

15 November 2022

Dr Jackie Hartley  
The Law Reform and Sentencing Council Secretariat  
NSW Department of Communities and Justice  
By email: [sentencingcouncil@justice.nsw.gov.au](mailto:sentencingcouncil@justice.nsw.gov.au)

Dear Dr Hartley,

### **Additional submissions to Consultation Paper on Fraud**

Thank you for the opportunity to provide a submission to the NSW Sentencing Council's Consultation Paper on Fraud (**Consultation Paper**).<sup>1</sup>

We make these brief submissions as an addendum to the Women's Legal Service NSW (**WLS NSW**) "Response to Consultation Paper on Fraud" (**WLS NSW Response**)<sup>2</sup> (attachment A) submitted on 11 November 2022, which we endorsed.

#### **Background: Western Sydney University Justice Clinic**

The [Western Sydney University Justice Clinic](#) (**WSU Justice Clinic**) is a community legal service, where practicing lawyers and academics work on client cases and law reform and access to justice projects, run health justice outreach clinics, provide community legal education, operate the university's student legal service, and teach the university's clinical legal and internship subjects.

Part of our caseload involves working directly with victim-survivors of family violence, sexual violence and modern slavery, and it is in relation to these victim-survivors that we make these submissions.

#### **Additional submissions to WLS NSW Response**

- 1.1 We consider it important to recognise the impact of coercive control and intimate partner violence (**IPV**), in relationships involving either domestic and family violence (**DFV**) or modern slavery, for people who may *commit* fraud offences in the context or aftermath of those abusive relationships, or be the *victims* of the fraud in that context.
- 1.2 For ease of reference, we refer to these relationships as 'abusive relationships' throughout these submissions.
- 1.3 While the written WLS NSW Response largely focused on the perpetrators of fraud in the context of abusive relationships, our focus in these additional submissions is on the victims of fraud in abusive relationships.

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<sup>1</sup> NSW Sentencing Council, *Consultation Paper: Fraud* (September 2022) (**Consultation Paper**).

<sup>2</sup> Women's Legal Service NSW, "Response to Consultation Paper on Fraud" (**WLS NSW Response**), submitted 11 November 2022.

### Question 3.1: Victim impact statements

- 2.1 We support victim impact statements (VIS) under the *Crimes (Sentencing Procedure) Act 1999* (NSW) (***Sentencing Procedure Act***) being extended to victims of fraud and fraud-related offences perpetrated within or after an abusive relationship.
- 2.2 Section 27(4)(c) of the *Sentencing Procedure Act* currently appears to allow for a VIS for a fraud and related offence under Part 4AA of the *Crimes Act*, as it is an offence referred to in Table 1 of Schedule 1 to the *Criminal Procedure Act 1986* (NSW) (***CPA***). However, this is only possible where the fraud offence results in actual physical bodily harm to any person (27(4)(c)(i)) or involves an act of actual or threatened violence (27(4)(c)(ii)).
- 2.3 In the case of abusive and coercive control relationships as we have defined, there is often no physical bodily harm though there may be extensive psychological injury. It may also be difficult to prove actual or threatened violence in a relationship of coercive control, as is well documented and particularly where the issue of defining and criminalising coercive control in legislation is still being debated and clarified in NSW.
- 2.4 Rather than try to wrestle with the current provisions in an attempt to include VISs for abusive relationships, it would be more effective to amend sections 27(2) and 27(4) of the *Sentencing Procedure Act* to ensure that fraud and fraud-related offences being prosecuted in either the Local Court or District Court are included for victims of an abusive relationship, and removing the additional requirements in sections 27(4)(c)(i)-(ii).
- 2.5 Extending VISs in this way 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.

