

Crimes Legislation
Amendment (Powers,
Offences and Other
Measures) Bill 2017

Legal Aid NSW submission to
Senate Legal and Constitutional
Affairs Legislation Committee

June 2017

323 CASTLEREAGH ST
HAYMARKET NSW 2000 / DX 5 SYDNEY

Table of Contents

Introduction	3
Schedule 2—Obligations of investigating officials	3
Schedule 4 - Increasing maximum penalties for general dishonesty offences	4
<i>Dishonestly intending to obtain a gain: section 135.1(1)</i>	5
<i>Dishonestly causing a loss: section 135.1(5)</i>	6
<i>Social security fraud and disadvantage</i>	8
<i>Increasing the maximum penalty may create inconsistency</i>	10
Schedule 4 - Personal information that may be relevant for integrity purposes	11

About Legal Aid NSW

The Legal Aid Commission of New South Wales (“Legal Aid NSW”) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 28 Women’s Domestic Violence Court Advocacy Services.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children’s Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court.

The Criminal Law Division also provides advice and representation in specialist jurisdictions including the Commonwealth Crimes Unit, the State Parole Authority, Drug Court and the Youth Drug and Alcohol Court.

Since the 2011 – 2012 financial year, grants of legal aid have been made in approximately 400 social security fraud prosecutions.

Legal Aid NSW’s Social Security Service provides free legal advice, assistance and representation about Centrelink problems. In response to Centrelink’s automated debt notice system, Legal Aid NSW, in partnership with LawAccess NSW and community legal centres in Sydney and the Illawarra, have recently established a streamlined referral protocol for specialist advice and legal assistance about Centrelink debt issues.

Legal Aid NSW welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee in relation to the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017.

Should you require any further information or wish to discuss this submission our contact officers are:

Harriet Ketley
Senior Legal Project Manager
Strategic Planning, Policy & Community Partnerships

Telephone

Robyn Gilbert
Law Reform Solicitor
Strategic Planning, Policy & Community Partnerships

Telephone

Introduction

Legal Aid NSW welcomes the opportunity to make a submission to the inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (“the Bill”). Our comments focus on the proposed amendments in Schedules 2, 4 and 7 of the Bill.

Schedule 2 - Obligations of investigating officials

Legal Aid NSW supports the clarification of the *Crimes Act 1914* (Cth) (**the Crimes Act**) to ensure that an investigating official must notify an Aboriginal legal assistance organisation (ALAO) prior to questioning a person they reasonably suspect to be an Aboriginal or Torres Strait Islander person. This amendment will ensure that such notification occurs before a suspect is questioned.

The lack of legislative clarity around the timing of notification was at issue in *R v CK* [2013] ACTSC 251. That decision does not, however, justify the amendment in Item 4 of Schedule 2 in respect of the content and extent of the existing notification obligations of investigating officials. Under the Bill, this will occur in two ways:

- The obligation to immediately inform the suspect that an ALAO will be notified of their arrest is altered by removing the word “immediately”
- The obligation to then notify the service is qualified by the phrase “take reasonable steps to notify...”

No explanation or justification is offered in the Second Reading Speech or the Bill’s Explanatory Memorandum for these further changes. We do not consider it necessary to weaken the existing notification provisions. Our criminal lawyers have noted that there is usually less urgency in questioning suspects in respect of federal, as opposed to state, offences. Legal Aid NSW considers that the obligation should remain to notify an ALAO, not merely to take ‘reasonable steps’ to notify.

The requirement to notify an ALAO was a response to recommendations of the Royal Commission into Aboriginal Deaths in Custody. Recommendation 223 called for protocols that require notification of the Aboriginal Legal Service when Aboriginal people are arrested or detained, and recommendation 224 called for legislation ‘to make it mandatory for Aboriginal Legal Services to be notified upon the arrest or detention of any Aboriginal person [other than certain arrests]’ [emphasis added]. We note that the recommendation calls for notification, not merely ‘reasonable steps to notify’.

Both recommendations are important protections for vulnerable Aboriginal and Torres Strait Islander suspects in light of the significant disadvantages they face in the criminal justice system. They should not be weakened.

