

Fraud and fraud- related offences in New South Wales

Legal Aid NSW submission to
the New South Wales Sentencing
Council

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Acknowledgement	4
About Legal Aid NSW	5
Executive Summary	6
Recommendations	7
Question 2.1: Fraud and fraud related offences in NSW	10
Recommendation 1	10
Question 3.1: Victim Impact Statements	11
Recommendation 2	12
Question 3.2: Business Impact Statements	13
Recommendation 3	13
Question 3.3: Reparation	14
Recommendation 4	16
Question 6: Fraud Sentencing Guidelines in England and Wales	17
Recommendation 5	19
Question 7.1: Sentences outcomes	20
Recommendation 6	22
Question 8.1: Maximum penalties for fraud	23
Recommendation 7	26
Question 8.2: Tiered maximum penalties	27
Recommendation 8	28
Question 8.3: Organised or continuing fraud offence	29

Recommendation 9.....	30
Question 8.4: Fraud committed in relation to other indictable offences	31
Recommendation 10.....	31
Question 8.5: Other aggravated fraud offences	32
Recommendation 11.....	32
Question 8.6: Indictable only offence	33
Recommendation 12.....	33
Question 8.7: Low level offending	34
Recommendation 13.....	35
Question 8.8: Aggravating factors	36
Recommendation 14.....	37

Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise their continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of Family Dispute Resolution Services, family violence services and the early triaging of clients with legal problems through the Family Law Early Intervention Unit.

Legal Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family Law Courts, all six specialist Children's Courts and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

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Executive Summary

Legal Aid NSW welcomes the opportunity to make a submission to the Sentencing Council on fraud and fraud-related offences in New South Wales. Our submission is informed by the legal services we provide to individuals charged with fraud and fraud-related offences, including Aboriginal and Torres Strait Islander people and victims of domestic violence.

Our Criminal Law Division regularly provides free legal advice and assistance to people charged with fraud and fraud related offences and represents those people in the Local, District and Supreme Courts on both a duty basis and under a grant of aid. In the 2021-2022 financial year, Legal Aid NSW provided 4824 inhouse duty, minor assistance and advice services to people charged with fraud and fraud-related offences. Of those services, 1474 were provided to people who identified as female, and 879 of those services were provided to people who identified as Aboriginal or Torres Strait Islander. In that same year we granted 1,184 applications for legal aid for fraud and fraud-related offences, and of those applications 340 were for people who identified as female and 218 were for people who identified as Aboriginal or Torres Strait Islander.

Legal Aid NSW considers the sentences currently being imposed for fraud and fraud-related offences by NSW sentencing courts as generally appropriate. Legal Aid NSW supports changing some aspects of fraud offences, including introducing tiered maximum penalties, however Legal Aid NSW is concerned that some of the proposed changes may further disadvantage our client base, particularly Aboriginal and Torres Strait Islander people and victims of domestic violence.

Recommendations

Recommendation 1

No changes should be made to the specific fraud and fraud-related offences outside of part 4AA of the *Crimes Act 1900* (NSW).

Recommendation 2

Whilst we acknowledge that victims of fraud may wish to be heard in sentencing proceedings, Legal Aid NSW does not support extending victim impact statements to fraud and fraud-related offences.

Recommendation 3

Legal Aid NSW does not support the introduction of business impact statements for fraud and fraud-related offences.

Recommendation 4

Whilst Legal Aid NSW does not oppose the use of reparation orders at sentencing for fraud and fraud-related offences, we suggest the following amendments be made to the *Victims Rights and Support Act 2013* (NSW) to ensure that reparation orders are made in appropriate circumstances and do not amount to undue punishment:

1. Add at the end of section 99 (d) the financial circumstances of the offender and their capacity to pay a compensation order.
2. Delete the word 'immediately' in section 100 and replace it with the words "within 28 days". Retain "or within such period (if any) as is specified in the direction".
3. Add a subsection to the existing section 100 to state that "If an offender is in custody any order for compensation shall be stayed until 28 days after the offender is released".

Recommendation 5

Legal Aid NSW does not consider NSW to be in a position to introduce sentencing guidelines of the kind currently in operation in UK, nor do we consider it necessary or appropriate to introduce aspects of those guidelines in isolation.

Recommendation 6

Legal Aid NSW views current sentences imposed for fraud and fraud-related offences as appropriate. We also consider fines to be an appropriate sentence for fraud and fraud-related offences in certain circumstances, however we note the disproportionate impact of fines on people experiencing disadvantage and vulnerability.

Recommendation 7

Legal Aid NSW considers current maximum penalties for fraud and fraud-related offences to be appropriate.

Recommendation 8

Legal Aid NSW supports maximum penalties under section 192E of the *Crimes Act 1900* (NSW) being tiered depending on the value of the fraud.

Legal Aid NSW suggests the following tiers:

1. Maximum penalty of 5 years' imprisonment if the value of the property is less than \$10,000, and
2. Maximum penalty of 10 years if the value of the property is \$10,000 or more.

Recommendation 9

Legal Aid NSW does not support the introduction of an organised, continuing or aggravated fraud offence.

However, if an organised, continuing or aggravated fraud offence were to be introduced, Legal Aid NSW submits that the maximum penalty should not exceed 15 years imprisonment, and the offence should contain the following elements:

1. The amount defrauded exceeds \$100,000; and

2. The fraud is the result of a prolonged deception (for example deceptive conduct over a 12 month period); and
3. The offender abused a position of trust or authority.

