METHODOLOGICAL IMPEDIMENTS TO RESEARCHING SERIOUS FRAUD IN AUSTRALIA AND NEW ZEALAND

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Introduction

Fraud is one of the principal crime concerns of the twenty-first century that affects governments, businesses and individuals alike. Financial crimes committed through dishonesty create anxiety in the community and have the capacity to retard legitimate business development, as we have seen in the case of electronic commerce where security risks have slowed the implementation of on-line business models. Losses can result in increased costs for consumers or depleted return on investments as well as considerable losses of public sector revenue.

In August 1996, I gave a paper at the *Australasian Heads of Fraud Conference* at Perth (subsequently published as Smith 1997). This conference was held annually during the 1990s for the heads of police fraud squads from each state and territory in Australia and New Zealand. One of the recommendations of this conference was that: 'the Australian Institute of Criminology be asked to provide assistance in addressing the issue of compiling national statistics in relation to fraud'.

The idea was proposed that a sample of finalised police briefs supplied by each agency would be examined and analysed to determine the nature of fraud cases prosecuted, how much financial loss was involved, who the offenders and victims were, and how cases were dealt with in the courts.

During 1997, I undertook a preliminary examination of records held by the Victorian Major Fraud Group and began the process of developing a research agenda to gather data from each jurisdiction.

In addition, and also in 1997, I participated in a group organised by the Institute of Chartered Accountants in Australia, the Fraud Advisory Council, which was established to address the problem of fraud in Australia. Arising from the Report of the Council, *Taking Fraud Seriously* (Smith and Grabosky 1998), discussions were held with PricewaterhouseCoopers, which was also a Council member, about the need for national fraud statistics and an agreement was reached to fund a research study of serious fraud cases.

The preliminary findings of the study will be released this week in Canberra (Australian Institute of Criminology and PricewaterhouseCoopers 2003).

This paper reviews the various problems that arose during the conduct of this study over four years and considers ways in which they might be overcome in the future. The principal difficulties related to definitional and sampling questions particularly concerning the range of criminal offences involved across jurisdictions, obtaining permission to inspect official police and prosecution files, dealing with privacy and confidentiality questions, ensuring uniformity in data collection, and devising appropriate coding and classification practices to analyse costs involved and criminal justice performance measures in systems with differing procedural and sentencing practices.

Definitional Problems

The first problem which arose concerned the definition of fraud. Fraud is a generic category of conduct that involves the use of dishonest or deceitful means in order to obtain some unjust advantage over another. Dishonesty is the key attribute that distinguishes fraudulent from innocent conduct and rather than defining dishonesty in legislation it is usually a matter of fact for juries to determine in criminal cases.

Australian Auditing Standard AUS 210 defines fraud as 'an intentional act by one or more individuals among management, those charged with governance of an entity, employees, or third parties involving the use of deception to obtain an unjust or illegal advantage' (Auditing and Assurance Standards Board 2002).

Although fraud is usually considered in terms of economic consequences, it can also occur in other settings such as offences of procuring sexual penetration by threats or fraud. This makes fraud a difficult concept to delineate.

In the federal criminal law system which operates in Australia, there are nine separate jurisdictions, in addition to New Zealand. Each has its own offences of deception with different sanctions applying in many.

The Australian Bureau of Statistics (1997) has its own classification of offence types, the Australian Standard Offence Classification which has used the category of 'deception and related offences' since 1997. This includes offences involving 'the use of deception, secret agreements or the making of false instruments with the intent of dishonestly obtaining property, services or other advantage'. The previous system, the Australian National Classification of Offences, used the category fraud and misappropriation, and before this various categories of fraud offences were used by police such as deception and currency offences, obtaining by deception; offences against trust/currency; fraud, forgery and false pretences (including offences of trusteeship, false pretences, currency and imposition).

An indication of the far-reaching scope of fraud is apparent from Victoria Police Crime Statistics which set out 137 different deception offence descriptions currently in use. In addition, there are a further 170 offence descriptions that could also be relevant to the prosecution of certain other forms of fraud and dishonesty including conduct that relates to electronic commerce. These include various computer crime offences and telecommunications crimes.

The problem is that each jurisdiction has a different range of offences making comparisons difficult.

The need to harmonise laws in Australia has been addressed by the Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General. Already legislation has been enacted by the Commonwealth to establish uniform rules governing offences of theft and fraud *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act* 2000, which received assent on 24 November 2000 and commenced on 24 May 2001. When uniform laws are adopted by the States and Territories, this will make the task of gathering of uniform fraud statistics considerably easier.

