Submission on Crimes Amendment (Fraud and Forgery) Bill 2009 (Consultation Draft)

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[This is a slightly amended version of the submission made in response to the Consultation Draft Crimes Amendment (Fraud and Forgery) Bill 2009 and accompanying Discussion Paper issued by the Legislation Policy and Criminal Law Review Division, Attorney General's Department NSW in August 2009]

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Executive Summary

The offences contained within the Bill are some of the most complex and wide-ranging offences in the criminal law, and my strong submission would be that further consultation on reform in this area is necessary - possibly by way of a reference to the Law Reform Commission. Much of the review of the current law in my 2004 report for the Criminal Law Review Division - Redefining Fraud: Proposed Reform of Fraud Offences in New South Wales based on the Model Code/Theft Act Approach - remains applicable and could form the basis of a Discussion Paper.

In the following pages I make a number of detailed submissions on aspects of the Bill. In summary those submissions argue:

- The reforms would not increase comity with Commonwealth and other jurisdictions. Adoption of identical elements of actus reus is irrelevant if the elements of mens rea differ. Worse, the use of identical terms with different meanings can only increase juror confusion.

- The failure to adopt a definition of dishonesty that incorporates a subjective element is contrary to the approach in a majority of jurisdictions. It perpetuates the confusion over the correct test for fraud offences, with different tests for dishonesty in fraud offences being applicable in the decisions of Love, Peters and Macleod.

- An objective test for dishonesty (if Peters does apply to these offences) fails to acknowledge that in fraud offences – particularly general fraud offences – the proscribed activity is lawful other than if done dishonestly. Consequently principled criminal law requires that the test for dishonesty be determined by proof of subjective awareness on the part of the accused that they are doing wrong. Failure to do so results in liability through negligence. Liability for negligence should only arise when the activity is clearly dangerous or significantly outside of the bounds of expected behaviour. Neither situation is necessarily the case in the proposed fraud offences.

- The Model Criminal Code definition of claim of right should not be adopted. However, legislative clarification is needed to ensure that claim of right is preserved as a conclusive negation of dishonesty, and as a “defence” to property offences generally.

- There should be a much greater use of consistent terms. This will greatly aid the development of precedent and allow for greater certainty of operation of the offences:
  - Dishonesty should be an element of all fraud offences. It is the underlying basis for liability in fraud and should be seen as a unifying and core element. In particular it should be applied to proposed cl192F. An inchoate offence should not have lesser fault elements than the corresponding completed offence.
  - There should be a consistent use of terminology across all offences that relate to gain/loss, advantage/detriment or property transfer. A requirement of obtaining of property in these offences is an unnecessary complication. All the offences should instead refer to a concept of financial gain or loss and that should be defined to include control of property.

- More justification needs to be given for the proposed maximum penalties for each offence. It is incorrect to consider an offence that requires proof of both deception and dishonesty to amount to double criminality. Such reasoning creates an artificial and dangerous precedent for determining maximum penalties. Doubling the maximum penalties for fraud places those offences out of line with maximum penalties for other property and dishonesty offences. Any alterations to penalty tariffs should be part of a proper consideration of penalties across all relevant offences.
• The increasing use of technology in fraud suggests that it is misplaced to deem computers to be deceived. Instead an appropriate set of offences based on misuse of computers for fraudulent purposes should be enacted.

• There should not be a general dishonesty offence as proposed by cl 192G. Such offences have been rejected by law reform bodies that have examined the idea. Enactment would have the effect of criminalising a large range of everyday activities that are not currently prohibited by the criminal law and are beyond its appropriate scope. Enactment would be likely to have a significant impact on business generally. There is no demonstrated gap in the law that justifies such an extraordinary offence.

• If identity fraud offences are to be enacted, they should be in the same form as the Commonwealth offences and require proof of an intention to commit an identity-related crime. The proposed offences are unacceptably broad. Recklessness – as defined in common law – is not an appropriate mens rea for such offences.

• In light of the intention to create offences of identity fraud, and the increased scope of the proposed fraud offences, it is unclear why separate forgery offences remain necessary. The proposed offences are unnecessarily complex.

• There are difficulties with the notion of possession of information that need to be addressed, and the proposed wording of possession of equipment offences in cl 192H is unacceptably broad. There needs to be a restriction of the type of equipment, etc. to those specifically designed to create forgeries.

• The proposed false statement by company officer offence in cl 257 is unnecessarily complex. It is unclear why only this offence is to be retained in a new formulation but all other corporate officer offences are to be repealed.
**Detailed Submissions on the Discussion Paper and Draft Bill**

**Comity**

The Discussion Paper (p1) claims that the amendments will bring NSW in line with the national approach to fraud. This is misleading as there is no national approach. The presumed aim of the amendments is to bring NSW largely in line with the approach at Commonwealth, Australian Capital Territory and Northern Territory jurisdictions. South Australia’s approach is a variant on that approach. Together NSW and Victoria represent the majority of criminal proceedings in Australia and remain common law based jurisdictions – rather than Code based. While there is nothing in principle wrong with a decision to align with Commonwealth approaches, it requires more justification than has been given.

In fact, the lack of the equivalent of Chapter 2 of the Criminal Code in NSW, the continuing importance of common law principles, and the failure to propose a codification of dishonesty have the effect of preventing comity with the Commonwealth legislation. Under the current proposals, in any trial involving both NSW and Commonwealth offences, juries and magistrates will be required to apply significantly different approaches to recklessness and dishonesty in assessing the liability of an accused. The available defences will also differ significantly. In many ways the most important needs for comity are in aligning the trial procedures and the meanings of core concepts, not the physical elements of offences. By aligning the physical elements of offences, but not the core mental elements the proposed amendments will increase rather than decrease juror confusion.

**Problems with the Peters definition of dishonesty**

The definition of dishonesty set out in Peters (1998) CLR 493 has been rejected by all legislatures that have reformed theft or fraud laws in recent years. To decide to not codify dishonesty in light with these jurisdictions undermines the key argument of comity.

The Discussion Paper suggests that dishonesty at common law is as defined in Peters. However in both Peters and Spies (2000) 201 CLR 603 the High Court saw the test of dishonesty as not applying to “by deception dishonestly obtains” in the current s178BA – which is replicated in the proposed amendments. Instead they approved the approach in Salvo [1980] VR 401 and Love (1989) 17 NSWLR 608 of a “special meaning” of dishonesty that required a jury to be informed of the conclusive nature of a belief in a claim of right. On the other hand, the decision of the High Court in Macleod (2003) 214 CLR 230 applies the Peters test to the current s173, an offence that uses the terms “fraudulently takes”. It therefore is unclear from these decisions what the High Court considers to be the appropriate common law test to apply to the proposed fraud offences.

On the decisions in Peters and Macleod, it would seem that the Salvo/Love test would apply to proposed sections 192D and 192E but arguably not to any other proposed offence. It would be best to provide consistency by a definition, or partial definition, of dishonesty.

There are significant problems with the High Court’s current approach to dishonesty. I have exhaustively critiqued the approach in Peters in a forthcoming article for the Adelaide Law Review, a draft of which I attach. For the purposes of this submission I highlight three key problems with the Peters test.

- In rejecting the second stage of the test in Ghosh [1982] Q B 1053 (that the accused be aware that the community would consider the behaviour dishonest) the High Court has removed the basis for seeing dishonesty as a justification for moral condemnation of the offender. As a general principle, persons are convicted of crimes because they act with awareness that what they are doing is wrong. This is the key message of the English courts in setting up the modern test for dishonesty in both Feely [1973] 1 Q B 530 and

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1 Describing Dishonest Means: The Implications of Seeing Dishonesty as a Course of Conduct or Mental Element (2009) 30 Adelaide Law Review (forthcoming)
Ghosh. Without such awareness, dishonesty becomes just another situational element of the actus reus of the offence. This approach has been taken in Canada. While it would be possible to do so in NSW it would amount to a significant break with other Australian and English jurisdictions. If so, further consideration would need to be given to finding an appropriate form of mens rea on which to criminalise the fraudulent behaviour.

- The approach in Peters can be usefully contrasted with the approach of the Canadian Supreme Court in Theroux [1993] 2 SCR 5 and Zlatic [1993] 2 SCR 29. In both cases the concept of dishonesty is linked to fraudulent or dishonest means. The Canadian approach is to see this as an element of the actus reus of a crime, and thus to be determined objectively and without reference to the knowledge, belief or intent of the accused. In the UK and Model Code approach the knowledge of the accused as to community standards is the defining determinant of liability and dishonesty is thus clearly a mental/mens rea element that determines moral wrongdoing. The Peters test is an unfortunate hybrid of both approaches, placing the concept of dishonesty in the actus reus/physical element but importing mental elements. It is undesirable that dishonesty as a concept have different meanings across different Australian jurisdictions, and that this difference of meaning be so fundamental as to create the possibility that for some offences it is actus reus, whereas for others it is mens rea.

This creates difficulties of interpretation as yet unexplored by courts. If dishonesty as described in Peters is an element of actus reus, then the High Court’s decision in He Kaw Teh (1985) 157 CLR 523 suggests that there is a presumption that the courts should imply into the offence an element of mens rea that the accused be aware of the characterisation of the relevant acts as dishonest. This may mean that the effect is to create a Ghosh style outcome. To date the issue has not arisen because of the existence of other mental elements in fraud offences. However, a general offence, such as set out in proposed s192G raises the strong possibility that “dishonestly does anything” is an actus reus element of the offence and imports a requirement of awareness of the dishonesty. Further, seeing dishonesty as an element of the actus reus raises the distinct possibility that the statutory defence of self-defence might become available – and thus in some cases import a subjective element into the offences.

- Despite this hybrid approach to dishonesty in Peters, the High Court in Macleod saw dishonesty as a form of mens rea. However, by refusing to allow the subjective mental state of the defendant to determine liability, the role of dishonesty becomes more akin to a form of negligence. That is, an accused is judged dishonest by the finder of fact on the basis that ordinary people find such behaviour dishonest, not whether the accused is aware that it is dishonest. Criminal liability for negligence should only arise when the activity is clearly dangerous or significantly outside of the bounds of expected behaviour. Neither situation is necessarily the case in the proposed fraud offences. A negligence basis for dishonesty has at least two worrying implications. The first is that the test for negligent dishonesty is based on a bare ordinary person test – not a criminal standard of gross negligence. There are real dangers in Local Court proceedings of accused being held to unrealistic standards of civic and ethical awareness that are supposedly held by the “ordinary” person. The second danger is that at the edges of allegedly fraudulent behaviour, the activities engaged in are prima facie acceptable and not out of the ordinary – such as selling houses and cars. There is likely to be significant confusion and complexity for legal practitioners attempting to advise business clients as to the forms of behaviour that will amount to dishonest behaviour. With a subjective basis for dishonesty, the vagueness of the notion of dishonesty is ameliorated by a businessperson’s knowledge that it is not criminally dishonest if they honestly believe that the behaviour is acceptable. Under the Peters test, legal practitioners must advise their clients that this belief, while taken into account by the finders of fact, is only a factor in an overall assessment of what ordinary people consider to be dishonest.
By failing to require a definition of dishonesty that is not at least partially subjective the proposed offences place great reliance on dishonesty as an incriminating element. In fraud offences dishonesty is largely the element that apportions moral blame, and differentiates the conduct from conduct that is merely civilly wrong (or in a general dishonesty offence, otherwise legal). In the absence of other mens rea elements—such as knowledge of a deception—there is little to separate criminal from non-criminal behaviour.

I would strongly urge that consideration be given to either adoption of the Model Criminal Code test for dishonesty or to some other formulation that requires the element to be finally determined on a subjective basis.

Problems with the common law application of claim of right

The Discussion Paper suggests that this is not an appropriate time to begin codifying the common law claim of right defence. The attempted codification of a general defence of claim of right in the Model Criminal Code has been generally accepted as a failure.\(^2\) The wording is circular and is considered to not provide any defence beyond that already provided for by dishonesty. I therefore agree that the Model Code definition should not be adopted in NSW.

However, the decision in Macleod creates considerable uncertainty as the continuing role of claim of right in NSW if the Peters test for dishonesty is to continue. In Macleod the High Court held that, at least for the purposes of that case, the consideration of a belief in a claim of right was adequately dealt with by a general direction as to the test for dishonesty.

As discussed above, the overall objectiveness of the Peters test for dishonesty has the effect of changing the role of the subjective belief of the accused in a claim of right from one that precludes a finding of dishonesty to merely a dispensable factor. The fundamental basis of the common law defence of claim of right is that liability is avoided because of an objectively erroneous belief by the accused in an enforceable property right. The existence of that belief negates liability. Under the approach in Macleod, the genuine belief of an accused that the property is theirs and that they are therefore engaging in no crime (as in a sting operation) fails to exonerate the accused. Instead such a belief is merely one factor the jury must take into account in assessing whether the conduct is objectively dishonest.

The decision in Macleod throws into doubt the approach taken in Salvo and Love. In both those cases—upheld as examples of special forms of dishonesty in Peters—the courts in NSW and Victoria held that a person obtaining property by a deception was not acting dishonestly if acting pursuant to a claim of right. This is the reverse of the approach in Macleod, which appears to have the effect of seeing claim of right as a dispensable subsidiary of dishonesty. One reading of Macleod is that Salvo and Love were wrongly decided.