Recommendation 10

Legal Aid NSW does not support the introduction of an aggravated offence of committing a fraud in a way that is related to another indictable offence.

Recommendation 11

Legal Aid NSW does not support the introduction of any other aggravated forms of the main fraud offences.

Recommendation 12

Legal Aid NSW does not support the introduction of an indictable only version of section 192E of the *Crimes Act*.

Recommendation 13

Legal Aid NSW supports the introduction of diversionary options for adult low-level fraud offenders in the following forms:

1. A scheme similar to Juvenile Youth Justice Conferences, but adapted to cater for adult offenders, and
2. Infringement Notices.

However, Legal Aid NSW does not support the use of infringement notices for fraud and fraud-related offences committed by children, particularly those aged under 14 years.

Recommendation 14

Legal Aid NSW considers current aggravating factors in section 21A of *Crimes (Sentencing Procedure) Act 1999* (NSW) to be appropriate.

Legal Aid NSW recommends adding as a factor in mitigation that the offence was committed by a person who was at the time of the offence the victim of domestic violence.

Question 2.1: Fraud and fraud related offences in NSW

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?

AND

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

In our experience fraud-related offences outside of Part 4AA of the *Crimes Act 1900* (NSW) (**Crimes Act**) are rarely charged, and the conduct captured by them is very specific. Their underutilization may be the result of a lack of knowledge and training. Nevertheless, Legal Aid NSW considers these additional offences (which usually carry lower maximum penalties) useful in negotiations between prosecution and defence. To this end, these additional offences help facilitate the administration of justice by reducing the number of defended hearings and trials for fraud allegations.

Legal Aid NSW views the lesser penalties for these offences as justified. If the fraud is serious, it is open to the prosecution to charge an offence under Part 4AA of the *Crimes Act*.

Recommendation 1

- No changes should be made to the specific fraud and fraud-related offences outside of part 4AA of the *Crimes Act 1900* (NSW).

Question 3.1: Victim Impact Statements

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 statutory victim impact statement scheme in NSW extends only to certain serious offences involving physical harm, actual and threatened violence and sexual offences. It does not currently allow victims of other criminal offences to provide a victim impact statement at sentencing.

Whilst acknowledging that victims of fraud may wish to be heard in sentencing proceedings, and that the impacts of fraud often go beyond being purely financial, we are not convinced that it would be appropriate for victim impact statements to be introduced for this category of offending. We note that when available, the prosecution is able to adduce evidence at the time of sentencing showing the impact of the offending on victims including, for example, by presenting financial records showing the extent of any financial loss suffered. The prosecution is therefore already able to canvass, at least in part, matters likely to be addressed in a victim impact statement.

Legal Aid NSW is concerned that the introduction of victim impact statements in fraud proceedings would make the sentencing process longer and more complex and would place an additional burden on an already overstretched criminal justice system, contributing to further delays.

Further, Legal Aid NSW notes the statutory scheme for victim impact statements does not limit any other law by, or under which a court may receive information relevant to sentence.¹ Accordingly, courts can, and do receive

¹ *Porter v R* [2008] NSWCCA 145 [54] (Bell JA, Johnson and McCallum JJ); *Siganto v R* [1998] HCA 74, 194 CLR 656, 665–666. See also *Crimes (Sentencing Procedure) Act 1999 (NSW)* s 27(5).

material that bears upon the question of the emotional and financial impact of fraud. Accordingly, Legal Aid NSW does not consider statutory change to be necessary.

If so, under what circumstances and conditions should they be available?

Although we do not support the introduction of victim impact statements in fraud related matters, if this practice was nevertheless introduced, we believe it should be limited to sentencing proceedings in the District Court. Sentencing proceedings in the District Court are allocated substantially more time than those conducted in the Local Court and therefore the introduction of victim impact statements would be less burdensome in the District Court.

If victim impact statements were to be introduced for fraud and fraud-related offences, consideration would also need to be given to the allocation of additional resources given the likely increase in the length and complexity of sentencing proceedings.

Recommendation 2

- Whilst we acknowledge that victims of fraud may wish to be heard in sentencing proceedings, Legal Aid NSW does not support extending victim impact statements to fraud and fraud-related offences..

Question 3.2: Business Impact Statements

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

Legal Aid NSW acknowledges that the ramifications of fraud on businesses vary depending on their size and corporate structure, and might extend beyond purely financial ones. Nevertheless, Legal Aid NSW does not support the introduction of business impact statements for fraud and fraud-related offences in NSW for the reasons provided above, namely, that evidence of harm caused by the fraud can be adduced by prosecution in the course of sentencing proceedings, and that the introduction of business impact statements would prolong the sentencing process placing additional burden on the criminal justice system.

Recommendation 3

- Legal Aid NSW does not support the introduction of business impact statements for fraud and fraud-related offences.

Question 3.3: Reparation

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

Legal Aid NSW acknowledges that for most victims of fraud-related offences financial reparation is a priority. Legal Aid NSW agrees with the Office of the Director of Public Prosecutions' (ODPP) observation 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".²

Legal Aid NSW is not opposed to the use of reparation orders under section 43 of the *Criminal Procedure Act 1986* (NSW) and sections 94 and 97 of the *Victims Rights and Support Act 2013* (NSW) (VRS Act) in certain circumstances. We agree that they can be appropriate and useful in fraud and fraud-related proceedings. Reparation orders, as an adjunct to sentence proceedings, facilitate victims recovering losses without them having to initiate civil proceedings of their own accord.