Unreported and Undetected Fraud

Of course, research that relies upon cases coming to the attention of the police excludes non-reported matters as well as matters that might not even have been detected by victims of fraud and deception, such as those who give money to non-existent charities. Victims may simply part with funds in the belief that they will be used for the legitimate purpose for which they were intended. Only rarely will a benefactor verify the identity of an individual collecting for a charity, particularly if the organisation is unregistered and does not qualify for tax deductibility status. It is impossible to know precisely the extent of under-reporting of crimes committed in this way.

Also excluded are cases which victims may classify as bad debts that are written off for accounting and taxation purposes. If a bank, for example, lends money to an individual who fails to make repayments and is unable to be located, this could either be dealt with by the bank as fraud or simply as a default in payment. Arguably many such cases are simply written off as bad debts and never reported to police.

The latest KPMG fraud survey found that 37% of fraud offences were not reported to the police by the victim organisation (KPMG 2002), while Ernst and Young's *Eighth Global Fraud Survey* found that 75% of cases of fraud were not reported to police (Ernst and Young 2003). Any attempt to estimate the size of the fraud problem must take the problem of non-reporting of fraud extremely seriously.

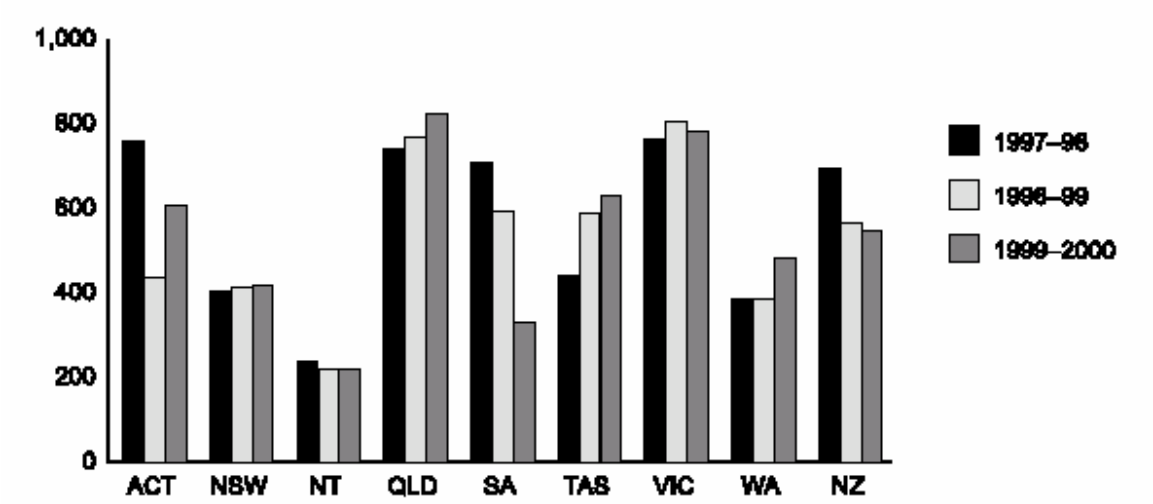
The study which we have undertaken does not attempt to address the problem of non-reporting but simply confines itself to the analysis of cases that have come to the attention of police and been prosecuted before the courts. Although this restricts the sample, it means that there can be greater confidence that the allegations made have been proved and that the facts recorded are verifiable.

Sampling

In addition to involving a wide range of criminal offences, fraud exists on a large spectrum in terms of seriousness. Individual cases could extend from passing a cheque for $50 having insufficient funds in the account, to misuse of corporate funds involving many millions of dollars.

In Australia in 2000-2001, 106,141 deception offences were recorded by police, or 545 per 100,000 of the Australian population. Rates for each State and Territory and New Zealand are shown in Figure 1.

Figure 1 – Rate of fraud offences recorded by police 1997-2000 per 100,000 population



Sources: ACT: Australian Federal Police, *Annual Report on Policing in the Australian Capital Territory*, 1997/98 - 1999/2000; NSW: NSW Bureau of Crime Statistics and Research 1997 – 2000; NT: Annual Report of the Police Force of the Northern Territory, Northern Territory Emergency Services, Fire Service of the Northern Territory/ Northern Territory Police, Fire & Emergency Services, *Annual Report* 1997/98 - 1999/2000; QLD: Queensland Police Service, *Annual Statistical Review*, 1997/98 - 1999/2000; SA: South Australia Police, *Statistical Review*, 1997/98 - 1999/2000; TAS: *Annual Report of the Department of Police & Public Safety* 1997/98 - 1999/2000; VIC: Victoria Police, *Crime Statistics*, 1997/98 - 1999/2000; WA: Western Australia Police Service, *Annual Crime Statistics Report*, 1997/98 - 1999/2000; NZ: New Zealand Police, *Annual Report*, 1997/98 – 1999/2000.