Because of this fundamental uncertainty, there is a need to provide a legislative statement as to the roles of claim of right and dishonesty. Under the Theft Act model—adopted in the UK and Victoria, claim of right is seen as a subset of dishonesty, and a belief in claim of right legislatively deems a person to not be dishonest. This may have been the intent of the Model Code as well, but the current general provision fails to provide this outcome.

I would suggest that a partial definition of dishonesty preserve the common law position of claim of right. The provision could be along the lines of:

A person who acts pursuant to a claim of right does not act dishonestly.

There is a further difficulty with reliance on claim of right as a common law defence if it is not proposed to make dishonesty a fault element of all fraud offences. This is that it has been held in R v Gatzka (2004) 9 VR 459 that claim of right is tied to the concept of dishonesty and does not apply to an offence that does not involve the concept. This may be a debatable proposition, as

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claim of right may well apply to other property offences such as property damage. There is also NSW authority pre-dating Gatzka that suggests claim of right is applicable (see eg R v Hassen [2002] NSWCCA 25). Specifically, Gatzka held that claim of right did not apply to Victorian forgery offences because dishonesty was not an element of the offences. Similar considerations could well apply to the proposed forgery amendments if dishonesty were not an element of the offences – and also to the proposed offence of making a false statement cl 192F. I would suggest that claim of right should apply broadly across all fraud related offences. This may be most conveniently done by also making dishonesty an element of all fraud offences. It should not be the case that a person who passes a dud cheque to regain possession of a car they believe is rightfully theirs is innocent of a crime (per Salvo) but who forges a signature on a cheque and impersonates another to regain the car is guilty of forgery. The aim should be to provide consistent criminalisation across the methods used to induce similar acts.

**Lack of consistency between gain/loss, property and financial advantage**

Given that the aim of the reform is to remove the complexity of the law in this area, it is somewhat surprising that the various offences use different terms to describe the intended consequences of the accused’s actions.

There seems to be no reason why gain and loss need be defined in terms of property rather than financial advantage or detriment. There are serious doctrinal difficulties with the continued reliance on any offence that refers to the obtaining of property belonging to another. The House of Lords in Preddy [1996] AC 815 held that such offences could not apply to any inducement to transfer funds electronically.¹ I have argued elsewhere that the core underlying criminality in this area is the inducement of behaviour by deception or dishonesty.² Whether property is obtained is a secondary consideration. Obtaining of property is merely one convenient way of establishing an obtaining of a financial benefit. In light of the apparent need to extensively define the meaning of property belonging to another in proposed cl192D, and the fact that all prosecutions for fraud would involve property of some value, the reference to property seems unnecessary.

It would seem far simpler to have one offence that refers to the dishonestly deceptive obtaining of a financial gain or causing of a financial loss. This would avoid the difficulty of navigating between overlapping offences of obtaining property, gain and financial advantage that are currently proposed. The definition of gain or loss could include any gain or loss of property. For example, gain could be defined as:

- **Gain means:**
  - (a) a financial advantage; or
  - (b) ownership, possession or control of property that arises or continues as a result of the prohibited conduct;
  - etc

Subsection (b) is intended to overcome the doctrinal difficulties of Preddy which suggests that, at least for money, property does not move from one person to another and cannot be obtained from another (cf proposed 192D(5)).

It is difficult to see how the proposed four dishonesty offences in Part 4AA achieve the stated goal of reducing overlapping offences.

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¹ See the discussion in Alex Steel, “Problematic and Unnecessary? Issues with the Use of the Theft Offence to Protect Intangible Property” (2008) 30 Sydney Law Review 575
Definition of property in Crimes Act

This definition could be modernised, but more consideration should be given to its application throughout the Crimes Act. For the purposes of the proposed offences it seems unclear how the extension of property “into or for which the same may have been exchanged ... (etc)” could be relevant to an offence based on obtaining.

Penalties

The suggestion in the Discussion Paper (p3) that a maximum penalty of 10 years for the proposed cl 192D is justified because there are two elements of mens rea is both simplistic and dangerous. On that reasoning the maximum penalty should in fact be 15 years because of the third element of an intention to permanently deprive. In fact the requirement of deception in addition to dishonesty means that the offence is merely a subset of the broad range of dishonest conduct and may not necessarily catch the most egregious forms of fraud. The expansion of the offence of conspiracy to defraud in the last 30 years is largely based on an attempt to avoid proof of deception.\(^5\) The coupling of dishonesty (in the intention to obtain) to deception (in the means used) is not evidence of a double criminality, but instead recognition that there are a range of non-criminal deceptions that are part of day-to-day life.

Presumably the increased maximum penalty is to bring the NSW offences in line with Commonwealth offences. However, this creates a significant disparity with the larceny based offences which range between 2-14 years maximum penalties. It is hard to see exactly how fraud justifies a penalty twice that of larceny (s 117), but roughly two-thirds that of cattle rustling (s 126) or stealing a firearm (s 154D).

It is suggested that a broader examination of maximum penalties in this area be conducted, and that any increases in maximum penalties be consistently applied if justified.

Comments on specific offences

192B Deception - meaning

(1) In this Part, deception means any deception, by words or other conduct, as to fact or as to law, including:

(a) a deception as to the intentions of the person using the deception or any other person, or

(b) conduct by a person that causes a computer, a machine or any electronic device to make a response that the person is not authorised to cause it to make.

(2) A person does not commit an offence under this Part by a deception unless the deception was intentional or reckless.

The Discussion Paper (p2) suggests that the increasing reliance on technology means that the law should recognise that deception can be practiced through computers and the Internet. The proposed definition does not do this. Instead it deems any unauthorised use of a computer to be a deception. The result is not a computer-based deception offence. It is, instead, a dishonest and unauthorised use of computer offence.

In light of the increasing reliance on computers, any general prohibition on dishonest and unauthorised use of computers might be better set out in a separate offence that did not refer to deception and be placed in Part 6 Computer Offences.

\(^5\) See eg the discussion in Alex Steel, “Describing Dishonest Means: The Implications of Seeing Dishonesty as a Course of Conduct or Mental Element: (2009) 30 Adelaide Law Review (forthcoming)
192C and 250 Gain or loss - meaning

(1) In this Part:

- gain means a gain in property (whether temporary or permanent) and includes keeping what one has, and obtaining a gain includes:
  (a) obtaining a gain for oneself or for another person, and
  (b) inducing a third person to do something that results in oneself or another person obtaining a gain.

- loss means a loss in property (whether temporary or permanent) and includes not getting what one might otherwise get, and causing a loss means causing a loss to another.

(2) For the purposes of this Part, a gain or loss in property includes a gain or loss relating to the supply of services.

As mentioned above it seems strange that the general concepts of gain and loss be limited to property. Instead these terms, if used, should be linked to financial gain or loss. Unnecessary complexity can arise in trials if prosecutors are required to link gains to forms of property. Thus if a victim is defrauded out of an employment opportunity it is relatively simple to see how that might lead to financial detriment, but requires more abstract reasoning to see the loss as one of property.

The artificiality of linking gain and loss to property is underlined by the deeming of services to be property in subsection (2). Services are not property, but the gain of a service can well be financially advantageous.

The use of the terms gain and loss might be better expressed as advantage and detriment. These are comparative terms, whereas gain and loss are more quantified terms. Detriment and advantage are more apt to describe the effect of a loss of a chance.

192D Obtaining property by deception

(1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an offence.

 Maximum penalty: Imprisonment for 10 years.

(2) For the purposes of this section, a person obtains property if:

- (a) the person obtains ownership, possession or control of the property for himself or herself or for another person, or
- (b) the person enables ownership, possession or control of the property to be retained by himself or herself or by another person, or
- (c) the person induces a third person to do something that results in the person or another person obtaining or retaining ownership, possession or control of the property.

(3) For the purposes of this section, property belongs to a person if:

- (a) the person has possession or control of the property, or
- (b) the person has a proprietary right or interest in the property (not being an equitable interest arising only from an agreement to transfer or grant an interest or from a constructive trust).

(4) If property is subject to a trust, the persons to whom it belongs include any person having a right to enforce the trust.

(5) A person’s obtaining of property belonging to another may be dishonest even if the person is willing to pay for the property.

(6) A person obtaining property belonging to another without meaning the other permanently to lose the thing itself has, nevertheless, the intention of permanently depriving the other of it if the person’s intention is to treat the thing as his or her own to dispose of regardless of the other’s rights. A borrowing or lending of the property may amount to so treating it if, but only if, the
borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.

(7) Without limiting the generality of subsection (6), if:

(a) a person has possession or control (lawfully or not) of property belonging to another, and
(b) the person parts with the property under a condition as to its return that the person may not be able to perform, and
(c) the parting is done for the purposes of his or her own and without the other's authority, the parting amounts to treating the property as his or her own to dispose of regardless of the other's rights.

(8) A person may be convicted of an offence against this section involving all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were obtained over a period of time.

(9) A conviction for an offence against this section is an alternative verdict to a charge for the offence of larceny, or any offence that includes larceny, and a conviction for the offence of larceny, or any offence that includes larceny, is an alternative verdict to a charge for an offence against this section.

As mentioned above, this offence seems unnecessary in light of the broader obtaining financial advantage offence that follows it. Given that a financial advantage is likely to be achieved in any obtaining of property, and that such advantage can be fleeting, the requirement that the property be obtained with intention to permanently deprive seems unnecessary.

Indeed the entire offence is a relic of the historic development of false pretences offences out of the common law offence of larceny. As the other offences in this Bill make clear, fraud ranges far beyond the permanent deprivation of property by deception. The importation of the English Theft Act's torturous definitions of obtaining property undermine the Bill's aspirations to simplicity and forward-looking reform.

Subsection (3)(b) excises equitable interests in only two instances. The second exclusion is that of constructive trusts – an omission in the English Theft Act corrected in the Model Criminal Code. But as I have argued elsewhere, similar exclusions should also be considered for other forms of remedial equitable interests such as resulting trusts and liens which are similarly uncertain.

Subsection (5) does not appear to include potential beneficiaries of discretionary trusts. It may be important to include these to allow for prosecution of fraudulent behaviour by trustees of discretionary trusts. Alternatively, it may well be better to see criminal behaviour by trustees as a specific form of wrongdoing, in a similar way that wrongdoing by corporate officers is seen. It may be that the high degree of trust placed in trustees justifies specific trustee offences – as is currently the case. This would have the effect of removing the complexity of needing to define persons to whom trust money belongs in this section and provide a clearer legislative condemnation of fraudulent trustees.

Subsection (6) is a difficult subsection that has been the subject of confusing English caselaw, and possibly conflicting Australian interpretations. Under current English interpretations it may have the effect of removing the requirement that an obtaining be with intent to permanently deprive. I have discussed this in some detail in "Permanent Borrowing and Lending: A New View of s6

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6 Alex Steel, “Problematic and Unnecessary? Issues with the Use of the Theft Offence to Protect Intangible Property” (2008) 30 Sydney Law Review 575
7 I have suggested this in Alex Steel, “Taking Possession: The Defining Element of Theft?” (2008) 32 Melbourne University Law Review 1030 at1061
As mentioned above, there seems to be little reason to require a permanent deprivation of property but allow a temporary financial advantage. It would be best to provide a consistent approach.

Subsection (9) seems to be partial in application. Other than robbery, there would be few offences that could easily be described as “including larceny”. Offences such as s 125 Larceny by bailee deem certain activity to amount to larceny, while other offences that are larceny-related such as s 157 Embezzlement by clerk or servant operate alongside larceny as alternatives. Presumably this subsection is intended to apply to all offences which use the word “steal”, but this is not clearly stated.

192E Obtaining financial advantage by deception

(1) A person who by any deception dishonestly obtains any financial advantage is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(2) In this section, obtain a financial advantage includes:

(a) obtain a financial advantage for oneself or another person, and
(b) induce a third person to do something that results in oneself or another person obtaining a financial advantage.

I would take issue with the assertion in the Discussion Paper that “financial advantage” is a simple term. As I explored at length in “Money for Nothing, Cheques for Free? The Meaning of ‘Financial Advantage’ in Fraud Offences”, the term is possibly irreconcilably complex. In order to preserve some “commonsense” meaning for the term, it should not be applied to situations of deceptive attempts to avoid payment of debts. They should either be excised from the scope of the offence as Glanville Williams argued, or consideration be given to the creation of a lesser offence of by deception dishonestly causing a financial detriment.

192F Obtaining property or financial advantage by false or misleading statements

(1) A person who makes or publishes any statement (whether or not in writing) that is false or misleading in a material particular:

(a) knowing that, or being reckless as to whether, the statement is false or misleading in a material particular, and

(b) with the intention of obtaining property or a financial advantage, is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

(2) In this section, obtaining property or a financial advantage includes:

(a) obtaining property or a financial advantage for oneself or another person, and

(b) inducing a third person to do something that results in oneself or another person obtaining property or a financial advantage.

This offence is misleadingly titled. The offence does not require obtaining of anything. Instead it is an inchoate offence of making statements with intent to obtain. As such it covers the same territory as the forgery offences, but without the requirement for a false document.