**Should more use be made of reparation orders at sentencing? How should such use be encouraged? AND
What changes could be made to make these orders more effective?**

Whilst Legal Aid NSW is not opposed to the use of reparation orders in fraud related matters, we do not support making such orders mandatory. We acknowledge that at the moment reparation orders are rarely used. However, in our view this is not an issue that requires legislative change, but better training and education of both prosecution and the judiciary around the availability and appropriateness of these types of orders.

² NSW Office of the Director of Public Prosecutions, Submission PFR05 to New South Wales Sentencing Council, *NSW Sentencing Council Review of Fraud and Fraud-Related Offences* (30 March 2022) 5.

Legal Aid NSW is concerned that the current legislation does not include a requirement for the court to consider an offender's capacity to pay an order for compensation. Under section 99 of the VRS Act when determining whether or not to give a direction for compensation, and in determining the sum to be paid under such a direction, the court must have regard to the following:

- (a) any behaviour (including past criminal activity), attitude or disposition of the aggrieved person which directly or indirectly contributed to the injury or loss sustained by the aggrieved person,
- (b) any amount which has been paid to the aggrieved person or which the aggrieved person is entitled to be paid by way of damages awarded in civil proceedings in respect of substantially the same facts as those on which the offender was convicted,
- (c) such other matters as it considers relevant.³

Most of the clients we assist who are charged with fraud related offences have very limited means with little or no capacity to pay a reparation order. Making an order against impecunious offenders brings no benefit to the victim and may be counterproductive by setting up expectations which cannot be met. It also places an additional burden on already disadvantaged individuals. If the use of reparation orders was to increase, Legal Aid NSW recommends that section 99 of the VRS Act be amended to include an express requirement to consider the offender's financial circumstances and their capacity to pay prior to making an order for compensation.

We note that section 100 of the VRS Act requires an order for compensation to be paid immediately (unless a period for payment is specified in the Order). In our experience, many offenders' capacity to pay a reparation order is even more limited in the short term. We therefore suggest that the legislation be

³ *Victims Rights and Support Act 2013* (NSW) s 99 ('VRS Act').

amended to require that the order be paid within 28 days (unless a period for payment is specified in the Order).

We also note that if an offender is serving a custodial sentence, they are unlikely to have the capacity or ability to pay a reparation order until they are released. There is currently no acknowledgement in the legislation of an offender's inability to access funds whilst in custody. Accordingly, Legal Aid NSW supports the introduction of a provision which stays a reparation/compensation order for the period of time during which an offender remains in custody.

Legal Aid NSW also notes that in some instances, particularly tap-and-go fraud cases, the victim can report the fraud to their financial institution, and they will often then be reimbursed by them. In these types of matters, care needs to be taken to ensure that the victim is not compensated twice for their loss.

Recommendation 4

- Whilst Legal Aid NSW does not oppose the use of reparation orders at sentencing for fraud and fraud-related offences, we suggest the following amendments be made to the Victims Rights and Support Act 2013 (NSW) to ensure that reparation orders are made in appropriate circumstances and do not amount to undue punishment:

- Add at the end of section 99 (d) the financial circumstances of the offender and their capacity to pay a compensation order.
- Delete the word 'immediately' in section 100 and replace it with the words "within 28 days". Retain "or within such period (if any) as is specified in the direction".

Add a subsection to the existing section 100 to state that "If an offender is in custody any order for compensation shall be stayed until 28 days after the offender is released".

Question 6: Fraud Sentencing Guidelines in England and Wales

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?

How could any such guidance be implemented?

Legal Aid NSW has the benefit of employing a lawyer with firsthand experience of appearing in fraud-related matters for sentence under the Fraud Sentencing Guidelines in UK. We understand from our lawyer's experience that the sentencing guidelines for fraud offer many benefits.

From the defendant's perspective, the guidelines offer sentence predictability and consistency. The prosecution and defence will ordinarily discuss, and quite often agree on where the offence sits within the guideline's matrix before the matter even comes to a sentencing hearing. By identifying the starting point, both parties have a clear idea of the sentence range which the defendant faces, and defence lawyers are able to advise clients with a greater degree of certainty. Our solicitors note that this is not the case under the current sentencing regime in New South Wales, as sentences for fraud can vary significantly, and some judicial officers take a more lenient approach to sentencing for this type of offence than others. As a result, solicitors need to be more careful about how they manage their clients' expectations regarding their sentence.

To the extent that the guidelines offer clear sentence ranges as well as factors which determine the category of offending, the sentencing process is also seen as fairer and more transparent by the parties. Whilst judges may depart from the guidelines, it is our understanding that such departures are only made in exceptional circumstances, meaning that sentences ultimately handed down are quite predictable.

Once the starting point is identified, defendants who enter a guilty plea are given a discount on sentence which is applied to the starting point (the maximum sentence discount available is up to one-third of the total sentence, the default period actually served is one-half of the resulting term).

Our understanding is that the sentencing guidelines help make the sentencing process quicker and more efficient than is currently the case in New South Wales. In the course of identifying the sentencing starting point, factors bearing on the offender's culpability and level of harm caused by their offending are generally already canvassed and agreed on by the parties, removing the need to cover those issues extensively in submissions. Quicker sentencing procedures result in obvious cost savings for the entire criminal justice system. Although the guidelines appear quite prescriptive, our understanding is that they nevertheless allow for some judicial discretion, whilst delivering the benefits outlined above.

