

Tab A – NSWPF comment on Consultation Questions

The NSW Police Force thanks the NSW Sentencing Council for the opportunity to comment on the Fraud Consultation Paper. Police identified the relevant questions from the Discussion Questions, which have been responded to below.

Overall, the NSW Police Force maintains its belief that the current maximum penalties for fraud are manifestly inadequate, particularly given there is no provision for increasing the maximum in circumstances of aggravation. The current penalties are disproportionate with the severity of the types of fraud-related crimes the NSW Police Force encounters across the state.

The below table identifies the most relevant questions to the NSW Police Force, and the NSW Police Force's input.

No	Topic	Description	NSW Police Force comment
2	Fraud and fraud-related offences in NSW	<p>2.1 Fraud and fraud-related offences in NSW</p> <p>(1) Are specific fraud and fraud-related offences outside of part 4AA of the <i>Crimes Act 1900</i> (NSW) still useful? Are the lesser penalties for these offences justified?</p> <p>(2) What other issues can be identified about the structure of fraud and fraud-related offences in NSW and their respective penalties?</p>	<p>1) Offences outside Part 4AA of the <i>Crimes Act 1900</i> are still useful, noting approximately 30 fraud-related offences were previously repealed when Part 4AA was introduced in 2009.</p> <p>For example, the Identity offences at Part 4AB are commonly relied upon by Police to combat modern-day fraud methodologies.</p> <p>There are also alternative verdict provisions for larceny and fraud contained at section 192E (4) of the Crimes Act.</p> <p>The lesser penalties for some of the offences outside Part 4AA generally apply to miscellaneous type matters involving applications etc or are specific to fraud related offences contained in other legislation.</p> <p>2) The maximum penalty for fraud is inadequate, particularly when considering the dollar value of the proceeds obtained. There have been victims targeted by overseas syndicates through investment scams who have personally lost over \$1 million, often being their entire life savings. A fraud syndicate will often work in conjunction with a money laundering syndicate to transfer the proceeds of crime overseas.</p> <p>Example of impact of fraud within syndicates</p> <p>A recent example was Strike Force Beswick, which involved a group of 13 Pakistani Nationals who were remitting funds to Pakistan. Investigators identified that the funds were from "cold call" scams. Over \$5m was remitted in a 6-month period. The maximum penalty for a proceeds of crime offence is 20 years. In this case, the predicate offence is Fraud. There is a lack of</p>

parity between the Fraud offence, which realistically causes the most harm to the victim and the proceeds of crime offence.

Despite this, the NSWPF acknowledges that current fraud offences are generally fit for purpose and the appellant Courts have largely supported the intention of Parliament in the 2009 reforms that the offences be broad in nature and capture a range of criminal conduct that involves deception and dishonest conduct.

Fraud in the online world

'Modern day' fraud is becoming more reliant on technology, with increasingly prevalence of online fraud. The consultation paper highlights these various types of the fraud methods, including 'phishing' scams and identity fraud. The use of technology to engage in fraud is illustrated by the fact that for credit card fraud, the "card not present" (CNP) category amounted to 90 % of all card fraud in 2020 (Paragraph 1.17 of the Consultation paper).

Relevantly, the consultation paper highlights that ABS estimates **over** 2.1 million Australians experienced fraud in 2020-21 (Paragraph 1.43).

Dealing with cases of fraud in the courts

In practical terms, the maximum 10-year penalty for fraud is only applicable for matters dealt with in the District Court. As highlighted in the earlier NSWPF submission (Paragraph 7.72), inadequate sentences occur in the Local Court where the presiding Magistrate is restricted by jurisdictional limits that do not provide adequate scope in sentencing - Maximum 2 years custodial for a single offence – or cumulatively up to 5 years for multiple offences.

For various practical and appropriate reasons, several serious charges are often "rolled up" to a single count. When this occurs in the District Court environment, the Court nevertheless maintains scope for an adequate sentence, with the 10-year maximum penalty available as a 'starting point'. This is not the case in the Local Court, where sentencing options are dramatically reduced, with the maximum penalty for a single serious fraud offence being 2 years' imprisonment.

