

Report

# Fraud

**JUNE 2023**

**NSW  
Sentencing  
Council**

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# Terms of reference

The Sentencing Council is asked to conduct a review of sentencing for fraud and fraud-related offences in New South Wales, especially but not limited to offences in Part 4AA of the *Crimes Act 1900* (NSW), and make any recommendations for reform that it considers appropriate.

In undertaking this review, the Sentencing Council should:

- (1) provide sentencing statistics for convictions over a five year period;
- (2) provide information on the characteristics of offenders, sentence type and length; and
- (3) provide background information, including:
  - a. the key sentencing principles and reasoning employed by sentencing judges;
  - b. the mitigating subjective features of offenders; and
  - c. any other significant factors considered in sentencing decisions that explain how courts come to their final decision on sentence (which may be done using case-studies or collation of predominate themes across cases).

[21 September 2021]

# Participants

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NSW Bureau of Crime Statistics and Research

NSW Department of Communities and Justice, Court Services.



# Executive summary

## Introduction

- 0.1 The Attorney General asked us to review the sentencing of fraud and fraud-related offences, through terms of reference received in September 2021.
- 0.2 This report presents our recommendations for reform. It follows preliminary submissions and preliminary consultations, a consultation paper released in September 2022 and submissions received in response.
- 0.3 There are several reasons for a review of sentencing for fraud and fraud-related offences:
- Many people and organisations are affected by fraud.
  - Fraud can cause significant harm to victims and the community. In addition to financial loss, fraud causes other harms, which can be psychological, relational or social, as well as disrupting businesses, community organisations and government programs.
  - Technology, particularly through the Internet, has created more opportunities for fraud offences of increasing complexity and makes it harder to police.
- 0.4 These reasons have informed our approach to framing recommendations for reform.

## Fraud offences and sentencing in NSW (Chapter 2)

- 0.5 There are a large number of fraud and fraud-related offences in the *Crimes Act 1900* (NSW) (*Crimes Act*) and other legislation.
- 0.6 The focus of this report is on the fraud offences under s 192E of the *Crimes Act*. Section 192E provides that a person is guilty of fraud if they, by deception, dishonestly:
- obtain another’s property, or
  - obtain a financial advantage or cause a financial disadvantage.

The maximum penalty is 10 years’ imprisonment.

- 0.7 The offences under s 192E are broadly framed, cover most fraud offending and are the most frequently charged fraud offences in NSW.
- 0.8 There is also general satisfaction with the maximum penalties for other fraud and fraud-related offences.
- 0.9 The sentencing data for s 192E offences in the Local Court shows that offenders are sentenced to imprisonment more often and are fined less often relative to other offences.

- 0.10 The sentencing of a greater proportion of fraud offenders to imprisonment in the District Court reflects the fact it deals with more serious cases.

## Victims of fraud (Chapter 3)

- 0.11 Victims of fraud can suffer significant harm, including financial harm and psychological and emotional harm. The needs of victims include being heard and receiving adequate reparation.

### Victim impact statements

- 0.12 While courts may receive statements from fraud victims in their discretion, victims of fraud are not covered by the victim impact statement (VIS) provisions in the *Crimes (Sentencing Procedure) Act 1999* (NSW). We recommend that victims of fraud should be able to make VISs when offenders are sentenced in the District Court or Supreme Court (**recommendation 3.1**). This will give fraud victims certainty about the reception and use of their statements.
- 0.13 We have limited our recommendation to matters in the higher courts because of concerns about the negative impact of making VISs fully available in the Local Court, which is a high turnover and efficient jurisdiction.

### Business impact statements

- 0.14 We considered, but do not support, establishing structures to allow representatives of corporations to make business impact statements only in relation to fraud. The introduction of business impact statement provisions, beyond fraud offences, would require wider consultation and further consideration.

### Compensation directions

- 0.15 Recouping losses suffered by fraud victims is important. We identified some issues relating to the law that allows courts to make enforceable compensation directions in favour of fraud victims, but we make no recommendations for change.
- 0.16 The civil jurisdictional limits apply to compensation directions: \$100,000 in the Local Court and \$1,250,000 in the District Court. Where the amount of a fraud exceeds the jurisdictional limit, a victim would need to seek an enforceable order through civil proceedings in a higher court, which involves additional trouble and expense. We consider that these issues should be addressed in the context of a broader review of the jurisdictional limits of the courts.
- 0.17 While frequently made, compensation directions may not be made as often as they could be. Part of the reason may be that victims are not aware of them. We encourage the relevant participants in criminal proceedings to consider what more can be done to ensure that those victims who want compensation can apply for it.
- 0.18 An offender's ability to pay compensation is, in practice, a matter that courts take into account when deciding whether to make a compensation direction. In our view

the courts should continue to exercise this discretion, and an express provision is not necessary.

## Maximum penalties (Chapter 4)

- 0.19 The maximum penalty for fraud offences under s 192E of the *Crimes Act* is 10 years' imprisonment.
- 0.20 The maximum penalty should be able to respond to serious and increasingly complex frauds and deal appropriately with low level offending. To achieve this, we recommend a tiered offence structure based on the value of the fraud **(recommendation 4.1)**
- 0.21 The tiered offence structure involves increasing the maximum penalty for frauds over \$5,000,000 to 20 years' imprisonment. This will allow courts to respond to increasingly complex frauds. It also aligns with penalties for related offences, such as money laundering.
- 0.22 However, we do not think low level fraud offences, which can be relatively minor, should be subject to the existing maximum penalty. To allow courts to deal with this offending appropriately, we recommend lowering the maximum penalty for frauds under \$100,000 to 5 years' imprisonment.
- 0.23 In recommending a tiered offence structure, we note that some provision may need to be made for alternative verdicts. We also note that all tiers can continue to be Table 1 offences, as there will be some cases in all tiers that may appropriately be dealt with summarily and some that may appropriately be dealt with on indictment.

## Low level offending (Chapter 5)

- 0.24 We considered some options for dealing with low level fraud offending including placing further limits on using imprisonment, introducing criminal infringement notices (CINs) for low level fraud, and making better provision for diversion programs. These options were partly in response to concerns about potential negative impacts (through more punitive sentences) that any increase in the maximum penalty might have on low level offenders.
- 0.25 We have concluded that there is no need to add to the existing law in NSW that a court must not sentence an offender to imprisonment "unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate".
- 0.26 We have also concluded that, while making CINs available for frauds involving minor amounts would keep some low level offenders out of court and save them from a recorded conviction, they are not an adequate response to the underlying problems of some fraud offending.
- 0.27 Diversion programs can promote rehabilitation by dealing with underlying issues that may lead to offending behaviour, such as drug, alcohol and gambling problems,

which are often present in fraud cases. The Magistrates Early Referral Into Treatment (MERIT) program is a good example of a diversion program primarily for offenders with drug problems. We recommend that the government consider options for expanding the operation of suitable diversion programs, in particular those that deal with drug, alcohol and gambling problems (**recommendation 5.1**)

## **Aggravating and mitigating factors (Chapter 6)**

- 0.28 Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) includes a non-exhaustive list of aggravating and mitigating factors that courts must take into account when sentencing.
- 0.29 We do not recommend any change to the aggravating and mitigating factors in s 21A. In this review, as in past reviews, we heard that s 21A should be repealed altogether or replaced with a simpler provision. Concerns about s 21A include that it is overly complicated, increases the risk of appeals, and uses up valuable court resources. Because of these concerns, any amendments to s 21A should be considered in a broader review.
- 0.30 In our view s 21A is adequate to address the relevant factors for fraud offences. Even if a factor is not explicitly included in s 21A, it can be taken into account under s 21A(1)(c), as “any other objective or subjective factor that affects the relative seriousness of the offence”.
- 0.31 In particular, changes to aggravating and mitigating factors in relation to domestic violence are not necessary since these are adequately covered by existing law.

## **Other issues and conclusions (Chapter 7)**

- 0.32 In the Consultation Paper, we considered some matters that raise issues that go beyond sentencing for fraud and that would require a wider review. These matters include sentencing principles, sentencing guidelines, charging practices and fines.
- 0.33 We do not recommend any changes to sentencing law that would impact on more than just sentencing for fraud and fraud-related offences.

# Recommendations

## 3. Victims of fraud

### **Recommendation 3.1: Victim impact statement in Supreme Court and District Court**

The *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended so that the victim impact statement provisions apply to a fraud offence under part 4AA of the *Crimes Act 1900* (NSW) when dealt with on indictment in the Supreme Court or on indictment or summarily in the District Court.

## 4. Maximum penalties

### **Recommendation 4.1: Tiered offences for fraud**

There should be a tiered offence structure for offences in s 192E of the *Crimes Act 1900* (NSW). The maximum penalties for the offences should be:

- (a) for amounts of \$5,000,000 or more: 20 years
- (b) for amounts of \$100,000 or more up to \$5,000,000: 10 years
- (c) for amounts less than \$100,000: 5 years.

## 5. Low level offending

### **Recommendation 5.1: Encourage use and development of diversion programs**

Consideration should be given to expanding the operation of diversion programs for offenders with drug, alcohol and/or gambling problems as far as is possible given resource constraints. Options for expansion that should be considered include:

- (a) providing programs in more locations,
- (b) providing programs that deal with alcohol issues in more locations, and
- (c) expanding the programs to defendants with addictions other than alcohol and illegal drugs such as to gambling or prescription drugs.



# 1. Introduction

## In brief

The Attorney General asked us to review the sentencing for fraud and fraud-related offences in NSW. Fraud offences capture a wide range of conduct. Many people and organisations are affected by fraud. We held several consultations, sought submissions to a consultation paper, and sampled Local Court cases, to inform our recommendations in this report.

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## Terms of reference

- 1.1 On 21 September 2021, the then Attorney General, the Hon Mark Speakman SC, asked us to review the sentencing of fraud and fraud-related offences in NSW. The terms of reference for this review state:

The Sentencing Council is asked to conduct a review of sentencing for fraud and fraud-related offences in New South Wales, especially but not limited to offences in Part 4AA of the *Crimes Act 1900* (NSW), and make any recommendations for reform that it considers appropriate.

In undertaking this review, the Sentencing Council should:

- (1) provide sentencing statistics for convictions over a five year period;
- (2) provide information on the characteristics of offenders, sentence type and length; and
- (3) provide background information, including:
  - a. the key sentencing principles and reasoning employed by sentencing judges;
  - b. the mitigating subjective features of offenders; and
  - c. any other significant factors considered in sentencing decisions that explain how courts come to their final decision on sentence (which may be done using case-studies or collation of predominate themes across cases).

## Fraud in NSW law

- 1.2 The term “fraud” is applied to offences that involve an “intentional dishonest act or an omission done with the purpose of deceiving”.<sup>1</sup>
- 1.3 Numerous fraud and fraud-related offences are contained in the *Crimes Act 1900* (NSW) (*Crimes Act*) and other legislation. Fraud-related offences include embezzlement, forgery and identity crime. The conduct captured and the maximum penalties vary across the offences. These are detailed in chapter 2.
- 1.4 As we explain in chapter 2, the most common fraud offences are where a person, by any deception, dishonestly obtains property, or obtains a financial advantage or causes a financial disadvantage. These are contained in s 192E of the *Crimes Act*.
- 1.5 The offences in s 192E have a maximum penalty of 10 years’ imprisonment, which is equal to or greater than the other fraud and fraud-related offences in NSW. These offences cover a broad range of offending conduct. This flexibility, and a maximum penalty that allows for a range of sentences, contribute to the frequent use of the s 192E offences. The s 192E offences are, therefore, the focus of our recommendations relating to victim impact statements (VISs) in chapter 3 and maximum penalties in chapter 4.

## Reasons for the review

- 1.6 There are several reasons for a review of sentencing in relation to fraud and fraud-related offences:
- Many people, government agencies and businesses are affected by fraud.<sup>2</sup>
  - Fraud causes significant harm to individual victims, businesses, not for profit organisations and the general community. In addition to financial loss, fraud causes other harms, which can be psychological, relational or social, as well as disrupting businesses and government programs.<sup>3</sup>
  - Technology, particularly through the Internet, has created more opportunities for fraud offences of increasing complexity and makes it harder to police.<sup>4</sup>
- 1.7 These reasons have informed our approach to framing recommendations for reform. For example, the harm that fraud causes informs our recommendation in chapter 3, to make VISs available to fraud victims. The increased opportunity for more

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1. LexisNexis, *Encyclopaedic Australian Legal Dictionary*, definition of “fraud” (retrieved 2 May 2023).

2. NSW Sentencing Council, *Fraud*, Consultation Paper (2022) [1.43]–[1.44].

3. NSW Sentencing Council, *Fraud*, Consultation Paper (2022) [1.45]–[1.48].

4. NSW Sentencing Council, *Fraud*, Consultation Paper (2022) [1.49]–[1.50].



complex frauds informs our recommendation in chapter 4, to increase maximum penalties for more serious forms of fraud.

## The conduct of the review

### Preliminary submissions and consultations

- 1.8 We requested preliminary submissions on the terms of reference and received eight submissions. These are listed in Appendix D. Some of these may be viewed on our website.
- 1.9 We also conducted 11 preliminary consultations with various people and organisations with experience of fraud offending and fraud offenders. These are listed in Appendix E.

### Consultation paper

- 1.10 We released a consultation paper in September 2022.<sup>5</sup> It set out the law and data relating to fraud and the sentencing of it in NSW. It also examined the needs of victims of fraud, the motivations of fraud offenders, and the sentencing principles and factors that the courts take into account when sentencing for fraud.
- 1.11 The paper asked whether the existing arrangements for sentencing fraud offences were adequate, and whether sentences for fraud are appropriate. It also sought responses to options for reform, including in relation to maximum penalties, indictable only and summary only offences, limits on the use of imprisonment, aggravating factors and decriminalisation and diversion.
- 1.12 We received 14 submissions in response to the consultation paper. These are listed in Appendix F. Some of these may be viewed on our website.

### Sampling of Local Court cases

- 1.13 As part of the project, we reviewed a sample of cases finalised in the Local Court in 2019, the last full year of operation before the COVID-19 pandemic. The summaries of these cases are set out in Appendix A.
- 1.14 Our review started with a selection of cases finalised in the Downing Centre Local Court in Sydney for both offences under s 192E. These cases covered all available sentencing outcomes and a range of sentence lengths and fine amounts. Following the Council's review of these results, we conducted similar sampling of cases in the Parramatta Local Court, in order to include prosecutions by NSW Fair Trading, and in the Dubbo Local Court, in order to include more Aboriginal offenders.

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5. NSW Sentencing Council, *Fraud*, Consultation Paper (2022).

## Outline of this report

1.15 This report has six other chapters:

- **Chapter 2: Fraud in NSW**, outlines the wide variety of fraud offences in NSW, explains the report's focus on the fraud offences in s 192E of the *Crimes Act*, and sets out the sentencing statistics for those offences.
- **Chapter 3 Victims of fraud**, considers the needs of fraud victims, including the need to be heard about their experiences and the need to receive reparation. We recommend allowing victims of fraud to make a VIS under the *Crimes (Sentencing Procedure) Act 1999* (NSW) in cases tried in the District Court or Supreme Court.
- **Chapter 4: Maximum penalties**, recommends a tiered offence structure based on the value of the fraud for the offences under s 192E of the *Crimes Act*. This recommendation will allow courts to respond to increasingly complex frauds while also dealing appropriately with low level offending.
- **Chapter 5: Low level offending**, looks at some other options for dealing with low level offending, including criminal infringement notices, limits on using imprisonment and diversion programs. We recommend that the government considers options for expanding the operation of suitable diversion programs, in particular those that deal with drug, alcohol and gambling problems.
- **Chapter 6: Aggravating and mitigating factors**, considers some suggestions for reform of aggravating and mitigating factors. We conclude that the existing law is adequate for taking aggravating and mitigating factors into account for fraud and fraud-related offences.
- **Chapter 7: Other issues and conclusions**, sets out some matters covered in the consultation paper that raise broad issues, which would have an impact that goes beyond sentencing for fraud offences. Resolving these issues requires a wider review, which considers sentencing principles, sentencing guidelines, the appropriateness of fines and charging practices.

## 2. Fraud offences and sentencing in NSW

### In brief

There are a large number of fraud and fraud-related offences in the *Crimes Act 1900* (NSW) and other legislation. The focus of this report is on the fraud offences under s 192E of the *Crimes Act 1900* (NSW) since these involve the majority of relevant offending. The sentencing data for s 192E offences in the Local Court shows that offenders are sentenced to imprisonment more often and are fined less often relative to other offences. The sentencing of a greater proportion of fraud offenders to imprisonment in the District Court reflects the fact it deals with more serious cases.

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- 2.1 In this chapter, we outline the fraud and fraud-related offences in the *Crimes Act 1900* (NSW) (*Crimes Act*) and other legislation. We also explain that we have chosen to focus on the offences under s 192E of the *Crimes Act*, as these are the most commonly charged and sentenced fraud offences. Finally, we examine the sentencing outcomes for the fraud offences under s 192E.

# Fraud offences

## The general fraud offences: s 192E of the *Crimes Act*

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

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

The maximum penalty is 10 years' imprisonment.<sup>1</sup>

2.3 Section 192E and the remainder of part 4AA of the *Crimes Act* commenced in 2010.<sup>2</sup> The provisions in part 4AA replaced over 30 existing offences, which targeted specific fraudulent conduct.<sup>3</sup>

## Other offences under part 4AA of the *Crimes Act*

2.4 The other offences under part 4AA apply when:

- a person dishonestly destroys or conceals an accounting record with the intention of obtaining another's property or obtaining a financial advantage or causing a financial disadvantage – maximum penalty: 5 years' imprisonment<sup>4</sup>
- a person dishonestly makes or publishes (or concurs in making or publishing) any statement (whether or not in writing) that is false or misleading, with the intention of obtaining another's property or obtaining a financial advantage or causing a financial disadvantage – maximum penalty: 5 years' imprisonment,<sup>5</sup> and
- an officer of an organisation, with the intention of deceiving members or creditors about its affairs, dishonestly makes or publishes (or concurs in making or publishing) a statement (whether in writing or not) that to their knowledge may be false or misleading – maximum penalty: 7 years' imprisonment.<sup>6</sup>

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

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

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

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

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

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

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

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

### Stealing and similar offences

2.6 Part 4 of the *Crimes Act* covers stealing and similar offences, including larceny and embezzlement. There is some overlap between these offences and fraud.

2.7 Larceny is a crime where a person takes and carries away another's property, with the intention of permanently depriving them of it.<sup>7</sup> A key element is "fraudulent intent", which means the person did not believe they had a legal right to the property.<sup>8</sup> However, larceny does not require deception.

2.8 If a person is charged with fraud under s 192E of the *Crimes Act*, an alternative verdict is a conviction for larceny and vice versa.<sup>9</sup> The offence of fraudulent appropriation is an alternative verdict to a charge of larceny.<sup>10</sup>

2.9 There are several specific fraud and fraud-related offences in part 4 of the *Crimes Act*. Many of these offences predate the 2010 reforms that introduced s 192E and cover specific fraudulent conduct. One example is embezzlement, which involves the fraudulent appropriation of property by a person to whom it has been entrusted. These offences include where:

- a person in temporary possession of property fraudulently takes or converts that property, for their own, or others' use<sup>11</sup>
- a "clerk or servant" (that is, an employee) steals or embezzles property,<sup>12</sup> and
- a "public servant" (that is, a person employed in the Public Service) steals or embezzles property.<sup>13</sup>

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7. LexisNexis, *Halsbury's Laws of Australia*, IV Property Offences, "Elements of Offence" (retrieved 13 April 2023) [130–5015]. See also *Ilich v R* (1987) 162 CLR 110.

8. LexisNexis, *Halsbury's Laws of Australia*, IV Property Offences, "Fraudulent Requirement Otiose" (retrieved 13 April 2023) [130–5110].

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

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

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

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

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

- 2.10 The maximum penalties for these offences vary, and include 10 years' imprisonment,<sup>14</sup> 5 years' imprisonment,<sup>15</sup> 3 years' imprisonment,<sup>16</sup> and 1 year's imprisonment.<sup>17</sup>

### **Identity offences**

- 2.11 In addition to part 4AA, the *Crimes Act* includes offences that criminalise the misuse of a person's identification information.<sup>18</sup> Identification information includes a name or address, driver licence, passport, credit card or digital signature.<sup>19</sup>
- 2.12 Making, supplying or using such identification information, with the intention of committing an indictable offence, carries a maximum penalty of 10 years' imprisonment. Possessing identification information for this purpose carries a maximum penalty of 7 years' imprisonment.<sup>20</sup> The relevant indictable offence could be any offence and does not necessarily have to be a fraud or fraud-related offence.<sup>21</sup>
- 2.13 There is also an offence of possessing equipment to make a document that contains identification information. The maximum penalty is 3 years' imprisonment.<sup>22</sup>

### **Forgery offences**

- 2.14 Forgery involves making or using false documents. The *Crimes Act* contains some general forgery offences.<sup>23</sup>
- 2.15 The main forgery offence is making a false document to induce another person to accept it as genuine, and thereby obtain another's property, obtain financial advantage or cause financial disadvantage, or influence the exercise of a public duty. The maximum penalty is 10 years' imprisonment.<sup>24</sup>

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

15. See, eg, *Crimes Act 1900* (NSW) s 117, s 125, s 154I(1).

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

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

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

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

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

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

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

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

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

- 2.16 There are also offences of using or possessing a false document, knowing it is false, which also carry maximum penalties of 10 years' imprisonment.<sup>25</sup>
- 2.17 A further offence involves making or possessing equipment for making false documents, which carries a maximum penalty of 10 or 3 years' imprisonment, depending on whether the person intends to use the equipment to commit a forgery offence.<sup>26</sup>

### **Other offences**

- 2.18 The *Crimes Act* includes various other fraud and fraud-related offences, across different parts. Some of these include:
- making false or misleading statements to obtain an authority such as a licence, permit or registration, or in an application to obtain a benefit,<sup>27</sup> and
  - producing false or misleading documents to comply with a state law.<sup>28</sup>
- 2.19 There are also offences contained in the part of the *Crimes Act* that deals with crimes against property which may also be classified as fraud or fraud-related. The offence of dishonestly destroying or damaging property “with a view to making a gain” is subject to a maximum penalty of 7 years' imprisonment. When that offence is committed and the destruction or damage is caused “by means of fire or explosives”, the maximum penalty is 14 years' imprisonment.<sup>29</sup>

### **Fraud and fraud-related offences in other legislation**

- 2.20 There are numerous fraud and fraud-related offences in legislation other than the *Crimes Act*. These relate to the many provisions that require statements, documents or other information to be supplied in order to obtain certain benefits, including, for example, a payment, grant or licence. This carries with it a risk of fraudulent conduct.
- 2.21 Some of these statutes also cover the conduct of employees, employers, contractors and public officers. These people often have access to information or control of money or decisions, that they could fraudulently use for their, or others', benefit.
- 2.22 These offences cover specific conduct and situations relevant to the subject matter of the statute. However, the conduct may also be captured by the broad fraud

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

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

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

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

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

offence in s 192E, or one of the other fraud, stealing, identity or forgery offences in the *Crimes Act* (see above).

- 2.23 There is a lot of variation in the maximum penalties for fraud and fraud-related offences in other legislation. For example, some offences carry a maximum penalty of 5 penalty units (\$550).<sup>30</sup> Others have a maximum penalty of imprisonment for 5 years and/or 500 penalty units (\$55,000).<sup>31</sup>

## Focus on s 192E fraud offences

- 2.24 As we explain above, there are many fraud offences. However, this report focuses on those fraud offences under s 192E of the *Crimes Act*.

### The s 192E offences are broad and cover most fraud offending

- 2.25 We have chosen to focus on s 192E because it is broad and intended to cover most fraud cases.<sup>32</sup> It is meant to be “technologically neutral” to “ensure that criminal conduct now and well into the future can be caught”.<sup>33</sup> Submissions observed that it captures “creative” conduct and emerging technologies and that it is simple and easy to understand, with not too many elements to prove.<sup>34</sup>
- 2.26 Our survey of cases in the Local Court shows a broad range of offending charged under s 192E. For example, in addition to high level frauds involving accounting and low level offences involving credit cards (in particular tap and go offences), there is:
- failure to provide goods and services by car repairers<sup>35</sup>
  - tradespeople performing work they were not licensed or qualified to do<sup>36</sup>
  - renting houses for use as drug premises<sup>37</sup>
  - failure to pay for accommodation, meals, or petrol<sup>38</sup>

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

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

32. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 12 November 2009, 19508. See also NSW Police Force, *Preliminary Consultation PFRC03*.

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

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

35. [A.159].

36. [A.247].

37. [A.43], [A.152].

38. [A.376], [A.108], [A.385], [A.393], [A.35], [A.257], [A.270].



- dishonestly cashing in TAB and casino tickets<sup>39</sup>
- selling non-existent goods (like concert tickets) on online trading platforms<sup>40</sup>
- making false insurance claims<sup>41</sup>
- falsely stating that proceeds from a barbecue would be given to a local sporting team<sup>42</sup>
- using false identity documents to obtain goods on credit<sup>43</sup>
- submitting false time sheets as an employee<sup>44</sup>
- seeking refunds for goods that had not been purchased<sup>45</sup>
- using another person's prescription to obtain a restricted substance,<sup>46</sup> and
- acting as a rideshare driver without authority.<sup>47</sup>

2.27 Because their coverage is so broad, the s 192E offences account for both the most charges and the most finalised charges for fraud and fraud-related offences.

2.28 In 2019, 19,125 charges (for state and federal offences) were finalised in NSW courts in relation to fraud, deception and related offences. The most frequently charged state offence was the offence of dishonestly obtaining property by deception under s 192E(1)(a) with 6824 charges. This was followed closely by the offence of dishonestly obtaining financial advantage or causing financial disadvantage by deception under s 192E(1)(b), with 6502 charges. These two offences represent 70% of all fraud and fraud-related charges in 2019.

2.29 In 2021, of the 12,425 finalised charges in the Local Court for fraud and fraud-related offences in the *Crimes Act*, 10,263 (83%) were for offences under s 192E. There were only 2162 finalised charges for the other fraud and fraud-related offences.<sup>48</sup>

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39. [A.361], [A.405].

40. [A.49].

41. [A.308], [A.321].

42. [A.303].

43. [A.143].

44. [A.191].

45. [A.196], [A.235], [A.288].

46. [A.370].

47. [A.413].

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

## Some consideration of s 192E offences is warranted

- 2.30 The majority of submissions that addressed the issue were generally satisfied that the sentencing for s 192E offences carried out by the courts has been appropriate and did not identify any underlying or systemic issues.<sup>49</sup>
- 2.31 One submission, however, considered that some further research and analysis might be required to understand what it described as disparities in some sentences in the District Court.<sup>50</sup>
- 2.32 The NSW Police Force submitted that current sentencing was not appropriate, particularly in the Local Court where a relatively small percentage of cases (compared with those in the District Court) received a custodial sentence.<sup>51</sup> Legal Aid, on the other hand, considered that the rate of imprisonment in the Local Court for dishonestly obtaining property by deception was actually quite high, when compared with other offences dealt with in that court, and that this indicates that the Local Court treats such offences “as serious”.<sup>52</sup>

## There is general satisfaction with the other fraud offences

- 2.33 While some submissions considered the rationales for some of the maximum penalties for the other fraud offences, other than s 19E, were difficult to explain,<sup>53</sup> submissions were generally satisfied with how these offences operate and/or their maximum penalties.<sup>54</sup> Some submissions, in particular, noted that:
- they are relatively rarely charged<sup>55</sup>
  - they relate to specific conduct,<sup>56</sup> and

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49. Local Court of NSW, *Submission FR02*, 2; NSW Office of the Director of Public Prosecutions, *Submission FR04*, 5; Law Society of NSW, *Submission FR10*, 3; NSW Bar Association, *Submission FR11* [12]; Legal Aid NSW, *Submission FR12*, 20.

50. NSW Young Lawyers Criminal Law Committee, *Submission FR13* [21].

51. NSW Police Force, *Submission FR03*, 4.

52. Legal Aid NSW, *Submission FR12*, 20.

53. NSW Bar Association, *Submission FR11* [3]; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [29].

54. Local Court of NSW, *Submission FR02*, 1; NSW Police Force, *Submission FR03*, 1, 5; Law Society of NSW, *Submission FR10*, 2, 4; NSW Bar Association, *Submission FR11* [2]–[3], [15]; Legal Aid NSW, *Submission FR12*, 10, 25; NSW Young Lawyers Criminal Law Committee, *Submission FR13* [1], [25]; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [31]. But see District Court of NSW, *Submission FR06*, 2.

55. Legal Aid NSW, *Submission FR12*, 10.

56. NSW Police Force, *Submission FR03*, 1; District Court of NSW, *Submission FR06*, 2; Legal Aid NSW, *Submission FR12*, 10.

- the offences under s 192E are usually available in the alternative for offending that requires a more serious sentence.<sup>57</sup>
- 2.34 We are therefore not reproducing the data for the other fraud and fraud-related offences in the *Crimes Act*, which we included in the Consultation Paper,<sup>58</sup> because our penalty recommendations do not touch on them.

## Sentencing outcomes for the s 192E fraud offences

- 2.35 In the following section we look at the sentencing outcomes for 2016–2021 for the s 192E offences:
- dishonestly obtain property by deception, and
  - dishonestly obtain a financial advantage, or cause financial disadvantage, by deception.
- 2.36 We have combined the data for the two offences in s 192E because there is considerable overlap between the conduct covered by these offences, particularly at the lower end of the offending spectrum. Our sample of cases in the Local Court shows that, for example, for “tap and go” offences (where tap and go credit card facilities are used to purchase consumer goods), offenders were convicted of either offence.<sup>59</sup>
- 2.37 In the District Court in 2016–2021, only 20% of the cases where a s 192E offence was the principal offence involved obtaining property by deception.<sup>60</sup> In some reported District Court cases, the offender charged with dishonestly obtaining financial advantage by deception had obtained physical property, such as motor vehicles<sup>61</sup> and consumer goods<sup>62</sup> through tap and go transactions. However, in a number of cases charged as dishonestly obtaining property by deception, the offender simply received money and could equally have been charged with the obtaining financial advantage offence.<sup>63</sup>
- 2.38 Based on the cases we reviewed, it seems that most circumstances of fraud can be covered by one or other of the two offences. Because of this, we cannot explain the

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57. Law Society of NSW, *Submission FR10*, 4.

58. NSW Sentencing Council, *Fraud*, Consultation Paper (2022) [7.48]–[7.55].

59. See, eg, [A.54], [A.59], [A.63], [A.77], [A.94], [A.217].

60. NSW Sentencing Council, *Fraud*, Consultation Paper (2022) [7.22], [7.42].

61. *R v Bird* [2019] NSWDC 675.

62. *Ristevski v R* [2022] NSWCCA 38; *Tweedie v R* [2015] NSWCCA 71.

63. *R v Egar* [2019] NSWDC 445; *Cordoba v R* [2021] NSWCCA 144; *R v Keane* [2019] NSWDC 591.

differences between the types of sentence and duration of sentence handed down for each offence without a detailed analysis of the circumstances of each case.

- 2.39 We have used the classifications of supervised and unsupervised community sentences. This is because the 2018 sentencing reforms make it difficult to compare particular non-custodial sentencing orders before and after the reforms. “Community sentence” therefore covers the old bonds, suspended sentences and community service orders, as well as the new conditional release orders, community correction orders and intensive correction orders. They are differentiated by whether supervision was included as a condition. When we refer to a custodial sentence, we mean a sentence of imprisonment served in full-time custody, even though intensive correction orders are classed as “custodial sentences” served in the community.<sup>64</sup>
- 2.40 The data is arranged according to court, as well as by gender and Aboriginal status of the offenders. There are differences in sentencing patterns for these two demographic characteristics.

## Local Court

- 2.41 In 2016–2021, the Local Court sentenced those convicted of a s 192E fraud offence as the principal (most serious) offence on 10,477 occasions.
- 2.42 The relatively large number of fraud and fraud-related cases dealt with in the Local Court means that we have approached questions of reform with a view to not impacting on the Local Court’s efficiency as a high volume jurisdiction.
- 2.43 Men were sentenced on 6863 (66%) of these occasions, and women were sentenced on 3614 (33%). This shows a higher representation of female offenders compared with the average of female offenders in finalised criminal matters in NSW adult courts in 2021, at 21.8%.<sup>65</sup> These statistics are broadly consistent with statistics from other jurisdictions suggesting there is a higher representation of women for fraud than other offence types.<sup>66</sup>
- 2.44 The statistics show a disproportionate representation of Aboriginal offenders. Of the 6864 occasions when men were sentenced, 1728 (25%) involved Aboriginal offenders. Of the 3614 occasions when women were sentenced, 1093 (30%) involved Aboriginal offenders. Aboriginal men represent 3.5% of the resident male

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64. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 2 div 2.