Whilst the UK sentencing guidelines for fraud and fraud related offences offer many benefits, we note that these guidelines exist alongside sentencing guidelines for many other offences. Sentencing according to guidelines is therefore quite common in UK and widely accepted. In contrast, there are only a handful of guideline judgments in New South Wales, and the concept of sentencing according to set guidelines is not widely supported. Creating sentencing guidelines for fraud in these circumstances, and in the absence of guidelines for other offences, would place this type of offending in an anomalous position. Whilst we acknowledge that there is a significant degree of variation in sentences for fraud related offences, this is not necessarily unique to this category of offending, so as to justify a unique sentencing approach.

We also note that some of the factors which help determine the offender's culpability or level of harm caused according to the guidelines are expressly set out in section 21A of the Crimes (Sentencing Procedure) Act, whilst others are covered by common law. The guidelines therefore do not add to the sentencing

principles already in existence in New South Wales for these types of offences, but the manner in which they are set out and applied is obviously very different.

Legal Aid NSW is concerned that cherry picking aspects of the guidelines which could be useful in New South Wales without taking a similarly comprehensive approach overall, risks causing unintended consequences, and could lead to a process which resembles mandatory sentencing. Legal Aid NSW is therefore of the view that whilst the UK sentencing guidelines offer many benefits, they operate in an environment that is set up for this kind of sentencing and are thoroughly considered. The introduction of sentencing guidelines for this category of offences should follow a broader consideration of sentencing practices in New South Wales. On that basis, Legal Aid NSW does not consider that there is a place for sentencing guidelines for fraud related offences of the kind that are in use in UK, or aspects thereof, in New South Wales at the moment, but we welcome the opportunity to be engaged in broader discussions on sentencing practices and the future role of guidance in sentencing overall.

Recommendation 5

- Legal Aid NSW does not consider NSW to be in a position to introduce sentencing guidelines of the kind currently in operation in UK, nor do we consider it necessary or appropriate to introduce aspects of those guidelines in isolation.

Question 7.1: Sentences outcomes

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

Legal Aid NSW agrees with both the Commonwealth Director of Public Prosecutions (**CDPP**) and the NSW Bar Association that fraud sentences are generally appropriate and that there “does not appear to be any systematic issues in terms of the purposes of sentencing being applied inappropriately by the courts”.⁴

Using statistics for offences under 192E(1)(a) of the Crimes Act as an example, we note the following:

1. The majority of offenders sentenced in the Local Court received a supervised community-based order whilst 18 per cent received a custodial sentence. When compared to other offences dealt with in the Local Court, the rate of imprisonment is actually quite high, which indicates that the Local Court treats offences under section 192E(1)(a) as serious.⁵
2. In the District Court 78.5 per cent of offenders received imprisonment. Again, this figure indicates that the District Court treats offences of this nature as serious and sentences accordingly.⁶

⁴ Commonwealth Director of Public Prosecutions, Submission PFR03 to New South Wales Sentencing Council, *NSW Sentencing Council Review of Fraud and Fraud-Related Offences* (6 April 2022) 13; NSW Bar Association, Submission PFR07 to South Wales Sentencing Council, *NSW Sentencing Council Review of Fraud and Fraud-Related Offences* (1 April 2022).

⁵ In 2020, 8.6% of all offenders sentenced in the Local Court were sentenced to imprisonment: NSW Bureau of Crime Statistics and Research (BOCSAR), ‘New South Wales Criminal Courts Statistics Jan 2016 – Dec 2020’, *BOCSAR* (Web Page, May 2021) <https://www.bocsar.nsw.gov.au:443/Pages/bocsar_publication/Pub_Summary/CCS-Annual/Criminal-Court-Statistics-Dec-2020.aspx>.

⁶ *Ibid*: in 2020, 70.8% of all offenders sentenced in the District Court were sentenced to imprisonment.

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

Legal Aid NSW acknowledges that in certain cases fines will be an appropriate sentence for fraud and fraud-related offences. However, Legal Aid NSW notes that fines will not reimburse the victims of this type of offending. Given the importance of financial reparation towards the victim in fraud and fraud-related offences, Legal Aid NSW considers fines to be counterproductive in many cases. We note that offenders may not have the funds to pay both a fine and a reparation order and they may prioritise the payment of fines ahead of compensating victims.

Additionally, we note that fines, unlike other penalties, raise issues of equity as some offenders will have the capacity to pay a large fine quite easily and avoid other penalties such as community service or even custody, whilst others will have no capacity to pay and may therefore be subject to more onerous penalties. There is significant research and literature that highlights the disproportionate impact of fines on people experiencing disadvantage and vulnerability.⁷ This includes Aboriginal and Torres Strait Islander people, single parents, young people, people in unstable housing, people on government benefits, people with a disability and unemployed people.⁸ In particular, the NSW Law and Justice Foundation Report, *Fines: are disadvantaged people at a disadvantage?* found that people experiencing disadvantage were less likely to have the financial and legal capability to handle their fine problems and were less likely to take any type of action, and therefore less likely to finalise their fines. The study found that these cumulative issues result in a cycle of fines, disadvantage and debt, where the increased vulnerability to fines, inaction,

⁷ See, eg, NSW Law Reform Commission (NSWLRC), *Penalty Notices* (Report No 132, February 2012). See also Zhigang Wei, High M. McDonald and Christine Coumarelos, 'Fines: are disadvantaged people at a disadvantage?' *Law and Justice Foundation of NSW* (February 2018).