Clearly it would be impossible to analyse all of these cases in any depth.

Seriousness

Accordingly, it was decided to focus on serious fraud cases that came within the jurisdiction of the principal police fraud agencies in Australia and the Serious Fraud Office in New Zealand. The following factors were used in the determination of seriousness:

- financial loss (generally over $100,000 unless other factors made the case of unusual seriousness or complexity); or
- sophistication in the planning and or execution of the offence (such as through the use of computers, electronic transfers of funds, forged instruments, multiple false identities etc.); or

- organisation of the offender(s) (such as the presence of multiple offenders, cross-border activities relating to the movement of individuals or funds, large numbers of victims, etc.); or
- fraud offences committed by professionals such as solicitors, accountants, financial advisers, mortgage brokers etc. who carry out serious offences involving breach of trust concerning clients' funds.

Offences

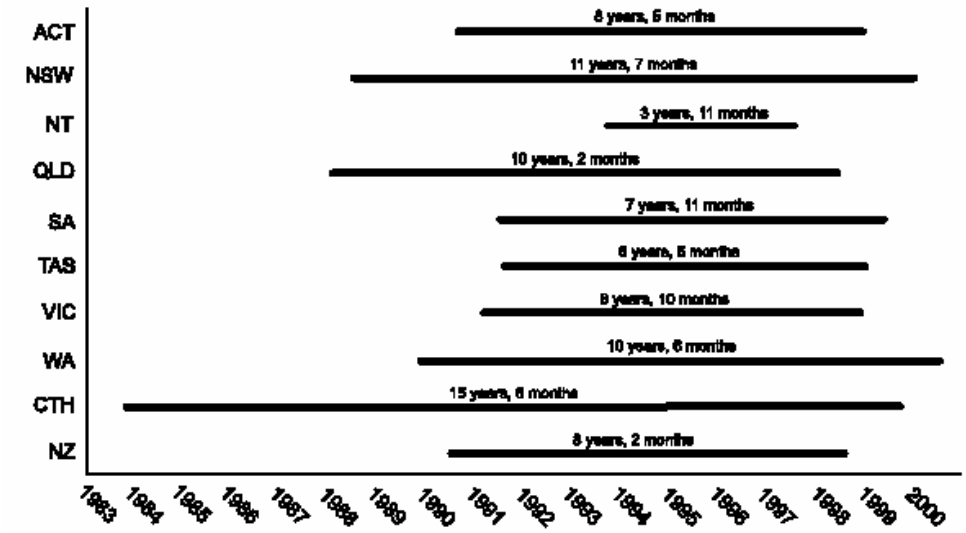
The present study examined cases involving serious fraud, as defined above that were prosecuted throughout Australia and New Zealand. Cases were included if they involved fraud or dishonesty-related offences such as obtaining property by deception and obtaining financial advantage by deception even if the case also had other offences charged such as conspiracy, theft, forgery or computer-related offences. Cases involving theft of Commonwealth funds and benefits through dishonest means were also included.

Years

Again, in order to limit the scope of the study, it was decided to examine only cases that had resulted in a judicial determination in the calendar years 1998 and 1999 as well as cases in which an appeal was lodged during those years, even if the appeal was not heard until later. This meant that the incidents that were involved took place some considerable time earlier, in one Commonwealth case heard in Victoria, extending back as far as December 1983.

Figure 2 shows the duration of the most lengthy cases in each jurisdiction with each bar representing the date of the first offence to the date of original sentencing.

Figure 2 – Duration of the most lengthy proceedings by jurisdiction.

