

A RATIONAL APPROACH TO SENTENCING WHITE-COLLAR OFFENDERS IN AUSTRALIA

ABSTRACT

There are no overarching (and few settled) principles governing the sentencing of white-collar offenders. This is especially the situation in relation to the relevance of public opprobrium to the sentencing calculus and the manner in which employment deprivations stemming from the penalty impact on the sentence. To the extent that there is general convergence in the approach to sentencing white-collar offenders, the approach is often not sound. This is the case in relation to the minor sentencing discount accorded for previous good character, and the prevailing orthodoxy which assumes that offences targeted at major institutions, such as banks, meaningfully impair community confidence in such institutions. Fundamental reform of the manner in which white-collar offenders are sentenced is necessary in order to make this area of law more coherent and doctrinally sound. These reforms include providing a significant and pre-determined discount for restitution, reducing the weight given to general deterrence in the sentencing calculus, and providing a greater discount for previous good character and employment deprivations suffered as a direct result of the sentence. Further, crimes against individuals should be regarded as being more serious than those committed against large corporations or the public revenue. The article focuses on the existing law in Australia, however, the reform proposals and doctrinal analysis could be applied to all jurisdictions.

I INTRODUCTION

White-collar crime stands apart from other criminal offences. The differences are often exacerbated when it comes to sentencing white-collar offenders. Considerations that often distinguish white-collar offences from other types of crime include:

- white-collar offenders are not normally from socially-deprived backgrounds;
- white-collar offenders often do not have prior convictions;
- white-collar offences often involve a breach of trust or violation of some other moral virtue, such as loyalty;

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- the offences are normally well planned or may continue over a long period of time;
- it is often possible to fully remedy the resulting tangible harm through monetary restitution;
- there is no limit to the maximum benefit derived from the crime;
- the harm caused by the offence often goes beyond that inflicted on individuals and extends to financial institutions and markets;
- there are often non-criminal sequels to the conduct in question; and
- there is often a range of incidental sanctions which are suffered by white-collar offenders, including loss of reputation and reduction of future career prospects.

The unique features of white-collar offending have resulted in a fluid and unsettled jurisprudence in the sentencing of such offenders. This is unremarkable given the absence of legislative fiat dealing expressly with this criminological subset. This article examines the nature of white-collar crime with a view to providing a framework for a rational and consistent approach to sentencing white-collar offenders.

In part II of the article, we define ‘white-collar crime’. Part III analyses the current sentencing approach to white-collar criminals. In part IV, we suggest how the sentencing of white-collar criminals should be reformed.

The reforms we ultimately propose include: making restitution to the victim a stronger mitigating factor; providing a greater sentencing discount for previous good character; recognising the impact of incidental harms, such as diminished career prospects, in the sentencing process; and making the measure of harm caused by the offence the key determinant in sentence severity, consistent with the concept of proportionality.

II THE DEFINITION OF WHITE-COLLAR CRIME

There is no universally-accepted definition of white-collar crime despite the concept first being introduced over 80 years ago by Edwin Sutherland as ‘a crime committed by a person of respectability and high social status in the course of his occupation’.¹ This definition is forensically inadequate because notions such as ‘respectability’ and ‘social status’ are too obscure to be meaningful,² and

¹ This was the description given by Sutherland in a speech he delivered to the American Sociological Society in 1939: see J Kelly Strader, *Understanding White-Collar Crime* (LexisNexis, 2002) 1.

² Richard Quinney, ‘The Study of White-Collar Crime: Toward a Re-orientation in Theory and Research’ in Gilbert Geis and Robert F Meier (eds), *White-Collar Crime — Offenses in Business, Politics and the Professions* (Free Press, 1977) 285.

white-collar offending clearly transcends occupational or workplace transgressions.³

In a relatively recent analysis of white-collar crime in his book, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime*, Stuart Green declines to attempt an exhaustive definition of what is encompassed by the concept. He notes the failure of sociologists to ascribe a consistent meaning to 'white-collar crime', observing that the conduct often concerns behaviour at the margins of the criminal spectrum. The diversity of conduct falling within the rubric of 'white-collar' leads Green to steer away from identifying semantic parameters, instead observing that such offending shares certain characteristics with other similar types of offending, though no single characteristic is essential.⁴

According to Green, key characteristics include: a diffused type of harm (often harming financial environments as opposed to identifiable individuals); wrongdoing that violates accepted norms (such as employee fidelity); and, a diminished role for mens rea.⁵ However, he concedes that many offences stand apart from this model. Thus, some offences which have a high mens rea, such as bribery and obstruction of justice offences, still fall within the white-collar crime rubric. The wrongs that Green identifies which are committed by white-collar criminals include breaches of trust, loyalty, dishonesty, deception and lying.⁶

The nebulous nature of white-collar crime is further illustrated by Arie Freiberg, who notes:

Discussion of the problem of sentencing [a] 'white-collar criminal' is plagued by the initial problem of identifying the subject matter. There is no discrete group of offences which can readily be identified as 'white-collar crime' ... [O]ver recent years, the phrase has been extended ... to cover any occupational deviance, whether by persons of high status or not, and violation of professional ethics. It would thus extend to cover the case of an academic who demands sexual favours in return for good grades. To some it has come to refer to almost any form of illegal behaviour other than conventional street crimes.⁷

³ For a discussion of the evolution of the white-collar terminology, see Kam Wong, 'From White-Collar Crime to Organizational Crime: An Intellectual History' (2005) *Murdoch University Electronic Journal of Law* 14.

⁴ Stuart P Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006) 18.

⁵ *Ibid* 34.

⁶ *Ibid*.

⁷ Arie Freiberg, 'Sentencing White-Collar Criminals' (Paper presented at the Fraud Prevention and Control Conference, Australian Institute of Criminology, Surfers Paradise, Queensland, 24–25 August 2000) 2 <http://aic.gov.au/media_library/conferences/fraud/freiberg.pdf> (citations omitted).

The United States Department of Justice gave a partial definition of white-collar crime in the following terms:

Nonviolent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities; also, nonviolent crime for financial gain utilizing deception and committed by anyone having special technical and professional knowledge of business and government, irrespective of the person's occupation.⁸

Indeed, a workable definition of white-collar crime has proved so elusive that some commentators have suggested defining the phrase by what it is *not*. Thus, J Kelly Strader posits that a white-collar crime is one that does not:

- (a) necessarily involve force against a person or property;
- (b) directly relate to the possession, sale, or distribution of narcotics;
- (c) directly relate to organized crime activities;
- (d) directly relate to such national policies as immigration, civil rights, and national security; or
- (e) directly involve 'vice crimes' or the common theft of property.⁹

While definitions of white-collar crime can vary widely, it does not mean that the search for a definition should be abandoned. A working definition is crucial to the coherent analysis of existing jurisprudence, as well as to the process of informed decision-making and to any proposals for reform.

A white-collar crime involves an act which involves the taking of money or property (such as shares) or avoiding a legal obligation (such as a tax liability) without legal justification by an individual who is in a position of substantial influence regarding the relevant transaction. Examples of influence are where a bank employee transfers bank money into his or her account or where an individual submits a fraudulent tax return or deposits a false cheque or subverts the normal operation of the market system. It is further illustrated by paradigm instances of white-collar offending, which include:

- theft of company assets by company directors and employees (such as bankers);
- theft of client money by lawyers and accountants;
- insider trading and other market manipulation by people employed in industries associated with the financial markets;

⁸ Bureau of Justice Statistics, *United States Department of Justice, Dictionary of Criminal Justice Data Terminology* (2nd ed, 1981) 215, quoted in Strader, above n 1, 2.

⁹ Strader, above n 1, 2.

- complex tax fraud;
- corruption; and
- money laundering.

III CURRENT APPROACH TO SENTENCING WHITE-COLLAR OFFENDERS

A *General Matters Relevant to Sentence*

Sentencing is a complex activity and it is not feasible in an article of this size (and with its focus) to explain the key principles and rules.¹⁰ However, by way of background, we provide an overview of the structure of the sentencing law and the manner in which sentencing determinations are made as a backdrop to the remaining discussion.

