

3 February 2022

NSW Sentencing Council  
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By email: [sentencingcouncil@justice.nsw.gov.au](mailto:sentencingcouncil@justice.nsw.gov.au)

Dear The Honourable Peter McClellan AM,

### **Review of sentencing for fraud and fraud related offences**

Thank you for the opportunity to provide a preliminary submission in relation to the Sentencing Council review of sentencing for fraud and fraud related offences.

There are a broad range of fraudulent offences in NSW, the majority of which are prosecuted in the Local Court. This Office primarily prosecutes indictable offences that arise from Part 4AA of the *Crimes Act 1900* (NSW) (**Fraud offences**).

Attached to this submission is a schedule tallying the total number of matters involving fraud offences falling under Part 4AA received and completed by our office between 2019 and mid-November 2021. Since 2019, our office has received 843 fraud matters of which 802 have been finalised. Of those 802 finalised matters, 464 were tried on indictment.

Against that background we raise the following issues for consideration by the Sentencing Council:

#### **I. Disparity between maximum penalties for Fraud offences and Proceeds offences**

Our office most commonly prosecutes offences against s 192E-192H of the *Crimes Act 1900*. These matters are frequently accompanied by a proceeds of crime charge to account for the subsequent conduct of dealing with the fraudulently obtained property. As outlined in the table below, there is an inconsistency between the penalties available to be imposed for fraud offences and the penalties available to be imposed for proceeds of crime offences (**Proceeds offences**). The maximum penalty for the most serious type of fraud committed under s 192E is 10 years. This is to be contrasted against the range of maximum penalties for proceeds of crime offences under s 193B that range from 10-20 years.

In our view, the predicate fraudulent conduct is often more serious than the subsequent dealing with the proceeds of crime. In matters where the fraudulent conduct is complex and perpetuated over a long period of time, the proceeds of crime offending can be the least serious aspect of the offender's overall conduct.

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Although it is acknowledged that Proceeds offences often arise in relation to criminal conduct other than fraud, the substantial difference between the maximum penalties for Fraud offences as opposed to Proceeds offences can cause artificiality on sentence in fraud matters, as the arguably more serious criminal conduct is the subject of the charge with the lower maximum penalty. Consideration should be given to increasing the maximum penalty for offences under Part 4AA, of the *Crimes Act 1900* to appropriately reflect the seriousness of such offences and to permit sentencing courts to fashion sentences that appropriately reflect the criminality of the conduct.

| Fraud Offences        |   |                 |
|-----------------------|---|-----------------|
| Act                   | Section   | Maximum Penalty |
| Crimes Act 1900 (NSW) | 192E(1)(a) – Obtain property belonging to another by deception  | 10 years        |
|                       | 192E(1)(b) – Obtain financial advantage or cause financial disadvantage by deception  | 10 years        |
|                       | 192F(1)(a) and (b) – Dishonestly destroy or conceal accounting record with intention to obtain property belonging to another or obtain financial advantage or cause financial disadvantage  | 5 years         |
|                       | 192G (a) and (b) – Dishonestly making or publishing or concurring in the making or publishing of any statement, that is false or misleading in a material particular with intention to obtain property belonging to another or obtain financial advantage of cause financial disadvantage | 5 years         |
|                       | 192H (1) – Officer of an organisation, with intention of deceiving members or creditors of the organisation about its affairs, dishonestly makes or publishes or concurs in making or publishing a statement, that is false or misleading in a material particular                        | 7 years         |

| Proceeds of Crime Offences |  |                 |
|----------------------------|--|-----------------|
| Act                        | Section  | Maximum Penalty |
| Crimes Act 1900 (NSW)      | S 193B (1) (a) and (b) – Knowingly deal with proceeds of crime intending to conceal that it is proceeds of crime | 20 years        |
|                            | S 193B (2) – Knowingly deal with proceeds of crime   | 15 years        |
|                            | S 193B (3) – Recklessly deal with proceeds of crime  | 10 years        |

## II. Differences in penalties between Commonwealth and NSW offences

As part of its review of the adequacy of penalties imposed for Fraud offences, we refer the Sentencing Council to the maximum penalties that are currently in force for substantive Commonwealth fraud and proceeds of crime offences, as summarised in the table attached to this submission. Whilst the maximum penalties for state and federal offences are broadly comparable, the maximum penalties available for Commonwealth proceeds of crime offences are significantly greater than those available for their state counterparts. In particular, we note



the maximum penalty of life imprisonment for the most serious Commonwealth proceeds of crime offences.