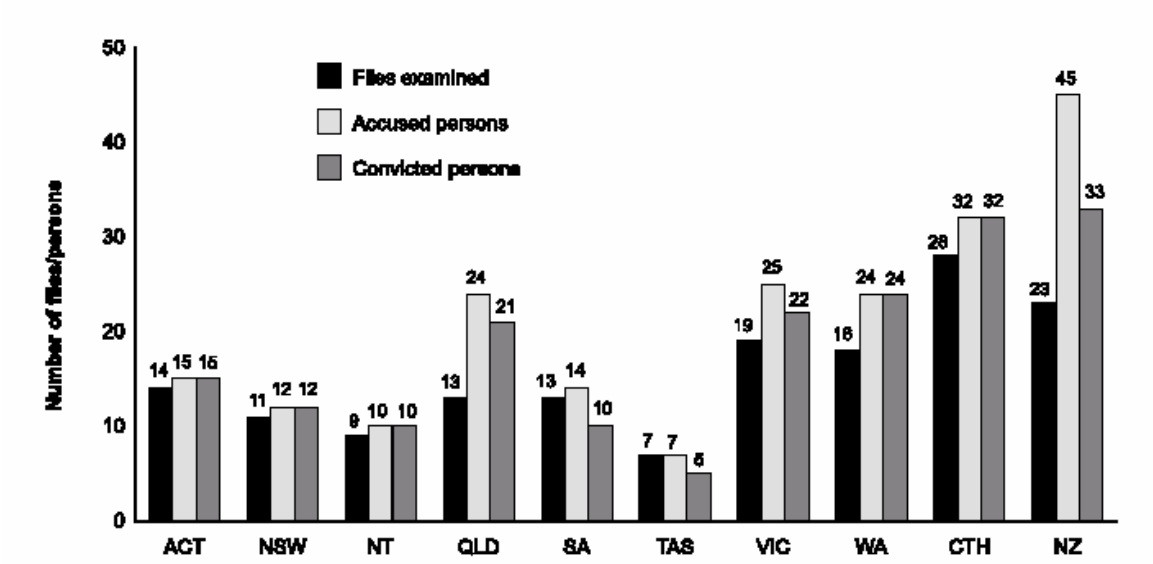


Source: Australian Institute of Criminology and PricewaterhouseCoopers (2003) computer file.

The years 1998 and 1999 were chosen in order for any appeals resulting from court decisions to have been disposed of (some of which took a number of years to be concluded) as it was important for the judicial process to have been finalised, as much as was possible. Data were recorded on the basis of appeal decisions rather than first instance trial decisions, where appeals had taken place.

Sample Description
To summarize, the research involved the inspection of 155 files relating to 208 accused persons from the ten jurisdictions, 183 of whom were convicted of offences (Figure 3).

Figure 3 - Number of files examined and persons accused and convicted in each jurisdiction



Note: The category of convicted persons excludes those accused who were acquitted (7) or in respect of whom charges were dismissed (7), or a *Nolle Prosequi* entered (1), or proceeding was stayed (1), or where information concerning their conviction was unavailable (9).
Source: Australian Institute of Criminology and PricewaterhouseCoopers (2003) computer file.

A 'file' was defined as the documents relating to legal proceedings that involved charges against one or more accused persons that were heard by one judge in a single sentencing hearing. Accordingly, some individuals were involved in a number of files in some jurisdictions and some files had more than one accused.

In addition, the number of 'files' inspected did not necessarily coincide with the number of agency files, separately numbered, as in some cases various agency files involving the same offender were dealt with by a single judge during the one hearing. 183 persons were convicted of some or all charges (88 % of the total number of accused persons). The reason for this high conviction rate is partly due to the fact that the files made available for inclusion in the study tended to be those in which a conviction had been obtained as these were more easily able to be located.

In the Northern Territory and Tasmania, the least number of files were examined as the serious fraud case load in these jurisdictions was relatively small. Commonwealth files were drawn from the regional offices of the Commonwealth DPP in various jurisdictions as these matters were heard by the relevant State or Territory court. The number of files inspected in each jurisdiction did not necessarily reflect the case load of the agencies involved. Rather, the files inspected were simply those that were available and fulfilled the sampling criteria described above.

Access

Obtaining data from official documentary sources presented some practical difficulties. The relevant facts were usually contained in documents in police briefs and prosecution files, although these sometimes failed to have the trial judge's sentencing remarks which had to be obtained from court registries and reporting agencies on some occasions. Information concerning appeals was also often located in separate files, although appeal decisions were usually available from on-line databases.

The key documents within official files were the police charge documents, witness statements, pre-sentence reports, offenders' prior criminal history transcripts, trial judges' sentencing remarks, and appeal decisions. In addition, important facts relating to key dates in the court process were often located on the covers of some files.

