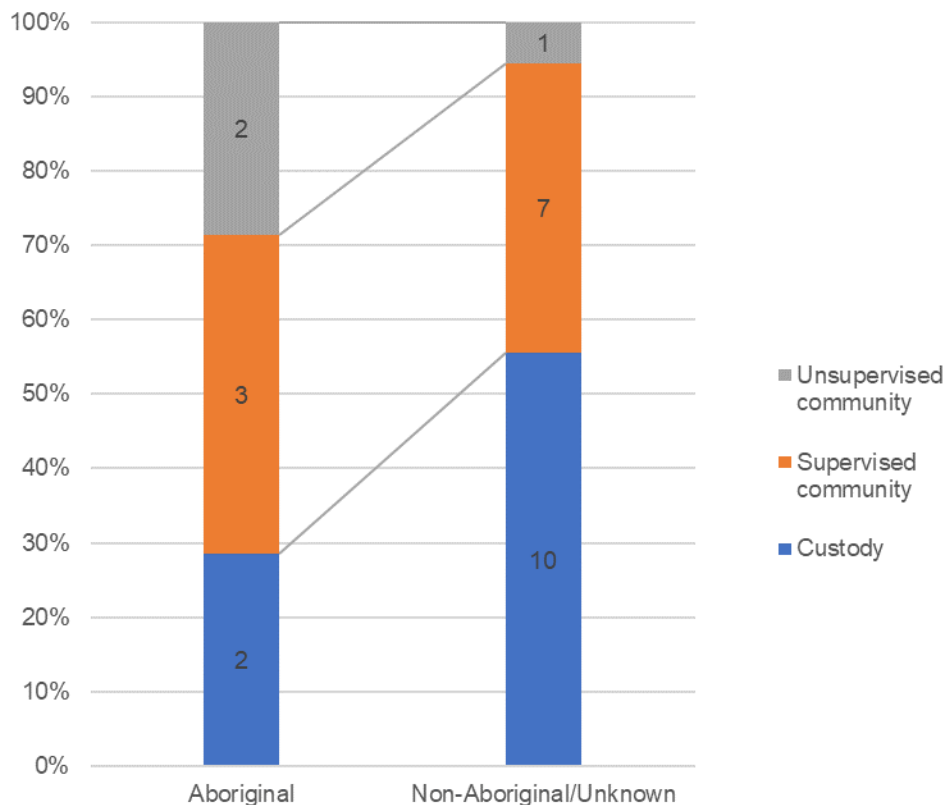
- 7.46 Figures 7.19 and 7.20 show that while Aboriginal men make up 28% of male offenders, they represent only 16.7% of those receiving a custodial sentence and 66.7% of those receiving an unsupervised community sentence. The proportions are different from the Local Court outcomes, where Aboriginal offenders are over-represented among those receiving a custodial sentence. However, the numbers in the District Court may be too small for a meaningful comparison.

Figure 7.19: District Court sentencing outcomes for male offenders by Aboriginality where obtaining property was the principal offence, 2016–2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

Figure 7.20: District Court sentencing outcomes for male offenders by Aboriginality where obtaining property was the principal offence, 2016–2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

- 7.47 While Aboriginal women make up 50% of female offenders sentenced in the District Court, they represent only 20% of those receiving a custodial sentence and 80% of those receiving a supervised community sentence. The proportions are again different from the Local Court outcomes. However, the numbers in the District Court are too small for a meaningful comparison.

Other fraud and fraud-related offences in the Crimes Act

- 7.48 The following figures set out the sentencing outcomes for the other fraud and fraud-related offences in the *Crimes Act* which are listed in appendix B. The maximum penalties for these offences range from 2 to 10 years' imprisonment.

Children's Court

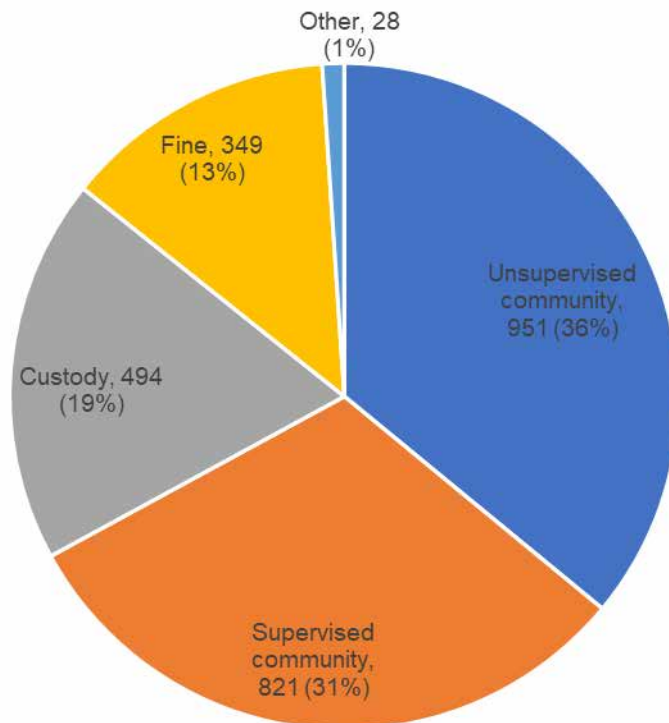
- 7.49 A fraud or fraud related-offence in the *Crimes Act* was the principal offence in 15 cases in the Children's Court in 2016–2021. Of these 15 cases, only one resulted in a custodial sentence. Almost half (seven) resulted in an "other" outcome, which includes juvenile dismissal orders under the *Young Offenders Act 1997 (NSW)* and *Children (Criminal Proceedings) Act 1987 (NSW)*.⁸

Local Court

- 7.50 Figure 7.23 shows the sentencing outcomes in the Local Court where a fraud or fraud-related offence in the *Crimes Act* was a principal offence. The data reflects the summary jurisdiction of the Local Court which results in a greater number of less serious matters being prosecuted there.
- 7.51 Of the 2643 sentences, the most common was an unsupervised community sentence (36.0%) followed by a supervised community sentence (31.1%). A custodial sentence was imposed in 18.7% of cases and a fine imposed in only 13.2% of cases.

8. *Young Offenders Act 1997 (NSW)* s 31(1A), s 57(2); *Children (Criminal Proceedings) Act 1987 (NSW)* s 33(1)(a), s 45(2)(d), s 48R(2).

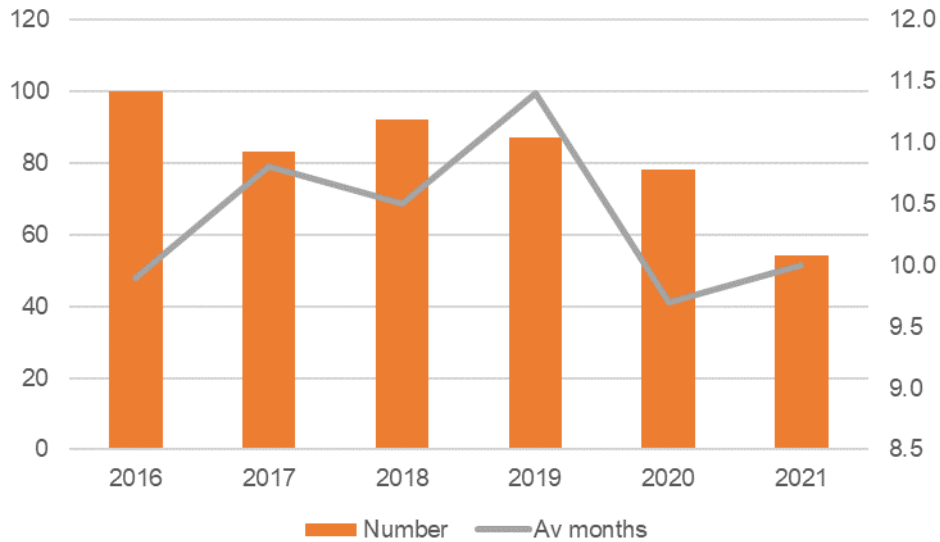
Figure 7.23: Sentencing outcomes in the Local Court, where another fraud or fraud related-offence in the *Crimes Act* was the principal offence, 2016–2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

7.52 Figure 7.24 shows the number of cases in the Local Court resulting in a custodial sentence together with the average head sentence for the principal offence. It shows variability in both the number of cases (ranging from 100 in 2016 to 54 in 2021) and the duration of the average head sentence (from 11.4 months in 2019 to 9.7 months in 2020). This range is slightly higher than the range of sentences in the same period for the financial advantage/disadvantage version of the offence (which ranged from 10.3 months to 8.9 months).

