



# CDPP

Australia's Federal Prosecution Service

Commonwealth Director  
of Public Prosecutions

Locked Bag A4020, Sydney South NSW  
1235  
Level 10, 175 Liverpool Street  
Sydney NSW 2000  
DX 11497, SYDNEY DOWNTOWN

Telephone (02) 9321 1100  
Facsimile (02) 9264 8241  
[www.cdpp.gov.au](http://www.cdpp.gov.au)

31 January 2022

Secretary  
New South Wales Sentencing Council  
GPO Box 31  
SYDNEY NSW 2001

**Via email:** [sentencingcouncil@justice.nsw.gov.au](mailto:sentencingcouncil@justice.nsw.gov.au)

Dear Sir/Madam,

### **Preliminary Submission - Sentencing for fraud and fraud related offences**

1. I refer to the call for preliminary submissions as part of a review of sentencing for fraud and fraud related offences being conducted by the New South Wales Sentencing Council in relation to offences in Part 4AA of the *Crimes Act 1900* (NSW) ('the *NSW Crimes Act*').
2. Whilst Commonwealth offences are not part of the review, sentencing principles applied by the courts when sentencing for Commonwealth offences are likely to also be relevant in the State context and therefore hopefully of some benefit to this review.
3. This preliminary submission addresses each of the '*Questions to guide preliminary submissions*', noting that the scope of our submission is necessarily limited given this Office primarily prosecutes Commonwealth offences.

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

4. As is the case for sentencing in NSW state offences<sup>1</sup>, sentencing for Commonwealth offences is conducted within a legislative framework which provides a non-exhaustive list of factors to be taken into account in sentencing.
5. Part IB of the *Crimes Act 1914* (Cth) ('the *Crimes Act*') and specifically s16A, provides for the '*General Sentencing Principles*' to be applied in sentencing for all Commonwealth matters. Section 16A states that in "*determining the sentence to be passed or the order to be made in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence*". The section then sets out an extensive but non exhaustive list of factors to be taken into account in determining the appropriate sentence, including the nature and circumstances of the offence, whether the

---

<sup>1</sup> Refer to s21A *Crimes (Sentencing Procedure) Act 1999* (NSW).

offender pleaded guilty, the degree to which the person has co-operated with law enforcement agencies, general and specific deterrence, the character, antecedents, age, means and physical or mental condition of the person and, if the person's standing in the community was used by the person to aid in the commission of the offence — that fact as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates.

6. Section 16A also specifically lists as relevant factors any injury, loss or damage resulting from the offence and action taken by the offender to make reparation, factors that are of particular relevance in relation to the prosecution of white collar matters.
7. There is now a considerable body of appellate level case law which underscores the seriousness of white-collar crime (which includes Commonwealth fraud offences) and its impact on the community. That case law also entrenches the principle that 'general deterrence' is the primary sentencing objective<sup>2</sup>. General deterrence is particularly important because white-collar offenders typically come before sentencing courts with evidence of good character and no prior convictions. In different circumstances, 'prior good character' may operate to significantly mitigate an offender's sentence. However, courts recognise that it is often this factor which enables the offence by allowing the white-collar offender to obtain and exploit a position of trust. Accordingly, sentencing courts give less weight to prior good character when sentencing white-collar offenders<sup>3</sup>.
8. In addition, courts sentencing offenders for Commonwealth fraud offences have emphasised the following factors as being particularly relevant:
  - a. the amount of money defrauded;
  - b. the degree of planning, premeditation and sophistication;
  - c. the period of time over which the offence was committed;
  - d. the number and status of victims, including their vulnerability;
  - e. whether the offending involved a breach of trust.
9. In comparing the NSW and Commonwealth legislative framework, of note, for state offences, s21A of the *Crimes (Sentencing Procedure) Act 1999* ('the *Sentencing Act*') sets out the aggravating and mitigating features that are to be taken into account in sentencing an offender. By contrast, the Commonwealth framework does not categorise the relevant factors as being either aggravating or mitigating. An example of how the distinction between the two frameworks may bear upon the factors taken into account in sentencing is found in s21A(3)(f) of the *Sentencing Act*, which provides that it is a mitigating factor for the purposes of sentencing, if the offender is a person of good character.
10. As stated above, however, in sentencing for Commonwealth fraud offences, prior good character is usually given less weight by a sentencing court, given it is frequently the prior good character of the offender which has put the offender in the position where they are able to commit the offence. Additionally, as set out in section 16A(2)(m)(a) of the *Crimes Act*, if the person's standing in the community was used by the person to aid in the commission of the offence — that fact is to be taken into account as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates.