Sentencing law and practice is not uniform throughout Australia. Each of the nine jurisdictions has distinctive statutes which guide sentencing decisions.¹¹ Sentencing law throughout Australia is, however, remarkably similar in the context of white-collar offending. This is because all of the sentencing statutes set out similar objectives of sentencing, in the form of general and specific deterrence, community protection, denunciation and rehabilitation.¹² In relation to each statutory scheme, there is no attempt to prioritise these sometimes conflicting objectives.¹³ The High Court of Australia has established that the key consideration in setting the penalty is the proportionality principle, which stipulates that the harshness of the sanction should match the seriousness of the offence.¹⁴

Moreover, the aggravating and mitigating considerations that inform the sentencing determination are largely universal. These factors are, principally, a manifestation of the common law, although some statutory schemes set out such matters in detail.¹⁵ Important factors that can aggravate or mitigate penalty include the level of harm caused by the offence, the offender's prior criminal record, remorse, the attitude of the victim (including victim impact statements), the level of planning

¹⁰ For an extensive analysis, see Richard G Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2nd ed, 1999); Mirko Bagaric and Richard Edney, Thomson Reuters, *Australian Sentencing*, vol 1 (at Release 10); Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010).

¹¹ The main statutes that deal with sentencing in the respective Australian jurisdictions are as follows: *Crimes (Sentencing) Act 2005* (ACT); *Crimes Act 1914* (Cth) pt 1B ss 16–22A; *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT); *Penalties and Sentences Act 1992* (Qld); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1997* (Tas); *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (WA).

¹² See Bagaric and Edney, above n 10, [1-39101].

¹³ *Ibid.*

¹⁴ See further the discussion below.

¹⁵ See especially the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.

involved, the prevalence of the offence, the effect of the proposed sanction, hardship to others (especially the offender's family), any guilty plea, voluntary reparation, worthy social contributions, and assistance to the criminal justice system.¹⁶

All Australian sentencing schemes provide for the imposition of a similar range of sanctions. The least serious is a finding of guilt without any further harshness being imposed on the offender, and the most severe being a term of imprisonment.¹⁷

Further, the High Court has made clear that sentencing decisions are an 'instinctive synthesis' of all of the relevant variables as opposed to a mathematical calibration of each determinant that is relevant in a particular case.¹⁸ As a result, there is no single penalty which is objectively correct in any case. As was noted recently by the Victorian Court of Criminal Appeal in *Freeman v The Queen*:¹⁹

[i]t is a basic principle of sentencing law that there is no single correct sentence in a particular case. On the contrary, there is a 'sentencing range' within which views can reasonably differ as to the appropriate sentence.²⁰

Within this rubric, sentencing principles relating to white-collar crime are largely unsettled, but, in practice, there is nonetheless a number of widely-accepted and observed rules. Prior to examining the issue in some depth, it is possible to provide a framework by setting out some core matters.

White-collar offences are generally regarded as being committed principally for greed,²¹ thus, a paramount consideration in sentencing is the amount of money

¹⁶ Bagaric and Edney, above n 10, [1-42001], [1-60721].

¹⁷ Bagaric and Edney, above n 10, [1-501].

¹⁸ *Markarian v The Queen* (2005) 228 CLR 357; *Hili v The Queen* (2010) 242 CLR 520. The instinctive approach to sentencing means that discussions of sentencing which focus on increases and reductions in penalties are somewhat obscure, given that generally a mathematical or clear weighting is not ascribed to relevant variables. In this discussion we focus in particular on mitigating considerations. Although the extent to which any mitigating factors reduce the sanction is unclear, it is settled that where more than one mitigating factor is applicable, the factors operate in a cumulative manner to reduce sentence. There is no precise mathematical precision associated with this process other than the limitation that the factors cannot cumulate so significantly to result in a disproportionate sentence. This allows the courts to adopt a 'rolled up' or an 'analytical approach': see *R v Ehrlich* (2012) 219 A Crim R 415 (Adams J); *R v NP* [2003] NSWCCA 195 (17 July 2003); *R v El Hani* [2004] NSWCCA 162 (21 May 2004). The extent to which mitigating factors impact on sentence is made clearer by the fact that, as discussed below, certain considerations (namely, plea of guilty and assistance to authorities) attract a mathematical reduction to the penalty.

¹⁹ [2011] VSCA 214 (27 July 2011).

²⁰ *Ibid* [6].

²¹ See, eg, *R v Mercieca* [2004] VSCA 170 (10 September 2004).

involved.²² Other important considerations are the level of sophistication and planning of the offence²³ and whether or not a breach of trust occurred.²⁴ Offences committed over a long period of time are normally considered to be more serious.²⁵ That may be because long periods of time provide an offender the opportunity to desist from offending. Where an offender has desisted it is a strong mitigating factor, especially if coupled with an offender who voluntarily discloses the crimes to police.²⁶ The most important sentencing objective that the courts emphasise in sentencing white-collar criminals is general deterrence. It is mainly for this reason that white-collar crimes involving large amounts (roughly in the order of \$100 000) normally result in an immediate custodial term being imposed, irrespective of other mitigatory factors.²⁷

A good recent example of the general approach to sentencing white-collar offenders is set out in the comments of Warren CJ, Redlich J and Ross AJA in *DPP (Cth) v Gregory*²⁸ in the context of rejecting an appeal against sentence for a tax evasion offence. The passage is set out at some length to illustrate the complexity of the sentencing inquiry in such matters:

In seeking to ensure that proportionate sentences are imposed, the courts have consistently emphasised that general deterrence is a particularly significant sentencing consideration in white-collar crime and that good character cannot be given undue significance as a mitigating factor, and plays a lesser part in the sentencing process ... Moreover, general deterrence is likely to have a more profound effect in the case of white-collar criminals. White-collar criminals are likely to be rational, profit seeking individuals who can weigh the benefits of committing a crime against the costs of being caught and punished. Further, white-collar criminals are also more likely to be first time offenders who fear the prospect of incarceration.

In many if not most cases, imprisonment will be the only sentencing option for serious tax fraud in the absence of powerful mitigating circumstances. A sophisticated degree of planning accompanied by a lack of contrition should ordinarily lead to a more severe sentence of imprisonment. But despite the recognised importance of general deterrence, tax fraud has not always been as

²² Freiberg, above n 7, 9. See also, *Hoy v The Queen* [2012] VSCA 49 (7 March 2012).

²³ *R v Coukoulis* (2003) 7 VR 45; *R v Webber* (2000) 114 A Crim R 381; *R v Cameron* (1993) 171 LSJS 305 (SACCA).

²⁴ *R v Smith* (2000) 114 A Crim R 8.

²⁵ *R v Ralphs* [2004] VSCA 33 (9 March 2004) (fraud by a law clerk over a nine year period); *R v Grossi* (2008) 23 VR 500 (theft from employer lasting six years); *R v Galletta* [2007] VSCA 177 (30 August 2007) (theft from employer for nine years).

²⁶ *R v Lopez* [1999] NSWCCA 245 (12 March 1999); *R v Kittson* [2008] VSCA 77 (5 May 2008).

²⁷ *R v Whitnall* (1993) 42 FCR 512; *R v Nguyen* [1997] 1 VR 386; *DPP (Cth) v Carter* [1998] 1 VR 601; *R v Schwabegger* [1998] 4 VR 649, 654.

²⁸ *DPP (Cth) v Gregory* (2011) 250 FLR 169.

severely enforced as other forms of criminality. Over a decade ago this court, constituted by Winneke P, Brooking and Callaway JJA observed in *R v Nguyen and Phan* that the seriousness of the offence of defrauding the Commonwealth of income tax ‘has not always been sufficiently reflected in the sentence passed’ ...

