PURSUIT OF WHITE-COLLAR CRIME IN NEW ZEALAND

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Abstract:

This article examines Government funding and performance targets for three New Zealand agencies tasked with investigating different facets of white-collar crime. The agencies are: the tax authority, Inland Revenue; the Serious Fraud Office, which is responsible for investigation and prosecution of serious financial fraud; and the Financial Markets Authority, which is responsible for financial market regulation and enforcement of conduct.

The primary question asked in this study is: do we take white-collar crime seriously in New Zealand? Reference to funding provided to each agency, and selected performance measures, suggests not. Furthermore, when compared to other financial crime, such as benefit fraud, different patterns of funding are visible. The agencies responsible for protecting society from white-collar crime are poorly funded and key performance measures have been diluted in recent times. The issues raised are examined through the theoretical frames of deterrence theory and procedural justice.

It is well-established that white-collar criminals receive more lenient punishments for equivalent crimes. However, the results of this study suggest that they are further privileged as their crimes are less likely to be investigated and prosecuted. This is, at least in part, a result of limited resources available to the government agencies responsible for these tasks.

Key Words: White-collar crime, tax evasion, prosecution, investigation

I. INTRODUCTION

Historically, studies have suggested that white-collar criminals committing white-collar crimes are likely to receive preferential outcomes in the justice system when compared to their blue-collar counterparts committing equivalent blue-collar crimes. However, a range of corporate scandals (such as Enron)[1] and individual financial fraud cases (such as Bernie Madoff)[2] have challenged this perception as high profile court cases with resulting harsh punishments have become visible. However, these cases remain relatively isolated in their harsh punishments and appear to result from governing bodies wishing to make examples of the most egregious offenders and offences. Moreover, the most well-known examples emanate from the United States of America, with few examples of harsh punishments outside this jurisdiction.

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[1] Jeffrey Skilling, former CEO of Enron, received a prison sentence of 24 years. Ellen S Podgor, 'The Challenge of White Collar Sentencing' (2007) 97(3) *The Journal of Criminal Law & Criminology* 731.

[2] Sentenced to 150 years in prison. Diana B Henriques, 'Madoff is Sentenced to 150 Years for Ponzi Scheme', *New York Times* (online) 29 June 2009, http://www.nytimes.com/2009/06/30/business/30madoff.html.

There have been a small number of isolated prosecutions of serious white-collar crime in New Zealand.[3] Given the financial loss to society, this study examines whether white-collar crime is taken seriously in New Zealand. There is a complex relationship between achieving both efficiency and equity in relation to financial crime. Serious financial crime generates significant harm to society, either directly by impacting on citizens or corporations, or indirectly through the state with crimes such as tax evasion. An efficient outcome would produce a gain to society from prosecution of the crime, or at least no further loss. This outcome may be difficult as prosecution of white-collar crime is often timely and resource-heavy, and accordingly it is expensive and no recompense may be provided regardless of the outcome of a trial. Therefore, a negotiated outcome where some financial reparation is made may be the most efficient outcome. However, as will be shown later in this article, there are many cases that are not prosecuted by the agencies tasked with dealing with serious and complex financial fraud.

White-collar crime can be defined from the perspective of the offence or the offender. This study approaches white-collar crime from the perspective of the offence, whereby any individual in any class could potentially be a white-collar criminal.[4] For the purposes of this study, the definition of white-collar crime proposed by the Federal Bureau of Investigation in 1989 is utilised:

> those illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence. These acts are committed by individuals and organizations to obtain money, property, or services; to avoid the payment or loss of money or services; or to secure personal or business advantage.[5]

White-collar crime can be differentiated from other crimes in multiple ways including: the type of offender (usually higher socio-economic and often well-educated); the offender's occupation (usually managerial or professional);[6] and the sophistication and/or complexity of the offending.

To date the literature has mostly focused on punishment outcomes. This is not unreasonable as punishment data is readily comparable. However, there is little written on the potential for white-collar criminals to receive privileged treatment by way of avoiding entering into the criminal justice system in the first instance. Again, this is not unreasonable as the robustness of measuring something that did not occur is questionable. However, there are indicators that can be used to gauge how seriously a society views white-collar crime, such as the amount of resource it invests in the activity.[7] This is the approach adopted in this study.

The theoretical frameworks of deterrence theory and procedural justice are used for analytical purposes. Three government departments are examined in this study. Each is responsible for a different component of white-collar crime. The departments are: Inland Revenue (IR), which is responsible for tax collection and pursuing those who are not compliant in their tax affairs;

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[3] See, for example, Financial Markets Authority, Closed Cases <https://fma.govt.nz/news-and-resources/fma-cases-before-the-courts/closed-cases/>.

[4] Sean Maddan, Richard D Hartley, Jeffery T Walker and J Mitchell Miller, 'Sympathy for the Devil: An exploration of Federal judicial discretion in the processing of white-collar offenders' (2012) 37 *American Journal of Criminal Justice* 4.

[5] United States Department of Justice, Federal Bureau of Investigation, 'White-Collar Crime: A report to the public' (US Department of Justice, Washington, 1989) 3.

[6] J Scott Dutcher, 'From the Boardroom to the Cellblock: The justifications for harsher punishment of white-collar and corporate crime' (2005) 37 *Arizona State Law Journal* 1295.

[7] It is acknowledged that other tools may also be used to measure how society views white-collar crime, such as surveys.

the Serious Fraud Office (SFO), which is responsible for investigating serious financial crime in New Zealand; and the Financial Markets Authority (FMA), which is tasked with ensuring that New Zealand has well functioning markets. As part of this role the FMA is responsible for enforcing securities, financial reporting and company law, as it applies to financial services and securities markets.[8]

The study commences with a brief explanation of the primary roles and objectives of the three government agencies included in this study. Section three follows with an explanation of current knowledge on white-collar crime. Section four outlines the theoretical frameworks of deterrence theory and procedural justice, while section five presents the data. Section six discusses the data in conjunction with the literature and theoretical frameworks, with conclusions drawn in section seven.

II. AGENCIES INVOLVED IN INVESTIGATION AND PROSECUTION OF WHITE-COLLAR CRIME

This, brief, section outlines the statutory obligations of the three government departments that are the focus of this article: IR; the FMA; and the SFO. Section five presents data from each of the agencies. The FMA, SFO and IR are the primary agencies in New Zealand that investigate white-collar crime. A fourth agency, the Commerce Commission, also investigates and prosecutes some financial crime. However, as the focus of this article is on individual fraud, and the majority of the Commerce Commission cases are against corporations, the Commerce Commission is not included in this study.

A. *Inland Revenue*

IR is the New Zealand tax authority. It is responsible for tax collection, providing tax advice to government, and collecting and disbursing some social support payments. IR collects over 80 per cent of the Crown's revenue, with a staff of 5,500.[9] IR is also responsible for the collection of KiwiSaver (retirement savings) contributions and joint administration of the student loan programme with the Ministries of Education and Social Development. In 2016-17, IR collected NZ$69.2 billion of revenue.[10]

Sections 6 and 6A of the *Tax Administration Act 1994* outline the responsibility of officials to protect the integrity of the tax system. However, section 6A(3) provides that the duty of the Commissioner of IR is to:

> collect over time the highest net revenue that is practicable within the law having regard to: (a) the resources available to the Commissioner; and (b) the importance of promotion compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts, and (c) the compliance costs incurred by taxpayers.[11]

Also of relevance to this study is s 176 of the *Tax Administration Act 1994*, which provides that the Commissioner must maximise the recovery of outstanding tax from a taxpayer.

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[8] Financial Markets Authority, What We Do < https://fma.govt.nz/about-us/what-we-do/>.
[9] Inland Revenue, 'Annual Report 2017' (Inland Revenue, 2018).
[10] Ibid.
[11] *Tax Administration Act 1994,* s 6A(3).