Making fraud a strictly indictable offence

Fraud may be dealt with summarily *unless* the Prosecutor or the accused elects otherwise. This election process is discussed in the consultation paper and relevantly the monetary value defrauded is not the sole determinative factor for an ODPP election. The ODPP has made the comment that they do not consider it "necessary or desirable to introduce monetary limits on election decisions" and are content with the current process.

			<p>However, it is acknowledged in the consultation paper that large-scale fraud (over \$500,000) is “<i>increasingly</i>” dealt with to finality in the Local Court. In fact, the NSWPF is aware of fraud-related cases involving up to \$4 million being finalised in the Local Court.</p> <p>The current election process may create an injustice for members of the community who have been victims of large-scale, targeted fraud.</p> <p>A consideration around how this situation may be avoided is that frauds of a certain monetary value (perhaps in excess of \$1 million) be categorised as <i>strictly indictable</i>, being only able to be finalised in the District Court.</p> <p>Towards this suggestion, as referred to in the consultation paper, England recently introduced fraud sentencing guidelines to determine the starting point of any custodial sentence. These are based on a “category” dependant on the <i>amount of money defrauded</i>.</p>
3	The experiences of victims of fraud	<p>3.1 Victim Impact Statements</p> <p>(1) Should victim impact statements under the <i>Crimes (Sentencing Procedure) Act 1999 (NSW)</i> be extended to victims of fraud and fraud-related offences? Why or why not?</p> <p>(2) If so, under what circumstances and conditions should they be available?</p>	<p>1) Yes. As referenced, the consultation paper highlights the prevalence of fraud in the community. Currently the victim impact statement (VIS) scheme only extends to certain offences involving physical or sexual violence. The ODPP have highlighted that for fraud matters there is only a “discretion” at common law to introduce a VIS’s at sentence proceedings.</p> <p>Including victims of fraud in the statutory scheme would better address the needs of these members of the community. It would allow the Court to subjectively consider how fraud can have long reaching effects on a person that they may never financially recover from.</p> <p>2) Victim Impact Statements should be available in the more serious offences dealt with by the District Court. Particularly in cases where victims have been tricked out of large sums of money. The psychological effect and shame felt by a victim is often life altering. Moreover, large and complex fraud is often determined in the Local Court environment and victims in such matters should not be precluded from any VIS scheme jurisdictional considerations.</p>
		<p>3.2: Business impact statements</p> <p>Should there be business impact statements for fraud and fraud-related offences in NSW? Why or why not?</p>	<p>Businesses are regularly targeted by fraud - in particular, employee related fraud where there is an embezzlement/redirection of monies. Such fraud can be in the hundreds of thousands of dollars and may be crippling for a business, particularly a smaller owner/operated business.</p> <p>Business impact statements would provide an opportunity for the Court to consider the true impact of the offending, financial and otherwise.</p>
		<p>3.3: Reparation</p>	

		<ul style="list-style-type: none"> (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? 	<p>1) The NSWPF notes the consultation paper highlights that such orders are often not made, and it is raised in the paper this might be due in part to a lack of victim engagement in the sentencing process. However, the reasons for the lack of such orders are not completely clear. It may be a matter of better education for Court users.</p> <p>Given this, reparation orders would be appropriate in Fraud cases. The issue to consider is whether an order is sufficiently effective in recovering funds from a convicted offender or provide support for victims in other ways (see (3) below).</p> <p>2) If the funds taken from victims are not recovered, this should be seen as an aggravating factor in sentencing.</p> <p>3) Reparation orders should be used to support the victims of crime fund, which could be used to fund counselling and recovery services for fraud victims.</p>
6	Fraud Sentencing Guidelines in England and Wales	<p>6.1: Sentencing guidelines for England and Wales</p> <ul style="list-style-type: none"> (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? 	<p>1) The NSWPF considers the 10-year maximum penalty in England and Wales to be inadequate.</p> <p>However, the NSWPF sees utility in the categorisation of fraud offences based on the monetary value defrauded. This would appear to be a commonsense way to manage fraud offences.</p> <p>2) The abovementioned consideration around making certain frauds strictly indictable would progress fraud-related matters into the District Court.</p>
7	Sentencing outcomes	<p>7.1: Sentences for fraud</p> <ul style="list-style-type: none"> (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? 	<p>1) Overall, current sentencing practices imposed for such offences are not appropriate.</p> <p>As is noted in the consultation paper, the section 192E offence captures low level offending up to complex, planned, multi-million-dollar frauds. The sentencing statistics reflect that there are far fewer custodial sentences in the Local Court as opposed to the District Court for obtaining a financial advantage related fraud (18% v 78%).</p> <p>The previous NSWPF submission quoted similar statistics and highlighted that the aspect of general deterrence is of particular importance with respect to fraud offending, noting the Local</p>