Figure 7.24: Number of cases and average head sentence of imprisonment (months) in the Local Court, where another fraud or fraud related-offence in the *Crimes Act* was the principal offence, 2016–2021

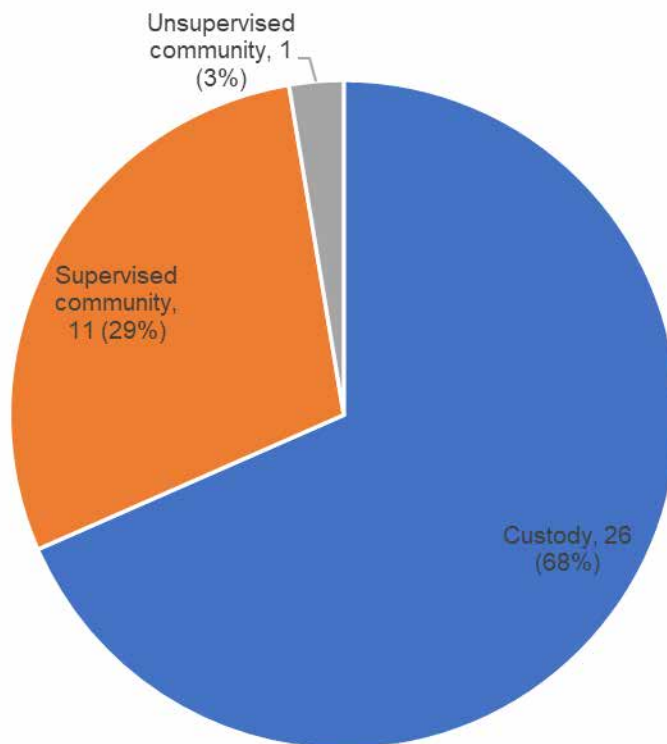


Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

District Court

- 7.53 Figure 7.25 shows the sentencing outcomes in the District Court where another fraud or fraud related-offence in the *Crimes Act* was the principal offence. The data reflects the jurisdiction of the District Court which results in more serious matters being prosecuted there.
- 7.54 Of the 38 sentences, the most common was a custodial sentence (68.4%), followed by a supervised community sentence (28.9%). An unsupervised community sentence was imposed in only 2.6% of cases.

Figure 7.25: Sentencing outcomes in the District Court, where another fraud or fraud related-offence in the *Crimes Act* was the principal offence, 2016–2021



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.

- 7.55 When the District Court imposed a sentence of imprisonment, the average head sentence was 3 years.⁹

Prosecutorial factors that may influence sentencing outcomes

- 7.56 In assessing whether the sentences for fraud are appropriate, it is also important to consider how the decisions made at the charging and prosecution stage may affect the sentencing outcomes detailed above.

Election decisions

- 7.57 As noted in chapter 2, the main fraud offences under s 192E are to be tried summarily unless the prosecutor or the accused elects otherwise. This can be contrasted with larceny and other property offences where this applies when the amount exceeds

9. NSW Bureau of Crime Statistics and Research, reference 22-21286.

\$5,000.¹⁰ Otherwise, only the prosecutor can elect to have the matter dealt with on indictment.¹¹

7.58 The fraud offences in the *Crimes Act* are indictable offences that are to be dealt with summarily unless the prosecutor or the person charged elects otherwise.¹² This means the vast majority are prosecuted in the Local Court, which has a jurisdictional maximum of two years for a single offence and five years for multiple offences.¹³ We heard that larger fraud cases, for example those over \$500,000, are increasingly prosecuted in the Local Court.¹⁴ We have identified at least one case involving an amount of \$2.4m that was prosecuted in the Local Court.¹⁵ This may affect fraud sentences for offences involving large amounts.

7.59 Where a fraud matter is referred to the Office of the Director of Public Prosecutions (ODPP) for election, the ODPP makes a decision in accordance with Chapter 6 of the Prosecution Guidelines.¹⁶ This means the election decision is not just based on the amount of the fraud.¹⁷ The guidelines state that in deciding whether to elect to deal with an offence on indictment, the prosecutor should consider:

1. whether the conduct giving rise to the offence can be adequately addressed within the sentencing limits of the Local Court having regard to:
 - a. the seriousness of the offence, including:
 - i. the circumstances of the offence
 - ii. the nature of the conduct
 - iii. any aggravating or mitigating circumstances
 - b. the accused's personal circumstances, including criminal background

10. *Criminal Procedure Act 1986* (NSW) sch 1 table 1 item 3.

11. *Criminal Procedure Act 1986* (NSW) sch 1 table 2 item 3.

12. *Criminal Procedure Act 1986* (NSW) s 6(1)(c)(ii), sch 1 table 1 item 4A.

13. NSW Police Force, *Preliminary Consultation PFRC03*.

14. NSW Police Force, *Preliminary Consultation PFRC03*; NSW Office of the Director of Public Prosecutions, *Preliminary Consultation PFRC05*.

15. "Susanne Hunter Sentenced", *Cruise Weekly* (online, 21 November 2019) <issues.cruiseweekly.com.au/2019/Nov19/cw211119.pdf> (retrieved 21 September 2022); A Gleeson, "Ambitious Office Manager Rips off Employer \$2.4m" *Daily Telegraph* (online, 27 February 2019).

16. NSW Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2021) [6.1]–[6.2].

17. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 4.

- c. the maximum penalties available for summary disposal and on indictment
- d. any standard non-parole period applicable to the offence
2. the prevalence of the offence in the community and the greater deterrent effect of an accused being dealt with on indictment
3. the manner in which any co-accused is being dealt with
4. whether there is a relevant connection between the Table offence and an offence that is strictly indictable or another Table offence suitable to being dealt with on indictment
5. whether for some other reason the interests of justice require that the matter be dealt with on indictment.¹⁸

“Rolling up” charges

- 7.60 Fraud offences frequently involve “a course of conduct comprised of multiple acts committed over an extended period”.¹⁹ Each of these acts could, if taken alone, be charged as a separate offence. As a result, some charges will cover two or more, sometimes hundreds more, acts that could each constitute a separate offence. The process of combining these is sometimes referred to as “rolling up”.²⁰
- 7.61 Police have indicated that they will sometimes withdraw charges and roll them up as part of a plea deal so long as the facts and amount remain the same.²¹ This is sometimes done by particularising the conduct between certain dates and obtaining the total benefit of deception over that period.²²
- 7.62 The CCA has accepted the availability of rolling up for fraud offences.²³ However, the basis for doing so is unclear.²⁴ One submission pointed to the risks of charges being struck out for duplicity on the basis that a charge should not involve the commission of more than one offence unless it is part of one act or part of a transaction.²⁵

18. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2021) [6.2].

19. NSW Office of the Director of Public Prosecutions, *Submission PFR05*, 3.

20. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 3–4; NSW Police Force, *Preliminary Consultation PFR03*; NSW Bar Association, *Preliminary Consultation PFR07*.

21. NSW Police Force, *Preliminary Consultation PFR03*.

22. NSW Office of the Director of Public Prosecutions, *Preliminary Consultation PFR05*.

23. *Hughes v R* [2021] NSWCCA 238. See also *Moussad v R* [1999] NSWCCA 337; *Calleija v R* [2012] NSWCCA 37 [68]–[70].

24. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 3. See also *Hughes v R* [2021] NSWCCA 238.