The equivalent provisions in the Australian Capital Territory and New South Wales require the police officer 'to notify' the Aboriginal Legal Service (NSW/ACT).¹ Legal Aid NSW considers that the present consistency in the extent of notification obligations arising for Australian Federal Police and those police who investigate state or territory based offences is appropriate, and should be maintained.

Legal Aid NSW notes the further amendments in Items 2 and 9 of the Bill to:

- Remove the Minister's obligation to maintain a list of interview friends and interpreters (through repeal of section 23J of the Crimes Act)
- Amend the definition of Aboriginal legal aid organisation in section 23B of the Crimes Act.

Legal Aid NSW defers to the views of the Aboriginal Legal Service NSW/ACT and other ALAOs in respect of these amendments.

Schedule 4 - Increasing maximum penalties for general dishonesty offences

Legal Aid NSW does not support the proposed increase to the maximum penalties for offences under sections 135.1(1), (3), (5) and (7) of the *Criminal Code Act 1995* (Cth) (**the Criminal Code**) from five to ten years. While the doubling of penalties is intended to address concerns about sentencing 'white-collar criminals',² the amendment is not targeted to those types of offenders, and is likely to impact disproportionately and unfairly on vulnerable people prosecuted for social security fraud under the same provisions.

The examination below of cases recorded on the Judicial Commission of NSW's Judicial Information Research System (JIRS) reveals that:

- a significant proportion of the offences prosecuted under sections 135.1(1) and (5) are social security offences.³
- Existing maximum penalties are adequate to address offending in respect of social security fraud: individuals convicted under these provisions are rarely sentenced

¹ *Crimes (Forensic Procedures) Act 2000* s 24A (ACT), *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) cl 37.

² The Second Reading Speech indicates that the proposed increased maximum penalty was influenced by evidence provided by the Commonwealth Director of Public Prosecutions before the Senate Economics References Committee inquiry into white-collar crime. The Senate Committee adopted the following definition of white-collar crime: 'financially motivated non-violent crimes committed by businesses or individuals acting from a position of trust and authority.... Common examples of white-collar crime include fraud, bribery, insider trading, embezzlement, money laundering, forgery, cybercrime, identity theft and Ponzi schemes': Senate Economics References Committee *Lifting the fear and suppressing the greed: Penalties for white-collar crime and corporate and financial misconduct in Australia (2017)* [1.12].

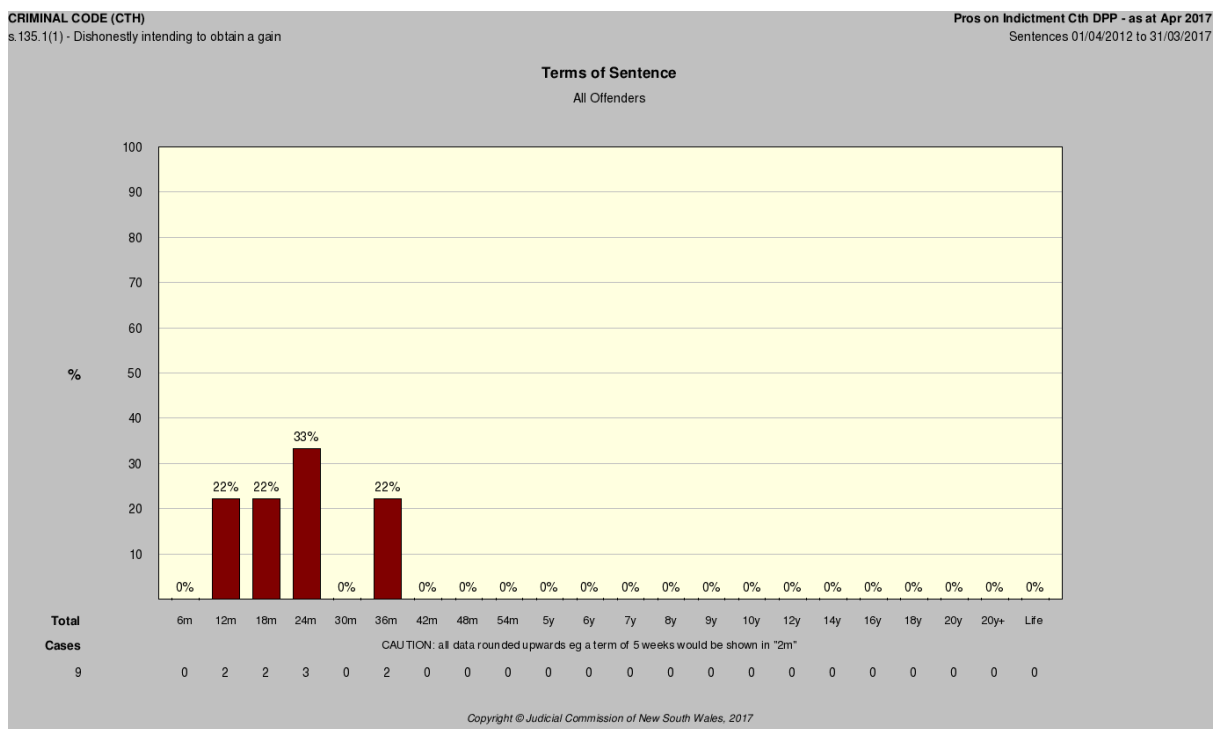
³ At present, the large majority of social security offences are prosecuted summarily under section 135.2, which carries a 12 month maximum (and will not be affected by the proposed amendment). It appears that social security fraud is not generally prosecuted under sections 135.1(3) and 135.1(7).