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

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

population in NSW,<sup>67</sup> while Aboriginal women represent 3.4% of the resident female population in NSW.<sup>68</sup>

### **General sentencing outcomes**

- 2.45 Figure 2.1 shows the sentencing outcomes in the Local Court where one of the two main fraud offences was the principal offence. The data reflects the summary jurisdiction of the Local Court which involves the prosecution of a greater number of less serious matters.
- 2.46 Of the 10,477 sentences, the most common was a supervised community sentence (33%), followed by an unsupervised community sentence (26%). A custodial sentence was imposed in 18% of cases and a fine was imposed in 21% of cases.
- 2.47 The statistics show that offenders convicted of s 192E fraud offences are sentenced to imprisonment relatively more frequently than offenders generally in the Local Court. A custodial sentence was imposed on 18% of these offenders. This can be compared with the 9.9% to 11.4% of all offenders who received custodial sentences in the Local Court in each of the financial years 2017/18–2021/22.<sup>69</sup>
- 2.48 Offenders convicted of s 192E fraud offences receive fines relatively less often. The 21% of such offenders fined can be compared with the 33.9% to 40.6% of all offenders fined in the Local Court in each of the financial years 2017/18–2021/22.<sup>70</sup>

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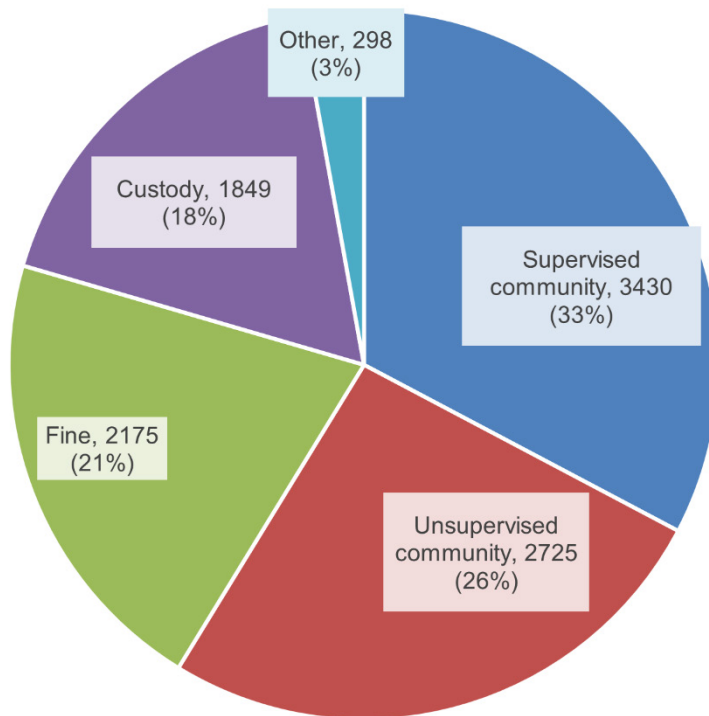
67. Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (Catalogue No 3238.0.55.001, June 2016).

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

69. NSW Bureau of Crime Statistics and Research, “NSW Adult Criminal Sentencing, 2017/18 to 2021/22” <[sentencingtool.bocsar.nsw.gov.au/](http://sentencingtool.bocsar.nsw.gov.au/)> (retrieved 2 May 2023).

70. NSW Bureau of Crime Statistics and Research, “NSW Adult Criminal Sentencing, 2017/18 to 2021/22” <[sentencingtool.bocsar.nsw.gov.au/](http://sentencingtool.bocsar.nsw.gov.au/)> (retrieved 2 May 2023).

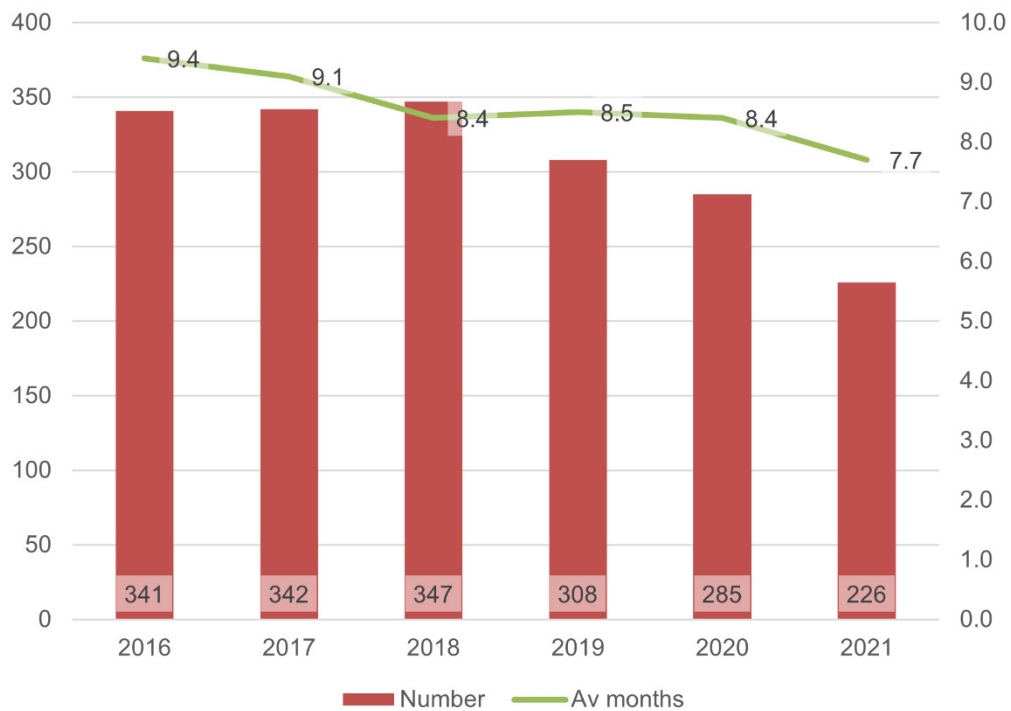
**Figure 2.1: Sentencing outcomes in the Local Court, where a s 192E fraud offence was the principal offence, 2016–2021**



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.  
The data tables for this figure are in Appendix G.

- 2.49 Figure 2.2 shows the number of cases in the Local Court resulting in a custodial sentence, together with the average head sentence for the principal offence. It shows a decline in both the number of cases (from 341 in 2016 to 226 in 2021) and the duration of the average head sentence (from 9.4 months in 2016 to 7.7 months in 2021). The decline was particularly noticeable in 2020 and 2021.

**Figure 2.2: Number of cases and average head sentence of imprisonment (months) in the Local Court, where a s 192E fraud offence was the principal offence, 2016–2021**



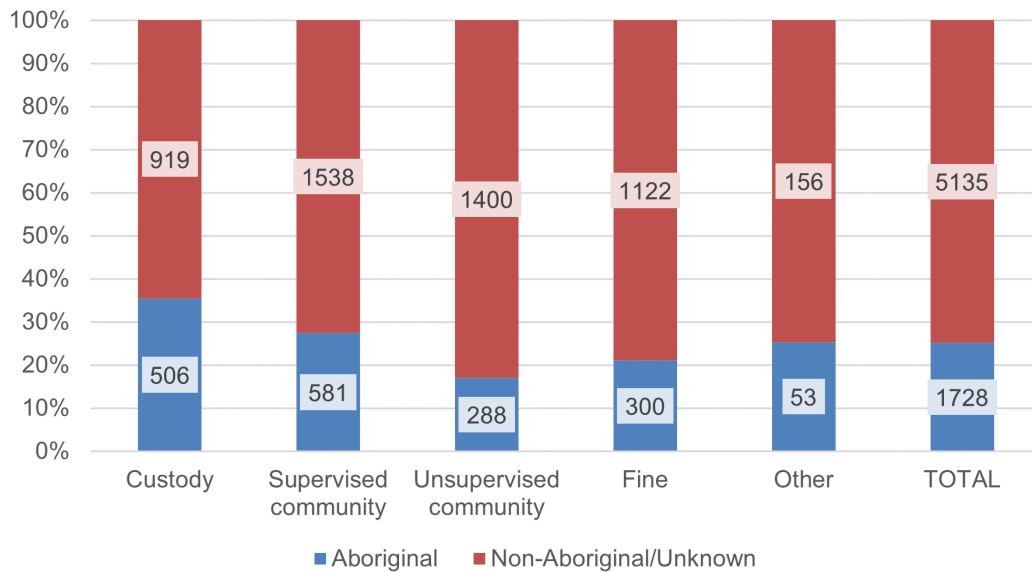
Source: NSW Bureau of Crime Statistics and Research, reference 22-21286. The data tables for this figure are in Appendix G.

### Outcomes by gender and Aboriginal status

2.50 Figures 2.3 and 2.4 show that, while Aboriginal men make up 25% of male offenders for s 192E, they represent 36% of those receiving a custodial sentence in the Local Court and only 17% of those receiving an unsupervised community sentence. This is broadly consistent with the generally higher incarceration rates for Aboriginal men compared with offenders who are not Aboriginal or their Aboriginal status is not known.<sup>71</sup>

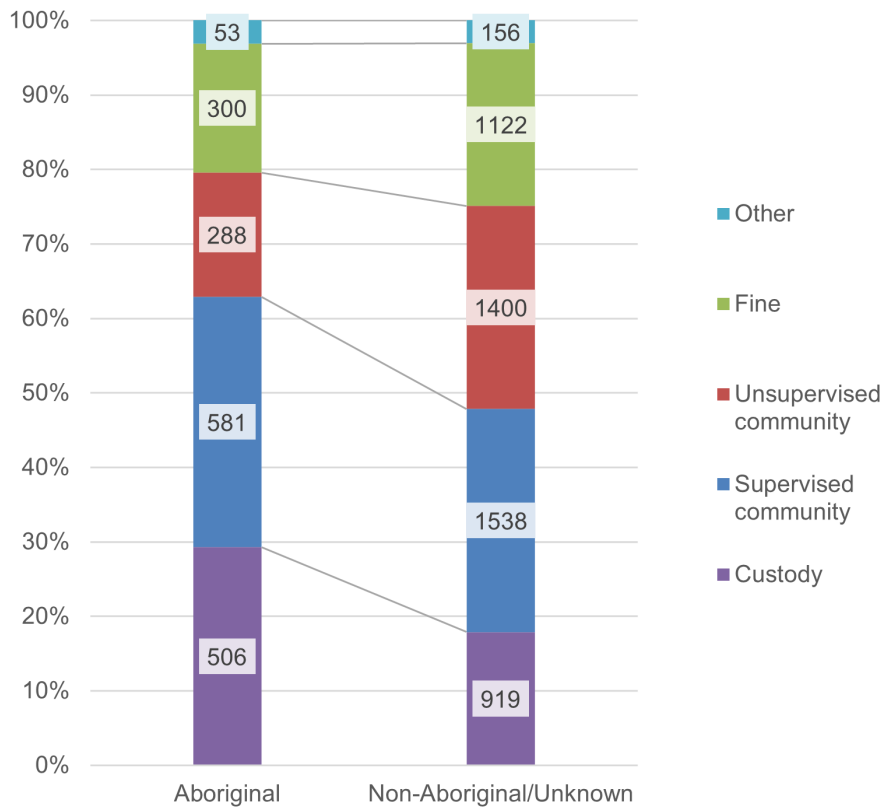
71. See, eg, NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2020 (2021) [4.12]–[4.17].

**Figure 2.3: Local Court sentencing outcomes for men by Aboriginality where a s 192E fraud offence was the principal offence, 2016–2021**



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.  
The data tables for this figure are in Appendix G.

**Figure 2.4: Local Court sentencing outcomes for men by Aboriginality where a s 192E fraud offence was the principal offence, 2016–2021**

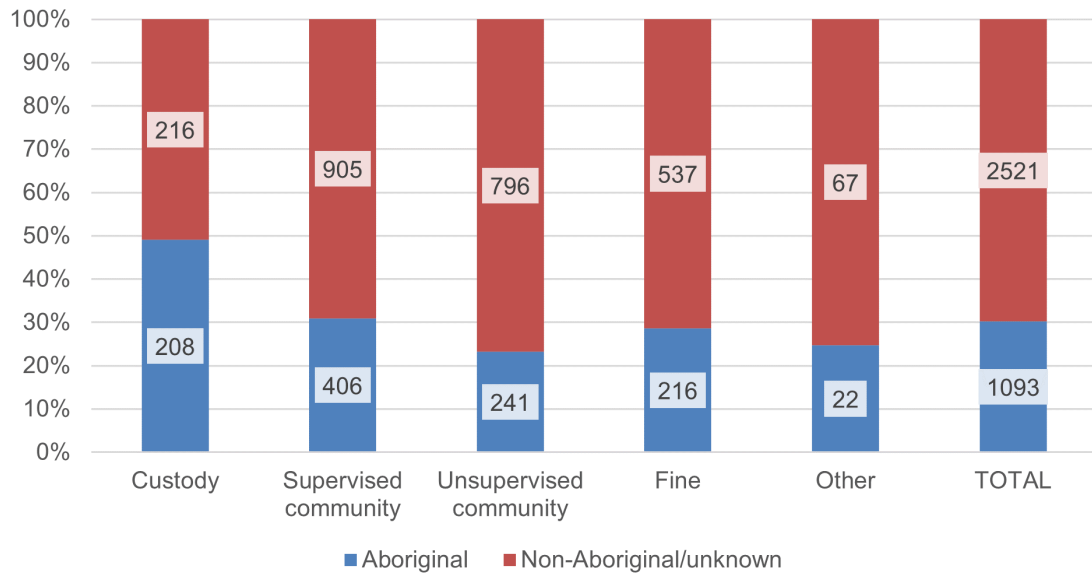


Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.  
The data tables for this figure are in Appendix G.



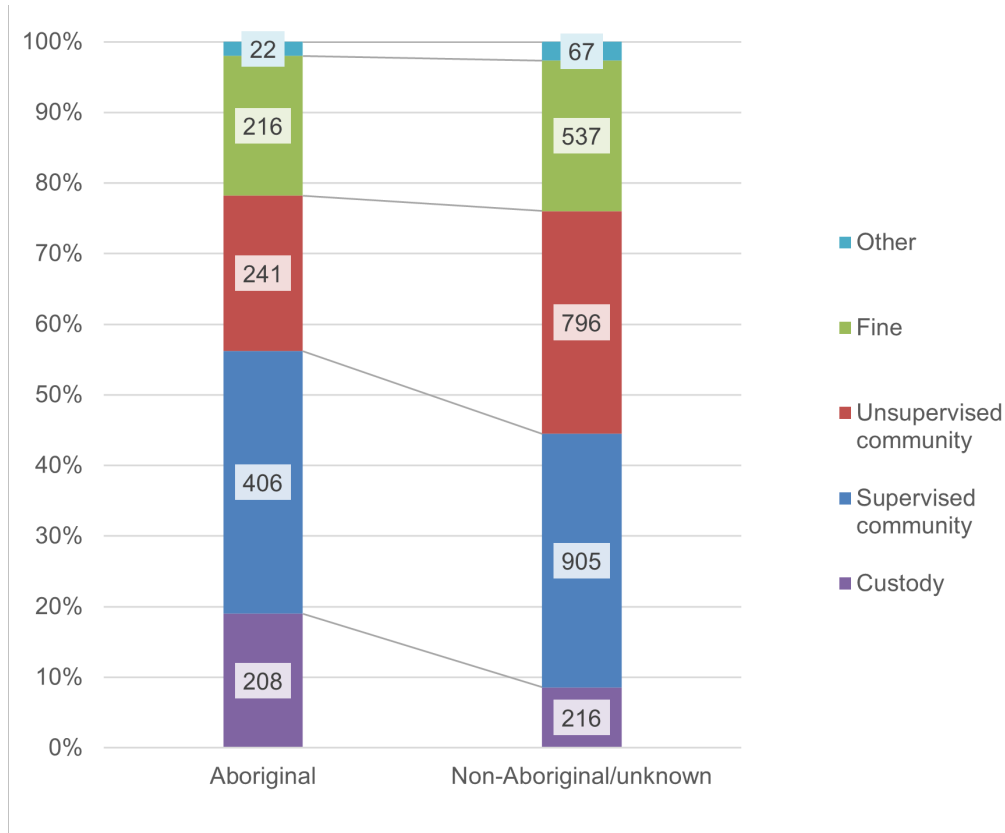
2.51 Figures 2.5 and 2.6 show that, while Aboriginal women make up 30% of female offenders for s 192E, they represent 49% of those receiving a custodial sentence and only 23% of those receiving an unsupervised community sentence.

**Figure 2.5: Local Court sentencing outcomes for women by Aboriginality where a s 192E fraud offence was the principal offence, 2016–2021**



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286. The data tables for this figure are in Appendix G.

**Figure 2.6: Local Court sentencing outcomes for women by Aboriginality where a s 192E fraud offence was the principal offence, 2016–2021**



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286. The data tables for this figure are in Appendix G.

## District Court

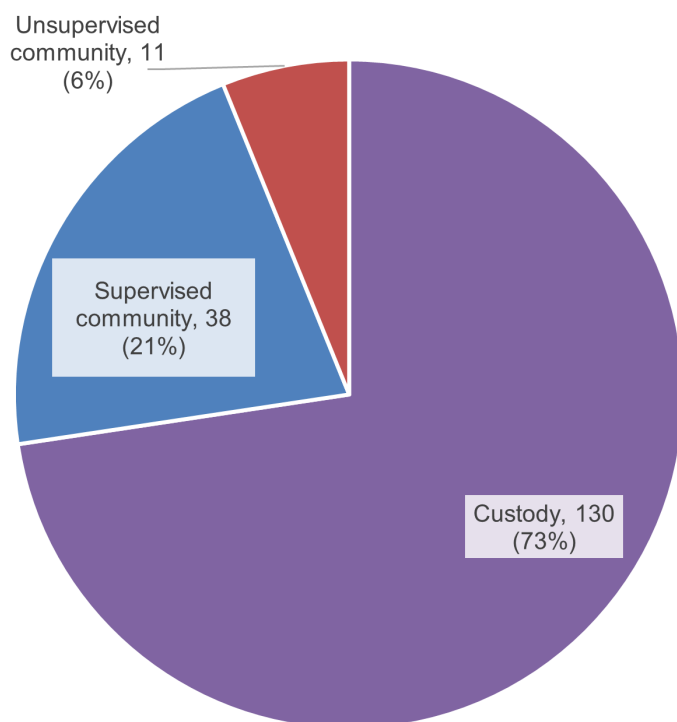
- 2.52 In 2016–2021, the District Court sentenced offenders who had one of the s 192E fraud offences as their principal offence on 179 occasions.
- 2.53 Men were sentenced on 123 (69%) of these occasions, and women were sentenced on 56 (31%).
- 2.54 In contrast with the Local Court, Aboriginal men were sentenced on only 10 (8%) of the 123 occasions involving men. Five Aboriginal women (9%) were sentenced on the 56 occasions involving women. While this is still disproportionate to the Aboriginal population in NSW, it is significantly lower when compared with the equivalent offences in the Local Court and to incarceration rates for Aboriginal people generally.

### General sentencing outcomes

- 2.55 Figure 2.7 shows the sentencing outcomes in the District Court where one of the s 192E fraud offences was the principal offence. The data reflects the jurisdiction of the District Court where more serious matters are prosecuted.

2.56 Of the 179 sentences, the most common was a custodial sentence (73%), followed by a supervised community sentence (21%). An unsupervised community sentence was imposed in only 6% of cases.

**Figure 2.7: Sentencing outcomes in the District Court, where a s 192E fraud offence was the principal offence, 2016–2021**



Source: NSW Bureau of Crime Statistics and Research, reference 22-21286.  
The data tables for this figure are in Appendix G.

2.57 When the District Court imposed a sentence of imprisonment for the principal offence, the average head sentence was approximately 3 years and 3 months.<sup>72</sup>

### **Outcomes by gender and Aboriginal status**

2.58 In the District Court, Aboriginal men made up 8% of male offenders, and represented 6% of those receiving a custodial sentence. The proportions are quite different when compared with the Local Court outcomes. However, the numbers in the District Court may be too small for a meaningful comparison.

2.59 Likewise, Aboriginal women made up 9% of female offenders, and they represented 2% of those receiving a custodial sentence.

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

## Themes in the statistics

- 2.60 When the Local Court data for the s 192E fraud offences is compared with the data for all offences, it shows:
- a relatively high proportion of sentences of imprisonment in 18% of appearances, and
  - a relatively low proportion of fines in 21% of appearances.
- 2.61 The statistics show an over representation of Aboriginal offenders generally and a greater over representation among those sentenced to imprisonment.
- 2.62 Generally, in the District Court there is a much greater proportion of sentences of imprisonment than in the Local Court. This is consistent with the more serious offending dealt with in the indictable jurisdiction. In relation to Aboriginal offenders, there is a much smaller over representation in the numbers sentenced to imprisonment, however, the numbers may not be high enough for a proper comparison.
- 2.63 There have also been declines over 2016–2021 in the number of cases involving fraud or fraud-related offences and reductions in average sentences imposed over the same period. These changes may not represent long-term trends because restrictions and behaviour change related to the COVID-19 pandemic may have resulted in fewer court finalisations and reduced opportunities for offending in some cases.

# 3. Victims of fraud

## In brief

The needs of victims include being heard during the sentencing process and receiving adequate reparation. We recommend that victims of fraud should be able to make victim impact statements when offenders are sentenced in the District or Supreme Courts. We encourage the use of compensation directions where appropriate.

<b>Allowing individual victims of fraud to make victim impact statements</b>	<b>24</b>
The current law is inadequate	24
Recognising personal harms resulting from fraud	26
Right limited to higher courts	29
<b>Business impact statements</b>	<b>30</b>
The current law does not allow for business impact statements	31
Impact of fraud on businesses	31
Business impact statements are not supported	33
<b>Reparation</b>	<b>34</b>
Needs of victims	34
The current law	35
Specific issues	36
Jurisdictional limits	37
Encouraging the use of compensation directions where appropriate	38
Ability to pay	39

3.1 As we explain below, victims of fraud can suffer significant harm, including financial harm and psychological and emotional harm. These harms can give rise to the need for some victims to have their experience acknowledged and taken into account during the sentencing process, as well as the need to receive reparation for the loss suffered. This chapter looks at issues that are particularly relevant to victims, that is, the ability to make a statement about the impact of the fraud offence and the availability of compensation.

## Allowing individual victims of fraud to make victim impact statements

### Recommendation 3.1: Victim impact statement in Supreme Court and District Court

The *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended so that the victim impact statement provisions apply to a fraud offence under part 4AA of the *Crimes Act 1900* (NSW) when dealt with on indictment in the Supreme Court or on indictment or summarily in the District Court.

- 3.2 We recommend making the fraud offences in part 4AA of the *Crimes Act 1900* (NSW) (*Crimes Act*), which include those under s 192E, offences that may be subject to a victim impact statement (VIS) in the District Court and Supreme Court.
- 3.3 By including fraud among the offences that can be the subject of a VIS in the higher courts, a victim of fraud, just like a victim of any other nominated offence, will be able to make a VIS, so long as they have suffered “personal harm” as a result of the offence.

### The current law is inadequate

- 3.4 One of the purposes of sentencing is to recognise the harm done to the victim of the crime and the community.<sup>1</sup> A court has always been able to take harm to victims into account at sentencing,<sup>2</sup> but the admission and handling of any statements by a victim can only occur at the court’s discretion, unless there was a statutory scheme for such statements.
- 3.5 The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides a statutory framework for the use of VISs by the courts in certain circumstances. This framework gives some certainty to victims when they provide a VIS. A court must accept and acknowledge a VIS prepared by an eligible victim, as long as it complies with certain requirements.<sup>3</sup> An eligible victim also has the right to read out their statement before the offender is sentenced.<sup>4</sup> These rights for victims and obligations on courts are not available at common law, although there are instances of courts receiving statements even though they do not conform to the statutory scheme.<sup>5</sup>

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

2. *Porter v R* [2008] NSWCCA 145 [54]; *Siganto v R* [1998] HCA 74, 194 CLR 656 [29]. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(5).

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

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

5. See, eg, *Miller v R* [2014] NSWCCA 34 [156]; *R v Hatton* [2022] NSWDC 688 [70]–[73]; *R v Fineff* [2023] NSWDC [239]–[241].

- 3.6 For many offences, a VIS can be a useful way to recognise the harm done to the victim of the crime and the community.<sup>6</sup> It is the primary way a victim's experience is conveyed to the court. A VIS can also help the court to understand aggravating factors such as, "the injury, emotional harm, loss or damage caused by the offence was substantial".<sup>7</sup>
- 3.7 However, the VIS scheme in NSW only extends to victims of certain offences involving physical harm, actual and threatened violence and sexual offences.<sup>8</sup> It does not extend to victims of fraud. It also imposes further limits on eligible offences in the Local Court,<sup>9</sup> where most fraud offences are finalised.
- 3.8 Currently, the VIS provisions are structured to limit those who are entitled to make a VIS in two ways:
- by limiting the entitlement to make a VIS as a "primary victim" to those:
    - against whom the offence has been committed, and
    - who have suffered "personal harm" as a result of the offence, that is "actual physical bodily harm or psychological or psychiatric harm",<sup>10</sup> and
  - by limiting the application of the relevant division to certain offences in particular jurisdictions for example, categories of offences dealt with in the Supreme or District Courts, or the Local Court.<sup>11</sup>
- 3.9 Given the nature of fraud offences, the only likely harm falling within the above definition of "personal harm" will be either psychological or psychiatric.
- 3.10 Once this threshold is crossed, a victim can, in relation to a permitted offence, present a VIS that contains particulars of the following matters that are a direct result of the offence:
- (a) any personal harm,
  - (b) any emotional suffering or distress,
  - (c) any harm to relationships with other persons,
  - (d) any economic loss or harm that arises from any matter referred to in paragraphs (a)–(c).<sup>12</sup>

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

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

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

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

10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definitions of "personal harm" and "primary victim".

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

12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1).

- 3.11 For most fraud offences, the economic loss directly resulting from the offence should already be in evidence before the court and, unlike consequent economic harm, may not need to be included in the VIS.<sup>13</sup>
- 3.12 The difference between the harm that entitles a victim to make a VIS and the sort of harm they can talk about in their VIS has come about through a partial implementation of recommendations in our 2018 report, *Victims' Involvement in Sentencing*. These recommendations sought to:
- remove the requirement that a “primary victim” who can make a VIS be limited to the person against whom the offence was committed<sup>14</sup>
  - expand the list of harms that allow primary victims to make a VIS to include emotional suffering or distress, harm to interpersonal/social relationships and consequent economic harm,<sup>15</sup> and
  - allow a VIS to cover any of the expanded list of personal harms.<sup>16</sup>
- 3.13 The government supported the recommendations in principle. However, it gave effect to the extended list of personal harms by changing what the VIS could contain, but without adjusting the definition of personal harm. The government stated further consultation and analysis would be conducted before adopting the recommendation about the definition of personal harm.<sup>17</sup>

## Recognising personal harms resulting from fraud

- 3.14 Recommendation 3.1 would allow victims, who may feel their experience goes unrecognised under the current law, to feel they had been heard. It is justified on the grounds that victims of fraud can experience the forms of harm envisaged by the Act, such as psychological and psychiatric harm as well as emotional and relational harm.<sup>18</sup>
- 3.15 It is a “myth to think that fraud losses are only financial”.<sup>19</sup> The impact of fraud is often experienced as significant emotional, psychological, relational or social

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13. NSW Sentencing Council, *Victims' Involvement in Sentencing*, Report (2018) [2.25]–[2.28].

14. NSW Sentencing Council, *Victims' Involvement in Sentencing*, Report (2018) rec 2.1.

15. NSW Sentencing Council, *Victims' Involvement in Sentencing*, Report (2018) rec 2.2.

16. NSW Sentencing Council, *Victims' Involvement in Sentencing*, Report (2018) rec 4.1.

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

18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “personal harm”, s 28(1).

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



trauma.<sup>20</sup> We heard that victims want to be acknowledged and have what happened to them taken seriously.<sup>21</sup>

- 3.16 For offline fraud, where the offender is known to the victim (such as in an intimate relationship or friendship), the victim may take on more intense feelings of shame and embarrassment, sometimes made worse by feelings of betrayal. Victims may internalise feelings of blame for trusting the person, and this can affect future intimate and/or social relationships where issues of trust arise.<sup>22</sup>
- 3.17 For online frauds, where the victim typically does not know the offender, the emotional reaction may be more of anger, a sense of injustice and a feeling of hopelessness. These feelings occur more strongly in online matters because there is often no identifiable person or entity to blame.<sup>23</sup>
- 3.18 Online fraud victims may also experience re-victimisation. For instance, personal information obtained from a fraudulent activity may be included on a “sucker’s list”. This list is then sold to other offenders who attempt to defraud the victim in another way. A second offender may offer to assist the victim in recovering the lost funds for a further fee and defraud the victim again. This may lead to chronic victims who are subject to multiple offences on multiple occasions.<sup>24</sup>
- 3.19 The effects of fraud may also build on pre-existing vulnerabilities. Vulnerable people are often more likely to be the victims of fraud offences.<sup>25</sup>
- 3.20 The impacts on individuals can be seen in this summary of a statement by a victim of fraud that the District Court received in its common law jurisdiction (since it could not be admitted under the statutory scheme):

[The victim] told me that the offences affected him greatly, not just economically but emotionally. Initially he blamed family members for money he believed was missing. False accusations were made about the family members damaging his

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

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

22. NSW Sentencing Council, *Fraud*, Consultation Paper (2022) [3.9].

23. NSW Sentencing Council, *Fraud*, Consultation Paper (2022) [3.10].

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

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

relationship with them. He told me he felt emotionally worn down from the experience, guessing and blaming others around him. He said he suffered anxiety and anger issues. ... The extra stresses upon him have been exhausting and he still struggles to shake that exhaustion. He concludes “I find it hard to trust my own decisions, and people in my life”.<sup>26</sup>

3.21 The judge in this case observed that such statements “serve the very practical purpose of drawing to the offenders, the courts and the community’s attention, the personal and economic damage and harm caused by these crimes”.<sup>27</sup>

3.22 Submissions supported VISs being available for fraud victims as a way of bringing harm and loss suffered by individuals before the courts, in appropriate cases.<sup>28</sup>

3.23 The Office of the Director of Public Prosecutions (ODPP) supported the availability of VISs for victims of serious fraud, noting:

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. ... 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.<sup>29</sup>

3.24 This can be made worse where victims have particular vulnerabilities that should be recognised at sentencing. The Seniors Rights Service emphasised that the age of the victim and their vulnerability is an important factor in sentencing.<sup>30</sup> Importantly, older victims are often in poor physical or psychological health, socially isolated, less familiar with technology, and more likely to experience abuse.<sup>31</sup> The three elements of their vulnerability are often physical, financial and social.<sup>32</sup>

3.25 Another submission considered that allowing VISs for fraud would be particularly beneficial in the case of fraud that is associated with coercion and domestic violence as this would “acknowledge the experiences of victims and assist recovery, potentially raise victim vulnerability or emotional impact of the victim as an aggravating factor upon sentence, and build a greater understanding and evidence base of coercive control and abusive relationships”.<sup>33</sup>

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26. *R v Hatton* [2022] NSWDC 688 [71].

27. *R v Hatton* [2022] NSWDC 688 [73].

28. NSW Bar Association, *Submission FR11* [4]; NSW Young Lawyers Criminal Law Committee, *Submission FR13* [2]; NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [37]–[39].

29. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 2.

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

31. Seniors Rights Service, *Preliminary Submission PFR06*, 1–2.

32. C Cross, “‘They’re Very Lonely’: Understanding the Fraud Victimisation of Seniors” (2016) 5 *International Journal for Crime, Justice and Social Democracy* 60, 62.

33. Western Sydney University Justice Clinic, *Submission FR09* [2.5].

## Right limited to higher courts

- 3.26 Our recommendation is limited to VISs in the higher courts because there are practical and efficiency concerns around making VISs fully available in the Local Court. VISs are currently available only on a limited basis in the Local Court.<sup>34</sup>
- 3.27 Providing a right to make a VIS in the Local Court presents particular problems due to the nature of the Local Court's work, as a high turnover, efficient jurisdiction. Practical problems may be made more difficult for example, where there are multiple victims who might need to be given an opportunity to consider making a VIS, especially in relation to low level offending. The Local Court has raised concerns that, owing to the high volume of fraud cases, the impact on the Local Court's operations is likely to be significant.<sup>35</sup>
- 3.28 Within the existing system, a victim has the right to be informed of charges laid and any decision to modify or not proceed with charges in a reasonable timeframe. A victim will also be consulted before a decision is taken to modify or not proceed with charges in relation to a serious crime where the victim has suffered psychological or psychiatric harm.<sup>36</sup> These rights to information provide victims with some opportunity raise relevant issues of harm with the prosecution.
- 3.29 Some submissions stated that the impact on the operation of the courts (including the Local Court) was a reason for rejecting the idea of extending the right to make a VIS in all fraud cases.<sup>37</sup>
- 3.30 Despite misgivings around making VISs available to fraud victims in the Local Court, some submissions supported the availability of VISs for fraud offences in the higher courts.<sup>38</sup> The Commonwealth Director of Public Prosecutions submitted that extending the VIS scheme to fraud victims would:
- greatly increase the variety of appropriate responses to victims' needs in sentencing for fraud offences in NSW, resulting in the needs of such victims being dealt with more effectively in the sentencing process.<sup>39</sup>
- 3.31 The ODPP noted that, in the District Court, the relatively low numbers of charges finalised each year "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".<sup>40</sup>

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

35. Local Court NSW, *Submission FR02*, 1.

36. *Victims Rights and Support Act 2013* (NSW) s 6(6.5).