25. NSW Office of the Director of Public Prosecutions, *Preliminary Consultation PFR05*.

- 7.63 There are facilitative provisions in NSW and elsewhere that allow a single charge to encompass two or more instances of offending conduct. Examples include money laundering offences in NSW²⁶ and stealing offences in the Northern Territory.²⁷ However, even if a facilitative provision were introduced “[i]t would remain a question for the prosecution as to the extent to which Fraud offences could appropriately be ‘rolled-up’ in any given matter ... bearing in mind questions of totality and fairness”.²⁸
- 7.64 The prosecution’s decision on how to charge multiple acts of fraud will affect a sentence in a number of ways. It may reduce the maximum cumulative penalty available to the court and, therefore, limit the sentence.²⁹ This would be particularly the case in the Local Court’s jurisdiction, where a conviction for a single charge for multiple acts may be subject to a jurisdictional limit of 2 years. The CCA noted in one case that the benefits to a fraud offender of a “rolled up” charge was “that it restricted the maximum available sentence to that prescribed by the legislation for a single offence, rather than the total theoretically available as a maximum sentence from multiple charges”.³⁰
- 7.65 On the other hand, there are problems where fraudulent acts are not rolled up. This is particularly the case for low level offenders, where multiple small offences that are part of one course of conduct are charged separately.
- 7.66 Under the *Victims Rights and Support Act 2013* (NSW), a person who is convicted of an offence is liable to pay a victims support levy for that offence. The levy was originally set at \$156 for a person convicted on indictment and at \$69 for a person convicted summarily.³¹ However, the amounts have been subject to an annual CPI adjustment since 2013 and now stand at \$199 and \$90 respectively.³²
- 7.67 The levy is “in addition to, and does not form part of, any pecuniary penalty or order for payment of compensation imposed in respect of the same offence”.³³ The imposition of this levy is automatic upon conviction. A court has no discretion to alter it, even in cases where the court has determined that the offender is unable to pay even a small fine. This means that an offender convicted in the Local Court of 10 tap and go offences involving transactions under \$100 who receives a conditional release order, is liable to pay \$90. Rolled up charges would mean that the offender was liable for a single levy of \$90.

26. *Crimes Act 1900* (NSW) s 193FA(1).

27. *Criminal Code 1983* (NT) s 310(2).

28. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 3. See also *Knight v R* [2004] NSWCCA 145 [27].

29. NSW Office of the Director of Public Prosecutions, *Preliminary Consultation PFRC05*.

30. *Hughes v R* [2021] NSWCCA 238 [12].

31. *Victims Rights and Support Act 2013* (NSW) s 106(1).

32. *Victims Rights and Support Act 2013* (NSW) s 107; *Victims Rights and Support (Victims Support Levy) Notice 2022* (NSW) cl 2.

33. *Victims Rights and Support Act 2013* (NSW) s 106(2).

Briefs of evidence

7.68 Sentencing outcomes may also be affected by the way in which briefs of evidence are prepared for the prosecution. In some cases, corporate victims identify and investigate the frauds perpetrated against them. They may then provide the material gathered to police, who compile and serve the material as the brief of evidence. As this material is usually gathered for “accounting and disciplinary purposes”, “the material assembled frequently does not meet the exacting standards of proof required for a criminal prosecution”.³⁴ This may affect the evidence available at sentencing when a court is considering aggravating factors and, therefore, affect the sentencing outcome.

7.69 The ODPP noted some other challenges with this:

It is our experience that this practice has led to briefs of evidence where the primary evidence of the commission of the Fraud offences is lacking, or where the primary material has not been properly scrutinised to account for all possible fraudulent behaviour. ... These evidentiary defects can result in pleas being accepted or lesser charges or matters being finalised in the Local Court instead of being tried on indictment. ... this Office has no investigative function and is ultimately reliant upon the evidence assembled by the police or other responsible law enforcement officers. This Office accepts that the investigation of Fraud offences is resource-intensive, as is their prosecution. However, a proper and thorough police investigation is the first and necessary step to ensuring just sentencing outcomes that appropriately reflect the criminality of the offending involved.³⁵

Are sentences for fraud appropriate?

7.70 There were varying views on whether sentences for fraud offences are appropriate. Below, we set out some considerations relating to this question.

Imprisonment rates

7.71 On one hand, the Commonwealth Director of Public Prosecutions indicated that fraud sentences are generally appropriate, and “does not consider there to be any systematic issues in terms of the purposes of sentencing being applied inappropriately by the Courts”.³⁶ The NSW Bar Association did not regard current sentences as too lenient.³⁷

7.72 On the other hand, the NSW Police Force expressed concern that sentences are not sending a “consistent message of general deterrence” given low rates of imprisonment

34. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 5.

35. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 5–6.

36. Commonwealth Director of Public Prosecutions, *Preliminary Submission PFR03* [13].

37. NSW Bar Association, *Preliminary Consultation PFRC07*.

for s 192E offences, particularly in the Local Court.³⁸ This is a particular issue for complex and significant frauds.³⁹

7.73 However, the Young Lawyers Criminal Law Committee argued that given that “judicial decision-makers rarely approach the maximum penalty for any of the Part 4AA offences” this actually “indicates that the current maximum penalties are sufficient”.⁴⁰ This may reflect the breadth of s 192E, as considered in chapter 2. For example, relatively low rates of imprisonment in the Local Court may be due to high rates of minor offending charged under this offence. The conduct charged under s 192E captures everything from low level, opportunistic offending, such as tap and go offences, to complex, sophisticated, multi-million dollar frauds. Such a range of offending presents challenges for sentencing courts.

Use of fines

7.74 As we note above, fines are employed relatively infrequently in relation to fraud and fraud-related offences, even though fines are generally the most frequently imposed penalty in the Local Court. This may be the result of financial pressures that sit behind some fraud offending. It may also be due to the requirement in the *Fines Act 1996* (NSW) (“*Fines Act*”) that, when fixing the amount of any fine, courts must consider “such information regarding the means of the accused as is reasonably and practicably available to the court for consideration”.⁴¹

7.75 In some cases, the offender will not have the money to pay a fine. Where fraud is committed because of the offender’s financial circumstances, a fine may only exacerbate these circumstances.⁴²

7.76 Fines also raise issues of equity. For example, wealthy offenders may have more capacity to pay fines although issues of equity may be less relevant where the offending is driven by financial circumstances arising from business failure or gambling. There is a possibility that offenders may use any available funds (including the defrauded money, or money from friends or family) to pay off fines, ahead of compensating the victims of fraud.

7.77 Revenue NSW enforces fines, including fines imposed by courts and fines imposed by way of penalty notice. Fine mitigation measures, such as work and development orders⁴³ and time to pay arrangements⁴⁴ are available under the *Fines Act*.

38. NSW Police Force, *Preliminary Submission PFR08*, 3.

39. NSW Police Force, *Preliminary Consultation PFRC03*.

40. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [32].

41. *Fines Act 1996* (NSW) s 6(a).

42. A Steel, *Preliminary Consultation PFRC09*.

43. *Fines Act 1996* (NSW) s 99A–99K.

44. *Fines Act 1996* (NSW) s 100.

Question 7.1: Sentences for fraud

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

8. Options for reform

In Brief

One option for reform is to adjust the maximum penalties for the main fraud offences either generally, or according to aggravated forms of the offences, based on such measures as the amount of the fraud, or that the fraud was organised or continuing. Having an indictable only version of the offence is another option. Options for dealing with low level offending include having summary only offences, limiting the use of imprisonment and decriminalisation and diversion. We also ask if any aggravating factors should be reformed.

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8.1 This chapter considers some options for reforming the legislative framework relating to sentencing for fraud and fraud-related offences. We seek your views on whether there should be:

- an adjustment to the maximum penalties
- an indictable-only version of the offence
- further options for dealing with low-level offending, and/or
- some reform to aggravating factors.

Adjusting maximum penalties

- 8.2 The maximum penalty for fraud offences under s 192E of the *Crimes Act 1900* (NSW) (*Crimes Act*) is 10 years' imprisonment. Maximum penalties for some other relevant fraud and fraud-related offences, are outlined in chapter 2 and appendix B.
- 8.3 Other jurisdictions have a 10-year maximum penalty for fraud offences like the ones in s 192E, including England and Wales, the Commonwealth, the Australian Capital Territory, and Victoria.¹
- 8.4 Some other jurisdictions have maximum penalties of 10 years' imprisonment or less for their comparable fraud offences, but maximum penalties of 10 years or more for aggravated forms. These jurisdictions include the Northern Territory,² South Australia,³ Western Australia,⁴ and Queensland.⁵ The elements of aggravation are not uniform across these jurisdictions and sometimes include monetary amounts, victim characteristics and different circumstances of offending.
- 8.5 Two broad options arise for those who view the existing maximum penalties as inadequate:
- generally increasing the maximum penalties, or
 - increasing the maximum penalties according to various elements of aggravation.