A sentence imposed for fraud upon the taxation revenue, is intended to reaffirm basic community values that all citizens according to their means should fairly share the burden of the incidence of taxation so as to enable government to provide for the community, that the revenue must accordingly be protected, and that the offender should be censured through manifest denunciation. When these considerations are not reflected in the responses of the courts, the criminal justice system itself fails to achieve its objectives.²⁹

Several notable aspects emerge from the above passage. First, the preparedness of the court to look widely at the harm caused by a white-collar offence, in this case tax evasion, and focus not only on the obvious and immediate victim (the tax office) but also the ultimate victim (the general public). Second, the degree of planning and sophistication of the offence is important. Third, general deterrence is given considerable weight in the sentencing calculus because of the need to discourage similar offending. It is assumed that this will be especially effective in the case of those inclined to commit white-collar offences, because they do not normally have prior convictions and are likely to be rational agents who undertake a cost/benefit analysis prior to engaging in offending. Finally, it is noted that previously, in some instances, white-collar crimes were inadequately punished, which justifies an increase in current tariffs.

The cardinal role of general deterrence in relation to such crimes has been confirmed by numerous other authorities. For example, Sheller JA in *Director of Public Prosecutions (NSW) v Hamman*³⁰ stated:

General deterrence is a predominant consideration when sentencing for offences of defrauding the revenue. Appeal Courts have discussed and emphasised the seriousness of frauds committed to the detriment of the public revenue. Inevitably, the Australian system of tax collection depends upon the honesty of taxpayers and, in particular, upon their fully declaring in each year of income what their gross income is.³¹

The previous good character of the offender is recognised in the sentencing calculus. However, as was highlighted in *R v Gregory* above, the current sentencing orthodoxy maintains that this is the very feature of many white-collar offenders which enables them to commit such crimes, and accordingly, little weight is usually attributed to this factor.

²⁹ Ibid 182–4 [53], [54], [57] (citations omitted, emphasis added).

³⁰ (Unreported, New South Wales Court of Criminal Appeal, Sheller JA, 1 December 1998).

³¹ Ibid 6. See also *R v Bromley* (2010) 79 ATR 692, 697 [31]; *R v Nicholson; Ex parte DPP (Cth)* [2004] QCA 393 (22 October 2004) [20]; *R v Wheatley* (2007) 67 ATR 531.

In *R v Coukoulis*³² the role of good character in sentencing white-collar offenders was addressed by Ormiston JA in the context of a solicitor who committed a large-scale fraud (of more than \$8 million from over 40 people — mainly clients), where his Honour said:

[A]lthough the fact that the appellant has had *no prior convictions is of importance and must be recognised, these are the very circumstances in which he was able to deceive so many of his clients*. His very reputation, as a solicitor and generally in the community, enabled him to obtain the moneys he stole, to persuade his clients and others that he was always acting in their interests, to reassure them and to allow him to dissuade them from enquiring further as to the precise manner of their moneys' application. Implicit faith was, wrongly, placed in him in circumstances where, were the moneys obtained by an unqualified person or through a person with a lesser reputation, those depositors might well have been more cautious about protecting themselves against possible misuse of their moneys.³³

It is notable that, as in *Coukoulis*, above, assessing the harm done required the court to look again beyond the immediate victim, and to recognise the damage caused to the profession and the wider community in which the offender practised the profession. In evaluating the harm, the court also stated that the victims were caused greater distress because the offence involved a breach of trust. It was partly for this reason that the court stated that a heavy penalty was necessary to appropriately denounce the conduct.

In *R v Swift*³⁴ Nettle JA (with whom Vincent JA and Habersberger AJA agreed) noted that there is no tariff for white-collar offences, but that a breach of trust is a strongly aggravating factor, as is the financial vulnerability of the victim. Moreover, the Court gave little weight to factors personal to the accused (including loss of reputation and excellent prospects of rehabilitation) and rejected an appeal against a term of imprisonment of five years and three months for offending that spanned over two years, and totalled approximately \$1.5 million.

In *McMahon v The Queen*³⁵ the offender pleaded guilty to 38 counts of tax fraud and 42 counts of identity fraud, and was sentenced to a total effective term of six years imprisonment with a minimum term of four years. In rejecting his appeal against sentence, the New South Wales Court of Appeal again noted that while previous good character is relevant to the sentencing of white-collar offenders, it is pragmatically of little weight given the strong need for general deterrence.³⁶

The Court also rejected a submission that white-collar offenders should be met with a shorter non-parole period, primarily because of the growing seriousness

³² (2003) 7 VR 45.

³³ Ibid 59–60 [42] (emphasis added). See also *R v Kelvin* (2000) 46 ATR 1.

³⁴ (2007) 15 VR 497.

³⁵ [2011] NSWCCA 147 (22 June 2011).

³⁶ Ibid [76].

and visibility of such offences (in the community) and the fact that such offences are difficult and expensive to detect.³⁷ Even where a sentencing court is moved by an ‘exceptionally good prior character’ to wholly suspend a sentence of imprisonment, such as in *R v Pollard*³⁸ which involved electronic theft from an employer of about \$92 000 over three months, the Court of Criminal Appeal declared that such a sentence would be manifestly inadequate. It opined that ‘[t]he limited relevance of prior good character in formulating the length of an appropriate sentence cannot be transformed into a more compelling factor for the purposes of determining whether a sentence of imprisonment should be suspended’.³⁹

In *Stevens v The Queen*⁴⁰ the Court again noted the increasing seriousness with which such offending is viewed — even when a breach of trust is not involved — and the institutional damage that it can cause. That case involved a number of systematic deceptions in a bank, over a 16 year period which totalled approximately \$400 000. It noted that there can be no tariff for such offending, given the wide range of circumstances in which it can be committed, and the impact that a crime has on public confidence in a system is a strong aggravating consideration:

If public confidence in the integrity of the [electronic banking] system is to be maintained the courts have an obligation to ensure that when dishonest breaches of its security are identified the offenders are appropriately punished. Both personal and general deterrence are of particular significance in relation to these types of offences.⁴¹

Although there is no tariff, the courts have on occasions catalogued a large number of other white-collar facts and penalties to provide some level of consistency to the sentences imposed. Recent examples of this are *Pollock v Western Australia*,⁴² *Brennan v Western Australia*⁴³ and *Scook v The Queen*.⁴⁴

Voluntary restitution by the offender is consistently regarded by the courts as an important consideration. However, where restitution does occur, it does not automatically result in a significant discount because of the perception that an offender is ‘buying his or her way out of prison’.⁴⁵ In *R v Phelan*,⁴⁶ Hunt CJ at CL stated that

³⁷ Ibid [82]–[84]; See also *Hili v The Queen* (2010) 242 CLR 520, 538–41 [59]–[67].

³⁸ [2006] NSWCCA 405 (15 December 2006).

³⁹ Ibid [19]. It should be noted that the Court declined to allow the Crown appeal on the basis of the double jeopardy principle.

⁴⁰ (2009) 262 ALR 91.

⁴¹ Ibid 104 [79] (McClellan CJ at CL).

⁴² [2011] WASCA 133 (15 June 2011) [42].

⁴³ [2010] WASCA 19 (15 February 2010).

⁴⁴ (2008) 185 A Crim R 164.

⁴⁵ See *Kovacevic v Mills* (2000) 76 SASR 404, 421 [81] (Doyle CJ, Mullighan, Bleby and Martin JJ).

⁴⁶ (1993) 66 A Crim R 446.

offenders should not be able to purchase a lesser sentence, but then qualified this by stating: '[w]here there has been a substantial degree of sacrifice involved in the repayment, that is a matter which may properly be taken into account by way of mitigation'.⁴⁷

Thus, to the extent that voluntary restitution currently impacts upon a sentence, it is only in circumstances where the restitution constitutes a demonstrable hardship to the offender that it will provide a significant mitigation of penalty. The utilitarian benefits of reparation to the victim appear to be a secondary consideration.

B *Impact of Incidental Burdens and Hardships*

A particularly complex sentencing issue is the extent to which courts factor into the sentence hardships or burdens which directly stem from the offending, but which are not strictly part of the court-imposed penalty. These are referred to as the 'incidental burdens or hardships' flowing from the offence. They take two broad forms: those which are imposed by the courts and those not imposed by courts but are a direct consequence of the sentence. We consider them in that order.

There are three forms of curial deprivations. The first are confiscation orders. The second are restitution orders. The third are disqualifications from being involved with companies.⁴⁸ The main forms of non-curial hardships are:

- shame, embarrassment and social ostracism; and
- reduced employment and career prospects.

We first look at the current legal position regarding incidental curial deprivations.

