NEW SOUTH WALES
BAR ASSOCIATION

Our ref: 22/76

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The Honourable Peter McClellan AM, KC
Chairperson
NSW Sentencing Council
GPO Box 31
SYDNEY NSW 2001

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

Dear Mr McClellan,

NSW Sentencing Council Review of Fraud and Fraud-related Offences

1. The NSW Bar Association (the **Association**) welcomes the opportunity to respond to the NSW Sentencing Council's review into fraud and fraud-related offences. The following submissions respond to the Questions posed in Appendix A of the Consultation Paper dated September 2022 (the **Consultation Paper**).

Question 2.1: Fraud and fraud-related offences in NSW

(1) Are specific fraud and fraud-related offences outside of part 4AA of the Crimes Act 1900 (NSW) still useful? Are the lesser penalties for these offences justified?

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

2. As a general observation, the fraud-related offences outside of Part 4AA of the *Crimes Act 1900* (NSW) retain utility in specific circumstances, as reflected in the continuing utilisation of the provisions as shown by the statistics on the finalisation of charges in NSW criminal courts at pages 133-134 of the Consultation Paper.

3. While the reasons for some of the variations in the maximum penalties for a number of these offences are not readily apparent, and there could be some rationalisation of them, the offences with lesser penalties generally appear to involve conduct preparatory to, or undertaken with the intention of carrying out, a fraudulent transaction rather than the actual implementation or carrying out of the fraudulent conduct.

Question 3.1: Victim impact statements (VIS)

(1) Should victim impact statements under the Crimes (Sentencing Procedure) Act 1999 (NSW) be extended to victims of fraud and fraud-related offences? Why or why not?

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

4. The Association supports the extension of the categories of persons who may give a VIS under s 27 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the **CSP Act**) to individual victims of fraud. Such statements would be an appropriate way for harm and loss suffered by individual victims to be taken into account and acknowledged by a Court.

5. The provisions governing the requirements for and use of these statements should generally reflect those already in existence under Part 3, Division 2 of the CSP Act and should not offend the common law principles as to the burden of proof for establishing matters of aggravation (as set out in *R v Tuala* [2015] NSWCCA 8 and *Culbert v R* [2021] NSWCCA 38).

Question 3.2: Business impact statements

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

6. The Association does not support the introduction of business impact statements in fraud matters. The extent of loss or disruption to a business is a factor that can already be taken into account as a measure of the harm done or the objective seriousness of the offending, where the factual circumstances permit such a finding. The introduction of an entitlement for businesses to make such a statement risks the introduction of issues concerning the extent of loss or interruption to business in a greater number of cases and where the resolution of such issues may be complex and/or require expert evidence to be adduced.

7. Moreover, there may be a tendency for corporate businesses to be self-serving in their statements where the opportunity to commit the fraud or failure to detect it came about through deficiencies in the corporate business's own systems and controls. There may also be a risk that there will be a greater motivation to make self-serving statements where there is a related insurance claim. Business impact statements are likely to raise a number of complex and unnecessary issues for resolution on the sentencing hearing which would not otherwise arise and may place an unreasonable burden upon the parties and the Court.

Question 3.3: Reparation

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

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

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

8. In the experience of the Association's members, reparation orders are utilised infrequently in fraud matters. This appears to be because often, the offender upon detection, has or will be rendered bankrupt and/or the money has been dissipated, meaning there is no practical utility

in such an order. Further, reparation orders may not be sought due to the jurisdictional limits of the Local and District Courts. To the extent there may be a mechanism available to overcome this, the Association considers that it is important that the availability and limits for such orders should not affect the ODPP's decision whether to elect to proceed on indictment.

9. Reparation orders under both s 43 of the *Criminal Procedure Act 1986* (NSW) (the **CP Act**) and ss 94 and 97 of the *Victims Rights and Support Act 2013* (NSW) (the **VRAS Act**) should be retained and utilised where available. The Association also notes the comprehensive proceeds of crime schemes available for both State and Commonwealth offences, which are utilised regularly and provide an extremely broad scope for the making of orders with respect to confiscation, forfeiture and pecuniary penalties.[1]The Association considers these schemes to be more than sufficient to address any concerns with respect to offenders retaining the financial benefit from fraud offending.