to a full term of more than three years' imprisonment, and the full term is usually much less. This is reflected by the fact that in 2015 – 2016, Centrelink referrals to the Commonwealth Director of Public Prosecutions were overwhelmingly dealt with summarily (1,246 referrals were dealt with summarily and 29 on indictment).⁴ Legal Aid NSW solicitors who represent people charged with social security fraud observe that, as improved data matching between Centrelink and the Australian Taxation Office leads to earlier detection of fraud, the amounts defrauded are smaller and lengthy custodial penalties have become less likely.

Dishonestly intending to obtain a gain: section 135.1(1)

Between 1 April 2012 and 30 March 2017, 14 people were sentenced after prosecution on indictment for an offence under section 135.1(1) of the Criminal Code.⁵ Of the nine imprisoned, five involved social security offences. Of these five, none received a sentence of longer than two years (see Figure 1). The two matters that exceeded 24 months were both taxation matters. Even in those two cases, the sentence was for multiple offences.

Figure 1: Terms of imprisonment for offences under section 135.1(1) dealt with on indictment

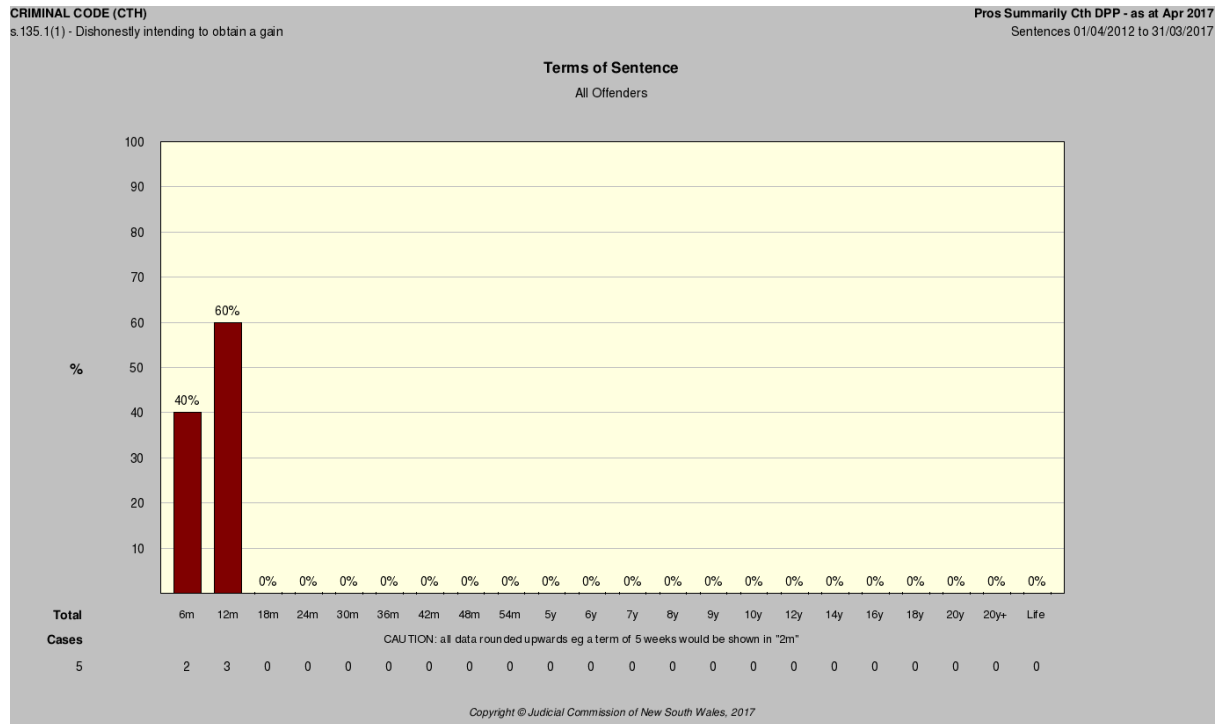


⁴ 'Defendants dealt with' includes not only convictions and findings of guilt but also matters resulting in acquittals, prosecutions which are discontinued in accordance with the Prosecution Policy of the Commonwealth based on evidentiary or public interest considerations or as part of a charge negotiation, as well as when there is a hung jury, matters where a warrant is issued as the defendant has absconded, and determinations that a defendant is unfit to be tried: Commonwealth Director of Public Prosecutions *Annual Report 2015 -16*, p 32 (Table 11).

⁵ Current JIRS statistics include matters prosecuted by the Commonwealth Director of Public Prosecutions for the 5 years between 1 April 2012 and 31 March 2017.

There were 30 matters prosecuted summarily under section 135.1(1). Of these, 15 were social security matters. Of the five who received prison sentences, all sentences were for terms of under twelve months, including those for the three social security offenders (see Figure 2).

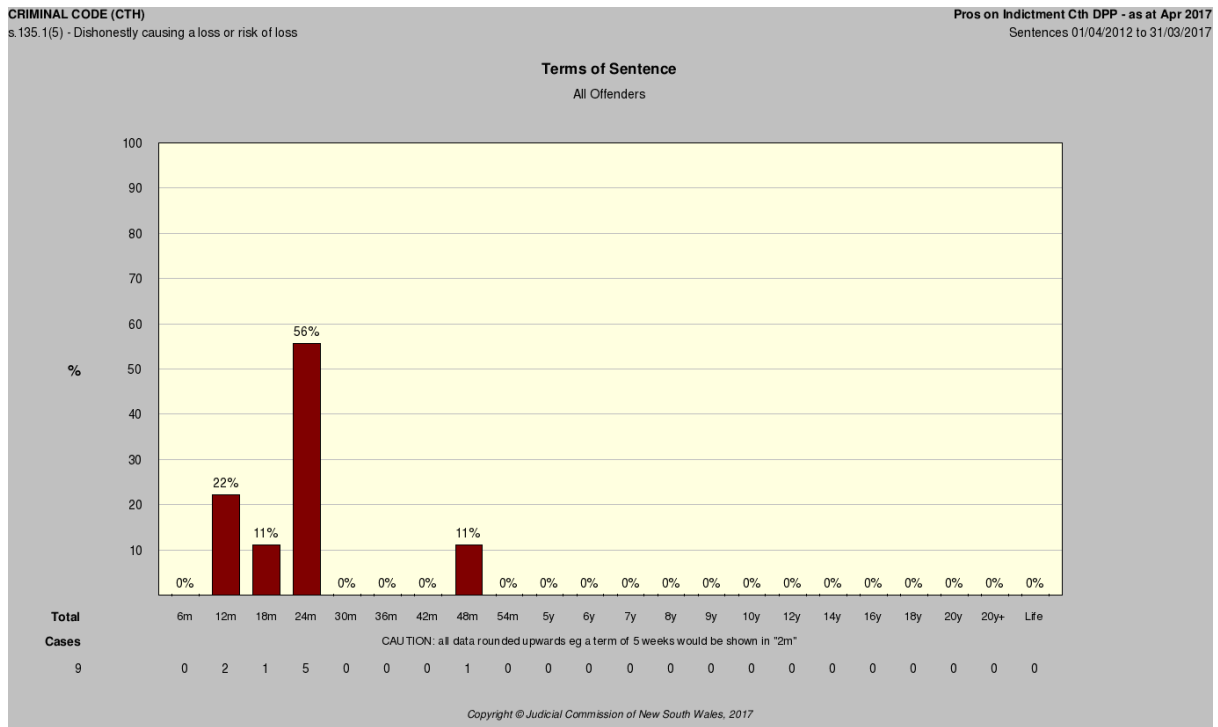
Figure 2: Terms of imprisonment for offences under section 135.1(1) dealt with summarily