1 *Confiscation Proceedings*

Confiscation proceedings are being increasingly used against offenders, especially in relation to drug and property offences.⁴⁹ Broadly, these proceedings can result in reclamation of property or money derived from the offence, or go further and strip

⁴⁷ Ibid 448. This approach was endorsed by Spigelman CJ (Price J agreeing) in *Thewlis v The Queen* (2008) 186 A Crim R 279, 280 [4]. See also *R v Conway* (2001) 121 A Crim R 177; *R v Berlinsky* [2005] SASC 316; *Stratford v The Queen* [2007] NSWCCA 279 (18 September 2007) [22]–[24]; *Chandler v The Queen* [2008] NSWCCA 240 (20 October 2008).

⁴⁸ For an extensive analysis of incidental curial deprivations, see Fox and Freiberg, above n 10, ch 6.

⁴⁹ The relevant statutory provisions are: *Confiscation of Criminal Assets Act 2003* (ACT); *Proceeds of Crime Act 2002* (Cth); *Confiscation of Proceeds of Crime Act 1989* (NSW); *Criminal Assets Recovery Act 1990* (NSW); *Criminal Property Forfeiture Act 2002* (NT); *Criminal Proceeds Confiscation Act 2002* (Qld); *Criminal Assets Confiscation Act 2005* (SA); *Crime (Confiscation of Profits) Act 1993* (Tas); *Confiscation Act 1997* (Vic); *Criminal Property Confiscation Act 2000* (WA).

the offender of property or assets regardless of whether they can be directly linked to the criminal activity or not. In essence, the general approach taken by sentencing courts is that the first type of orders will not result in mitigation of penalty, whereas the second will. The principles are set out in *R v McLeod*⁵⁰ as follows:

The obligation to disgorge the proceeds of crime is not a penalty. Disgorgement is necessary to prevent unjust enrichment. Forfeiture of the proceeds of crime has, nevertheless, been treated as a mitigating factor in some cases. Thus, it has been said that pecuniary penalty orders which relate entirely to profits from the unlawful activity constitute an additional punishment.

Disgorgement of benefits apart, forfeiture is relevant to penalty. At common law, forfeiture of lawfully-acquired property has generally been regarded as a mitigating factor in sentencing, since it places the offender in a worse position than he/she was before the commission of the offence. That is, forfeiture has a punitive or deterrent effect.

The sentencing principle of proportionality requires that the nature and extent of any forfeiture of property be considered in fixing the sentence. That is not to say that such orders are always to be viewed as warranting mitigation of penalty. It is necessary to consider whether the forfeiture will have a disproportionate or exceptional effect on the offender and may have a substantial deterrent effect.⁵¹

In that case, the Court also held that, in setting the penalty, the likelihood of future hardship in terms of exaction of property may be taken into account. This approach is reflected in s 320 of the *Proceeds of Crime Act 2002* (Cth).⁵² In *McMahon v The Queen*⁵³ the Court stated that repayment of money (in this case to the Australian Taxation Office) through a pecuniary penalty order is not in itself mitigatory,⁵⁴ however, consent to such an order can be taken into account as an indication of genuine contrition and remorse.⁵⁵

⁵⁰ (2007) 16 VR 682.

⁵¹ Ibid 685–6 [16]–[18]. In *R v Ford* (2008) 100 SASR 94 a similar approach was taken by Gray J (with whom Doyle CJ agreed).

⁵² This states:

A court passing sentence on a person in respect of the person's conviction of an indictable offence:

- (a) may have regard to any cooperation by the person in resolving any action taken against the person under this Act; and
- (b) must not have regard to any forfeiture order that relates to the offence, to the extent that the order forfeits proceeds of the offence; and
- (c) must have regard to the forfeiture order to the extent that the order forfeits any other property; and
- (d) must not have regard to any pecuniary penalty order, or any literary proceeds order, that relates to the offence.

⁵³ [2011] NSWCCA 147 (22 June 2011).

⁵⁴ As a consequence of s 320(d) of the *Proceeds of Crime Act 2002* (Cth).

⁵⁵ *McMahon v The Queen* [2011] NSWCCA 147 (22 June 2011) [72].

The situation is different in New South Wales and Western Australia, where s 24B of the *Crimes (Sentencing Procedure) Amendment Act 2010* (NSW) and s 8(3) of the *Sentencing Act 1995* (WA), respectively, preclude confiscation orders of any nature from being taken into account to reduce penalty.⁵⁶

2 Restitution

Courts in all jurisdictions have power to order restitution to victims of property offences.⁵⁷ In Victoria, for example, where goods have been stolen and a person found guilty of an offence connected with the theft, the court may order that the person return the stolen goods or the proceeds of their sale to their true owner.⁵⁸ As noted above in *Kovacevic v Mills*,⁵⁹ restitution in the context of property offences is a mitigating consideration, but is not necessarily a weighty factor.

3 Disqualifications

Individuals convicted of certain offences are disqualified — normally automatically — from being involved in the management of corporations for some period of time. ‘Managing corporations’ is defined expansively, not only prohibiting offenders from acting as company directors, but also from participating in corporate decision making or significantly affecting a company’s financial standing, or from communicating instructions or wishes to directors who might customarily act in accordance with those instructions. It, thus, operates as an effective total ban on any managerial involvement with a company.⁶⁰ The key provisions are contained in s 206B of the *Corporations Act 2001* (Cth) as follows:

- (1) A person becomes disqualified from managing corporations if the person:
 - (a) is convicted on indictment of an offence that:
 - (i) concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation; or
 - (ii) concerns an act that has the capacity to affect significantly the corporation's financial standing; or

⁵⁶ In *Stock v The Queen* (2011) 206 A Crim R 574 it was held that confiscation proceedings even prior to the legislative changes in NSW were not normally mitigatory. This was also the view in *Greco v R* [2010] NSWCCA 268 (25 November 2010).

⁵⁷ *Crimes Act 1914* (Cth) s 21B; *Crimes (Sentencing) Act 2005* (ACT) ss 19–20; *Criminal Procedure Act 1986* (NSW) s 43; *Sentencing Act 1995* (NT) s 88; *Penalties and Sentences Act 1992* (Qld) ss 35, 194; *Criminal Law (Sentencing) Act 1988* (SA) s 52; *Sentencing Act 1997* (Tas) s 65; *Sentencing Act 1991* (Vic) s 84; *Sentencing Act 1995* (WA) ss 109–122.

⁵⁸ *Sentencing Act 1991* (Vic) s 84.

⁵⁹ *Kovacevic v Mills* (2000) 76 SASR 404, 421 [81].

⁶⁰ *Corporations Act 2001* (Cth) s 206A.

- (b) is convicted of an offence that:
 - (i) is a contravention of this Act and is punishable by imprisonment for a period greater than 12 months; or
 - (ii) involves dishonesty and is punishable by imprisonment for at least 3 months; or
- (c) is convicted of an offence against the law of a foreign country that is punishable by imprisonment for a period greater than 12 months.

The disqualification follows automatically upon conviction and the sentencing court is given no discretion.⁶¹ While not all white-collar offenders will suffer hardship equally as a consequence, Martin and Webster point out that any disqualification or disability ‘contributes significantly to the social stigma of the finding of guilt or conviction’.⁶² For those offenders whose occupation involved the management of a company, the disqualification presents an obvious and significant hardship. Courts have recognised this in some cases⁶³ but not in others.⁶⁴ Freiberg observes: ‘[t]he courts have been ambivalent on this issue, sometimes decreasing a sentence to take into account the additional detriment, and sometimes refusing to do so. The cases present no clear pattern’.⁶⁵

It should be noted that white-collar offenders can also be subject to disqualification orders consequent upon civil penalty proceedings, even where there are no criminal proceedings afoot.⁶⁶ The discretion resides with the prosecuting authority,⁶⁷ and there is no bar to pursuing a white-collar offender criminally after the conclusion of a civil penalty proceeding.⁶⁸

⁶¹ However, the Court has power upon application by the disqualified person to grant leave to manage a corporation in the future: *Corporations Act 2001* (Cth) s 206G.

