

4 November 2022

NSW Sentencing Council
GPO Box 31
Sydney NSW 2001

By email: sentencingcouncil@justice.nsw.gov.au

Dear The Honourable Peter McClellan AM,

Response to the Consultation Paper: Fraud - review of sentencing for fraud and fraud related offences

Thank you for the opportunity to provide a submission to the Sentencing Council in response to the Consultation Paper: Fraud (CPF).

The Office of the Director of Public Prosecutions (ODPP) made a preliminary submission to the Sentencing Council on the 3 February 2022 (Annexure 1). This submission should be read in conjunction with our preliminary submission.

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?**

The ODPP primarily prosecutes indictable offences that arise from Part 4AA of the *Crimes Act 1900* (**Fraud Offences**). This Office has limited involvement in the prosecution of fraud related offences outside of Part 4AA; offences that arise under different legislation; or the prosecution of fraud and fraud related offences that are summary offences only. As a result, the Office does not maintain or have access to any statistics regarding the use and operation of such offences. The CPF provides limited information regarding the use and charging of such offences. Although it is accepted that the broad nature of Fraud Offences in Part 4AA overlaps with some of the specific fraud and fraud related offences, the utility of those charges can only be assessed against evidence and statistics that indicate whether there is ongoing, and effective use of those charges. Accordingly, at this stage the ODPP does not make a submission on this issue.

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

As outlined in our preliminary submission, the ODPP has identified two issues that relate to the structure of fraud and fraud related offences in NSW:

Office of the Director of Public Prosecutions

175 Liverpool Street	Phone	02 9285 8888
Sydney NSW 2000	Fax	02 9285 8601
Locked Bag A8	TTY	02 9285 8646
Sydney South NSW 1232		
DX 11525 Sydney Downtown	odpp.nsw.gov.au	

- i) Disparity between Fraud offences and Proceeds offences¹
- ii) Duplicity and rolling-up charges²

The preliminary submissions made in respect to these issues remain relevant and are addressed further below.

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?**

The ODPP supports extending victims impact statements (VIS) for serious fraud and fraud related offences. In our experience it is not uncommon for victims of serious Fraud Offences to experience mental and emotional harm in addition to the financial loss. This is pronounced in circumstances where the victim has not received restitution for their loss. The CPF also outlines that fraud victims also experience relational or social trauma that can surpass the physical and emotional damage of street level crimes.³

A VIS is an appropriate mechanism by which a court can recognise the harm done to the victim of the crime and the community. This is particularly important where the circumstances are such, that it may be open to a court to consider the existence of the s 21A aggravating factor that 'the injury, emotional harm, loss or damage caused by the offence was substantial'.⁴

In our experience, the operation of the statutory victim impact scheme provides a direct opportunity for the victim's experience to be acknowledged and heard by the justice system, which is an important factor that assists a victim's recovery from trauma, or emotional harm.

- (2) If so, under what circumstances and conditions should they be available?**

The ODPP supports the introduction of a VIS for serious fraud offences that are prosecuted on indictment. The ODPP routinely assists in the preparation of VIS in matters that meet the statutory requirement for such statements and is able to resource this process for serious fraud offences.

We acknowledge that in almost all cases of fraud there will be an impact upon the targeted business, institution or individual. The impact of the offence will vary depending on the type of fraud, and the gravity and scale on which the fraud is perpetuated. However, it is primarily the serious examples of Fraud Offences that give rise to the more substantial type of harm alluded to above, and that justifies closer consideration by the court through a VIS.

It will undoubtedly concern some stakeholders that introducing a VIS for fraud and fraud related offences may impose an undue burden on justice stakeholders and the Court system. The ODPP proposal to limit the availability of a VIS to serious fraud matters largely address this concern. The statistics provided in the CPF outlines that in 2021, the Local Court dealt with 12,425 finalised charges for fraud and fraud related offences, the majority (10,263) were for fraud offences under s 192E. In the corresponding year, the ODPP finalised 155 indictable fraud charges under Part 4AA of the *Crimes Act 1900*. The table below outlines that a similar number of indictable Part 4AA fraud charges were finalised each year across 2019 and 2020. Reference is made to these numbers to demonstrate that minimal additional resources will be required, if the availability of the VIS was limited to serious fraud offences that are prosecuted on indictment.