### III. Duplicity and "rolling-up" charges

The prosecution of serious Fraud offences often involves a course of conduct comprised of multiple acts committed over an extended period. Whilst each individual Fraud offence may only relate to a limited sum or financial advantage/disadvantage that, taken in isolation, may only warrant Local Court disposition (discussed further below), the total quantum may reveal offending of significantly greater seriousness.

This raises the issue of how the case should be characterised and the charges that should be preferred.

The Court of Criminal Appeal has confirmed that, at least for Commonwealth fraud offences prosecuted under s 135 *Criminal Code* and the now-repealed s 29D *Crimes Act 1914* (Cth), it is open to the prosecution to frame its case on the basis that each fraudulent act is part of a single criminal enterprise or criminal activity and so it is permissible for multiple fraud offences to be "rolled-up" into a single count: see *Moussad v R* [1999] NSWCCA 337 and *Calleija v R* [2012] NSWCCA 37.

Whilst the Court of Criminal Appeal has at least implicitly accepted the availability of "rolling-up" s 192E(1) offences where there has been a plea of guilty (see for example *Hughes v R* [2021] NSWCCA 238), there is presently no appellate authority confirming the availability of such an approach at trial. Further, there is authority to the contrary with respect to the inchoate offence of intending to defraud by false or misleading statement pursuant to s 192G: see *Giam v R* [1999] NSWCCA 53 (concerning the predecessor offence under s 178BB *Crimes Act 1900*).<sup>1</sup>

It is the position of this Office that, in appropriate cases, the principles concerning "rolling-up" enterprise-type offences at trial as considered in *Moussad* and *Calleija* (decisions which draw on the reasoning applied in NSW drug supply enterprise matters such as *Hamzy* (1994) 74 A Crim R 341) can properly be applied to offences under s 192E(1). As was observed by Smart AJ in *Moussad* at [50] "duplicity is a matter of form, not evidence".

Nevertheless, to avoid doubt as to the availability of such a course, consideration should be given to the inclusion of a facilitative provision for Fraud offences similar to that which exists for proceeds of crime offences under s 193FA of the *Crimes Act 1900*.

Such a facilitative provision would also serve to highlight to an accused person the benefits of a plea to a "rolled-up" count, and thereby encourage early pleas of guilty. As was observed in *Hughes* by Payne JA at [12]:

*"The advantage to the applicant in the use of a rolled-up charge was that it restricted the maximum available sentence to that prescribed by the legislation for a single offence, rather than the total theoretically available as a maximum sentence from multiple charges: R v Glynatsis [2013] NSWCCA 131; (2013) 230 A Crim*

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<sup>1</sup> The primary concern with duplicity - uncertainty as to the jury's verdict and the issues that flow from that uncertainty - is of less moment when there has been a plea of guilty to agreed facts: see *R v F* (1996) 90 A Crim R 356.



*R 99 at [67]-[68] per Hoeben CJ at CL (with whom Rothman and McCallum JJ agreed); Kristensen v R [2018] NSWCCA 189 at [10]."*

It would remain a question for the prosecution as to the extent to which Fraud offences could appropriately be "rolled-up" in any given matter, either at trial or as part of a negotiated plea, bearing in mind questions of totality and fairness (see the discussion in *Knight v R* [2004] NSWCCA 145 per Howie J at [27]).

The frequency with which Fraud offences are "rolled-up" is an important matter for the Sentencing Council to bear in mind when considering the appropriateness of the sentences imposed.

#### **IV. Jurisdictional Limits and the decision to elect**

Fraud offences charged under Part 4AA and Part 4AB of the *Crimes Act 1900* are dealt with summarily unless the prosecutor or person charged elects to have the matter tried on indictment ("Table 1 offences"): *Cl 4A, Schedule 1, Criminal Procedure Act 1986* (NSW).<sup>2</sup>

Where such a fraud matter is referred to the ODPP for election, a decision is made in accordance with Chapter 6 of the ODPP Prosecution Guidelines, reproduced below:

1. *Whether the conduct giving rise to the offence can be adequately addressed within the sentencing limits of the Local Court having regard to:*
  - a. *the seriousness of the offence, including:*
    - i. *the circumstances of the offence*
    - ii. *the nature of the conduct*
    - iii. *any aggravating or mitigating circumstances*
  - b. *the accused's personal circumstances, including criminal background*
  - c. *the maximum penalties available for summary disposal and on indictment*
  - d. *any standard non-parole period applicable to the offence*
2. *The prevalence of the offence in the community and the greater deterrent effect of an accused being dealt with on indictment*
3. *The manner in which any co-accused is being dealt with*
4. *Whether there is a relevant connection between the Table offence and an offence that is strictly indictable or another Table offence suitable to being dealt with on indictment*
5. *Whether for some other reason the interests of justice require that the matter be dealt with on indictment.*

Election decisions for fraud offences are not guided by monetary limits imposed by *Schedule 1 Criminal Procedure Act 1986*. This contrasts with the election decision for offences such as larceny, or break and enter type offences, where the exercise of the discretion to elect is guided by the value of the items stolen. For example, break and enter offences under ss 109 and 112 that involve stealing or damaging property where the value exceeds \$60,000 must be tried on indictment.

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<sup>2</sup> With the exception of s 192L which is a Table 2 offence



Although this factor is raised for the Sentencing Council's consideration as a matter relevant to the assessment of the adequacy of sentences imposed for Fraud offences, particularly in the Local Court, this Office does not consider it necessary or desirable to introduce monetary limits on election decisions. In our experience, serious Fraud offences are appropriately referred by police prosecutors so that the question of an election may be considered, and Chapter 6 of the Prosecution Guidelines ensures that all relevant factors are considered in the determination of these referrals.

## **V. Victims and sentencing**

The victims of Fraud offences prosecuted by this Office generally fall into two categories: corporate victims and individual victims. In our experience corporate victims such as banks and large multinational conglomerates are generally less invested in the sentencing process and the sentencing result than individual victims. In contrast, individual victims typically feel strongly that offenders should be held accountable for their actions. This attitude is particularly prevalent in cases where the victim(s) have not been reimbursed or compensated for their loss and the offender is impecunious, and where they have personally been deceived by the offender.

Victims of fraud are not permitted to provide a victim impact statement at sentencing: s 27(2) of the *Crimes (Sentencing Procedure) Act 1999*. In our experience, individuals who are the victims of serious cases of fraud often experience serious mental and emotional harm in addition to the financial loss. Consideration should be given as to whether victims of serious fraud offences should be entitled to provide a victim impact statement to the sentencing court.

We would support the Sentencing Council seeking input from victims and victim's right groups as to their expectations at sentencing and whether those expectations are being met.

## **VI. Wider issues affecting sentencing of fraud matters**

This Office acknowledges that the Sentencing Council's terms of reference focus primarily on the sentencing exercise for Fraud offences. Nevertheless, we raise for the Council's consideration what this Office considers to be an issue with the investigation of Fraud offences, which has obvious flow-on effects to prosecutorial charge determination and ultimately to the sentencing process.

Unlike most other criminal matters, the evidence supporting a fraud prosecution is not always obtained as a direct result of a police investigation. It is not uncommon for alleged Fraud offences to come to light as a result of an internal investigation conducted by a corporate victim such as a bank or insurer, or the auditor of such a corporate victim. The material gathered in such an internal investigation is provided to police, who compile and serve the material as the brief of evidence. There will often be no further forensic examination of the material received from the corporate victim. An internal investigation is generally conducted for accounting and disciplinary purposes of the corporate victim and the material assembled frequently does not meet the exacting standard of proof required for a criminal prosecution.

It is our experience that this practice has led to briefs of evidence where the primary evidence of the commission of the Fraud offences is lacking, or where the primary material has not been properly scrutinised to account for all possible fraudulent behaviour. A common example is where evidence of the individual transactions said to be fraudulent, or documents allegedly containing fraudulent signatures or information is provided in summary form only. These evidentiary defects can result in pleas being accepted to lesser charges or matters being finalised in the Local Court instead of being tried on indictment. Whilst this Office can and does issue requisitions to try and rectify deficient briefs of evidence, this Office has no investigative function and is ultimately reliant upon the evidence assembled by the police or other responsible law enforcement officers.



This Office accepts that the investigation of Fraud offences is resource-intensive, as is their prosecution. However, a proper and thorough police investigation is the first and necessary step to ensuring just sentencing outcomes that appropriately reflect the criminality of the offending involved.

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

Yours faithfully

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Sally Dowling SC

**Director of Public Prosecutions**