General increase in the maximum penalty

- 8.6 There were differing views in submissions and consultations as to whether the maximum penalty in s 192E is sufficient.
- 8.7 Some said that the maximum penalty is appropriate. The Young Lawyers Criminal Law Committee, for example, was “of the preliminary view that the maximum penalties are generally sufficient”.⁶ Although the Committee did note some issues with the disparity in maximum penalties for certain fraud and fraud-related offences.⁷
- 8.8 Some argued that the maximum penalty should be higher. The NSW Police Force submitted that the “maximum penalty is manifestly inadequate, particularly when there is no provision for increasing the maximum penalty in circumstances of aggravation”.

1. *Fraud Act 2006* (UK) s 1–4; *Criminal Code* (Cth) s 134.1(1), s 134.2(1); *Criminal Code 2002* (ACT) s 326, s 332; *Crimes Act 1958* (Vic) s 81(1), s 82(1).

2. *Criminal Code* (NT) s 210, s 227(1).

3. *Criminal Law Consolidation Act 1935* (SA) s 134(1), s 139, s 5AA.

4. *Criminal Code* (WA) s 409(1).

5. *Criminal Code* (Qld) s 408C(1)–(2A).

6. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [31].

7. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [27]–[29].

They argued that “[i]ncreasing the penalties for fraud offences ... would send a strong message of deterrence to potential offenders and the community generally”.⁸

- 8.9 The Office of the Director of Public Prosecutions (ODPP) and Police pointed out the disparity between the maximum penalty for fraud in NSW (10 years) and for money laundering offences (up to 20 years).⁹ As such, the ODDP suggested that consideration be given to increasing the maximum penalty for the principal fraud offences in order appropriately to:

reflect the seriousness of such offences and to permit sentencing courts to fashion sentences that appropriately reflect the criminality of the conduct.¹⁰

- 8.10 Fraud and money laundering offences are frequently charged together.¹¹ However, they do not necessarily sit well together. For example, where a fraud involves money laundering, a person at the bottom of the hierarchy of a syndicate might be convicted for a money laundering offence that has a high maximum penalty. But the person who takes a more active and continuing role in the fraud may be convicted of a fraud offence with a lesser maximum penalty.¹² The ODPP pointed out that this disparity causes “artificiality on sentence in fraud matters”.¹³
- 8.11 Some care needs to be taken in comparing fraud with money laundering. Money laundering offences are different to fraud, as they have different objects and elements. For example, some money laundering offences don’t require any deceit (which is a key element of fraud); only that a person recklessly deals with the proceeds of crime.¹⁴
- 8.12 The *Crimes Act* provisions dealing with money laundering were introduced to target activity that was seen as “a significant global problem”. They were part of “an increased focus by governments around the world on strengthening their anti-money laundering regimes and on targeting terrorist financing”. They were also intended to ensure that the NSW regime was “consistent with international standards set by the OECD’s Financial Action Task Force on Money Laundering”.¹⁵
- 8.13 Some submissions expressed concern that the 10-year maximum penalty for the existing fraud offences is too high when applied to low level conduct, such as tap-and-

8. NSW Police Force, *Preliminary Submission PFR08*, 5.

9. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 1–2; NSW Police Force, *Preliminary Submission PFR08*, 5. See *Crimes Act 1900* (NSW) s 192E(1), s 193B(1)–(3).

10. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 2.

11. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 1; NSW Bar Association, *Preliminary Consultation PFR07*.

12. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 1.

13. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 2.

14. *Crimes Act 1900* (NSW) s 193B(3).

15. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 September 2005, 18044–18045.

go offences. For example, Women’s Legal Service expressed concern that raising maximum penalties for fraud as a response to complex or white-collar crime, may impact lower level offenders, such as those committing opportunistic fraud (such as tap-and-go).¹⁶

- 8.14 The Young Lawyers Criminal Committee also noted potential unintended effects of increasing maximum penalties, including dissuading some offenders from pleading guilty.¹⁷

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?

Aggravated forms of the fraud offence

- 8.15 One issue with general fraud offences in s 192E is that they cover a broad range of criminal activity. As the Commonwealth Director of Public Prosecutions (CDPP) noted, the maximum penalty therefore:

applies to all fraud offences, from unsophisticated frauds of a trivial sum committed by an individual, to an ongoing course of fraudulent conduct committed by an offender acting in concert with others, utilising complex corporate structures and trusts to systematically defraud substantial amounts, sometimes in the many tens of millions of dollars.¹⁸

- 8.16 The CDPP observed that a more significant maximum penalty for offences with particularly serious features such as large amounts, and significant premeditation and sophistication over an extended period:

would enable sentencing courts to impose sentences of imprisonment for significant and systematic frauds which are commensurate with the serious criminality involved.¹⁹

- 8.17 A related approach, therefore, could involve increasing the maximum penalty for fraud, but applying it only to frauds that have particular aggravating elements such as frauds

16. Women’s Legal Service NSW, *Preliminary Consultation PFR01*.

17. NSW Young Lawyers Criminal Law Committee, *Preliminary Consultation PFR10*.

18. Commonwealth Director of Public Prosecutions, *Preliminary Submission PFR03* [16].

19. Commonwealth Director of Public Prosecutions, *Preliminary Submission PFR03* [19].

involving large amounts, or involving organised or continuing activity. Some options for aggravated forms of the fraud offence are described in the following paragraphs.

Quantum of fraud

- 8.18 One option is to adopt a system of tiered offences, based on the quantum of the fraud.²⁰
- 8.19 Other Australian states and territories have a tiered approach based on the quantum of the fraud (and other factors), including the Northern Territory and Queensland.
- 8.20 In the Northern Territory, a person who obtains property or a benefit by deception “is liable to the same punishment as if he or she had stolen the property or property of equivalent value to the benefit fraudulently obtained”.²¹ The general offence of stealing is subject to a maximum penalty of 7 years’ imprisonment or 14 years if the thing stolen has a value of \$100,000.²²
- 8.21 In Queensland, the maximum penalty for the principal fraud offence is 5 years’ imprisonment, or:
- 14 years if the property, yield or detriment caused has the value of at least \$30,000 but less than \$100,000, or
 - 20 years if the property, yield or detriment caused has the value of at least \$100,000.²³
- 8.22 In New Zealand the maximum penalties for the offence of obtaining by deception or causing loss by deception²⁴ are related to the amount of the fraud:
- 3 months’ imprisonment for amounts up to NZ\$500
 - 12 months’ imprisonment for amounts more than NZ\$500 and up to NZ\$1000, and
 - 7 years’ imprisonment for amounts over NZ\$1000.²⁵
- 8.23 A tiered approach may help ensure that low level frauds (for example, tap-and-go offences), could be subject to a lower maximum penalty. More sophisticated and significant frauds (for example those valued in the millions of dollars) could have a maximum penalty of more than 10 years.

20. Commonwealth Director of Public Prosecutions, *Preliminary Submission PFR03* [17].

21. *Criminal Code* (NT) s 227(1).

22. *Criminal Code* (NT) s 210.

23. *Criminal Code* (Qld) s 408C(1)–(2A).

24. *Crimes Act 1961* (NZ) s 240.

25. *Crimes Act 1961* (NZ) s 241.

- 8.24 Some submissions have drawn attention to the tiered offence structure for money laundering or proceeds of crime offences.²⁶
- 8.25 For example, in NSW, dealing with property suspected of being proceeds of crime, attracts a maximum penalty of:
- 3 years' imprisonment if the value of the property is less than \$100,000, and
 - 5 years if the value of the property is \$100,000 or more.²⁷
- 8.26 The Commonwealth proceeds of crime offences have more tiers based on value of the property and state of knowledge. For example, where property or money is proceeds of crime and the offender believes that it is proceeds of crime the following scale applies:
- any value: 12 months' imprisonment and/or 60 penalty units
 - \$1000 or more: 5 years' imprisonment and/or 300 penalty units
 - \$10,000 or more: 10 years' imprisonment and/or 600 penalty units
 - \$50,000 or more: 15 years' imprisonment and/or 900 penalty units
 - \$100,000 or more: 20 years' imprisonment and/or 1200 penalty units
 - \$1 million or more: 25 years' imprisonment and/or 1500 penalty units
 - \$10 million or more: life imprisonment.²⁸
- 8.27 However, in supporting a tiered approach to fraud, the CDPP did not suggest that fraud required so many tiers as those applied to proceeds of crime.²⁹
- 8.28 The quantum of fraud may not always be the most appropriate measure of the seriousness of the offence.³⁰ In some situations, an amount of, for example, \$100,000, may be enough to destroy an individual person's financial situation, whereas \$100,000 may be relatively insignificant to a large corporation or bank.