¹ ODPP Preliminary submission; Point I, Page 1

² ODPP Preliminary submission; Point III, Page 3

³ Consultation Paper Fraud; p 24

⁴ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A (2)(g)



Fraud Offences committed to higher court	2019	2020	2021
Committed for Trial	41	47	62
Committed for Sentence	115	106	93
Total	156	153	155

Question 3.2 Business impact statements

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

The ODPP supports the introduction of business impact statements from a representative of a corporate victim of serious fraud. Similar to the previous submission above, a VIS should only be available to matters which are prosecuted on indictment.

The introduction of a business impact statement would allow, in appropriate cases, for businesses to outline the impact of fraud in greater detail than simply a monetary or financial loss. Although this may have limited utility for a larger business which are generally better able to absorb the loss, the impact on a smaller business frequently extends beyond a monetary figure. For example this can include, dissolution of a company due to the financial loss, loss of market value, reputational damage and leaving employees without employment. The current sentencing framework provides limited means for such evidence to be put before the sentencing court. The inclusion of such factors provides the court with relevant information to allow a thorough and realistic assessment of the consequences of fraud upon business entities.

This approach would be consistent with the England and Wales⁵ and we would support the framework in existence in that jurisdiction with a view that a business impact statements cover:

- Financial impact as a direct result of the crime
- Other indirect financial costs
- Non-financial impact such as reputational damage

Question 3.3 Reparation

(1) Are reparation orders, as an adjunct to sentencing, appropriate or useful in fraud cases? Why or why not?

The current statutory scheme for reparation orders allows for orders to made by a criminal court for restitution of property, or for compensation for the loss sustained.⁶ An order for restitution of property under s 43 of the *Criminal Procedure Act 1986*, may be made whether or not the court finds the person guilty of an offence of acquiring or disposing the property. Although the court does not require a conviction to make such an order, generally such orders are rarely made in the absence of a conviction for that offence or a related offence.

In relation to orders made under s 94 and s 97 of the *Victims Rights and Support Act 2013*, such orders are only available when a matter reaches sentencing and the offender has been convicted. In fraud offences that are prosecuted by indictment, it is not uncommon for sentence proceedings to be reached 12 months or more after charges are laid. In those circumstances the length of time since the initial discovery and investigation of the fraud to sentence can extend to

⁵ *Domestic Violence, Crime and victims Act 2004* (UK), s 32 -33; UK, and Ministry of Justice, *Code of Practice for Victims of Crime in England and Wales (2020)*; [7.6]-[7.8]

⁶ *Criminal Procedure Act 1986* (NSW) s 43, and *Victims Rights and Support Act 2013* (NSW) s 94, 97



several years and the operation of reparation orders may not meet its objectives in a timely manner. However, it is also important to acknowledge that the overwhelming majority of fraud and fraud related offences are prosecuted to finality in the Local Court in a significantly shorter period.

Although civil action for restitution is an avenue available to victims, the availability of reparation orders as an adjunct to sentencing can, and does, avoid the need to initiate separate proceedings. It remains a useful option in assisting the victim in remedying the loss suffered. The ODPP supports the continued operation of reparation orders.

(2) Should more use be made of reparation orders at sentencing? How should such use be encouraged?

A decision for the ODPP to apply for a reparation order is a discretionary decision that turns on a number of factors including the view of the victim, whether civil action has been commenced, any information about an offender's financial status, whether repayment or part repayment has been made, jurisdictional limits of the Court and any other relevant factors. The ODPP is of the view that reparation orders are being used appropriately in fraud matters that are prosecuted by this office.

It is not uncommon for an application for reparation orders to be dismissed by a Court on the basis that the offender is impecunious, or has already disposed of the proceeds of their fraud and has limited tangible assets. This factor militates against making reparation orders mandatory.

(3) What changes could be made to make these orders more effective?