37. Law Society of NSW, *Submission FR10*, 2; Legal Aid NSW, *Submission FR12*, 11.

38. NSW Police Force, *Submission FR03*, 3; NSW Office of the Director of Public Prosecutions, *Submission FR04*, 2; Legal Aid NSW, *Submission FR12*, 12.

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

40. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 2.

- 3.32 We acknowledge there is also a real possibility of there being multiple victims of some serious frauds dealt with in the District Court. However, such risks already exist, for example, where there are large numbers of immediate family of murder victims. Choosing a limit on the number of people who can make a VIS to counter situations where there might potentially be hundreds or thousands of victims (as envisaged by the complex cases justifying an increase in the maximum penalty in chapter 4) would be difficult and apply in only rare cases. We would expect that only a small proportion of victims would choose to make a VIS in these circumstances.
- 3.33 In our 2018 report on victims, we recommended that the Department of Justice (now Department of Communities and Justice) should investigate ways of accommodating victims in the sentencing processes of the Local Court.<sup>41</sup> We acknowledged that they should not be prejudiced in relation to making a VIS because the jurisdiction in which their case is heard cannot easily accommodate them. However, we also noted that there are challenges involved in ensuring that victims can exercise their rights in the Local Court.<sup>42</sup>
- 3.34 We noted that some care will be needed in implementing existing VIS provisions in the Local Court to avoid unintended negative consequences. There are real risks of impacting the Local Court through court delays, where matters may need to be adjourned to allow a VIS to be prepared, and from additional time spent in tendering, reading and making submissions on VISs.
- 3.35 We particularly noted that systemic delays might also not be in the interests of some victims who would be best served by swift justice.<sup>43</sup>
- 3.36 The Department of Communities and Justice should consider our previous recommendation during any implementation of the recommendations in this report.

## Business impact statements

- 3.37 Despite the serious harm that a business can experience as an entity, we do not consider it appropriate to make a statutory base for business impact statements. Introducing statutory business impact statements, which do not currently exist for any offences, would go beyond the scope of this review. However, we note that previous recommendations of the Sentencing Council would allow individuals, who suffered harm as a result of an offence against a business, to make VISs.

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

42. See NSW Sentencing Council, *Victims' Involvement in Sentencing*, Report (2018) [1.37].

43. NSW Sentencing Council, *Victims' Involvement in Sentencing*, Report (2018) [1.40].

## The current law does not allow for business impact statements

- 3.38 Currently the VIS scheme does not allow impact statements by corporate entities that are victims of fraud or owners of businesses that are victims of fraud, although they can be admitted at common law at the discretion of the court.<sup>44</sup> This is because corporations cannot be victims of the offences to which the VIS provisions currently apply, for example, prescribed sexual offences or offences that result in death or actual physical bodily harm.<sup>45</sup> Businesses also cannot suffer “personal harm”, as this is defined as types of harm that a business cannot suffer, namely, actual physical bodily harm or psychological or psychiatric harm.<sup>46</sup> As a person entitled to make a VIS must be “a person against whom the offence was committed”, a business owner cannot give a VIS as an individual.<sup>47</sup>
- 3.39 An example of a statutory provision that allows a business to make an impact statement can be found in, for example, England and Wales, where the *Code of Practice for Victims of Crime in England and Wales (Victim’s Code)* provides that all businesses or enterprises (such as charities) that are victims of criminal offences are entitled to make an “Impact Statement for Business”.<sup>48</sup> This is intended to explain how the offence has affected the business. The Impact Statement for Business covers:
- financial impact as a direct result of the crime including assets lost or stolen, damage to buildings and property
  - other indirect financial costs such as loss of custom, impact on consumer confidence, staff time, expenditure on security measures, medical expenses, costs of contractual staff, and
  - non-financial impact such as reputational damage.<sup>49</sup>

## Impact of fraud on businesses

- 3.40 Generally, fraud can cause financial, commercial or reputational harm to businesses or organisations. According to a recent survey, fraud and corruption are seen as the

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44. See, eg, *R v Hanks* (unreported, NSWDC, Pickering DCJ, 18 February 2022).

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

46. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “personal harm”.

47. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “primary victim”.

48. *Domestic Violence, Crime and Victims Act 2004* (UK) s 32; UK, Ministry of Justice, *Code of Practice for Victims of Crime in England and Wales* (2020) [7.6]–[7.8]; Police.UK, “Impact Statement for Business” (2023) <[www.police.uk/pu/impact-statement-for-business/](http://www.police.uk/pu/impact-statement-for-business/)> (retrieved 14 April 2023).

49. Police.UK, “Impact Statement for Business” (2023) <[www.police.uk/pu/impact-statement-for-business/](http://www.police.uk/pu/impact-statement-for-business/)> (retrieved 14 April 2023).

greatest risks to businesses globally, with no downward trend over the last 14 years.<sup>50</sup>

3.41 Entities of all sizes are at risk of:

- misappropriation of commercial property, including client lists
- intellectual property fraud, for example, logos or names
- invoicing and funds transfer fraud
- frauds involving the misuse of business information
- misrepresentation of instructions from executives concerning funds transfers, and
- business opportunities and investment scams.<sup>51</sup>

3.42 Other harmful effects include diminished faith in an organisation, loss of stakeholders' trust, loss of market value, and the erosion of public morality.<sup>52</sup> The impact of fraud on a business can be so significant that a company is dissolved, leaving employees without employment and causing shareholders to lose their investment.<sup>53</sup>

3.43 Some submissions considered that evidence of harm to business could be adequately (if not fully) introduced through existing avenues for adducing evidence.<sup>54</sup> The ODPP observed that, while larger businesses are generally better at absorbing losses due to fraud:

the impact on a smaller business frequently extends beyond a monetary figure. For example this can include, dissolution of a company due to financial loss, loss of market value, reputational damage and leaving employees without employment.<sup>55</sup>

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50. EY Forensic and Integrity Services, *Integrity in the Spotlight: The Future of Compliance*, 15th Global Fraud Survey (2018) 5; EY Forensic and Integrity Services, *Tunnel Vision or the Bigger Picture? How a Focus on Enhanced Governance can Help Reimagine Corporate Integrity*, Global Integrity Report 2022 (2022) 8.

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

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

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

54. Legal Aid NSW, *Submission FR12*, 13; NSW Bar Association, *Submission FR11* [6].

55. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 3

3.44 The ODPD noted that the current sentencing provisions provide:

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.<sup>56</sup>

### **Business impact statements are not supported**

3.45 We do not support establishing a new legislative framework to allow representatives of corporations to make business impact statements only in relation to fraud. A wider application of such provisions, beyond fraud offences, would require further consultation and consideration.

3.46 One preliminary submission suggested a representative of a corporate victim should be able to make a VIS in order to inform the court about the impact suffered by a corporate entity.<sup>57</sup>

3.47 There was some support in submissions for smaller businesses and their owners (as well as not for profit organisations) to be able to make a statement,<sup>58</sup> and for representatives of businesses, especially in indictable cases.<sup>59</sup>

3.48 However, submissions were generally against allowing larger corporations to make VISs. Reasons for this included that such a statement may not be appropriate or meaningful, particularly from larger institutions such as banks or multinational companies.<sup>60</sup> One submission suggested that statements from corporations might be self-serving, especially where the fraud was brought about through failures in business systems and controls, and particularly where there might be a related insurance claim.<sup>61</sup>

3.49 Another view is that a VIS may not be relevant for a corporate victim or add any value to the understanding of the impact on a corporate victim in the sentencing process.<sup>62</sup> The amount and impact of the fraud on a business may already be clear from the statement of facts.<sup>63</sup>

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56. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 3.

57. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [39]. See also NSW Police Force, *Submission FR03*, 3.

58. NSW Police Force, *Submission FR03*, 3; NSW Young Lawyers Criminal Law Committee, *Submission FR13* [7].

59. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 3; District Court of NSW, *Submission FR06*, 11.

60. District Court of NSW, *Submission PR06*, 11; NSW Bar Association, *Preliminary Consultation PFRC07*.

61. NSW Bar Association, *Submission FR11* [7],

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

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



- 3.50 However, individuals do suffer relevant harm from frauds committed against corporations, for example, if they are the owners of the business. Recognising such victims is part of a wider question around who is recognised as a victim.
- 3.51 Our recommendation, in 2018, to remove the requirement that the offence be committed against the victim<sup>64</sup> would allow individual owners of defrauded business entities to make a VIS (so long as they suffered a relevant harm). The government, while supporting a widening of the use of VISs, considered that further consultations and analysis were required for the recommendation to be adopted “without undue operational impacts”.<sup>65</sup>

## Reparation

- 3.52 Recovering loss arising from fraud is an important concern for many victims. The primary means of recovering that loss is through compensation directions which are ancillary to the sentencing process. The avenues for retrieving losses are otherwise limited. Initiating a civil action to recover losses may be difficult for many victims, as it would take additional time and resources without any guarantee that they would recover their loss. The system of victim support payments and recovery of victims’ support payments from offenders administered by the Commissioner of Victims Rights does not apply to victims of fraud.<sup>66</sup>
- 3.53 While we considered a number of specific issues around compensation directions, which we outline below, we make no recommendations to change the existing arrangements.

## Needs of victims

- 3.54 Appropriate reparation for loss is one of the needs of victims that particularly applies to victims of fraud. We have heard that many victims want an outcome for their case, and a sense of justice.<sup>67</sup> This may involve compensation for their financial loss and suffering.
- 3.55 The Seniors Rights Service has observed that where frauds impact older people, “ensuring restitution for the older person of what they have lost would be a huge improvement on the current situation where there is almost no recourse”.<sup>68</sup> The ODPP has observed that victims “typically feel strongly that offenders should be

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

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

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

67. C Cross, *Preliminary Submission PFR04*, 4–5; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 5.

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



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”.<sup>69</sup>

3.56 The ability to recoup losses caused by fraud is, therefore, important to victims. The Seniors Rights Service emphasised that older victims who have been defrauded of their assets or finances, particularly if retired, have limited capacity to recover from the fraud.<sup>70</sup> In a recent case, the District Court, in considering the objective seriousness of a substantial fraud, noted “the age of several of the victims and their inability to recoup the losses they suffered at the hands of the offender”.<sup>71</sup>

## The current law

3.57 There are two avenues for reparation for victims of fraud, that are available as an adjunct to sentencing proceedings. A criminal court, when sentencing an offender, may make:

- an order for restitution of property,<sup>72</sup> and
- a direction for compensation for any loss sustained as a result of the offence.<sup>73</sup>

3.58 These orders were introduced to allow victims to request compensation or return of property in the one court action without the need to initiate separate civil proceedings.<sup>74</sup> In the case of restitution of property, a conviction is not required, although an order is rarely made in circumstances without a conviction.<sup>75</sup>

3.59 These orders are strictly ancillary to the sentencing process.<sup>76</sup> One submission noted that the availability of reparation orders shows that restoration is an important outcome of the criminal justice process despite not being itself a purpose of punishment.<sup>77</sup>

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

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

71. *R v Fineff* [2023] NSWDC [239]–[241].

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

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

74. NSW Attorney General’s Department, *Sentencing Review 1994* (1994) 39.

75. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 3.

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

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

- 3.60 At the time of making a direction for compensation, a court may specify a period within which the payment can be made, otherwise the sum directed to be paid must be paid immediately.<sup>78</sup> A direction for compensation is appealable as a “sentence”.<sup>79</sup>
- 3.61 If the amount specified in the direction is not paid as required, the registrar of the court, on the application of the victim, must issue a certificate that, among other things, specifies the amount outstanding. The person in whose favour the certificate is issued may file it “in the registry of a court having jurisdiction to order payment of the amount specified ... and the registrar of that court must immediately enter judgment in favour” of them.<sup>80</sup> Any filing fees payable to the registrar are also included in the judgment against the offender.<sup>81</sup>
- 3.62 Directions for compensation may only be enforced in accordance with this process.<sup>82</sup> The enforcement of judgments for the payment of money is generally governed by the *Civil Procedure Act 2005* (NSW) and there are, for example, some provisions for deferral and payment by instalments.<sup>83</sup> However, these provisions are expressly excluded from proceedings to enforce compensation directions.<sup>84</sup> It seems that, in absence of any other provision, much will fall back on the common law for enforcement.
- 3.63 This does not guarantee that a victim will be reimbursed and it will sometimes be the case that the money is simply no longer available. Several stakeholders emphasised the difficulty of enforcing reparation orders, particularly given that many offenders do not have any money left.<sup>85</sup>

## Specific issues

- 3.64 In the consultation paper we identified potential problems with compensation directions such as:
- the jurisdictional limits that apply when compensation is sought in the Local and District Courts,
  - potential underuse of orders, and
  - the ability of offenders to pay.<sup>86</sup>

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78. *Victims Rights and Support Act 2013* (NSW) s 100.

79. *Crimes (Appeal and Review) Act 2001* (NSW) s 11(1), s 3(1) definition of “sentence” (a)(iv).

80. *Victims Rights and Support Act 2013* (NSW) s 101(3).

81. *Victims Rights and Support Act 2013* (NSW) s 101(3)(b).

82. *Victims Rights and Support Act 2013* (NSW) s 101(4).

83. *Civil Procedure Act 2005* (NSW) s 106, s 107.

84. *Uniform Civil Procedure Rules 2005* (NSW) r 1.6(b)(v).

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

86. NSW Sentencing Council, *Fraud*, Consultation Paper (2022) [3.58]–[3.60].

## Jurisdictional limits

- 3.65 A magistrate’s direction for compensation is treated as a civil order and therefore subject to the Local Court’s civil jurisdictional limit of \$100,000.<sup>87</sup> This cannot be exceeded by more than 20%.<sup>88</sup> This amount is considerably less than some of the amounts associated with fraud offences prosecuted in the Local Court. We have identified at least one instance where the Local Court has needed to limit compensation directions to \$100,000 despite the amount involved in the fraud being substantially higher.<sup>89</sup>
- 3.66 A similar problem may arise in the District Court which has a jurisdictional limit of \$1,250,000.<sup>90</sup>
- 3.67 The current provision requires that only the court that convicts the person can make a compensation direction.<sup>91</sup> This means that a victim may have to initiate a civil action in a higher court than the one that dealt with the criminal conviction.
- 3.68 Applying the civil jurisdictional limit to reparation orders goes against the intention to provide a quick, simple and cheap mechanism for victims to recover their loss resulting from an offence. It is always possible for a victim to seek an enforceable order through civil proceedings, but this causes more trouble for the victim, as well as the likely expense of going to a higher court. This is particularly the case where, for example, there is only a relatively small amount left over after the Local Court’s \$100,000 limit has been reached.
- 3.69 There is a strong argument for removing the limit, especially if the amount is recorded in the charges and is the subject of a court finding or a plea of guilty, and has been established beyond reasonable doubt for the purposes of determining the seriousness of the offence at sentencing.
- 3.70 In many cases the amounts will be clear – an amount deducted from an account or charged to a credit card. However, there may be a problem with proof of loss through, for example, damage to property in some cases which would require proof at the sentencing or a subsequent hearing. Some care may also need to be taken since the amount of loss sustained by the victim may not be the same as the amount of advantage gained by the offender. Financial advantage does not necessarily translate to loss on the part of the victim.<sup>92</sup>

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

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

89. [A.190]. But see [A.20].

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

91. *Victims Rights and Support Act 2013* (NSW) s 97(1).

92. *R v Schultz* [2022] NSWDC 63 [22]–[23].

- 3.71 There is also the question of fairness to victims, in particular whether civil jurisdictional limits should preclude victims of the large and complex frauds prosecuted in the Local Court from access to appropriate reparation. Conversely, it would also be undesirable if the Director of Public Prosecution's decision to proceed on indictment were to be affected by jurisdictional limits on compensation in the Local Court.<sup>93</sup>
- 3.72 However, when viewed through the lens of civil jurisdiction, there are some problems with expanding the courts' jurisdiction, particularly with respect to how some losses might be proved.
- 3.73 Some submissions suggested that the jurisdictional limit could be removed in cases where the parties to the criminal proceedings consented or agreed on the amount of the fraud.<sup>94</sup> Another option we considered could be expressly limiting it to the amount of loss charged. However, there is a risk that such approaches could affect the willingness of offenders to agree to amounts beyond the jurisdictional limits when considering a guilty plea.
- 3.74 In our sampling of cases in the Local Court in 2019, two of the three instances of frauds worth more than \$100,000 involved banks<sup>95</sup> which, arguably, would be able to bear the expense and inconvenience of civil proceedings to recover funds better than most individual victims.
- 3.75 We have concluded that it is not appropriate to alter the jurisdictional limits of the courts only for fraud offences. Even if the objections to altering the limits are minor, there may be unintended consequences if any changes were to be applied generally beyond fraud cases. While there may be an obvious problem with the civil jurisdictional limits in clear cases of fraud, there are likely to be other issues in other contexts which would need to be considered in a wider review of the jurisdictional limits of the courts.

### **Encouraging the use of compensation directions where appropriate**

- 3.76 We understand from our consultations that, while frequently made, compensation directions may not be made as often as they could be.<sup>96</sup> One possible reason for this is that victims may not be aware of the option to request reparation at sentencing. Much of this can be resolved by appropriate administrative action.

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93. NSW Bar Association, *Submission FR11* [8]; NSW Young lawyers Criminal Law Committee, *Submission FR13* [17].

94. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 4; Law Society of NSW, *Submission FR10*, 3; NSW Young Lawyers Criminal Law Committee, *Submission FR13* [17].

95. [A.3], [A.16], [A.184].

96. NSW Office of the Director of Public Prosecutions, *Preliminary Consultation PFR05*; NSW Police Force, *Submission FR03*, 4.

- 3.77 We understand that reparation orders are covered in police training and the *NSW Police Force Handbook* sets out what must be done when a victim seeks compensation.<sup>97</sup> We also understand that the Operational Legal Services Command has recently issued a note to police and prosecutors about compensation in the Local Court.
- 3.78 Saskatchewan is an example of a jurisdiction where a government department encourages victims to apply for compensation through a “Statement on Restitution” form that records details of financial loss and damage due to the fraud.<sup>98</sup> Similarly, in Alberta victims are encouraged to submit a “Statement on Restitution” to seek recovery of their losses.<sup>99</sup>
- 3.79 Some submissions supported further education about compensation directions (when appropriate) for all participants in the criminal justice system.<sup>100</sup>
- 3.80 The Local Court suggested that prosecuting authorities could prepare and submit details of losses sustained in advance of the sentencing hearing, noting that, “in general, the itemisation of loss is an afterthought to conviction and a requirement to impel the timely provision of this information would assist the court in making appropriate reparation orders”.<sup>101</sup>
- 3.81 In our view, such administrative actions are appropriate ways to encourage the use of compensation directions. There is no need to recommend legislative change achieve this. We, therefore, encourage the relevant participants in criminal proceedings to consider what more can be done to ensure that victims are supported to apply for compensation, should they wish to.

### **Ability to pay**

- 3.82 The question of an offender’s ability to pay compensation when directed is subject to some tension between law and practice. Notwithstanding some statements of the Court of Criminal Appeal (CCA) that suggest that capacity to pay is not strictly a relevant consideration in directing compensation (outlined below), we prefer not to make recommendations that might disturb the current practice of courts taking such matters into account.

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97. *NSW Police Force Handbook* (2014) 384.

98. Government of Saskatchewan, “Victim Impact Statement and Restitution” <[www.saskatchewan.ca/residents/justice-crime-and-the-law/victims-of-crime-and-abuse/victim-impact-statement-and-restitution#completing-a-statement-on-restitution](http://www.saskatchewan.ca/residents/justice-crime-and-the-law/victims-of-crime-and-abuse/victim-impact-statement-and-restitution#completing-a-statement-on-restitution)> (retrieved 16 April 2023).

99. Government of Alberta, “Victim Restitution and Recovery” (2023) <[www.alberta.ca/victim-restitution-and-recovery.aspx](http://www.alberta.ca/victim-restitution-and-recovery.aspx)> (retrieved 16 April 2023).

100. NSW Police Force, *Submission FR03*, 4; Western Sydney University Justice Clinic, *Submission FR09* [3.7]; Legal Aid NSW, *Submission FR12*, 14.

101. Local Court of NSW, *Submission FR02*, 2.

- 3.83 In one case the CCA has observed that inability to pay should “not ordinarily be regarded as a reason for declining to make a direction” because the inability may be temporary and the offender’s financial position may change through “rehabilitation and hard work or by good fortune”, or the offender may have lied about their true financial position.<sup>102</sup>
- 3.84 In another case, the CCA observed that making a compensation direction did not “of itself give rise to any material hardship” given that being exposed to the streamlined enforcement offered by a compensation direction merely helped to enforce what was already a civil liability that could be pursued through the civil courts.<sup>103</sup>
- 3.85 Notwithstanding the CCA’s attitude, in reality courts do exercise a discretion. The ODPP has noted:
- 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.<sup>104</sup>
- 3.86 The ODPP also exercises a discretion whether to apply for a compensation direction 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.<sup>105</sup>
- 3.87 Some submissions raised issues around the question of the ability of some offenders to pay and the negative impact of compensation directions on the rehabilitation of such offenders.<sup>106</sup> Legal Aid submitted that the requirement that a court considering whether to give a direction for compensation have regard to “such other matters as it considers relevant”, may need to be revisited if the use of reparation orders were to increase. They suggested that the requirements should include an “express requirement to consider the offender’s financial circumstances and their capacity to pay” before making a direction.<sup>107</sup>
- 3.88 While we agree with the submissions that supported the continuance of the courts’ discretion to direct compensation in appropriate cases,<sup>108</sup> we do not think that express provision is necessary at this stage.

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102. *Connor v R* [2005] NSWCCA 431 [41].

103. *Upadhyaya v R* [2017] NSWCCA 162 [12].

104. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 4.

105. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 4.

106. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 4; Legal Aid NSW, *Submission FR12*, 15; NSW Young Lawyers Criminal Law Committee, *Submission FR13* [16].

107. Legal Aid NSW, *Submission FR12*, 15.

108. District Court of NSW, *Submission FR06* [13].

## 4. Maximum penalties

### In brief

The maximum penalty for fraud offences under s 192E of the *Crimes Act 1900* (NSW) should be able to respond to increasingly complex frauds and deal appropriately with low level offending. We recommend a tiered offence structure that has maximum penalties based on the value of the fraud.

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- 4.1 In this chapter, we recommend a tiered offence structure for fraud offences under s 192E of the *Crimes Act 1900* (NSW) (*Crimes Act*) with maximum penalties based on the value of the fraud. The focus on the s 192E offences is explained in chapter 2.
- 4.2 The tiered offence structure involves an increase to the maximum penalty for frauds over \$5,000,000 to allow courts to respond to increasingly complex frauds.
- 4.3 However, we do not think low level fraud offences, which can be relatively minor, should be subject to the existing maximum penalty of 10 years' imprisonment. To allow courts to deal with this offending appropriately, we recommend a lower penalty for frauds under \$100,000.

### There should be a higher maximum penalty

- 4.4 We consider that some increase to the maximum penalty is justified. The existing maximum penalties may not be enough to reflect the seriousness of offending in increasingly complex schemes involving ever greater amounts.



## The current maximum penalty

- 4.5 The maximum penalty for fraud offences under s 192E of the *Crimes Act* is 10 years' imprisonment. This maximum penalty represents an increase in the 5-year maximum penalty for some fraud offences that applied before the fraud reforms of 2010.<sup>1</sup> The reforms were intended to bring NSW into line with the national approach to fraud, as set out in the Model Criminal Code.<sup>2</sup>
- 4.6 Other jurisdictions have a 10-year maximum penalty for fraud offences like those in s 192E. These include England and Wales, the Commonwealth, the Australian Capital Territory, and Victoria.<sup>3</sup>
- 4.7 Some jurisdictions have maximum penalties for comparable fraud offences ranging from 5 to 10 years, but maximum penalties for aggravated forms of the offences ranging from 10 years to 20 years. These jurisdictions include the Northern Territory, South Australia, Western Australia, and Queensland.<sup>4</sup> The elements of aggravation are not uniform across these jurisdictions and sometimes include monetary amounts, victim characteristics and different circumstances of offending.

## Arguments in relation to increasing the maximum penalty

- 4.8 The main argument for an increased maximum penalty for fraud is that it provides more scope for dealing with serious and complex fraud. Another argument is that an increase is consistent with penalties for related offences.

### More scope for dealing with serious and complex fraud

- 4.9 While some submissions supported keeping the current maximum penalty,<sup>5</sup> we agree with those that supported an increase at least in some more serious cases.<sup>6</sup> Increasing the maximum penalty for more serious cases would allow courts to deal appropriately with more complex frauds in a changing technological landscape. The tiered approach we recommend addresses concerns about unintended consequences a general increase may have.

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1. *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009* (NSW) sch 1 [3] inserting *Crimes Act 1900* (NSW) pt 4AA, pt 4AB. See, eg, *Crimes Act 1900* (NSW) s 178BA, s 178BB, s 179 repealed by *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009* (NSW) sch 2 [10]–[11], [13].
  2. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 3: Theft, Fraud, Bribery and Related Offences*, Report (1995) 124 (cl 17.2), 134 (cl 17.3).
  3. *Fraud Act 2006* (UK) s 1–4; *Criminal Code* (Cth) s 134.1(1), s 134.2(1); *Criminal Code 2002* (ACT) s 326, s 332; *Crimes Act 1958* (Vic) s 81(1), s 82(1).
  4. *Criminal Code* (NT) s 210, s 227(1); *Criminal Law Consolidation Act 1935* (SA) s 134(1), s 139, s 5AA; *Criminal Code* (WA) s 409(1); *Criminal Code* (Qld) s 408C(1)–(2A).
  5. Legal Aid NSW, *Submission FR12*, 23.
  6. NSW Police Force, *Submission FR03*, 5; District Court of NSW, *Submission FR06*, 12.



- 4.10 We agree with the submissions that pointed to the need for courts to respond appropriately to frauds using advanced technology to gain large sums of money.<sup>7</sup> The NSW Office of the Director of Public Prosecutions (ODPP), for example, supported increasing the maximum penalty for fraud:
- 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.<sup>8</sup>
- 4.11 The ODPP noted that it was now prosecuting matters involving amounts in the tens of millions of dollars and that 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.<sup>9</sup>
- 4.12 Another submission supported an increase in order properly to reflect “the increased sophistication of the frauds being committed and the significant increase in the number of frauds being committed in such a variety of ways”.<sup>10</sup>
- 4.13 However, there is a risk that increasing the maximum penalty could have unintended consequences, including by raising sentences for low level offending. The Women’s Legal Service expressed concern that raising maximum penalties for fraud as a response to complex or white-collar crime, may impact low level offenders, such as those committing opportunistic fraud (such as tap and go).<sup>11</sup>
- 4.14 Legal Aid also raised concerns about the impact raising the maximum penalty would have on low level offenders. They also raised concerns about Aboriginal offenders and the negative impact an increase could have on progress towards Closing the Gap targets.<sup>12</sup>
- 4.15 The Young Lawyers Criminal Law Committee noted potential unintended effects of a general increase in maximum penalties, including dissuading some offenders from pleading guilty.<sup>13</sup>
- 4.16 To avoid these unintended consequences, we recommend a tiered approach to maximum penalties, based on the amount of the fraud (discussed below).

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7. District Court of NSW, *Submission FR06*, 2, 5–6.

8. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 6.

9. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 6.

10. District Court of NSW, *Submission FR06*, 12.

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

12. Legal Aid NSW, *Submission FR12*, 25–26.

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

## Consistency with penalties for related offences

- 4.17 An increase in the maximum penalty for s 192E would be consistent with higher penalties for other, related offences. It would also reflect the general trend of increasing penalties for white-collar crime. For example, recent amendments to the *Corporations Act 2001* (Cth)<sup>14</sup> have increased penalties for dishonest use of position as director to gain benefit<sup>15</sup> from a maximum penalty of 5 years' imprisonment to one of 15 years. The second reading speech noted that the bill more than doubled maximum penalties for some of the most serious white-collar crimes, "bringing Australia's penalties in closer alignment with leading international jurisdictions".<sup>16</sup>
- 4.18 Some penalties for money laundering are also high. For example, the Commonwealth proceeds of crime offences, where property or money is proceeds of crime and the offender believes that it is proceeds of crime, have maximum penalties ranging from 15 years' imprisonment to life imprisonment for amounts ranging from \$50,000 to amounts of \$10,000,000 or more.<sup>17</sup>
- 4.19 Some submissions specifically raised the issue of interaction with money laundering penalties, in particular the disparity between the maximum penalties for fraud in NSW on the one hand, and for certain money laundering offences on the other.<sup>18</sup> Because of this, the ODDP suggested that increasing the maximum penalty for the main fraud offences should be considered, in order appropriately to:
- reflect the seriousness of such offences and to permit sentencing courts to fashion sentences that appropriately reflect the criminality of the conduct.<sup>19</sup>
- 4.20 Fraud and money laundering offences are frequently charged together.<sup>20</sup> This can lead to some apparently inconsistent outcomes. For example, where a fraud involves money laundering, a person at the bottom of the hierarchy of a syndicate might be convicted for a money laundering offence that has a high maximum penalty. But the person who takes a more active and continuing role in the fraud

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14. *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) sch 1 [140] amending *Corporations Act 2001* (Cth) sch 3.

15. *Corporations Act 2001* (Cth) s 184(2), sch 3.

16. Australia, House of Representatives, *Parliamentary Debates*, Second Reading Speech, 24 Oct 2018, 10873.

17. *Criminal Code* (Cth) s 400.2B(1), s 400.3(1), s 400.4(1), s 400.5(1).

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

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

20. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 1; NSW Bar Association, *Preliminary Consultation PFRC07*.

may be convicted of a fraud offence with a lower maximum penalty.<sup>21</sup> The ODPP pointed out that this disparity causes “artificiality on sentence in fraud matters”.<sup>22</sup>

- 4.21 However, care should be taken in comparing fraud offences with money laundering offences. Despite these offences sometimes being dealt with together, money laundering offences have different objects and elements to fraud offences, and different penalties may be appropriate.
- 4.22 In addition, the reasons for the high maximum penalties for the money laundering offences have a very particular context that is not relevant to many fraud offences. The *Crimes Act* provisions dealing with money laundering were introduced to target activity that was seen as “a significant global problem”. They were part of “an increased focus by governments around the world on strengthening their anti-money laundering regimes and on targeting terrorist financing”. They were also intended to ensure that the NSW regime was “consistent with international standards set by the OECD’s Financial Action Task Force on Money Laundering”.<sup>23</sup>
- 4.23 Further, not all members of the Council were convinced of the strength of the consistency argument, especially if there is no evaluation of the appropriateness of the existing higher penalties for some proceeds of crime offences.

## A tiered offence structure

### Recommendation 4.1: Tiered offences for fraud

There should be a tiered offence structure for offences in s 192E of the *Crimes Act 1900* (NSW). The maximum penalties for the offences should be:

- (a) for amounts of \$5,000,000 or more: 20 years
- (b) for amounts of \$100,000 or more up to \$5,000,000: 10 years
- (c) for amounts less than \$100,000: 5 years.

- 4.24 We recommend a structure that offers higher and lower penalties based on the value of the fraud.

## A tiered approach is preferable to a general increase

- 4.25 We prefer tiered offences with corresponding maximum penalties to the alternative of a general increase in the maximum penalties for the s 192E fraud offences. This addresses both concerns about the impact of a general increase in the maximum

21. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 1.

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

23. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 September 2005, 18044, 18045.

penalty on low level offenders,<sup>24</sup> as well as concerns about the appropriateness of the current maximum penalty for low level offenders.<sup>25</sup>

4.26 Some submissions supported or did not oppose a tiered approach.<sup>26</sup> Legal Aid NSW considered that, in light of the large variation in the amounts of fraud from less than \$100 for a tap and go offence to millions of dollars, tiered offences would:

- assist the court in determining the seriousness of an offence
- better reflect the broad range of offences charged, and
- “support more consistent sentencing outcomes”.<sup>27</sup>

4.27 While some submissions considered that a single maximum penalty was sufficient to allow the courts to impose appropriate sentences in all the circumstances of a case, including for low level offending,<sup>28</sup> there are concerns about unintended consequences that may come from a general increase (which we discuss above).

### **The tiers should be based on quantum**

4.28 We recommend a maximum penalty of 20 years' imprisonment for top tier frauds amounting to more than \$5,000,000. The existing maximum penalty of 10 years' imprisonment should be preserved for frauds between \$100,000 and \$5,000,000. A new maximum penalty of 5 years' imprisonment should apply to frauds valued at less than \$100,000.