It is unclear why the torturous definitions of obtaining property contained in s192D are not replicated here. The failure to be consistent in definition is only likely to raise appeal points as to possible legislative intention that there be a difference in meaning between the two offences. It is also unclear why this offence can include both the intent to obtain property or financial

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advantage but if such property or advantage is actually obtained, they should be separated into separate offences as is proposed in s192D and 192E.

There is a fundamental problem of principle in this offence. If a person intends to obtain financial advantage by a false statement, but does not achieve that end there is no requirement that they act dishonestly. But if they do in fact achieve the obtaining they are then required to act dishonestly. It is unprincipled to require that the inchoate attempt be less morally wrong than the actual fulfilment of the intention. Both should have the same mens rea. Section 192F should require proof of dishonest intent.

192G Dishonestly obtaining gain or causing loss

A person who dishonestly does anything with the intention of:

(a) obtaining a gain from another person, or
(b) causing a loss to another person,

is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

This offence is unnecessary and overly broad. The Model Criminal Code Officers Committee ("MCCOC") examined and rejected the arguments for a broader dishonesty offence. The MCCOC Report noted:

The ambit of these offences is extremely wide extending to damage to reputation, avoidance of school or work discipline, obtaining business, sexual or other personal favours, and so on. MCCOC has decided that the offences in this chapter should be restricted to offences against property and that other forms of benefit or detriment should be considered, if at all, in the context of specific offences (eg sex offences). ...

Ultimately, the criticism of a general dishonesty offence is that it has all the vices of the old law of conspiracy - vices to some extent ameliorated in that offence by the requirement that there be an agreement. MCCOC has considered the arguments for and against a general dishonesty offence and has concluded that such an offence should not be included in the MCC.

Although the Committee believes that generally fraud offences in the Model Criminal Code should be no broader than proposed in this report, it recognises that in this area of the criminal law, there are special problems (which may be peculiar to a particular jurisdiction) that may justify the creation of special offences of a general nature. However, consistently with its decision to limit the scope of offences of dishonesty within the MCC, the Committee believes that where the creation of a special offence can be justified, its application should be no wider than is necessary to address the particular problem identified and it ought to be restricted to a specific subject matter or a particular class of conduct. Of course any such offence should otherwise accord with the general principles contained in the Code.10

In its 1999 Consultation Paper, the English Law Commission argued strongly against any general dishonesty offence. They considered that dishonesty was an uncertain and contested concept, and that the Ghosh test was less of a definition than a way of coping with a lack of definition.11 The fact that dishonesty raised a moral issue for decision by the jury made it unusual in the criminal law and consequently it was only appropriate to use it in a negative sense – that is, as a defence.12

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11 At p50 fn 8.
12 At pp52ff.
Given that dishonesty is a concept that is given to the jury with no real definition, it would not be possible to place any constraints on the scope of the offence. Examples the Law Commission gave were the way it would subvert the boundaries of current offences by permitting convictions in circumstances where a jury considered the actions of the defendant dishonest even though those actions clearly fell below what was required to commit a traditional offence. It would also render the detailed legislative schemes for controlling wrongdoing in the corporate and financial areas redundant and would criminalise areas of law that were not currently considered unlawful.

They commented:

5.28 In our provisional view, this is an unsatisfactory state of affairs. In general, we believe that the criminal law should take a robust view of what is to be allowed in the market place; and in particular we think it wrong that conduct which is not actionable (that is, which gives rise to no remedy in civil law) should be regarded as a substantive crime of dishonesty. The proper role of the criminal law of dishonesty, in our view, is to provide additional protection for rights and interests which are already protected by the civil law of property and obligations. To apply it to conduct which gives rise to no civil liability is to extend it beyond its proper function. ...

5.30 ... Even if it were provided that the general dishonesty offence does not catch conduct which is not actionable, it would still catch all conduct which causes loss to another, is actionable by that other, and is characterised by the fact-finders as dishonest. For example, there might be circumstances in which some people would think it dishonest to default on a debt or other contractual obligation. In such circumstances, such a default would be criminal.

5.31 Our provisional view is that this option too would be unacceptable. Leaving aside those offences that already use dishonesty as a positive element (such as theft and conspiracy to defraud), there are many kinds of conduct which, though they may give rise to civil liability, the criminal law regards as lying outside its province; and we think that on the whole it is right to do so. There is no pressing need to criminalise breaches of contract and the non-payment of debts, even if they are characterised as “dishonest”. And in the absence of such a need, we do not believe that it would be right to create an offence which is capable of criminalising such conduct.  

The Law Commission also concluded that any general dishonesty offence would be in breach of the European Convention on Human Rights.  

In their Report in 2002, the Law Commission was even further of the view that a general dishonesty offence was unwarranted.

5.25 An offence which is defined only by fact-finders’ moral opinions would necessarily be uncertain. Such an offence infringes, by a margin, the key principles of maximum (not absolute) certainty and fair warning and thus, the principle of legality. As Professor Andrew Ashworth has put it:

A vague law may in practice operate retroactively, since no one is quite sure whether given conduct is within or outside the rule. ... [R]espect for the citizen as a rational, autonomous individual and as a person with social and political duties requires fair warning of the criminal law’s provisions and no undue difficulty in ascertaining them.
Responding to the submissions of prosecutors that a broad offence was necessary the Commission stated:

5.28 We continue to believe that a general dishonesty offence, by not requiring as an element some identifiable morally dubious conduct to which the test of dishonesty may be applied, would fail to provide any meaningful guidance on the scope of the criminal law and the conduct which may be lawfully pursued. We do not accept the argument that inherent uncertainty is satisfactorily cured by the promise of prosecutorial discretion. This cannot make a vague offence clear and, while it might ameliorate some of the risks, it does not excuse a law reform agency from formulating a justifiable and properly defined offence. We do not believe it is for the police and prosecutors to decide the ambit of the criminal law. As the Supreme Court of the United States has said:

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.\(^\text{16}\)

5.38 ... People across the jurisdiction tell small lies every day. This will often rightly result in social retribution, but such instances of dishonesty cannot be properly described as criminal. It is simply not appropriate to extend the scope of the criminal law to cover every minor social problem or instance of human frailty. A general dishonesty offence would be based on principles which, if taken to their logical conclusion, would trivialise the law and extend its scope too far.

The Commission was unconvinced by arguments that prosecutorial discretion would prevent over-criminalisation:

5.39 Ultimately ... we do not accept ... that a general dishonesty offence would be rendered certain and fair by the benign application of prosecutorial discretion. An offence as broad as a general dishonesty offence would necessarily demand that prosecution services would be called upon to exercise their discretion in an increasing number of cases. This must raise concerns about consistency, and prosecutorial discretion leaving “the boundaries of the criminal law in a distinctly uncertain state”

5.40 This is no mere academic concern. Both ILEX and the Justices’ Clerks’ Society were cautious about prosecutorial discretion. They stated that it creates concern for the victims of crime, the accused and the police. It is notable that those who expressed the strongest reservations about prosecutorial discretion are those who have to deal with the impact of it in relation to minor offences on a regular basis. If a general dishonesty offence were introduced, it would replace the current deception offences, and therefore it would be used on a daily basis in Magistrates’ Courts across the country. Its uncertain scope could have a highly deleterious effect on the ability to dispense summary justice in a fair and consistent manner.

These arguments are compelling. In fact the arguments are even stronger if the proposal to not codify dishonesty is adopted. In such cases the offence would be one without any moral basis for criminalisation. The characterisation of the activity as dishonest would not be required to be based on the accused’s awareness that such activities were proscribed by law. The failure to be able to predict that any particular act would be illegal because of an accompanying mental state would mean that there would be no real possibility for responsible individuals to prevent breaches of the law. The deterrent value of the offence would be significantly lessened.

Instead what would ensue could be a deadening effect on entrepreneurial behaviour that could have a significant impact on investment in the State. The key problem is that a jury would be asked whether ordinary people would think that the charged behaviour was the right thing to do. The behaviour could, other than this ethical or moral evaluation, be entirely legal. If the Peters

\(^{16}\) At p45, quoting Conally v General Construction Co 269 US 385, 391 (1926).
test was applied the jury would be instructed that a lack of awareness by the accused that this behaviour was not the right thing to do would not by itself lead to an acquittal.

Examples of conduct that could well fall within the offence include:

- Forms of advertising the jury thought were unfair though not misleading - this might be particularly the case for industries that did not have a wide reputation for ethical behaviour, such as motor vehicle retailers and real estate agents
- Hard fought business negotiations where one party was not informed by the other of significant information - this might be particularly the case where a jury perceived a large imbalance in power between the parties
- Family disputes over the division of estates where there had been some influence by a family member on the deceased, that fell outside of equitable prohibitions, but which a jury were nonetheless convinced were unfair.
- Disputes over ethics requirements in medical tests and other scientific experiments

In short the offence has the potential to make any apparently unethical or immoral behaviour an indictable offence, in that a large proportion of activities in modern life involve the making of a gain or the suffering of a loss.

The proposed offence fails to provide any clear boundary between activities that are unethical but not illegal or civil but not criminal. It is vital that any liberal legal system maintain these boundaries.

Identity fraud

There is an inconsistency between this proposed section and the preceding sections. Whereas separate crimes are placed in separate sections 192D – 192G, all the identity fraud offences are placed within s192H. For consistency they should be in separate sections. Further, the definitional matters in 192H(7) should precede the substantive offences.

Recklessness as the mens rea

Under s 5.4 of the Commonwealth Criminal Code, recklessness in relation to a result is defined to be:

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

However under NSW common law, recklessness requires merely the awareness of a possibility that the result might occur (see Coleman (1990) 19 NSWLR 467). A judgment as to a justification for taking that risk is not part of the definition. This significant difference means that the level of proof of the identity fraud offences are very low because this awareness of a possibility need only be awareness of a possibility that the information be used to facilitate the commission of an indictable offence.

If a website published personal information about a person the publisher need only be aware that a viewer of the website might use that information in order to build a profile of the person that would enable an identity fraud to occur. Given the high level of publicity of identity fraud in the media, it would be difficult for any publisher of personal information on a website to deny awareness of the possibility of misuse of such information.

However, under the Model Code definition of recklessness such problems do not arise, as publication of such information could be justifiable either as being in the public interest or relevant to questions of freedom of speech. I would therefore suggest that if recklessness is to be
retained as the mens rea of these offences some form of defence of justification or reasonable behaviour in the circumstances be appended to the offences. That said, the Commonwealth approach of requiring intention is a clearer and more principled approach.

Availability of defences

The use of recklessness as a mental element rather than intention also creates significant difficulties in determining whether the defence of intoxication is available for these offences. The current consultation draft does not propose to list these new offences as crimes of specific intent. Section 428B(1) limits crimes of specific intent to:

An offence of specific intent is an offence of which an intention to cause a specific result is an element.

Intoxication should be available as defence to the offences in proposed subsections 192H(1) and (2). Paradoxically, it appears to be available for cl 192H(3).

192H (7) Identity fraud - definitions

(7) In this section:

deal in identification information includes make, supply or use any such information.

identification information means information relating to a person (whether living or dead, real or fictitious, or an individual or body corporate) that is capable of being used (whether alone or in conjunction with other information) to identify or purportedly identify the person, and includes the following:

(a) a name or address,
(b) a date or place of birth, marital status, relative’s identity or similar information,
(c) a driver licence or driver licence number,
(d) a passport or passport number,
(e) biometric data,
(f) a voice print,
(g) a credit or debit card, its number or data stored or encrypted on it,
(h) a financial account number, user name or password,
(i) a digital signature,
(j) a series of numbers or letters (or both) intended for use as a means of personal identification,
(k) an ABN.

(4) This section does not apply to dealing in a person’s own identification information.

These definitions are themselves uncontroversial. The significant concern is with the lack of purposive elements in the substantive offences. The definition of identification information reflects the fact that almost any information about a person can be used to construct fraudulent identities. This recognition means that unless the offence concentrates on proscribing use of information for certain purposes, there is significant over-criminalisation.

It is unclear why the definition of identification information does not include documents as in the Commonwealth form of the offence. As discussed below, one may knowingly possess a document and be aware of its nature without specific knowledge of the information contained within it. In such circumstances there is not “possession” of the information itself.

This has a flow on effect to the definition of “deal”. The partial definition of deal makes most sense if information includes a document. It is difficult to see how one “makes” information, as opposed to a document. If one deciphers a code – is this making information, or was the hidden message inherent in the code from the beginning? If the information is obtained in coded form,
there may be difficulties in establishing that there is “possession” of identification information. If it is then decoded, has an offence of dealing occurred, or is the result that the information is now “possessed” in a different format, and one that now amounts to identification information.

There may also be some difficulty in determining what a “person’s own identification information” is. Presumably this is intended to relate to information that identifies that person. The wording might however be construed to extend to some forms of identification information relating to another over which the accused has control – and in some cases limited forms of ownership. For example, the results of medical tests may well be under the control of the doctor or medical lab rather than the patient.

It is also unclear why one could not be convicted of supplying one’s own information knowing that there is a possibility that it could be used to facilitate an offence, but yet be convicted of possessing that information.

192H (1) Dealing with identification information

A person who:

(a) deals in identification information, and

(b) is reckless about the use of the information to commit, or to facilitate the commission of, an indictable offence, is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

This offence is extraordinarily wide. As it stands it would be an offence for a security guard to answer a question from a member of the public as to the company whose offices were in the building - without first establishing on some basis that there was no possibility that the questioner would use that information to commit an indictable offence. It creates the possibility that it could be an offence to place any information on a website that identifies an individual or company if there is a possibility that it might be used to commit an indictable offence. This is likely to have a significant impact on media outlets - given the fact that at times news of the activities of individuals or corporations can lead individual members of the public to commit revenge crimes.