⁸ Zhigang Wei, High M. McDonald and Christine Coumarelos, 'Fines: are Disadvantaged People at a Disadvantage?' (February 2018) *Justice Issues Paper 27, Law and Justice Foundation of NSW* 1.

further penalties and adverse consequences may continue to compound their disadvantage.⁹ Further, we note that fines may not be a successful deterrent if the person perpetrating the fraud has significant funds or assets hidden in reserve. For these reasons Legal Aid NSW does not consider fines under Part 2, Division 4 of the *Crimes (Sentencing Procedure) Act 1999* as an appropriate penalty in many circumstances.

Recommendation 6

- Legal Aid NSW views current sentences imposed for fraud and fraud-related offences as appropriate. We also consider fines to be an appropriate sentence for fraud and fraud-related offences in certain circumstances, however we note the disproportionate impact of fines on people experiencing disadvantage and vulnerability..

⁹ Ibid.

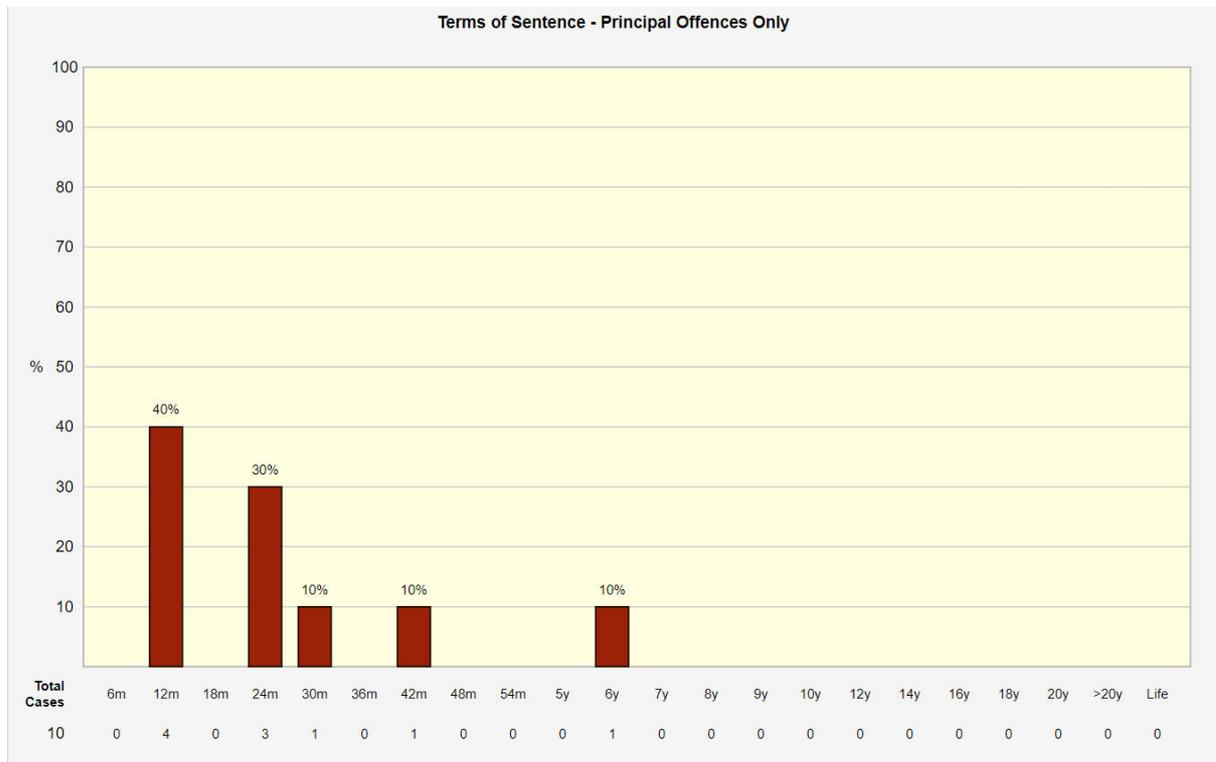
Question 8.1: Maximum penalties for fraud

Is the maximum penalty for fraud under s 192E of the *Crimes Act 1900* (NSW) sufficient? Why or why not?