However, notwithstanding this, the Commissioner may not recover outstanding tax to the extent that 'recovery is an inefficient use of the Commissioner's resources; or recovery would place a taxpayer, being a natural person, in serious hardship'.[12]

B. *Financial Markets Authority*

The FMA is the New Zealand government agency responsible for financial regulation. It is responsible for regulating some financial market participants, exchanges and the setting and enforcing of financial regulations. The *Financial Markets Authority Act 2011* established the FMA as an independent Crown entity and provides for the FMA to have certain general information-gathering and enforcement powers.[13] The primary role of the FMA is to promote and facilitate well-functioning financial markets.[14]

The FMA regulate and oversee FMA licensed product providers, some financial advisers, infrastructure providers such as crowdfunding providers and other frontline regulators.[15] The FMA approach to regulation is intelligence led and risk based.[16] Under the *Financial Markets Authority Act 2011* the FMA's main objective is to 'promote and facilitate the development of fair, efficient, and transparent financial markets'.[17] Forms of misconduct that the FMA may investigate include insider trading, market manipulation and investment scams.[18] In their most recent annual report, the FMA report that 70% of their completed investigations result in sanctions other than court action.[19]

C. *Serious Fraud Office*

The SFO is responsible for investigation and prosecution of serious or complex financial crime in New Zealand. The SFO is also the lead agency for bribery and corruption investigations. The SFO has around 50 staff, of which 90 per cent are involved in front-line activities.[20]

The SFO adopts a strategic approach to investigation and prosecution of cases, whereby it focuses on high-impact offending to ensure resources are used to maximum effect.[21] The most recent SFO annual report notes that 'the presence of an agency dedicated to white collar crime is integral to New Zealand's reputation for transparency, integrity, fair-mindedness and low levels of corruption'.[22]

The *Serious Fraud Office Act 1990* determines the powers of the Director of the SFO. Factors that are taken into account in determining whether the Director of the SFO will undertake a prosecution include: the nature and consequences of the fraudulent activity; the suspected scale of the fraud; the legal, factual and evidential complexity of the matter; and any relevant public

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[12] *Tax Administration Act 1994*, s 176(1)-(2).
[13] *Financial Markets Authority Act* 2011, s 3.
[14] Financial Markets Authority, 'Annual Report 2017' (Financial Markets Authority, 2018) 52.
[15] Ibid.
[16] Ibid.
[17] *Financial Markets Authority Act 2011*, s 8.
[18] Financial Markets Authority, '2017 Conduct Outcomes Report' (Financial Markets Authority, 2018) 4.
[19] Financial Markets Authority, above n 14, 12.
[20] Serious Fraud Office, Our Organisation and Our People < https://www.sfo.govt.nz/our-organisation-and-our-people>.
[21] Serious Fraud Office, '2017 Annual Report' (Serious Fraud Office, 2018).
[22] Ibid, 6.

interest considerations.[23] The Solicitor-General's test for prosecution also informs the decision to prosecute. This requires there to be sufficient evidence to provide a reasonable chance of conviction and that the prosecution is required in the public interest.[24]

III. LITERATURE

This section provides the context for the rest of this article with an examination of the literature on white-collar crime. The section commences by explaining current knowledge on white-collar crime. This is followed by a deeper exploration of outcomes in the justice system for white-collar crimes and criminals. The section concludes with a discussion of the role of class in the justice system.

A. *White-Collar Crime*

Bagaric and Alexander note the factors that differentiate white-collar offences from other types of crime, including: those who engage in white-collar offending are not usually from a socially-deprived background; often white-collar crimes are first offences and involve a breach of trust; white-collar crimes can typically be rectified with financial restitution; the harm generated from white-collar crime may be wide-reaching; and additional sanctions may be suffered by white-collar criminals as a result of their offending, such as reputation damage.[25] Moreover, white-collar crime often requires some degree of sophistication and is typically undertaken over a long period of time. Croall notes that white-collar crime can be relatively invisible and more easily concealed than more traditional crime.[26] Perhaps one of the key differences with some white-collar crimes is the tendency to view them as 'victimless', particularly where the victim is the state or large corporations, which may be able to claim insurance reimbursements from fraudulent activity. It is perhaps more accurate to view some crimes as having diffused, rather than individual, impact. However, this diffused impact ultimately results in wide-ranging results, such as higher insurance premiums or higher tax rates for society.

The objectives of white-collar crimes frequently differ from other more conventional offending, whereby the offender seeks some personal financial gain from the behaviour, at the expense of someone else.[27] Wheeler, Weisburd, Waring and Bode highlight some of the complexities and other differences in 'common' (non-violent) crime and white-collar crime.[28] These are outlined in Table 1:

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[23] *Serious Fraud Office Act 1990*, s 8.
[24] Crown Law, 'Solicitor-General's Prosecution Guidelines, as at July 2013' (Crown Law, 2013) 5.1.
[25] Mirko Bagaric and Theo Alexander, 'A Rational Approach to Sentencing White-Collar Offenders in Australia' (2014) 34 *Adelaide Law Review* 317.
[26] Hazel Croall, *Understanding White Collar Crime* (Open University Press, 2001).
[27] August Bequai, *White Collar Crime: A 20th Century Crisis* (Lexington Books, 1978).
[28] Stanton Wheeler, David Weisburd, Elin Waring and Nancy Bode, 'White Collar Crimes and Criminals' (1987) 25 *American Criminal Law Review* 331.

Table 1: Differences in (Non-Violent) Common and White-Collar Crime[29]

	Non-Violent Common Crimes	White-Collar Crimes	General Public
Pattern to the crime	23.9%	65.1%	N/A
Crime lasting more than a year	7%	50.9%	N/A
Involving an organisation	2.4%	40.2%	N/A
Involving five or more persons	18.9%	35.7%	N/A
High school education	45.5%	79.3%	69%
College education	3.9%	27.1%	19%
Unemployed	56.7%	5.7%	5.9%
Steady employment	12.7%	58.4%	N/A
Male	68.6%	85.5%	48.6%
Race (white)	34.3%	81.7%	76.8%
Age (average)	30	40	N/A
Home owner	6%	46%	N/A

Table 1 illustrates some of the distinctive differences in white-collar and other criminals, showing that the two categories of offenders draw from different sectors of the population.[30] Different patterns of the offending are also visible. The figures in Table 1 show that white-collar criminals have higher levels of education and employment than 'common' criminals. Moreover, white-collar criminals have higher levels of education and employment than the general population.

Table 1 also shows that white-collar crimes are more organised, longer-lasting and more likely to involve an organisation. In addition, white-collar criminals are more likely to be male, white, and older than those committing more traditional (non-violent) crime. White-collar offenders are nearly eight time as likely as common criminals to own their own home, suggesting greater wealth and/or asset holdings.

B. *White-Collar Crime Outcomes in the Justice System*

Criticism of inadequate punishments handed down to white-collar crimes and criminals is not a new phenomenon.[31] Research generally concurs that white-collar offenders receive more lenient sentences for their white-collar crimes; [32] a practice that does not extend to blue-collar

[29] Ibid, 339-341.
[30] Ibid.
[31] Faichney, Daniel, 'Autocorrect? A proposal to encourage voluntary restitution through the white-collar sentencing calculus' (2014) 104(2) *The Journal of Criminal Law & Criminology* 389.
[32] Laureen Snider, Traditional and Corporate Theft: A comparison of sanctions, in P Wickman and T Dailey (eds) *White-Collar and Economic Crime* (Lexington Books, 1982); Barbara A Hudson, *Penal Policy and Social Justice* (MacMillan Press, 1993); Tony G Poveda, *Rethinking White-Collar Crime* (Praeger, 1994); David Nelken, White-Collar Crime, in M Maguire, R Morgan and R Reiner (eds), *The Oxford Handbook of Criminology, 2nd Edition* (Oxford University Press, 1997); Croall, above n 26; Kaaryn Gustafson, 'The Criminalization of Poverty' (2009) 99 *Journal of Criminal Law and Criminology* 3, 643; J Hagan, I Nagel and C Albonetti, 'The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts' (1980) 45 *American Sociological Association* 5, 802; David Weisburd, Stanton Wheeler, Elin Waring, and Nancy Bode, *Crimes of the Middle Classes: White-collar offenders in the federal courts* (Yale University Press, 1991); Brian K Payne, Dean A

offenders committing white-collar crimes, with white-collar offenders less likely to receive a custodial sentence than other offenders.[33] Studies also indicate that the public are generally less concerned about specific white-collar crimes against the state such as taxation fraud than they are about benefit fraud.[34] This is despite the crimes producing the same outcome and impacting on the same victims (the state and society as a whole).