Any reparation order made by the Court is subject to jurisdictional limits. In the Local Court the limit is \$100,000, in the District Court, the limit is \$750,000. As acknowledged in the CPF, fraud and fraud related offences within both jurisdictions frequently involve financial loss that exceeds those jurisdictional limits. Accordingly, the jurisdictional limit can be an impediment for a victim obtaining a reparation order commensurate to the loss suffered. Consideration should be given to a legislative amendment which permits reparation orders, particularly if it is by consent of the parties, to be made without the need to initiate civil action in a different jurisdiction.

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?

The ODPP does not support the introduction of sentencing guidelines as currently in place in England and Wales.

First, it should be noted that the mechanism by which guideline judgments are developed is contained in Part 3 Div 4 of the *Crimes (Sentencing Procedure) Act 1999*, which involves a different process to that available in England and Wales, where sentencing guidelines are developed extra-curially by their Sentencing Council.

Second, the nature of fraudulent offending is continually evolving to take advantage of technological change. The breadth of the types of fraudulent offending can be seen in the large number of fraud and fraud related offences that exist under NSW legislation.⁷ As outlined in the CPF, fraudulent offending can range from simple 'tap and go' credit card fraud, to sophisticated frauds, or individuals utilising insider knowledge or a position of trust to obtain a benefit. The application of the principles embodied in the *Crimes (Sentencing Procedure) Act 1999* to fraud

⁷ Consultation Paper Fraud; see Chapter 2



offences, developed through the jurisprudence of the NSW Court of Criminal Appeal, are sufficiently flexible to account for the broad and evolving range of fraud and fraud related offences.

Third, the wide range of conduct involved in this type of offending makes it difficult to frame a guideline for fraud offences, given there is arguably no 'standard' case. Attempting to create such a guideline may undermine the flexibility and discretion required by sentencing courts to impose individual justice.

Fourth, the ODPP does not support the sliding scale of culpability and sentence starting points based on individual factors as required by the England and Wales model. The operation of that guideline requires a sentencing court to follow six distinct steps that lead to an appropriate sentence.⁸ Utilising the sliding scale of culpability and sentence starting points, in combination with the mandatory six steps would arguably be inconsistent with the foundational concept of instinctive synthesis that remains a hallmark of sentencing practice in NSW.

In our view, the England and Wales model is overly prescriptive in the manner in which each relevant factor must be taken into account. Such an approach would make the already difficult task for a sentencing court even more complex and prone to error.

(2) How could any such guidance be implemented?

Not applicable, given the views of the ODPP.

7. Sentencing outcomes

Question 7.1 Sentence for fraud

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

The ODPP consider that sentences imposed for fraud and fraud related offences are generally appropriate. The ODPP has not identified any underlying or systemic issues that relate to the type and length of punishment that is imposed at sentence. This is reflected by the BOCSAR statistics that indicate for the two versions of the main fraud offence (s 192E (1)(b) and s 192E(1)(a)) that are dealt with in the District Court:

- S 192E(1)(b) – Dishonestly obtain financial advantage - 78% were sentenced to imprisonment with an average head sentence of approximately 3 years and 6 months.
- S 192E(1)(a) – Dishonestly obtain property by deception – 48.6% were sentenced to imprisonment with an average head sentence of approximately 2 years.

However, as outlined in our previous preliminary submission, we reiterate the issues that arise in relation to duplicity and 'rolled up' charges⁹ and submit that a facilitative provision similar to s 193FA of the *Crimes Act 1900* should be considered for fraud offences.

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

The availability of a fine as a sentencing option is appropriate in fraud and fraud related offences. The wide variance in the types, nature and scale of fraudulent offending require a sentencing court to have the full range of sentencing options at its disposal. A sentencing court is the appropriate body to determine whether a fine is a suitable sentence in any given case.

⁸ Consultation Paper Fraud; Figure 6.1 Page 68

⁹ ODPP Preliminary submission, Point III, Page 3



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?**

The ODPP supports increasing the maximum penalty for fraud under s 192E. The current maximum penalty for fraud is 10 years. As noted in the preliminary submissions of the Commonwealth Director of Public Prosecutions, speaking about the cognate Commonwealth offence, this maximum penalty '*applies to all fraud offences from unsophisticated frauds of 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 trust to systematically defraud substantial amounts, sometimes in the many tens of millions of dollars*'.¹⁰ Given the increasing complexity, quantum and scale of fraudulent conduct, a more significant maximum penalty should be available to ensure that a sentencing court is able to impose a commensurate sentence for the most serious types of fraudulent conduct.