⁶² J P Martin and D Webster, *The Social Consequences of Conviction* (Heinemann Educational, 1971) as cited in Fox and Freiberg, above n 10, 526.

⁶³ For example, specific reference to disqualification can be found in *R v Chan* (2010) 79 ACSR 189, 194 [20] (Forrest J); *DPP v Tang (aka Widjaja)* (Unreported, County Court of Victoria, Patrick J, 8 December 2011) 68.

⁶⁴ No reference to the statutory disqualification was made at all in *R v Hartman* (2010) 81 ACSR 121 or *R v Richard* [2011] NSWSC 866 (12 August 2011).

⁶⁵ Freiberg, above n 7, 12.

⁶⁶ *Corporations Act 2001* (Cth) ss 1317DA, 206C.

⁶⁷ The matters that inform the discretion whether to proceed by civil or criminal proceedings are unclear and the lack of transparency involved in this decision was noted by Higgins J in *R v Whitnall* (1993) 42 FCR 512, 518. See further Michelle Welsh, ‘The Regulatory Dilemma: The Choice Between Overlapping Criminal Sanctions and Civil Penalties for Contraventions of the Directors’ Duty Provisions’ (2009) 27 *Company and Securities Law Journal* 370; Michael Gething, ‘Do We Really Need Criminal and Civil Penalties for Contraventions of Directors’ Duties?’ (1996) 24 *Australian Business Law Review* 375.

⁶⁸ *Corporations Act 2001* (Cth) s 1317P.

4 *Public Opprobrium and Social Ostracism*

A common non-curial hardship stemming from white-collar offending is shame and embarrassment. The law is not settled on the impact that this should have on sentence. It was considered by the several members of the High Court in *Ryan v The Queen*,⁶⁹ but a majority of the Court did not endorse a clear position. Kirby and Callinan JJ stated that public opprobrium was a factor which could be taken into account to reduce the sanction imposed by the court, whereas McHugh J took the opposite approach. Gummow J did not canvass the issue, while Hayne J ‘substantially’ agreed with McHugh J.⁷⁰ Callinan J stated:

Of course the abuse of an office to commit a crime is greatly to be deplored but the crime of a person occupying an office of some prominence will often attract much greater vilification, adverse publicity, public humiliation, and personal, social and family stress than a crime by a person not so circumstanced. When these consequences are attracted they should not be ignored by the sentencing court.⁷¹

Kirby J agreeing with Callinan J stated:

[s]tigma [stemming from conviction] commonly add[s] a significant element of shame and isolation to the prisoner and the prisoner's family. This may comprise a special burden that is incidental to the punishment imposed and connected with it. If properly based on evidence, it could, in a particular case, be just to take such considerations into account in fixing the judicial punishment required.⁷²

McHugh J rejected the relevance of public opprobrium because:

First, it would seem to place a burden on the sentencing judge which would be nearly impossible to discharge. The opprobrium attaching to offences varies greatly from one offender and one offence to another. How a judge could realistically take such a matter into account is not easy to see ...

Secondy, the worse the crime, the greater will be the public stigma and opprobrium. The prisoner who rapes a child will undoubtedly be subject to greater public opprobrium and stigma than the prisoner who rapes an adult person.⁷³

In *R v Bunning*⁷⁴ the Court regarded it as mitigating that the offender ‘lost his reputation, his career [as a police officer] ... and suffered public humiliation’.⁷⁵

⁶⁹ (2001) 206 CLR 267.

⁷⁰ *Ibid* 313–14 [157].

⁷¹ *Ibid* 318–19 [177].

⁷² *Ibid* 304 [123]. In *McDonald v The Queen* (1994) 48 FCR 555 Burchett and Higgins JJ, at 564–5 [23], gave this considerable mitigating weight.

⁷³ *Ryan v The Queen* (2001) 206 CLR 267, 284–5 [53], [55].

⁷⁴ [2007] VSCA 205 (27 September 2007).

⁷⁵ *Ibid* [47].

The balance of authority indicates that shame can be a mitigating factor but that it generally carries little weight. In *Kenny v The Queen*,⁷⁶ Howie and Johnson JJ stated that public shame could be given some weight if it was so significant as to damage the person physically or psychologically. In *Einfeld v The Queen*⁷⁷ Basten JA (Hulme and Latham JJ agreeing on this issue) endorsed the position in *Kenny*, above, and stated that in that case two considerations could affect the manner in which public opprobrium factors into the sentencing calculus. The first was the offender's status as a former judge, which made the offence worse and gave rise to an increased level of public humiliation. Second, the offender used his previous position to advance his unlawful purpose.⁷⁸

An extensive analysis of the authorities was undertaken in *R v Nuttall; Ex parte Attorney-General (Qld)*⁷⁹ by Muir JA (Fraser and Chesterman JJA agreeing). The Court 'assumed' public opprobrium was relevant in light of the fact that it was not submitted that the sentencing judge failed to take it into account, but noted that public humiliation was of little weight given that it was inevitable:

The attainment of high public office brings with it public exposure and media scrutiny as well as power, fame and prestige. Criminal abuse of the office, if detected, will inevitably attract media attention and result in shame and distress to the offender and his family.⁸⁰

In part IV(D) below, we discuss the weight that public opprobrium should have in the sentencing calculus.

5 *Employment Deprivations: Dismissal or Loss of Opportunity to Work*

There is no generally agreed approach to the relevance of employment deprivations to sentence. A number of different approaches have been taken. In both *Kovacevic v Mills*⁸¹ and *G v Police*⁸² the sentence was mitigated to avoid damage to the offender's career prospects. In a similar vein, there have been a number of instances where sentences have been discounted because of consequential damage to career or prospects.⁸³ On the other

⁷⁶ [2010] NSWCCA 6 (12 February 2010).

⁷⁷ (2010) 266 ALR 598.

⁷⁸ Ibid 621 [98]–[101].

⁷⁹ (2011) 209 A Crim R 538.

⁸⁰ Ibid 553 [65].

⁸¹ (2000) 76 SASR 404.

⁸² (1999) 74 SASR 165.

⁸³ See *Moorhead v Police* [1999] SASC 243 (7 June 1999); *R v Richards* (1980) 2 Cr App R (S) 119; *Ryan v The Queen* (2001) 206 CLR 267; *Simmonds v Bureau of Customs* [2001] SASC 306 (29 August 2001); *Hook v Ralphs* (1987) 45 SASR 529; *R v McDermott* (1990) 49 A Crim R 105; *McDonald v The Queen* (1994) 48 FCR 555; *R v Purdon* (Unreported, Court of Criminal Appeal for New South Wales, Hunt, McInerney and Donovan JJ, 27 March 1997).

hand, in *R v Boskovitz*⁸⁴ and *Brewer v Bayens*⁸⁵ a sentence was imposed regardless of the effects on career or prospects, while in *R v Liddy [No 2]*⁸⁶ and *Hook v Ralphs*⁸⁷ the sentence was designed or calculated to destroy career or prospects.⁸⁸

The strongest statement regarding the supposed irrelevance of reduced employment prospects to the sanction which is imposed is found in the comments of McPherson JA in *R v Qualischefski*.⁸⁹ His Honour stated:

The applicant ... claims that a conviction for possession of cannabis will have dire consequences for him if it continues to be recorded. It will, he says, lose him his job as a computer operator with the Health Department, along with his career, his social position and his lifestyle. Those consequences are undoubtedly severe; but, if for that reason, appeals like this are allowed and recording of convictions set aside, the impact of the administration of justice will in the course of time be no less serious. *It will mean that we are sanctioning the division of offenders into two classes. There will be those with good jobs and careers, enviable social positions and prosperous life-styles. Their convictions will not be recorded for fear of the damage it may do them. Then there will be those without jobs, or career prospects, or with standards of living that are already depressed. In their case, convictions will be recorded. Such an outcome seems to me to be quite wrong and thoroughly indefensible. It smacks of privilege, and can only lead to the evolution of a special class of persons in society who are exempt from the full operation of the criminal law, at least at its lower reaches ...*

Most recently, in *R v Nuttall; Ex parte Attorney-General (Qld)*⁹⁰ Muir JA (Fraser and Chesterman JJA agreeing) took the view that: ‘the respondent’s loss of employment and lack of job prospects on his release are relevant considerations’.⁹¹ However, it is clear that the courts have failed to adopt a systematic or principled approach to the impact of likely employment deprivations on sentence.