The issue is perhaps best captured by Reiman and Leighton when they write that 'for the same criminal behavior, the poor are more likely to be arrested; if arrested, they are more likely to be charged; if charged, more likely to be convicted, more likely to be sentenced to prison; and if sentenced, more likely to be given longer prison terms than members of the middle and upper classes'.[35] Various explanations have been suggested for why this is the case, including the policing and punishment associated with their crimes;[36] the ability to afford better (or any) legal representation;[37] and the complexity of the crimes themselves.[38] Other suggestions for the more lenient outcomes stem from implicit favouritism from positive social identity; because white-collar offenders retain the potential to contribute to society;[39] or because of the implicit punishment in the fall from grace.[40] Literature has also noted the potential for the wealthier in society to 'buy' a preferential outcome in the justice system. This is evident across a range of activities including tax: 'a differentiated approach to tax illegalities that benefits the offenders who have the social and financial capacity to proceed with the payment of their debt'.[41]

Research from Maddan et al in the US find that white-collar criminals and 'street level criminals' are treated differently during the sentencing process, with street level criminals almost four times as likely to receive a prison sentence as their white-collar counterparts.[42] The authors also observe the different factors that were taken into account in the decision to imprison the two different types of criminal. The street level criminals were sentenced as per the sentencing guidelines, taking into account factors such as criminal history and the seriousness of the offence. However, white-collar criminals had extra-legal variables taken into

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Dabney and Jessica L Ekhomu, 'Sentencing Disparity Among Upper and Lower Class Health Care Professionals Convicted of Misconduct' (2011) 24(3) *Criminal Justice Policy Review* 353.

[33] Michael Levi, *Fraudulent Justice? Sentencing the business criminal* (Open University Press, 1989); Damon M Cann, 'Justice for Sale? Campaign Contributions and Judicial Decisionmaking' (2007) 7(3) *State Politics & Policy Quarterly* 281; Bert Brandenberg, 'Big Money and Impartial Justice: Can they live together? (2010) 52 *Arizona Law Review* 207.

[34] Greg Marston and Tamara Walsh, 'A Case of Misrepresentation: Social security fraud and the criminal justice system in Australia' (2008) 17 *Griffith Law Review* 1, 285; Geoffrey Smith, Mark Button, Les Johnston and Kwabena Frimpong, *Studying Fraud as White Collar Crime* (Palgrave MacMillan, 2011).

[35] Jeffrey Reiman and Paul Leighton, *The Rich Get Richer and the Poor Get Prison: Ideology, class and criminal justice* (Pearson Publishing, 10th ed, 2013) 119.

[36] Susan P Shapiro, 'Collaring the Crime, not the Criminal: Reconsidering the concept of white-collar crime' (1990) 55(3) *American Sociological Review* 346; Samuel W Buell, 'Is the White Collar Offender Privileged?' (2014) 63(4) *Duke Law Review* 823.

[37] Shapiro, above n 36; Snider, above n 32; Stanton Wheeler, Kenneth Mann and Austin Sarat, *Sitting in Judgment: The sentencing of white-collar criminals* (Yale University Press, 1988); Katia Weidenfeld and Alexis Spire, 'Punishing tax offenders in France and Great Britain: two criminal policies' (2017) 24(4) *Journal of Financial Crime* 574.

[38] Arie Freiberg, 'Sentencing White-Collar Criminals' (Paper presented at the Fraud Prevention and Control Conference, Surfers Paradise, Australia 24-25 August 2000).

[39] Kenneth Mann, Stanton Wheeler and Austin Sarat, 'Sentencing the White-Collar Offender' (1980) 17 *American Criminal Law Review* 479 500.

[40] Ibid.

[41] Weidenfeld and Spire, above n 37, 578.

[42] Maddan, Hartley, Walker and Miller, above n 4.

account, such as education, gender and acceptance of responsibility.[43] The authors include 'white-collar offenders are treated more leniently than street level offenders in all of the analyses conducted here'.[44]

Weidenfeld and Spire's research includes interviews of judges.[45] The authors find that judges justify not awarding custodial sentences to tax offenders as tax evaders are often well integrated into society and judges are reluctant to remove the offenders from society where they have the potential to be productive. This argument is supported by the general trend in most developed countries to not incarcerate offenders unless absolutely necessary.

A further reason that is suggested in relation to the differences in treatments of wealthy criminals is raised by Payne, Dabney and Ekhomu who note that many white-collar offenders will not have their cases forwarded to the prosecution stage, unless their crimes are sufficiently serious with overwhelming evidence, that a criminal prosecution can progress.[46] The authors also observe that when sanctions do occur, they are more likely to take place in an administrative or civil capacity, leading to the conclusion that 'white-collar offenders are getting away with less serious acts by having those cases diverted away from the criminal justice system'.[47] A similar finding emanates from Weidenfeld and Spire's research whereby agents of Her Majesty's Revenue and Customs in the United Kingdom selected cases that had a high probability of leading to a guilty plea and therefore would avoid an expensive trial.[48] The authors note that the outcome here is that the focus on efficiency often leads to greater penalisation of poorer taxpayers who cannot afford to go to trial.

Mann, Wheeler and Sarat's research from the 1980s was among the first to highlight the extent to which the judiciary favoured the wealthy.[49] The interview based research reports numerous judges' comments noting the extra-legal factors that are taken into account in determining the sentence for white-collar criminals: damage to professional standing; loss of income; greater sensitivity of white-collar criminals to the prison environment; impact on dependants; and not wanting to remove that person from society in order that they could continue to make a contribution. It is worth noting that Mann, Wheeler and Sarat report that 'a large number of our respondants [sic] felt that prison has a significantly greater impact on white-collar defendants, and that the prison environment has to be compared to the environment from which the defendant comes in order to determine an appropriate sentence'.[50] Moreover, 'interview responses repeatedly give evidence of the judges' understanding, indeed sympathy, for the person whose position in society may be very much like their own'.[51]

Mann, Wheeler and Sarat also identified the apparent preference for general deterrence in the sentencing process, unlike other crimes, which have a range of objectives such as rehabilitation, incapacitation, restitution and/or retribution.[52] However, this contrasts with the lighter penalties awarded to white-collar criminals. That is, if general deterrence was the ultimate objective, then harsh sentences are most likely to achieve greater general deterrence. The authors' respond to the anomaly by showing that when judges 'feel that an offender has already been punished

[43] Ibid.
[44] Ibid, 16.
[45] Weidenfeld and Spire above n 37.
[46] Payne, Dabney and Ekhomu, above n 32.
[47] Ibid, 356.
[48] Weidenfeld and Spire, above n 37.
[49] Mann, Wheeler and Sarat, above n 39.
[50] Ibid, 487.
[51] Ibid, 500.
[52] Ibid.

enough through the process of indictment, trial, and conviction, they find it hard to impose what will be additional punishment for the offender, solely to achieve the aims of deterrence'.[53]

It must be acknowledged when discussing older literature that these interviews occurred prior to the introduction of federal sentencing guidelines in 1987. These guidelines were enacted to provide for greater uniformity and proportionality in sentencing, and to limit discretion in judicial sentencing by requiring judges to apply pre-determined offence characteristics when calculating sentences.[54]

Despite this apparent historical and ongoing acceptance that white-collar crime is of less importance in society than blue-collar crime, throughout this time it has also been generally accepted that white-collar crime not only has the potential to be significantly greater in magnitude, it also has the potential to generate broader societal issues. For example, over 70 years ago, Sutherland proposed that while the financial loss from white-collar crime is significant, it is 'less important than the damage to social relations. White-collar crimes violate trust and therefore create distrust, which lowers social morale and produces social disorganization on a large scale'.[55]

One of the more common white-collar crimes is tax evasion. The observation of Weidenfeld and Spire perhaps best captures how this addressed in many countries: 'despite their resolute declarations, institutions in both countries [France and Great Britain] remain trapped by a tolerance of tax evasion that is embedded in practice and in social representation. The commitment to promote harsher treatment of tax offences is severely hampered by the unwavering belief that tax fraud requires mainly a civil response'.[56] A further factor worth observing is that tax evaders are often not viewed as criminals. This is both from a societal perspective and from the judiciary.[57]

Also relevant in the discussion on white-collar crime is the extent to which negotiated outcomes are the result of the crime. Courts in the United States have specifically noted their intentions to avoid creating the perception that white-collar criminals can buy their way out of a custodial sentence.[58] However, in some cases, the perception remains that some white-collar crimes, such as tax evasion, are not sufficiently serious to warrant harsh punishments. McBarnet furthers this debate when arguing that 'the tax system is not heavily geared to criminalisation'.[59] McBarnet observes the preference for settlement or use of non-criminal sanctions, which has the result of decriminalising tax offending.[60]