26. Commonwealth Director of Public Prosecutions, *Preliminary Submission PFR03* [17]; NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 2–3; NSW Police Force, *Preliminary Submission PFR08*, 5.

27. *Crimes Act 1900* (NSW) s 193C.

28. *Criminal Code* (Cth) s 400.2B(1)–(3), s 400.3(1)–(1B), s 400.4(1)–(1B), s 400.5(1), s 400.6(1), s 400.7(1), s 400.8(1).

29. Commonwealth Director of Public Prosecutions, *Preliminary Submission PFR03* [19].

30. A Steel, *Preliminary Consultation PFR09*.

- 8.29 Other factors that may go to seriousness include whether the money was recovered, how it was defrauded, the level of sophistication and the offender’s motivation.³¹ The Court of Criminal Appeal has observed, for example, that the amount is “only one of the relevant considerations in determining the seriousness of the offences and it is not necessarily decisive”.³²
- 8.30 One question that arises in this context is whether the current maximum penalty of 10 years’ imprisonment is sufficient to reflect any circumstances of aggravation, without the need to resort to more serious tiered penalties.
- 8.31 There may also be some problems with quantifying the value of a fraud. Measures could be of profit gained, or loss caused, but complexity could arise where there is a combination of these outcomes. At least one commentator has suggested it might be possible to combine the two into a single scale.³³

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?

Organised or continuing fraud

- 8.32 Another option would be to enact an organised or continuing fraud offence that attracts a more serious maximum penalty. Examples, which we outline below, are the organised fraud offence that was once available in the Commonwealth jurisdiction, and the Victorian continuing criminal enterprise offence.
- 8.33 However, we note that a relevant aggravating factor identified in the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*Sentencing Procedure Act*) is that “the offence was part of a planned or organised criminal activity”.³⁴ This can be applied to sentencing for fraud and fraud-related offences within the existing maximum penalties.

Organised fraud offence (Commonwealth)

- 8.34 An organised fraud offence was in the *Proceeds of Crime Act 1987* (Cth) until 2000.³⁵ Under this offence, a person was subject to 25 years’ imprisonment and/or a fine of

31. See, eg, NSW Office of the Director of Public Prosecutions, *Preliminary Consultation PFRC05*. See also A Steel, *Preliminary Consultation PFR09*.

32. *Assi v R* [2006] NSWCCA 257 [28].

33. A Ashworth and R Kelly, *Sentencing and Criminal Justice* (Hart, 7th ed, 2021) [4.3].

34. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(n).

35. *Proceeds of Crime Act 1987* (Cth) s 83, repealed by *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth) sch 2.

\$250,000 if they engaged in organised fraud. Organised fraud involved acts or omissions:

- that constituted three or more “public fraud offences”, and
- from which the person derived “substantial benefit”.

Alternate fraud verdicts were available if an offender could not be convicted for the organised fraud offence.³⁶

8.35 The Commonwealth provisions were repealed following the conclusions in the 1995 report of the Model Criminal Code Officers Committee of the Standing Committee of Attorneys General. The Committee noted that the offence was designed to “reflect the higher level of criminality involved in the organisation of a series of frauds” and that its primary purpose was “to provide heavier penalties”.³⁷

8.36 Arguments in favour of an organised fraud offence included:

- it was important to make the necessary findings at conviction rather than leaving it “to the relatively less stringent processes of fact-finding at the sentencing stage”
- relying on the courts to impose cumulative sentences was “unacceptable given the propensity of courts to give concurrent sentences and to sentence white-collar criminals leniently”, and
- using a rolled up organised fraud charge would involve shorter and less costly trials in complex fraud cases.³⁸

8.37 The Committee considered some additional criteria to overcome concerns that the offence could be misused, for example, in relation to multiple social security offenders. These additional criteria were:

- the fact that there were two or more people involved in the offences;
- the presence of “substantial planning and organisation” either as a broad criterion or expressed in a more specific form such as “a series of events which occur either simultaneously or over a defined period of time as a result of substantial planning and a pattern of conduct”;
- the use of sophisticated methods or techniques; and

36. *Proceeds of Crime Act 1987* (Cth) s 83(3).

37. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 3: Theft, Fraud, Bribery and Related Offences*, Report (1995) 161.

38. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 3: Theft, Fraud, Bribery and Related Offences*, Report (1995) 161.

the three offences are all serious offences of fraud or theft.³⁹

- 8.38 However, the Committee noted that there was no evidence that the remainder of the existing law relating to fraud did not cope with the problem of organised fraud and the provision had been used infrequently. It also noted problems with the elements of such an offence.⁴⁰
- 8.39 The ACT has a similar organised fraud provision.⁴¹ However, the observations about a potential lack of use of such offences are supported by the fact that there are no instances in the ACT sentencing database of the offence being dealt with as a principal offence and no relevant case law.
- 8.40 The Committee preferred the use of sentencing discretion as “the most appropriate way to deal with the element of substantial planning and organisation sometimes suggested as an additional criterion for an organised fraud offence”.⁴² It also noted the “practical advantages in terms of court time and costs in dealing with these matters at sentence rather than as ill-defined elements to be litigated at trial” and that “recent sentencing practice shows an increasing willingness by courts to impose very substantial sentences for serious fraud”.⁴³ The Committee concluded:

An organised fraud offence which accurately targets the sorts of people it is intended to target defies reasonable definition. Such defendants are relatively rare and the culpability has more to do with the scale of their operation and the absence of mitigating factors than it does with organisation. These are matters which are typically dealt with in sentencing. Creation of a separate offence to deal with them runs the risk of over-complicating the law and drawing in people who are not the objects of the offence. These risks are not justified, especially in view of the fact that the existing law is adequate to deal with them.⁴⁴

Continuing criminal enterprise (Victoria)

- 8.41 Continuing criminal enterprise provisions under the *Sentencing Act 1991* (Vic) relate to offenders convicted at one or more trials, of three or more fraud and other property

39. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 3: Theft, Fraud, Bribery and Related Offences*, Report (1995) 163.

40. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 3: Theft, Fraud, Bribery and Related Offences*, Report (1995) 163–165.

41. *Crimes Act 1900* (ACT) s 114D.

42. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 3: Theft, Fraud, Bribery and Related Offences*, Report (1995) 165.

43. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 3: Theft, Fraud, Bribery and Related Offences*, Report (1995) 167.

44. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 3: Theft, Fraud, Bribery and Related Offences*, Report (1995) 167.

offences (including obtaining property by deception, obtaining financial advantage by deception, and false accounting), each involving property valued at \$50,000 or more. Such offenders are liable to a maximum term of imprisonment of twice the length of the offence's maximum term or 25 years, whichever is the lesser.⁴⁵

8.42 The provisions were introduced in 1997,⁴⁶ as part of a package of reforms involving the confiscation of proceeds of crime. They were aimed at those who had “acquired wealth as a result of sustained, repeat criminal behaviour”.⁴⁷ At the time it was said that “large-scale fraud is another area of increasing concern to the community and the business sector in particular”.⁴⁸ The continuing criminal enterprise offence was also made subject to the automatic forfeiture provisions of the *Confiscation Act 1997* (Vic).

8.43 The Victorian Court of Appeal has observed that, in enacting the continuing criminal enterprise provisions, the Victorian Parliament:

expressed an intention to deter those who demonstrate preparedness to engage in repeated predatory behaviour, affecting through the commission of offences of the kind presently under consideration, the economic welfare of individual victims and the general community.⁴⁹

8.44 However, the provisions have been criticised as being poorly drafted and giving rise to anomalies.⁵⁰ For example, in dissent Justice Vincent questioned whether it was intended that the way that charges were presented would impact sentencing outcomes, so that a “person who was found guilty of three relevant offences at the same time, perhaps arising out of the same course of conduct and not demonstrating a continuing propensity to engage in that type of behaviour” would be in a worse position than a person “who had twice previously been found guilty of such offences and had demonstrated a tendency to recidivism”.⁵¹

45. *Sentencing Act 1991* (Vic) s 6H, s 6I, sch 1A.

46. *Confiscation Act 1997* (Vic) s 148.

47. Victoria, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 4 December 1997, 910.

48. Victoria, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 4 December 1997, 908.

49. *R v Arundell* [2003] VSCA 69 [22]. See also *R v Roussety* [2008] VSCA 259, 24 VR 253 [35].

50. *R v Roussety* [2008] VSCA 259, 24 VR 253 [1].