Originally, the sample was to include all completed matters that fulfilled the above criteria of date, seriousness, and nature of offence. It transpired, however, that some files failed to contain essential documents necessary to complete the data collection process while other files could not be located by the agencies in question. This meant that a form of quota sampling was employed in which cases were included in which files were available for inspection and in which the bulk of the data fields could be satisfied. Inevitably, some data remained missing.

The selection of files was largely undertaken by officers within the agencies concerned who located cases that fulfilled the above criteria. This sometimes required police services to notify prosecution agencies of relevant cases, or individual investigators to identify appropriate cases for inclusion in the sample. The sample could, arguably, have been distorted by agencies failing to produce certain files for inspection, although there was no indication that any conscious or organised attempt to manipulate the sample in this was undertaken by the agencies involved. Agencies remained cooperative with the study throughout, although were sometimes hampered by limitations in staff and resources.

In most jurisdictions, the office of the Director of Public Prosecutions was able to provide the necessary files. Where this was not possible, police or court files were examined. Often the files held by these different agencies contained copies of the same documents.

In New Zealand, access to relevant files proved to be considerably more straightforward than the process in Australia. The Serious Fraud Office deals principally with fraud cases and has joint investigatory and prosecutorial functions. All the necessary documents were, therefore, able to be found within the files.

Privacy and Ethical Considerations

Because police and prosecution files contain confidential and sometimes sensitive information, it was necessary to have the research approved by an Institutional Human Research Ethics Committee. This was done originally on 10 February 2000 and subsequently, in respect of the revised methodology concerning Commonwealth matters, on 21 August 2001.

The particular issues relating to confidentiality were that the files contained the names of accused persons, witnesses and sometimes informants who had provided information to police in confidence and whose safety could be placed in jeopardy if public disclosure took place. Police and prosecution agencies sometimes entered into agreements with informants not to disclose their names to third parties, which, of course, included researchers, even if undertakings were given not to disclose information publicly.

Files also contained private information relating to offenders such as criminal history information and psychiatric assessments contained in pre-sentence reports, as well as victim impact statements.

In order to comply with ethical principles, personal undertakings were given by the researchers who examined the files not to record or to disclose the names of individuals or organisations or to record information that could lead to the identification of anyone.

In some jurisdictions, such an undertaking was considered to be insufficient and staff of the agencies in question were required actually to remove sensitive documents from files prior to the files being examined by the researchers.

In the case of the Commonwealth, researchers were not permitted to inspect police or prosecution files at all as this would have infringed various pieces of legislation and memoranda of understanding with departments concerning disclosure of information. Although the Australian Federal Police identified a selection of files, resources did not permit AFP staff to extract the relevant facts from these files in respect of the 60 data fields in question. Generally, three hours was required to examine each file and to record the relevant data.

Instead, it was decided to approach the Commonwealth DPP, but again researchers were not permitted access to files. The DPP also was unable to locate relevant files that met the sampling criteria from its various offices due to resource constraints, and so the Commonwealth cases were selected by locating relevant appeal decisions that had been publicly reported on various on-line databases (Austlii and Scaleplus). The names of appellants were then provided to DPP officers who located and examined the files in question and recorded the information requested. Much information concerning Commonwealth files, however, was contained in publicly available appeal decisions.

In order for this information to be disclosed to researchers, a Public Interest Determination had to be obtained from the Commonwealth Privacy Commissioner as the disclosure of even anonymous data from DPP files might have infringed Commonwealth Information Privacy Principle No 11. The Public Interest Determination took effect on 26 August 2002 (No. 8 of 22 March 2002, Crompton 2002). This was limited to the 28 Commonwealth files examined for this study only. Personal undertakings were also given by AIC and PwC staff members not to divulge confidential information contained in official files nor to name individuals or organisations in any report of the study.

Consistency

In all, some sixty data fields were used relating to the types of fraudulent activity perpetrated; the amount of financial losses reported and prosecuted; demographic characteristics of offenders and victims; the motivations of offenders; how cases were discovered and investigated and certain aspects of the judicial process such as procedural delay and sentencing outcomes.

Obtaining consistency in data collection was difficult, especially as qualitative data were used and multiple researchers were involved. In the present study, I was involved in recording data in all jurisdictions other than the Commonwealth and was assisted in each place by a research assistant who I was able to train beforehand and who sat with me during the data recording process. Data were recorded using qualitative text files and I was able to check each file to ensure consistency. In the case of the Commonwealth files, much of the information was able to be extracted from publicly-available appeal decisions with CDPP officers providing the remaining data. Again, each completed text file was checked for consistency.