---

<sup>2</sup> Refer for example, *R v Pantano* (1990) 49 A Crim R 328; *DPP v Bulfin* (1998) 4 VR 114; *R v Jamieson* [1988] VR 879; *R v Healy* [1999] VSCA 219; *R v McLean* [2000] VSCA 217; *R v El Rashid* (unreported, NSW CCA, 7 April 1995; *R v Corner* (unreported, NSW CCA, 19 December 1997); *R v Rivkin* (2004) 59 NSWLR 284.

<sup>3</sup> Refer for example, *DPP v Hamman* (unreported, NSW, CCA 1 December 1998); *R v Healy* [1999] VSCA 219; *R v Liddell* [2000] VSCA 37; *R v Rivkin* (2004) 59 NSWLR 284.

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

11. As part of the sentencing process, judges are required to ‘instinctively synthesise’<sup>4</sup> a broad range of factors in order to arrive at a sentence ‘that is of a severity appropriate in all the circumstances of the offence’<sup>5</sup>. They do so within the parameters of the maximum penalty prescribed by statute for the offence(s) and through the application of relevant common law principles.
12. Crown appeals against sentence are an important mechanism for this Office to challenge sentences it considers to be ‘manifestly inadequate’, ‘substantially and unnecessarily inconsistent’ and or otherwise meeting the criteria set out in paragraph 6.33 of the *Prosecution Policy of the Commonwealth*<sup>6</sup>.
13. Whilst there are currently a number of Crown Appeals against sentence before the courts involving Commonwealth fraud offences, the CDPP does not consider there to be any systemic issues in terms of the purposes of sentencing being applied inappropriately by the Courts.

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

14. The maximum penalty for an offence prescribed by statute signals the degree of seriousness with which Parliament, and by implication the community, views the offence relative to other offences and sets the outer limit of the court’s sentencing discretion.
15. As a result of law reform in recent years, there is now widespread uniformity of maximum penalties for fraud and forgery offences pursuant to NSW and Commonwealth law. Of note, the maximum penalty of 10 years’ imprisonment for ‘Obtain property or financial advantage’ pursuant to s134.1(1) and 134.2(1) of the *Criminal Code Act 1994* (Cth) (‘the *Criminal Code*’) is the same as for ‘Obtain property or financial advantage’ pursuant to s192E(1) of the *NSW Crimes Act*. Similarly, the maximum penalty of 10 years’ imprisonment for ‘Forgery’, ‘Use forged document’, or ‘Possess forged document’ pursuant to ss 144.1, 145.1 and 145.2 of the *Criminal Code* is the same as for ‘Make false document’, ‘Use false document’, or ‘Possess false document’ under ss 253, 254 and 255 respectively of the *NSW Crimes Act*.
16. Whilst there is a degree of uniformity between penalties for NSW and Commonwealth fraud and forgery offences, one challenge posed under the current Commonwealth legislative regime is that the statutory maximum of 10 years’ imprisonment 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.
17. One method by which the Legislature may be able to deal with this issue is by adopting a tiered method of imposing maximum penalties, based on the quantum of the fraud. By way of comparison, the maximum penalties in Division 400 of the *Criminal Code* which relate to

---

<sup>4</sup> Refer *Markarian v the Queen* (2005) 228 CLR 357

<sup>5</sup> Refer section 16A of the *Crimes Act 1914* (Cth).

<sup>6</sup> Paragraph 6.33 of the *Prosecution Policy* states:

“The prosecution right to appeal against sentence should be exercised with appropriate restraint. In deciding whether to appeal, consideration is to be given as to whether there is a reasonable prospect that the appeal will be successful.” It then goes on to list a number of relevant factors.

'Money Laundering' are scaled according to the value of money or property involved and the mental state of the offender (whether intention/belief, recklessness or negligence). Notably, the offence of intentionally dealing in proceeds of crime in the sum of \$10,000,000 or more pursuant to section 400.2B(1) of the *Criminal Code* carries a maximum penalty of life imprisonment, whereas intentionally dealing in proceeds of crime in the sum of \$1,000 to \$9,999 under section 400.7(1) carries the lesser penalty of 5 years' imprisonment and/or a fine of 300 penalty units. In between these two extremes the Legislature has provided for a further four levels of maximum penalties, each applying to a different financial threshold in terms of the quantum alleged to have been laundered.