The definition of identification information makes clear that there is no distinction between public and private data in these offences. It therefore will be possible to charge a person with a so called “identity fraud” offence for almost any criminal activity that is not entirely spontaneous. Extending the scope of this term to include the name or address of any person or corporation leads to the ludicrous result that an identity crime can be committed if a person knows the address of a bank they intend to rob, or the name of any person they intend to assault.

Such concerns do not arise in the Commonwealth form of the offence. Under the proposed Commonwealth offence (s 372.1) the information must be used as part of an identity crime. There must be an intention that it be so used, rather than awareness that it might be used, and the intended use is limited to facilitation of the use of a fictitious identity. As a result of this principled restriction both in terms of intention and result, there is no concern over the breadth of information that can be used in this way.

Basing the offence on recklessness punishes people who are more educated as to the misuse of information, but make an informed decision that the benefits of the use of the information outweigh the potential for misuse. Such a judgment is no defence to recklessness in NSW, though it is under Commonwealth law. There are also unaddressed issues relating to the requirement for disclosure of identification information in a range of regulatory and contractual situations. As it stands, the proposed offence could be committed by the publication of licencing details. Such details are essential to ensuring that persons who claim to be licenced are in fact licenced, but the information is also easily misused to impersonate licenceholders.

The proposed NSW offence contains none of these safeguards and is thus unacceptable.
192H (2) Possession of identification information

A person who:

(a) possesses identification information, and
(b) is reckless about the use of the information to commit, or to facilitate the commission of, an indictable offence, is guilty of an offence.

Maximum penalty: Imprisonment for 3 years.

There are significant complexities associated with legislative descriptions of information. Information is not considered a species of property, yet the language used to describe interactions with information seems to be inescapably bound up with property-based terminology. Thus, s192H(2) proposes an offence based on possession of information. There has been some discussion of the concept of possession of information in insider trading cases and it has been acknowledged that possession in this context does not mean possession in the property sense of physical control and intention to control, but instead an awareness of the information (see eg Hannes [2000] NSW CCA 503 at [224]ff). In light of these cases there is the strong possibility that possession of information in an identity fraud context would require the accused to be aware of the nature of the information. Use of the word “possession” also gives rise to the possibility that the approach in He Kaw Teh to possession of drugs will be applicable - that is awareness that the information is identification information is required before it can be possessed. The following scenarios explain the complexity. Imagine the accused is told:

a) “That person’s name is John Smith. Put that on the false passport”
b) “This letter contains that person’s home address. Use that to make the false passport”
c) “Take this envelope to James so he can make the false passport” - the envelope is blank

In scenario a) the accused knows the identification information. In scenario b) and c) the accused has physical possession of a document containing information, but does not know what that information is, and in c) is not aware that it is identification information. Applying the approach in insider trading cases, it may well be that scenarios b) and c) do not amount to possession of information. However, one stated aim of the provisions is to allow convictions of “mules”.

The difficulty could well be overcome by avoiding use of possession and instead using terms that are more appropriate when describing information. For example, the offence could refer to “knowledge or control of information”. “Knowledge” would apply to situations where the accused has a mental memory of information which can be used or conveyed for criminal purposes, and “control” would apply to situations where the accused has control over a physical or electronic form in which identification information is contained, whether or not they are aware of the precise details of the information.

The nature of possession in relation to tangible property is such that it is always possible for a person to give up possession and to thus desist from criminal activity. However, if possession involves being aware of information there is no possibility of ending this possession - absent a comprehensive forgetting.

Perversely, at present it would be an offence under this subsection to be in possession of your own personal identification information if you were aware that your continued possession meant it was possible an indictable offence could be committed with it. One common example would be persons who write down their PIN’s on cards in their wallet. Unless the act of transferring that information to the card was construed as a dealing and hence protected by subsection (4), such methods of self-reminding would amount to a crime.
192H (3) Possession of equipment etc to make identification documents or things

A person who:

(a) possesses any equipment, material or other thing that is capable of being used to make a document or other thing containing identification information, and

(b) intends that the document or other thing made will be used to commit, or to facilitate the commission of, an indictable offence,

is guilty of an offence.

Maximum penalty: Imprisonment for 3 years.

This offence is badly drafted, as is the current s 302A. The Commonwealth provision (s 372.3) requires that the equipment be possessed with the intention to use it to make the document, and with the further intention that the document be used to commit an identity crime.

The proposed NSW offence does not require that a document be intended to be made, yet requires an intention to use the unintended document to commit a crime. It is not possible to intend a use of something that one does not intend to create in the first place. It is suggested that if an offence of this nature is required, the Commonwealth provision is more logical starting place.

If the Commonwealth offence is compared to the equipment offences relating to false instruments it can be seen that if the offence wishes to criminalise the possession of equipment capable of making false documentation, then either the equipment must be able to be characterised as having that purpose by the nature of the equipment (and hence the “specially adapted” provision of the current false instrument offence in s302A) or else evidence is needed of the specific intentions of the accused. If not, the offence unacceptably prohibits the possession of all instruments of document making including not only computers and laminators, but also pens and pencils.

As it stands any person intending to write a note to themselves with a pen or pencil that might assist them in committing a crime would be guilty of an offence.

192I Special provisions with respect to geographical jurisdiction

(1) This section applies for the purposes of, but without limiting, Part 1A.

(2) The necessary geographical nexus exists between the State and any of the offences against this Part if the offence is committed by a public official (within the meaning of the Independent Commission Against Corruption Act 1988) and involves public money of the State or property held by the public official for or on behalf of the State.

These offences relate to identification information. It is unclear how such information “involves public money … or property”. Both may be the intended gains from a later fraud, but may not be directly involved in the offences themselves.

Part 5 Forgery and related offences

Conceptually these proposed offences appear to have only minor differences from present offences – though there are some additional possession forms of the offence. Given that this Bill seeks to reform fraud offences and overcome the problems of overlapping offences, it seems strange that a more thorough review of forgery offences has not been undertaken. While forgery was a historically important extension of fraud offences in an emerging market economy it may now be largely obsolete. The existence of false statement offences, and proposed identity fraud offences may leave little scope for forgery offences to operate in their own right. I would suggest that consideration be given to ascertaining what gaps in the law might be left if forgery offences were repealed, and fashioning specific offences to fill those gaps. The proposed forgery offences are highly complex and may not extend significantly beyond the behaviour prohibited under the cl 192F
251 False document— meaning (cf sec 19.2 Model Code; sec 143.2 Cth Code)

(1) For the purposes of this Part, a document is false if, and only if, the document (or any part of the document) purports:

- (a) to have been made in the form in which it is made by a person who did not in fact make it in that form, or
- (b) to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form, or
- (c) to have been made in the terms in which it is made by a person who did not in fact make it in those terms, or
- (d) to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms, or
- (e) to have been altered in any respect by a person who did not in fact alter it in that respect, or
- (f) to have been altered in any respect on the authority of a person who did not in fact authorise its alteration in that respect, or
- (g) to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered, or
- (h) to have been made or altered by, or on the authority of, a person who did not in fact exist.

(2) For the purposes of this Part, a person is to be treated as making a false document if the person alters a document so as to make it false within the meaning of this section (whether or not it is false in some other respect apart from that alteration).

(3) For the purpose of the application of this section, a document that purports to be a true copy of another document is to be treated as if it were the original document.

The listed forms of purporting are unnecessarily complex and fail to address the difficulties caused by English case law. A first issue is the implication by the courts that despite silence in the definitions, the document must tell a lie about itself (R v More [1987] 1 WLR 1578). This common law concept underlies the distinction between a forgery and a document containing a false representation. It could be reflected in the definition of a false document. A reiteration of previous law without recognition of this might have the effect of undermining this key concept.

Clause 251(1)(g) has caused difficulties of interpretation. The phrase “otherwise in circumstances” do not clearly require that the lie told by the document relate to the way in which it is made. A broad interpretation that did not take account of the implications of the other subsections, and the implied requirement that the document tell a lie about itself, could mean that any representation in the document as to circumstances existing at the time of the document’s creation could make the document a forgery. Thus a certificate from a doctor stating that a patient was unfit for work could be seen to be a forgery if at the time the certificate was made, the patient was in fact healthy. While this is clearly a false statement, the document itself should not be seen as a forgery. There is thus a need to re-word this subsection to overcome this ellipsis.

252 Inducing acceptance of false document

(1) In this Part, a reference to inducing a person to accept a false document as genuine includes a reference to causing a machine to respond to the document as if it were a genuine document.

(2) If it is necessary for the purposes of this Part to prove an intent to induce some person to accept a false document as genuine, it is not necessary to prove that the accused intended so to induce a particular person.

I agree with the suggestion of the Discussion Paper (pp8-9) that there is no need to maintain a separate definition of document in light of its definition in the Interpretation Act. I would suggest
that a Note be added to alert readers to this definition. I do have some misgivings however about the potential breadth of such a definition of document.

Under the expansive definition in the Interpretation Act forgery might well extend to situations such as a person leaving a message impersonating another person on an answering machine, or logged keystrokes on a computer. While R v Gold and Schifreen [1988] 1 AC 1063 held entering a password was not permanent enough to constitute a document, that decision was on the basis of the UK equivalent of the current s299(1)(c) which requires information be “recorded” and “stored”. Arguably such a requirement is not contained within s 21 Interpretation Act 1987. Whether such situations fall within the intended scope of a forgery offence is problematic. Avoiding such cases by requiring some degree of “permanence” of record is itself problematic.

It may well be that the issue is avoided by the additional requirement of an intention that the document be accepted as genuine. However, if the meaning of inducement is extended as suggested in cl 252 significant problems of over-criminalisation could arise.

It would seem that any data entered into a computer could amount to a document. If that data (such as another person’s password) were entered to effect an operation of the software, then there would arguably be an intention that the machine respond as if the data had been entered by the authorised person. On this basis misuse of passwords to access subscription services – assuming entry is recorded – might amount to forgeries.

### 253 Forgery— making false document

A person who makes a false document with the intention that the person or another will use it:

(a) to induce some person to accept it as genuine, and  
(b) by reason of so accepting it, to obtain a gain or cause a loss or to influence the exercise of a public duty,

is guilty of the offence of forgery.  
Maximum penalty: Imprisonment for 10 years.

### 254 Using false document

A person who uses a false document, knowing that it is false, with the intention of:

(a) inducing some person to accept it as genuine, and  
(b) by reason of the person so accepting it, obtaining a gain or causing a loss or influencing the exercise of a public duty, is guilty of an offence.  
Maximum penalty: Imprisonment for 10 years.

These offences are drawn from the English Forgery and Counterfeiting Act 1981. That Act is closely modelled on the Law Commission Report on Forgery and Counterfeit Currency (1973). When that report was written the meaning of dishonesty under the Theft Act 1968 had not been clearly defined by the courts, and the highly articulated mens rea of the proposed offences was intended to overcome the uncertainty of a dishonesty based offence. Since that time dishonesty has emerged as a key concept in fraud offences, and it is now appropriate to re-insert a requirement of dishonesty into these offences. In most cases dishonesty will not be in issue if the intentions set out in proposed sub-sections a) and b) exist. It is preferable however to have a general basis for criminality across all these offences – and that is supplied by a requirement of dishonesty.

The concept of a public duty is not a defined term and it is unclear how broad a concept it is. Is it intended to have the same meaning as s 249O:

### 249O Public duty— meaning

For the purposes of this Part, a public duty means a power, authority, duty or function:

(a) that is conferred on a person as the holder of a public office, or
(b) that a person holds himself or herself out as having as the holder of a public office.

It would be desirable that the same meaning be given to the term in both forgery and blackmail.

255 Possession of false document

A person who has in his or her possession a false document, knowing that it is false, with the intention that the person or another will use it:

(a) to induce some person to accept it as genuine, and

(b) by reason of the person so accepting it, to obtain a gain or cause a loss or to influence the exercise of a public duty,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

This offence is of its nature a highly inchoate offence. It would be desirable that it be not possible to be convicted of attempting to commit this offence.

256 Making or possession of equipment etc for making false documents (cf sec 19.6 Model Code; sec 145.3 Cth Code)

(1) A person who makes, or has in his or her possession, any equipment, material or other thing designed or adapted for the making of a false document:

(a) knowing that it is so designed or adapted, and

(b) with the intention that the person or another person will use the equipment, material or other thing to commit the offence of forgery,

is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(2) A person who, without reasonable excuse, makes or has in his or her possession any equipment, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted, is guilty of an offence.

Maximum penalty: Imprisonment for 3 years.

(3) A person who possesses any equipment, material or other thing that is capable of being used to make a false document, with the intention that the person or another person will use the equipment, material or other thing to commit the offence of forgery, is guilty of an offence.

Maximum penalty: Imprisonment for 3 years.

(4) This section applies in respect of any equipment, material or other thing that is designed or adapted for the purpose of making a false document whether or not it is also designed or adapted for another purpose.

(5) This section applies to a person who intends to commit an offence even if committing the offence concerned is impossible or the offence concerned is to be committed at a later time.