Once data had been recorded each text file was given a unique number that could not be related back to named court reports.

Coding

Coding of the information recorded raised numerous difficult problems as these tended to be complex cases sometimes involving multiple offenders, multiple victims, numerous types of criminal offences, and entailing complex interlocutory and appellate legal proceedings.

For example, one question that raised particular problems related to the quantification of financial loss. Determining this deceptively simple figure was, however, a matter of some complexity. Criminal courts are often unwilling and ill-equipped to conduct the detailed analysis of financial losses which tends often to take place only in civil proceedings. In some cases, victims were unaware of how much had been stolen and unable to calculate the losses with certainty. On other occasions, even the perpetrators of the fraud had simply lost track of how much they had taken, and were themselves surprised to learn the full extent of their dishonesty.

Three primary analyses were undertaken. First, the 'amount sentenced' was ascertained. This was defined as the maximum amount included in final charges in respect of which the offender was sentenced. In cases with more than one offender, the amount sentenced was the aggregate of sums stolen by each offender where these related to separate counts of dishonesty. This amount included sums taken into consideration for sentencing, that is, charges that the accused admitted and wished to be taken into account by the court when determining sentence but which had not formally been charged. The amount involved in charges that alleged attempted fraud were also included in the 'amount sentenced' where allegations of attempted offences were proved. The amount sentenced did not, however, include sums involved in charges which had been withdrawn or which were not proceeded with by the prosecution. Where an offender had obtained finance by dishonestly making representations concerning securities offered, the 'amount sentenced' included the amount of finance obtained, even if the lender had not suffered any actual loss.

Secondly, information concerning the amount of restitution actually made was recorded. This was defined as the amount of money the offender (or others on behalf of the offender) had repaid prior to the date of sentencing. In some cases, sums were repaid following sentencing, although information about this was rarely recorded and in the majority of cases the offender sought to make restitution prior to sentencing in order to claim any benefits that this might attract in terms of a reduced sentence. It can be assumed, therefore, that sums repaid prior to sentencing represented the full extent of restitution made in almost all cases. The amount of restitution did not include any sums recovered by victims through insurance or professional indemnity payments as these not come from the offender. Similarly, any sums recovered by way or civil action were excluded. In cases with more than one offender, the amount of restitution was the aggregate of sums repaid by each offender where these related to separate counts of dishonesty.

Thirdly, a calculation was made of the 'actual loss' suffered by the victim. This was defined as the maximum amount in respect of which the offender was sentenced less any sums repaid by way of restitution (as explained above) or recovered by the victim through other forms of compensation, insurance, professional indemnity payments made prior to sentencing, but excluding any indirect losses suffered by victim and losses incurred in prosecuting the case. Where multiple victims were involved, the actual loss was the total of sums lost by all the victims that related to separate counts of dishonesty. In some cases, victims were able to indicate to the court the amounts they claimed to have lost which were in excess of the amounts charged and the 'amount sentenced'. This usually occurred in cases in which victims made submissions supporting claims for compensation.

In order to make the sums involved comparable, New Zealand dollars were converted to Australian dollars at the rate of NZ$1 = A$0.885.

In all, the 155 files examined involved $260.5 million in respect of the total amount sentenced, $13.5 million recovered as restitution prior to sentencing, and $143.9 million suffered as the total amount of actual loss. The largest losses were sustained in New Zealand, the Commonwealth, New South Wales and Queensland, all involving actual losses in excess of $20 million.

Similarly complex coding problems arose with a number of other variables, particularly those relating to offence categorisation and judicial outcomes.

Conclusions

To conclude, the seemingly simple question of finding out information about fraud in Australia and New Zealand raised some difficult practical, ethical and methodological issues. In all, the study took over four years to conceptualise, negotiate, research, and publish – and even this remains a pilot study.

Questions of access to official files for research purposes and responding effectively to privacy considerations remain on the agenda and may require legislative solutions to enable quantitative research of this nature to be conducted in the future. Problems of multi-jurisdictional research also remain as does the need for harmonisation of criminal law across Australia.

The findings of the study do, however, provide some insights into the manner in which fraud is perpetrated, by and against whom offences are committed, and how the criminal justice system handles complex cases of this nature.

Even with the cooperation of willing agencies, the expenditure of considerable resources, and plenty of time, carrying out research of this nature is not for the faint-hearted.

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