Question 6.1: Sentencing guidelines for England and Wales

(1) What aspect, if any, of the principles and factors in the sentencing guidelines for England and Wales could be adopted to help guide sentencing for fraud in NSW?

(2) How could any such guidance be implemented?

10. In the Association's view, the fraud sentencing guidelines for England and Wales do not appear to offer any significant assistance or guidance which could be adopted in New South Wales. There is no relevant equivalent in Australia of s 120 of the *Coroners and Justice Act 2009* (UK) and the approach reflected in the sequence of steps set out in Figure 6.1 of the Consultation Paper is inconsistent with the "instinctive synthesis" approach to sentencing adopted in Australia.[2]

11. As regards the substance of the guidelines, there are numerous reasons why the approach in England and Wales would not be of assistance in NSW:

    a. The categories reflecting the level of harm appear to be based entirely on the financial level of the fraud. While this is already recognised as an important factor in NSW sentencing law, it is not determinative and there is a risk that the amount alone would become an unduly prominent consideration. It may be noted generally that in *Wong v The Queen* (2001) 207 CLR 584 the High Court held that the formulation of the drug importation guideline was flawed because it unduly elevated the weight of the drug as the crucial factor to be taken into account when sentencing. By analogy, a similar flaw arises where the financial level of a fraud is elevated as determinative of harm and seriousness.

    b. With respect to the factors going to culpability, some of those identified as giving rise to high culpability are extremely broad. For example, the fact that "the offender abused a position of power, trust or responsibility" would be true of almost all frauds committed by an employee (regardless of whether they were operating in a clerical or executive role). That

[1] The Assocation notes that a result of the recent enactment of the Confiscation of Proceeds of Crime Legislation Amendment Bill 2022 the NSW proceeds of crime regime has been amended to enable the forfeiture of property connected with the commission of a crime to occur more easily and quickly.
[2] See *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25.

an offence "was sophisticated or involved significant planning" is an overly broad description given that fraud matters frequently involve at least some manipulation of an accounting process or steps to cover up the conduct (as opposed to 'highly sophisticated' constituting a threshold for high culpability). That the activity "was conducted over a sustained period of time" renders ongoing smaller frauds more serious than a one-off transaction for the same overall amount. While that may be a basis for finding a higher degree of culpability, it is not necessarily the case.

c. Moreover, as noted in the Consultation Paper at [6.24], serious criminality can be indicated by just one of the identified factors. Given the breadth of some of the factors included, such an approach should be treated with considerable caution.

d. That medium culpability is presented as the default option when none of the higher or lesser factors are present appears to be problematic. The majority of matters would be expected to fall within this band. To the extent that guideline judgments have been utilised in NSW sentencing law, they usually provide a guideline for the 'typical' case of that kind of offending and indicate the factors which may aggravate or mitigate the offending.[3] The UK guidelines appear to take a different approach.

e. The lesser culpability category also poses problems in circumstances where the listed characteristics are not the only factors which may reduce an offender's culpability, and where they are largely based on the absence of particular features rather than the presence of features. A prescriptive list of this nature results in the risk of erroneous reasoning; for example, that offending motivated by financial gain (even if coerced or with limited awareness) could not be of lesser culpability given that one of the prescribed features is that the offending was not motivated by financial gain.

Question 7.1: Sentences for fraud

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

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

12. In the Association's view there are no systemic issues in sentencing for fraud and current sentences for fraud are generally considered appropriate. The Association is not aware of any appellate decisions suggesting that the penalties are inadequate, nor does there appear to be anything remarkable about the degree of appellate intervention that warrants a change in the legislative scheme.

13. While fines are generally imposed less frequently for fraud matters than for other types of offences (in particular in the Local Court) for the reasons identified in the Consultation Paper, the data suggesting fines are still utilised in 19.7% of matters in that jurisdiction indicates that fines remain an appropriate sentencing tool in an appreciable number of cases and ought to be retained as an available penalty. In particular, fines may be regarded as an appropriate penalty in fraud matters involving a relatively small sum, where there is unlikely to be any impact on the capacity of the offender to make restitution and there is capacity to pay.

[3] See, for example, *R v Henry* (1999) 46 NSWLR 346; *R v Whyte* (2002) 55 NSWLR 252.

Question 8.1: Maximum penalties for fraud

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

(2) Are the maximum penalties for other fraud and fraud-related offences in the Crimes Act 1900 (NSW) and other legislation sufficient? Why or why not?