4.29 The top tier is intended to deal with the very serious and complex cases of the sort described above that justify a maximum penalty that allows for greater scope in sentencing.

4.30 The lower tier is intended for less serious frauds. We do not think that offences such as tap and go offences and other low level offending, especially where the offending is in the context of poverty, addiction or other disadvantage, should be subject to the higher maximum penalty.

4.31 This may result in fewer incarcerations of low level offenders which is appropriate given that many of the criminogenic factors are better addressed in the community.

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24. Women's Legal Service NSW, *Preliminary Consultation PFRC01*; Legal Aid NSW, *Submission FR12*, 25–26; District Court of NSW, *Submission FR06*, 12.

25. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission FR14*, 2; Institute of Public Affairs, *Submission FR05*, 24, 27.

26. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 6–7; District Court of NSW, *Submission FR06* [24]–[25]; Legal Aid NSW, *Submission FR12*, 27–28.

27. Legal Aid NSW, *Submission FR12*, 27.

28. Local Court of NSW, *Submission FR02*, 2, 3; Law Society of NSW, *Submission FR10*, 4; NSW Bar Association, *Submission FR11* [14]; Legal Aid NSW, *Submission FR12*, 23; NSW Young Lawyers Criminal Law Committee, *Submission FR13* [26]–[27].

This will, of course, depend on the availability of appropriately targeted programs to address problem behaviour, such as gambling and alcohol and drug addiction (see chapter 5). It should be noted that, at present, the cases that we have sampled do not show any egregious examples of inappropriate sentences.

- 4.32 One submission suggested a lower penalty to align better with low level offending.<sup>29</sup> Another submission noted that a tiered approach applying lower maximum penalties for low level fraud offending might assist offenders who have committed fraud because of an abusive relationship.<sup>30</sup>
- 4.33 The tiers align with the existing offences of dealing with property suspected of being proceeds of crime provisions which offer tiers for amounts less than \$100,000, amounts between \$100,000 and \$5,000,000 and amounts of \$5,000,000 or more.<sup>31</sup>
- 4.34 Money amounts appear to be the most practical way of separating out offenders, particularly low level offenders.<sup>32</sup> We do not consider it is necessary to use other indicators of complexity or seriousness, such as an organised or continuing fraud offence that attracts a higher maximum penalty. Such aggravated forms of an offence may create unnecessary problems of proof. We prefer to have a general offence, with maximum penalties based on the amount of the fraud, that is flexible enough to deal with emerging forms of fraud.
- 4.35 In making this recommendation, we acknowledge that the quantum of fraud may not always be the most appropriate measure of the seriousness of the offence.<sup>33</sup> In some situations, an amount of, for example, \$100,000, may be enough to destroy an individual person's financial situation, whereas \$100,000 may be relatively insignificant to a large corporation or bank. The ODDP noted:
- 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.<sup>34</sup>
- 4.36 We agree that the amount defrauded will not always reflect the harm to the individual victim and the criminality involved in the offence. However, in our view, introducing other elements of aggravation in the tiered system would likely lead to unnecessary complexity and difficulties with proof. The courts already consider such factors as part of the sentencing exercise. For example, harm to the victim and

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29. Legal Aid NSW, *Submission FR12*, 27.

30. Western Sydney University Justice Clinic, *Submission FR09* [4.2]. See also NSW Bar Association, *Submission FR11* [20].

31. *Crimes Act 1900* (NSW) s 193C(1AA), s 193C(1), s 193C(2).

32. Western Sydney University Justice Clinic, *Submission FR09* [4.2].

33. A Steel, *Preliminary Consultation PFRC09*.

34. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 7.

community is taken into account as a sentencing purpose,<sup>35</sup> and abuse of trust is an aggravating factor<sup>36</sup> (see chapter 6).

- 4.37 Finally, the maximum penalty of 5 years' imprisonment, which we suggest for the lowest tier, is still substantial and provides enough flexibility to allow courts to deal with offences under \$100,000 that have relatively high objective seriousness.
- 4.38 This recommendation is consistent with other Australian states and territories which have a tiered approach based on the quantum of the fraud (and other factors), including the Northern Territory and Queensland, albeit at lower levels than we propose.
- 4.39 In the Northern Territory, a person who obtains property or a benefit by deception "is liable to the same punishment as if he or she had stolen the property or property of equivalent value to the benefit fraudulently obtained".<sup>37</sup> The general offence of stealing is subject to a maximum penalty of 7 years' imprisonment or 14 years if the thing stolen has a value of at least \$100,000.<sup>38</sup>
- 4.40 In Queensland, the maximum penalty for the principal fraud offence is 5 years' imprisonment, or:
- 14 years if the property, yield or detriment caused has the value of at least \$30,000 but less than \$100,000, or
  - 20 years if the property, yield or detriment caused has the value of at least \$100,000.<sup>39</sup>
- 4.41 In New Zealand, the maximum penalties for the offence of obtaining by deception or causing loss by deception<sup>40</sup> are related to the amount of the fraud:
- 3 months' imprisonment for amounts up to NZ\$500
  - 12 months' imprisonment for amounts more than NZ\$500 and up to NZ\$1000, and
  - 7 years' imprisonment for amounts over NZ\$1000.<sup>41</sup>

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

36. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(k).

37. *Criminal Code* (NT) s 227(1).

38. *Criminal Code* (NT) s 210.

39. *Criminal Code* (Qld) s 408C(1), s 408C(2)(d), s 408C(2A)(a).

40. *Crimes Act 1961* (NZ) s 240.

41. *Crimes Act 1961* (NZ) s 241.

## Implementation issues

- 4.42 Some incidental issues that may need to be considered in implementing recommendation 3.1 include the availability of alternative verdicts and whether all of the tiers should be “Table 1” offences that are to be tried summarily unless the prosecutor or accused elects otherwise.

### Alternative verdicts may need to be available

- 4.43 Some provision may need to be made for alternative verdicts for cases where it turns out the amount is below or above the tier charged. While it is possible that the common law may allow for alternative verdicts where a lesser offence is an essential ingredient of a more serious offence,<sup>42</sup> existing NSW and Commonwealth legislation expressly provides for alternative verdicts in cases where quantities of money or drugs are elements of the offence. This suggests a need for legislative clarity around alternative verdicts for tiered offences.
- 4.44 In the *Drug Misuse and Trafficking Act 1985* (NSW), alternative verdicts are framed around thresholds identified as small quantities and commercial quantities of the relevant drug.<sup>43</sup> Likewise, the NSW proceeds of crime offences, which are tiered based on the value of the proceeds,<sup>44</sup> are subject to an alternative verdict provision.<sup>45</sup> The various Commonwealth money laundering offences, which are classified according to level of intent, are also tiered according to value.<sup>46</sup> These offences are also subject to an alternative verdict provision.<sup>47</sup>
- 4.45 Alternative verdicts based on the amount of the fraud are unlikely to lead to complexity of trials and difficulties for prosecutors that might arise for other elements of aggravation – for example, where juries may need to consider the possibility of alternative verdicts depending on their findings in relation to particular elements. One submission, in supporting a tiered approach based on amount, referred to the “benefits derived through this approach” in the *Drug Misuse and Trafficking Act 1985* (NSW).<sup>48</sup>
- 4.46 Other alternative verdicts are already available for s 192E offences. Currently, if a person is charged with fraud under s 192E, an alternative verdict is a conviction for

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42. *R v Cameron* [1983] 2 NSWLR 66.

43. *Drug Misuse and Trafficking Act 1985* (NSW) s 23(1B), s 23(1C), s 23(3), s 23(3A), s 23A(4), s 23A(5), s 24(3), s 25(3).

44. *Crimes Act 1900* (NSW) s 193C(1AA), s 193C(1)–(2).

45. *Crimes Act 1900* (NSW) s 193E(2AD)–(2B).

46. *Criminal Code* (Cth) pt 10.2.

47. *Criminal Code* (Cth) s 400.14.

48. District Court of NSW, *Submission FR06*, 6.



larceny and vice versa.<sup>49</sup> Fraudulent appropriation is an alternative verdict to a charge of larceny.<sup>50</sup> There is no reason why these alternative verdicts should not be available for all of the tiered offences that we recommend.

### **All tiers should be Table 1 offences**

- 4.47 All offences under part 4AA, including the fraud offences under s 192E, are Table 1 offences, that is, they are to be tried summarily unless the prosecutor or accused elects otherwise, in which case they will be tried on indictment.<sup>51</sup> When finalised summarily in the Local Court, the maximum penalty the court can impose for each offence is two years, and for multiple offences the total maximum is five years.<sup>52</sup>
- 4.48 Since the proposed tiers involve amending a provision in part 4AA of the *Crimes Act*, each tier will be a Table 1 offence, unless changes are made to the table offence provisions. We consider that no change is necessary to the Table 1 provisions.
- 4.49 We expect that offences charged in the lower tier will generally be dealt with summarily in the Local Court and that offences charged in the higher tier will generally be tried on indictment in the District Court. However, there will be cases in both the lower and higher tiers where it is appropriate to deal with the charges in the other jurisdiction. For example, there could be an offence under \$100,000 that involves a serious breach of trust over an extended period where a longer sentence of imprisonment available on indictment would be appropriate. In the same way, there could a fraud involving more than \$5,000,000 that involves sufficient mitigating factors (such as a one-off transaction made by a person with no criminal record, admitted to immediately and repaid in full) that could be dealt with appropriately in the Local Court.

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

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

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

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



## 5. Low level offending

### In brief

Some options for appropriately dealing with low level fraud offending include criminal infringement notices, limits on using imprisonment and diversion programs. We recommend that the government consider options for expanding the operation of suitable diversion programs, in particular those that deal with drug, alcohol and gambling problems.

<b>There should not be further limits on using imprisonment</b>	<b>51</b>
<b>Criminal infringement notices should not be available for fraud</b>	<b>52</b>
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- 5.1 In the consultation paper, we raised a number of options for dealing with low level offenders outside of the current penalty structure. These options, which included placing further limits on the use of imprisonment, and decriminalising some offences or diverting some offenders,<sup>1</sup> responded in part to concerns about negative impacts (through more punitive sentences) that an increase in the maximum penalty might have on low level offenders.<sup>2</sup>
- 5.2 This chapter considers the main options for dealing with low level offending and makes one recommendation - that the government consider options for expanding the operation of suitable diversion programs, particularly those aimed at drug, alcohol and gambling problems.

### There should not be further limits on using imprisonment

- 5.3 When sentencing an offender in NSW, a court must not sentence them to imprisonment “unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate”.<sup>3</sup> We do not recommend imposing additional limits on the use of imprisonment, such as those employed in s 17B(1) of the *Crimes Act 1914* (Cth). Under s 17B, where an offender is convicted of

1. NSW Sentencing Council, *Fraud*, Consultation Paper (2022) [8.71]–[8.77].

2. NSW Sentencing Council, *Fraud*, Consultation Paper (2022) [8.13]–[8.14], [8.64].

3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).

certain minor fraud offences where the total value is less than \$2000 and where the offender had not previously been imprisoned, the court cannot impose imprisonment unless satisfied there are exceptional circumstances.<sup>4</sup> Under the current law in NSW it would be rare for a person meeting the criteria in s 17B(1) to receive a sentence of imprisonment, unless they had a substantial prior record. We have found no evidence that sentences of imprisonment are being handed down in cases where low level offenders do not have substantial prior records.<sup>5</sup>

- 5.4 Some submissions, when addressing low level offending, expressed general satisfaction with the current approach of allowing the courts the discretion to impose the existing range of sentencing options.<sup>6</sup> Only the submission of the Aboriginal Legal Service addressed and supported the option of limiting the use of imprisonment for some low level offending.<sup>7</sup>

## **Criminal infringement notices should not be available for fraud**

- 5.5 We do not recommend making criminal infringement notices (CINs) available for fraud offences involving minor amounts, because of our concerns about the use and impact of CINs. While this would allow low level offenders to accept a fine without the need to go to court and without a conviction being recorded, we do not think they are an adequate response to the underlying problems of some fraud offending.
- 5.6 An example of this approach can be seen in the current provisions making larceny or shoplifting<sup>8</sup> in amounts under \$300 a penalty notice offence. Penalty notices for larceny/shoplifting are governed by chapter 7 part 3 of the *Criminal Procedure Act 1986* (NSW). Only police may issue them, and they may not be issued to children. In 2021–22, 2222 penalty notices were issued for the larceny/shoplifting offence. Before the COVID pandemic, in 2018–19, 4316 penalty notices were issued for such offences.
- 5.7 In 1995, the Model Criminal Code Officers Committee of the Standing Committee of Attorneys General considered options for dealing with small value frauds of less than \$150. The Committee observed that some people argued that offences involving such amounts “should be decriminalised because they do not warrant the

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4. *Crimes Act 1914* (Cth) s 17B(1).

5. See, eg, [A.14], [A.37], [A.65], [A.73], [A.79], [A.87].

6. Local Court of NSW, *Submission FR02*, 4; NSW Office of the Director of Public Prosecutions, *Submission FR04*, 9; District Court of NSW, *Submission FR06*, 8–9.

7. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission FR14*, 2.

8. *Crimes Act 1900* (NSW) s 117; *Criminal Procedure Regulation 2017* (NSW) sch 4.

stigma of prosecution for the more serious categories of theft nor the expense of prosecuting them”.<sup>9</sup>

- 5.8 Some submissions supported making low level fraud offending, for example involving small amounts of money in the range of \$100 to \$300, a penalty notice offence<sup>10</sup> notwithstanding the problems with capacity to pay for some low level offenders. Concerns about capacity to pay were seen as outweighed by the benefit of no conviction for some offenders and the savings in court time by reducing the case load in the Local Court.<sup>11</sup> It was also noted that making this change would simply involve adding frauds up to a specified amount.<sup>12</sup>
- 5.9 Problems with CINs include that they do not deal with criminogenic factors and miss opportunities to divert (where diversion options are available). They may, because of their administrative simplicity, have the perverse effect of encouraging police to divert even those who would benefit from supervision under a non-custodial order. They can also be criminogenic, for example, if their enforcement results in loss of a driver licence.
- 5.10 The Office of the Director of Public Prosecutions (ODPP) considered that such an approach should be accompanied by a statutory review of the infringement notice system to assess whether there are issues around non-payment and difficulties with enforcement processes. The ODPP also raised the need to consider whether such an approach might give rise to net widening.<sup>13</sup>
- 5.11 The disproportionate impact of CINs on Aboriginal people has been noted in reports by the NSW Ombudsman and WA Ombudsman.<sup>14</sup> The Aboriginal Legal Service highlighted “the importance of applying a broad and comprehensive understanding of the potential impact of any reform on the overrepresentation of Aboriginal people in custody”.<sup>15</sup>

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9. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 3: Theft, Fraud, Bribery and Related Offences*, Report (1995) 175–177. See also B Fisse, *Howard’s Criminal Law* (5th ed, 1990) 314–315.

10. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 9; Law Society of NSW, *Submission FR10*, 6; NSW Bar Association, *Submission FR11* [27]; Legal Aid NSW, *Submission FR12*, 34; NSW Young Lawyers Criminal Law Committee, *Submission FR13* [15].

11. Law Society of NSW, *Submission FR10*, 6; NSW Office of the Director of Public Prosecutions, *Submission FR04*, 9.

12. Law Society of NSW, *Submission FR10*, 6.

13. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 9.

14. NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009); Ombudsman Western Australia, *A Report on the Monitoring of the Infringement Notices Provisions of The Criminal Code: Volume 3: The Impact on Aboriginal and Torres Strait Islander and Other Communities* (nd).

15. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission FR14*, 2.

- 5.12 Introducing penalty notices for fraud may also cause problems for offenders in other disadvantaged or vulnerable groups, such as homeless people and people with mental health and cognitive impairments, who are generally adversely affected by penalty notices.<sup>16</sup>
- 5.13 Legal Aid, while supporting the use of CINs, noted some other concerns that apply generally to penalty notices:
- there is limited judicial and public scrutiny over issuing agencies which may lead to discriminatory and unfair practices
  - there is a risk that people who are not guilty will simply pay the penalty to avoid the cost and inconvenience of contesting the infringement notice
  - infringement notices do not take into account objective seriousness or subjective circumstances of an offender, including ability to pay, and
  - the use of licence sanctions as part of the enforcement regime may amount to a double penalty and lead to secondary offending.<sup>17</sup>
- 5.14 It may not make sense to have an offender use limited resources to pay a fine (and get the benefit of no conviction) rather than repay the victim.
- 5.15 If penalty notices were to be available, the associated risks would require there to be guidelines for issuing them. For example, one submission expected that the exercise of police discretion would be based on factors such as the nature of the fraud, the circumstances in which it was perpetrated and the offender's circumstances. The submission also considered that some low level fraud might continue to be inappropriate for infringement notices, for example, where the fraud involves a breach of trust.<sup>18</sup> Police may already have discretion to consider such matters when issuing cautions.<sup>19</sup>
- 5.16 However, even if there were guidelines, we do not consider they would be sufficient, in practice, to counteract the potential problems with penalty notices for fraud.

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16. NSW Law Reform Commission, *Penalty Notices*, Report 132 (2012) [1.46]–[1.57].

17. Legal Aid NSW, *Submission FR12*, 35.

18. NSW Young Lawyers Criminal Law Committee, *Submission FR13* [31].

19. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [16.3].

## Diversion programs could be expanded

### Recommendation 5.1: Encourage use and development of diversion programs

Consideration should be given to expanding the operation of diversion programs for offenders with drug, alcohol and/or gambling problems as far as is possible given resource constraints. Options for expansion that should be considered include:

- (a) providing programs in more locations,
- (b) providing programs that deal with alcohol issues in more locations, and
- (c) expanding the programs to defendants with addictions other than alcohol and illegal drugs such as to gambling or prescription drugs.

- 5.17 We recommend that the government consider expanding the operation of diversion programs for offender with drug, alcohol and/or gambling problems. This is in line with the support from some submissions that low level offenders participate in diversion programs.<sup>20</sup>
- 5.18 Submissions suggested formal warnings or cautions,<sup>21</sup> and diversion to a conferencing scheme or other restorative justice program.<sup>22</sup> However, not all means of diverting offenders from court or sentencing are necessarily effective. While some of these options may prevent the criminalisation of some offenders, some may do little to reduce reoffending and may even be counterproductive if they do not address underlying problems.
- 5.19 A considerable number of the Local Court cases we sampled involved drugs and alcohol.<sup>23</sup> There were also some offenders who struggled with gambling,<sup>24</sup> and some ICOs and other non-custodial orders were subject to conditions requiring treatment for gambling addiction.<sup>25</sup> Some of the offenders with drug and/or alcohol problems committed further offences in breach of non-custodial orders and were dealt with by the courts again.<sup>26</sup>
- 5.20 Some diversion programs can promote rehabilitation by dealing with underlying issues that may lead to offending behaviour, such as drug, alcohol and gambling

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20. NSW Police Force, *Submission FR03*, 8; NSW Office of the Director of Public Prosecutions, *Submission FR04*, 9; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission FR14*, 2; Legal Aid NSW, *Submission FR12*, 34.

21. NSW Bar Association, *Submission FR11* [27].

22. Legal Aid NSW, *Submission FR12*, 35; NSW Young Lawyers Criminal Law Committee, *Submission FR13* [32].

23. [A.22], [A.27], [A.67], [A.73], [A.80], [A.96], [A.102], [A.110], [A.121], [A.139], [A.146], [A.168], [A.174], [A.233], [A.240], [A.265], [A.283], [A.293], [A.316], [A.329], [A.349], [A.367], [A.391], [A.398].

24. [A.17], [A.121], [A.155], [A.159], [A.163], [A.168], [A.185], [A.217], [A.251].

25. [A.157], [A.245], [A.163], [A.170].

26. [A.124], [A.235], [A.285], [A.336], [A.354].

problems. However, there are limited options for helping such offenders to address their offending behaviour within the current system, particularly at the early stages of criminal proceedings. One such program that could be expanded is the Magistrates Early Referral Into Treatment (MERIT) program.

## Magistrates Early Referral Into Treatment (MERIT)

5.21 MERIT is an example of a pre-plea diversionary scheme that seeks to address underlying criminogenic factors. It is a voluntary scheme available in the Local Court at some locations for defendants with drug problems and, in fewer locations, alcohol problems.<sup>27</sup>

### How MERIT works

5.22 MERIT aims to reduce criminal offending associated with drug or alcohol use by allowing participants to engage in drug or alcohol treatment and rehabilitation before sentencing. MERIT is available only in the Local Court and targets less serious offending by people who are eligible for bail or do not require bail consideration.<sup>28</sup>

5.23 If a defendant is eligible to participate, proceedings are adjourned for the MERIT assessment team to conduct a suitability assessment. If found suitable, the defendant may be placed in the program if a magistrate approves.<sup>29</sup>

5.24 An individualised treatment plan is then made that matches health and welfare services with the participant's treatment needs. The court monitors the participant as a condition of bail.<sup>30</sup> The participant appears before the court at intervals and a MERIT progress report is provided to the court.

5.25 At the end of the program, a final report is provided to the court and the defendant is asked to enter a plea. The court takes successful engagement in the program into account on sentence, and it may be "a matter of some weight to the defendant's favour".<sup>31</sup> For example, in 2018, 17% of those who did not complete the

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27. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012, as amended 18 December 2020) [12.1].

28. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012, as amended 18 December 2020) [12.1].

29. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012, as amended 18 December 2020) [12.5].

30. J Linden, "Magistrates Early Referral Into Treatment Program (MERIT): Reducing Drug Related Crime through the Treatment of Offenders" (2003) 15 *Judicial Officers' Bulletin* 33, 33.

31. Local Court of NSW, *Case Management of Criminal Proceedings in the Local Court* (Practice Note Crim 1, 24 April 2012, as amended 18 December 2020) [12.8]. See, eg, *Brown v R* [2006] NSWCCA 144 [4].

MERIT program received a sentence of imprisonment, compared with only 3% of those who completed the MERIT program.<sup>32</sup>

### **The MERIT program is effective and could be expanded**

5.26 There have been a number of evaluations of MERIT that have found that:

- it reduced reoffending<sup>33</sup>
- it reduced drug use<sup>34</sup>
- it was cost effective<sup>35</sup>
- participants reported significant improvements in their health and wellbeing after participating in the Alcohol MERIT program,<sup>36</sup> and
- there was a high level of judicial satisfaction.<sup>37</sup>

5.27 In 2017, the parliamentary inquiry into the provision of drug rehabilitation services in regional, rural and remote NSW noted strong support for MERIT. It recommended that the government review MERIT and investigate the feasibility of establishing MERIT in additional regional areas.<sup>38</sup> In 2020, the Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants, noted the proven success of MERIT and the need for it to be available in more locations, including some areas of disadvantage. It recommended that the government adequately resource MERIT to "ensure access for all eligible defendants across New South Wales".<sup>39</sup>

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32. NSW Department of Communities and Justice, Office of Community Safety and Cohesion, *Magistrates Early Referral Into Treatment Program, 2019 Annual Report* (2021) 40.

33. R Lulham, *The Magistrates Early Referral Into Treatment Program: Impact of Program Participation on Re-offending by Defendants with a Drug Use Problem*, Crime and Justice Bulletin No 131 (NSW Bureau of Crimes Statistics and Research, 2009) 8–9. See also NSW Department of Communities and Justice, Office of Community Safety and Cohesion, *Magistrates Early Referral Into Treatment Program, 2019 Annual Report* (2021) 41–42.

34. NSW Health, *The Magistrates Early Referral Into Treatment (MERIT) Program: Health Outcomes* (2007) 25.

35. L Bartels, *Challenges in Mainstreaming Specialty Courts*, Trends and Issues in Crime and Criminal Justice No 383 (Australian Institute of Criminology, 2009) 3, citing M Passey and others, *Evaluation of the Lismore MERIT Pilot Program*, Final Report (Northern Rivers University Department of Rural Health, 2003) 74–75.

36. S Spratley, N Donnelly and L Trimboli, *Health and Wellbeing Outcomes for Defendants Entering the Alcohol-MERIT Program*, Bureau Brief No 92 (Bureau of Crime Statistics and Research, 2013) 7–8.

37. L A Barnes and P Poletti, *MERIT: Magistrates Early Referral Into Treatment Program: A Survey of Magistrates*, Monograph 24 (Judicial Commission of NSW, 2004) 50.

38. NSW Parliament, Legislative Council, Portfolio Committee No 2 Health and Community Services, *Provision of Drug Rehabilitation Services in Regional, Rural and Remote New South Wales*, Report 49 (2018) [3.182]–[3.183] rec 4.

39. NSW, *Special Commission of Inquiry into Crystal Methamphetamine and Other Amphetamine-type Stimulants*, Report (2020) vol 2 [11.398] rec 13.

- 5.28 In our view there should be greater availability of MERIT programs for suitable offenders with drug and alcohol problems. Similar programs should also be investigated and made available for offenders with gambling problems.
- 5.29 We realise that a recommendation for expansion and greater availability of the MERIT program could apply to all offenders, not just fraud offenders, and that there are obvious resource implications.
- 5.30 In its 2013 review of sentencing, the NSW Law Reform Commission (LRC) recommended expanding the MERIT program:
- Given the widespread satisfaction with the MERIT program and its ability to reduce reoffending, we consider that, as far as is possible given resource constraints, MERIT should be offered to an expanded pool of defendants.<sup>40</sup>
- 5.31 Recommendation 4.1 is based on the LRC's recommendation.<sup>41</sup> The LRC also concluded that the program could usefully be extended to cover gambling problems.<sup>42</sup>

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40. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [16.40].

41. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) rec 16.3.

42. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [16.40], rec 16.3(f).



## 6. Aggravating and mitigating factors

### In brief

Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) includes a non-exhaustive list of aggravating and mitigating factors that courts must take into account when sentencing. Because of concerns about the operation of s 21A, any amendments should be considered in a broader review. Changes to aggravating factors in relation to domestic violence and intimidation and to mitigating factors in relation to domestic violence are not necessary since these are adequately covered by existing law.

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- 6.1 This section explains why we do not recommend any change to the aggravating and mitigating factors in s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). It provides a background to s 21A, considers relevant aggravating and mitigating factors for fraud and fraud-related offences and addresses the proposals for reform we heard in this review.
- 6.2 As s 21A applies to all offences, we are hesitant to recommend amending the section without a broader review considering the impact this would have on sentencing more generally and the criminal justice system as a whole. Without this, there is a risk that any change would have unintended, wide-ranging consequences.<sup>1</sup> We also do not see any reason to amend s 21A for only fraud and

1. NSW Young Lawyers Criminal Law Committee, *Submission FR13* [35].

fraud-related offences. Amending s 21A in this way would lead to inconsistency, as well as complicating the sentencing framework for fraud and fraud-related offences. This would have flow-on effects on court resources.

- 6.3 There are also some concerns about the operation of s 21A, which may be made more difficult by adding more factors. We outline these below.
- 6.4 In our view, s 21A is adequate to address the relevant factors for fraud offences. Even if a factor is not explicitly included in s 21A, it can be taken into account under s 21A(1)(c), as “any other objective or subjective factor that affects the relative seriousness of the offence”.

## Background to aggravating and mitigating factors

### Overview of the current law

- 6.5 When sentencing for any offence, the court must take into account certain aggravating and mitigating factors outlined in s 21A.<sup>2</sup> This is not an exhaustive list – the court is also to take into account “any other objective or subjective factor that affects the relative seriousness of the offence”.<sup>3</sup> However, the court cannot consider any aggravating factor if it is also an element of the offence.<sup>4</sup>
- 6.6 The fact that any aggravating or mitigating factor is relevant and known to the court does not require it to increase or reduce the sentence.<sup>5</sup> Rather, the factors should be taken into account as part of the process of “instinctive synthesis” when deciding the appropriate sentence.<sup>6</sup>
- 6.7 We outline the aggravating and mitigating factors that are particularly relevant to fraud offences in the consultation paper and provide a summary of these below.

### General concerns about the operation of s 21A

- 6.8 In this review and in past reviews, we have heard a number of concerns about the operation of s 21A. These include that it is unnecessarily complex, leads to more sentence appeals and uses valuable court resources.
- 6.9 In this review, the Law Society noted that its “long standing position is that s 21A should be repealed”,<sup>7</sup> because:

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2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)–(3).  
3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1)(c).  
4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).  
5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5).  
6. *Markarian v R* [2005] HCA 25, 228 CLR 357 [51].  
7. Law Society of NSW, *Submission FR10*, 6.

- the factors in s 21A are covered by the common law, and were taken into account before the provision existed
  - the section is not necessary and complicates sentencing
  - courts may use the s 21A factors as a checklist, which can lead to courts trying to apply factors that may not be relevant, and
  - the “checklist approach” may undermine the process of instinctive synthesis and give the s 21A factors disproportionate weight.<sup>8</sup>
- 6.10 The NSW Law Reform Commission (LRC) outlined similar concerns in its 2013 report on sentencing.<sup>9</sup> The LRC recommended that s 21A should be replaced with a simplified, broader section that does not divide the factors into aggravating and mitigating categories. It found that there are problems with applying s 21A, including:
- risks of appeals due to double counting, the court considering an irrelevant factor or failing to consider a relevant factor, or taking into account a factor not in accordance with common law principles
  - risks of appeals due to both aggravating and mitigating factors including factors that affect the objective seriousness of the offence, as well as factors that relate to the offender’s subjective circumstances
  - while the factors appear “comprehensive”, they are subject to common law principles (which s 21A recognises as relevant), and
  - appeals that allege an error in the application of s 21A use valuable resources and may not impact the outcome of the sentence.<sup>10</sup>
- 6.11 In 2015, the Council indicated that it supported the recommendations of the LRC “to replace the section with a simplified, non-exhaustive list of factors that a court must take into account on sentencing” without categorising these as aggravating and mitigating.<sup>11</sup>
- 6.12 In previous reviews, the Council has not recommended amending s 21A for a variety of reasons, including some general concerns that are relevant to this review. In our recent report on homicide, we preferred “not to increase the risk of double counting (and consequent appeals) which would follow from adding to the list of factors in s 21A”, where we found that the section already allowed the court to consider relevant factors.<sup>12</sup>

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8. Law Society of NSW, *Submission FR10*, 6.

9. NSW Law Reform Commission, *Sentencing*, Report 139 (2013).

10. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [4.39]–[4.43].

11. NSW Sentencing Council, *Alcohol and Drug Fuelled Violence*, Report (2015) [2.1]–[2.26].

12. See, eg, NSW Sentencing Council, *Homicide*, Report (2021) [2.20]–[2.40].

- 6.13 In another report on alcohol and drug fuelled violence, we opposed adding a new aggravating factor to s 21A. We noted the “strong opposition” from stakeholders,<sup>13</sup> who expressed concerns that adding factors would make sentencing hearings more complex and lead to “the potential for more avenues of appeal, increasing the workload for higher courts.”<sup>14</sup>
- 6.14 Adding any aggravating or mitigating factors to s 21A would add to these risks. In our view, this should be avoided unless there is a very strong reason for change.

## The current aggravating factors are adequate

- 6.15 In this section, we summarise stakeholder views on aggravating factors, before outlining the aggravating factors commonly considered by courts in fraud sentences. We then address the proposals to add specific aggravating factors that we heard in this review. Although we agree that each of the proposals raises factors that may be relevant in sentencing, in our view, each can already be taken into account under s 21A. With this in mind, we would prefer to avoid the risks associated with adding factors to s 21A that we identify above.
- 6.16 Most submissions we received did not support changing the aggravating factors in s 21A(2).<sup>15</sup> The Local Court reported no operational difficulties with the provision, finding that the factors are “routinely applied” and magistrates can adapt them appropriately to individual cases.<sup>16</sup> The NSW Police Force considered the factors in s 21A to be “comprehensive”, although proposed that another aggravating factor be added to the list (which we consider below).<sup>17</sup> Other stakeholders found that the factors in s 21A(2) are appropriate and adequately cover the field for fraud offences.<sup>18</sup> The NSW Young Lawyers Criminal Law Committee did not support any change to s 21A, given the potential for unintended consequences. Legal Aid agreed with them that fraud offences are not so “exceptional” to justify changing s 21A(2).<sup>19</sup>
- 6.17 We received two proposals to add aggravating factors, which we consider below.

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13. NSW Sentencing Council, *Alcohol and Drug Fuelled Violence*, Report (2015) [2.23].

14. NSW Sentencing Council, *Alcohol and Drug Fuelled Violence*, Report (2015) [2.15].

15. Local Court of NSW, *Submission FR02*, 5; NSW Office of the Director of Public Prosecutions, *Submission FR04*, 9; Institute of Public Affairs, *Submission FR05*, 23; Law Society of NSW, *Submission FR10*, 6; Legal Aid NSW, *Submission FR12*, 36; NSW Young Lawyers Criminal Law Committee, *Submission FR13* [33].