(6) It is not an offence to attempt to commit an offence against this section.

These offences are overly broad, particularly as a result of combination of proposed subsections (2) and (4). As the Discussion Paper suggests, proposed subsection (4) is intended to apply to everyday, legal items such as photocopiers – and hence also to ink, pens and paper. The section sets up the objectionable situation in which a person could be charged with being in possession of a photocopier, a pen or printing paper and be required to provide justification for such possession.

If a reversal of onus of proof is justified in possession offences, it can only be justified if the person possesses items that have no other purpose than to commit a crime, or are themselves illegal to possess.

The current offences require possession of equipment “specially” designed or adapted for the making of false instruments. This additional requirement emphasises that the equipment is not an
example of a generally available type – such as a pen, but that some modification has occurred to make it specially adapted for a criminal purpose. In many cases there will be some “thing” that will be specially designed. Software is the most obvious example of such a thing. Reliance on criminalisation of that, rather than the possession of a printer or paper is a more appropriate basis for criminalisation.

257 False statement by officer of organisation

(1) An officer of an organisation who, with the intention of deceiving members or creditors of the organisation about its affairs, dishonestly publishes or concurs in publishing a document containing a statement or account that to his or her knowledge is or may be misleading, false or deceptive in a material particular is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

(2) In this section:

- creditor of an organisation includes a person who has entered into a security for the benefit of the organisation.
- officer of an organisation includes any member of the organisation who is concerned in its management and any person purporting to act as an officer of the organisation.
- organisation means any body corporate or unincorporated association.

It seems unclear why the maximum penalty for this offence has been halved to 5 years when other offences have had maximum penalties increased. Further no justification has been advanced for preserving this offence whilst repealing other corporate officer offences. There are good grounds for leaving specific corporate officer offences to be dealt with under Commonwealth Corporations Act provisions, with general fraud offences available in the alternative.

The one significant ground for retaining corporate officer specific offences would be to recognise the high degree of trust placed in such persons by enacting offences with greater maximum penalties. However, in light of the Commonwealth’s decision not to do so, it would be inappropriate for one jurisdiction to set its own additional penalties.

The proposed offence does not fit well with the extreme breadth of cl 192F which does not require dishonesty, deception or knowledge of the falsity of the statement. The offence is extraordinarily complex. A prosecution would need to prove that there was an intention to deceive identified members or creditors. They would then need to separately prove that the manner of publishing was dishonest – whatever that might mean, and then thirdly that there was knowledge of falsity in a material particular.
Answers to Questions posed in Discussion Paper

Question One:
Are the terms of “gain” and “loss” appropriate terms and are their definitions correct? If not what is the better approach? Is the definition of property appropriate for this division, if not what is a better alternative?

It would be desirable to have one set of concepts for all offences, and to avoid reliance on property. I provide detailed suggestions below.

Question Two:
Is this offence too broad, if so how should they be refined?

The offence is too broad, and inappropriate. It should not be enacted. I provide detailed reasons below.

Question Three:
Do you think that an organised fraud offence is needed in the Crimes Act 1900? If so how should it be structured and how should “organised” be defined?

The discussion paper provides no arguments in favour of an organised crime offence, and there are already criminal group offences enacted in Division 5 Participation in criminal groups, Crimes Act 1900. It is hard to see what need there could be for further offences. It would be inappropriate to make detailed comment without seeing a proposed offence.

Question Four:
Is “recklessness” an appropriate standard of fault for the offence in clause 192H(1), or is the higher standard of “intent” more appropriate and why?

Recklessness is not an appropriate standard. If the offence is to be enacted it should require the same mental elements as the Commonwealth offence – intention to commit an identity-related crime. I provide more detailed reasons below.

Question Five:
Is recklessness an appropriate standard of fault for the offence in 192H(2), or is the higher standard of intent more appropriate?

Recklessness is not an appropriate standard. If the offence is to be enacted it should require the same mental elements as the Commonwealth offence – intention to commit an identity-related crime. I provide more detailed reasons below.

Question Six:
Are there any provisions that are currently in Part 5 of the Crimes Act 1900 that will not be covered in the proposed broad forgery offences? If so what are they, are they still relevant and why?

I agree that they should all be repealed. I provided a detailed analysis of this in Redefining Fraud from page 157 - 167. Counterfeiting is now prohibited under Commonwealth law, and forgery of public documents is adequately prohibited under Part 7 Public Justice Offences, Crimes Act 1900.
Questions Seven, Eight and Nine:
Is the fault element of “intention” adequate or would it be more appropriate to adopt the model provision’s additional test of “dishonesty”? Is 10 years an appropriate maximum penalty? If no, what is a more appropriate sentence length and why?

It would be best to adopt the additional requirement of dishonesty for all forgery offences. That would ensure consistency across all fraud offences. The penalty for forgery offences should be assessed in light of a broader examination of penalties for all fraud offences. In terms of its current relative weight, there is no justification for the inchoate offences of forgery to be greater than the substantive offences of fraud.

Question Ten:
Should this provision be adopted into the Crimes Act 1900 or can the circumstances it covers be dealt with under the new more general fraud provisions?

This appears to be unnecessarily complex. It should not be adopted. Instead a broad ranging review of corporate officer offences should be undertaken. It is unclear why this offence is intended to be preserved when other corporate officer offences are proposed to be repealed.

Question Eleven:
Do you agree with the removal of the above provisions? If not, what provision do you disagree should be removed; how is it not covered in either the newer fraud or forgery provisions and why is the provision still needed?

I do not disagree with the repeal of these provisions. I note that s 527 is generally regarded as an adjunct to larceny rather than fraud.

Question Twelve:
Do you think that it is appropriate that NSW adopts this provision? Do you think that it will assist victims of identity crime? Should the Evidence Act apply to obtaining the certificate?

I am in favour of any measures to assist victims of identity crime. I question whether an offence under the cl 192H causes problems for a victim as suggested in cl 309A. The problems are more likely to be caused subsequent to the commission of any offences in cl192H. It may be that a broader range of fraud offences should fall within this clause - with the limitation that the offence involve the assumption of the victim’s identity.

Similarly in 309A(3)(b) it is not clear that a finding on the balance of probabilities that an identity fraud offence has been committed pursuant to 309A(1) has the legal effect that such an offence has in fact been committed.

For these reasons I would suggest that the wording adopted in the Commonwealth provision is more appropriate.
Appendix: Discussion Paper and Consultation Draft Bill
Interviewer: Could you tell me about your experience with Australian reconciliation processes? 

Speaker: Well, I’ve been involved in various aspects of reconciliation efforts in Australia. My experience has been quite diverse, from participating in community-based reconciliation initiatives to working with government bodies on policy development.

Interviewer: What do you think is the most significant barrier to reconciliation in Australia? 

Speaker: I believe the most significant barrier is the ongoing legacy of colonisation and the resulting disconnection from traditional practices and land. It’s a deep-seated issue that requires ongoing dialogue and action.

Interviewer: How important do you think cultural awareness training is for all Australians? 

Speaker: Cultural awareness training is crucial for promoting mutual understanding and respect. It helps individuals develop empathy and sensitivity towards different cultures, which is fundamental to reconciliation.

Interviewer: What advice would you give to young people who are interested in getting involved in reconciliation efforts? 

Speaker: I would encourage young people to engage with their communities and participate in local initiatives. Building relationships, learning from elders, and being proactive in seeking out opportunities for volunteering or advocacy are excellent starting points.
A Bill for

An Act to amend the Crimes Act 1900 with respect to fraud, forgery and other related offences; and to make a related amendment to the Criminal Procedure Act 1986.
The Legislature of New South Wales enacts:

1 Name of Act
This Act is the *Crimes Amendment (Fraud and Forgery) Act 2009*.

2 Commencement
This Act commences on a day or days to be appointed by proclamation.
Schedule 1  Principal amendments to Crimes Act 1900 No 40

[1] Part 4AA

Insert after section 193 (re-numbered as section 192A by Schedule 2):

Part 4AA  Fraud

192B  Deception—meaning (cf sec 17.1 Model Code; sec 133.1 Cth Code)

(1) In this Part, *deception* means any deception, by words or other conduct, as to fact or as to law, including:
   (a) a deception as to the intentions of the person using the deception or any other person, or
   (b) conduct by a person that causes a computer, a machine or any electronic device to make a response that the person is not authorised to cause it to make.

(2) A person does not commit an offence under this Part by a deception unless the deception was intentional or reckless.

192C  Gain or loss—meaning (cf sec 14.3 Model Code; sec 130.1 Cth Code)

(1) In this Part:
   *gain* means a gain in property (whether temporary or permanent) and includes keeping what one has, and *obtaining a gain* includes:
   (a) obtaining a gain for oneself or for another person, and
   (b) inducing a third person to do something that results in oneself or another person obtaining a gain.
   *loss* means a loss in property (whether temporary or permanent) and includes not getting what one might otherwise get, and *causing a loss* means causing a loss to another.

(2) For the purposes of this Part, a gain or loss in property includes a gain or loss relating to the supply of services.

192D  Obtaining property by deception (cf sec 17.2 Model Code; sec 134.1 Cth Code)

(1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an offence.
   Maximum penalty: Imprisonment for 10 years.

(2) For the purposes of this section, a person *obtains property* if:
(a) the person obtains ownership, possession or control of the property for himself or herself or for another person, or
(b) the person enables ownership, possession or control of the property to be retained by himself or herself or by another person, or
(c) the person induces a third person to do something that results in the person or another person obtaining or retaining ownership, possession or control of the property.

(3) For the purposes of this section, *property belongs* to a person if:
(a) the person has possession or control of the property, or
(b) the person has a proprietary right or interest in the property (not being an equitable interest arising only from an agreement to transfer or grant an interest or from a constructive trust).

(4) If property is subject to a trust, the persons to whom it belongs include any person having a right to enforce the trust.

(5) A person’s obtaining of property belonging to another may be dishonest even if the person is willing to pay for the property.

(6) A person obtaining property belonging to another without meaning the other permanently to lose the thing itself has, nevertheless, the intention of permanently depriving the other of it if the person’s intention is to treat the thing as his or her own to dispose of regardless of the other’s rights. A borrowing or lending of the property may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.

(7) Without limiting the generality of subsection (6), if:
(a) a person has possession or control (lawfully or not) of property belonging to another, and
(b) the person parts with the property under a condition as to its return that the person may not be able to perform, and
(c) the parting is done for the purposes of his or her own and without the other’s authority,

the parting amounts to treating the property as his or her own to dispose of regardless of the other’s rights.

(8) A person may be convicted of an offence against this section involving all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were obtained over a period of time.
(9) A conviction for an offence against this section is an alternative verdict to a charge for the offence of larceny, or any offence that includes larceny, and a conviction for the offence of larceny, or any offence that includes larceny, is an alternative verdict to a charge for an offence against this section.

192E Obtaining financial advantage by deception (cf sec 17.3 Model Code; sec 134.2 Cth Code)

(1) A person who by any deception dishonestly obtains any financial advantage is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.

(2) In this section, *obtain* a financial advantage includes:
(a) obtain a financial advantage for oneself or another person, and
(b) induce a third person to do something that results in oneself or another person obtaining a financial advantage.

192F Obtaining property or financial advantage by false or misleading statements (cf sec 178BB Crimes Act)

(1) A person who makes or publishes any statement (whether or not in writing) that is false or misleading in a material particular:
(a) knowing that, or being reckless as to whether, the statement is false or misleading in a material particular, and
(b) with the intention of obtaining property or a financial advantage,
is guilty of an offence.
Maximum penalty: Imprisonment for 5 years.

(2) In this section, *obtaining* property or a financial advantage includes:
(a) obtaining property or a financial advantage for oneself or another person, and
(b) inducing a third person to do something that results in oneself or another person obtaining property or a financial advantage.
192G **Dishonestly obtaining gain or causing loss** (cf sec 135.1 Cth Code)
A person who dishonestly does anything with the intention of:
(a) obtaining a gain from another person, or
(b) causing a loss to another person,
is guilty of an offence.
Maximum penalty: Imprisonment for 5 years.

192H **Identity fraud**
(1) **Dealing with identification information**
A person who:
(a) deals in identification information, and
(b) is reckless about the use of the information to commit, or to facilitate the commission of, an indictable offence,
is guilty of an offence.
Maximum penalty: Imprisonment for 5 years.

(2) **Possession of identification information**
A person who:
(a) possesses identification information, and
(b) is reckless about the use of the information to commit, or to facilitate the commission of, an indictable offence,
is guilty of an offence.
Maximum penalty: Imprisonment for 3 years.

(3) **Possession of equipment etc to make identification documents or things**
A person who:
(a) possesses any equipment, material or other thing that is capable of being used to make a document or other thing containing identification information, and
(b) intends that the document or other thing made will be used to commit, or to facilitate the commission of, an indictable offence,
is guilty of an offence.
Maximum penalty: Imprisonment for 3 years.

(4) This section does not apply to dealing in a person’s own identification information.
(5) It is not an offence to attempt to commit an offence against this section.

(6) Section 309A of the Criminal Procedure Act 1986 enables a victim of an offence against this section to obtain a certificate from a court that such an offence has been committed to assist with problems the offence has caused in relation to the victim’s personal or business affairs.