Dishonestly causing a loss: section 135.1(5)

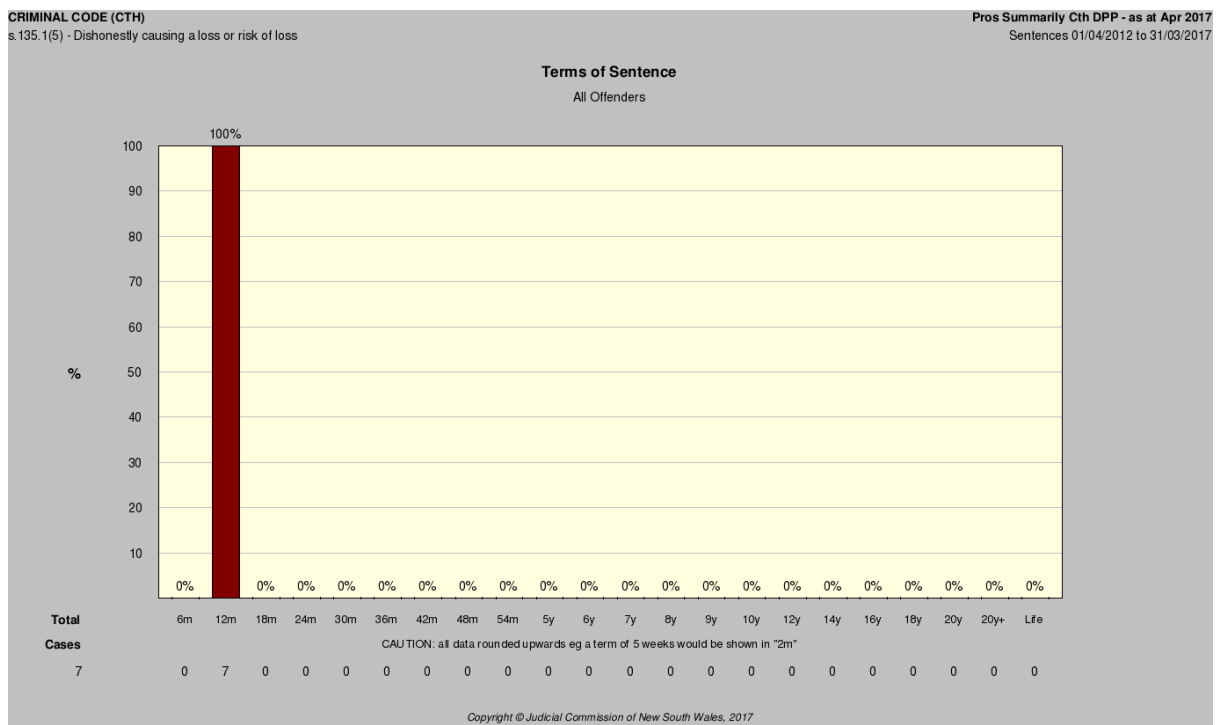
Similar results can be seen in sentencing for offences under section 135.1(5) of the Criminal Code: see Figure 3. Of the 23 matters prosecuted on indictment under 135.1(5), 15 were social security matters. Nine people received sentences of imprisonment, including five social security offenders. Only one person was sentenced to more than two years, and this person was convicted of multiple counts of tax offences (see Figure 3). Again, there appears to be scope for the courts to address the full range of criminality that comes before them under current penalty provisions.

Figure 3: Terms of imprisonment for offences under section 135.1(5) dealt with on indictment



Of the 26 matters prosecuted summarily under 135.1(5), nine were social security matters and five social security offenders received prison terms, all less than 12 months. The two offenders sentenced to imprisonment for other types of offences also received sentences of less than 12 months (see Figure 4).