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[53] Ibid, 486.
[54] Celesta A Albonetti, Theoretical Perspectives and Empirical Assessments of Race/Ethnicity Disparities in Federal Sentencing, in Mathieu Deflem (ed.) *Race, Ethnicity and Law (Sociology of Crime, Law and Deviance, Volume 22)* (Emerald Publishing Limited, 2017).
[55] Edwin Sutherland, 'White Collar Criminality' (1940) 5(1) *American Sociological Review* 5.
[56] Ibid, 575.
[57] Weidenfeld and Spire, above n 37.
[58] Faichney, above n 31, 403-404. Faichney writes: 'allowing sentencing courts to department downward based on a defendant's ability to make restitution would thwart the intent of the guidelines to punish financial crimes through terms of imprisonment by allowing those who could pay to escape prison' quoting United States v Seacott, 15 F.3d 1380, 1389 (7th Cir. 1994).
[59] Doreen McBarnet, 'Whiter than white collar crime: tax, fraud insurance and the management of stigma' (1991) 42(3) *The British Journal of Sociology* 323, 341.
[60] Ibid.

From the time that Sutherland suggested this in the 1940s, there have been only a handful of research outputs that suggest this is no longer the case.[61] Notwithstanding this comment, there is a strand of the academic literature that argues that less punitive sentences for white-collar offenders can be justified. For example, Lott models an outcome to show that allowing wealthy individuals to obtain a preferential outcome in a trial through the purchase of legal services is consistent with the optimal penalty literature.[62] This research addresses the challenge made to equity in the legal system when those who are wealthier can purchase more effective legal services. Lott argues that the length of prison sentence should allow for the subjective opportunity costs of the criminal, including the cost of future lost earnings. However, subsequent research challenges the efficiency claims of this study.[63]

What is visible from the above literature is the common finding that white-collar criminals receive privileged treatment in the justice system. What is less well-established is the extent to which white-collar criminals avoid engagement with the justice system at all, as their cases do not proceed through to an investigation. This point is also noted by Reiman and Leighton, who suggest that the poor receive harsher sentences than the wealthy because the 'criminal justice system effectively weeds out the well-to-do'.[64] In New Zealand, this process starts early on, where government agencies are not resourced to investigate all complex financial fraud, so many crimes do not progress into a full investigation. This 'weeding out' continues at other stages of the criminal justice system, as will be shown later in the article. A further contributing factor is that the poor do not have the same opportunity to commit the crimes of the wealthy. Engagement in complex financial fraud typically requires some degree of expertise or education, as well as the opportunity to commit the fraud. Frequently, opportunity is provided when the offender holds a senior role or position of authority.

C. *Class*

A component of this study necessarily incorporates class. In Sutherland's seminal article of 1940, he suggests that 'respectable, or at least respected, business and professional' people have access to resources and power that facilitates committing financial crime, something that is not available to 'crime in the lower class, composed of persons of low socioeconomic status'.[65] This view appears largely unchanged today and is visible in the data used for analysis in this study. There are no cases where the judge suggests that the crime is committed for the purpose of meeting fundamental needs, and frequently reference is made to 'pure greed' as the driver of the criminal activity.

In the mid-19th century, crime was understood to have 'a high incidence in the lower socio-economic class and a low incidence in the upper socio-economic class'.[66] This is likely to remain unchanged. However, Sutherland continues to suggest that, at least in part, this can be explained as:

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[61] Stanton Wheeler, David Weisburd and Nancy Bode, 'Sentencing the White-Collar Criminal: Rhetoric and Reality' (1982) 47(5) *American Sociological Review* 641.
[62] John R Lott Jr, 'Should the Wealthy Be Able to "Buy Justice"?' (1987) 95(6) *Journal of Political Economy* 1307.
[63] Nuno Garoupa and Hugh Gravelle, 'Efficient Deterrence does not Require that the Wealthy should be Able to Buy Justice' (2003) 159(3) *Journal of Institutional and Theoretical Economics* 545.
[64] Reiman and Leighton, above n 35, 119.
[65] Sutherland, above n 55, 1.
[66] Edwin Sutherland, *White Collar Crime* (Holt, Reinhart and Winston, 1949) 3.

> persons of the upper socio-economic class are more powerful politically and financially and escape arrest and conviction to a greater extent than persons who lack such power, even when guilty of crimes. Wealthy persons can employ skilled attorneys and in other ways influence the administration of justice in their own favour more effectively than can persons of the lower socio-economic class.[67]

Thus, over 60 years ago Sutherland was suggesting that the criminal justice system was biased in favour of those who have a higher social status. More recent research suggests that this state remains.[68] Despite reports that community attitudes toward white-collar crime have been becoming increasingly punitive,[69] this largely pertains to corporate crime, and the gap in the treatment of blue- and white-collar individuals remain.

IV. THEORY

Macrory (2006:10) proposes six principles that sanctions should attempt to achieve, suggesting that they should:

1. Aim to change the behaviour of the offender;
2. Aim to eliminate any financial gain or benefit from non-compliance;
3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma associated with a criminal conviction;
4. Be proportionate to the nature of the offence and the harm caused;
5. Aim to restore the harm caused by non-compliance; and
6. Aim to deter future non-compliance.

Principle one relates to rehabilitation. While in some cases this is not a key objective of punishment of white-collar crime, as usually it applies to crimes that include anti-social behaviour, it remains relevant to the topic of this study as recidivist offending by serious financial fraudsters generates significant economic harm. Principle two has particular relevance to white-collar crime. As this crime is financial in nature, there is the potential for offenders to personally gain from the offending. Thus, removal of any potential gain is important to dilute the appeal of the crime. As will be shown later in this article, there is significant opportunity for white-collar offenders to benefit from their offending, without commensurate punishment.

Principle three involves retribution. It is intended to reflect society's displeasure at certain behaviours. In relation to retribution, no social objective is sought; instead punishment results solely from committing the offence. Retribution is also visible in principle four, where punishments must be in proportion to the harm that results from the crime.

Restitution is the focus of principle five. Restitution is measurable in the case of white-collar offending, as there is a clear quantum of financial harm. The final principle, principle six, is deterrence. This may be in the form of general deterrence, where the aim is to deter society in general from the crime, or specific deterrence, where the objective is to deter a particular

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[67] Ibid, 8.
[68] Lisa Marriott, 'Tax Crime and Punishment in New Zealand' (2012) *British Tax Review* 5, 623; Lisa Marriott, 'Justice and the Justice System: A comparison of tax evasion and welfare fraud in Australasia' (2014) 22 *Griffith Law Review* 2, 403; Hudson, above n 32; Nelken, above n 32; Marston and Walsh, above n 34.
[69] John Braithwaite, 'White Collar Crime' (1985) 11 *Annual Review of Sociology* 1.

offender from a particular crime. It is the final principle, deterrence, which is the focus of this study.

D. *Deterrence*

Deterrence theory was initially developed by Beccaria[70] and Bentham.[71] However, Becker is one of the more well-known authors who have raised the profile of the theory in recent times.[72] Becker's theory of crime, is economically focused with the fundamental idea that penalties will deter criminal activity, where they are sufficiently certain and sufficiently harsh.[73] The theory suggests that decisions on criminal behaviour are made by rational individuals, taking into account costs and benefits associated with the criminal activity, with the aim of maximising the outcome for the individual. The costs of the crime include the cost of punishment, while the benefits include the potential gain from the activity and the likelihood that the offending will not be detected. Thus, the theory proposes that deterrence is increased where the cost of committing the crime increases to the extent that the costs of offending outweigh the benefits. This may be achieved by harsher penalties or increased potential of detection. Therefore, at least in theory, 'if judges can make the "costs" of an offence more onerous than the derived benefits, individuals will be deterred from committing offences'.[74]

Deterrence theory suggests that there are three primary forms of social control: threatened punishments; legal sanctions (state-imposed punishment); and social stigma (peer-imposed punishment).[75] However, while punishment exists, in part, to influence behaviour, the majority of people will not engage in anti-social behaviour because they identify with the general values of society, such as respect for others and for the law, rather than as a result of a fear of punishment.[76] Importantly, penalties will only be an effective deterrent to the extent that offenders believe there is an opportunity of being caught and successfully prosecuted.