(7) In this section:

**deal** in identification information includes make, supply or use any such information.

**identification information** means information relating to a person (whether living or dead, real or fictitious, or an individual or body corporate) that is capable of being used (whether alone or in conjunction with other information) to identify or purportedly identify the person, and includes the following:

(a) a name or address,
(b) a date of birth, marital status, relative’s identity or similar information,
(c) a driver licence or driver licence number,
(d) a passport or passport number,
(e) biometric data,
(f) a voice print,
(g) a credit or debit card, its number or data stored or encrypted on it,
(h) a financial account number, user name or password,
(i) a digital signature,
(j) a series of numbers or letters (or both) intended for use as a means of personal identification,
(k) an ABN.

192I Special provisions with respect to geographical jurisdiction

(1) This section applies for the purposes of, but without limiting, Part 1A.

(2) The necessary geographical nexus exists between the State and any of the offences against this Part if the offence is committed by a public official (within the meaning of the Independent Commission Against Corruption Act 1988) and involves public money of the State or property held by the public official for or on behalf of the State.
[2] Part 5
Omit the Part. Insert instead:

**Part 5  Forgery and related offences**

**Division 1  Preliminary**

250 **Gain or loss—meaning** (cf sec 14.3 Model Code; sec 130.1Cth Code )

(1) In this Part:

- **gain** means a gain in property (whether temporary or permanent) and includes keeping what one has, and **obtaining a gain** includes:
  - (a) obtaining a gain for oneself or for another person, and
  - (b) inducing a third person to do something that results in oneself or another person obtaining a gain.

- **loss** means a loss in property (whether temporary or permanent) and includes not getting what one might otherwise get, and **causing a loss** means causing a loss to another.

(2) For the purposes of this Part, a gain or loss in property includes a gain or loss relating to the supply of services.

251 **False document—meaning** (cf sec 19.2 Model Code; sec 143.2 Cth Code)  

(1) For the purposes of this Part, a document is **false** if, and only if, the document (or any part of the document) purports:

- (a) to have been made in the form in which it is made by a person who did not in fact make it in that form, or
- (b) to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form, or
- (c) to have been made in the terms in which it is made by a person who did not in fact make it in those terms, or
- (d) to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms, or
- (e) to have been altered in any respect by a person who did not in fact alter it in that respect, or
- (f) to have been altered in any respect on the authority of a person who did not in fact authorise its alteration in that respect, or
(g) to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered, or
(h) to have been made or altered by, or on the authority of, a person who did not in fact exist.

(2) For the purposes of this Part, a person is to be treated as making a false document if the person alters a document so as to make it false within the meaning of this section (whether or not it is false in some other respect apart from that alteration).

(3) For the purpose of the application of this section, a document that purports to be a true copy of another document is to be treated as if it were the original document.

252 Inducing acceptance of false document (cf sec 19.1 Model Code; sec 144.1 Cth Code)

(1) In this Part, a reference to inducing a person to accept a false document as genuine includes a reference to causing a machine to respond to the document as if it were a genuine document.

(2) If it is necessary for the purposes of this Part to prove an intent to induce some person to accept a false document as genuine, it is not necessary to prove that the accused intended so to induce a particular person.

Division 2 Forgery

253 Forgery—making false document (cf sec 19.3 Model Code; sec 144.1 Cth Code)

A person who makes a false document with the intention that the person or another will use it:
(a) to induce some person to accept it as genuine, and
(b) by reason of so accepting it, to obtain a gain or cause a loss or to influence the exercise of a public duty,

is guilty of the offence of forgery.

Maximum penalty: Imprisonment for 10 years.

Division 3 Offences related to forgery (cf sec 19.4 Model Code; sec 145.1 Cth Code)

254 Using false document

A person who uses a false document, knowing that it is false, with the intention of:
consultation draft

Crimes Amendment (Fraud and Forgery) Bill 2009
Schedule 1 Principal amendments to Crimes Act 1900 No 40

(a) inducing some person to accept it as genuine, and
(b) by reason of the person so accepting it, obtaining a gain or
causing a loss or influencing the exercise of a public duty,
is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.

255 Possession of false document (cf sec 19.5 Model Code; sec 145.2 Cth Code)
A person who has in his or her possession a false document,
knowing that it is false, with the intention that the person or
another will use it:
(a) to induce some person to accept it as genuine, and
(b) by reason of the person so accepting it, to obtain a gain or
cause a loss or to influence the exercise of a public duty,
is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.

256 Making or possession of equipment etc for making false
documents (cf sec 19.6 Model Code; sec 145.3 Cth Code)
(1) A person who makes, or has in his or her possession, any
equipment, material or other thing designed or adapted for the
making of a false document:
(a) knowing that it is so designed or adapted, and
(b) with the intention that the person or another person will use
the equipment, material or other thing to commit the
offence of forgery,
is guilty of an offence.
Maximum penalty: Imprisonment for 10 years.

(2) A person who, without reasonable excuse, makes or has in his or
her possession any equipment, material or other thing designed or
adapted for the making of a false document, knowing that it is so
designed or adapted, is guilty of an offence.
Maximum penalty: Imprisonment for 3 years.

(3) A person who possesses any equipment, material or other thing
that is capable of being used to make a false document, with the
intention that the person or another person will use the
equipment, material or other thing to commit the offence of
forgery, is guilty of an offence.
Maximum penalty: Imprisonment for 3 years.
(4) This section applies in respect of any equipment, material or other thing that is designed or adapted for the purpose of making a false document whether or not it is also designed or adapted for another purpose.

(5) This section applies to a person who intends to commit an offence even if committing the offence concerned is impossible or the offence concerned is to be committed at a later time.

(6) It is not an offence to attempt to commit an offence against this section.

257 False statement by officer of organisation (cf sec 176 Crimes Act; sec 19.8 Model Code)

(1) An officer of an organisation who, with the intention of deceiving members or creditors of the organisation about its affairs, dishonestly publishes or concurs in publishing a document containing a statement or account that to his or her knowledge is or may be misleading, false or deceptive in a material particular is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

(2) In this section:

 creditor of an organisation includes a person who has entered into a security for the benefit of the organisation.

 officer of an organisation includes any member of the organisation who is concerned in its management and any person purporting to act as an officer of the organisation.

 organisation means any body corporate or unincorporated association.
Schedule 2  Consequential and other amendments to Crimes Act 1900 No 40

[1]  Part 4, heading
    Omit the heading. Insert instead:
    
    **Part 4  Stealing and similar offences**

[2]  Part 4, Division 1, heading
    Omit the heading.

[3]  Part 4, Division 1, Subdivisions 1–6 and 16, headings
    Omit “Subdivision” wherever occurring.
    Insert instead “Division”.

[4]  Section 158 Destruction, falsification of accounts etc by clerk or servant
    Omit the section.

[5]  Sections 164–178
    Omit the sections (and the Subdivision in which they are contained).

[6]  Section 178A
    Omit the section (and the Subdivision in which it is contained).

[7]  Section 178B
    Omit the section (and the Subdivision in which it is contained).

[8]  Section 178BA
    Omit the section (and the Subdivision in which it is contained).

[9]  Section 178BB
    Omit the section (and the Subdivision in which it is contained).

[10]  Section 178C
    Omit the section (and the Subdivision in which it is contained).

    Omit the sections (and the Subdivision in which they are contained).
[12] Section 185A
Omit the section (and the Subdivision in which it is contained).

[13] Section 186
Omit the section (and the Subdivision in which it is contained).

[14] Section 193
Renumber the section as section 192A.

[15] Part 4, Division 1A, heading
Omit the heading. Insert instead:

Part 4AB  Money laundering

[16] Part 4, Division 2, heading
Omit the heading. Insert instead:

Part 4AC  Criminal destruction and damage

[17] Part 4AC (as re-numbered by this Schedule), Subdivision headings
Omit “Subdivision” wherever occurring. Insert instead “Division”.

[18] Part 4AA Offences relating to transport services
Omit the heading to the Part. Insert instead:

Part 4AD  Offences relating to transport services

[19] Section 527 Fraudulently appropriating or retaining property
Omit the section.

[20] Section 527A Obtaining money etc by wilfully false representation
Omit the section.

[21] Section 527B Framing a false invoice
Omit the section.

[22] Section 528 Advertising reward for return of stolen property
Omit the section.
[23] **Section 545A Bogus advertisements**
Omit the section.

[24] **Section 547A False statement respecting births, deaths or marriages**
Omit the section.
Schedule 3  Amendment of Criminal Procedure Act 1986 No 209

[1] Section 309A
Insert after section 309:

309A Certificate may be issued to victim of identity crime

1) The Local Court may issue a certificate under this section if satisfied, on the balance of probabilities, that:
   (a) an identity fraud offence has been committed, and
   (b) the certificate may assist with problems the offence has caused in relation to the victim’s personal or business affairs.

2) For the purposes of this section, the victim of an identity fraud offence is any person whose identification information is the subject of the offence.

3) A certificate under this section is to:
   (a) identify the victim of the offence, and
   (b) describe the manner in which identification information relating to the victim was used to commit the offence.

4) The certificate may contain such other information as the Local Court considers appropriate.

5) The certificate is not to identify the perpetrator or any alleged perpetrator of the offence.

6) The Local Court may issue a certificate under this section whether or not:
   (a) the perpetrator of the offence is identifiable, or
   (b) any criminal proceedings have been or can be taken against a person in respect of the offence, or are pending.

7) The Local Court may issue a certificate under this section on the court’s own initiative or on application by the victim of the offence.

8) The certificate is not admissible in any criminal proceedings in relation to the offence.

9) The powers conferred by this section on the Local Court may also be exercised by the Supreme Court or the District Court during any proceedings before that Court for the alleged identity fraud offence concerned or on the disposal of any such proceedings.
(10) In this section:

identification information has the same meaning as it has in section 192H of the Crimes Act 1900.

identity fraud offence means an offence against section 192H of the Crimes Act 1900.

[2] Schedule 1 Indictable offences triable summarily

Insert after clause 10C of Part 3 of Table 1:

10D Fraud and related offences

An offence under Part 4AA of the Crimes Act 1900 (other than under section 192H (2) or (3))

[3] Schedule 1 Indictable offences triable summarily

Insert after item 12A of Part 3 of Table 1:

12B Forgery and related offences

An offence under Division 2 or 3 of Part 5 of the Crimes Act 1900 (other than under section 256 (2) or (3))

[4] Schedule 1 Indictable offences triable summarily

Insert after item 4 of Part 2 of Table 2:

4A Identity fraud

An offence under section 192H (2) or (3) of the Crimes Act 1900.

4AA Offences related to forgery

An offence under section 256 (2) or (3) of the Crimes Act 1900.
DISCUSSION PAPER ON CRIMES AMENDMENT (FRAUD AND FORGERY) BILL 2009

Background

Fraud and particularly identity fraud is a growing problem in NSW. The Australian Bureau of Statistics found that almost $1 billion was lost to Australians by fraud. This Bill creates new fraud, forgery and identity fraud offences, with up to 10 years imprisonment, in order to deter and punish those that commit these offences.

The aim of the Crimes Amendment (Fraud and Forgery) Bill 2009 is to modernise, and simplify the existing Fraud and Forgery provisions in the Crimes Act 1900 with a view to deleting the obsolete and redundant provisions and replacing them with provisions that conceptually fit in a modern Crimes Act. The Bill also creates offences addressing identity crime.

The fraud and forgery offences in the Crimes Act 1900 (NSW) are archaic, antiquated and some are obsolete. There are over 40 existing offences, many of which overlap.

The Bill adopts a number of the provisions and more broadly the structure of the national Model Criminal Code that was developed by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCLOC), which can be accessed at <http://www.pcc.gov.au/uniform/crime%20(composite-2007)-website.pdf>. The proposed amendments will bring NSW in line with the national approach to fraud, forgery and identity crime, therefore bringing Australia closer to harmonised criminal laws.

It should, however, be noted, that NSW is currently a common law state and has not codified its criminal law (i.e. the common law is still available). As a result, the Bill departs from the model criminal code in some areas. The wording of provisions differ, as NSW has not codified principles of criminal responsibility. Also, the Bill does not define dishonesty or legislate for the defence of a claim of right.

Claim of Right

In Walden v Hensler (1987) 163 CLR 561 it was found that a claim of right is a positive mistaken belief that a person has rights to the property under the law. The ‘Claim of Right’ defence can extend to larceny, property and fraud offences.

Chapter 2 of the Model Criminal Code legislates for the ‘Claim of Right’ defence as follows:

(1) A person is not criminally responsible for an offence that has a physical element relating to property if:
   (a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and

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1 The Crimes Amendment (Fraud and Forgery) Bill 2009 and this discussion paper are for consultation purposes only and do not necessarily reflect the views of the NSW Government.
(b) the existence of that right would negate a fault element for any physical element of the offence.

(2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.

(3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

NSW will continue to rely on the common law defence of claim of right under the proposed Bill. Given the defence may extend to other offences, and NSW is not currently moving to a code, it is not appropriate to begin codifying defences at this time.

Dishonesty

In Peters v The Queen (1998) 192 CLR 493 it was found that ‘If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people.’

The Model Criminal Code relies on the test established in R v Ghosh [1982] QB 1053. The Model Criminal Code defines dishonesty as follows:

(1) In this Chapter, “dishonest” means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people.