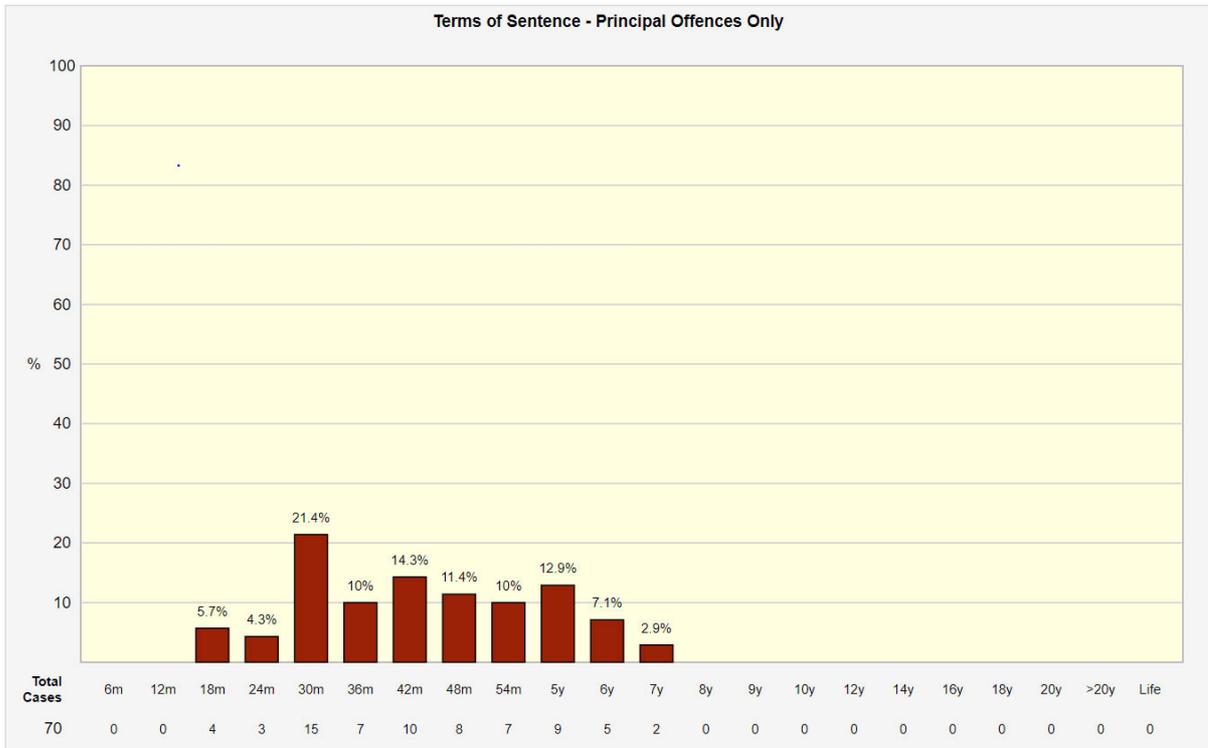
Legal Aid NSW considers the maximum penalty for offences under section 192E of the Crimes Act in their current form to be sufficient. We note the broad range of conduct captured in offences under this section and also note that the maximum penalty of 10 years imprisonment is very high for an offence that is typically dealt with in the Local Court.

Judicial Commission of New South Wales sentencing statistics for matters dealt with in the District Court show that the maximum penalty of 10 years imprisonment for offences under section 192E is generally not reached:

192E(1)(a)



192E(1)(b)



These statistics support our view that the maximum penalty for offences under section 192E of the *Crimes Act 1900* (NSW) is sufficient.

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?

Legal Aid NSW considers the maximum penalties for other fraud related offences to be sufficient. Many of the fraud related offences under the *Crimes Act* carry maximum penalties of 10 years imprisonment which is a substantial penalty and one that is rarely imposed in practice. We also point out that most of the offences with lower maximum penalties (such as offences under sections 256(3) and 256(2)) relate to possessing equipment to commit fraud rather than committing a substantive fraud.

Should the maximum penalties for any fraud or fraud-related offences be increased? Why or why not?

Legal Aid NSW is of the view that the maximum penalties for fraud-related offences are sufficient and this is supported by the fact that the maximum penalty is rarely imposed by sentencing courts.

The National Agreement on Closing the Gap aims to improve life outcomes for all Aboriginal and Torres Strait Islander people by working in partnership and share decision making with Aboriginal organisations and communities. The National Agreement was made between the Coalition of Aboriginal and Torres Strait Islander Peak Organisations, the Australian government, state and territory governments, and the Australian Local Government Association in July 2020. Reducing the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15 per cent by 2031 has been identified as an important target of the plan.¹⁰ Based on the most recent year of data, this target is not on track to be met in New South Wales.¹¹

Legal Aid NSW is concerned that raising maximum penalties for fraud and fraud-related offences as a response to complex or white-collar crime may disproportionately impact lower-level offenders, such as vulnerable offenders from low socio-economic backgrounds, who are more likely to commit opportunistic fraud (such as tap-and-go offences). Legal Aid NSW notes there is an over-representation of Aboriginal offenders in fraud matters generally, and a greater overrepresentation among those sentenced to imprisonment. Statistics show that while Aboriginal men make up 21.3 per cent of men being sentenced for fraud or fraud-related offences, they represent almost a third of those receiving a custodial sentence and only 14.5 per cent of those receiving an

¹⁰ Closing the Gap, 'Closing the Gap Targets and Outcomes', *Closing the Gap* (Web Page, November 2022) <<https://www.closingthegap.gov.au/national-agreement/targets>>

¹¹ Ibid. See also Productivity Commission, 'Socioeconomic outcome area 10 - Aboriginal and Torres Strait Islander adults are not overrepresented in the criminal justice system', *Closing the Gap Information Repository - Productivity Commission* (Web Page, 29 June 2022) <<https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area10>>.

unsupervised community sentence.¹² Further, figures show that while Aboriginal women make up just over a quarter of female offenders being sentenced for fraud or fraud-related offences, they represent just under half of those who receive a custodial sentence. These figures show care must be taken when considering whether to increase penalties for fraud and fraud-related offences so as not to unnecessarily contribute further to the overrepresentation of Aboriginal and Torres Strait Islander people in custody, in turn making it even harder to reach targets under Closing the Gap.

Recommendation 7

- Legal Aid NSW considers current maximum penalties for fraud and fraud-related offences to be appropriate.

¹² New South Wales Sentencing Council, *Fraud* (Consultation Paper, September 2022) 84.

Question 8.2: Tiered maximum penalties

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?