16. Local Court of NSW, *Submission FR02*, 5.

17. NSW Police Force, *Submission FR03*, 8.

18. Institute of Public Affairs, *Submission FR05*, 23; Law Society of NSW, *Submission FR10*, 6.

19. NSW Young Lawyers Criminal Law Committee, *Submission FR10* [33], [35]; Legal Aid, *Submission FR12*, 36.

## Aggravating factors considered by courts in fraud cases

6.18 Aggravating factors under s 21A that may be particularly relevant to fraud offences include that:

- the offender abused a position or trust or authority in relation to the victim<sup>20</sup> (a breach of trust by a professional, such as an accountant or legal professional, can also be aggravating<sup>21</sup>)
- the victim was vulnerable, for example, because the victim was very young or very old, had a disability, was geographically isolated or because of their occupation<sup>22</sup>
- the offence was committed for financial gain<sup>23</sup> (for offences where gaining a financial advantage is an element of the offence, this will not be an aggravating factor “unless its nature or extent was unusual”)<sup>24</sup>
- the offence was part of a planned or organised criminal activity<sup>25</sup> (courts have found that a high degree of planning for fraud offences can make them more serious)<sup>26</sup>
- the injury, emotional harm, loss or damage caused by the offence was substantial,<sup>27</sup> and
- the offence involved multiple victims or a series of criminal acts.<sup>28</sup> This covers situations “where a single offence contains a number of allegations of criminal acts that are part and parcel of a single course of criminal conduct”, often found in “cases of fraud or dishonesty perpetrated against a single victim”.<sup>29</sup>

6.19 In addition to these aggravating factors under s 21A, courts have also taken into account that:

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20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(k).

21. See, eg, *R v Murtaza* [2001] NSWCCA 336 [15]; *Itaoui v R* [2005] NSWCCA 415 [34]. See also NSW Sentencing Council, *Fraud*, Consultation Paper (2022) [5.34]–[5.44].

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

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

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

25. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(n).

26. See, eg, *R v Araya* [2005] NSWCCA 283 [96].

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

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

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

- the offence involved a large sum of money,<sup>30</sup> which the Court of Criminal Appeal (CCA) has found is relevant but does not determine the seriousness of the offence<sup>31</sup>
- the loss was irretrievable, which in some cases has been found to make the offence more serious,<sup>32</sup> and
- the offence was motivated by personal greed (the CCA has found that there is a difference between offences motivated by greed and offences committed for the benefit of another person).<sup>33</sup>

## Additional aggravating factors are not necessary

6.20 We received two proposals to add aggravating factors to s 21A(2).

### Domestic violence

6.21 The Western Sydney University Justice Clinic proposed adding domestic violence to the list of aggravating factors, either as a standalone factor, or listed as an example of the vulnerability of the victim in s 21A(2)(l).<sup>34</sup> This would cover situations where the victim and offender were in an abusive relationship when the offence took place.<sup>35</sup> The Clinic considered that this should be included “to appropriately recognise the experiences of the victim and the context and seriousness of the perpetrator’s actions”.<sup>36</sup> In the Clinic’s view, this would also be an “important part of a system-wide response to coercive control”.<sup>37</sup>

6.22 We agree that a context of domestic violence perpetrated by the offender towards the victim may be a relevant consideration on sentence. However, the current framework already allows courts to take this into account in aggravation. The Clinic acknowledged that in some cases, this scenario could be taken into account under current aggravating factors, including where the victim was vulnerable.<sup>38</sup> Legal Aid

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30. See, eg, *R v Hawkins* (1989) 45 A Crim R 430, 435; *R v Finnie* [2002] NSWCCA 533 [59]; *R v Hinchliffe* [2013] NSWCCA 327 [149]. See also NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PFR07* [3], citing *R v Todorovic* [2008] NSWCCA 49 [19]; Institute of Public Affairs, *Submission FR05*, 8, 23.

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

32. *R v Phelan* (1993) 66 A Crim R 446, 448. Also see, eg, *R v Weir* [2003] NSWCCA 204 [29]; *R v Todorovic* [2008] NSWCCA 49 [19]; *R v Hinchliffe* [2013] NSWCCA 327 [149]; *Upadhyaya v R* [2017] NSWCCA 162 [67]–[68].

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

34. Western Sydney University Justice Clinic, *Submission FR09* [5.1]–[5.4].

35. Western Sydney University Justice Clinic, *Submission FR09* [5.1].

36. Western Sydney University Justice Clinic, *Submission FR09* [5.3].

37. Western Sydney University Justice Clinic, *Submission FR09* [5.3].

38. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(l); Western Sydney University Justice Clinic, *Submission FR09* [5.2].

pointed out that the examples of vulnerable categories in s 21A(2)(l) are not exhaustive,<sup>39</sup> which allows the court to consider vulnerability due to an abusive relationship.<sup>40</sup> The Clinic also acknowledged that this could be taken into account where the injury, emotional harm, loss or damage caused by the offence was substantial.<sup>41</sup>

6.23 A context of domestic violence perpetrated by the offender could also be considered as “any other objective or subjective factor that affects the relative seriousness of the offence”.<sup>42</sup> It is often taken into account in assessing the seriousness of other offences, particularly violent offences.<sup>43</sup> Although we are not aware of any published fraud cases over the past three years where this was considered, this may be because there are limited published fraud cases, as the majority are dealt with in the Local Court. While this did not come up in our sample of Local Court transcripts, these were not necessarily representative of all fraud cases in that jurisdiction. In addition, there may be broader issues around recognising and proving domestic violence in sentencing, which go beyond the scope of this review.

6.24 We are also concerned about unintended consequences of this proposal, where we have not done a wider review in relation to all offences. The impact on Aboriginal people and progress towards Closing the Gap targets would need to be carefully considered before we could make a recommendation.

6.25 Where there are risks with adding factors to s 21A, and the section already allows courts to take domestic violence into account, we do not think it is necessary for this to be added explicitly.

### **Offence was designed to cause fear in the mind of the victim**

6.26 The Police Force proposed adding an aggravating factor that “the offence was designed to cause fear in the mind of the victim”.<sup>44</sup> We agree this would be a relevant factor impacting the seriousness of the offence. However, this can already be considered under s 21A(1)(c) as “any other subjective or objective factor that affects the relative seriousness of the offence”. This may also be covered by other aggravating factors, such as:

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

40. Legal Aid NSW, *Submission FR12*, 36.

41. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(g); Western Sydney University Justice Clinic, *Submission FR09* [5.2].

42. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1)(c).

43. See, eg, *Kiss v R* [2021] NSWCCA 158 [35], [55]–[62]; *R v Burton* [2008] NSWCCA 128 [95]; *R v Hamid* [2006] NSWCCA 302 [75]; *R v Villaluna* [2017] NSWSC 1390 [45], [50]; *Goodbun v R* [2020] NSWCCA 77 [261].

44. NSW Police Force, *Submission FR03*, 8.



- the offence involved the actual or threatened use of violence, a weapon or explosives or a chemical or biological agent<sup>45</sup>
  - the offence was committed in the victim's home<sup>46</sup>
  - the injury, emotional harm, loss or damage caused by the offence was substantial,<sup>47</sup> or
  - the offender abused a position of trust or authority in relation to the victim.<sup>48</sup>
- 6.27 As this can already be considered under the existing framework, we do not see a need to include it explicitly, where this would increase the risks we have outlined above.

## The current mitigating factors are adequate

- 6.28 In this section, we outline what we heard about mitigating factors and summarise the factors commonly considered by courts in fraud cases. We then address a proposal to add a mitigating factor in relation to domestic violence.
- 6.29 Although we did not ask about amendments to the mitigating factors in s 21A(3) in the consultation paper, some submissions still addressed whether any additional factors should be added. The Institute for Public Affairs considered that relevant mitigating factors to fraud offences are already considered by courts.<sup>49</sup> As mentioned above, the NSW Young Lawyers Criminal Law Committee did not support any change to s 21A, either generally or for fraud offences specifically.<sup>50</sup>

## Mitigating factors considered by courts in fraud cases

- 6.30 Some mitigating factors under s 21A(3) may be particularly relevant to fraud offences. These include where the offender does not have a criminal record<sup>51</sup> and was a person of good character.<sup>52</sup> These factors will be given less weight where the offender abuses a position of trust that they were able to obtain because of their good character.<sup>53</sup> Similarly, where multiple fraud offences were committed over a

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45. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(b)–(ca).

46. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(eb).

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

48. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(k).

49. Institute of Public Affairs, *Submission FR05*, 23.

50. NSW Young Lawyers Criminal Law Committee, *Submission FR10* [33], [35].

51. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(e).

52. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(f).

53. *R v Rivkin* [2004] NSWCCA 7, 59 NSWLR 284 [410]; *R v Gentz* [1999] NSWCCA 285 [12]; *R v Houghton* [2000] NSWCCA 62 [18].



period of time, it has been held that the offender cannot rely on good character after the first offence.<sup>54</sup>

- 6.31 Another relevant factor is where the offender shows remorse, but only if the offender provides evidence of accepting responsibility and has acknowledged and/or made reparation for any injury, loss or damage.<sup>55</sup> The fact that the amount of the fraud has been repaid is generally not taken into account in mitigation, unless it involved “a substantial degree of sacrifice”.<sup>56</sup> It will also only be taken into account if it has been repaid at the time of the sentence (if an offender says they are willing to repay the victim but hasn’t made any payments, it will be less significant).<sup>57</sup>
- 6.32 The fact that the offender has entered a guilty plea<sup>58</sup> is also relevant to fraud cases. As detecting and investigating white-collar crime can be difficult and use a lot of resources, this can justify a bigger discount.<sup>59</sup>
- 6.33 Finally, the offender acting under duress<sup>60</sup> may also be relevant to fraud cases. This can be found where an offender is the victim of domestic violence and coercion.<sup>61</sup> However, some stakeholders told us that this is not always taken into account in appropriate cases.<sup>62</sup> We discuss this below.
- 6.34 As well as those mitigating factors under s 21A(3), the court has occasionally taken into account the fact that some offenders suffer extra curial punishment due to, for example, losing their career.<sup>63</sup> This is not always accepted as a mitigating factor, or it may be given less weight, because it is considered an “inevitable” consequence of the offence.<sup>64</sup>
- 6.35 The fact that the amount of money was “relatively small” can also be mitigatory.<sup>65</sup>

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54. *R v Phelan* (1993) 66 A Crim R 446, 448; *R v Houghton* [2000] NSWCCA 62 [18]; *R v Chan* [2000] NSWCCA 345 [20]; *R v Giallussi* [1999] NSWCCA 56 [20]; *R v Smith* [2000] NSWCCA 140 [21]–[22].

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

56. *R v Phelan* (1993) 66 A Crim R 446, 448; *R v Conway* [2001] NSWCCA 51 [22]; . See also *Stratford v R* [2007] NSWCCA 279 [24]; *Thewlis v R* [2008] NSWCCA 176 [3]–[4]; [38]–[43]; *Job v R* [2011] NSWCCA 267 [32]–[50].

57. *R v Cage* [2006] NSWCCA 304 [34]; *Job v R* [2011] NSWCCA 267 [47]–[49].

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

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

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

61. See, eg, *R v Longbottom* [2018] NSWDC 351 [54].

62. Women’s Legal Service NSW, *Preliminary Consultation PFRC01*; Legal Aid NSW, *Submission FR12*, 36–37.

63. See, eg, *Oudomvilay v R* [2006] NSWCCA 275 [18]–[20]; *R v Wu* [2021] NSWDC 627 [129]; *R v Agius* [2012] NSWSC 978 [88]. See also Institute of Public Affairs, *Submission FR05*, 23.

64. See, eg, *R v Zerafa* [2013] NSWCCA 222 [92]; *R v Hatton* [2022] NSWDC 688 [103]–[104].

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

- 6.36 Generally, the fact that offences were committed to fund a gambling addiction will not be taken into account as a mitigating factor.<sup>66</sup> However, this may be relevant to the objective seriousness of the offences it may impact, for example, the degree of planning or the offender's capacity to use good judgment.<sup>67</sup> A gambling addiction may also be relevant as a subjective circumstance of the offender. Particularly, how the addiction started and whether the offender has tried to overcome it may be relevant to their prospects of rehabilitation, as well as their moral culpability.<sup>68</sup>
- 6.37 In our sample of Local Court transcripts, an offender's gambling addiction was often considered as part of the offender's subjective case.<sup>69</sup> However, a gambling addiction may not be treated as a mitigating factor where the frauds were sophisticated and committed over a long period,<sup>70</sup> or where there were multiple offences that were premeditated and involved a lot of money.<sup>71</sup>

### **Additional mitigating factors are not necessary**

- 6.38 Some submissions supported adding a mitigating factor relating to offenders who are the victim of an abusive relationship.<sup>72</sup> Legal Aid pointed to recent data showing that more women commit fraud offences compared with other offences,<sup>73</sup> which we discuss in chapter 2.<sup>74</sup> This mitigating factor would cover situations where:
- the offender was coerced into committing the fraud offences by an abusive partner,<sup>75</sup> or
  - the offender developed an addiction to alcohol, drugs or gambling to numb feelings of trauma from domestic violence, and resorted to fraud to fund this.<sup>76</sup>
- 6.39 We agree that these circumstances may be relevant to sentencing. However, they are already covered by the existing law. In light of this, we would prefer to avoid the risks associated with adding factors that we outline above. We consider each of these situations below.

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66. *Johnston v R* [2017] NSWCCA 53 [36], citing *Assi v R* [2006] NSWCCA 257 [27].

67. *Johnston v R* [2017] NSWCCA 53 [40]–[41], citing *R v Henry* [1999] NSWCCA 111; 46 NSWLR 346 [273]–[274].

68. *Johnston v R* [2017] NSWCCA 53 [40]–[41], citing *R v Henry* [1999] NSWCCA 111; 46 NSWLR 346 [273]–[274].

69. See [A.17], [A.121], [A.155], [A.159], [A.163], [A.168], [A.185], [A.217], [A.251].

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

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

72. Women's Legal Service, *Submission FR07*, 2; Domestic Violence NSW, *Submission FR08*, 1–2; Legal Aid NSW, *Submission FR12*, 9, 36–37.

73. Legal Aid NSW, *Submission FR12*, 36.

74. [2.43].

75. Women's Legal Service, *Submission FR07* [7]; Domestic Violence NSW, *Submission FR08*, 1–2.

76. Women's Legal Service, *Submission FR07* [7]; Domestic Violence NSW, *Submission FR08*, 2.

## Coercion in the context of domestic violence

- 6.40 Situations where an offender is coerced into offending in the context of family and domestic violence could be considered under the mitigating factor of duress,<sup>77</sup> or as “any other factor impacting the relative seriousness of the offence”.<sup>78</sup>
- 6.41 We are aware of cases where the fact that the offender was a victim of domestic violence has already been taken into account. In a case involving fraud offences, the sentencing judge considered the domestic violence the offender suffered from her long-term partner as a mitigating factor.<sup>79</sup> There was evidence that the offender had asserted that her “violent partner ‘made her apply for credit cards on behalf of other people [...] or else he was going to bash’ her”.<sup>80</sup> In dismissing the offender’s sentence appeal, the CCA acknowledged that the offender’s experience of domestic violence and diagnosis of post-traumatic stress disorder played a role in her offending (although found that the offender was primarily motivated to commit the offences to fund her drug addiction).<sup>81</sup>
- 6.42 In another case involving Commonwealth fraud offences, the CCA recognised the “physical, emotional and financial abuse” the offender was suffering at the time of the offending, as part of her subjective case.<sup>82</sup>
- 6.43 We have also seen cases where domestic violence has been taken into account in the context of other offences, including manslaughter of infants,<sup>83</sup> drug offences<sup>84</sup> and accessory after the fact to murder.<sup>85</sup> In our sample of Local Court cases, we found three cases where the magistrate considered the offenders’ history of domestic violence.<sup>86</sup> In one, the offender was found to be vulnerable to manipulation due to her diagnosis of post-traumatic stress disorder from her experience of domestic violence.<sup>87</sup>
- 6.44 However, we heard from the Women’s Legal Service that courts and practitioners often do not recognise duress due to family and domestic violence, and that it is not

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77. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(d). See also Legal Aid NSW, *Submission FR12*, 36–37.

78. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1)(c).

79. *Kapua v R* [2023] NSWCCA 14 [100].

80. *Kapua v R* [2023] NSWCCA 14 [83].

81. *Kapua v R* [2023] NSWCCA 14 [114].

82. *Totaan v R* [2022] NSWCCA 75, 108 NSWLR 17 [112], [114].

83. *R v AS* [2018] NSWSC 930 [64]–[65]; *R v TP* [2018] NSWSC 369 [48].

84. *R v Obiekie* [2022] NSWDC 654 [244].

85. *R v Howlett* [2021] NSWSC 959 [63].

86. See [A.29], [A.80], [A.343]. See also [A.316].

87. [A.29].

always taken into account in appropriate cases.<sup>88</sup> As well, Legal Aid is aware of cases where the court did not consider a “duress-like situation” of domestic violence in fraud sentencing proceedings.<sup>89</sup>

- 6.45 As discussed above, there may be complex reasons why a court may not take domestic violence into account in sentencing. These could include issues with recognising and proving domestic violence in this context. For these reasons, along with the risks we identify above, we do not recommend that this factor be added to s 21A(3).

### **Addiction as a result of domestic violence**

- 6.46 In our view, the fact that the offender has an addiction, including one that formed as a result of domestic violence, can already appropriately be taken into account in sentencing. The CCA has held that while addiction is not a mitigating factor, it is relevant to the objective criminality of the offence and an offender’s subjective case.<sup>90</sup> Particularly, the “origin or extent of the addiction” may:

suggest that the addiction was not a matter of personal choice but was attributable to some other event for which the offender was not primarily responsible ...<sup>91</sup>

- 6.47 This could apply to situations where the addiction started as a response to trauma from domestic violence.

- 6.48 As the CCA has pointed out, taking addiction into account in mitigation could send a message that committing a criminal offence to fund an addiction is less deserving of punishment than otherwise.<sup>92</sup> The CCA has stated that people with drug addiction:

should not be encouraged, as a class, to think that they are free to engage in serious criminal conduct of whatever kind with impunity, or with any hope of favourable treatment because they are able to show that they needed money through their addiction.<sup>93</sup>

- 6.49 It was held that this applies “equally to cases of fraud to feed a gambling addiction”.<sup>94</sup>

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

89. Legal Aid NSW, *Submission FR12*, 36–37.

90. *Johnston v R* [2017] NSWCCA 53 [40]–[41], citing *R v Henry* [1999] NSWCCA 111, 46 NSWLR 346 [273]–[275].

91. *Johnston v R* [2017] NSWCCA 53 [40], citing *R v Henry* [1999] NSWCCA 111, 46 NSWLR 346 [273].

92. *R v Henry* [1999] NSWCCA 111; 46 NSWLR 346 [274], quoted by *Johnston v R* [2017] NSWCCA 53 [40].

93. *R v Henry* [1999] NSWCCA 111; 46 NSWLR 346 [275], quoted by *Johnston v R* [2017] NSWCCA 53 [40].

94. *Johnston v R* [2017] NSWCCA 53 [41].

6.50 As the current law already allows addiction to be taken into account in a way we think is appropriate, we do not recommend adding this mitigating factor.



## 7. Other issues and conclusions

### In brief

In the consultation paper, we considered some matters that raise issues that go beyond sentencing for fraud and that would require a wider review. These matters include sentencing principles, sentencing guidelines, charging practices and fines.

<b>No change to sentencing principles</b>	<b>73</b>
<b>Sentencing guidelines should not be introduced</b>	<b>74</b>
<b>No recommendations about charging practices</b>	<b>75</b>
<b>No recommendation about fines</b>	<b>76</b>

- 7.1 In the consultation paper for this review, we outlined the background to the sentencing of fraud offences, including sentencing principles, sentencing guidelines, fines and charging practices.<sup>1</sup> These raise issues that are broad and apply to sentencing for offences generally, not just in relation to fraud offending.
- 7.2 We do not recommend any changes to sentencing law that would impact on more than just sentencing for fraud and fraud-related offences. Any reforms in these areas would need to be considered in a wider context than can be dealt with by a review of sentencing for specific offences.

### No change to sentencing principles

- 7.3 In the consultation paper we outlined the sentencing principles that are especially relevant in determining appropriate sentences for fraud and fraud-related offences. In addition to the factors that are important in assessing the seriousness of an offence and aggravating and mitigating factors (which we summarise in chapter 6), we considered the purposes of sentencing that are particularly relevant to fraud offending: deterrence and recognition of harm to victims and the community.<sup>2</sup>
- 7.4 We have not identified any need to change these sentencing principles in relation to fraud and fraud-related offences.

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1. NSW Sentencing Council, *Fraud*, Consultation Paper (2022) ch 5, ch 6, [7.56]–[7.67], [7.74]–[7.77].

2. NSW Sentencing Council, *Fraud*, Consultation Paper (2022) ch 5.

7.5 Submissions generally did not show particular concerns about existing sentencing principles applied by the courts to fraud and fraud-related offences.<sup>3</sup> The cases sampled from Local Court proceedings in 2019 generally show no problems with the application of sentencing principles and factors that are specific to sentencing for fraud.<sup>4</sup>

## Sentencing guidelines should not be introduced

7.6 While informal guidance to sentencing judges (short of formal or statutory guidelines) might be useful in some cases, we do not see the need for formal guidelines either through a guideline judgment in NSW,<sup>5</sup> or similar to the sentencing guidelines in England and Wales.

7.7 In the consultation paper, we looked at the definitive sentencing guidelines for sentencing for fraud produced by the Sentencing Council for England and Wales<sup>6</sup> as an example of an attempt to formulate a comprehensive sentencing model for fraud and fraud-related offences in a comparable jurisdiction.<sup>7</sup> We asked whether a more structured approach, specifically targeted to fraud offending, was needed in NSW. In particular, we asked what aspect (if any) of the sentencing guidelines for England and Wales could be adopted to help guide sentencing for fraud in NSW and how this could be implemented.<sup>8</sup>

7.8 In rejecting the idea of guidelines for fraud, a number of submissions were satisfied with the way that sentencing principles are generally applied in fraud cases.<sup>9</sup> Others considered any formal guidelines to be inconsistent with existing sentencing practice which deals appropriately with individual cases.<sup>10</sup>

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3. NSW Local Court, *Submission FR02*, 3; NSW Office of the Director of Public Prosecutions, *Submission FR04*, 4–5; NSW District Court, *Submission FR06*, 11; NSW Young Lawyers Criminal Law Committee, *Submission FR13* [18]–[20]. See also Legal Aid NSW, *Submission FR12*, 18–19. But see Institute of Public Affairs, *Submission FR05*, 5–23.

4. Appendix A.

5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 36–42A.

6. *Coroners and Justice Act 2009* (UK) s 120, Sentencing Council for England and Wales, *Fraud, Bribery and Money Laundering Offences: Definitive Guideline* (2014).

7. NSW Sentencing Council, *Fraud*, Consultation Paper (2022) ch 6.

8. NSW Sentencing Council, *Fraud*, Consultation Paper (2022) [6.4], question 6.1.

9. NSW Local Court, *Submission FR02*, 2–3; NSW Office of the Director of Public Prosecutions, *Submission FR04*, 4–5; NSW District Court, *Submission FR06*, 11; NSW Young Lawyers Criminal Law Committee, *Submission FR13* [18]–[20]. See also Legal Aid NSW, *Submission FR12*, 18–19.

10. NSW District Court, *Submission FR06*, 4; Law Society of NSW, *Submission FR10*, 3; NSW Bar Association, *Submission FR11* [10].



## No recommendations about charging practices

- 7.9 Questions around charging practices, including the rolling up of fraud charges and the impact of the victims support levy, go beyond sentencing for fraud. They are broad questions which would need a wider review.
- 7.10 As part of the background to sentencing for fraud, we considered how the decisions made at charging and prosecution may affect the sentencing outcomes. This involved considering the practice of rolling up charges. “Rolling up” is a term used to describe the process of combining multiple charges. Fraud offences often involve “a course of conduct” made up of multiple acts “committed over an extended period”.<sup>11</sup> Each of these acts could, if taken alone, be charged as a separate offence. As a result, some charges will cover two or more, sometimes hundreds more, acts that could each be a separate offence.<sup>12</sup>
- 7.11 There are facilitative provisions in NSW and elsewhere that allow a single charge to encompass two or more instances of particular offending conduct. Examples include money laundering offences in NSW<sup>13</sup> and stealing offences in the Northern Territory.<sup>14</sup> However, there are no such facilitative provisions for fraud offences in NSW. The Court of Criminal Appeal has accepted that fraud offences can be rolled up.<sup>15</sup> However, the basis for this is unclear.<sup>16</sup> Some submissions considered a facilitative provision to assist rolling up would be helpful.<sup>17</sup>
- 7.12 However, even if a facilitative provision were introduced “[i]t would remain a question for the prosecution as to the extent to which Fraud offences could appropriately be ‘rolled-up’ in any given matter ... bearing in mind questions of totality and fairness”.<sup>18</sup>
- 7.13 One of the main problems with rolling up is that it can fail to acknowledge harm to individuals where there is more than one victim of a sequence of fraud offences.

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

12. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 3–4; NSW Police Force, *Preliminary Consultation PFRC03*; NSW Bar Association, *Preliminary Consultation PFRC07*.

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

14. *Criminal Code* (NT) s 310(2).

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

16. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 3–4. See also *Hughes v R* [2021] NSWCCA 238.

17. NSW Office of the Director of Public Prosecutions, *Submission FR04*, 3–4; NSW Bar Association, *Submission FR11* [23].

18. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PFR05*, 4. See also *Knight v R* [2004] NSWCCA 145 [27].

Because of this, rolling up may be more appropriate in cases with only one victim or for “victimless” crimes, such as money laundering.

- 7.14 There may also be problems where fraudulent acts are not rolled up. This is particularly the case for low level offenders, where multiple small offences that are part of one course of conduct are charged separately. This is because, under the *Victims Rights and Support Act 2013* (NSW), a person who is convicted of an offence must pay a victims support levy for that offence. The levy, which is increased annually, is set at \$199 for a person convicted on indictment and at \$90 for a person convicted summarily.<sup>19</sup>
- 7.15 This levy is imposed automatically on conviction. A court has no discretion to alter it, even in cases where the court has determined that the offender cannot pay even a small fine. This means that an offender convicted in the Local Court of ten tap and go offences involving transactions under \$100 who receives a conditional release order, is liable to pay \$900. Rolled up charges, in such a case, mean that the offender would be liable for a single levy of \$90.
- 7.16 One submission raised concerns around the harmful impact of the levy in situations where an impoverished offender is charged with multiple minor offences and must pay all the levies.<sup>20</sup>

## No recommendation about fines

- 7.17 We have found no evidence of problems with fines imposed for fraud and fraud-related offences beyond general concerns around fines, including, in particular, the ability to pay of offenders who may have committed fraud due to financial difficulties.<sup>21</sup>
- 7.18 As we note above in chapter 2, fines are used relatively infrequently for fraud and fraud-related offences, even though fines are generally the most frequently imposed penalty in the Local Court.
- 7.19 Submissions considered that fines remained appropriate penalties in some cases, even with the inherent problems associated with fines.<sup>22</sup>
- 7.20 The case samples in Appendix A show circumstances where a fine appears to be an appropriate response to fraud offending. Fines are sometimes used when offenders

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19. *Victims Rights and Support Act 2013* (NSW) s 106(1), s 107; *Victims Rights and Support (Victims Support Levy) Notice 2022* (NSW) cl 2.

20. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission FR14*, 2.

21. NSW Sentencing Council, *Fraud*, Consultation Paper (2022) [7.74]–[7.77].

22. NSW Local Court, *Submission FR02*, 3; NSW Office of the Director of Public Prosecutions, *Submission FR04*, 5; Law Society of NSW, *Submission FR10*, 4; Legal Aid NSW, *Submission FR12*, 21–22; NSW Young Lawyers Criminal Law Committee, *Submission FR13* [22]–[24].

are convicted in their absence,<sup>23</sup> or where other options are not suitable for the rehabilitation of the offender.<sup>24</sup> In a number of cases, magistrates specifically referred to work and development orders which are available to mitigate fines under the *Fines Act 1996* (NSW).<sup>25</sup>

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23. [A.375], [A.384].

24. [A.392], [A.237].

25. *Fines Act 1996* (NSW) s 99A–99K; [A.392], [A.334].



# Appendix A:

## Local Court case summaries

A.1 The following summaries set out the main factors considered by magistrates when sentencing offenders who committed fraud offences under s 192E of the *Crimes Act 1900* (NSW). We have sampled cases from the Local Court of NSW at the Downing Centre in Sydney, Parramatta and Dubbo in 2019, the last calendar year not impacted by the COVID pandemic.

A.2 Some of the themes that arise include:

- A wide variety of offending is captured by the s 192E fraud offences including tap and go, complex accounting frauds, using false identities to allow rented premises to be used for drug cultivation, obtaining medication on a false prescription, pretending to be a rideshare driver, failing to pay hotels and restaurants, service station drive offs, pretending to raise money for a local sporting club, using an application to collect someone else's betting winnings, and filing false claims for insurance.
- Purchasing goods by credit/debit card is sometimes charged as obtaining property and sometimes charged as obtaining financial benefit.
- Often people who commit s 192E fraud offences are also charged with possessing other credit/debit/bank cards under a variety of offences including having goods in custody, possessing identification information, and receiving goods.
- Rolled up charges are sometimes used for large-scale offending, while multiple charges are sometimes used for small transactions.
- Form 1 matters are not applied consistently. For example, in one case the fraud amounts involved in the Form 1 matters were very much greater than the amounts involved in the substantive offences.
- Some of the lesser available penalties (including conviction only) were imposed where the offences were part of a larger course of conduct that had already been dealt with adequately by the courts, usually by a sentence of imprisonment.
- Imprisonment is used for a wide variety of fraud offenders, including first time offenders who committed complex frauds over long periods of time and low level tap and go offenders for whom, because of their prior record of offending, there was no alternative but imprisonment. Some of the sentences for low level offenders were backdated to cover time spent on remand or in sentenced custody for other offences.

- A number of the offenders who received intensive correction orders (ICOs) had already spent time in remand custody in relation to the offence.
- Predominant themes in the backgrounds of offenders include drug use and gambling. Alcohol abuse and mental health issues were present to a lesser extent.
- It is difficult to count Aboriginal offenders because of the way information is presented in transcripts and related materials.
- Compensation directions are made relatively frequently. In some cases the magistrate declined to make a direction because there was insufficient evidence of the amount of the loss sustained. In one case a direction was not made after the magistrate considered the offender's ability to pay.
- In one case the magistrate needed to limit compensation directions to \$100,000 despite the amount involved in the fraud being substantially higher.

## Imprisonment

### 1: Downing Centre

- A.3 The offender, a 62-year-old woman, pleaded guilty to eight charges of dishonestly obtaining financial advantage by deception. Four of the charges involved making false entries in her employer's accounting system on 495 occasions over 4 years, involving \$2,225,865.61. The other four charges involved transferring funds from her employer's bank account to her own bank account on 183 occasions over 4 years, involving \$387,430.25. The total amount defrauded was \$2,613,295.86 of which around \$2.1m had been repaid.
- A.4 The offender had no prior criminal history and general good character. However, she had been in a position of considerable authority and responsibility in her employment and there was a degree of planning involved in setting up a business and a business name for siphoned funds, and creating false invoices. The seriousness of the offending was assessed at about mid-range or a bit above.
- A.5 The magistrate noted that the offender experienced ongoing embarrassment, estrangement in personal relationships, and public embarrassment and shame because of media coverage – but this was not a significant factor in sentencing since this is always part of the consequences of such offending.
- A.6 The offender had a history of mental and emotional problems from an early age. The magistrate found a reasonably clear link between mental and emotional health and the offences. In particular, the magistrate found a real connection between the second half of the offending and a significant trauma endured by a family member.

- A.7 It was also noted that the delay in the proceedings of around two years would give rise to anxiety, especially for somebody who is mentally and emotionally vulnerable.
- A.8 The magistrate considered that the custodial threshold had been crossed, especially because of the need for general deterrence. General deterrence was considered important, in part, because the offences are less easy to detect than others.
- A.9 The offender received a discount for her early guilty plea and the magistrate found special circumstances to vary the non-parole period particularly because of her mental health. It was also considered that custody would be hard for a person of her age and “social station”.
- A.10 The magistrate sentenced each offence separately, amounting to an effective sentence of 2 years 6 months’ imprisonment with a non-parole period of 1 year 3 months.