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

14. The Association considers the maximum penalty for fraud under s192E to be sufficient and notes it is in line with the equivalent penalties under the *Commonwealth Criminal Code* (s134.2, s135.1 and s135.4). It should be borne in mind that fraud prosecutions under s192E rarely involve a single transaction and often involve a large number of transactions. For contested matters where there are multiple charges, the maximum available penalty will be well in excess of 10 years, with issues of totality and accumulation being the more prominent considerations. Where matters are resolved by way of plea there is sufficient scope for the parties to negotiate either a single charge or to break the transactions down into a smaller series of charges. In such cases the Prosecutor is well placed to determine whether the breakdown in a particular case leaves sufficient scope for the maximum available penalty to reflect the criminality involved. In this context, there is no need to amend the maximum penalties available.

15. The penalties for other fraud and fraud-related offences in the *Crimes Act 1900* (NSW) also appear to be sufficient. Many of the offences carry a 10 year maximum penalty and those with lesser penalties generally involve conduct that is preparatory to, or with the intention of, carrying out the fraud rather than having carried it out to completion. As noted above, there could be scope for some rationalisation of these charges (for example, to reduce the maximum penalty for an offence under s 255(b) to reflect the nature of the conduct as merely preparatory). However, on the whole there is no demonstrated need for any of the penalties to increase.

16. The Sentencing Tables Index prepared by the Public Defenders demonstrates that where there is serious conduct involving multiple acts or transactions, they are either captured by multiple charges or "rolled up" into a single count involving multiple transactions over a period of time. In neither scenario do the maximum penalties appear to be insufficient. For frauds involving significantly large amounts of money (i.e. over $5,000,000) there has been sufficient scope to impose appropriate penalties, with very few overall head sentences approaching the maximum penalty.

Question 8.2: Tiered maximum penalties

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

(2) If maximum penalties under s 192E of the Crimes Act 1900 (NSW) were to be tiered depending on the value of the fraud what should the values and maximum penalties be?

17. The Association does not support the introduction of tiered maximum penalties for fraud offences. As noted above, it is clear that the amount defrauded is already a significant factor in sentencing for fraud matters in NSW sentencing law and even for very significant frauds (i.e. in

excess of $5,000,000) there is no basis to find that the existing maximum penalties are inadequate. The introduction of a tiered system risks giving additional significance (in terms of the effect on the guideposts) to the amount rather than other sentencing considerations (see [10(a)] above).

18. The criminality or the gravamen of the offending does not lie in the value of the fraud in any determinative sense. The introduction of higher maximum penalties for higher value frauds conflicts with the principle in *Nahlous v R* [2010] NSWCCA 58, where it was noted that the receipt of money as a result of a sale of an unauthorised good (in that case, a decoder) did not result in a separate act of criminality that warranted a separate charge and a separate penalty, as the offence of the sale encompassed the criminality of possessing the proceeds. By analogy, a higher value fraud does not represent an aspect of the criminality that warrants a difference in applicable penalty, as the value is but one aspect of the criminality of the act of fraud itself.

19. The tiered system of penalties for money laundering offences under Commonwealth legislation does not provide a sound basis for the introduction of a similar system for fraud offences. These provisions were introduced in order to meet perceived global problems with offences such as organised drug trafficking and financing terrorism. These types of offences are matters in which the level of criminality is intrinsically bound up with the scale of the laundering. This is not the case for fraud offences, which are mainly carried out by individual offenders. Where a fraud is part of a broader syndicate, the prosecution has available to it the charges under Part 3A, Division 5 of the *Crimes Act 1900* (NSW), being the charges of participating in a criminal group (which includes offences of ongoing participation and directing a criminal group) and receiving a material benefit derived from the activities of the criminal group.

20. The Association also notes that some offenders engaging in fraud offences are also victims of fraud offences at the same time. With the increased prevalence of internet-based "romance scams", often vulnerable victims are exploited emotionally to recklessly engage in fraud offences, including offences involving dealing with significant amounts of money. The Association is aware of prosecutions being brought against such persons. In 2020, the Australian Federal Police issued a warning after a spike of "romance scams" being used to target "unwitting individuals" in order to recruit them as "money mules" to transfer proceeds of crime between accounts. In such cases, the value of the fraud has little to no role to play given the position of the offender and the significance of the surrounding circumstances of the offending.