The importance of detection and subsequent punishment is visible in the literature. Research to date is undecided on the extent to which penalties deter crime. Perhaps counter-intuitively, there is a large body of literature that supports the view that harsh punishment is not effective.[77]

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[70] Beccaria, Cesare, marchese di. *An essay on crimes and punishments, translated from the Italian; with a commentary, attributed to Mons. de Voltaire, translated from the French* (London, Eighteenth Century Collections Online, 1767.

[71] J Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1789).

[72] A M Polinsky and S Shavell, 'The Economic Theory of Public Enforcement of Law' (NBER Working Paper No 6993, National Bureau of Economic Research, 1999).

[73] Gary Becker, 'Crime and Punishment: An economic approach' (1968) 76 *Journal of Political Economy* 2, 169.

[74] Kimberly Varma and Anthony Doob, 'Deterring Economic Crimes: The case of tax evasion' (1998) 40(2) *Canadian Journal of Criminology* 165, 167.

[75] H G Grasmick and W J Scott, 'Tax Evasion and Mechanisms of Social Control: A comparison with grand and petty theft' (1982) 2 *Journal of Economic Psychology* 213.

[76] Ministry of Justice, *Sentencing Policy and Guidelines: A Discussion Paper* (Ministry of Justice, 1997) 28.

[77] Thomas Callanan, *Punishment: For and Against* (Hart Publishing, 1971) 85; Russell H Weigel, Dick J Hessing and Henk Elffers, 'Tax Evasion Research: A critical appraisal and theoretical model' (1987) 8 *Journal of Economic Psychology* 215; Michael W Spicer and Thomas J Everett, 'Audit Probabilities and the Tax Evasion Decision: An experimental approach (1982) 2 *Journal of Economic Psychology* 241; James Alm and Michael McKee, 'Audit Certainty, Audit Productivity, and Taxpayer Compliance' (2006) 59 *National Tax Journal* 4, 801; James Alm, Betty Jackson and Michael McKee, 'Getting the Word Out: Enforcement information dissemination and compliance behaviour' (2009) 93 *Journal of Public Economics* 392; Joel Slemrod, Marsha Blumenthal, and Charles Christian, 'Taxpayer Response to an Increased Probability of Audit: Evidence from a controlled experiment in Minnesota' (2001) 79 *Journal of Public Economics* 455; Greg Pogarsky and Alex R Piquero, 'Can

The literature suggests that factors such as an increased likelihood of detection and certainty of punishment are more effective as deterrents than increasingly harsh penalties.[78] Notwithstanding this observation, severity of punishment is still important, as harsher punishments can result in moderating behaviour.[79] However, 'it is very difficult to state with any precision how strong a deterrent effect the criminal justice system provides'.[80] Nonetheless, deterrence remains a key component of the criminal justice system in New Zealand.[81]

Despite the appeal of deterrence theory, it is not without its critics, particularly when it rejects complexity in favour of simple theories such as rational choice.[82] For example, recent regulatory theory suggests that deterrence may be achieved through measures that move well beyond the historically important factors of likelihood of detection and certainty of punishment. For example, John Braithwaite suggests that the deterrent component of responsive regulation is best understood as a Sword of Damocles.[83] Braithwaite's proposal is that the perception of punishment may be a more effective deterrent than the punishment itself. Braithwaite cites examples where offenders given a caution, rather than a prosecution, are less likely to go on to engage in activity that will lead them into the criminal justice system.

Responsive regulation proposes that the conduct of the offender is a relevant factor in deciding whether a more or less interventionist response is needed.[84] Responsive regulation challenges the idea that harmful conduct mandates regulatory intervention, suggesting that neither consistent punishment nor consistent persuasion are optimal strategies.[85] Braithwaite writes that 'the crucial point is that responsive regulation is a dynamic model in which persuasion and/or capacity building are tried before escalation up a pyramid of increasing levels of punishment'.[86] While not disputing this idea, this study suggests that a lenient approach is less desirable for the most serious financial crimes in New Zealand. The crimes that are the focus of this study are among the most serious financial crime in the country. They have usually resulted in considerable financial harm to institutions and/or individuals. The argument is made that in these cases, persuasion to behave correctly has already failed and there is little to be gained by pursuing informal or less stringent sanctions.

Punishment Encourage Offending? Investigating the "resetting" effect' (2003) 40 *Journal of Research in Crime and Delinquency* 95.

[78] Silvia M Mendes, 'Certainty, Severity, and their Relative Deterrent Effects: Questioning the implications of the role of risk in criminal deterrence policy' (2004) 32(1) *The Policy Studies Journal* 59; Johannes Andenaes, 'The General Preventative Effects of Punishment' (1966) 114(7) *University of Pennsylvania Law Review* 949; Raymond Paternoster, 'How Much Do We Know about Criminal Deterrence?' (2010) 3 *Journal of Criminal Law and Criminology* 765; Matthew C Scheider, 'Deterrence and the Base Rate Fallacy: An examination of perceived certainty' (2001) 18(1) *Justice Quarterly* 63; Varma and Doob, above n 74; Mirko Bagaric, Theo Alexander and Athula Pathinayake, 'The Fallacy of General Deterrence and the Futility of Imprisoning Offenders for Tax Fraud' (2011) 26 *Australian Tax Forum* 511; Ken Devos, 'Penalties and Sanctions for Australian Taxation Crimes and the Implications for Taxpayer Compliance' (2002) 17(3) *Australian Tax Forum* 257.

[79] Polinsky and Shavell, above n 72, 30.

[80] Paternoster, above n 78, 765.

[81] *Sentencing Act 2002*, s 7(1)(f).

[82] John Braithwaite, 'Minimally Sufficient Deterrence' (2018) 47 *Crime and Justice* 69.

[83] John Braithwaite, 'Control, threat and deterrence' Speech to Australian National University School of Regulation and Global Governance (REGNET), <http://regnet.anu.edu.au/news-events/podcasts/audio/6804/control-threat-and-deterrence-john-braithwaite>.

[84] John Braithwaite, 'Types of Responsiveness' in Peter Drahos (Ed) *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 117-132.

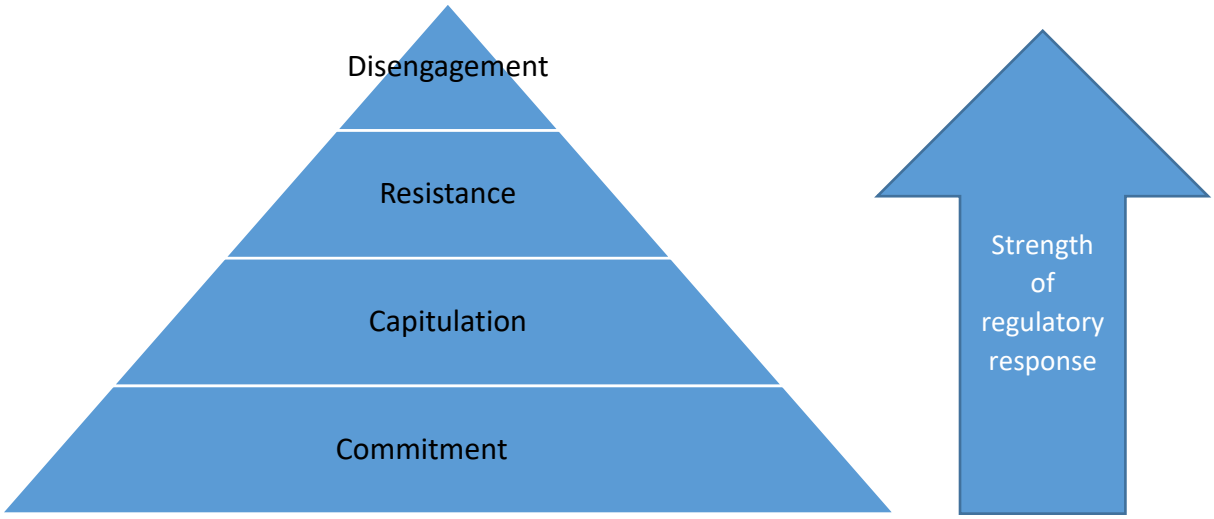
[85] Braithwaite, above n 84.

[86] Braithwaite, above n 84, 118.