Legal Aid NSW supports introducing tiered maximum penalties for fraud offences under s 192E of the *Crimes Act 1900* (NSW). This is because there are large variations in the amounts of fraud dealt with under s 192E (for example a simple tap-and-go fraud involving \$100 versus a fraud resulting in a million-dollar loss). We believe tiered penalties would assist the court in determining the seriousness of the fraud offence by reference to the amount of the fraud.

Legal Aid NSW recognises that whilst sentencing courts can deal with differences in financial amounts of fraud when assessing objective seriousness, and also with reference to the aggravating factors under section 21A *Crimes (Sentencing Procedure) Act*, we are of the view that a tiered penalty system will better reflect the broad range of offences charged under section 192E and support more consistent sentencing outcomes.

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?

Legal Aid NSW recommends a similar tiered approach to that of dealing with property suspected of being proceeds of crime, being:

- 5 years' imprisonment if the value of the property is less than \$10,000, and
- 10 years if the value of the property is \$10,000 or more.

Recommendation 8

- Legal Aid NSW supports maximum penalties under section 192E of the *Crimes Act 1900* (NSW) being tiered depending on the value of the fraud.
- Legal Aid NSW suggests the following tiers:
 1. Maximum penalty of 5 years' imprisonment if the value of the property is less than \$10,000, and
 2. Maximum penalty of 10 years if the value of the property is \$10,000 or more.

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? AND

(2) If there is to be such an offence:

(a) what form should it take, and

(b) what maximum penalty should apply?

Legal Aid NSW does not support there being an aggravated fraud offence for organised fraud or for a continuing criminal enterprise and views the current fraud offences and maximum penalties as sufficient to deal with a broad range of fraud.

However, if a continuing/aggravated fraud offence were to be introduced we suggest the following elements:

1. That the amount of the fraud is \$100,000 or more; and
2. That the fraud is the result of a prolonged deception (for example deceptive conduct over a 12 month period); and
3. That the offender abused a position of trust or authority.

Legal Aid NSW is of the view that if introduced, such an offence should carry a maximum penalty of 15 years imprisonment.

If such a provision were introduced, Legal Aid NSW notes that caution must be exercised when drafting the provision to ensure that repeated, but low-level offending, is not captured in an aggravated form of the offence. Legal Aid NSW does not support an aggravated version of an offence requiring only three or more instances of fraud, given this could capture low level “tap-and-go”

offending where the card is used multiple times despite the offending being opportunistic and the overall amount defrauded low.

Legal Aid NSW recommends any reference to “continuing criminal enterprise” would need to be carefully defined so as not to capture any other criminal conduct, such as break and enter offences where a credit card is taken and used for minor purchases, as again, this has the potential to disproportionately target vulnerable offenders, including Aboriginal and Torres Strait Islander persons, as opposed to white collar crime.

Recommendation 9

- Legal Aid NSW does not support the introduction of an organised, continuing or aggravated fraud offence.
- However, if an organised, continuing or aggravated fraud offence were to be introduced, Legal Aid NSW submits that the maximum penalty should not exceed 15 years imprisonment, and the offence should contain the following elements:
 1. The amount defrauded exceeds \$100,000; and
 2. The fraud is the result of a prolonged deception (for example deceptive conduct over a 12 month period); and
 3. The offender abused a position of trust or authority.

Question 8.4: Fraud committed in relation to other indictable offences

Should there be an aggravated offence of committing a fraud in a way that is related to another indictable offence? Why or why not? AND

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?

Legal Aid NSW does not support an aggravated offence of committing a fraud in a way that is related to another indictable offence. In our view such an offence would not address white collar crime and would disproportionately target low level, opportunistic fraud, committed in the context of theft or break and enter offences. We are concerned that such an offence would disproportionately impact vulnerable clients, including Aboriginal and Torres Strait Islander individuals, who are facing other serious charges. These offenders already receive appropriate penalties for the substantive indictable offence and therefore an aggravated form of a fraud offence in these circumstances is not warranted.

Recommendation 10

- Legal Aid NSW does not support the introduction of an aggravated offence of committing a fraud in a way that is related to another indictable offence.

Question 8.5: Other aggravated fraud offences

Should there be any other aggravated forms of the main fraud offences?

Why or why not? AND

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?

Legal Aid NSW does not support other aggravated forms of the main fraud offences. As stated above, if an aggravated version of a section 192E offence were to be introduced, Legal Aid NSW suggests a tiered offence, being an offence carrying a maximum penalty of no more than 15 years imprisonment. If such an offence were to be introduced, we suggest that it should only apply where the value of money defrauded is at least \$100,000 AND the fraud is the result of a prolonged deception (for example deceptive conduct over a period of 12 months) AND the offender abused a position of trust or authority.

Legal Aid NSW does not consider that there is a need for aggravated forms of fraud offences, nor any other aggravating features having regard to the existing aggravating factors in section 21A of the *Crimes (Sentencing Procedure) Act*.

Recommendation 11

- Legal Aid NSW does not support the introduction of any other aggravated forms of the main fraud offences.

Question 8.6: Indictable only offence

Should there be an indictable-only version of s 192E of the *Crimes Act 1900* (NSW)? Why or why not? AND

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?**

Legal Aid NSW does not support an indictable only version of a fraud offence. Legal Aid NSW agrees with the ODPP who noted they do 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”.¹³

However, if an indictable only version of a section 192E offence were to be introduced, Legal Aid NSW suggests it be aggravated by both the amount of money obtained and the level of deception, as suggested in answer to question 8.3 above.