### Question 3.3: Reparation

- 3.1 While fraud is often underreported and known to have one of the lowest reporting rates of all crimes,<sup>3</sup> we submit that fraud in abusive relationships is drastically underreported. Many of the reasons for this are contained within the Consultation Paper.<sup>4</sup> In the cases we see, the priority for victims in abusive relationships is to meet their immediate needs, which often include emergency accommodation, relocation, child safety, food, living expenses, visa security and psychological support. Criminal prosecution, including prosecuting any fraud, is usually well down the list of priorities.
- 3.2 However, this is not to suggest that victims may not feel strongly that perpetrators should be held accountable or that victims should be compensated for any loss. There is an immediate and

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<sup>3</sup> Consultation Paper [3.20], p 27, citing C Cross, *Preliminary Submission PFR04*, 2; NSW Bar Association, *Preliminary Consultation PFC07*.

<sup>4</sup> Consultation Paper, [3.21ff], p 27ff.

overwhelming need for financial assistance to recover from abusive relationships. This need may be even greater where fraud is a factor.

- 3.3 Unfortunately, the avenues to pursue that particular loss are limited, unrealistic and onerous for victims of abusive relationships. As noted in the Consultation Paper, “[i]nitiating a civil action for recovery would be an unsuitable option for many victims as it involves the investment of further time and resources without a guaranteed return”.<sup>5</sup> Importantly, the very system that is established in NSW to support victims, being the NSW Victims Support Scheme (VSS) under the *Victims Rights and Support Act 2013* (NSW)(VRSA) does not apply to victims of fraud. Only victims of an act of violence or act of modern slavery can make applications for victims support.<sup>6</sup> While victims of abusive relationships we are discussing may make victims support applications, the financial assistance available to victims is restricted and does not include any financial loss resulting from fraud.<sup>7</sup> For further analysis of the VRSA and some of its deficiencies in meeting the needs of victims of abusive relationships, we have attached our submissions to the statutory review of the VRSA from July 2022 (attachment B).
- 3.4 We acknowledge the difficulties in enforcing reparation orders, particularly where it is rare for the offender to have the means to make reparation and where courts may consider an offender’s financial circumstances when exercising their discretion to make a reparation order.<sup>8</sup> However, the monetary amounts that have been obtained fraudulently by the perpetrator in an abusive relationship scenario are often minimal comparative to other fraud offences. This means that the jurisdictional limits in the Local Court (\$100,000) and the District Court (\$750,000) should not present a barrier to making a reparation order in an abusive relationship context. Also, the likelihood of the offender being able to repay the monetary amount is more likely and not as far-fetched, which may be persuasive to a court considering making a reparation order.
- 3.5 For example, in a recent case we have worked on, the victim in an abusive relationship had approximately \$5,000 taken from her over the course of her relationship with the perpetrator in what could potentially be framed (amongst other offences) as ‘romance fraud’. We propose that seeking reparation of that \$5,000 from the offender is not unrealistic.
- 3.6 For further context, the Commissioner of Victims Rights is empowered under Part 5 of the VRSA to recover victims support payments that have been made under the VSS from offenders where they have been found guilty of the crimes giving rise to the payments. The total amount that can be recovered under such a reparation order is the amount of any financial support or recognition payment awarded to the victim.<sup>9</sup> The majority of applications we have been involved in over a period of some years have involved an average monetary award of between \$1,500 - \$10,000 for victims of abusive relationships, although we note that these figures are not definitive and are happy to seek clarity given more time and if requested. If it is reasonable for

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<sup>5</sup> Consultation Paper, [3.55], p 34.

<sup>6</sup> *Victims Rights and Support Act 2013* (NSW)(VRSA), section 38(1).

<sup>7</sup> VRSA, sections 26(1)(b)-(c) and the *Victims Rights and Support Regulation 2019* (NSW), Part 3.

<sup>8</sup> See, for example, VRSA section 99(c), which allows the court to have regard to “such other matters as it considers relevant” in determining whether or not to make a compensation order.