## **2: Dubbo**

- A.11 The offender, a 31-year-old man, pleaded guilty to three charges of dishonestly obtaining financial advantage by deception by using a stolen debit card on one day to purchase:
- cigarettes worth \$33.95
  - 28.59 litres of fuel (worth \$40) a packet of cigarettes (worth \$34.49), a mobile telephone (worth \$59) and 1.25 litre bottle of Coke (worth \$5), and
  - food at McDonalds worth \$36.70.
- A.12 He also pleaded guilty to one charge of driving while disqualified on the same day as the fraud offences, as well as a charge of driving while disqualified three days later and using an offensive weapon to prevent lawful detention on that occasion.
- A.13 The offender was already in custody in relation other offences at the time of sentencing (a combination of revoked parole and bail refused matters). It was noted that the jurisdiction of the Local Court was limited because of the sentences he was already serving.
- A.14 The offender had a very significant and lengthy criminal history. The magistrate assessed the fraud offences as being towards the lower end of objective seriousness.
- A.15 The magistrate imposed an aggregate sentence of 2 years 4 months’ imprisonment with a non-parole period of 1 year 9 months. Indicative sentences of 3 months were recorded for each of the fraud offences. Indicative sentences were also recorded of

6 months for each drive while disqualified offence and 2 months for the preventing arrest offence.

### **3: Parramatta**

- A.16 The offender, a 38-year-old man and bank employee, pleaded guilty to three charges of dishonestly obtaining financial advantage by deception and one charge of concealing an accounting record to obtain an advantage. Two of the charges relating to financial advantage involved conducting and disguising 95 transactions amounting to \$386,728.54 from one of the bank's internal accounts to his own bank accounts over 18 months. The other charge involved conducting and disguising several transactions, amounting to \$76,511.53, from one of the bank's internal accounts to receive property from four businesses as well as cash refunds. Only about \$8000 of the \$463,239.07 had been repaid and in small amounts. The concealing offence involved altering the bank's debit and credit accounting spreadsheets to hide the added credit payments going to the offender's own bank account.
- A.17 Probably around \$100,000 was spent on gambling, some of the money was spent on the offender's family and the rest was "just squandered". The offender also bought two cars.
- A.18 The offence involved a long standing pattern of conduct, planning and a huge breach of trust over 18 months. It was effectively one course of conduct. The magistrate assessed seriousness as certainly mid-range, if not above, given the actual amounts involved.
- A.19 The offender had no prior convictions and was involved in community work and mentoring. It was noted that the offender would have to sell the family home to pay back the amount and that steps were in train to achieve this. He was given a 25% discount for his early guilty plea.
- A.20 The magistrate imposed an aggregate sentence of 2 years' imprisonment with a non-parole period of 1 year 2 months. The magistrate also directed compensation of \$455,623.24 payable to the bank, without reference to the jurisdictional limit of the Local Court.

### **4: Parramatta**

- A.21 The offender, a 26-year-old Aboriginal man, pleaded guilty to 15 offences which included:
- a range of driving offences,
  - using a carriage service to menace, harass and offend,
  - stalking or intimidation,



- two offences of dishonestly obtaining financial advantage by deception:
    - by unlawfully accessing a bank account for \$2869
    - by cashing a stolen cheque worth \$1627, and
  - receiving a cheque book knowing it to have been stolen.
- A.22 He was bailed to appear before the Local Court in relation to some of these offences in August 2018. Later that month he was convicted in his absence and an arrest warrant was issued. In the next month he was denied bail and, after entering pleas, was referred to the Drug Court but was ultimately found unsuitable. He was listed for sentence in the Local Court on a number of subsequent occasions. He, therefore, appeared at sentencing in March 2019 on an audio-visual link from a correctional centre, having been in custody for the previous 6 months.
- A.23 The offender had a lengthy criminal history and *Bugmy* and *Fernando* factors<sup>1</sup> were present, which included childhood abuse. The magistrate accepted that the offender had shown remorse and found special circumstances to vary the non-parole period because of disadvantage.
- A.24 The magistrate imposed an aggregate sentence of 1 year 6 months' imprisonment with a non-parole period of 10 months. The indicative terms for the fraud offences were 6 months. The sentence was backdated to the offender's entry to custody, which allowed for his release in 3.5 months.

## 5: Parramatta

- A.25 The offender, a 36-year-old woman, was found guilty after a hearing of dishonestly obtaining financial advantage by deception by selling, with a co-offender, a rental car for \$2500 and using false registration papers.
- A.26 The co-offender, who was the offender's ex-partner and father of her two youngest children, had an extensive criminal history and received an indicative sentence of 12 months for the fraud offence.
- A.27 The offender, who was in custody at the time of sentencing for other offences pending in the District Court (with a potential Drug Court referral), had a significantly difficult upbringing, was a methylamphetamine user and was receiving chemotherapy.
- A.28 The magistrate assessed the offending in the mid-range of objective seriousness, noting a substantial degree of planning which involved creating false registration papers, and a false personal property security register report indicating that there was no encumbrance on the vehicle. The sale was also for a significant amount of money.

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1. *Bugmy v R* [2013] HCA 37; 249 CLR 571; *R v Fernando* (1992) 76 A Crim R 58.

- A.29 The offender was found to be vulnerable to manipulation because of her mental health condition. She had post-traumatic stress disorder, arising from significant domestic violence, which custody made worse.
- A.30 The offender had a fairly significant record of previous offending involving dishonesty and stealing. Despite having plans in place upon release, her prospects for rehabilitation were guarded. She had not shown contrition or remorse.
- A.31 The magistrate noted that the sentence must give effect to general deterrence since such schemes are difficult to detect and the scam was detected by luck. There was an element of community protection in the sentence because her prospects of rehabilitation were guarded.
- A.32 The magistrate found that the custodial threshold had been crossed, but that specific deterrence would not be met by an ICO. It was also noted that bail had been refused in relation to the more serious pending matters.
- A.33 Taking totality into account (because the offences involved one course of conduct), the magistrate imposed an aggregate sentence of 14 months' imprisonment with a non-parole period of 7 months dating from her most recent entry into custody. Indicative sentences of 12 months were recorded for each of the offences.
- A.34 Special circumstances were found to vary the non-parole period to allow for rehabilitation which would ultimately protect the community.

## **6: Downing Centre**

- A.35 The offender, a 48-year-old man, pleaded guilty to taking and driving a car without consent, driving while disqualified, and dishonestly obtaining property by deception by driving off from a service station without paying for 54.89 litres of petrol worth \$99.30.
- A.36 The offender was in custody for other offences and asked that the matter be dealt with immediately (without further assessments) because it was holding back his progress through the custodial classification system.
- A.37 The offender had a long criminal history with many drive while disqualified offences. The new offences were also in breach of existing non-custodial orders, namely two conditional release orders (CROs) and one community correction order (CCO) in relation to two previous driving offences and having custody of a knife in a public place.
- A.38 A previous psychiatric assessment showed the offender had attention deficit hyperactivity disorder (ADHD), was institutionalised and had a personality disorder. He had trouble surviving outside of custody and doing things like paying bills. Special circumstances were found to adjust the non-parole period because of the offender's mental health history and treatment needs.

- A.39 The magistrate gave the offender the full benefit of his guilty plea at the first possible opportunity, by applying a 25% discount.
- A.40 The magistrate sentenced the offender to fully concurrent sentences of 8 months' imprisonment with a non-parole period of 3 months.
- A.41 The non-custodial orders for previous offences were revoked and the offender was sentenced to terms of imprisonment for each offence, which did not affect his parole release date.

## **7: Parramatta**

- A.42 The offender, a 25-year-old man and Chinese national, pleaded guilty to dishonestly obtaining financial advantage by deception by subleasing a rental property.
- A.43 It was noted that another Local Court had already dealt with a "similar" offence, for which the offender was sentenced, before the current matter was charged. The prior offence involved using a false NSW driver licence to obtain financial advantage by inducing someone to give access to rental premises including associated keys. The offender was also sentenced for assisting in organising those premises as drug premises for the enhanced indoor cultivation of cannabis.
- A.44 The extent of the financial advantage was unclear. It was noted that there was also harm to the owner arising from the need to repair the premises, but it was not possible to assess this financial loss accurately.
- A.45 The magistrate noted that the degree of planning involved increased the objective seriousness and assessed it as being at the lower middle end of the range of seriousness.
- A.46 At the time of the offence, the offender had no other criminal convictions in NSW. The magistrate gave him a 25% discount for the early guilty plea.
- A.47 In imposing a sentence of imprisonment, the magistrate emphasised deterrence and noted that an ICO was unavailable because the offender was already serving a sentence of imprisonment. It was also the case that the offender's visa had been cancelled and arrangements were being made to deport him.
- A.48 The magistrate found special circumstances to adjust the non-parole period because of the offender's age and previous lack of criminal record in NSW and imposed a sentence of 7 months' imprisonment with a non-parole period of 4 months. The sentence was backdated so that it effectively added 2 months onto the previously imposed non-parole period.

## 8: Parramatta

- A.49 The offender, a 30-year-old man, pleaded guilty to two charges of dishonestly obtaining financial advantage by deception by answering online advertisements requesting concert tickets, receiving the money, but not providing the tickets as agreed. He obtained \$250 in March 2019 and \$110 in May 2019.
- A.50 At the time of sentencing, the offender was serving a sentence of 1 year 4 months' imprisonment with a non-parole period of 9 months for similar offences.
- A.51 The magistrate characterised the deception as obvious, calculated, and cynical.
- A.52 It was noted that these two offences, if dealt with at the same time as the very many similar offences, would not have impacted the total sentence received.
- A.53 The magistrate imposed a fixed term of 6 months' imprisonment and observed that, while it did not disturb the existing non-parole period, it "at least acknowledges and denounces the conduct involved".

## 9: Downing Centre

- A.54 The offender, a 42-year-old man, pleaded guilty to fraud offences involving a number of different credit cards over 2 days. The offences were:
- offences of dishonestly obtaining property by deception by using credit cards:
    - to obtain two gold and diamond chains and a gold and diamond bracelet from a jeweller valued at \$10,457.60
    - to pay a deposit of \$149.95 to obtain clothing and apparel from a clothing store valued at \$599.79
    - to obtain clothing and apparel from a clothing store valued at \$84.90
  - an offence of obtaining financial advantage by deception by using a credit card to pay a taxi fare of \$38.54, and
  - an offence of attempting to obtain property dishonestly by deception by trying to use a credit card for \$90 to obtain men's clothing and apparel from a department store valued at \$746.13.
- A.55 Three attempts were taken into account on a Form 1, including two other attempts to obtain the clothing and apparel valued at \$746.13 and one attempt to obtain the jewellery valued at \$10,457.60.
- A.56 The offences were committed before the offender was imprisoned for other offences, but only came to light after his release. The magistrate noted that these offences may have extended his previous sentence of imprisonment, if dealt with at the time.

- A.57 The offender had not committed any offences since leaving gaol, had a good pre-sentence report and was now working as a satellite cable installer.
- A.58 The magistrate imposed fixed terms of 6 months' imprisonment backdated to the previous period of imprisonment, resulting in the offender's immediate release.

## **10: Downing Centre**

- A.59 The offender, a 48-year-old man, used a credit card that he found in a wallet on a poker machine stool to get \$866 worth of cigarettes which he then gave back to the shop attendant for \$160 cash. This resulted in pleas of guilty to the following charges:
- stealing (by finding) a black leather wallet worth \$300
  - dishonestly obtaining property by deception by using a stolen credit card to obtain tobacco related products, and
  - dealing with tobacco related products with reasonable grounds to suspect they were proceeds of crime.
- A.60 The offence was opportunistic, arising out of one transaction.
- A.61 The offender had a criminal record dating back to the 1980s. He was already in sentenced custody after participating in a Drug Court program during which he set up a business as a handyman and a roof restorer.
- A.62 Accommodation was available for him upon release, and the magistrate noted that a further term of imprisonment would involve losing housing and prospects of employment. The magistrate, therefore, imposed 2 months' imprisonment to be served concurrently with the offender's current sentence.

## **11: Downing Centre**

- A.63 The offender, a 38-year-old woman, pleaded guilty to two charges of dishonestly obtaining property by deception, namely by using a credit card one morning to obtain from Coles Express:
- two packets of cigarettes, a bottle of "V", chocolate and a large bottle of Coca-Cola valued at \$32.95, and
  - two packets of cigarettes valued at \$74.40.
- A.64 She also pleaded guilty to having in custody a mountain bike suspected of being stolen (valued at \$109) and to using a forged medical certificate as an excuse for failing to report on bail.
- A.65 The offender had a substantial record for similar matters, since 2002.

- A.66 The most serious of the matters was considered to be using the forged medical certificate to avoid breach of bail. The other offences fell in the medium to lower end of seriousness.
- A.67 The offender had a never-addressed drug problem of 18 years. She made immediate and full admissions to the police and received a 25% discount for her early guilty plea.
- A.68 Given her record, the magistrate considered that full-time custody was the only appropriate sentence. In the absence of reports, any alternative sentence could not be assessed.
- A.69 The magistrate imposed a fixed term of imprisonment for 1 month, backdated to her entry to custody.

## **12: Dubbo**

- A.70 The offender, a 24-year-old man, pleaded guilty to one charge of dishonestly obtaining financial advantage by deception and one charge of taking and driving a vehicle without the owner's consent.
- A.71 The offences involved the offender stealing a utility, filling it with 56.62 litres of fuel (valued at \$79.18) and driving off without paying. At the time of the offences, he was on parole.
- A.72 At the time of the sentencing hearing, the offender had been in custody on remand for 5 months for other more serious matters yet to be determined in the District Court, involving theft of a vehicle, use of an offensive weapon and preventing apprehension.
- A.73 The offender had a lengthy criminal record. He admitted to issues with drugs and alcohol, having commenced use of marijuana from a young age and use of methylamphetamine from the age of 14.
- A.74 He was given the benefit of his guilty plea on the day of the hearing and sentenced to concurrent fixed terms of 1 month's imprisonment for the fraud offence and 5 months' imprisonment for the theft of the utility. The sentences were backdated to commence from when bail was refused and even though they had effectively expired, the offender remained in custody pending the resolution of the District Court proceedings.

## **13: Dubbo**

- A.75 The offender, a 29-year-old Aboriginal woman, pleaded guilty to two charges of obtaining financial advantage by deception. She was also found guilty, after a hearing, of three charges of break and enter a house and commit larceny in company and one charge of having goods suspected of being stolen in her premises.

- A.76 A co-offender, with whom she was in a relationship, was also found guilty of these charges.
- A.77 The fraud charges involved one charge of using a bank card at a service station to purchase two bottles of soft drink and cigarettes worth \$44.99 and another charge of using a bank card in three transactions at a supermarket to purchase a trolley of groceries worth \$88 and a mobile telephone worth \$79.
- A.78 The co-offender was in the car while the first fraud offence was being committed and was present with the offender in the supermarket during the second fraud offence. The magistrate, however, was “not satisfied that it can be shown to the requisite standard that he would have known or took any active part in the dishonest use of that card”.
- A.79 The offender was also dealt with for earlier offences of possessing housebreaking implements and receiving three stolen handbags (and their contents). Her lawyer conceded the custodial threshold had been crossed because of the nature of her criminal record and the seriousness of the offences. The offender’s criminal record included being sentenced to custody as a juvenile and she had spent a significant part of her adult life in custody.
- A.80 The offender had been raised by her grandmother and her father died from a drug overdose when she was nine. She had been using drugs since age 12. The magistrate observed that drug abuse was at the heart of all her offending. She had a history of relationships involving domestic violence.
- A.81 The magistrate imposed an aggregate term of 18 months’ imprisonment with a non-parole period of 9 months. The non-parole period reflected a finding of special circumstances. At the hearing, the offender’s lawyer requested a finding of special circumstances because of her drug issues, her prospects of rehabilitation (a supportive grandmother) and her being 8 months pregnant.
- A.82 Indicative sentences were recorded of 1 month for each of the two fraud offences.
- A.83 The sentence was backdated to reflect time already spent in custody on remand amounting to just under 9 months in all. This meant that the offender would be released in just over a week.

## **14: Dubbo**

- A.84 The offender, a 31-year-old man, pleaded guilty to charges of entering a hotel with intent to commit larceny, stealing property (a handbag, cash, wallet and driver licence) to the value of \$313, and dishonestly obtaining financial advantage by deception by using a stolen credit card to obtain \$60 worth of phone credit.
- A.85 At the time of the offences, he was on parole for affray and using an offensive weapon.

- A.86 At the time of sentencing, he had been in custody for over one month, part of the time was attributable to remand, however part of it was serving the balance of his parole.
- A.87 His lawyer conceded that the custodial threshold had been crossed bearing in mind the seriousness of one offence and the offender's record.
- A.88 The magistrate considered that each of the matters was serious, in light of the overall circumstances and the fact that the accused was on parole at the time. The offender was not assisted by his previous convictions.
- A.89 The offender had been a long-standing user of speed and methamphetamine from the age of 14.
- A.90 The magistrate made a finding of special circumstances to allow for a longer parole period.
- A.91 The magistrate imposed an aggregate sentence of 7 months' imprisonment with a non-parole period of 4 months. An indicative sentence of 1 month was recorded for the fraud offence. There was some backdating of the sentence to cover the time spent in custody.
- A.92 In relation to a requested compensation direction, the magistrate considered that in the circumstances of the custodial sentence, a direction was not appropriate. Earlier in the proceedings it had been noted that the claim for compensation was quite high and that there was no evidence of exactly what the claim related to.

## **15: Dubbo**

- A.93 The offender, a 27-year-old Aboriginal man, pleaded guilty to a large number of charges involving offending that took place over the course of a month.
- A.94 Five charges related to larceny or entering properties with intent to commit larceny, five charges involved stealing two bicycles from a car at a motel and related charges including furious riding, not wearing an approved helmet and possessing a knife in a public place, and seven charges involved dishonestly obtaining financial advantage by deception. The dishonesty charges involved using a stolen credit card at a supermarket, a fast food restaurant and a service station to purchase goods totalling \$406.51 over a two-hour period. The transactions ranged from \$3.70 to \$93.35.
- A.95 The magistrate noted that all the matters crossed the custodial threshold. Even though some of the matters were quite minor, the offender's criminal history did not help. The magistrate particularly noted an extensive history of dishonesty offences, some of them resulting in custodial sentences. A lot of the offences were opportunistic, involving no planning.



- A.96 The offender had mental health issues. His criminal record disclosed previous mental health diversions and discharges.<sup>2</sup> At the time of the offences, he was technically or effectively homeless. He also had a history of drug use, which increased significantly in the wake of the untimely deaths of two of his brothers.
- A.97 The sentence assessment report suggested he displayed some empathy towards the victims and was willing to make restitution to the victim of the dishonesty offences. He was also willing to attend a residential rehabilitation facility. However, he was assessed as a high risk of reoffending.
- A.98 The magistrate allowed a 25% discount for the guilty pleas and made a finding of special circumstances to allow a longer time on parole. She imposed an aggregate sentence of 12 months' imprisonment with a non-parole period of 7 months. There was some backdating to allow for time already spent in custody. Indicative sentences of 2 months were recorded for each of the dishonesty offences.

## 16: Dubbo

- A.99 The offender, a 33-year-old man, pleaded guilty to ten charges for a variety of offences, including having goods in custody, resisting police officers, offensive language, failing to appear in accordance with a bail acknowledgement, and dishonestly attempting to obtain financial advantage by deception.
- A.100 All of the offences were committed in breach of a good behaviour bond<sup>3</sup> in relation to the theft of a \$40 jacket. The offender was also resentenced for this offence. One of the goods in custody offences was committed in breach of a CRO, a CCO and an ICO.
- A.101 The attempted dishonesty offence involved the offender depositing a cheque for \$20,000 into his own bank account. The transaction was detected and reversed and no money was lost. The magistrate noted the planning involved.
- A.102 The offence was related to the offender's drug dependency. At the time of sentencing the offender had been in custody for almost 6 months following the breach of a drug condition of his bail.
- A.103 The magistrate noted that most of the offences crossed the custodial threshold, except for offensive language and the fail to appear offences.

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2. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 32–33, repealed by *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) sch 3.

3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9, substituted by *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) sch 1[9].

- A.104 The sentencing assessment report recorded a diagnosis of schizophrenia and the offender's lawyer submitted that there were *Bugmy/Fernando* considerations, including as a victim of sexual abuse.
- A.105 The magistrate made a finding of special circumstances having regard to the offender's background and subjective matters, resulting in a significant alteration in the ratio between parole and non-parole periods. A discount was applied for the guilty pleas that were made on the day of the hearing. The magistrate also backdated the sentence to cover the period already spent in custody.
- A.106 The magistrate imposed an aggregate term of 18 months' imprisonment with a non-parole period of 12 months. An indicative sentence of 12 months was recorded for the dishonesty offence. The offensive language and fail to appear offences each received a conviction with no other penalty.

## 17: Dubbo

- A.107 The offender, a 31-year-old man, pleaded guilty to four charges of dishonestly obtaining financial advantage by deception. The proceedings also involved an offence of taking and driving a car, for which the offender had been dealt with in his absence, five years ago.
- A.108 The dishonesty offences involved the offender not paying for accommodation (and some food) at four different hotels. Three of the offences took place in the course of one week. The amount involved was \$1969.30 for a total of ten nights' accommodation at the four hotels and some food and alcohol at one hotel.
- A.109 The offender had an extensive record in Queensland, with a number of similar offences for which he had served periods of imprisonment. The magistrate agreed he had no alternative but to impose a custodial sentence, especially in light of the offender's extensive record. He also noted the number of matters before the court.
- A.110 In submissions, the offender's lawyer raised *Bugmy/Fernando* factors, reporting that the offender left home at 13 and began sleeping on the streets and at refuges and he developed an alcohol problem.
- A.111 The magistrate allowed a discount for the guilty pleas made at the first opportunity and imposed a fixed term of 6 months' imprisonment for each dishonesty offence, to be served concurrently. A concurrent fixed term of 4 months was also imposed for the taking and driving offence. The sentences were backdated to account for two weeks spent in custody before the sentencing.

# Intensive correction order

## 18: Downing Centre

- A.112 The offender, a 60-year-old man and company employee, pleaded guilty to 27 charges of dishonestly obtaining financial advantage by deception and the former offence of obtaining money by deception<sup>4</sup> from his employer. Broadly, these offences involved:
- misrepresenting EFT transactions to a total of \$185,102.86 (15 charges covering 193 occasions over 6 years)
  - obtaining cash cheques totalling \$126,035.44 for misrepresented business purposes (8 charges covering 157 occasions over 5 years), and
  - transferring a total of \$39,969.61 to an assistant (4 charges covering 52 occasions over one year).
- A.113 There was a level of planning involved in the offences, although they were unsophisticated. The offences occurred over a lengthy period. The offender was in a position of trust, with a level of autonomy, that enabled the transactions. General deterrence was a necessary consideration given the initial difficulty in detection compared with the ease of committing the offences. The magistrate considered that objective seriousness was increased by the offender involving an assistant (who was under his authority) in the conduct.
- A.114 It was noted that the offender was overwhelmed by the demands of his job and that his family were under significant financial stress due to mismanagement and poor decisions, rather than a flagrantly luxurious lifestyle. The offender's prior good character was given relatively limited weight because it contributed to his being in a position to commit the offences.
- A.115 Around \$112,000 of the total of \$351,107.91 had been repaid directly or by forfeiture of leave. This was said to demonstrate contrition. Community Corrections assessed him as having a low risk of reoffending.
- A.116 The magistrate allowed a 25% discount for the guilty pleas and imposed an aggregate sentence of 15 months to be served by an ICO because of the need for a rehabilitative sentence that reflected the low risk of reoffending. The additional condition on the order was 250 hours of community service work.

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4. *Crimes Act 1900* (NSW) s 178BA(1), repealed by *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009* (NSW) sch 2 [10].

## 19: Parramatta

- A.117 The offender, a 29-year-old woman, pleaded guilty to 13 charges primarily relating to the possession and use of personal identification material.
- A.118 The first group of offences, which were dealt with by a CCO, involved possessing and dealing with a large quantity of mail, bank cards, driver licences, passports and other identification documents, obtained from letterboxes. There was also an offence of possessing housebreaking implements, namely two keys used to open letterboxes.
- A.119 The second group of offences, which were dealt with by an ICO, involved:
- four charges of dealing with identify information in order to commit an indictable offence, namely obtaining financial advantage by deception (with a further two charges dealt with on a Form 1)
  - one charge of dealing with \$19,600 having reasonable cause to suspect it was proceeds of crime
  - one charge of participating in a criminal group and contributing to criminal activity, and
  - one charge of dishonestly obtaining financial advantage by using a savings bank card to obtain \$1000.
- A.120 The magistrate observed that the offender's conduct involved three separate episodes in an escalating series. The final episode saw the offender directly involved in a syndicate, where she went beyond raiding letterboxes to an active involvement in getting personal identification numbers and similar things.
- A.121 She used the proceeds to sustain drug and gambling habits.
- A.122 The magistrate noted the need for general deterrence because of the increasing prevalence of such offences and their impact on the community. He concluded that a term of imprisonment in the region of 2 years would be appropriate for the second group of offences which involved the most serious of the offender's behaviour. However, he noted that she had already spent 12 months in custody in relation to the charges, during which she had successfully undertaken a rehabilitation program, and had then spent 3 months out of custody during which she remained abstinent. He, therefore, imposed an ICO for 12 months. The additional conditions were that she undertake 120 hours of community service work and abstain from illegal drugs.
- A.123 In relation to the first group of offences (which were less serious) he imposed a CCO for 18 months, subject to similar conditions (the community service work requirement being concurrent with the ICO). This allowed for an effective extension of the offender's supervision period by 6 months.

A.124 Less than 2 weeks before the end of the CCO term, the offender was found to be in possession of a prohibited drug. In the following two months, she was found on three separate occasions to be driving while her licence was suspended and with drugs in her system. All of the matters were brought to court in 2021. The magistrate decided to take no action on the breach of the existing CCO and imposed a combination of fines and a new CCO for the new offences.

## 20: Parramatta

A.125 The offender, a 28-year-old man, was found guilty after a hearing of five charges under the *Home Building Act 1989* (NSW) (*Home Building Act*) in relation to electrical work he was not qualified or licenced to undertake. Each of these offences has a maximum penalty of \$22,000.

A.126 He was also found guilty of dishonestly obtaining financial advantage by deception from one of his electrical work clients in relation to the construction of a home, by taking \$12,026.30 for the preparation of plans that were not produced.

A.127 The offender engaged a sophisticated series of deceptions designed to draw in the victim. He set up a home building company and created a fake office address, false employees with fake positions, a fake website and an invented approvals entity.

A.128 He made false representations about how long the company had been operating, what it could do, and the status of its insurance coverage in order to secure a \$385,000 contract with the victim. The company's architect was located overseas and was not registered to practice in NSW. The magistrate considered that the offender's conduct involved deliberate and conscious acts of dishonesty. The amount of money involved was not large but was significant for the victim.

A.129 The offender had no relevant prior criminal history. However, he had previously received 12 penalty notices for breach of regulatory/licensing requirements.

A.130 The offender had difficulty conceptualising the illegality of his actions and continued to rationalise his conduct. The lack of insight meant the magistrate couldn't conclude there was remorse. The magistrate also noted there was real reason to believe the character reference he submitted was fake.

A.131 The offender had a diagnosis of ADHD as a child, but no great weight was attached to his childhood difficulties. He was assessed as having a medium to low risk of reoffending.

A.132 The magistrate considered that there was a clear need to meet all the purposes of sentencing.

A.133 The *Home Building Act* offences were dealt with by fines totalling \$13,000. There was a question of the offender's capacity to pay a fine. He already had a \$7000-\$8000 debt with the State Debt Recovery Office in relation to unpaid fines and was

subject to a payment plan of \$25 per fortnight. Despite requests from the victim, he had not yet made any repayments.

- A.134 The magistrate found that the custodial threshold had been crossed for the fraud offence and imposed a sentence of 2 years to be served by an ICO which included an additional condition of 300 hours' community service work. He was also ordered to pay the costs of the prosecutor (Department of Finance, Services and Innovation) of \$20,000 and compensation to the victim of \$12,026.

## **21: Parramatta**

- A.135 The offender, a 34-year-old man, pleaded guilty to two charges of dishonestly obtaining financial advantage by deception. He used a "bogus" credit card for two transactions, one to obtain a tablet computer worth \$498 and the other to obtain a mobile telephone worth \$1349.
- A.136 The offences took place one month after the offender had received a suspended sentence of 9 months for the offences of break and enter in company with intent to commit larceny and possessing housebreaking implements and a good behaviour bond of 12 months for damage to property.
- A.137 The magistrate assessed the dishonesty offences as being at the lower middle end of the range. The seriousness had been increased because the offending was part of an organised criminal activity involving 12 others. The offender had gained the credit card through the group. However, it was noted that the offender's involvement in the group was at the lower end since he was not a decision-maker and was not involved in stealing mail.
- A.138 The offending was aggravated by the offender's criminal history and the fact that the offences were committed while on conditional liberty. The magistrate characterised the criminal record as a "concerning" one that spanned 15 years. But it was also noted that he had not committed any further offences in the 18 months before the sentencing hearing.
- A.139 The offender had been subject to bail with strict reporting provisions (5 days a week) for the previous 18 months and in this period had also obtained continuing employment at a tavern. He had a long standing and continuing drug problem and was assessed as unsuitable for community service work because of this and because of unresolved epilepsy.
- A.140 The magistrate emphasised the need to ensure adequate punishment for the dishonesty offences. He also noted the need for deterrence because the use of fake credit cards was becoming more prevalent. On the question of rehabilitation, the magistrate noted that the offender had not offended in the previous 18 months.
- A.141 The magistrate found that the offender had crossed the custodial threshold both in respect of the earlier, previously sentenced offences and the dishonesty offences.

He revoked the earlier sentences and sentenced the offender for those offences as well as the dishonesty offences.

- A.142 After allowing discounts for early guilty pleas, the magistrate imposed an aggregate sentence of two years, to be served by an ICO, subject to a home detention condition for 9 months. Indicative sentences were recorded of 7 months and 9 months for each of the dishonesty offences.

## 22: Downing Centre

- A.143 The offender, a 31-year-old woman, pleaded guilty to many charges, mostly related to the purchase of consumer goods from an online store over the course of 12 months. These included charges (some of them rolled up) of dishonestly obtaining property by deception as follows:

- three charges related to using NSW driver licences to obtain goods to the value of \$7452.33
- four charges related to using credit cards to obtain goods to the value of at least \$2683.64, and
- one charge related to using credit points from previously cancelled purchases to obtain goods to the value of \$364.66.

- A.144 Four attempts to use credit cards to obtain consumer goods and vouchers amounting to \$2962.30 were included on a Form 1.

- A.145 The offender also pleaded guilty to:

- one charge of possessing identity information (10 driver licences, 22 bank cards, 7 Medicare cards, 4 NSW photo cards) in order dishonestly to obtain property by deception
- one charge of having in custody a medical prescription pad in the name of three doctors, suspected of being stolen, and
- three charges of possessing methylamphetamine and cocaine.

- A.146 The offences were committed over long period of time involving multiple victims. The magistrate commented on the variety of goods obtained and observed that there was nothing that was required for sustenance to live because of poverty or otherwise, but rather the items were for greed or for a quick sale to obtain money for drugs.

- A.147 In relation the possession of identity information, the magistrate commented:

the police were very kind to place each of these on one charge rather than recognise each victim individually by charging the defendant with every individual item separately. I wonder how those people felt when they were advised by police



that the cards were found ... no doubt they lived with the concern that they do not know what part of their lives had been interfered with, how their privacy had been disturbed, how many times the cards had been used, for what purpose they were used, whether it would give them a bad rating somewhere, whether they would ever find out soon enough whether something is outstanding.

- A.148 The offender had been a victim of sexual assault resulting in addiction to amphetamines and ice. She had lost custody of her 9-month-old daughter. She had been recently discharged from one rehabilitation facility because of a positive urinalysis, but had received an offer of admission to another facility during the sentencing hearing.
- A.149 General deterrence was taken into account because of the prevalence of such offending. The magistrate considered that the custodial threshold had been crossed and, after allowing a 10% discount for the guilty pleas, sentenced the offender to 12 months to be served by an ICO. The additional conditions were to accept the rehabilitation treatment proposed by Community Corrections and to abstain from drugs. Fines totalling \$660 were also imposed for the three drug offences.
- A.150 The magistrate made compensation directions for \$2611.38 payable to the online store, and for \$8625.27 payable to the bank which allowed 48 charge backs to the victim of the credit card transactions.

## **23: Parramatta**

- A.151 The offender, a 49-year-old man, pleaded guilty to two charges of dishonestly causing financial disadvantage by deception by using a false identity to rent houses and by causing damage to the properties and lost rent for the owners.
- A.152 The offender had been given \$200 a week to pay the rent on behalf of others who used the premises for drug production. The offender also pleaded guilty to two charges of organising drug premises.
- A.153 While the lost rent was not quantified in either case, there was evidence of \$55,000 in damage to one of the houses.
- A.154 The offender had a minor criminal history.
- A.155 He had lost his home because of a gambling problem and had been unemployed for almost 2 years. Using the funds to sustain a gambling habit was not considered a mitigating factor. However, he had assisted police by identifying the second house.
- A.156 The magistrate highlighted the need for general deterrence, noting the significant problem of rental premises being used for hydroponic farms.
- A.157 The custodial threshold having been crossed, the magistrate imposed a sentence of 12 months to be served by an ICO. The additional conditions were that the offender



undertake 80 hours' community service work, and engage in counselling to deal with his gambling problem.