Recommendation 12

- Legal Aid NSW does not support the introduction of an indictable only version of section 192E of the *Crimes Act*.

¹³ NSW Office of the Director of Public Prosecutions, Submission PFR05 to New South Wales Sentencing Council (n 2) 5.

Question 8.7: Low level offending

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

Legal Aid NSW does not support the use of infringement notices for fraud and fraud related offences for children, particularly those aged under 14 years (who are presumed to be *doli incapax*). Legal Aid NSW does not see infringement notices as an appropriate penalty for young children, particularly when there are other diversionary options available to them under the *Young Offenders Act*.

Legal Aid NSW supports diversions for low level fraud offending by adults in appropriate circumstances and agrees with the NSW Sentencing Council that “the use of penalty notices is, for the most part, a cost effective, prompt and appropriate means of providing a sanction and of creating a deterrent for a wide range of regulatory and minor offences that do not merit the acquisition of a criminal record, or require more than the payment of a pecuniary penalty”.¹⁴ We note a criminal conviction, even for low-level fraud offences, can have huge implications on a person’s ability to obtain employment for many years into the future which can be counterproductive to reparation. We therefore support the use of infringement notices for low level fraud offending by adults as it avoids the recording of a criminal conviction.

However, we note the following concerns with infringement notices and recommend consideration be given to them when determining whether to extend their use to low level fraud and fraud related offences:

¹⁴ New South Wales Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed Fines and Penalty Notices* (Interim Report, October 2006) ix.

1. There is limited judicial and public scrutiny over the relevant issuing agencies, with the potential for the development of discriminatory or unfair practices,
2. There is a risk that innocent recipients of infringement notices will simply pay the penalty rather than incur the cost and inconvenience of contesting the matter in court;
3. The imposition of fixed penalties does not permit or take into consideration the objective seriousness of the offence, or the personal circumstances of the offender, including their capacity to pay;
4. The use of licence sanctions for non-payment of an infringement notice can be counterproductive, constitute a double penalty and often leads to secondary offending.

Legal Aid NSW also supports a restorative justice approach similar to Youth Justice Conferences under the *Young Offenders Act* for low level fraud offences. This would successfully allow an offender to acknowledge the harm done to the victim and make attempts at reparation. Legal Aid NSW acknowledges that legislating such a scheme requires careful consideration, extensive consultation and additional funding.

Recommendation 13

- Legal Aid NSW supports the introduction of diversionary options for adult low-level fraud offenders in the following forms:
 1. A scheme similar to Juvenile Youth Justice Conferences, but adapted to cater for adult offenders, and
 2. Infringement Notices.
- However, Legal Aid NSW does not support the use of infringement notices for fraud and fraud-related offences committed by children, particularly those aged under 14 years.

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?

Legal Aid NSW does not consider it necessary to introduce any amendments to the aggravating factors set out in section 21A of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*. We agree with the NSW Young Lawyers Criminal Law Committee that fraud offences are not “subject to sufficiently exceptional circumstances” to justify altering section 21A.¹⁵

We consider existing aggravating factors adequate, including those relating to substantial harm, abuse of a position of trust or authority, multiple victims, planning and financial gain.

Legal Aid NSW agrees with the New South Wales Sentencing Council that the age of the victim may not be the only indicia of vulnerability in a matter relating to fraud, but note that the factor relating to vulnerability (being s21A(2)(l)) is non-exhaustive and allows for vulnerabilities other than age to be taken into account.

Legal Aid NSW notes the recent fraud data shows there is a higher representation of female offenders in fraud matters when compared with other crimes. Legal Aid NSW assists women who are primary victims of domestic violence and have been charged with offences of fraud or offences involving an intentional dishonest act. Legal Aid NSW recommends the addition of a mitigating factor relating to fraud committed by a victim of domestic violence at the encouragement of their abusive partner. Whilst such a situation might amount to duress under sub-section 21A(3)(d), we are aware of cases in which

¹⁵ NSW Young Lawyers Criminal Law Committee, Submission PFR010 to New South Wales Sentencing Council, *NSW Sentencing Council Review of Fraud and Fraud-Related Offences* (11 April 2022) 4.

the courts did not consider the fact that the offence was committed in a duress-like situation against the background of domestic and family violence as a mitigating factor in sentence proceedings for fraud related offending. We therefore consider that it would be beneficial to introduce this as a mitigating factor in section 21A.

Case study:

Wendy is an Aboriginal woman who has a long history of being the victim of domestic violence at the hands of her partner, Brian. Brian stole a wallet and gave a credit card out of that wallet to Wendy to use. Wendy used the stolen credit card to buy groceries for her and Brian at his request. Police charged both Brian and Wendy with obtaining a financial advantage by deception under section 192E of the *Crimes Act*. Wendy entered a plea of not guilty and argued that she was unaware the card was stolen when she used it. Wendy was found guilty of the offence and sentenced. At sentencing the fact that the Wendy had been a victim of domestic violence for a long-time at the hands of Brian was not taken into account as a mitigating factor.

Recommendation 14

- Legal Aid NSW considers current aggravating factors in section 21A of *Crimes (Sentencing Procedure) Act 1999* (NSW) to be appropriate.
- Legal Aid NSW recommends adding as a factor in mitigation that the offence was committed by a person who was at the time of the offence the victim of domestic violence.



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