The ODPP is prosecuting an increasing number of serious fraudulent offences where the quantum involved surpasses a million dollars and upwards into tens of millions. An increase in the maximum penalty would demonstrate the seriousness with which the legislature regards this type of offending and in serious cases would ensure that any sentence imposed would properly punish and deter future conduct of that nature.

We also refer to our preliminary submission regarding the disparity between maximum penalties for fraud offences and proceeds offences as an additional basis to increase the maximum penalty so as to avoid artificial sentencing when both offences arise out of the same set of circumstances.¹¹

- (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?**

For the same reasons explained in our answer to Question 8.1, the ODPP submit that the maximum penalties for the remaining Fraud Offences under Part 4AA should be similarly increased. We do not take a position in relation to fraud related offences in other legislation.

- (3) Should the maximum penalties for and fraud or fraud-related offences be increased? Why or why not?**

See response to Question 8.1 (2).

Question 8.2 Tiered Maximum penalties

- (1) Should the maximum penalty for the fraud offences under s 192E *Crimes Act 1900* (NSW) be tiered according to the value of the fraud? Why or why not?**

The ODPP considers that there are valid arguments both for and against such an approach. Currently, the quantum of the fraud is a particular of the offence, which the sentencing court will take into account in assessing its objective seriousness. The introduction of tiered maximum penalties has the capacity to add what is arguably an unnecessary layer of complexity to charge selection, the tribunal of fact's consideration of the elements of the charge should the matter be contested, and the sentencing process. The introduction of tiered maximum penalties will also be inherently arbitrary demarcation between fraudulent conduct, and it is not necessarily the case that quantum is the primary determinative factor of the objective seriousness of any particular

¹⁰ CDPP Preliminary submission: [16] Page 3

¹¹ ODPP Preliminary submission; Point I, Page 1



fraud matter; there may be matters where the loss to the particular complainant is so significant, and involving such a profound abuse of trust, that the conduct is properly assessed at a high level of seriousness notwithstanding that a modest amount was defrauded.

Nevertheless, it must be acknowledged that quantum is a relevant factor in assessing objective seriousness that is common to all Fraud Offences. The introduction of tiered maximum penalties would also be consistent with Commonwealth fraud and proceeds of crime offences and with NSW proceeds of crime offences.

Should tiered maximums be introduced, this would increase the need, in the ODPP's view, for a statutory provision roll-up fraud offending.

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?

In the event that tiered maximum penalties are to be introduced for s192E offences, the ODPP considers that regard should be had to the tiers that present apply to Commonwealth fraud and proceeds offences, as well as NSW proceeds of crime offences, in determining the appropriate values and maximum penalties.

Question 8.3 Organised or continuing fraud offence

(1) Should there be an aggravated fraud offence for organised fraud or for continuing criminal enterprise? Why or why not?

The ODPP does not consider there to be a need for the introduction of an aggravated fraud offence for organised fraud or continuing criminal enterprise. This factor is expressly recognised as an aggravating factor under s 21A(2)(n) of the *Crimes (Sentencing Procedure) Act 1999* 'the offence was part of a planned or organised criminal activity'. A sentencing court is able to appropriately take this factor into account under the current legislative scheme.

If there is to be such an offence:

(a) What form should it take, and

Not applicable, given the views of the ODPP.

(b) What maximum penalty should apply?

Not applicable, given the views of the ODPP.

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?

The ODPP is of the view that fraud committed in relation to other indictable offences (for example, in furtherance of terrorism or drug importation) would generally be covered by the aggravating factor in s 21A(2)(n) - 'the offence was part of a planned or organised criminal activity'. Generally speaking, frauds that are committed in relation to other indictable offences would be undertaken with a view to securing finance for the other offence. In those circumstances, the fraud would be a preparatory step for the indictable offence and could be properly considered as part of a planned or organised criminal activity.