18. It is also worthwhile noting that in 2016, the CDPP made a submission to the Senate Economics Reference Committee Inquiry into penalties for white collar crime, in relation to statutory maximum penalties for white collar offences, including Commonwealth fraud offences. In its submission the CDPP invited the inquiry to consider whether a tiered scheme of penalties based on the sum of money defrauded should be introduced for the fraud offences in Part 7.3 of the *Criminal Code* (akin to the Division 400 offences). Additionally, the CDPP recommended that the maximum penalty for an offence contrary to s135.1 of the *Criminal Code*, namely 'General Dishonesty' be increased from five to ten years' imprisonment – a change which was subsequently effected from 25 August 2018.
19. The CDPP maintains that while it is not suggested that fraud offences require as many tiers as provided for in the Commonwealth money laundering offences, there is merit in a tiered scheme of penalties for fraud offences being introduced, which in essence allows for higher penalties in circumstances of aggravated fraud. This would necessarily require a more significant maximum penalty to be prescribed by the Legislature for offences characterised by particularly serious features, such as a large sum of money defrauded and that involve significant premeditation, sophistication and an extended offence period. This in turn would enable sentencing courts to impose sentences of imprisonment for significant and systematic frauds which are commensurate with the serious criminality involved.

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

20. As outlined in paragraphs 12-13 Crown appeals against sentence are an effective mechanism that all prosecution agencies, including the CDPP, utilise from time to time to signal to the courts that the Crown considers a particular sentence to be manifestly inadequate or substantially and unnecessarily inconsistent with the established sentencing purposes and principles.
21. As a general observation, over the past twenty or so years, courts have changed their attitude in relation to white collar offending (such as social security and tax fraud), which is now treated much more seriously by sentencing judges. The change in the judiciary's outlook has been reflected in a general increase in the penalties being imposed, including offenders being more frequently sentenced to a period of imprisonment.

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

22. The NSW victim impact statement ('VIS') provisions are set out in the *Crimes (Sentencing Procedure) Act 1999 No. 92 ('the CSPA')*. The legislation identifies a range of offence types involving victims of crime where VIS may be provided, including offences that involve threats of

violence, sexual offences and offences that result in death and actual physical bodily harm.<sup>7</sup> However, the statutory VIS scheme does not extend to victims of State fraud offending.

23. This differs from other jurisdictions, such as Victoria, where the definition of a victim who may be entitled to submit a VIS is broader than the NSW legislation and includes '*a person who, or body that, has suffered injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender*'.<sup>8</sup>
24. While a sentencing court has discretion at common law to admit a VIS as relevant to the sentencing process<sup>9</sup> and the common law is expressly preserved in s27(5) of the CSPA<sup>10</sup>, extending the availability of the statutory VIS scheme to State fraud victims in order to allow them to express to the court the impact of the fraud on them or their family member 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.
25. Fraud offences strike victims financially. Therefore, the main redress that victims usually seek is to be financially compensated for their losses. Unfortunately, in many cases it does not appear that this is possible, given offenders are often impecunious and unable to satisfy reparation or compensation orders, resulting in these largely being unenforceable. Any mechanism the Legislature can adopt to make such orders easier to enforce would be commendable and better respond to the needs of victims of fraud.
26. Please do not hesitate to contact [REDACTED] or [REDACTED] if you wish to discuss any of the issues raised in this letter.

Yours faithfully,

[REDACTED]

Sarah McNaughton SC  
Commonwealth Director of Public Prosecutions

---

<sup>7</sup> Sections 26 and 27 of the *Crimes (Sentencing Procedure) Act 1999 No. 92* (NSW)

<sup>8</sup> Sections 3 and 8K of the *Sentencing Act 1991* (VIC)

<sup>9</sup> *Porter v R* [2008] NSWCCA 145 at [53]-[55]. In that case, statements by victims of the offences of break, enter and steal and maliciously damage property by fire, were tendered. The court noted that it is well-established principle that loss or damage suffered by a victim is a factor to be taken into account in the sentencing process; the evidence in the statements was admissible with respect to demonstrating an aggravating factor in s21A(2)(g) of the CSPA, that the injury, emotional harm, loss and damage caused was substantial; and the purpose of sentencing includes recognition of harm to victims: s3A(g) of the CSPA. See also *Miller v R* [2014] NSWCCA 34 at [155]-[156] involving State offences of obtaining a financial advantage by deception and using false instruments, where the court said evidence of emotional and financial harm occasioned to a victim by an offence has always been relevant and admissible whether or not given by way of VIS or under former s28.

<sup>10</sup> Section 27(5) states that '*nothing in this Division limits any other law by or under which a court may receive and consider a victim impact statement in relation to any offence to which this Division does not apply*'.