Responsive regulation suggests that regulators should start at the bottom of the compliance pyramid (replicated in Figure 1) and work upwards. This involves starting with education and guidance, which is then escalated where non-compliance remains.[87] The crimes discussed in this article refer to those at the top of the pyramid, that is, those who are deliberately not complying with the law. Thus, we would expect to see harsher punishments resulting from these serious offences.

Also relevant is that enforcement options are more likely to work effectively if they are actually used. As captured by Roche 'to be taken seriously regulators need to be able to convince others that they have a big stick and are not afraid to use it'.[88] The issue, of course, is knowing when to use more or less deterrence. Research has established that deterrence can promote dismissive defiance, that is, disengagement and illegal behaviour resulting from a complete breakdown of relationships with authority, where it is not used appropriately.[89]

Figure 1: Example of regulatory practice[90]



E. *Procedural Justice*

The second theoretical frame adopted in this study is that of procedural justice. In the context of this study, procedural justice is concerned with the administration of the justice system processes that determine outcomes. It may be possible to achieve an unfair outcome with fair processes. Equally, it may be possible to achieve a fair outcome with unfair processes. In this study, it will be argued that unfair outcomes result from unfair processes.

[87] Colin Scott, 'The Regulatory State and Beyond' in Peter Drahos (Ed) *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 265-287.
[88] Declan Roche, Tax Office Prosecutions – Firm and Fair Regulatory Enforcement, Regulatory Institutions Network, Occasional Paper 9 (Australian National University, 2006).
[89] Valerie Braithwaite and Monika Reinhart, 'Deterrence, Coping Styles and Defiance' (2013) 69(4) *Public Finance Analysis* 1.
[90] Valerie Braithwaite, 'A New Approach to Tax Compliance' in Valerie Braithwaite (Ed) *Taxing Democracy: Understanding tax avoidance and evasion* (Ashgate Publishing, 2003) 1-14.

There is theoretical support for contemplating processes as well as outcomes when assessing justice. For example, Nozick[91] proposes that final outcomes (such as incomes or capabilities) are not sufficient to measure whether justice is achieved, rather the process by which the outcomes are produced is also relevant.[92] Rawls argues that outcomes must not only be efficient, they must also be just.[93] Rawls pursues this argument by claiming that assuming the first principle applies (equal liberty and a free market economy), formal equality of opportunity must also be present to achieve just outcomes.[94] Specifically, Rawls claims that people 'require a formal equality of opportunity in that all have at least the same legal rights of access to all advantaged social positions'.[95] Thus, one question is whether outcomes are just, when the conditions that result in the outcomes are different, that is, when crimes of privilege have less funding than crimes of the poor.

As explained by Rawls, it is this second principle that specifies the conditions under which social and economic inequalities are justified.[96] Thus, the problem is to determine a distribution that is not 'improperly influenced by the arbitrary contingencies of social fortune and the lottery of natural assets'.[97] Rawls proposes that 'assuming the framework of institutions required by fair equality of opportunity to obtain, the higher expectations of those better situated in the basic structure are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society'.[98] Thus, the social order should not improve the situation of those who are better off unless this results in advantage to the less fortunate.

V. DATA

This section outlines government funding provided to the FMA, the SFO and IR. The section also provides information on certain measures of activity, such as complaints or investigations. It further provides data obtained through Official Information Act (OIA) requests pertaining to fines imposed and collected as a result of prosecution action taken.

An OIA request to the Ministry of Justice in June 2018 requested information on fines filed in court by the FMA and the SFO. The information request is repeated below:

1. The total amount of fines imposed as a result of prosecutions by the FMA in 2015, 2016 and 2017
2. The total amount of fines imposed as a result of prosecutions by the SFO in 2015, 2016 and 2017
3. The total amount of fines that were collected for each of the three years for both authorities
4. The total amount of fines that were remitted for each of the three years for both authorities

[91] R. Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell Publishing, 1974).
[92] John E Roemer and Alain Trannoy, 'Equality of Opportunity' (Cowles Foundation Discussion Paper No. 1921. Cowles Foundation for Research in Economics, Yale University, 2013).
[93] John Rawls, 'Distributive Justice: Some addenda' (1968) 13(51) *Natural Law Forum* 57.
[94] Ibid.
[95] Ibid.
[96] Rawls, above n 93, 55.
[97] Rawls, above n 93, 59.
[98] Ibid.

5. The total amount of fines that were remitted when the debt entered into bankruptcy or liquidation for each of the three years for both authorities
6.

A. *Financial Markets Authority*

At the time of writing in July 2018, the FMA reported 14 closed cases, two current investigations and three current cases. This averages to around two cases per year. Table 2 shows the number of complaints received annually over the past five year period, which shows relatively stable numbers of complaints at around 1,000 per year. In 2016/17, 48 cases were opened – 5% of complaints received.[99]

Table 2: Financial Markets Authority Complaints Reported (2012/13 – 2016/17)[100]

	2012/13	**2013/14**	**2014/15**	**2015/16**	**2016/17**
Number of Complaints	1,331[101]	839	1,051	970	1,045

Table 3 outlines budget information for the FMA over the past five years. The majority of income reported in each year is from the government. Other, smaller amounts are included in the revenue figures from income sources such as interest. Revenue from the Crown has been relatively stable, but with declines of around 4% between 2014/15-2015/16 and 2015/16-2016/17.

Table 3: Financial Markets Authority Funding (2012/13 – 2016/17)[102]

	2012/13	**2013/14**	**2014/15**	**2015/16**	**2016/17**
Total Revenue ('000)	$26,250	$28,754	$29,451	$28,382	$27,260
Revenue budgeted for investigation and enforcement functions ('000)	$6,969	$7,973	$7,973	$6,835	$6,046
Revenue budgeted for the FMA litigation fund ('000)[103]	$2,000	$2,000	$2,000	$2,000	$2,000

As shown in Table 3, revenue budgeted for investigation and enforcement activity has declined over recent periods. From 2014/15 to 2015/16, revenue for investigation and enforcement declined by 14%. It declined a further 12% in the following period from 2015/16 to 2016/17. Only $2 million per annum is appropriated by the government for actual litigation expenses.

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[99] Financial Markets Authority, above n 14, 22. Not all cases opened are as a result of complaints.
[100] Financial Markets Authority, Annual Reports <https://fma.govt.nz/about-us/corporate-publications/annual-reports/>.
[101] An unusual spike in complaints resulted in this outlier. Nearly 500 complaints were received in November 2012, whereas other months in the period received between 57 and 104 complaints.
[102] Serious Fraud Office, Annual Reports <https://www.sfo.govt.nz/annual-report>.
[103] This fund is on top of the reported revenue amount. The litigation fund is a separate government appropriation to cover actual litigation costs up to $2 million per annum.

Table 4 outlines data provided in relation to the OIA request for information on FMA fines. The data in Table 4 comprises fines filed in court by calendar year.[104]

Table 4: Financial Markets Authority Fines Imposed, Collected and Remitted (2015-2017)[105]

	2015	**2016**	**2017**
Amount of fines imposed	$500,947	0	$16,461
Amount of fines collected	$380	$123,060	$10,320
Amount of fines remitted	0	$337,182	0
Amount of fines remitted due to liquidation	0	0	0

The relatively low value of fines imposed is likely to reflect the few cases that are taken by the FMA. At least in part, funding limits the ability of the FMA to pursue greater numbers of prosecutions.

A. *Serious Fraud Office*

The role of the SFO is to investigate and prosecute complex financial crime. In 2016/17 the SFO received 831 complaints.[106] Of these complaints, 25 were pursued further to determine if the complaint should become a full investigation (called Part 1 enquiries). Eighteen investigations commenced – i.e. 2% of complaints.[107] Ten prosecutions commenced in 2016/17.[108] Table 5 shows the number of investigations commenced and the number of cases prosecuted over the five years from 2012/13 to 2016/17.

Complaints received by the SFO are outlined in Table 5. Table 5 shows that the number of complaints made has increased by over 90% in the five year period shown. However, investigations commenced have declined by 40% over the same period. The decline in investigations commencing as a proportion of the number of complaints receives is also shown in Table 5. This has declined from 6.9% in 2012/13 to 2.2% in 2016/17.