21. Should this position not be accepted and a tiered system be introduced, the Association would not support maximum penalties that exceed the currently available penalties for fraud offences.

Question 8.3: Organised or continuing fraud offence

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

(2) If there is to be such an offence: (a) what form should it take, and (b) what maximum penalty should apply?

22. The Association does not consider that there is a need for an aggravated fraud offence for organised fraud or for a continuing enterprise. This is because, as noted above, many (or most) fraud matters involve a series of transactions but can often be charged as either a single count or

multiple counts. It is important to look at the criminality in the overall conduct rather than regarding the presence of continuing conduct as necessarily aggravating. Further, penalties are generally adequate and there is no demonstrated need for an aggravated form of the offence with any additional penalty. Lastly, there are other offences (as noted above with respect to criminal groups) which capture the criminality in a continuing criminal enterprise.

23. The Association acknowledges that the uncertain status of "rolled up" charges in contested matters which involve a large number of transactions can be problematic and cumbersome when leading to trials on indictment involving hundreds of counts. A facilitative provision to assist with the rolling up of counts may be a more effective way of addressing this issue.

Question 8.4: Fraud committed in relation to other indictable offences

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

(2) If there was such an aggravated offence:(a) what offences should it apply to; (b) how should these offences be related to the fraud offending, and (c) what maximum penalties should apply?

24. The Association does not consider that there is any need for an aggravated offence of committing fraud in a way that is related to another indictable offence. The Association is not aware of any cases where the criminality of fraud related to another indictable offence has not been captured by an appropriate array of charges. Where fraud is connected with other types of offences, those can be properly prosecuted separately without any need for an aggravated form of the offence.

Question 8.5: Other aggravated fraud offences

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

(2) If any aggravated forms of the main fraud offences were to be introduced:(a) what forms of aggravation should be included, and (b) what maximum penalties should apply?

25. The Association does not consider that there is a need for any aggravated forms of the main fraud offences. While there are sound reasons for including aggravating factors for sexual offences, violence and robbery, the type of factors which may be perceived as aggravating fraud offences are properly taken into account as sentencing considerations. The introduction of aggravated offences risk introducing additional complexity, particularly in defended matters, to what can already be very complex matters to litigate (noting also the added complication of jury directions when prosecuted on indictment). The Association is of the view that there is greater benefit in keeping fraud offences as simple as possible.

Question 8.6: Indictable only offence

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

(2) If there were to be an indictable-only version of s 192E of the Crimes Act 1900 (NSW): (a) how might it be identified, and (b) what maximum penalties should apply?

26. The Association does not consider that there is a need for an indictable-only form of the offence. There are no difficulties identified with the present system of election by the prosecution and members have not identified complaints with the approach generally taken by the prosecution in accordance with the ODPP Guidelines. Generally speaking, matters involving significant sums tend to be dealt with on indictment and there is sufficient flexibility for there to be appropriate exceptions (in accordance with the ODPP Guidelines).

Question 8.7: Low level offending

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

27. The Association supports alternative approaches to deal with low level fraud offending. The expenditure of the criminal justice system's resources for low-level offending (for example, tap-and-go use of another person's credit card for a trivial amount) is disproportionate to the criminality of the offending. It also results in the over-criminalisation of those from low socio-economic backgrounds. For these reasons, the Association supports alternative approaches such as formal warnings, cautioning schemes and penalty notices (although noting the limited utility of a penalty notice for a likely impecunious offender). The Association does however question the utility of restorative justice methods (such as conferencing or circle/forum sentencing) given the nature of low-level fraud offending being relatively trivial and sometimes with an unidentifiable victim or corporate victim.

Question 8.8: Aggravating factors

What amendments, if any, are required to the aggravating factors in s 21A of the [CSP Act] in order to reflect aggravating factors that are relevant to fraud offences?

28. The Association does not propose any amendment to the aggravating factors set out in s 21A of the CSP Act. The current landscape of sentencing legislation and common law is sufficient to capture and reflect the full range of aggravating factors that may apply in a fraud case.

Conclusion

29. The Association thanks the NSW Sentencing Council for the opportunity to comment on the Fraud Review Consultation Paper. Should you have any questions, please contact Harriet Ketley, Director of Policy & Law Reform, at hketley@nswbar.asn.au

Yours sincerely,

Gabrielle Bashir SC

President