⁸⁴ [1999] NSWCCA 437 (20 December 1999).

⁸⁵ (2002) 26 WAR 510. The appellant psychologist was convicted of solicitation consequent upon a random police sting operation. A conviction was recorded despite (or regardless of) the likely effects on his career, PhD studies and occupational contributions to the community.

⁸⁶ (2002) 84 SASR 231.

⁸⁷ (1987) 45 SASR 529.

⁸⁸ A sentence meant to put an end to a career may also be discounted *because* it has had that intended effect. In *R v Whitnall* (1993) 42 FCR 512, the sentence was increased as a consequence of the defendant’s career.

⁸⁹ (Unreported, Queensland Court of Appeal, Fitzgerald P, McPherson JA, Ambrose J, 12 August 1994) 4 (emphasis added). This case is discussed in Andrew West, ‘Prospective Loss of Employment as a Factor in Mitigation of Penalty’ (1996) 16 *Queensland Lawyer* 157.

⁹⁰ [2011] 2 Qd R 328.

⁹¹ *Ibid* 343 [59].

C Summary of Sentencing Principles Relevant to White-Collar Offences

The above analysis demonstrates that sentencing principles and practices are not uniform or well-settled in relation to white-collar criminals. However, some key themes emerge from the decisions:

- The type of conduct which constitutes a white-collar crime varies widely, hence, it is not feasible for a sentencing tariff to be developed.
- A key consideration in determining offence severity for white-collar crimes is the amount of money or value of property involved.
- General deterrence is commonly identified as the paramount objective in sentencing white-collar offenders. This serves to increase the penalty — often considerably — at the expense of all other sentencing factors.
- Crimes that are well-planned and committed over a long period of time are often punished more heavily.
- Breach of trust is a strong aggravating factor.
- Restitution of the amount taken is a mitigating factor but, generally, does not carry considerable weight.
- Offences against individuals are sometimes regarded as being more serious, but there is no clear acceptance of this proposition. It is assumed that offences against institutions can damage institutional and investor confidence, threaten the revenue or endanger the community good generally.
- Previous good character carries little mitigating weight, given that this is said to be both typical and facilitative of white-collar offending.
- The fact that an offender has made a worthwhile contribution to the community is often of little mitigating weight.
- Good family background is also of little mitigating weight.
- Extra-curial harm suffered as a result of being convicted and punished, in the form of loss of reputation, social and public humiliation and embarrassment and reduction in employment prospects, normally has little weight.
- Penalties imposed incidentally or consequently upon conviction in the form of confiscation, restitution and/or disqualification orders may or may not be taken into account, depending on the jurisdiction and the reason for the penalty.

IV FLAWS WITH THE CURRENT SENTENCING APPROACH

There are several flaws with the current approach to sentencing white-collar offenders. Unsupportable assumptions underlying current sentencing practices and inconsistency in approach are evident. We start with a consideration of the proportionality principle and its implications for sentencing practice for white-collar offending.

A The Principle of Proportionality: Offences Against Individuals Are More Serious

The key determinant in the sentencing of white-collar offenders, as with all offenders, is the principle of proportionality.⁹² In crude terms, this means that the punishment must fit the crime. This is underpinned by the broader principle that benefits and burdens should be distributed with regard to, and commensurate with, a person's merit or blame. Proportionality operates to restrain not only sentences that are too heavy, but also those that are too light.⁹³ A clear statement of the principle of proportionality is found in the High Court case of *Hoare v The Queen*:⁹⁴

a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its *objective* circumstances.⁹⁵

The proportionality principle has two limbs: the harm caused by the offence and the level of pain inflicted by the punishment. The requirement of proportionality is satisfied if these limbs are aligned.

In *Veen v The Queen*⁹⁶ and *Veen v The Queen [No 2]*⁹⁷ the High Court stated that proportionality is the primary aim of sentencing. Proportionality is considered so important that it cannot be trumped even by the goal of community protection, which

⁹² Preserving proportionality between the seriousness of the offence and the severity of the sentence is a principle adhered to by all western legal systems: see Richard S Frase, 'Comparative Perspectives on Sentencing Policy and Research' in Michael Tonry and Richard S Frase (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press, 2001) 259, 261, cited in Ruth Kannai, 'Preserving Proportionality in Sentencing: Constitutional or Criminal Issue' (Paper presented at 18th International Conference of the International Society for the Reform of Criminal Law, Montreal, August 2004) <<http://www.isrcl.org/Papers/2004/Kannai.pdf>>.

⁹³ *R v Hernando* (2002) 136 A Crim R 451, 459 (Heydon JA).

⁹⁴ (1989) 167 CLR 348.

⁹⁵ *Ibid* 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis in original).

⁹⁶ (1979) 143 CLR 458, 467 (Stephen J), 478 (Jacobs J).

⁹⁷ (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

at various times has also been declared as the most important aim of sentencing.⁹⁸ Thus, for dangerous offenders, while community protection remains an important objective, at common law it cannot override the principle of proportionality. It is for this reason that preventive detention is not sanctioned by the common law.⁹⁹

Proportionality has also been given statutory recognition in most Australian jurisdictions. For example, in Victoria, the *Sentencing Act 1991* (Vic) provides that one of the purposes of sentencing is to impose just punishment,¹⁰⁰ and that in sentencing an offender the court must have regard to the gravity of the offence¹⁰¹ and the offender's culpability and degree of responsibility.¹⁰² The *Sentencing Act 1995* (WA) states that the sentence must be 'commensurate with the seriousness of the offence',¹⁰³ and the *Crimes (Sentencing) Act 2005* (ACT) provides that the sentences must be 'just and appropriate'.¹⁰⁴ In the Northern Territory and Queensland, the relevant sentencing statutes provide that the punishment imposed on the offender must be just in all the circumstances,¹⁰⁵ while in South Australia the emphasis is upon ensuring that 'the defendant is adequately punished for the offence'.¹⁰⁶ The need for a sentencing court to 'adequately punish' the offender is also fundamental to the sentencing of offenders for Commonwealth matters.¹⁰⁷ The same phrase is used in New South Wales.¹⁰⁸

The courts have not attempted to exhaustively define the factors that are relevant to proportionality. The broad approach taken to this problem is to adopt the principle that the upper limit for an offence depends on its objective circumstances. However, some factors have been positively identified as relevant to offence seriousness. These include the consequences of the offence (including the level of harm), the victim's vulnerability, the method of the offence, the offender's culpability (which turns on such factors as the offender's mental state),¹⁰⁹ and the level of sophistication involved.¹¹⁰

⁹⁸ For example, see *Chanon v The Queen* (1978) 33 FLR 433; *R v Valenti* (1980) 2 A Crim R 170, 174; *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370, 377.

⁹⁹ *Chester v The Queen* (1988) 165 CLR 611, 618.

¹⁰⁰ *Sentencing Act 1991* (Vic) s 5(1)(a).

¹⁰¹ *Ibid* s 5(2)(c).

¹⁰² *Ibid* s 5(2)(d).

¹⁰³ *Sentencing Act 1995* (WA) s 6(1).

¹⁰⁴ *Crimes (Sentencing) Act 2005* (ACT) s 7 (1)(a). The *Sentencing Act 1997* (Tas), however, does not refer to the principle of proportionality.

¹⁰⁵ *Sentencing Act 1995* (NT) s 5 (1)(a); *Penalties and Sentences Act 1992* (Qld) s (9)(1)(a).

¹⁰⁶ *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(k).

¹⁰⁷ *Crimes Act 1914* (Cth) s 16A(2)(k).

¹⁰⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a).

¹⁰⁹ For example, whether it was intentional, reckless or negligent.

¹¹⁰ New South Wales Law Reform Commission, *Sentencing*, Discussion Paper No 33 (1996) 62–4.