## 24: Parramatta

- A.158 The offender, a 50-year-old-man, pleaded guilty to 11 charges of dishonestly causing financial disadvantage by deception. A further two charges were included on a Form 1.
- A.159 The offender was a mechanic who took money from clients for motor vehicle parts and gambled it instead. The total amount of disadvantage caused was \$137,161.
- A.160 The offending involved a large amount of money, took place over a period of time, and involved a degree of planning.
- A.161 There were some mental health issues. The offender could not financially afford to undertake an assessment that would have allowed adjournment or dismissal under the Local Court's mental illness provisions.<sup>5</sup>
- A.162 The offender had no prior criminal history.
- A.163 The magistrate imposed concurrent ICOs for 9 months. The additional conditions were 200 hours of community work, that the offender abstain from alcohol and that he seek treatment for gambling addiction.
- A.164 Compensation directions totalling \$72,202.45 were made for nine customers. Some of the matters had been subject to separate proceedings before the NSW Civil and Administrative Tribunal and some orders had been made in that jurisdiction.

## 25: Downing Centre

- A.165 The offender, a 35-year-old man, pleaded guilty to one charge of dishonestly obtaining financial advantage by deception, by depositing a cheque to the value of \$3500.
- A.166 He also pleaded guilty to a number of other offences, including three charges of having goods in custody suspected of being stolen (covering 18 credit or bank cards, three cheques and 35 10,000 rouble bank notes), one charge of possessing identification information (a bank card) with intention to commit fraud, one charge of disposing of a Tag Heuer watch knowing it to have been stolen, one charge of making a false or misleading statement in relation to a requirement under the *Pawnbrokers and Second-hand Dealers Act 1996* (NSW), and two charges of possessing drugs (1.1g methylamphetamine and 0.1g of heroin).

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5. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 32, repealed by *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) sch 3.

- A.167 The offences were in breach of a 12-month good behaviour bond imposed for a goods in custody offence (involving a mobile phone, a credit card and a debit card). He had been in custody for 5 months on remand at the time of sentencing.
- A.168 His criminal record included prior goods in custody and drug possession offences. His offending was interrelated with and affected by drug use and gambling addiction.
- A.169 The magistrate noted that he was relatively young and had two dependent children.
- A.170 The magistrate observed that the custodial threshold had been crossed and after applying a 25% discount for the guilty pleas, imposed a sentence of 1 year 8 months to be served by an ICO. The additional conditions were a curfew from 8pm to 4:30am, participation in a rehabilitation program for gambling and drugs, and abstention from alcohol and drugs.
- A.171 The indicative sentence for the financial advantage offence was 9 months.

## **26: Parramatta**

- A.172 The offender, a 30-year-old man, pleaded guilty to one charge of attempting to obtain financial advantage by deception by presenting a withdrawal slip for \$5000 at a bank. His arrest resulted in further charges to which he also pleaded guilty: two charges of assaulting an officer in the execution of their duty; two charges of resisting an officer in the execution of their duty; one charge of possessing identity information (8 NSW driver licences) to commit fraud; one charge of custody of a knife in a public place; one charge of possessing housebreaking implements; and one charge of possessing 10 x Suboxone films containing 8mg of Buprenorphine and a 40 mg tablet of Oxycontin.
- A.173 Pending the hearing he was charged with three other offences that were dealt with separately with no penalty under s 10A.<sup>6</sup> These were having goods in custody suspected of being stolen (one NSW driver licence, two bank cards, a \$20 gift card, five mobile telephones, and identification documents in the name of another); possessing methamphetamine; and hindering two police officers in the execution of their duty.
- A.174 The offender had had previous involvement with the Drug Court and it was noted that he had “always had a drug problem”. The offender’s utility vehicle had recently been stolen in a robbery that gave rise to post-traumatic stress disorder.
- A.175 His rehabilitation (involving residential supported care) while on bail, counted as quasi-custody for the purpose of counting time served.

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6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10A.

A.176 In the course of his remarks, the magistrate spoke to the offender:

Now, something that maybe you were not thinking about at the time is the impact that that has on real people.

A.177 The magistrate found that the custodial threshold had been crossed in relation to the dishonesty matters and, after allowing a discount for a late guilty plea, sentenced the offender to 15 months to be served by an ICO. The additional conditions were 150 hours' community service and to accept the supervision of Community Corrections in implementing the supervision plan proposed in the sentencing assessment report, namely to monitor participation in and completion of the rehabilitation program, and participation in alcohol and other drug counselling as required.

## **27: Parramatta**

A.178 The offender, a 47-year-old man, pleaded guilty to dishonestly causing financial disadvantage by deception. The offending was originally the subject of 21 charges, but 20 of them were withdrawn and the indictment was amended to reflect the total number.

A.179 The offender was the general manager of a company that serviced and repaired mobile telephones and electronic devices. He instructed another company to make payments for parts supplied by his company, into accounts operated by himself and his wife. The multiple transactions took place over one year involving \$137,955.58. The total disadvantage caused to the other company was \$359,008.35.

A.180 The magistrate gave the offender some benefit for the guilty plea, which was not early. However, despite his admission of guilt, he attempted to implicate a manager, which could have wasted police time in investigation.

A.181 The offender had a solid working history with no prior criminal history. He had been involved in some financial difficulties. He was an active volunteer within an ethnic religious community. He also had colon cancer with liver metastases.

A.182 The magistrate found the custodial threshold had been crossed and imposed a sentence of 18 months to be served by an ICO (concurrent with other sentences). Given his health, he was clearly unable to perform community service work. The magistrate, therefore, found exceptional circumstances justifying no additional conditions. There was also an expectation that the offender would not be subject to active supervision by Community Corrections.

## **28: Downing Centre**

A.183 The offender, a 29-year-old woman, pleaded guilty to six charges of dishonestly obtaining financial advantage by deception. A further 12 offences were included on a Form 1.

- A.184 The offender was an operations manager with a bank. Each offence involved the offender transferring money from the bank's accounts into her own bank account without authority. The offences took place over almost 3 years and the total amount involved was \$413,110.27, \$279,109.33 of which arose from the Form 1 matters.
- A.185 The personal account to which the offender transferred the money was used for gambling. When she was charged, \$80,000 was left in the account and this was remitted back to the bank.
- A.186 The offender conceded that the custodial threshold had been crossed. The magistrate agreed that that the offender's position of trust, the planning involved, the ongoing nature of the offending over 3 years and the amounts involved warranted a custodial sentence.
- A.187 The offender was assessed as having a low risk of reoffending. She had voluntarily excluded herself from the casino. It was also said that several other family members had been afflicted by gambling. She also had an underlying issue of depression and was being trialled on antidepressant medication.
- A.188 The magistrate noted the positive steps the offender had taken towards rehabilitation by attending Gambling Anonymous, psychologists and psychiatrists, and by taking part in a positive lifestyles program. It was said to be in nobody's interest that such programs and counselling cease for the duration of a custodial sentence. It was in the offender's and community's best interests that she be given the opportunity to continue with and complete those programs. The magistrate therefore imposed a custodial sentence to be served by an ICO.
- A.189 After allowing a 25% discount for an early guilty plea, the magistrate imposed an aggregate sentence of 27 months and adjourned for 6 weeks to allow for a home detention assessment. Upon reconvening, the magistrate corrected the sentence<sup>7</sup> to be an aggregate sentence of 24 months. The additional condition of the ICO was 9 months of home detention.
- A.190 An amount of \$333,110.27 remained outstanding to the bank. The magistrate made a compensation order for \$100,000 in favour of the bank, noting that this was the maximum amount allowed because of the Local Court jurisdictional limit.

## **29: Downing Centre**

- A.191 The offender, a 57-year-old man, pleaded guilty to 30 charges of dishonestly obtaining financial advantage by deception. He was an employee of a labour hire company and submitted 30 false time sheets that resulted in payments of \$51,391.

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7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43.

- A.192 The offences were committed on 30 occasions, over a long period of time and the offender was in a position of trust. The magistrate noted that the amount defrauded was significant but the offence seriousness was “not above mid-range by any stretch”.
- A.193 The offender was a person of otherwise good character and law-abiding. He was assessed as unlikely to offend again. He expressed desire to repay and make good the wrong.
- A.194 There was also evidence of stress arising from a catastrophic life situation involving very significant injury to his ex-wife which resulted in his taking on parental responsibility for his daughter.
- A.195 The magistrate observed that the custodial threshold had been crossed and, after allowing a discount for the early guilty plea, imposed a sentence of 14 months to be served by an ICO. The additional condition was 150 hours of community service work. An indicative sentence of 3 months was recorded for each charge.

### **30: Parramatta**

- A.196 The offender, a 48-year-old man, pleaded guilty to two charges of dishonestly obtaining financial advantage by deception by requesting refunds, on the one day, from a Bunnings store for items he had not previously purchased (amounting to \$216.62). He was sentenced to a CRO with conviction for 12 months. On the same day, he was convicted (but received no further penalty) for dishonestly obtaining financial advantage by deception by using a receipt to obtain a refund for \$106 worth of goods from a Kmart store.
- A.197 Around 2 months later, the offender breached the CRO by breaking and entering a storage cage and stealing a bicycle. He pleaded guilty to this and to possessing house breaking implements. Before these offences and the breach of the CRO were dealt with, the offender voluntarily admitted and pleaded guilty to 66 charges of dishonestly obtaining financial advantage by deception by requesting refunds from Bunnings stores for items he had not previously purchased. Each of the 66 transactions, which took place before the offences the subject of the CRO, were in amounts ranging from \$44.86 to \$449, and were carried out at 11 suburban stores over 5 months. The total amount of the fraud was \$11,263.
- A.198 The offender was then refused bail in relation to the 66 charges and remained in custody for almost 3 months pending determination of all outstanding matters. The sentencing hearing, therefore, dealt with the breach of the CRO, the housebreaking offences and the 66 charges relating to dishonestly obtaining financial advantage by deception.
- A.199 The magistrate observed that the sheer volume of the fraud offences placed the seriousness of the offending in the mid-range. The offender conceded that the custodial threshold had been crossed.

- A.200 The offender, who was a management consultant, experienced financial difficulty after two contracts “went belly up”. The time on remand was his first time in custody.
- A.201 In relation to all the offences (including those that had been subject to the CCO), the magistrate imposed a sentence of 9 months to be served by an ICO. The additional conditions were that the offender not attend Bunnings stores and that he abstain from drugs, even though there was no evidence of drug use.

### **31: Dubbo**

- A.202 The offender, a 27-year-old man, pleaded guilty to four charges of dishonestly obtaining property by deception, three charges of dishonestly obtaining financial advantage by deception, one charge of larceny, and two charges of failing to appear in accordance with a bail acknowledgement.
- A.203 The fraud offences, which took place over a period of just over one month, involved:
- obtaining, by fraudulent cheques, from different businesses:
    - hearing aids valued at \$10,990
    - clothing, animal products and an Akubra hat, valued at \$487
    - clothing, boots and a hat valued at \$1199.35
  - obtaining, by misleading a shop attendant to believe that he had made a funds transfer, clothing and other items amounting to \$1063
  - obtaining a motor car from a young man valued at \$21,000
  - obtaining, by misleading the owner of a car dealership as to his ownership of the young man’s motor vehicle, a motor vehicle belonging to another man, and
  - misleading the owner of the same car dealership to make a payment of \$3000
- A.204 In assessing the objective seriousness of the offending as “very serious”, the magistrate noted:
- there were five victims (four were small businesses and one an individual)
  - the value of each of the goods and advantages obtained was a lot for the respective small businesses, and
  - the fact that the offences were committed over short period (just over one month) which the magistrate described as a “spree of dishonesty”.
- A.205 Obtaining the motor vehicle from the young man, which was committed with a co-offender with whom he was in a relationship at the time, involved a degree of planning. The magistrate noted the engagement with the victim “went on for a period of time, sending emails, sending assurances, going for a test drive, producing a document which looked like a transfer which was not, continuing to engage with that victim, assuring that the payment had been made and it was all a lie”.

- A.206 The offender had a history of regular employment and described feelings of disappointment in himself in light of the financial burden he placed on the victims. The plea of guilty which he entered on the hearing date did not entitle him to any discount on sentence.
- A.207 The magistrate decided that the custodial threshold had been crossed and imposed an aggregate term of 10 months' imprisonment for the fraud offences and the larceny (which involved the theft of a toolbox and builders rack worth \$1000) to be served by an ICO with a home detention condition. Indicative sentences were imposed ranging from 1 month to 6 months for each of the offences. He received convictions with no further penalty<sup>8</sup> for the failures to appear.
- A.208 The magistrate directed compensation to the businesses, except in relation to the hearing aids since it was not clear if they could be reused. In one case the amount was reduced because, while the goods had been returned, only some were still useable.

### **32: Dubbo**

- A.209 The offender, a 25-year-old woman, pleaded guilty to three charges of dishonestly obtaining financial advantage by deception.
- A.210 The offender, who was a bank employee, created three false loan accounts in amounts of \$5000, \$7000, and \$15,000.
- A.211 The defence lawyer conceded that the custodial threshold had been crossed. The offending was aggravated by the fact that she abused a position of trust as a bank employee. The magistrate also noted that the amounts involved were "not minor".
- A.212 The offender had been on welfare since the termination of her employment with the bank, during which time she gave birth to a child. She had also been fostering a child for two years. Her family was experiencing money issues owing to a car loan and phone plan that left her with very little discretionary income and her partner had lost his job as an apprentice. The fraud was the result of the financial overextension.
- A.213 The outstanding debt owed to the bank was transferred to a credit collection company with whom she had an agreement to repay at a rate of \$40 per fortnight. She had also undertaken financial counselling.
- A.214 The offender had no previous conviction and the sentencing assessment report considered her to be a low risk of reoffending. The offender acknowledged the impact of her offending. The magistrate considered her to be "still relatively young".

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8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10A.



- A.215 The magistrate gave her the benefit of an early guilty plea and sentenced her to an aggregate sentence of 15 months' imprisonment to be served by an ICO with 200 hours' community service work. Indicative sentences were recorded of 4, 6 and 8 months for each offence.
- A.216 The magistrate declined to direct compensation because arrangements had been made to repay the amounts through credit companies and the amounts owing would probably be changing all the time.

## **Community correction order**

### **33: Downing Centre**

- A.217 The offender, a 23-year-old man, pleaded guilty to one charge of dishonestly obtaining financial advantage by deception by using a credit card on six occasions to obtain goods worth \$106.75. The offending was originally the subject of six separate charges. The offender also pleaded guilty to having goods in custody suspected of being stolen, namely a Brazilian passport, a mobile telephone and bank cards, a driver licence and a Medicare card, as well as being an excluded person entering a casino.
- A.218 The magistrate gave the offender a reduced discount because the guilty plea was entered on the day of the hearing and imposed a CCO for 2 years in relation to the use of the credit card. He also imposed fines of \$500 for the goods in custody offence and \$1000 for the casino offence.
- A.219 The magistrate made a compensation direction for \$106.75 in favour of the bank that bore the cost of the credit card use.

### **34: Downing Centre**

- A.220 The offender, a 30-year-old woman, pleaded guilty to dishonestly causing financial disadvantage by deception by registering a company in her name with fraudulent details, thereby causing financial disadvantage to another company to the extent of \$573.
- A.221 She also pleaded guilty to possessing identification information (an image containing name and address and credit card details) in order to commit fraud.
- A.222 The magistrate observed that the amount was not hugely significant, certainly not at the lowest end of the scale, but towards the lower end.
- A.223 The offender was on a refugee visa (and, therefore, unable to access benefits) and had two children. Her husband was a co-accused. She had no prior criminal history in Australia or overseas. The plea to the fraud offence was made on the day of trial.



- A.224 The magistrate emphasised general deterrence because fraud matters are prolific and difficult to detect and considered the matters to be of sufficient seriousness that they required strong denunciation.
- A.225 The magistrate imposed a CCO for 12 months without supervision because the offender had no priors. A compensation direction for \$573 was made in favour of the victim company.

### **35: Downing Centre**

- A.226 The offender, a 44-year-old man was found guilty, after a hearing, of dishonestly obtaining property by deception by using credit card details of his brother's ex-partner to obtain vehicle modifications and iTunes purchases totalling \$9,856.95.
- A.227 The hearing took place in the context of a dispute with the offender's brother. A defence of honest and reasonable mistake was rejected at the hearing.
- A.228 The magistrate imposed a CCO for 18 months without supervision.
- A.229 A compensation direction was made in favour of the bank which refunded the \$9,856.95.
- A.230 Four months later, the Local Court dealt with a breach of the CCO (by driver licence offences) by taking no action but warning the offender against further breaches. Another four months later, the offender was charged with driving while disqualified. On this occasion, the magistrate assessed the driving offence as being mid-range and dealt with it by sentencing the offender to a 10-month ICO. The magistrate also revoked the CCO for the fraud offence and imposed a new CCO for 12 months and a fine of \$800.

### **36: Downing Centre**

- A.231 The offender, a 45-year-old woman, was found guilty of stealing two debit cards and 7 charges of dishonestly obtaining property by deception by using the stolen cards on the same day to obtain property to the value of \$317.06 from a bottle shop, a tobacco store, a supermarket, a department store, two service stations and a McDonalds.
- A.232 The offences took place before the offender entered custody for some other offences, but the charges were delayed until after the end of her non-parole period for those other offences. During the non-parole period for the other offences, she was convicted in her absence by the Lismore Local Court and sentenced by the Downing Centre Local Court.
- A.233 The offender had a lengthy criminal history. Her life had unravelled after her son was diagnosed with muscular dystrophy at a young age and later died, and she commenced heroin use. She was homeless at the time of the offences and had a

partner who was in need of mental health services. She had started the EQUIPS program and had a good report from a rehabilitation centre and a positive sentencing assessment report.

- A.234 The magistrate imposed a CCO for 12 months. Additional conditions were that she attend counselling, attend the EQUIPS Foundations Program, continue treatment through the rehabilitation centre or an opiate treatment program, and take methadone as directed.
- A.235 Just over a month after the CCO was imposed (and a week after the end of the parole period for the previous sentence), the offender committed a further three offences: stealing blue jean leggings valued at \$20; stealing a red colourful butterfly magnet valued at \$2; and dishonestly obtaining financial advantage by deception by collecting two cushions from a display counter and using old receipts to obtain a refund of \$7.
- A.236 In revoking the CCO, the magistrate noted the offender's 58-page record of dishonesty and her breach of the CCO a month after she got it. In the magistrate's view there was no alternative than a sentence of full-time imprisonment for the offences that had been subject to the CCO. However, the magistrate noted that a social worker had been working successfully with the offender to get stable accommodation in the rental market, to maintain mental and physical health and to re-engage in the community. A fixed term of 3 months' imprisonment was imposed backdated so that the sentence was already completed.
- A.237 In relation to the three new offences, the magistrate noted that if they had involved larger amounts, the offender "would be looking at a sentence of imprisonment" and imposed a fine of \$100 for each of the offences.

### **37: Downing Centre**

- A.238 The offender, a 37-year-old man, pleaded guilty to three charges of dishonestly obtaining property by deception. He used payWave on three occasions to obtain two six-packs of Jim Beam from a bottle store, three packets of cigarettes from a supermarket and toiletry items from the same supermarket. The goods purchased amounted to \$211.
- A.239 The offender had some dishonesty offences on record, as well as minor drug, public order, theft, bail and violence offences, some of them receiving sentences of imprisonment.
- A.240 The offender had a drug habit and may have had a brain injury, however, there was no evidence of this. He had taken steps towards rehabilitation by engaging in a rehabilitation program as part of a 6-month CCO he had received earlier in the year for uttering a forged prescription. He was also attending Narcotics Anonymous.

A.241 The magistrate imposed a 12-month CCO with additional conditions that the offender be subject to Community Corrections supervision and that he not consume drugs unless prescribed.

### **38: Downing Centre**

A.242 The offender, a 31-year-old man, pleaded guilty to one charge of dishonestly obtaining financial advantage by deception by making 75 unauthorised purchases with a fuel card amounting to \$11,224.37 over 12 months.

A.243 The magistrate observed that the period of offending, the number of transactions and the amount involved put the seriousness of the offending close to the custodial threshold.

A.244 The offender had no prior offences and had taken steps to address the underlying causes of his offending. However, the magistrate noted that anything short of a CCO would be inappropriately lenient.

A.245 The magistrate imposed a CCO for 2 years. Additional conditions included that the offender be supervised by Community Corrections, attend a gambling treatment clinic and follow its recommendations and attend a clinical psychologist for as long as Community Corrections considered necessary.

A.246 A compensation direction for \$11,224.37 was made to the victim company.

### **39: Parramatta**

A.247 The offender, a 43-year-old man pleaded guilty to one charge of dishonestly obtaining financial advantage by deception and 19 charges relating to fine-only residential building work offences, including seeking and carrying out residential building work without a licence and without insurance.

A.248 The fraud offence involved \$186,530 of which \$250 had been repaid.

A.249 The magistrate noted that the offence was planned and the offender had falsified documents and lied. He had pretended to be a licensed and insured builder. The offending was assessed as mid-range.

A.250 The offender had a prior criminal record for dishonesty including a sentence of 7 years 6 months' imprisonment imposed in 2011 for offences committed while he was a mortgage broker.

A.251 The offender had a substantial gambling addiction and was caring for elderly parents. He expressed shame, but without real or expressed contrition or remorse. The magistrate doubted he would reoffend, but this conclusion was guarded because of his criminal history.

- A.252 The magistrate noted that the offending required a sentence that gave effect to punishment, protection of the community, denunciation and recognition of the harm caused. The offender's record highlighted the need for specific and general deterrence.
- A.253 The prosecutor, the Department of Finance and Services (NSW Fair Trading) conceded that the custodial threshold had not been crossed and that a CCO with community service was appropriate, however there had been no suitability assessment.
- A.254 For the fine-only offences, the magistrate imposed fines amounting to \$63,000. After allowing a 15% discount for the guilty plea, the magistrate imposed a CCO for 2 years with no additional conditions.
- A.255 Professional costs of \$7732 were ordered against the offender and a compensation order of \$16,000 was made in favour of the one victim whose loss had been quantified.

#### **40: Downing Centre**

- A.256 The offender, a 46-year-old man, pleaded guilty to one charge of dishonestly obtaining property by deception and one charge of driving while disqualified.
- A.257 The fraud offence involved the offender driving off from a service station without paying for 47.95l of petrol valued at \$71.88.
- A.258 The driving offence put him close to a custodial sentence because of his prior driving offences. The fraud offence, however, had been committed more than 12 months before and there had been no such offending since. He had also repaid the service station.
- A.259 Despite being from a very prominent business family interstate, the offender was on the disability pension and had mental health issues. A back injury would cause some problem for orders with community service options.
- A.260 The magistrate imposed a CCO for 18 months for both offences. Additional conditions were that the offender be subject to Community Corrections supervision and participate in any program, treatment, intervention or related activity and comply with directions of a treating psychiatrist/psychologist. Supervision was to include attendance and participation at any road safety programs that Community Corrections deemed suitable.

#### **41: Downing Centre**

- A.261 The offender, a 20-year-old Aboriginal woman, pleaded guilty to one charge of dishonestly obtaining property by deception, one charge of having goods in custody

suspected being stolen, and one charge of possessing 0.1 grams of methylamphetamine.

- A.262 The fraud offence involved the use of a credit card in the course of one morning to obtain over \$650 worth of goods, mostly cigarettes. The multiple transactions, originally the subject of eight charges, included three transactions at one service station, five transactions at one newsagency and one transaction at another service station. There was also an attempted transaction (amounting to \$88.15) at a convenience store.
- A.263 By the time of sentencing the offender had failed to comply with bail conditions on seven occasions. The bail conditions included a requirement that the offender report three times a week, meet residence requirements, not leave home unless in the company of one of three named individuals, attend an acute mental health inpatient service, participate in a program at a residential drug and alcohol treatment facility, not take alcohol or non-prescribed drugs and abide by a curfew.
- A.264 She also had separate matters relating to motor vehicles (including a mid-range drink driving charge) pending in the Waverley Local Court.
- A.265 The offender had a serious history of mental illness, including a recent diagnosis of a psychotic disorder. She also had a “not insignificant” drug problem with ice and had a treatment plan with a drug and alcohol treatment program.
- A.266 She was in a relationship with a young man who was also charged with fraud offences.
- A.267 After allowing a 10% discount for the guilty plea, the magistrate imposed a 12-month CCO for the fraud and goods in custody offences. Additional conditions were supervision by Community Corrections and to take such medications as prescribed. A conviction was recorded with no further penalty for the drug possession offence.

## **42: Downing Centre**

- A.268 The offender, a 27-year-old man, was dealt with for 17 charges of dishonestly obtaining property by deception as well as one charge of shoplifting items amounting to \$26 from a supermarket and a charge of failing to appear in accordance with a bail acknowledgement.
- A.269 Having failed to appear as required, the offender was convicted in his absence and a warrant issued. He was brought to court and sentenced two months later.
- A.270 The fraud offences involved the offender driving off from service stations without paying for petrol on 17 occasions in an 8-month period.
- A.271 The offender was subject to a bond imposed by the District Court in a previous proceeding, but the Local Court was unable to deal with the breach.

- A.272 The offender had a mild to moderate intellectual disability and achieved a bad score on a memory test.
- A.273 In relation to the fraud and shoplifting offences, the magistrate imposed a CCO for 12 months. However, despite reference to developing a supervision plan as proposed in the pre-sentence report, no additional conditions were imposed.

### **43: Downing Centre**

- A.274 The offender, a 45-year-old woman, pleaded guilty to one charge of obtaining property by deception.
- A.275 As an employee at a pet grooming store, she used credit card details, that a customer supplied to book her pet in, to obtain a Fitbit for her daughter.
- A.276 The magistrate noted that the fraud was committed in the course of employment and that the offender had betrayed her employer and the customer. The offending was not at the lower end of objective seriousness because of the abuse of trust. The magistrate observed that finding a credit card on the street and doing one payWave to buy a packet of cigarettes, would be at the lower end.
- A.277 The offender was also a serial fraud offender, dating back to 2003 and had served a sentence of imprisonment in 2010. Her most recent prior offending resulted in an ICO for 12 months in 2014.
- A.278 The offender was a mother of three children aged 10, 15 and 16 and had struggled with depression and anxiety since the birth of her first child. The recent offending was said to be attributed to a reduction in medication.
- A.279 The magistrate stepped back from imposing a sentence of imprisonment, because the offender had engaged with treatment previously, and imposed a CCO for 2 years. The additional conditions were Community Corrections supervision and that the offender participate in any program, treatment or intervention as directed and continue to see her general practitioner and take medication as prescribed.

### **44: Downing Centre**

- A.280 The offender, a 44-year-old Aboriginal man, pleaded guilty to three charges of dishonestly obtaining financial advantage by deception, as well as a charge of having a knife in custody at a hospital emergency department and a charge of failing to comply with reporting obligations in relation to the child protection register.
- A.281 The fraud offences involved using a card obtained from his overnight lodging on three occasions in 15 minutes to obtain items valued at \$160.83.

- A.282 The magistrate considered that the use of another's card fell towards the mid-range of seriousness, noting that there was a degree of planning involved.
- A.283 The offender was homeless because of drug use and mental health issues. His failure to comply with child protection register requirements included a failure to report his change of address. after he had been evicted. He had engaged with a homelessness support group and with a homeless shelter caseworker.
- A.284 The magistrate considered the offender had a high risk of reoffending warranting supervision and imposed, in relation to the fraud offences, a CCO for 2 years, with an additional condition of Community Corrections supervision. The other offences received shorter concurrent penalties (the knife had been found in his possession by nurses after he was admitted to the hospital emergency department).
- A.285 One year and 7 months later, the offender committed new offences in breach of the CCO. He pleaded guilty to one charge of stealing from a dwelling (by taking a debit card and \$45 from the purse of an elderly client of a removalist for whom he was doing casual work) and one charge of dishonestly obtaining financial advantage by deception (by using the stolen debit card to make transactions in the amount of \$376.66). He used the card to buy cigarettes that he wanted to swap to get more methamphetamine.
- A.286 The magistrate considered the stealing offence to be a serious one (involving being in the victim's home) and likened it to his previous offence that involved stealing a card from a vulnerable sleeping person. She noted the offender's positive progress in addressing his drug issues. No action was taken on the breach of the CCO (which had expired by the time of the hearing). For the fraud offence he received a fine of \$500 and for the stealing offence he received a CCO for 15 months with additional conditions of Community Corrections supervision, and participating in rehabilitation treatment and continuing with drug treatment programs as directed. The length of the CCO reflected the seriousness of the offence and the need to commit to continuing with rehabilitation.

## **45: Downing Centre**

- A.287 The offender, a 27-year-old Aboriginal woman, pleaded guilty to one charge of dishonestly obtaining property by deception and a list of other charges including driving while disqualified, providing a false name to police, assault occasioning actual bodily harm (domestic violence), common assault (domestic violence), contravening an apprehended domestic violence order and shoplifting.
- A.288 The fraud offence involved obtaining a \$379 credit note by tricking a shop assistant into refunding items which the offender did not buy. On the same day she stole from the shop a trolley full of baby items, some clothing and a mobile telephone.
- A.289 The magistrate classified most of the offences as minor.



- A.290 The offender had a good pre-sentence report, but her life was chaotic with unaddressed mental health issues and alcohol issues. She had been referred to an Aboriginal mental health unit. The victim of her domestic violence offending had been her male partner.
- A.291 The magistrate imposed a CCO for 12 months with an additional condition that she continue treatment with the Aboriginal mental health unit. The magistrate observed, “No one wants to send Aboriginal women to gaol. No one wants to. But if you keep pushing, I think that's probably what's going to happen.”
- A.292 Three months before the sentencing, the offender had already committed further offences, including stealing a wallet and dishonestly obtaining financial advantage by deception by using a credit card to obtain cigarettes and alcohol in three separate transactions. The Local Court dealt with these offences, and two subsequent offences of contravening an apprehended domestic violence order and possessing 4.3g of cannabis.
- A.293 The magistrate noted the offender’s lengthy record and prior imprisonment for shoplifting and observed that “she has been given opportunities, and she does not seem to have taken them”. It was also noted that offender had received counselling and had an alcohol problem. The offender had been on remand for over a month. The magistrate made a finding of special circumstances to allow a reduction of the non-parole period because of the offender’s alcoholism in the expectation that she would undertake rehabilitation while on parole.
- A.294 The magistrate revoked the CCO and imposed an aggregate sentence of 15 months’ imprisonment with a non-parole period of 5 months. Indicative sentences were recorded for most of the offences, including 12 months for the original fraud offence and 9 months for each of the new fraud offences. A fine of \$100 was imposed for the drug possession and a fine of \$500 was imposed for stating a false name.
- A.295 A direction for compensation was sought in relation to a stolen wallet, cash and personal items, but, as receipts were not available, the magistrate declined to make the direction.

## **46: Downing Centre**

- A.296 The offender, a 26-year-old man, pleaded guilty to two charges of dishonestly obtaining financial advantage by deception and one charge of dishonestly obtaining property by deception.
- A.297 The offender was a cleaner and made all of the transactions in one hour after taking a debit card from an office. He used the card to withdraw \$500 from an ATM on two occasions and to purchase an Apple Macbook Pro.
- A.298 The offender had migrated to Australia on a partner visa, 3 years previously after a difficult upbringing in Ecuador and Spain.



- A.299 The magistrate considered that being a cleaner without supervision imposed a moral burden to act honestly and respectfully towards others' property. The prevalence of such conduct and the purposes of sentencing demanded that convictions be recorded, however, the offender's age and lack of antecedents indicated good prospects of rehabilitation.
- A.300 After allowing a 25% discount for the early guilty plea, the magistrate imposed CCOs for 2 years for obtaining the computer and 18 months each for the withdrawals. The magistrate also imposed fines of \$2000 for obtaining the computer and \$1000 each for the withdrawals.
- A.301 No compensation order was made as there was no evidence of the amount lost by a victim.

## **47: Dubbo**

- A.302 The offender, a 45-year-old woman, pleaded guilty to one charge of dishonestly obtaining financial advantage by deception.
- A.303 The offence involved the offender and her partner running sausage sizzles at Bunnings claiming to be raising funds on behalf of a sporting club. The magistrate found there was never an intention of paying the amounts raised to the club. The offender and her partner raised \$3482.50 on five occasions. The magistrate noted that this was a lot of money.
- A.304 The offender had three dependent children. Her family was experiencing financial stress due to her partner's gambling. Since the offending, she had separated her bank account from her partner and had \$600 saved to pay towards compensation. \$100 had already been paid back.
- A.305 The offender had no criminal history. The magistrate noted that if she had had a criminal record "this type of offending could easily have put you in gaol".
- A.306 The magistrate imposed a CCO for 12 months with no additional conditions. He directed compensation of \$3382.50 be paid to the club.