Figure 4: Terms of imprisonment for offences under section 135.1(5) dealt with summarily



Legal Aid NSW submits that the above sentencing statistics indicate that courts in New South Wales already have sufficient sentencing scope in respect of sections 135.1(1) and (5) of the Criminal Code.

Social security fraud and disadvantage

It cannot be said that the typical profile of a person prosecuted under sections 135.1(1) and 135.1(5) of the Criminal Code is that of a white collar criminal. Legal Aid NSW is therefore concerned that an effort to strengthen penalties in relation to white-collar crime will lead, over time, to disproportionately harsh sentences for those convicted of social security fraud.

In Legal Aid NSW's experience, those currently prosecuted are a vulnerable group of first offenders who have engaged in less complex offences involving overpayment. In our experience, and in contrast to other criminal offences, the majority of those convicted of social security fraud are women. This is supported by a study undertaken by the University of Wollongong, in collaboration with Legal Aid NSW, of overpayment prosecutions in the Wollongong area between July 2008 and June 2010. Published research from that study provided information about the profile of individuals prosecuted by the Commonwealth Director of Public Prosecutions for social security fraud.⁶ This research suggests that the majority of those prosecuted in the criminal jurisdiction are female (57%), in receipt of either parenting payment (43%) or Newstart (37%), and overwhelmingly engaged in precarious, low skilled, casual employment (72%). The top three industries represented are hospitality (31.5%), cleaning (13%) and retail (9.3%). These findings confirm the results of previous Queensland based research. This research reported that 53 per cent of defendants were female and that most defendants (89%) had not been previously charged with a fraud offence. The report also found that the motivation for social security fraud goes beyond the assumption of greed and lack of moral integrity but was driven by the economic necessity of vulnerable groups in the community.⁷

These research findings are reflected in sentencing decisions for social security fraud, as highlighted in the following reported decisions.⁸

⁶ F. Hui, L. Moerman & K. Rudkin (2011). *Centrelink Prosecutions at the Employment/Benefit Nexus: A Case Study of Wollongong*. Wollongong: Social Accounting and Accountability Research Centre (SAARC Report No 1, 2011).

⁷ Ibid, 3.

⁸ Citations for the decisions can be provided if requested. They have not been provided, and names of offenders have been anonymised, to protect the privacy of the individuals involved.

Case Study A

Ms A failed to declare her employment at Woolworths while receiving Centrelink benefits. She did so when she was suffering significant depression and was caring for her elderly and unwell mother. The court noted:

She has been working for Woolworths for some eighteen years and explained that she was using the extra money fraudulently obtained from the Commonwealth in her struggle to support herself and her children. She said she was not engaging in luxuries such as holidays or expensive clothes or items but they were basic needs for her and her family. In fact she said that she had never been on a holiday. She has suffered anxiety and depression for a long time. ... She told me that she felt very embarrassed and ashamed at what she had done.

Ms A was sentenced to two years jail, to be served in the community by way of an Intensive Correction Order with extensive conditions as to supervision and community service work.

Case Study B

Mrs B pleaded guilty to a number of social security fraud offences including under section 131.1(5) of the Criminal Code. Mrs B had fraudulently claimed a widow's pension for four years. She explained her conduct to the sentencing court on the basis that she was in need of money to help care for her grandchildren and she was not prepared to ask her children for help. Mrs B was the main carer of her severely mentally handicapped daughter which had resulted in both emotional and financial burdens. Mrs B had never been separated from her daughter for more than two weeks in her life. Mrs B admitted that she knew that what she was doing was wrong, but believed she had no other way to survive. The judge accepted that this was a case of "*pressing need rather than greed.*" Despite this, Mrs B was sentenced to three months full time imprisonment.

The sentencing regime for these sorts of offenders is already harsh, given that the starting point is custody.⁹ It should also be borne in mind that a person convicted of social security fraud will also be subject to administrative action by Centrelink for repayment of any debt owing.

⁹ It has long been an established principle that a custodial sentence should be imposed for social security fraud unless there are 'very special circumstances' justifying a lesser order: *R v Purdon* NSWCCA, unreported, 27 March 1997; applied in, for example, *R v West* [2015] ACTSC 134; *Thomson v R* [2014] NSWCCA 88; *Ivanovic v R* [2009] NSWCCA 28.