In terms of property offences, the harm comes in two main forms. The first is financial loss to the victim. This is dependent on the value of property taken from the victim, and the means of the victim. To this end, high value offences will usually cause more suffering than small ones, and real individuals are usually more harmed than large institutions, which have a greater capacity to recover losses or build them into their financial planning. Thus, crimes committed against individuals, especially those who are financially vulnerable or fragile (ie the most poor, the unemployed or financially struggling), cause more direct and much greater harm than crimes committed against the revenue or large corporations. An individual's capacity to recover is often limited and their interests are demonstrably set back by such crimes.

Accordingly, the law should be reformed to reflect the fact that white-collar offences involving the taking of money from individuals should be punished more heavily. Not only would this more clearly adapt the proportionality principle, but it would also enhance the doctrinal consistency of sentencing principle. Victim vulnerability is an entrenched aspect of sentencing practice. It is an established aggravating factor in relation to a range of offences, including assaults against the elderly¹¹¹ young,¹¹² and people with an intellectual disability.¹¹³

The second type of harm that is caused by white-collar offending is damage to institutional integrity and investor confidence. Depending on the crime, harm is normally caused to institutions, by insider trading offences, or to the body politic itself, by revenue offences. Sentencing courts often use the collective 'community interests' as a catch-all phrase to describe the victim. It could be argued that where the victim is *everyone* as opposed to *someone*, this type of offending is as serious, or perhaps even worse, than crimes against individuals. Former Federal Court judge Raymond Finkelstein, who heard many of the largest white-collar criminal trials and pleas, publicly adheres to this view.¹¹⁴

However, damage to institutional integrity is speculative at best. There is no evidence of a correlation between, say, share market activity and insider trading convictions or bank deposits and bank fraud. If such a relationship did exist, presumably, the direct victims of such crimes would demonstrate the greatest reduction in confidence in the financial system. In the United Kingdom, a scandal involving a pension-fund fraud committed by former Member of Parliament Robert Maxwell, which affected

¹¹¹ *DPP (Vic) v Grabovac* [1998] 1 VR 664; *R v Eisenach* [2011] ACTCA 2 (17 February 2011); *Royer v Western Australia* (2009) 197 A Crim R 319; *R v El-Chammas* [2009] NSWCCA 154 (2 June 2009).

¹¹² *R v AJW* (2001) 80 SASR 246; *Ollis v The Queen* [2011] NSWCCA 155 (14 July 2011); *Rioli v The Queen* [2010] NTCCA 13 (18 October 2010); *R v Eisenach* [2011] ACTCA 2 (17 February 2011).

¹¹³ For instance, see *R v Grech* [1999] NSWCCA 268 (6 September 1999) [37] (Carruthers AJ).

¹¹⁴ Patrick Durkin, 'Top Judge Takes Aim at White-Collar Criminals', *The Australian Financial Review* (Sydney), 10 June 2011.

25 000 individuals, led to a small study on the attitudinal effects of the crime on 25 of those individuals.¹¹⁵ Spalek concluded that:

The study reported in this paper illustrates that in some cases of fraud, victims may not be ‘duped investors’, but rather may distrust particular agents prior to any crime occurring, and may therefore be engaging in risk avoidance strategies. As a result, becoming the victim of a financial crime may not necessarily lead to individuals avoiding the financial system in general, because an integral part of their trust may be acknowledging that as investors they run risks.

The absence of a correlation between financial crimes and trust in the political and economic arenas is supported by research conducted elsewhere.¹¹⁶ Consequently, reform is required such that criminal sanctions (which have real consequences) are not made more severe in order to reflect imaginary harm to ‘the community’ without tangible evidence in support of that approach.

Arguably, institutional integrity has a relevance beyond investor confidence in market systems. Individuals may well be able to operate in a corrupt system, however, in a competitive global market, less money may flow into countries which have corrupt markets.¹¹⁷ Even this broad consideration of the meaning of institutional integrity does not justify more severe punishment for white-collar criminals. There is no evidence that collective market honesty and transparency is a principal driver of the international flow of funds — as opposed to where investors feel they can maximize their return. Even if a strong link between market integrity and international money flows is established, the connection between the negative impact on the entire market and any single criminal act is likely to be so minor that it would violate proportionalism to meaningfully increase sanction severity for this reason.

B Restitution Should Be a Strong Mitigating Factor — It Should Reduce the Penalty By Up to 30 Per Cent

As noted above, one limb of the proportionality principle is the harm caused by the offence. This has considerable implications for the manner in which restitution by white-collar offenders should be treated. As we have seen, the courts place some weight on restitution, but normally it is not a cardinal sentencing consideration.

¹¹⁵ Basia Spalek, ‘White-Collar Crime Victims and the Issue of Trust’ (Paper presented at British Criminology Conference, Leicester, July 2000) <<http://www.britsocrim.org/v4.htm>>.

¹¹⁶ The general conclusion in these studies is that white-collar crimes have little, if any, effect on trust: see, for example, John G Peters and Susan Welch, ‘The Effects of Charges of Corruption on Voting Behavior in Congressional Elections’ (1980) 74 *American Political Science Review* 697; Michael Mills and Elizabeth Moore, ‘The Neglected Victims and Unexamined Costs of White-Collar Crime’ (1990) 36 *Crime and Delinquency* 408; Neal Shover, Greer Litton Fox and Michael Mills, ‘Long-Term Consequences of Victimization by White-Collar Crime’ (1994) 11 *Justice Quarterly* 75.

¹¹⁷ We thank the anonymous referee for this observation.

The main rationale is that if restitution were given more prominence in sentencing, it would theoretically enable wealthy offenders to ‘buy their way out of prison’. There is some force to that argument and, in principle, it is an undesirable outcome. However, the practical consequence of adhering to that view is damage to victims. It means that offenders are not provided with any pragmatic incentive to repay victims and thus redress the harm they have caused.

Undeniably, non-restitution of relatively large sums of money, particularly to the financially vulnerable, can have a devastating impact on lives: in terms of health, enjoyment and longevity.¹¹⁸ This is a high price for victims to pay for doctrinal soundness. Thus, the harm from a crime can either be perpetuated, or it can be controlled, by acts of restitution. There is no easy way to resolve whether we should opt for ‘pure principle’ in the form of not rewarding offenders for paying back sums stolen from victims (a deontological perspective), or pursue good outcomes for victims and encourage those acts through sentencing discounts (a utilitarian perspective). However, as a general rule, speculative benefits should not be preferred over concrete benefits. This is certainly the manner in which the sentencing system resolves other similar tensions. It is readily observable in other contexts, such as the guilty plea discount and the discount for giving evidence against co-offenders.

All accused are entitled to plead not guilty and make the prosecution prove its case. In principle, offenders who plead not guilty to a crime should on no account be punished more heavily than those who plead guilty (apart from the extent to which a guilty plea is indicative of remorse). Yet, for pragmatic reasons, sentencing law provides a large discount to offenders who plead guilty. This is for no higher or more virtuous reason than without the discount, the court system would become clogged.

The High Court of Australia in *Cameron v The Queen*¹¹⁹ approved of the plead guilty discount and, in the process, the majority of the Court rejected a number of arguments against the discount, including that it constitutes a form of discrimination against offenders who elect to pursue their ‘right’ to a trial.

In all Australian jurisdictions, accused who plead guilty receive a sentencing discount.¹²⁰ This is so, irrespective of whether the plea is coupled with remorse. For example, in *R v Morton*¹²¹ the Victorian Court of Criminal Appeal stated that:

¹¹⁸ Barbara O’Neill et al, ‘Negative Health Effects of Financial Stress’ (2005) 51 *Consumer Interests Annual* <<http://www.personalfinancefoundation.org/research/efd/Negative-Health-Effects-of-Financial-Stress.pdf>>.

¹¹⁹ *Cameron v The Queen* (2002) 209 CLR 339.

¹²⁰ *Crimes Act 1914* (Cth) s 16A(2)(g); *Crimes (Sentencing) Act 2005* (ACT) s 35(2); *Penalties and Sentences Act 1992* (Qld) s 13(4); *Sentencing Act 1995* (NT) s 5(2)(j); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1); *Criminal Law (Sentencing) Act 1988* (SA) s 10(g); *Sentencing Act 1991* (Vic) s 5(2)(e); *Sentencing Act 1995* (WA) s 8(2).