<sup>9</sup> VRSA, section 60(5).

the Commissioner of Victims Rights to make restitution orders where the estimated average monetary amount to victims of abusive relationships is between \$1,500 - \$10,000, surely there is an argument that reparation orders as an adjunct to sentencing in fraud offences are reasonable in the same context.

- 3.7 We strongly support momentum to encourage and use reparation orders as an adjunct to sentencing, in fraud cases involving abusive relationships. We will put some more thought into how the use of reparation orders at sentencing should be encouraged. It may be a matter of building awareness among legal practitioners and courts of the relevant provisions and how to seek the orders. For example, in the recent case mentioned above, we will liaise with the prosecuting police to seek an order upon conviction where the perpetrator may be charged with a relevant fraud offence. It may also be that raising awareness about reparation orders and how they may assist victims, falls within the remit of the Commissioner of Victims Rights and the NSW Attorney-General, who are responsible for the VRSA.

#### Question 8.2: Tiered maximum penalties

- 4.1 As noted in the Consultation Paper, *“quantum of fraud may not always be the most appropriate measure of the seriousness of the offence”*<sup>10</sup> and *“a fraud in relation to a relatively small amount may still be considered more serious because of the detrimental impact on a victim of small means”*.<sup>11</sup> This is true of many abusive relationships involving fraud where the victim often has limited means or earning potential, and is why we submit that caution should be exercised in introducing tiered maximum penalties under section 192E of the *Crimes Act* according to the value of the fraud.
- 4.2 However, we also note that a tiered approach may help ensure low level frauds and offending are subject to lower maximum penalties, which may assist the offender cohort where the offender has perpetrated the fraud due to an abusive relationship, as documented in the WLS NSW Response.
- 4.3 It may be that where tiered maximum penalties are introduced, appropriately acknowledging a victim’s vulnerability as an aggravating factor at sentencing becomes more important and needs clarifying, as discussed below.

#### Question 8.8: Aggravating factors

- 5.1 We submit that an aggravating factor in sentencing of fraud offences is where the victim and perpetrator of the crime were in an abusive relationship, or had been in an abusive relationship, at the time of the offending.
- 5.2 In some cases, it may be that the current aggravating factors to be taken into account under section 21A(2) of the *Sentencing Procedure Act* cover that scenario. For example, where the offence was committed in the home of the victim (section 21A(2)(eb)), where the injury, emotional harm, loss or damage caused by the offence was substantial (section 21A(2)(g)), or the victim was vulnerable (section 21A(2)(l)).

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<sup>10</sup> Consultation Paper [8.28], p 114.

<sup>11</sup> Consultation Paper [5.22], p 51.

5.3 However, to appropriately recognise the experiences of the victim and the context and seriousness of the perpetrator's actions, we consider it preferable to explicitly include this circumstance as an aggravating factor. This is also an important part of a system-wide response to coercive control.

5.4 The amendment could be made in two ways. The first would be to introduce a new section 21A(2)(q), "where the victim and perpetrator of the crime were in an abusive relationship, or had been in an abusive relationship, at the time of the offending". The second would be to expand the current category of vulnerable victim under section 21A(2)(l) to explicitly include victims in an abusive relationship. For example, "(l) the victim was vulnerable, for example, because the victim ..... and perpetrator of the crime were in an abusive relationship, or had been in an abusive relationship, at the time of the offending". This expansion of the vulnerable victim category appears to fall well within the purview of the provision.<sup>12</sup>

For further discussion on the above, please contact me at [r.dominguez@westernsydney.edu.au](mailto:r.dominguez@westernsydney.edu.au) or T. 0459 656 953.

Yours faithfully,

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Encl.

Attachment A: Women's Legal Service NSW, Response to Consultation Paper on Fraud, [here](#)  
Attachment B: WSU Justice Clinic, Submissions to the statutory review of the *Victims Rights and Support Act 2013* (NSW), *attached*

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<sup>12</sup> See further Judicial Commission of NSW, *Sentencing Bench Book*, [11-170].