[104] The amounts remitted relate to fines filed in court from 2015-2017, but remittal could have occurred at any point during this period. The figures do not include fines, receipts or remittals that were cancelled, but do include any fees added on or after the fine was filed in court, such as enforcement fees or court costs.
[105] Information received under an Official Information Act 1982 request, Ministry of Justice, 3 July 2018. The amounts outlined in Table 1 do not include fines or amounts that were cancelled and do include additional fees added to the fine, such as enforcement costs or court costs. It is noted that fines may be collected in a different period to which they are imposed.
[106] Serious Fraud Office, above n 21, 12.
[107] Serious Fraud Office, above n 21, 29. It is acknowledged that there will be overlap in periods, i.e. some complaints received in the previous year may become investigations in the following year.
[108] Serious Fraud Office, above n 21, 12.

Table 5: Serious Fraud Office Complaints (2012/13 – 2016/17)[109]

	2012/13	2013/14	2014/15	2015/16	2016/17
Number of Complaints	435	595	536	596	831
Investigations Commenced	30	30	15	16	18
Investigations Commenced as % of Complaints Received	6.90%	5.04%	2.80%	2.68%	2.17%
Number of Cases Prosecuted	16	8	6	10	10

In the 2016/17 period the SFO was funded for 30-40 Part 1 enquiries, 20-25 investigations and 10-12 prosecutions.[110] Table 6 shows SFO funding and budgeted performance measures across the same five periods.

Table 6: Serious Fraud Office Funding and Performance Targets (2012/13 – 2016/17)[111]

	2012/13	2013/14	2014/15	2015/16	2016/17
Total Revenue ('000)	$10,039	$9,386	$9,098	$9,536	$9,736
Budgeted complaints	350-450	350-450	No longer a performance target		
Budgeted evaluations initiated	20	20	15	15	15
Budgeted investigations (commenced)	40-50	30-40	23-30	20-25	20-25
Budgeted cases bought to prosecution	20	15	10-12	10-12	10-12

Tables 6 shows a decrease in government funding across the five year period shown. This is despite the 90% increase in complaints (shown in Table 5). Budgeted performance targets have decreased across the time period. This is likely to result from performance targets not being met in earlier periods shown and performance targets have reduced to become achievable with funding provided.

The majority of successful SFO prosecutions result in custodial sentences. Therefore, there are only a small number that also include financial penalties. Information on SFO fines imposed, collected and remitted across the three most recent periods are outlined in Table 7.

[109] Serious Fraud Office, above n 21, 27.
[110] Serious Fraud Office, above n 21, 29-30.
[111] Serious Fraud Office, above n 102.

Table 7: Serious Fraud Office Fines Imposed, Collected and Remitted (2015-2017)[112]

	2015	**2016**	**2017**
Amount of fines imposed	$64,854	$57,174	$78,880
Amount of fines collected	0	$57,164	$900
Amount of fines remitted	0	0	0
Amount of fines remitted due to liquidation	0	0	0

B. *Inland Revenue*

This section outlines IR funding for audit and investigation functions. An Official Information Act was made to IR asking for data on how many taxpayers had negotiated outcomes with IR that resulted in their tax debts reducing. However, IR was not able to provide this information. Table 8 shows IR funding for their audit and investigation functions over the past five years, together with the performance measurement target of return on investment (ROI) for investigation activity.

Table 8: Inland Revenue - Funding and Performance Targets[113]

	2012/13	**2013/14**	**2014/15**	**2015/16**	**2016/17**
Unpaid tax detected through investigations	$1.2 BN	$1.2 BN	$1.2 BN	$1.2 BN	$1.3 BN
ROI for investigation activity	$7.47:$1	$8.00:$1	$7.52:$1	$7.91:$1	$8.31:$1
Total Revenue ('000) – audit and investigation function	$177,874	$171,862	$177,059	$169,406	$173,060
% Change in Revenue from previous year		-3.380%	3.024%	-4.322%	2.157%

Table 8 shows that the ROI on investigation activity is high. In recent periods for around each dollar invested, a return of around $8 has been achieved. Funding has been relatively stable, although it is noted that numbers of taxpayers have increased over the five year period shown.

It is also pertinent to consider activity by IR in relation to collection of penalties and interest. Where tax is not paid when due, penalties and interest will apply. Table 9 shows penalties and interest applied, collected and written off over the four year period from 2012/13 to 2015/16.

[112] Information received under an Official Information Act 1982 request, Ministry of Justice, 3 July 2018. The amounts outlined in Table 1 do not include fines or amounts that were cancelled and do include additional fees added to the fine, such as enforcement costs or court costs. It is noted that fines may be collected in a different period to which they are imposed.

[113] Inland Revenue, Annual Reports <http://www.ird.govt.nz/aboutir/reports/annual-report/>.

Table 9: Inland Revenue – Penalties Applied, Collected and Written Off[114]

	2012/13	2013/14	2014/15	2015/16
PENALTIES				
Penalties applied ($ m)	$850	$563	$552	$484
Penalties collected ($ m)	$151	$179	$175	$172
Penalties written off ($ m)	$281	$342	$341	$319
Penalties collected (%)	18%	32%	32%	36%
Penalties written off (%)	33%	61%	62%	66%
INTEREST				
Interest applied ($ m)	$420	$366	$354	$336
Interest collected ($ m)	$176	$190	$185	$213
Interest written off ($ m)	$143	$153	$194	$179
Interest collected (%)	42%	52%	52%	63%
Interest written off (%)	34%	42%	55%	53%

In relation to penalties applied, these have declined dramatically since 2012/13. However, penalties written off have not declined in a similar pattern. Penalties written off as a proportion of penalties applied have increased from 33% in 2012/13 to 66% in 2015/16. While there are some timing differences in years between when penalties are applied and when they are collected, this does not account for the increases in penalties written off.

Interest imposed on unpaid tax has also declined over the four year period shown. Similar to penalties, values written off also have a general upward trend over the period, from 34% of interest applied in 2012/13 to 53% of interest applied in 2015/16. Interest also may be applied in one period and written off in another. However, this timing difference is unlikely to be a significant explanatory factor in the general trend shown.

It is noted that IR is limited in the amount of tax (including penalties and interest) that it can write off in any one year, by the annual appropriation. In recent years this appropriation has been $1.2 billion. It has been subject to several increases in recent years. IR advise that this limitation is reflected in the penalties and interest write off figures.[115]

VI. ANALYSIS

Reiman and Leighton observe the following four points in relation to white-collar crime:

1. White-collar crime is costly
2. White-collar crime is widespread
3. White-collar criminals are rarely arrested or charged
4. When prosecuted and convicted, white-collar criminals sentences tend to be lenient when judged against the cost their crimes have imposed on society.[116]

[114] Information received under an Official Information Act 1982 request, Inland Revenue, 23 May 2018. Note that these amounts relate to all unpaid tax, not just outstanding amounts resulting from crime.
[115] Information received under an Official Information Act 1982 request, Inland Revenue, 23 May 2018.
[116] Reiman and Leighton, above n 35, 129.

The first point is relevant in the New Zealand environment. Detected tax evasion or other tax fraud is typically around $1.2 billion per annum in New Zealand. The SFO report that, on average, the value of the crimes they prosecute is $8 million each.[117] Reference to the FMA website confirms the significant value of the financial offending the agency investigates, with cases typically amounting to many millions.[118]

It is difficult to say with certainty that white-collar crime is widespread. This is because we do not know how much white-collar crime is undetected or, when detected, not pursued. In 2016/17 the SFO received 831 complaints and the FMA received 1,045. This number of complaints suggests that white-collar crime is not rare. As only 18 of the SFO complaints and 48 of the FMA complaints proceeded to a full investigation, this may indicate that the complaints are unsubstantiated. Conversely, it may indicate that the agency has insufficient resourcing to pursue cases other than those that are the most egregious, thereby lending support to Reiman and Leighton's third point outlined above, which is that white-collar criminals are rarely arrested or charged. Prior research has suggested that white-collar crimes may not be pursued where they are complex or where the offender is wealthy, as this is likely to result in a timely and/or costly prosecution.

The fourth point is perhaps the most difficult to substantiate. Prior research has shown that tax evaders receive lenient sentences for their offending.[119] The majority of the prosecutions undertaken by the SFO result in custodial sentences. However, frequently financial reparation from the offending is limited, as is shown in Tables 4 and 7 in the previous section. There is no lack of formal enforcement power. However, for many of the cases either prosecution does not occur or the most serious punishment options are not used.