Additionally, the ODPP envisages that if the other indictable offence is sufficiently serious, it should be charged as a stand-alone offence. In those circumstances the sentencing court will sentence individually for the other offending conduct, vitiating the need for the creation of a separate aggravated offence. The ODPP does not support creating a specific offence for fraud



committed in relation to other indictable offences.

(2) If there was such an aggravated offence:

(a) What offences should it apply to

Not applicable given the views of the ODPP.

(b) How should these offences be related to the fraud offending, and

Not application given the views of the ODPP.

(c) What maximum penalties should apply?

Not applicable given the views of the ODPP.

Question 8.5 Other aggravated fraud offences

(1) Should there be any other aggravated forms of the main fraud offences? Why or why not?

The ODPP does not consider there to be a need for any other aggravated forms of the main Fraud Offences. The current Part 4AA Fraud Offences have been intentionally drafted to be sufficiently broad to cover a range of offending conduct. This, in combination with the aggravating factors that exist within s 21A of the *Crimes (Sentencing Procedure) Act 1999*, provides the Court with the appropriate flexibility to account for all the relevant factors for sentencing offences of this type.

(2) If any aggravated forms of the main fraud offences were to be introduced:

(a) What forms of aggravation should be included, and

Not applicable given the views of the ODPP.

What maximum penalties should apply?

Not applicable given the views of the ODPP.

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?

Consistent with our position in the preliminary submission¹², the ODPP does not support the introduction of an 'indictable-only version' of s 192E offence. Although other jurisdictions create indictable offences based on the fraudulent conduct exceeding a particular monetary value, in our view this approach does not properly account for the other relevant considerations, including the sophistication and duration of the fraud, the amount possibly repaid to the victims, abuse of positions of trust etc.

In our experience, serious fraud offences are appropriately referred by police prosecutors so that the question of an election may be considered, and Chapter 6 of the Prosecution Guidelines ensures that all relevant factors are considered in the determination of these referrals.

(2) If there were to be an indictable-only version of s 192E *Crimes Act 1900* (NSW):

(a) How might it be identified, and

¹² ODPP Preliminary submission; Point IV, Page 4



Not applicable given the views of the ODPP.

(b) What maximum penalties should apply?

Not applicable given the views of the ODPP.

Question 8.7 Low level offending

(1) What alternative approaches could deal appropriately with low level fraud offending?

The ODPP considers that the current approach for dealing with most types of low-level fraud offending is appropriate. As indicated in the BOCSAR statistics provided in the CPF, in 2021 the Local Court dealt with 12,425 finalised charges for fraud and fraud related offences compared with the 155 serious Fraud Offences finalised in the District Court. The Local Court deals with the vast majority of fraud and fraud related matters and has significant experience in dealing with the full range of fraudulent conduct, including low level fraud offending. The court is best positioned to determine the appropriate penalty, noting that in applicable cases the court has the discretion to impose sentences that involves no conviction, or minimal penalty. The ODPP does not support the creation of a summary only offence.

There may, however, be some benefit in the lowest level of fraud offending (e.g. 'tap and go' credit card fraud under \$100) being prosecuted by way of Criminal Infringement Notices. This may obviate the need for offenders to attend Court with a subsequent reduction in the caseload of the Local Court. We acknowledge that this approach may be undermined by the possibility that such offenders may not have the means to pay the infringement notice. Any move towards this approach should be accompanied by a statutory review of the provision with a view to assessing whether this issue of non-payment and difficulties with enforcement processes arises. The possible net widening effect of such an approach should also be considered.

The ODPP is generally supportive of diversionary and restorative justice practices however given that this approach would primarily affect matters prosecuted by police prosecutors, we defer to their view on this issue. We would not support the introduction of these approaches for offences that are prosecuted by indictment given their serious nature.

Question 8.8 Aggravating factors

(1) 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?

The ODPP does not support any amendments to the aggravating factors in s 21A of the *Crimes (Sentencing Procedure) Act 1999*.

Thank you for the opportunity to make this submission. For any further information, please contact Johanna Pheils, Deputy Solicitor for the Public Prosecutions (Legal), Solicitor's Executive, Office of the Director of Public Prosecutions on [REDACTED] or [REDACTED].

Yours faithfully

Sally Dowling SC
Director of Public Prosecutions