Legal Aid NSW suggests that a more appropriate response to social security fraud would be one which emphasises early intervention and diversion so as to minimise a person's contact with the criminal justice system and the exacerbation of existing disadvantage and marginalisation.

Increasing the maximum penalty may create inconsistency

A further justification given for increasing the maximum penalties for general dishonesty offences is to address inconsistencies in penalties for offences covering similar types of conduct.¹⁰ However, Legal Aid NSW is concerned that increasing the penalty to ten years imprisonment may create inconsistency with other offences in Chapter 7 of the Criminal Code, where:

- There is also a statutory maximum of five years imprisonment for offences that are equivalent to the Division 135 offences, such as bribery (section 142.1) and abuse in public office (142.2).
- Increasing the maximum penalty to ten years imprisonment would place the Division 135 offences in the same category as the offences of trafficking explosives (section 72.12), people smuggling (section 73.1) and deal in proceeds of crime (where the value of the property concerned is more than \$100,000) (section 400.4(2))

With regard to concerns expressed by Government about the courts' ability to sentence for the full range of offending,¹¹ we note that five years imprisonment is a significant penalty for a single offence. If the offending has involved a course of conduct or multiple offences, multiple counts can be laid, and consecutive sentences can be imposed. Offending involving fraudulent schemes is also addressed by offences under the *Taxation Administration Act 1953* (Cth).

Legal Aid NSW is also concerned that an increase in the maximum penalty will mean that the prosecution may be less likely to agree to summary disposal. Currently, if both the accused and the prosecution agree, matters brought under Division 135 of the Criminal Code can be dealt with summarily, and are subject to the jurisdictional limit of the Local Court. If more matters are dealt with on indictment, there is a risk not only of increased sentences for social security fraud¹², but also increased costs and inefficiency for the defence, the prosecution and the court system.

¹⁰ Explanatory Memorandum to the Bill, at [9].

¹¹ *Ibid* at [77].

¹² The High Court acknowledged in *Muldock v The Queen* (2011) 244 CLR 120 that an increase in the maximum penalty "is an indication that sentences for that offence should be increased" (at [31]). See comments to similar effect in *R v Hartikainen* (unrep, 8/6/93, NSWCCA) per Gleeson CJ.

Schedule 4 - Personal information that may be relevant for integrity purposes

Legal Aid NSW is also concerned about the provisions in the Bill which authorise the collection, use and disclosure of sensitive information for preventing, detecting, investigating or dealing with:

- serious misconduct by persons working for Commonwealth bodies, or
- fraud affecting Commonwealth bodies, or
- offences against Chapter 7 of the *Criminal Code* (concerning the proper administration of Government).

The definition of 'sensitive information' is taken from the *Privacy Act 1988* (Cth), which is:

- (a) information or an opinion about an individual's:
- racial or ethnic origin
 - political opinions
 - membership of a political association
 - religious beliefs or affiliations
 - philosophical beliefs
 - membership of a professional or trade association
 - membership of a trade union
 - sexual orientation or practices
 - criminal record, or
- (b) health and genetic information about an individual, or
- (c) biometric templates and biometric information that is to be used for the purposes of automated identification or verification.¹³

In our view, there is inadequate explanation as to why it is necessary to collect, use and disclose this information for the purposes of combating fraud and corruption. Furthermore, the *Privacy Act 1988* (Cth) already provides exemptions from the Australian Privacy Principles (APPs) that can be used where APP entities have reason to suspect that unlawful activity or serious misconduct has been, is being, or may be engaged in.¹⁴ In other situations, a warrant can be obtained to access and use this sensitive information where it is necessary for investigation or law enforcement purposes.

¹³ See *Privacy Act 1988* (Cth), section 6.

¹⁴ For instance, APP 3.3 allows an APP entity to collect sensitive information about an individual where a 'permitted general situation' exists, as defined in section 16A of the *Privacy Act 1988* (Cth). This includes where (a) the entity has reason to suspect that unlawful activity, or misconduct of a serious nature, that relates to the entity's functions or activities has been, is being, or may be engaged in, and (b) the entity reasonably believes that the collection, use or disclosure is necessary in order for the entity to take appropriate action in relation to the matter.