The relatively low levels of funding provided to agencies that are responsible for investigating and prosecuting white-collar crime in New Zealand suggests that the offence is not viewed as a serious crime. Welfare fraud provides an effective comparison. In 2016/17 the welfare agency, the Ministry of Social Development, investigated 5,992 cases of suspected benefit fraud.[120] From these investigations, the Ministry established 2,307 cases of overpayment.[121] Of these cases, 453 prosecutions resulted, the majority of which were successful.[122] However, not all overpayments are the result of fraud. They may be due to official error or timing of benefit changes. Historically, fraud accounts for around 10% of detected overpayments.[123] In the 2016/17 period, the Ministry of Social Development had funding of $48 million to investigate overpayments and fraudulent payments, and collect overpayments. This funding is more than the entire Government funding provided to the FMA and SFO combined.

The return on investment achieved by the Ministry of Social Development is considerably lower than that of the FMA and IR. In 2016/17, fraud detected in the agency was around $21 million while total overpayments were $210 million, i.e. only 10% of overpayments result from fraud.[124] Thus, it is difficult to comment with accuracy about the return on investment from fraudulent activity. However, including all overpayment activity, which clearly overstates the

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[117] Serious Fraud Office, above n 21, 12.
[118] Financial Markets Authority, above n 3.
[119] Marriott, above n 68.
[120] Ministry of Social Development, '2016/17 Annual Report' (Ministry of Social Development, 2017) 35.
[121] Ministry of Social Development, above n 120, 67.
[122] Ibid.
[123] Taylor Fry, Report on the Benefit System for Working-Age Adults < https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/evaluation/annual-report-on-the-benefit-system-for-working-age-adults-as-at-30-june-2017.pdf>, 134.
[124] Ibid.

return on investment considerably, still results in a return on investment of around $4 for each $1 of expenditure. This is around half of the return on investment achieved by IR (as shown in Table 8). It is also around half of the return on investment achieved by the SFO, when taking into account their entire funding.[125]

It is important to consider the role of deterrence in white-collar crime. To the extent that Reiman and Leighton are correct in their claim repeated at the start of this section that white-collar crime is costly, widespread and rarely pursued by authorities, there is likely to be little deterrent among those who are inclined to commit financial crime. Where there are few costs associated with offending, combined with a low risk of detection, there is little to deter offenders from engaging in white-collar crime. Reference to Braithwaite's Sword of Damocles idiom is relevant here. The prosecuting authorities have the tools to create greater deterrence, but these are infrequently used.

Government agencies need to make trade-offs in relation to deterrence. One option available to government agencies is to settle a claim with an offender and achieve some form of negotiated outcome. In some cases, this may be the most efficient outcome. IR frequently use this option, although an Official Information Act request did not result in data showing how often this option is used. The other option is to pursue the offender, which is a costly approach. As noted in section 2.1, one of the roles of the IR is to collect the largest possible amount of tax revenue as permitted under the law, but without being an inefficient use of resources. As investigations and prosecutions are costly, many cases would not meet this requirement. Furthermore, a negotiated outcome may result in the collection of some tax revenue. By way of contrast, a prosecution will be costly and may not result in any additional funds collected.

SFO publications record its limited resourcing. The 2017 SFO Annual Report notes that:

> as a government agency with limited resources, we must focus on a relatively small number of cases that significantly impact the economy or the New Zealand public. In the case of bribery or corruption, we investigate crimes that could undermine confidence in the public sector or are of significant public interest. Cases are prioritised using a set of criteria that addresses the scale of the crime and its impact on victims, the complexity and the degree of public interest.[126]

The literature on sanctions outlined in section three supports the argument that, in isolation, harsh penalties have little deterrent effect. Instead, there are other factors that impact on an offender's decision to commit a crime. In particular, the literature suggests that the likelihood of detection and the likelihood of that sanction being incurred, are factors that act as stronger deterrents. Thus, rather than reducing the emphasis on general deterrence in the sentencing outcome, which signals to society that the crime is less serious, greater weighting could be placed on deterrence, while increasing investment in detection and prosecution of white-collar crime. This would, in turn, signal that a harsher punishment would be incurred. The importance of signalling must be acknowledged. In environments of information asymmetry, signalling provides relevant information to others in society with the aim of adjusting behaviour. To the extent that white-collar crimes are not often investigated or prosecuted, this is unlikely to achieve general or specific deterrence. Moreover, the low levels of funding of the agencies

[125] Calculated by taking the average value of SFO cases prosecuted ($8 million) and multiplying this by the number of cases prosecuted in the most recent year (10). This gives a total of $80 million. Divided by the Government funding to the SFO ($9.7 billion) gives a return on investment of $8.2 for each dollar of government funding.
[126] Serious Fraud Office, above n 21, 6.

tasked with investigating serious white-collar crime, signals that these crimes do not have a high priority in New Zealand.

Reference may be made to the Australian Taxation Office (ATO). In recent times, the ATO has gone to some lengths to indicate that it is a customer-friendly entity, in situations where taxpayers are compliant. However, it has also made significant effort to communicate the message that it will be tough on taxpayers who are not compliant.[127] This reinforces Braithwaite's argument, which is that it is important to not only have a range of punishment options, but that these must be used and be seen to be used in the most egregious cases of offending.[128]

From an equity perspective, the punishment should reflect the seriousness of the crime. However, punishment is expensive. In New Zealand it costs over $100,000 per annum to incarcerate an offender. The reality is that efficiency and equity are connected, and a trade-off must be made between ensuring minimal further financial loss while also providing deterrence and ensuring that those who engage in the crime are not in a preferential position to honest citizens.

This leads to the second theoretical frame of this study, which is the balance between equity and efficiency. As noted by Rawls, and highlighted in section four, it is not sufficient for outcomes to be efficient, they must also be just.[129] Efficient outcomes may result when individuals are not investigated or prosecuted, because intensive resourcing is required to do so. An efficient outcome may also be achieved through a negotiation with an offender, as some financial recompense may be provided. Where prosecutions take place, it is unlikely that reparation will result. However, to the extent that white-collar offenders commit crimes that, because of their complexity, or because of the wealth of the offender, result in the crimes not being investigated or prosecuted, then equity is not achieved.

In addition, equality of opportunity is not present. Individuals committing blue-collar financial offences, do not have the same opportunity to engage in negotiated outcomes as their wealthier counterparts committing white-collar offences. Moreover, as blue-collar offences, such as welfare fraud attract higher government funding, higher prosecutions and higher investigations, again the same opportunity of being investigated and prosecuted is not present for blue- and white-collar crimes.

The literature shows that white-collar offenders are likely to receive relatively lenient punishment when compared to their blue-collar counterparts. This is a pattern also established in New Zealand. The data presented in section five shows that limited cases are taken by the agencies in New Zealand that are responsible for investigating and prosecuting the most serious white-collar crimes. Thus, white-collar criminals gain at a second juncture: in reduced likelihood of investigation and prosecution, as well as in their likely punishment.

VII. CONCLUSION

This study has examined government funding provided to the agencies responsible for the investigation of financial fraud in New Zealand. The aim of the study is to question the extent

[127] Roche, above 88.
[128] Braithwaite, above 84.
[129] Rawls, above 93.

to which white-collar criminals are potentially advantaged by limited investigations and prosecutions undertaken by these agencies. Only a small proportion of SFO and FMA complaints are investigated and prosecuted. However, numbers of complaints indicate that white-collar crime is more widespread than investigations and prosecutions would suggest. While it is possible that some complaints are transferred to another agency, such as the New Zealand Police, it is the SFO and FMA that have the obligations of dealing with the most serious financial crime in the country.

The funding arrangements, and concomitant investigation and prosecution trends, do not suggest that New Zealand is an environment likely to generate a high level of deterrence for white-collar crime. As few cases are likely to be pursued by the FMA, the SFO or IR, the deterrent effect is diluted.

Procedural justice is challenged by the funding arrangements to the government agencies outlined in this study. Greater funding is provided to the welfare agency to investigate and collect welfare debt, than the entire budgets of the SFO and FMA combined. The majority of the crimes investigated by the three government agencies outlined above, are higher in value than the crimes investigated by the Ministry of Social Development. Moreover, higher returns on investment are gained by these three agencies. This suggests that greater investment in the investigation functions of these three agencies is likely to result in a more socially optimal outcome than, for example, funding for the investigation function of the Ministry of Social Development.