51. *R v Roussety* [2008] VSCA 259, 24 VR 253 [2]. But see *Roussety* [2008] VSCA 259, 24 VR 253 [36].

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?

Fraud committed in relation to other indictable offences

- 8.45 Another element of aggravation justifying an offence with a greater maximum penalty could be that the fraud offence is committed in relation to other indictable offences. For example, fraud committed in furtherance of terrorism or drug importation.
- 8.46 Examples of such an approach may be found in the *Crimes Act* where there are offences of:
- dealing with or possessing identification information “with the intention of committing, or of facilitating the commission of, an indictable offence”⁵²
 - entering a dwelling “with intent to commit a serious indictable offence” or of breaking out of a dwelling after committing “any serious indictable offence therein”⁵³
 - breaking and entering a building “with intent to commit any serious indictable offence therein”,⁵⁴ and
 - causing an unauthorised computer function with the intention of committing or facilitating a serious indictable offence.⁵⁵

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?

52. *Crimes Act 1900* (NSW) s 192J, s 192K.

53. *Crimes Act 1900* (NSW) s 109(1).

54. *Crimes Act 1900* (NSW) s 113(1).

55. *Crimes Act 1900* (NSW) s 308C.

Other elements of aggravation

- 8.47 Another option for reform would be to enact aggravated fraud offences based on elements other than the value of the fraud, or the other elements outlined above. There are examples of this approach in other jurisdictions.
- 8.48 In Queensland, for example, the maximum penalty for the principal fraud offence is 5 years' imprisonment.⁵⁶ However, it is 14 years in other circumstances including where:
- the offender is a director or officer of a corporate victim
 - the offender is an employee of the victim
 - the offender had possession or control of the relevant property and it was "subject to a trust, direction or condition" or held the relevant property on account of any other person, or
 - the offender is or was an employer of the victim.⁵⁷
- 8.49 The maximum penalty is increased to 20 years if "the offender carries on the business of committing the offence".⁵⁸
- 8.50 The aggravated form of the offence involving offenders who are or were employers of the victim, was part of amendments introduced in 2020 to deter wage theft, particularly by employers "who engage in it as a business model".⁵⁹ It was intended to mirror the corresponding circumstance of aggravation that applies where employees defraud their employer and "reflect the seriousness of wage theft and signal parliament's intention to provide a deterrent to those employers who deliberately underpay and take advantage of their workers".⁶⁰
- 8.51 The aggravated offence of carrying on the business of fraud was introduced in 2016 as part of amendments aimed at serious and organised crime. This aggravated form of the offence (together with the aggravated form involving fraud valued at \$100,000 or more) was a particular response to "the increasing prevalence and seriousness of cold call investment or 'boiler room' fraud and evolving threats in financial crimes ... that may not be adequately deterred by existing penalties".⁶¹ These frauds involve offenders taking money from victims through unsolicited contacts convincing victims to engage in

56. *Criminal Code* (Qld) s 408C(1).

57. *Criminal Code* (Qld) s 408C(2).

58. *Criminal Code* (Qld) s 408C(2A)(b).

59. Explanatory Notes, *Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020* (Qld) 1; Queensland, *Parliamentary Debates*, 15 July 2020, 1628.

60. Queensland, *Parliamentary Debates*, 15 July 2020, 1629.

61. Queensland, *Parliamentary Debates*, 13 September 2016, 3402

worthless or non-existent investments. Most of these investment frauds are said to be run out of offices known as “boiler rooms”.⁶²

8.52 Other possible elements of aggravation could relate to the vulnerability of a victim. For example, in Western Australia, if the general fraud offence is prosecuted on indictment, the maximum penalty is 7 years’ imprisonment or 10 years if the victim is over 60.⁶³ This provision was added in 2001 as part of amendments intended to apply to those who committed offences against the elderly. In relation to the fraud offence, the second reading speech observed that, in light of an enquiry into finance broking:⁶⁴

senior citizens are particularly vulnerable to fraud. This crime has a devastating effect on them, their families and the community, particularly as they lose their financial security at a time when all members will agree that they should be enjoying the fruits of their labour.⁶⁵

8.53 In South Australia, the main deception offence has a maximum penalty of 10 years’ imprisonment, with a maximum penalty of 15 years for an aggravated offence.⁶⁶ The circumstances of aggravation are in a general list that applies to all aggravated offences. The most relevant for the purposes of the deception offence are:

- that the offender committed the offence knowing that the victim was over 60, and
- the offender abused a position of authority, or a position of trust.⁶⁷

8.54 A legislative model in NSW for incorporating aggravating elements in relation to a fraud offence may be found in the housebreaking offences in the *Crimes Act* which include “circumstances of aggravation” and “circumstances of special aggravation”⁶⁸ that will increase maximum penalties, for example, from 14 years’ imprisonment to 20 years or 25 years respectively.⁶⁹

8.55 There was some support for such options in consultations.⁷⁰ However, others did not support this approach.⁷¹

62. “Boiler Room Fraud” Action Fraud: National Fraud and Cyber Crime Reporting Centre <www.actionfraud.police.uk/a-z-of-fraud/boiler-room-fraud> (retrieved 6 September 2022).

63. *Criminal Code (WA)* s 409(1).

64. See I Temby, *Royal Commission into the Finance Broking Industry*, Report (2001).

65. Western Australia, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 27 June 2001, 1464.

66. *Criminal Law Consolidation Act 1935 (SA)* s 139.

67. *Criminal Law Consolidation Act 1935 (SA)* s 5AA(1)(f), s 5AA(1)(i).

68. *Crimes Act 1900 (NSW)* s 105A–115A.

69. *Crimes Act 1900 (NSW)* s 109.

70. NSW Police Force, *Preliminary Submission PFRC03*, 5.

- 8.56 It can be argued that the aggravating factors in s 21A of the *Sentencing Procedure Act* are adequate and that a sentencing judge is best placed to weigh up and take into account the different aggravating and mitigating factors.⁷² For example an arbitrary age (such as 60) is not always a reliable indicator of vulnerability, especially among adult victims of fraud, and it may be more appropriate for such issues to be taken into account at sentencing.
- 8.57 The need to prove individual elements of an aggravated offence may also present difficulties for prosecutors and lead to more complex trials. This would be especially so in the case of jury trials involving complex fact situations where juries may need to consider the possibility of alternative verdicts depending on their findings in relation to particular elements of aggravation.
- 8.58 An example of an alternative verdict provision is found in s 115A of the *Crimes Act* in relation to housebreaking offences. This sets out how an aggravated offence may be reduced to a basic offence, how a specially aggravated offence may be reduced to an aggravated offence, and how a specially aggravated offence may be reduced to a basic offence.

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?

Indictable only version of the offence

- 8.59 Another option may be to have an indictable only version of s 192E for more serious offences, for example, for frauds over a certain amount with an appropriate maximum penalty.
- 8.60 Currently in NSW any fraud offence under the *Crimes Act* part 4AA must be tried summarily unless the prosecutor or the person charged elects otherwise.⁷³ There is no provision for strictly indictable fraud offences.

71. NSW Office of the Director of Public Prosecutions, *Preliminary Consultation PFRC05*; Legal Aid NSW, *Preliminary Consultation PFRC06*; NSW Bar Association, *Preliminary Consultation PFRC07*; A Steel, *Preliminary Consultation PFRC09*.

72. A Steel, *Preliminary Consultation PFRC09*.

73. *Criminal Procedure Act 1986* (NSW) sch 1 table 1 [4A].

8.61 Some other jurisdictions take a different approach. In Western Australia, for example, if the value of the fraud is more than \$10,000, the charge cannot be dealt with summarily.⁷⁴

8.62 However, there are disadvantages to this approach. As we noted in chapter 5, while the amount defrauded will be relevant, other relevant considerations include, for example:

- whether the money was recovered
- how it was defrauded, and
- the level of sophistication.

8.63 Given these considerations the ODPP did not:

consider it necessary or desirable to introduce monetary limits on election decisions. In our experience, serious Fraud offences are appropriately referred by police prosecutors so that the question of an election may be considered.⁷⁵

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?

Dealing with low level offending

8.64 We noted above concerns that some low level offenders might be adversely affected by a general increase in the maximum penalty for the offences under s 192E of the *Crimes Act 1900* (NSW).

8.65 A number of options present themselves, including enacting summary only offences, placing limits on the use of imprisonment, and decriminalising or diverting some offences.