## **48: Dubbo**

- A.307 The offender, a 30-year-old woman, pleaded guilty to two charges of dishonestly obtaining financial advantage by deception and two charges of using a false document to obtain financial advantage.
- A.308 The offending involved two fraudulent claims to an insurance company. In the first case, the offender claimed \$4900 for damage to a gaming computer that was damaged after her policy had expired and before she had taken out a new policy. She also falsified a letter from a computer store to support the claim. In the second

case, the offender claimed \$7300 for damage to a television and falsified a tax invoice from an electronics store to support the claim.

- A.309 On the second occasion she had been experiencing financial stress and had engaged in the fraud to pay some outstanding bills, without considering the alternatives that were available.
- A.310 The offender pleaded guilty at the first opportunity. The sentencing assessment report considered her to be a low risk of reoffending. She had no previous record.
- A.311 She had a shared custody arrangement in relation to two children and was paying support to the father. She had recently given birth to another child and, having left her employment, was receiving a parenting payment. This meant that payment of compensation to the insurance company would need to be done on a gradual basis until she could secure work.
- A.312 In response to a submission by the offender's lawyer, the magistrate considered the matter too serious for a CRO, as it involved a breach of trust and a "fairly substantial sum of money". If not for the fact the offender had no previous convictions, the magistrate would have been considering whether the custodial threshold had been crossed.
- A.313 The magistrate imposed a CCO for 18 months with no additional conditions. She also directed compensation of \$12,200 be paid to the insurance company.

## **49: Dubbo**

- A.314 The offender, a 41-year-old Aboriginal woman, pleaded guilty to one charge of dishonestly obtaining financial advantage by deception. The offence involved failing to pay for \$54.29 worth of fuel at a service station.
- A.315 The offending took place before the offender was sentenced to three CCOs for some other offences. The magistrate observed that it was highly likely that, if the offence had been dealt with at the same time, a similar order would have been imposed.
- A.316 Her prior record showed a number of dishonesty offences largely related to drug use. This corresponded with a former relationship characterised by drug use and domestic violence. The offender was now employed for the first time in seven years and in a more stable living environment with her father.
- A.317 The sentencing assessment report observed that "she appears to be committed to ongoing training which is in contrast to her previous periods of supervision". The magistrate was prepared to accept this favourable report notwithstanding her criminal record. The previous CCO had been served without breach and the offender had completed her community service hours.

- A.318 The day after entering the guilty plea, the offender paid \$54.30 to the service station. The magistrate noted this and that it was a relatively small amount.
- A.319 The magistrate imposed a CCO for 12 months. Additional conditions were supervision by Community Corrections and 60 hours of community service work.

## **50: Dubbo**

- A.320 The offender, a 25-year-old woman, pleaded guilty to three charges of dishonestly obtaining financial benefit by deception.
- A.321 The charges involved fraudulent claims made, over a period of 5 months, to an insurance company which resulted in payments of \$9191, \$4900 and \$4900.
- A.322 A co-offender, the offender's partner, lodged the fraudulent claims for the policies that were in the offender's name. These claims resulted in one electronic funds transfer that was made to the offender's account and two cheques that were posted to the offender's place of employment, which the offender banked. The fraudulent claims were not directly attributable to the offender; the deception resided in her banking the cheques and continuing to operate the bank account in the knowledge that she was not entitled to the money that had been paid in.
- A.323 The offender had responsibility for three children, was in employment and had a criminal history of only one offence dating back to 2002. The magistrate accepted that there was very little or no chance of reoffending and that the offender was remorseful.
- A.324 The magistrate emphasised the need for general deterrence so that fraudulent claims are not made.
- A.325 The magistrate allowed a discount for the guilty plea on the day of the hearing on the basis that it would have been a lengthy and quite complicated hearing. He also took into account the penalty which the co-offender had received (a CCO of 18 months), notwithstanding differences in what had been pleaded to.
- A.326 The magistrate imposed a CCO for 30 months with no additional conditions. He also directed that compensation be paid to the insurance company amounting to \$18,991.

## **51: Dubbo**

- A.327 The offender, a 34-year-old woman, pleaded guilty to four charges of dishonestly obtaining financial advantage by deception. She was also dealt with for failing to appear in relation to the matter, three weeks earlier.
- A.328 The charges arose from the use of a credit card in a wallet the offender found on a park bench. She was on ice at the time and the purchases were apparently to tide

her over the Christmas long weekend. The transactions included \$60 worth of telephone credit and \$54.97 of goods from an express supermarket.

- A.329 The offender pleaded guilty at the first opportunity. Her criminal record consisted mostly of drug possession offences. There were no theft or dishonesty offences in her adult record. She had previously engaged with the MERIT program but had failed.
- A.330 The magistrate imposed a CCO for 12 months without additional conditions.

## **Conditional release order with conviction**

### **52: Downing Centre**

- A.331 The offender, a 31-year-old man, pleaded guilty to one charge of dishonestly obtaining property by deception. The offence involved his obtaining \$84.76 of fuel and providing false details to a service station after being unable to pay for the fuel and failing to return within 24 hours to pay (the “first drive off offence”).
- A.332 Just over two weeks later, the offender damaged a motor vehicle with a metal tool. This offence was dealt with separately and resulted in a conviction and a CRO for 12 months that was imposed two weeks before the sentencing for the first drive off offence.
- A.333 The offender was a Palestinian who grew up in a warzone and then refugee camps. His business had failed after he had spent 8 months in prison. He was currently on a part completed ICO with a community work component. The offender had repaid the amount owing to the service station and had pleaded guilty at the first opportunity, demonstrating remorse and prospects for rehabilitation.
- A.334 Regard was also had to outstanding fines of about \$30,000 which were described as crushing. The magistrate encouraged the offender to look into work development order options in relation to the unpaid fines in order to help address mental health concerns.
- A.335 The magistrate entered a conviction and imposed a CRO for 10 months.
- A.336 About six months later, the offender committed a series of driving offences involving drug driving, drink driving and driving while suspended. Between the first and subsequent driving offences, he was also dealt with for an offence of dishonestly obtaining financial benefit by deception, by failing to pay for fuel (the “second drive off offence”) which occurred not long after the first drive off offence. In this case, the offender stated he had no work and everything was so expensive. After allowing a 25% discount for an early guilty plea, the magistrate imposed a \$1100 fine and a CCO for 12 months, with an additional condition that the offender

be subject to Community Corrections supervision, and undertake any counselling or supervision they deem necessary.

- A.337 When he was sentenced for the driving offences (involving fines and a conviction with a CRO for 12 months), breaches of the orders for the first and second drive off offences were recorded but no action was taken.
- A.338 At a subsequent hearing for breach, no action was taken on the breach of the CRO for the property damage or the CCO for the second drive off offence. However, the CRO for the first drive off offence was revoked and a CCO was imposed for 6 months.

### **53: Downing Centre**

- A.339 The offender, a 20-year-old woman, pleaded guilty to one charge of dishonestly obtaining property by deception, together with a charge of having goods in custody suspected of being stolen and a charge of failing to appear in accordance with a bail acknowledgement.
- A.340 The fraud offence involved using a stolen debit card to obtain 15 chicken and cheese burgers from McDonalds. The goods in custody were items of clothing and jewellery amounting to \$222.87.
- A.341 The fraud offence was opportunistic and the card was used to obtain food. The clothing and jewellery were, however, not items of necessity.
- A.342 The magistrate considered that the offences were prevalent and of community concern, requiring an element of general deterrence.
- A.343 The offender had no adult criminal record. Her juvenile record was the result of a difficult divorce that led to her spending a lot of time outside the home and mixing with the wrong people. She had been subject to domestic violence from her ex-partner.
- A.344 She had a history of failing to appear in court and had served 6 days in custody after breaching bail conditions.
- A.345 The magistrate convicted the offender and imposed a CRO for 18 months, subject to supervision by Community Corrections.
- A.346 The CRO was subsequently revoked for two further offences of being carried in a car taken without the consent of the owner, the first of these taking place a week after the initial sentencing. She was sentenced for these and the earlier offences to an ICO for 6 months (without additional conditions because of exceptional circumstances).

## 54: Downing Centre

- A.347 The offender, an 18-year-old man, pleaded guilty to nine charges of dishonestly obtaining property by deception, as well as charges of entering a vehicle without the owner's consent, possessing graffiti implements (10 cans of aerosol paint), stealing a debit card, and possessing 0.71g of cannabis leaf. He also pleaded guilty to a charge of possessing 0.5g of cannabis, which occurred after his arrest for the other charges and amounted to a breach of his bail conditions.
- A.348 The nine fraud offences involved using the stolen debit card, in the course of one hour, to obtain goods from convenience stores (on two occasions), a \$100 gift card, \$50 worth of goods from a newsagency (on two occasions), \$146 worth of aerosol spray paint from an art store (on four occasions).
- A.349 The matter was originally adjourned for the MERIT program, however, homelessness prevented the offender from participating. He also had matters before the Children's Court of a similar nature.
- A.350 The offender had left home at 15 and had been homeless for a long period. When the offences occurred, he lost his job and was kicked out of his father's house and lived with his grandfather for 12 weeks.
- A.351 Following his ineligibility for MERIT, he had been linked to a foundation which had secured some accommodation and he intended to complete school.
- A.352 On a quick assessment, the offender was found to be in the low risk category. The magistrate noted that he had been linked to fairly comprehensive support services but they did not have the capacity to notify the court if the offender fell out of contact with them.
- A.353 The magistrate recorded a conviction for the fraud offences and imposed a CRO for 12 months. In relation to the graffiti implements, the offender was fined \$440 and the implements were forfeited to the Crown. He received convictions with no other penalty for the remaining offences.
- A.354 Eleven months later, the offender committed a common assault (domestic violence). The CRO was found to have been breached but the court took no action. For the assault, the offender received a CCO for 18 months with Community Corrections supervision.

## 55: Downing Centre

- A.355 The offender, a 59-year-old woman, pleaded guilty to two charges of dishonestly obtaining financial advantage by deception.

- A.356 The offender took part in an unauthorised incentive scheme as an employee of a company, which involved her falsely declaring that she was the owner of goods listed for sale on contracts.
- A.357 The offences were originally charged as 16 separate declarations that took place over 4 years. The offender pleaded not guilty to the 16 charges, but subsequently pleaded guilty to the two consolidated charges. The total benefit obtained was \$4850.
- A.358 It was noted that the victim company was prepared to continue to employ the offender. The magistrate therefore considered that it was a matter for general deterrence rather than personal deterrence.
- A.359 After allowing the benefit of an early guilty plea, the magistrate convicted the offender and imposed a CRO for 15 months. Compensation orders were made in favour of the victim company to a total of \$4850.

## **56: Dubbo**

- A.360 The offender, a 44-year-old man, pleaded guilty to one charge of dishonestly obtaining property by deception.
- A.361 The offence involved using the TAB's phone application to obtain the winnings (amounting to just over \$2500) attached to a TAB ticket that the victim posted on Facebook. The offender claimed that he had initially used the application in order to satisfy his curiosity about the value of the ticket. To his surprise the money went straight to his son's account, he panicked and withdrew the money. He paid the money back in full, after he was charged.
- A.362 The magistrate took into account the repayment in full, the guilty plea at the first available opportunity and the offender's lack of criminal history. The magistrate also noted that the offence was spontaneous and "just an act of stupidity" which could have been avoided if he had made amends immediately.
- A.363 The magistrate convicted the offender and imposed a CRO for 12 months without additional conditions.

## **57: Dubbo**

- A.364 The offender, a 25-year-old man, pleaded guilty to two charges: one of dishonestly obtaining financial advantage by deception by using his mother's credit card to withdraw \$100; and one of dishonestly obtaining property by deception by using his mother's credit card to purchase \$22.70 worth of fast food.
- A.365 He had no prior convictions for fraud, his previous convictions being for traffic and driving offences.

- A.366 He attempted to repay his mother, but she refused to accept the money.
- A.367 The offender was on a disability support pension with diagnoses of ADHD and bipolar. The offender wished to engage with his alcohol and drug issues but had some difficulty meeting the requirements of MERIT.
- A.368 The magistrate convicted the offender and imposed a CRO for 12 months with additional conditions of Community Corrections supervision and drug and alcohol counselling.

## **Fine**

### **58: Downing Centre**

- A.369 The offender, a 26-year-old man, pleaded guilty to a mix of Commonwealth and state offences: one charge of dishonestly obtaining property by deception, one charge of possessing a prescribed restricted substance, and one charge of importing a border-controlled drug with no commercial intent.
- A.370 The fraud involved the offender using another person's prescription to obtain hydroxybutanoic acid (GHB). He had been prescribed GHB for jetlag previously and was in a hurry to obtain it before travelling overseas. The GHB was detected upon his return to Australia, which resulted in the possession and importation charges.
- A.371 He effectively spent 24 hours in custody while the question of commercial quantity of GHB was considered by the authorities. He was granted bail subject to strict conditions in relation to international ports and was required to report to police twice weekly.
- A.372 The magistrate considered that obtaining the GHB with another's prescription involved a degree of criminality "which puts it above the lowest level of seriousness".
- A.373 The offender, who had several business degrees, ran his own business. His criminal record involved a no conviction recorded in Queensland when he was 19.
- A.374 The magistrate imposed a \$750 fine for the fraud, and fines amounting to \$1250 for the other offences.

### **59: Downing Centre**

- A.375 The offender, a 26-year-old man, was convicted in his absence of one charge of dishonestly obtaining property by deception. He was also dealt with in his absence for a charge of self-administering methamphetamine on an earlier date. The drug charge was dealt with immediately by a fine of \$250, while the sentencing in the fraud matter was delayed for two weeks.



- A.376 The offender, despite having no available funds, stayed at a luxury hotel in Sydney one afternoon and ordered room service, thereby obtaining accommodation and meals to the value of \$1139.70.
- A.377 The magistrate imposed a fine of \$500 and made a compensation order in favour of the hotel for \$1139.70.
- A.378 In separate, almost parallel proceedings, the offender was also dealt with in his absence for an offence under the *Innkeepers Act 1968* (NSW)<sup>9</sup> of failing to pay a reasonable sum for meals and accommodation over two nights at a Darling Harbour hotel.
- A.379 The maximum penalty under the now repealed section of the *Innkeepers Act* was 0.5 penalty units and such compensation as was deemed reasonable. The magistrate therefore imposed a fine of \$50 and ordered compensation of \$1426.70 in favour of the hotel.

## 60: Downing Centre

- A.380 The co-offenders, a 21-year-old woman and a 22-year-old woman, pleaded guilty to two charges of dishonestly obtaining property by deception.
- A.381 The offenders, who were European backpackers and who worked in food delivery, found a debit card in the street. They used it in the course of about 15 minutes to obtain \$68.34 worth of tobacco products from one tobacconist and \$74 worth of tobacco products from another tobacconist.
- A.382 The magistrate considered the transactions to be two acts of deliberate dishonesty and set the offending at just below the mid-range of seriousness.
- A.383 They were fined \$300 each for each offence and ordered to pay compensation of \$142.34 to the owner of the debit card.

## 61: Downing Centre

- A.384 The offender, an 18-year-old man, was convicted in his absence in relation to one charge of obtaining property by deception.
- A.385 The offender failed to pay for food and drinks totalling \$319.40 that he and others consumed at a Darling Harbour restaurant.
- A.386 The magistrate imposed a fine of \$1000.

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9. *Innkeepers Act 1968* (NSW) s 9, repealed by *Fair Trading Act 1987* (NSW) sch 7 commencing 1 July 2019.

## 62: Downing Centre

- A.387 The offender, a 50-year-old woman, pleaded guilty to one charge of causing financial disadvantage by deception.
- A.388 She used a flatmate's company fuel card to make an authorised purchase of petrol and an unauthorised purchase of gift cards, causing \$800 in financial disadvantage to the company.
- A.389 The magistrate noted that the offence involved a degree of sophistication and, while the amount was not high, it was "definitely not at the lowest end".
- A.390 The offender had no criminal history and showed remorse and contrition.
- A.391 She had been the victim of historical sexual abuse (with associated post-traumatic stress disorder). It was also said that her flatmate had sexually assaulted her and that she had attempted suicide. She was receiving treatment for alcoholism.
- A.392 After allowing a 25% discount for the early guilty plea, the magistrate imposed a fine of \$1100 and encouraged the offender to seek a work development order to deal with her mental health issues.

## Conviction only

### 63: Downing Centre

- A.393 The offender, a 19-year-old man, pleaded guilty to dishonestly obtaining property by deception by driving off from a service station without paying for 41.05 litres of petrol valued at \$60.71.
- A.394 A payment facility was not available at the time, so he drove off.
- A.395 The fraud offence was at the start of a sequence of serious driving offences, for one of which the offender had already been sentenced to imprisonment. He was now under supervision on parole as part of that sentence. The magistrate observed that the fraud offence, if it had not been charged later, would have formed part of the sentences for the other offences. The offender had also repaid the amount.
- A.396 The magistrate convicted the offender without further penalty under s 10A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

### 64: Downing Centre

- A.397 The offender, a 25-year-old man, pleaded guilty to two charges of dishonestly obtaining financial advantage by deception. One charge involved a total of \$1868.13, while the other, which involved EFTPOS manipulation, amounted to \$2929.

- A.398 The offences charged took place at around the same time as six other fraud offences, involving dishonestly obtaining financial advantage by deception by claiming refunds from a variety of businesses amounting to \$21,900. These other offences had already been dealt with by referral to the Drug Court and by five compensation orders amounting to \$12,530. The two new charges were only laid after the other offences had been dealt with and the offender was already in custody for them.
- A.399 The magistrate observed that the two offences were similar to the other offences that had already been sentenced and, if they had been dealt with together, would have resulted in a slight accumulation of the earlier sentence. The magistrate convicted the offender without further penalty and made a compensation order in favour of one victim business of \$2929.

## **65: Dubbo**

- A.400 The offender, a 38-year-old man, pleaded guilty to one charge of dishonestly obtaining financial advantage by deception. The proceedings also dealt with other matters to which the offender had pleaded guilty, including possessing a prohibited drug, custody of a knife, two domestic violence assaults causing actual bodily harm (one of them in breach of an apprehended violence order), and resisting a police officer.
- A.401 The dishonesty offence involved using a debit card to purchase goods at a service station amounting to \$32.98.
- A.402 The magistrate considered the dishonesty offence to be one of the “relatively lesser matters” and convicted the offender with no further penalty. He did the same with the drug offence, one of the knife offences, and the resisting a police officer offence.
- A.403 For the remaining offences, the magistrate imposed an aggregate sentence of 20 months’ imprisonment with a non-parole period of 15 months, noting that he had no alternative in relation to acts of violence in breach of an apprehended violence order.

## **Conditional release order without conviction**

### **66: Downing Centre**

- A.404 The offender, a 37-year-old man, pleaded guilty to one charge of larceny and one charge of dishonestly obtaining financial advantage by deception.
- A.405 The larceny offence involved finding a “slots” purchase voucher in another person’s name and the fraud involved using it in a cash out machine at a casino to pay him \$405 to which he was not entitled.

A.406 The magistrate observed that the voucher was very close to having been abandoned. The offender effectively had no criminal record.

A.407 The magistrate imposed a CRO for 18 months without a conviction. There were no additional conditions attached to the order. The magistrate also ordered compensation of \$405 in favour of the owner of the voucher.

## **67: Dubbo**

A.408 The offender, a 31-year-old woman, pleaded guilty to dishonestly causing a financial disadvantage by deception. She failed to pay for a week's stay in a motel room and food items, amounting to \$1919.

A.409 The offender had a prior record of driving offences and drug offences, but no prior record for dishonesty.

A.410 The offender had written a letter (but not yet sent it) apologising to the business owners. The magistrate took into account the offender's payment of the outstanding amounts in full and the guilty plea, as well as a number of personal issues the offender was going through.

A.411 Without proceeding to conviction, the magistrate imposed a CRO for 12 months.

## **No conviction**

### **68: Downing Centre**

A.412 The offender, a 21-year-old man, pleaded guilty to one charge of attempting to obtain financial advantage by deception.

A.413 The offence involved attempting to obtain approximately \$90 in fares by offering Uber services without the necessary authority. The offender had also received a penalty notice for offering public passenger vehicle services without the necessary authority.

A.414 The magistrate observed that the offender's act was technically a crime but one at the very bottom of objective seriousness. He took into account the fact that the crime was one of ignorance rather than intent, the lack of personal gain, the offender's youth, and lack of prior offences. The offender had pleaded guilty at the first opportunity. The prospects of rehabilitation had already been realised and there had been a measure of collateral retribution in the penalty notice.

A.415 The magistrate declined to impose a conviction,<sup>10</sup> and dismissed the matter.

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10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(a).

## Appendix B:

# Fraud and fraud-related offences in the Crimes Act 1900 (NSW)

Crimes Act 1900 (NSW) provision	Description	Maximum penalty (years)
s 125	Larceny as bailee	5
s 156	Steal property as clerk/servant	10
s 157	Embezzle as clerk or servant	10
s 192F(1)(a)	Destroy or conceal accounting record to obtain property	5
s 192F(1)(b)	Destroy/conceal accounting record to obtain advantage	5
s 192G(a)	Publish etc false misleading material to obtain property	5
s 192G(b)	Publish etc false misleading material to obtain advantage	5
s 192H(1)	Officer publish etc false misleading statement to deceive	7
s 192J	Dealing with identification information to commit, facilitate commission of an indictable offence	10
s 192K	Possess identification information to commit, facilitate commission of an indictable offence	7
s 192L	Possess equipment etc to make identification documents or things - indictable offence	3
s 253(b)(i)	Make false document to obtain property	10
s 253(b)(ii)	Make false document to obtain advantage or cause disadvantage	10
s 253(b)(iii)	Make false documents to influence exercise of public duty	10
s 254(b)(i)	Use false document to obtain property	10
s 254(b)(ii)	Use false document to obtain financial advantage or cause disadvantage	10
s 254(b)(iii)	Use false document to influence exercise of public duty	10
s 255(b)(i)	Possess false document to obtain property	10
s 255(b)(ii)	Possess false document to obtain financial advantage	10
s 255(b)(iii)	Possess false document to influence exercise of public duty	10

Crimes Act 1900 (NSW) provision	Description	Maximum penalty (years)
s 256(1)	Make, possess, use etc equipment to make false document	10
s 256(2)	Make, possess equipment etc to make false document	3
s 256(3)	Make, possess equipment intend use for forgery	3
s 307A(1)	Make false/misleading statement for authority/benefit	2
s 307B(1)	Knowingly give false/misleading information to another	2
s 307C(1)	Knowingly produce false/misleading document under state law	2

# Appendix C:

## Top offences by charges finalised

- c.1 In 2019, 19,125 charges (for state and federal offences) were finalised in NSW courts in relation to fraud, deception and related offences.<sup>1</sup>
- c.2 The most frequently charged state offence in 2019 was the offence of dishonestly obtaining property by deception<sup>2</sup> with 6824 charges, followed closely by the offence of dishonestly obtaining financial advantage or causing financial disadvantage by deception,<sup>3</sup> with 6502 charges. This compares with the 20th and 21st most frequently charged offences with 65 charges each. Three of the state offences<sup>4</sup> involved historic charges, since they were repealed by *Crimes (Fraud, Identity and Forgery Offences) Act 2009* (NSW), and would probably now be dealt with as offences under s 192E of the *Crimes Act 1900* (NSW).
- c.3 In relation to federal offences, fewer than 200 charges were finalised in NSW courts for each of the two most frequent federal offences: obtaining a financial advantage by deception under s 134.2(1) of the *Criminal Code* (Cth) and dishonestly obtaining a financial advantage under s 135.2(1) of the *Criminal Code* (Cth).<sup>5</sup>

**Table C.1: Top 21 NSW fraud and fraud-related offences in NSW criminal courts by charges finalised, 2019**

Act	Section	Offence	Charges
Crimes Act 1900	s 192E(1)(a)	Dishonestly obtain property by deception	6824
Crimes Act 1900	s 192E(1)(b)	Dishonestly obtain financial advantage etc by deception	6502
Crimes Act 1900	s 192K	Possess identity info to commit etc indictable offence	768
Heavy Vehicle National Law	s 325(1)	Make false or misleading entry in work record	633
Crimes Act 1900	s 156	Steal property as clerk/servant	391
Crimes Act 1900	s 192J	Deal with identity info to commit etc indictable offence	347

1. NSW Bureau of Crime Statistics and Research, reference 21-20655.
2. *Crimes Act 1900* (NSW) s 192E(1)(a).
3. *Crimes Act 1900* (NSW) s 192E(1)(b).
4. *Crimes Act 1900* (NSW) s 178BA(1), s 176A, s 300(2).
5. NSW Bureau of Crime Statistics and Research, reference 21-20655.

Act	Section	Offence	Charges
Pawnbrokers and Second-hand Dealers Act 1996	s 15(4)	Furnish false information/statement to licensee	255
Crimes Act 1900	s 254(b)(ii)	Use false document to obtain financial advantage etc	213
Pawnbrokers and Second-hand Dealers Act 1996	s 24	Make/furnish a statement which is false/misleading	213
Crimes Act 1900	s 178BA(1) <sup>6</sup>	Obtain money etc by deception	157
Crimes Act 1900	s 157	Embezzle as clerk or servant	117
Crimes Act 1900	s 125	Larceny as bailee	102
Crimes Act 1900	s 176A <sup>7</sup>	Director/officer/member cheat or defraud	100
Law Enforcement (Powers and Responsibilities) Act 2002	s 13(a)	Give a false name	92
Crimes Act 1900	s 192G(b)	Publish etc false misleading material to obtain advantage	83
Crimes Act 1900	s 193N	Engage in conduct that corrupts betting outcome of event	75
Crimes Act 1900	s 254(b)(i)	Use false document to obtain property	75
Drug Misuse and Trafficking Act 1985	s 15	Utter, forge or alter prescription which includes prohibited drug	75
Crimes Act 1900	s 193Q(1)(a)	Use corrupt conduct information to bet on event	74
Crimes Act 1900	s 300(2) <sup>8</sup>	Use false instrument with intent	65
Poisons and Therapeutic Goods Act 1966	s 16(2)	Forge/alter, or utter prescription for prescribed restricted substance	65

Source: NSW Bureau of Crime Statistics and Research, reference 21-20655.

6. Repealed by *Crimes (Fraud, Identity and Forgery Offences) Act 2009* (NSW).
7. Repealed by *Crimes (Fraud, Identity and Forgery Offences) Act 2009* (NSW).
8. Repealed by *Crimes (Fraud, Identity and Forgery Offences) Act 2009* (NSW).



# Appendix D:

## Preliminary submissions

**PFR01** Confidential, 25 October 2021

**PFR02** Confidential, 31 January 2022

**PFR03** Commonwealth Director of Public Prosecutions, 31 January 2022

**PFR04** Dr Cassandra Cross, 31 January 2022

**PFR05** NSW Office of the Director of Public Prosecutions, 3 February 2022

**PFR06** Senior Rights Service, 4 February 2022

**PFR07** NSW Young Lawyers Criminal Law Committee, 7 February 2022

**PFR08** NSW Police Force, 17 February 2022



# Appendix E:

## Preliminary consultations

### Women's Legal Service (PFRC01)

**7 March 2022**

Liz Snell, Law Reform and Policy Co-ordinator

Carolyn Jones, Senior Solicitor

### Payment and Fraud Control, Service NSW (PFRC02)

**17 March 2022**

Kara Kennedy

### NSW Police Force (PFRC03)

**23 March 2022**

Detective Superintendent Linda Howlett, Commander Financial Crimes Squad

Detective Superintendent Matt Craft, Commander Cybercrime Squad

S/Sgt Amin Assaad, Senior Advocate, Police Prosecutions

Justin McLean, Principal Policy Officer, Legislation and Policy Branch

Zoe Carvosso, Legislation and Policy Branch

### Operations, Fines and Debt, Revenue NSW (PFRC04)

**16 March 2022**

Julianne Evans, Director, Operations, Fines and Debt

### NSW Office of the Director of Public Prosecutions (PFRC05)

**30 March 2022**

Huw Baker SC, Deputy Director of Public Prosecutions

Frank Veltro SC, Deputy Director of Public Prosecutions

James Chin, Legal and Policy Officer

### Legal Aid NSW (PFRC06)

**30 March 2022**

Thomas Spohr, Solicitor Advocate

Nicholas Ashby, Solicitor Advocate

Tijana Jovanovic, Senior Law Reform Officer

## **NSW Bar Association (PFRC07)**

**1 April 2022**

Tim Game SC

Celia Barnett-Chu, Director, Policy and Reform

Richard Easton, Policy Lawyer

## **Commonwealth Director of Public Prosecutions (PFRC08)**

**6 April 2022**

Gina Nott, Practice Group Leader, Revenue and Fraud Benefits Group

Berdj Tchakerian, Practice Group Leader, Commercial, Financial and Corruption Practice Group

## **Professor Alex Steel (PFRC09)**

**7 April 2022**

Professor Alex Steel, University of NSW

## **NSW Young Lawyers Criminal Law Committee (PFRC10)**

**11 April 2022**

Sarah Ienna, Chair, NSW Young Lawyers, Criminal Law Committee

Toni Mudditt, Secretary, NSW Young Lawyers, Criminal Law Committee

Leah Sarafim, President, NSW Young Lawyers

## **NSW Treasury (PFRC11)**

**20 May 2022**

Emily Speers Mears, Director, Strategy and Delivery Unit

# Appendix F:

## Submissions

- FR01** Confidential, 26 October 2022
- FR02** Local Court of NSW, 27 October 2022
- FR03** NSW Police Force, 4 November 2022
- FR04** NSW Office of the Director of Public Prosecutions, 4 November 2022
- FR05** Institute of Public Affairs, 4 November 2022
- FR06** District Court of NSW, 4 November 2022
- FR07** Women’s Legal Service NSW, 11 November 2022
- FR08** Domestic Violence NSW, 11 November 2022
- FR09** Western Sydney University Justice Clinic, 15 November 2022
- FR10** Law Society of NSW, 16 November 2022
- FR11** NSW Bar Association, 17 November 2022
- FR12** Legal Aid NSW, 17 November 2022
- FR13** NSW Young Lawyers Criminal Law Committee, 18 November 2022
- FR14** Aboriginal Legal Service (NSW/ACT) Ltd, 25 November 2022



# Appendix G:

## Data tables

Figure 2.1: Sentencing outcomes in the Local Court, where a s 192E fraud offence was the principal offence, 2016–2021

Penalty	Number	Percentage
Supervised community	3430	33%
Unsupervised community	2725	26%
Fine	2175	21%
Custody	1849	18%
Other	298	3%

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

Figure 2.2: Number of cases and average head sentence of imprisonment (months) in the Local Court, where a s 192E fraud offence was the principal offence, 2016–2021

Year	Number	Average months
2016	341	9.4
2017	342	9.1
2018	347	8.4
2019	308	8.5
2020	285	8.4
2021	226	7.7

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

**Figure 2.3: Local Court sentencing outcomes for men by Aboriginality where a s 192E fraud offence was the principal offence, 2016–2021**

Penalty	Aboriginal	Non-Aboriginal/ Unknown	Percentage Aboriginal
Custody	506	919	36%
Supervised community	581	1538	27%
Unsupervised community	288	1400	17%
Fine	300	1122	21%
Other	53	156	25%
Total	1728	5135	25%

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

**Figure 2.4: Local Court sentencing outcomes for men by Aboriginality where a s 192E fraud offence was the principal offence, 2016–2021**

Penalty	Aboriginal	Aboriginal: Percentage of penalties imposed	Non- Aboriginal/ Unknown	Non-Aboriginal/ unknown: Percentage of penalties imposed
Custody	506	29.3%	919	17.9%
Supervised community	581	33.6%	1538	30.0%
Unsupervised community	288	16.7%	1400	27.3%
Fine	300	17.4%	1122	21.9%
Other	53	3.1%	156	3.0%

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



**Figure 2.5: Local Court sentencing outcomes for women by Aboriginality where a s 192E fraud offence was the principal offence, 2016–2021**

Penalty	Aboriginal	Non-Aboriginal/ unknown	Percentage Aboriginal
Custody	208	216	49%
Supervised community	406	905	31%
Unsupervised community	241	796	23%
Fine	216	537	29%
Other	22	67	25%
Total	1093	2521	30%

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

**Figure 2.6: Local Court sentencing outcomes for women by Aboriginality where a s 192E fraud offence was the principal offence, 2016–2021**

Penalty	Aboriginal	Aboriginal: percentage of penalties	Non- Aboriginal/ unknown	Non- Aboriginal/ unknown: percentage of penalties
Custody	208	19.0%	216	8.6%
Supervised community	406	37.1%	905	35.9%
Unsupervised community	241	22.0%	796	31.6%
Fine	216	19.8%	537	21.3%
Other	22	2.0%	67	2.7%

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

**Figure 2.7: Sentencing outcomes in the District Court, where a s 192E fraud offence was the principal offence, 2016–2021**

Penalty	Total	Percentage
Custody	130	73%
Supervised community	38	21%
Unsupervised community	11	6%

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