			<p>Court sentences are in many cases not adequate. More serious offending should be finalised in the District Court environment where the scope for adequate sentences is more appropriate.</p> <p>2) The NSWPF does not consider fines to be an appropriate or sufficient penalty. A fraud offence always involves an element of deception. Fines are more appropriate for strict liability offences.</p>
8	Options for reform	<p>8.1: Maximum penalties for fraud</p> <p>(1) Is the maximum penalty for fraud under s 192E of the <i>Crimes Act 1900 (NSW)</i> sufficient? Why or why not?</p> <p>(2) Are the maximum penalties for other fraud and fraud-related offences in <i>the Crimes Act 1900 (NSW)</i> and other legislation sufficient? Why or why not?</p> <p>(3) Should the maximum penalties for any fraud or fraud-related offences be increased? Why or why not?</p>	<p>1) No, the NSWPF believes the maximum penalty of 10 years is inappropriate for higher value organised fraud offences under Sect 192E. An aggravated offence with a higher penalty, like that contained in the money laundering offences, would have merit.</p> <p>2) The maximum penalty of 10 years is appropriate for lower-level unsophisticated offences, for example, using a false document.</p> <p>3) The penalty is sufficient for one-off or lower-level offences.</p>
		<p>8.2: Tiered maximum penalties</p> <p>(1) Should the maximum penalty for the fraud offences under s 192E of the <i>Crimes Act 1900 (NSW)</i> be tiered according to the value of the fraud? Why or why not?</p> <p>(2) If maximum penalties under s 192E of the <i>Crimes Act 1900 (NSW)</i> were to be tiered depending on the value of the fraud what should the values and maximum penalties be?</p>	<p>1) A tiered system is problematic, as any type of organised fraud will involve hundreds of thousands (if not millions) of dollars. A loss of \$50,000 can be devastating to one person's financial situation, but not to another or a corporation or a bank. Anything over \$100,000 (either one off or cumulatively) should perhaps fall into the higher sentencing category.</p> <p>An aggravated <i>strictly indictable offence</i> based on a certain monetary amount would improve the scope of the offence</p> <p>2) A comparison may be drawn with the money laundering offences, which range from strictly indictable to summary with appropriately scaled maximum penalties. The highest-level fraud offence might include a monetary value of \$1 million or more. This offence might have a maximum penalty of 20 years in line with the highest tier money laundering offence.</p>

		<p>8.3: Organised or continuing fraud offence</p> <p>(1) Should there be an aggravated fraud offence for organised fraud or for a continuing criminal enterprise? Why or why not?</p> <p>(2) If there is to be such an offence:</p> <p>(a) what form should it take, and</p> <p>(b) what maximum penalty should apply?</p>	<p>1) Yes, there should be offence categories for aggravated or organised fraud. A typical example is Boiler Room fraud, in which there are hundreds or even thousands of victims and hundreds of millions of dollars in proceeds. These offences cost Australians hundreds of millions of dollars each year. Typically, these are run from overseas, but there have been examples of boiler rooms in Australia.</p> <p>2) An organised group systematically committing fraud offences should fall into a higher sentencing category which has a maximum penalty of 25 years. Where an organised group has committed hundreds or thousands of offences, a 10-year maximum sentence is inadequate.</p> <p>Any change needs to be considered carefully to not over-complicate the existing offences.</p>
		<p>8.4: Fraud committed in relation to other indictable offences</p> <p>(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?</p> <p>(2) If there was such an aggravated offence:</p> <p>(a) what offences should it apply to</p> <p>(b) how should these offences be related to the fraud offending, and</p> <p>(c) what maximum penalties should apply?</p>	<p>1) Fraud offences often target those classed as vulnerable persons, such the elderly. In the case of boiler room frauds or cold call scams, they are designed to create fear and a sense of urgency in the victim's mind <i>ie. You must deal with this matter now or you will be arrested.</i></p> <p>Often other indictable offences are preferred depending on the circumstances, such as money laundering, the criminal group offences, identity offences and drug offending. However, it is questionable whether this necessarily requires an additional form of aggravation for an accompanying fraud offence.</p> <p>2) Any organised group involved in systemic offending, such as a boiler room, cold call, card skimming, should be considered a circumstance of aggravation and be liable for a higher maximum penalty.</p> <p>There are instances where a single offender commits a high value fraud in the many millions of dollars. A fraud offence of this magnitude should also attract the higher penalty.</p> <p>Any change needs to be considered carefully to not over-complicate the existing offences.</p>
		<p>8.5: Other aggravated fraud offences</p> <p>(1) Should there be any other aggravated forms of the main fraud offences? Why or why not?</p>	<p>1) Yes.</p> <p>It is noted that the <i>Crimes (Sentencing Procedure) Act</i> provides scope to increase penalties where various aggravating features are present. Noted that in a defended matter the</p>