Summary only offences

8.66 Having a summary only offence with a maximum penalty appropriate to the summary jurisdiction may be a better way of dealing with low level offending. This would be

74. *Criminal Code* (WA) s 409(2).

75. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 5.

preferable to dealing with the indictable offence summarily with a more serious maximum, albeit subject to the jurisdictional limit in the summary jurisdiction.

8.67 One way of identifying a summary only offence would be by reference to a monetary limit, such as \$1000. Another way would be to describe the activity, for example, tap-and-go payments, with or without a monetary limit. For example, the ACT has a range of summary only offences arising from fraudulent conduct, such as:

- the offence of passing valueless cheques which attracts a maximum penalty of one year's imprisonment and/or a fine of 100 penalty units,⁷⁶ and
- the offence of making off without payment in relation to an amount of \$2000 or less which attracts a maximum penalty of 6 months' imprisonment and/or a fine of 50 penalty units.⁷⁷

Some other Australian jurisdictions have similar provisions.⁷⁸ However, NSW law does not target such specific activity. The offence of passing a valueless cheque was repealed with the fraud reforms in 2009.⁷⁹

8.68 Given the difficulty of detecting some offending, it may be appropriate to adjust the time limits on summary prosecutions. This could be done by extending the time limit from the commission of the offence, or by establishing a time limit that runs from the date the offence was discovered and/or reported to the authorities, with or without leave of the court.⁸⁰

Limits on the use of imprisonment

8.69 Under the *Crimes Act 1914* (Cth), in the case of some minor fraud offences, such as those involving not more than \$2000 where the offender had not previously been imprisoned, the court cannot impose imprisonment unless satisfied there are exceptional circumstances.⁸¹

8.70 This was introduced in 1992.⁸² The restrictions on the use of imprisonment were limited to specified offences involving small amounts of money because it was considered that a monetary limit was simplistic and did not "take account of the fact that, in offences

76. *Criminal Code 2002* (ACT) s 336.

77. *Criminal Code 2002* (ACT) s 323.

78. See, eg, *Criminal Law Consolidation Act 1935* (SA) s 144; *Criminal Code* (Qld) s 427A.

79. *Crimes Act 1900* (NSW) s 178B, repealed by *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009* (NSW) sch 2 [9].

80. See, eg, *Prevention of Cruelty to Animals Act 1979* (NSW) s 34(4); *Biodiversity Conservation Act 2016* (NSW) s 13.4(2); *Biosecurity Act 2015* (NSW) s 284(3); *Building Products (Safety) Act 2017* (NSW) s 67(2); *Protection of the Environment Operations Act 1997* (NSW) s 216(2).

81. *Crimes Act 1914* (Cth) s 17B(1).

82. *Crimes Act 1914* (Cth) s 17B(1), inserted by *Crimes Legislation Amendment Act 1992* (Cth) s 24.

such as bribery, it is not the amount offered as the bribe which determines the seriousness of the offence but rather the nature of the office sought to be corrupted”.⁸³

Decriminalisation and diversion

- 8.71 In 1995, the Model Criminal Code Officers Committee of the Standing Committee of Attorneys General considered options for dealing with small value frauds of, say, less than \$150. The Committee observed that some people argued that offences involving such amounts “should be decriminalised because they do not warrant the stigma of prosecution for the more serious categories of theft nor the expense of prosecuting them”. It noted a suggestion that such small amounts “might be dealt with by means of governmentally enforced civil remedies such as restitution”.⁸⁴
- 8.72 In one consultation, it was noted that many low level social security offences involving \$2000 or less in the Commonwealth jurisdiction are dealt with administratively or civilly and are not generally prosecuted.⁸⁵ However, the discretion to prosecute remains, and we understand it has been exercised recently against low level offenders in relation to drought, fire and flood relief.
- 8.73 Consultations indicated that restorative justice may be appropriate for some fraud and fraud-related cases, as it provides offenders with the opportunity to rebuild the harm done.⁸⁶ One study suggested that victims wanted to meet their perpetrators, or that fraudsters should have to help the victim.⁸⁷ It was found that restorative justice for online fraud offences was particularly appropriate as it was often perceived as a “faceless crime”.⁸⁸
- 8.74 An example of this approach may be found in the *Young Offenders Act 1997* (NSW). This gives the police discretionary powers in relation to certain offences, including fraud, to divert young offenders (aged between 10 and 17) from the court system. In addition to formal warnings and formal cautions, young people can be referred to a youth justice

83. Australia, *Parliamentary Debates*, Senate, Second Reading Speech, 16 September 1992, 925.

84. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 3: Theft, Fraud, Bribery and Related Offences*, Report (1995) 175–177. See also B Fisse, *Howard’s Criminal Law* (5th ed, 1990) 314–315.

85. Commonwealth Director of Public Prosecutions, *Preliminary Consultation PFRC08*.

86. Women’s Legal Service NSW, *Preliminary Consultation PFRC01*; A Steel, *Preliminary Consultation PFRC09*.

87. M Button and others, Online Fraud Victims in England and Wales: Victims’ Views on Sentencing and the Opportunity for Restorative Justice (2015) 54 *Howard Journal of Criminal Justice* 193, 206–7.

88. M Button and others, Online Fraud Victims in England and Wales: Victims’ Views on Sentencing and the Opportunity for Restorative Justice (2015) 54 *Howard Journal of Criminal Justice* 193, 206–7.

conference.⁸⁹ The Director of Public Prosecutions and the courts may also refer a young person to a conference.⁹⁰

8.75 The purpose of a conference is to make decisions and recommendations about the young person and develop an outcome plan.⁹¹ Participants engage in a roundtable discussion to develop an outcome plan that the child must adhere to. Outcomes might include:

- making an oral or written apology to a victim
- making reparation to a victim or the community, and
- participating in rehabilitation or educational programs.⁹²

8.76 A study of youth justice conferences in 2009–2010 found that restitution tasks included community work, financial reparation, work for the victim and giving a gift in kind.⁹³

8.77 Another approach might be to make frauds for minor amounts subject to penalty notices (criminal infringement notices). This would allow low level offenders to accept a fine without the need to go to court. However, such an approach may present problems since many low level offenders are unlikely to have the resources to pay a fine. Enforcement processes may present further difficulties.

Question 8.7: Low level offending

What alternative approaches could deal appropriately with low level fraud offending?

Reforming aggravating factors

8.78 Another option may be to reform the aggravating factors in s 21A(2) to ensure that they cover serious forms of fraud offending. One submission did not favour this approach noting that fraud offences were not “subject to sufficiently exceptional circumstances” to justify altering s 21A.⁹⁴

8.79 Some of the relevant aggravating factors appear adequate to deal with fraud, such as those relating to substantial harm, abuse of a position of trust or authority, multiple victims, planning and financial gain.

89. *Young Offenders Act 1997* (NSW) pt 5.

90. *Young Offenders Act 1997* (NSW) s 40.

91. *Young Offenders Act 1997* (NSW) s 34(2).

92. *Young Offenders Act 1997* (NSW) s 52.

93. I Taussig, *Youth Justice Conferences: Participant Profile and Conference Characteristics*, Bureau Brief No 75 (NSW Bureau of Crime Statistics and Research, 2012) 4.

94. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07*, 4.

8.80 However, the factor relating to vulnerability could be adjusted. Currently it is expressed as:

the victim was vulnerable, for example, because the victim was very young or very old or had a disability, because of the geographical isolation of the victim or because of the victim's occupation (such as a person working at a hospital (other than a health worker), taxi driver, bus driver or other public transport worker, bank teller or service station attendant).⁹⁵

8.81 The age of the victim may not be the only indicia of vulnerability. For example, the Seniors Rights Service has noted that "older people tend to be less internet savvy, or familiar with internet technology, and this can also make them vulnerable to cybercrime and fraud".⁹⁶

8.82 However, in relation to this, the Young Lawyers Criminal Law Committee did not consider amendment was necessary. It suggested that the courts could re-examine and expand the "current typical and recognised categories of vulnerable victims" given "the increasing prevalence of phone and email-based schemes designed to target unsuspecting ... consumers and technology users".⁹⁷

Question 8.8: Aggravating factors

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?

95. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(l).

96. Seniors Rights Service, *Preliminary Submission PFR06*, 2

97. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [2], [13].

Appendix A:

Questions

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?

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?

Question 3.2: Business impact statements

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

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?