(2) In a prosecution for an offence, dishonesty is a matter for the trier of fact.

Again, for the reasons given above, NSW will continue to rely on the common law test in Peters under the proposed Bill.

FRAUD OFFENCES

Insert cl 192B – Deception meaning

‘A deception is to induce a person to believe that a thing is true which is false.’

Clause 192B defines deception to include any deception, by words or other conduct as to fact or law. The deception must have been reckless or intentional, i.e. the person practising the deception must know that the representation is false, or be reckless as to whether the representation is false.

The definition of deception also includes conduct by a person that causes a computer, a machine or any electronic device to make a response that the person is not authorised to cause it to make. As technology improves, and the opportunity for criminals to use technology to commit fraud increases, it is important that it is acknowledged that deception can be practised through computers and via the Internet. It is important that offences will appropriately capture this conduct.

This definition draws on both section 17.1 of the Model Criminal Code and section 133.1 of the Criminal Code Act 1995 (Cth) (the Commonwealth Criminal Code).

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4 Model Criminal Law Officers Committee of the Standing Committee of Attorneys-General Chapter 3 Theft, Fraud, Bribery and Related Offences 1995 p 137.
Deception is currently defined in s 178BA of the Crimes Act 1900, which will be repealed by the proposed Bill.

**Insert cl 192C – Gain or loss - meaning**

Clause 192C defines gain to mean, a gain in property (whether temporary or permanent) and it includes keeping what one has. The gain can be obtained for oneself or for another person and also includes inducing a third person to do something that results in oneself or another person obtaining a gain.

Loss means, a loss in property (whether temporary or permanent) and includes not getting what one might otherwise get.

For the purpose of this Part a gain or loss in property includes a gain or loss in supply of services. Conceptually, supply of services is generally not a form of property. However, it is possible that one person may dishonestly induce another person to supply services to them, and therefore supply has been included in this definition.

The Crimes Act 1900, currently defines property by an inclusive list to ‘include every description of real and personal property; money, valuable securities, debts, and legacies; and all deeds and instruments relating to, or evidencing the title or right to any property, or giving a right to recover or receive any money or goods; and includes not only any property originally in the possession or under the control of any person, but also any property into or for which the same may have been converted or exchanged, and everything acquired by such conversion or exchange, whether immediately or otherwise.’

The definitions of gain and loss are based on section 14.3 of the Model Criminal Code and section 130.1 of the Commonwealth Criminal Code.

**Question One:**
Are the terms of “gain” and “loss” appropriate terms and are their definitions correct? If not what is the better approach? Is the definition of property appropriate for this division, if not what is a better alternative?

**Insert cl 192D – Obtaining property by deception**

Clause 192D makes it an offence for any person to dishonestly obtain by any deception, property belonging to another with the intention of permanently depriving the other of it. This carries a maximum penalty of 10 years imprisonment and is proposed to be a Table One offence (see clause 2 of Schedule 3 of the Crimes Amendment (Fraud and Forgery) Bill 2009).

The 10 year maximum penalty is justified as the offence contains the double fault elements of deception and dishonesty. It means that where a deception has occurred, the prosecution will also have to prove that the defendant has been dishonest. In most cases the deception will prove the dishonesty but not in all, eg. the claim of right defence may be made.5

Property belongs to a person if the person has possession or control of the property, or a proprietary right in the property (see cl 192D(3)).

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5 Model Criminal Law Officers Committee of the Standing Committee of Attorneys-General p. 141.
‘Permanently depriving’, may include borrowing of the property in certain circumstances (see cl 192D(6)).

This provision is based on section 17.2 of the Model Criminal Code and section 134.1 of the Commonwealth Criminal Code.

It can be seen that this is a broad provision that will cover many of the more specific fraud offences that are currently contained in the *Crimes Act 1900*. The offences that this provision will replace are outlined below (see omission of provisions section).

**Insert cl 192E – Obtaining financial advantage by deception**

Clause 192E makes it an offence for a person by any deception to dishonestly obtain any financial advantage. This carries a maximum penalty of 10 years imprisonment and is proposed to be a Table One offence (see clause 2 of Schedule 3 of the Crimes Amendment (Fraud and Forgery) Bill 2009).

The term “financial advantage” is a broad term, which relates to intangible financial benefits rather than property. In the case of *Mathews v Fountain* [1982] VR 1042, the terms “financial” and “advantage” were found to be ordinary words and the concept of “financial advantage” a simple one, that did not need defining.

The 10 year maximum penalty is justified as the offence contains the double fault elements of deception and dishonesty.

**Insert cl 192F – Obtaining property or financial advantage by false or misleading statements**

Clause 192F is a modernised version of section 178BB of the *Crimes Act 1900*. This provision makes it an offence for a person to make or publish any statement that is false or misleading in a material way, when they know or are reckless as to whether the statement is false or misleading and they intend to obtain property or a financial advantage as a result.

This offence carries a maximum penalty of five years (as does section 178BB of the *Crimes Act 1900*). The five year maximum penalty has been selected as the offence does not require the prosecution to prove that there was any deception or dishonesty in the accused’s actions. If deception and dishonesty can be established, the accused may be charged under either the “Obtaining financial advantage by deception” or “Obtaining property by deception” provisions, which carry maximum penalties of 10 years. It is proposed that the offence be a Table One offence (see clause 2 of Schedule 3 of the Crimes Amendment (Fraud and Forgery) Bill 2009).

**Insert cl 192G – Dishonestly obtaining a gain or causing a loss**

Clause 192G makes it an offence to dishonestly do anything with the intention of obtaining a gain or causing a loss. This provision covers circumstances where dishonesty is relied on to establish the offence.

Clause 192G is modelled on section 135.1 of the Commonwealth Criminal Code. However, MCLOC did not recommend that this form of provision be included in the Model Criminal Code. The breadth of the provision means that guilt ultimately hangs on whether the accused was dishonest.
The offence of “dishonestly obtaining a gain” is intended to cover situations where the defendant dishonestly obtains a gain, but there is no identifiable person that has suffered a loss.6

Dishonestly obtaining a loss covers situations where the accused did not actually obtain anything. For example, “Person A” may have hacked into “Person B’s” computer and obtained their bank account details and then transferred money from “Person B’s” account to “Person C’s” account (even though they intended to transfer it to their own account). “Person A” has caused a loss but has not obtained a gain. The aim of this provision is to cover such circumstances.

This provision carries a maximum of five years imprisonment as:
- only the element of dishonesty needs to be proven,
- in relation to obtaining a gain there is not necessarily a victim, therefore reducing culpability, and
- in relation to causing a loss it is not necessary that the accused obtained any benefit therefore reducing the culpability.

It is proposed that clause 192G be a Table One offence (see clause 2 of Schedule 3 of the Crimes Amendment (Fraud and Forgery) Bill 2009).

**Question Two:**

Is this offence too broad, if so how should they be refined?

<table>
<thead>
<tr>
<th>An organised fraud offence?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Much discussion has been had as to whether an organised fraud provision should be implemented into the NSW Crimes Act 1900.</td>
</tr>
<tr>
<td>There are significant problems in defining what is “organised”. Should “organised” reflect the number of people involved in committing the crime or the amount of times the crime was committed. In relation to the number of people that have committed a crime, the offence of conspiracy is an available alternative. That leaves us with defining “organised” based on the number of offences that have been committed, however such numerical values are arbitrary and may not necessarily establish any course of conduct. Experience else where also suggests that establishing an organised fraud offence can complicate and extend the length of any prosecution as both the primary and “organised fraud” elements must be established.</td>
</tr>
</tbody>
</table>

The sentencing discretion of the Court would be limited by creating an organised fraud offence with a maximum penalty of, for example 25 years as if a person has in fact committed three Fraud offences carrying 10 years imprisonment each they would in fact be liable for 30 years imprisonment. For these reasons MCLOC did not recommend that an organised fraud offence should be included in the Model Criminal Code.

It should also be noted that under the NSW common law there is an offence of ‘conspiracy to defraud’. For more information regarding this offence see Peters v The Queen (1998) 192 CLR 493.

6 Steel, A., From Larceny to Theft: Reform of property offences in New South Wales based on the Model Code/Theft Act Approach 10/10/2003 pg 223
Question Three:
Do you think that an organised fraud offence is needed in the Crimes Act 1900? If so how should it be structured and how should “organised” be defined?

IDENTITY CRIME OFFENCES

MCLOC released a final report on Identity Crime in March 2008. This Bill largely adopts the offences recommended by MCLOC. The offences in this Bill, are targeted at those who are dealing in identification information within a state jurisdiction.

While, identity crime is growing and merging with cyber crime as technologies develop, it tends to cross national and international borders, with the more serious cases of identity crime coordinated by international syndicates. As a result, this form of offending is better dealt with through Commonwealth cyber crime offences. The Commonwealth House of Representatives is currently conducting an inquiry into cyber crime and it is hoped that the House of Representatives will recommend some relevant policy and legislative mechanisms to deal with this issue.

In addition, identity crime overlaps with offences of theft, forgery, fraud and computer offences. It is envisaged that most defendants will be charged with an identity crime offence as well as a theft, fraud, forgery or computer offence. The pure identity crime offences attempt to fill any gaps in the existing legislation and criminalise the possession, creation and dealing in identity information notwithstanding the absence of any gain or loss occurring.

Insert cl 192H – Identity Fraud

Clause 192H(1) – Dealing with Identification Information

Clause 192H(1) makes it an offence to deal in identification information and be reckless about the use of the information to commit, or to facilitate the commission of, an indictable offence. The maximum penalty is five years imprisonment.

Clause 192H(1) adopts section 3.3.6(2) of the Model Criminal Code. However, clause 192H(1) departs from the model in one important aspect: the fault element for clause 192H(1) is “recklessness” whereas the fault element for the model provision is “intent”. The NSW provision will therefore, be broader than the model provision, enabling it to capture circumstances where the accused was reckless as to whether the information could be used to commit or facilitate a crime.

It is proposed that clause 192H(1) be a Table One offence (see clause 2 of Schedule 3 of the Crimes Amendment (Fraud and Forgery) Bill 2009).

Question Four:
Is “recklessness” an appropriate standard of fault for the offence in clause 192H(1), or is the higher standard of “intent” more appropriate and why?

“Deal” is very broadly defined (see cl 192H(7)). “Deal” includes making, supplying or using any identification information. This would include a range of things, such as the capture of data through skimming devices as well as obtaining information from hacking into people’s home computers.
“Identification information” is also very broadly defined (see cl 192H(7)). “Identification information” means information relating to a person (whether living or dead, real or fictitious, or an individual or a body corporate) that is capable of being used to identify or purportedly identify the person.

Clause 192H(1) is broad enough to make a “mule” culpable, as the offence covers any person that supplied information to another person, being reckless as to whether it would be used to facilitate the commission of an offence.

Clause 192H(2) – Possession of identification information
Clause 192H(2) makes it an offence to possess identification information and be reckless about the use of the information to commit, or to facilitate the commission of an indictable offence. The offence carries a maximum penalty of three years imprisonment and will be a Table Two offence (see clause 4 of schedule 3 of the Crimes Amendment (Fraud and Forgery) Bill 2009).

Clause 192H(2) adopts clause 6.3.6(3) of the Model Criminal Code. However, clause 192H(2) departs from the model in one important aspect: the fault element for clause 192H(2) is “recklessness” whereas the fault element for the model provision is “intent”.

An offence of mere possession of identification information without lawful excuse has not been adopted. Identification information is not criminal; per se and it may conflict with fundamental and long standing criminal law principles to place an onus on a defendant to prove lawful excuse. Such an offence was not recommended by MCLOC, as it was considered too broad and likely to capture innocuous conduct. It may also undermine any deterrent effect the offence may have, limit the scope of parliamentary intent and create a greater risk that legitimate activities will be caught. In addition, a person that merely possessed unlawfully obtained identity information could be prosecuted under section 527C of the Crimes Act 1900.

This offence has a three year maximum penalty as it is likely that an offender will be charged with another offence, such as fraud or forgery or in more serious cases, multiple counts. In situations where the offending is less serious and there is only one charge, the penalty of three years will be adequate. Clause 192H(2) is very similar to section 308F of the Crimes Act 1900 which also carries a maximum penalty of three years imprisonment.

Question Five:
Is recklessness an appropriate standard of fault for the offence in 192H(2), or is the higher standard of intent more appropriate?

Clause 192H(3) – Possession of equipment etc to make identification documents or things
Clause 192 is modelled on section 6.4(4) of the Model Criminal Code. Clause 192 makes it an offence for a person to possess any form of equipment (eg a printer or photocopier) that is capable of being used to make a document or thing containing identification documentation, with the intention that the document or thing be used to commit or facilitate the commission of an indictable offence. The maximum penalty for this offence is three years imprisonment. It is proposed that clause 192H(3) be a
Table Two offence (see clause 4 of schedule 3 of the Crimes Amendment (Fraud and Forgery) Bill 2009).

Clause 192H is comparable to clause 256(3) of the Crimes Act (Fraud and Forgery) Bill (discussed below). The intention of this offence is to capture conduct that would not otherwise be captured in the 10 year offence contained in clause 256(1) of the Crimes Act (Fraud and Forgery) Bill (discussed below). It also reflects developments in technology since the introduction of forgery offences and the fact that many commercially available pieces of equipment can be used to make identification information.