		<p>(2) If any aggravated forms of the main fraud offences were to be introduced:</p> <p>(a) what forms of aggravation should be included, and</p> <p>(b) what maximum penalties should apply?</p>	<p>circumstances of aggravation need to be proven by the Prosecution as additional element of the offence. (See paragraph 8.57).</p> <p>For example, targeting older or vulnerable persons should be a circumstance of aggravation. This aggravation is caused by an abuse of trust, originating from a position of authority</p> <p>2) Any change needs to be considered carefully to not over-complicate the existing offences</p>
		<p>8.6: Indictable only offence</p> <p>(1) Should there be an indictable-only version of s 192E of the <i>Crimes Act 1900 (NSW)</i>? Why or why not?</p> <p>(2) If there were to be an indictable-only version of s 192E of the <i>Crimes Act 1900 (NSW)</i>:</p> <p>(a) how might it be identified, and</p> <p>(b) what maximum penalties should apply?</p>	<p>1) Yes, as discussed above, there are merits for the creation of strictly indictable offences for certain high-level fraud.</p> <p>It is noted that some jurisdictions already include a monetary amount that determines whether a matter may be dealt with summarily. The consultation paper refers to such a scheme in Western Australia.</p> <p>The consultation paper also compares aggravated and special aggravated offences particular to the housebreaking offences in the <i>Crimes Act 1900 NSW</i>.</p> <p>The more serious housebreaking offences are strictly indictable.</p> <p>2) There are many circumstances in which a fraud offence cannot be dealt with in a local court due to the high dollar value and complexities.</p> <p>An organised fraud offence would be appropriate for many types of offending such as the boiler room or systemic investment scams.</p> <p>Forms of aggravation could include:</p> <ul style="list-style-type: none"> • Offences that target the elderly or vulnerable persons. • Abuse of a position of trust. • By monetary value (eg any fraud over \$100,000) • 20-year penalty commensurate with the top tier money laundering offence <p>Relevantly, the ODPP has highlighted the “disparity” between the maximum penalty for fraud and money laundering and how this may have a practical effect at sentencing proceedings.</p>

			An example is a criminal group situation, where a principal offender commits the substantive fraud offences and another lesser syndicate member commits the money laundering offence. The NSWPF has witnessed cases where penalties for these two offences can differ greatly.
		<p>8.7: Low level offending</p> <p>What alternative approaches could deal appropriately with low level fraud offending?</p>	Low level and/or first-time offending could be dealt with by way of a diversion program or good behaviour bond. The NSW Police Force believes the current offences and penalties are satisfactory.
		<p>8.8: Aggravating factors</p> <p>What amendments, if any, are required to the aggravating factors in s 21A of the <i>Crimes (Sentencing Procedure) Act 1999 (NSW)</i> in order to reflect aggravating factors that are relevant to fraud offences?</p>	The provisions of Sect 21A are quite comprehensive. An amendment to consider would be “the offence was designed to cause fear in the mind of the victim”.