6. Fraud Sentencing Guidelines in England and Wales

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?

7. Sentencing outcomes

Question 7.1: Sentences for fraud

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

8. Options for reform

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?

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?

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?

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?

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?

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?

Question 8.7: Low level offending

What alternative approaches could deal appropriately with low level fraud offending?

Question 8.8: Aggravating factors

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?

Appendix B:

Fraud and fraud-related offences in the Crimes Act 1900 (NSW)

Crimes Act 1900 (NSW) provision	Description	Maximum penalty (years)
s 125	Larceny as bailee	5
s 156	Steal property as clerk/servant	10
s 157	Embezzle as clerk or servant	10
s 192F(1)(a)	Destroy or conceal accounting record to obtain property	5
s 192F(1)(b)	Destroy/conceal accounting record to obtain advantage	5
s 192G(a)	Publish etc false misleading material to obtain property	5
s 192G(b)	Publish etc false misleading material to obtain advantage	5
s 192H(1)	Officer publish etc false misleading statement to deceive	7
s 192J	Dealing with identification information to commit, facilitate commission of an indictable offence	10
s 192K	Possess identification information to commit, facilitate commission of an indictable offence	7
s 192L	Possess equipment etc to make identification documents or things - indictable offence	3
s 253(b)(i)	Make false document to obtain property	10
s 253(b)(ii)	Make false document to obtain advantage or cause disadvantage	10
s 253(b)(iii)	Make false documents to influence exercise of public duty	10
s 254(b)(i)	Use false document to obtain property	10
s 254(b)(ii)	Use false document to obtain financial advantage or cause disadvantage	10
s 254(b)(iii)	Use false document to influence exercise of public duty	10
s 255(b)(i)	Possess false document to obtain property	10
s 255(b)(ii)	Possess false document to obtain financial advantage	10
s 255(b)(iii)	Possess false document to influence exercise of public duty	10
s 256(1)	Make, possess, use etc equipment to make false document	10
s 256(2)	Make, possess equipment etc to make false document	3

Crimes Act 1900 (NSW) provision	Description	Maximum penalty (years)
s 256(3)	Make, possess equipment intend use for forgery	3
s 307A(1)	Make false/misleading statement for authority/benefit	2
s 307B(1)	Knowingly make false/misleading statement	2
s 307C(1)	Knowingly produce false/misleading document under state law	2

Appendix C:

Top offences by charges finalised

- C.1 In 2019, 19,125 charges (for state and federal offences) were finalised in NSW courts in relation to fraud, deception and related offences.¹
- C.2 The most frequently charged state offence in 2019 was the offence of dishonestly obtaining property by deception² with 6824 charges, followed closely by the offence of dishonestly obtaining financial advantage or causing financial disadvantage by deception,³ with 6502 charges. This compares with the 20th and 21st most frequently charged offences with 65 charges each.
- C.3 In relation to federal offences, fewer than 200 charges were finalised in NSW courts for each of the two most frequent federal offences: obtaining a financial advantage by deception under s 134.2(1) of the *Criminal Code* (Cth) and dishonestly obtaining a financial advantage under s 135.2(1) of the *Criminal Code* (Cth).⁴

Table C.1: Top 21 NSW fraud and fraud-related offences in NSW criminal courts by charges finalised, 2019

Act	Section	Offence	Charges
Crimes Act 1900	s 192E(1)(a)	Dishonestly obtain property by deception	6824
Crimes Act 1900	s 192E(1)(b)	Dishonestly obtain financial advantage etc by deception	6502
Crimes Act 1900	s 192K	Possess identity info to commit etc indictable offence	768
Heavy Vehicle National Law	s 325(1)	Make false or misleading entry in work record	633
Crimes Act 1900	s 156	Steal property as clerk/servant	391
Crimes Act 1900	s 192J	Deal with identity info to commit etc indictable offence	347
Pawnbrokers and Second-hand Dealers Act 1996	s 15(4)	Furnish false information/statement to licensee	255
Crimes Act 1900	s 254(b)(ii)	Use false document to obtain financial advantage etc	213

1. NSW Bureau of Crime Statistics and Research, reference 21-20655.
2. *Crimes Act 1900* (NSW) s 192E(1)(a).
3. *Crimes Act 1900* (NSW) s 192E(1)(b).
4. NSW Bureau of Crime Statistics and Research, reference 21-20655.

Act	Section	Offence	Charges
Pawnbrokers and Second-hand Dealers Act 1996	s 24	Make/furnish a statement which is false/misleading	213
Crimes Act 1900	s 178BA(1)	Obtain money etc by deception	157
Crimes Act 1900	s 157	Embezzle as clerk or servant	117
Crimes Act 1900	s 125	Larceny as bailee	102
Crimes Act 1900	s 176A	Director/officer/member cheat or defraud	100
Law Enforcement (Powers and Responsibilities) Act 2002	s 13(a)	Give a false name	92
Crimes Act 1900	s 192G(b)	Publish etc false misleading material to obtain advantage	83
Crimes Act 1900	s 193N	Engage in conduct that corrupts betting outcome of event	75
Crimes Act 1900	s 254(b)(i)	Use false document to obtain property	75
Drug Misuse and Trafficking Act 1985	s 15	Utter, forge or alter prescription which includes prohibited drug	75
Crimes Act 1900	s 193Q(1)(a)	Use corrupt conduct information to bet on event	74
Crimes Act 1900	s 300(2)	Use false instrument with intent	65
Poisons and Therapeutic Goods Act 1966	s 16(2)	Forge/alter, or utter prescription for prescribed restricted substance	65

Source: NSW Bureau of Crime Statistics and Research, reference 21-20655.

Appendix D:

Preliminary submissions

PFR01 Confidential, 5 October 2021

PFR02 Confidential, 31 January 2022

PFR03 Commonwealth Director of Public Prosecutions, 31 January 2022

PFR04 Dr Cassandra Cross, 31 January 2022

PFR05 NSW Office of the Director of Public Prosecutions, 3 February 2022

PFR06 Senior Rights Service Senior Rights Service, 4 February 2022

PFR07 NSW Young Lawyers Criminal Law Committee, 7 February 2022

PFR08 NSW Police Force, 17 February 2022

Appendix E:

Preliminary consultations

Women's Legal Service (PFRC01)

7 March 2022

Liz Snell, Law Reform and Policy Co-ordinator

Carolyn Jones, Senior Solicitor

Payment and Fraud Control, Service NSW (PFRC02)

17 March 2022

Kara Kennedy

NSW Police Force (PFRC03)

23 March 2022

Detective Superintendent Linda Howlett, Commander Financial Crimes Squad

Detective Superintendent Matt Craft, Commander Cybercrime Squad

S/Sgt Amin Assaad, Senior Advocate, Police Prosecutions

Justin McLean, Principal Policy Officer, Legislation and Policy Branch

Zoe Carvosso, Legislation and Policy Branch

Operations, Fines and Debt, Revenue NSW (PFRC04)

16 March 2022

Julianne Evans, Director, Operations, Fines and Debt

NSW Office of the Director of Public Prosecutions (PFRC05)

30 March 2022

Huw Baker SC, Deputy Director of Public Prosecutions

Frank Veltro SC, Deputy Director of Public Prosecutions

James Chin, Legal and Policy Officer

Legal Aid NSW (PFRC06)

30 March 2022

Thomas Spohr, Solicitor Advocate

Nicholas Ashby, Solicitor Advocate

Tijana Jovanovic, Senior Law Reform Officer

NSW Bar Association (PFRC07)

1 April 2022

Tim Game SC

Celia Barnett-Chu, Director, Policy and Reform

Richard Easton, Policy Lawyer

Commonwealth Director of Public Prosecutions (PFRC08)

6 April 2022

Gina Nott, Practice Group Leader, Revenue and Fraud Benefits Group

Berdj Tchakerian, Practice Group Leader, Commercial, Financial and Corruption Practice Group

Professor Alex Steel (PFRC09)

7 April 2022

Professor Alex Steel, University of NSW

NSW Young Lawyers Criminal Law Committee (PFRC10)

11 April 2022

Sarah Ienna, Chair, NSW Young Lawyers, Criminal Law Committee

Toni Mudditt, Secretary, NSW Young Lawyers, Criminal Law Committee

Leah Sarafim, President, NSW Young Lawyers

NSW Treasury (PFRC11)

20 May 2022

Emily Speers Mears, Director, Strategy and Delivery Unit