**Insert cl 192I – Special provisions with respect to geographical jurisdiction**

Clause 192I merely extends the geographical jurisdiction for these offences to offences committed by a public official and where it involves public money.

**FORGERY AND RELATED OFFENCES**

**Omission of Part 5**

The offences in this part are particularly archaic. For example, section 260 makes it an offence to forge or utter an East India Bond, this offence dates back to the eighteenth century, when the East India Company issued ‘India bonds’ on the London Stock Exchange to fund the loans it made to the government. Part 5 of the Crimes Act 1900 is filled with specific and outdated offences. It is proposed to omit Part 5 and replace it with model, modern offences that due to their breadth will withstand the test of time (unlike the East Indian Bonds).

Question Six:
Are there any provisions that are currently in Part 5 of the Crimes Act 1900 that will not be covered in the proposed broad forgery offences? If so what are they, are they still relevant and why?

**Insert cl 250 - Definitions**

Clause 250 defines the terms “gain”, “obtaining a gain”, “loss” and “causing a loss”. The definitions for these terms are based on section 14.3 of the Model Criminal Code and section 130.1 of the Commonwealth Criminal Code and mirror the definitions in the fraud section (clause 192C).

**Insert cl 251 – False document - meaning**

Clause 251 defines what a false document is. The definition is based on section 19.2 of the Model Criminal Code and section 143.2 of the Commonwealth Criminal Code.

**Insert cl 252 – Inducing acceptance of false document**

Clause 252 stipulates that inducing a person to accept a document as genuine includes causing a machine to respond to the document as if it were a genuine document.

Under the Interpretation Act 1987 (NSW) document means any record of information, and includes:

(a) anything on which there is writing, or
(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or

(d) a map, plan, drawing or photograph.

As a result of the definition of document and clause 252 of the Bill, the misuse of modern technology for the purpose of forgery is covered.


**Insert cl 253 – Forgery – making false document**

Clause 253 makes it an offence for a person to make a false document, with the intention of inducing a person to except it as genuine and therefore obtain a gain or cause a loss. The maximum penalty is 10 years imprisonment.

This provision mirrors section 19.3 of the Model Criminal Code and section 144.1 of the Commonwealth Criminal Code. However, clause 253 departs from the model in two aspects. The first is that the fault element for clause 253 is “intention” whereas the fault element for the model provisions requires both ‘intent’ and ‘dishonesty’. The model provision states:

A person who makes a false document with the intention that the person or another will dishonestly use it:

(a) to induce some person to accept it as genuine; and

(b) by reason of so accepting it, to obtain a gain or cause a loss or to influence the exercise of a public duty,

is guilty of the offence of forgery.

Maximum penalty: Imprisonment for 7 years and 6 months.

It was decided to use only the fault element of “intention” as a person who makes a false document with the intention that they themselves or another person will induce a third person to accept it as genuine and therefore cause a loss or obtain a gain, is acting dishonestly. Therefore, there is no need to include the additional fault element of “dishonesty” in the provision.

It can also be assumed that a person who makes a false document knows that it is false, therefore the additional fault element of “knowing” the document to be false is not required.

Clause 253 departs from the model as it provides a maximum penalty of 10 years whereas the Model Criminal Code provides for a maximum penalty of 7 years and 6 months. The Commonwealth Criminal Code also adopts a maximum penalty of 10 years imprisonment.

It is proposed that clause 253 be a Table One offence (see clause 3 of Schedule 3 of the Crimes Amendment (Fraud and Forgery) Bill 2009).
Question Seven:
Is the fault element of “intention” adequate or would it be more appropriate to adopt the model provision’s additional test of “dishonesty”? Is 10 years an appropriate maximum penalty? If no, what is a more appropriate sentence length and why?

Insert cl 254 – Using false document
Clause 254 makes it an offence to use a false document, knowing it to be false with the intention of inducing some person to accept it as genuine and therefore obtaining a gain or causing a loss.

Clause 254 mirrors section 19.4 of the Model Criminal Code and section 145.1 of the Commonwealth Criminal Code. However, clause 253 departs from the model in two aspects. The first is that the fault elements for clause 253 are “knowledge” and “recklessness” whereas the fault elements for the model provisions are three fold: “knowledge”, “intention” and “dishonesty”. The model provision states:
A person who dishonestly uses a false document, knowing that it is false, with the intention of:
(a) inducing some person to accept it as genuine; and
(b) by reason of so accepting it, obtaining a gain or causing a loss or influencing the exercise of a public duty,
is guilty of an offence.
Maximum penalty: Imprisonment for 7 years and 6 months.

The second departure is that it provides a maximum penalty of 10 years whereas the Model Criminal Code provides for a maximum penalty of 7 years and 6 months. The Commonwealth Criminal Code also adopts a maximum penalty of 10 years imprisonment.

It is proposed that clause 254 be a Table One offence (see clause 3 of Schedule 3 of the Crimes Amendment (Fraud and Forgery) Bill 2009).

Clause 254 includes the fault element of ‘knowledge’ in order to ensure that the accused has imparted responsibility in the use of the forged document.

Question Eight:
Is the fault element of “intention” adequate or would it be more appropriate to adopt the model provision’s additional requirement of “dishonesty”? Is 10 years an appropriate maximum penalty? If no, what is a more appropriate sentence length and why?

Insert cl 255 – Possession of false document
Clause 255 makes it an offence to possess a false document, knowing that it is false, with the intention that the person or another will use it to induce some person to accept it as genuine and therefore obtain a gain or cause a loss. It is proposed that this offence would carry a maximum penalty of 10 years imprisonment.

This offence is distinguishable from the identity crime possession. Forged documents involve the positive act of their creation and are innately illegal. The possession of false documents offence requires the offender to know that the document is false and it also carries the fault element of intention. The identity crime offences cover a
wider range of material, which in itself may be innocuous. For these reasons there is variation between the penalties for the two offences.

Clause 255 mirrors section 19.5 of the Model Criminal Code and 145.2 of the Commonwealth Criminal Code. The only departure is the maximum penalty, which is 10 years’ in the Bill, and 7 years and 6 months in the Model Criminal Code. The Commonwealth Criminal Code also adopts a maximum penalty of 10 years imprisonment.

It is proposed that clause 255 be a Table One offence (see clause 3 of Schedule 3 of the Crimes Amendment (Fraud and Forgery) Bill 2009).

**Question Nine:**
Is 10 years an appropriate maximum penalty? If not, what is a more appropriate sentence length and why?

<table>
<thead>
<tr>
<th>Insert cl 256 – Making or possession of equipment etc for making false documents</th>
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</thead>
<tbody>
<tr>
<td>Clause 256(1) is modelled on section 19.6(1) of the Model Criminal Code and section 145.3 of the Commonwealth Criminal Code.</td>
</tr>
</tbody>
</table>

Clause 256(1) makes it an offence for a person who makes, or has in his or her possession, any equipment, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted and with the intention that the person or another person will use the equipment, material or other thing to commit the offence of forgery. The offence will carry a maximum penalty of 10 years imprisonment (the Commonwealth Criminal Code has a maximum penalty of 10 years imprisonment, whereas the Model Criminal Code recommends a maximum penalty of 7 years and 6 months). It is proposed that clause 256(1) be a Table One offence (see clause 3 of Schedule 3 of the Crimes Amendment (Fraud and Forgery) Bill 2009).

Clause 256(2) is modelled on section 19.6(2) of the Model Criminal Code and section 145.3 of the Commonwealth Criminal Code. Clause 256(2) makes it an offence for a person who, without reasonable excuse, makes or has in his or her possession any equipment, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted. The proposed maximum penalty is imprisonment for three years, whereas the Model Criminal Code and the Commonwealth Criminal Code have a maximum penalty of two years imprisonment. It is proposed that clause 256(2) be a Table Two offence (see clause 4 of schedule 3 of the Crimes Amendment (Fraud and Forgery) Bill 2009).

Clause 256(3) makes it an offence to possess any equipment, material or other thing that is capable of being used to make a false document, with the intention that the person or another person will use the equipment, material or other thing to commit the offence of forgery. This offence has a maximum penalty of three years imprisonment. It is proposed that clause 256(3) be a Table 2 offence (see clause 4 of schedule 3 of the Crimes Amendment (Fraud and Forgery) Bill 2009). This offence will cover situations were everyday equipment such as photocopiers are used for the purpose of forgery. It sits on par with the possession of equipment to create identification documentation.
**Insert s257 – False statement by officer of organisation**

This provision essentially modernises section 176 of the *Crimes Act 1900* and also adopts section 19.8 of the Model Criminal Code.

This provision makes it an offence for an officer of an organisation to dishonestly publish a document containing a statement that it knows may be misleading, false or deceptive in a material way with the intention of deceiving the organisation’s members or creditors. This offence would carry a maximum penalty of 5 years imprisonment.

It is proposed that clause 257 be a Table One offence (see clause 3 of Schedule 3 of the Crimes Amendment (Fraud and Forgery) Bill 2009).

**False accounting provision?**

The model Criminal Code contains a false accounting provision:

**False accounting**

A person who dishonestly, with the intention of obtaining a gain or causing a loss:

(a) destroys, defaces, conceals or falsifies any document made or required for any accounting purpose, or

(b) in furnishing information for any purpose, produces or makes use of any document made or required for any accounting purpose that to his or her knowledge is or may be misleading, false or deceptive in a material particular, is guilty of an offence.

Maximum penalty: Imprisonment for 7 years and 6 months.

**Question Ten:**

Should this provision be adopted into the *Crimes Act 1900* or can the circumstances it covers be dealt with under the new more general fraud provisions?

**CONSEQUENTIAL AND OTHER AMENDMENTS TO THE CRIMES ACT 1900**

This Schedule essentially reorders the structure of the property offences contained in the *Crimes Act 1900* and repeals provisions that will be replaced by the new fraud and forgery provisions or are no longer required.

**Omission of provisions that are covered by broader offences**

There are a number of provisions that are being removed from the *Crimes Act 1900* as they are now covered by the broader fraud and forgery offences or are no longer relevant. They are as follows:

- Section 158 *Destruction, falsification of accounts etc by clerk or servant*
- Section 164 *Terms ‘agents’, ‘intrusted’ and ‘misappropriate’.*
- Section 165 *Agent misappropriating money etc intrusted to him or her*
- Section 166 *The like as to goods etc intrusted to him or her*
- Section 167 *Not to affect trustees or mortgages nor to restrain agents from receiving money on valuables securities etc*
- Section 168 *Fraudulent sales of property by agent*
- Section 169 *The same by person under power of attorney*
- Section 170 *Agent obtaining advances on property of his or her*
• Section 171 What to be deemed instructing with goods etc
• Section 172 Trustees fraudulently disposing of property
• Section 173 Directors etc fraudulently appropriating etc property
• Section 174 Directors etc omitting certain
• Section 175 Director etc wilfully destroying etc books of company etc
• Section 176 Directors etc cheating or
• Section 176A Directors etc cheating or
• Section 177 Proviso to sections 165 to 176
• Section 178 No relief from compulsory disclosure
• Section 178A Fraudulent misappropriation of moneys collected or received
• Section 178B Valueless Cheques
• Section 178BA Obtaining Money by Deception
• Section 178C Obtaining Credit by Fraud
• Section 179 False pretences etc
• Section 180 Causing payment etc by false pretences
• Section 181 False pretences of title
• Section 182 Accused may be convicted on a charge of false pretences etc though property obtained partly by false promise
• Section 183 Trial for false pretences etc – verdict of larceny
• Section 184 Fraudulent personation
• Section 185 Inducing persons by fraud to execute instruments
• Section 185A Inducing persons to enter into certain arrangements by misleading etc statements etc
• Section 186 Taking reward for helping to recover stolen property
• Section 527 Fraudulently appropriating or retaining property
• Section 527A Obtaining money etc by wilfully false representation
• Section 527B Framing a false invoice
• Section 527C Persons unlawfully in possession of property
• Section 528 Advertising reward for return of stolen property
• Section 545A Bogus advertisements
• Section 547A False statement respecting births, deaths and marriages

Question Eleven:
Do you agree with the removal of the above provisions? If not, what provision do you disagree should be removed; how is it not covered in either the newer fraud or forgery provisions and why is the provision still needed?

AMENDMENT OF CRIMINAL PROCEDURE ACT 1986

| Insert cl 309A – certificate may be issued to victim of identity crime |

This provision adopts MCLOC’s recommendation that a court may issue a victim certificate when the court is satisfied on the balance of probabilities that the applicant was a victim of identity crime. Certificates will be able to be obtained during a trial or independently of a prosecution.

Question Twelve:
Do you think that it is appropriate that NSW adopts this provision? Do you think that it will assist victims of identity crime? Should the Evidence Act apply to obtaining the certificate?
Invitation to comment

Comment on any aspect of the draft Bill is invited no later than 14 August 2009 and can be sent to Lauren Judge at lauren_judge@agd.nsw.gov.au or to:

Ms Lauren Judge
Legislation Policy and Criminal Law Review Division
Attorney General’s Department
GPO Box 6 SYDNEY NSW 2001

It would be appreciated if your submission included the contact details of a relevant officer for possible further round table discussions on the proposed Bill.

Thank you for the time you have taken to read this consultation paper and for any comments that you may wish to make.