¹²¹ [1986] VR 863.

A plea of guilty may be taken into account regardless of whether or not it is also indicative of some other quality or attribute such as remorse ... A court may always take a plea of guilty into account in mitigation of sentence even though it is solely motivated by self-interest.¹²²

The main reason for the discount is purely the utilitarian benefit in the form of clearing court backlogs. Gaudron, Gummow and Callinan JJ in *Cameron v The Queen*¹²³ stated:

[Australian courts] have taken the pragmatic view that giving sentence ‘discounts’ to those who plead guilty at the earliest available opportunity encourages pleas of guilty, reduces the expense of the criminal justice system, reduces court delays, avoids inconvenience to witnesses and prevents the misuse of legal aid funds by the guilty.¹²⁴

The guilty plea discount is one of only two situations where a stated numerical discount is usually applied by the courts, despite the endorsement of the instinctive synthesis approach to sentencing.¹²⁵ The reason is to underline to the accused the reality of the discount and, hence, encourage greater pragmatism by them.

The normal range of the discount is between 10 per cent and about 30 per cent, depending on the circumstances of the case. In several jurisdictions it is either conventional or a statutory requirement to indicate the size of the discount.¹²⁶ In *R v Thomson*,¹²⁷ the New South Wales Court of Criminal Appeal issued a guideline

¹²² Ibid 867. This approach was also adopted by Spigelman CJ (with whom other members of the Court agreed) in *R v Thomson* (2000) 49 NSWLR 383, 411 [115] who stated that there are ‘benefits to the criminal justice system as a whole’ that result from a guilty plea. At 412, [122], his Honour further noted that the ‘public interest served by encouraging pleas of guilty for their utilitarian value is a distinct interest’.

¹²³ *Cameron v The Queen* (2002) 209 CLR 339.

¹²⁴ Ibid 73–4 (emphasis added) (citations omitted).

¹²⁵ This was most recently endorsed by the High Court in *Hili v The Queen* (2010) 242 CLR 520.

¹²⁶ In New South Wales and Queensland, the Court must indicate if it *does not* award a sentencing discount in recognition of a guilty plea: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(2) and *Penalties and Sentences Act 1992* (Qld) s 13(3)). In South Australia, Western Australia and New South Wales, the courts often specify the size of the discount given. In Victoria, s 6AAA of the *Sentencing Act 1991* (Vic) states that when courts provide a discount for a plea of guilty, they must specify the sentence that would have been given in the absence of that discount. An appeal does not lie against that ‘notional sentence’. See *R v Burke* (2009) 21 VR 471. Also see *Giordano v The Queen* [2010] VSCA 101 (7 May 2010) [45]. There has been some judicial comment as to the artificiality of s 6AAA given the instinctive synthesis that produces the actual sentence. See *Scerri v The Queen* (2010) 206 A Crim R 1, 5 [23]–[25]; *R v Flaherty [No 2]* (2008) 19 VR 305. The rationale and size of the typical discount in Victoria is discussed in *Phillips v The Queen* [2012] VSCA 140 (29 June 2012).

¹²⁷ (2000) 49 NSWLR 383.

judgement stating that a guilty plea will generally be reflected in a 10 to 25 per cent discount on sentence, depending on how early the plea is entered and the complexity of the case.¹²⁸ This suggested range relates only to the utilitarian value of a guilty plea to the criminal justice system and does not include additional discounts that may be available — for example, where the guilty plea may be said to evidence remorse. This now has a legislative basis.

Section 17 of the *Criminal Case Conferencing Trial Act 2008* (NSW) states that an early plea attracts a discount of up to 25 per cent, and late pleas can obtain a discount of up to 12.5 per cent. In *Lee v The Queen*¹²⁹ it was held where the plea was taken on the second day set for trial that a 12.5 per cent discount was appropriate. The co-offender received a 20 per cent discount for pleading on arraignment and it was held that the difference was appropriate.¹³⁰ In Western Australia, the discount often ranges from 20 to 35 per cent under the state's 'fast track system'.¹³¹ The Western Australian Court of Appeal rejected submissions that a full 'discount of the order of 30 per cent will automatically be afforded for a fast-track plea of guilty without more'.¹³² There is no requirement to quantify the discount in Western Australia.¹³³ In South Australia the common range is between 15 to 25 per cent, with 25 per cent regularly given for an early plea of guilty.¹³⁴

Providing assistance to authorities is treated in a similar way to guilty pleas, particularly where it results in the detection and prosecution of other offenders. It is important to note that, as with the guilty plea discount, this benefit is given independent of any reasons or remorse that might be demonstrated by assisting authorities. Criminals, in principle, should not be dealt with less severely because they opportunistically decide to give evidence against co-offenders. However, as a matter of public policy, the law encourages those involved in criminal behaviour to betray the confidence reposed in each other by providing a significant discount at the sentencing stage of the criminal justice system.¹³⁵ This is especially apposite given that it often places the individual in personal danger.¹³⁶

¹²⁸ See also *Charkawi v The Queen* [2008] NSWCCA 159 (4 July 2008); *R v Bugeja* [2001] NSWCCA 196 (11 May 2001).

¹²⁹ [2011] NSWCCA 169 (28 July 2011).

¹³⁰ The same discount was accorded in *Nakhla v The Queen* [2011] NSWCCA 143 (24 June 2011).

¹³¹ See, eg, *Trescuri v The Queen* [1999] WASCA 172 (10 September 1999); *Deering v Western Australia* [2007] WASCA 212 (17 October 2007).

¹³² *Cameron v The Queen* [2002] WASCA 81 (22 March 2002) [19].

¹³³ *McLean v Western Australia* [2011] WASCA 60 (16 March 2011) [57].

¹³⁴ *Fisher v Police* (2004) 154 A Crim R 511.

¹³⁵ *Malvaso v The Queen* (1989) 168 CLR 227, 239 (Deane and McHugh JJ).

¹³⁶ *R v Barber* (1976) 14 SASR 388, 390 (Bray CJ). See also *DPP (Cth) v AB* (2006) 94 SASR 316.

Assistance to law enforcement officials enjoys recognition in a number of statutory regimes.¹³⁷ In terms of the size of the discount that is available, it has been held that the discount for a plea of guilty and assistance to authorities should be up to 50 per cent.¹³⁸

Thus, when the legal system wishes to strongly encourage a course of conduct, the law is willing, with arithmetical clarity, to provide a significant and clear sentencing discount in order to encourage that conduct. This occurs despite the courts' steadfast adherence to the instinctive synthesis theory, and despite the questionable morality of permitting resource allocation to dictate the punitive consequences of criminal conduct. For far better reasons, the same approach should be adopted in respect of restitution to victims of crime.

Property offences are one of the few crimes where it is possible to restore the victim, economically, to the same position as before the offence. Where restitution does not occur, victims can be devastated — especially when they are individuals. There is a measurable difference in terms of harm caused between white-collar crimes that are restituted and those which are not. This should be reflected in the sentencing calculus. White-collar offenders who provide full restitution should get a discount of up to 30% — proportionally less for partial restitution.

It is accepted that this will place property offenders in a different situation from other offenders, but does not mean that they are given an opportunity to buy their freedom. It simply reflects the different nature of their crime: the targeting of commodities as opposed to other human interests. Moreover, the lives of victims should not be sacrificed in the fanatical pursuit of the dubious principle that offenders should not buy their way out of gaol. Principle often yields to the practical imperatives of the criminal justice system;¹³⁹ the lives of individual victims are no less important.

This approach entails that offenders who wish to but cannot make restitution, because they have dissipated the proceeds of their offending (for example, because of drug or gambling addictions), will receive more severe penalties than offenders

¹³⁷ See *Penalties and Sentences Act 1992* (Qld) s 9(2)(i); *Crimes (Sentencing) Procedure Act 1999* (NSW) s 23; *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(h); *Sentencing Act 1995* (NT) s 5(1)(h); *Crimes (Sentencing) Act 2005* (ACT) s 36. There are also similar provisions at the Commonwealth level. See *Crimes Act 1914* (Cth) s 16(2)(h).

¹³⁸ For an example of where a 50 per cent discount was allowed, see *R v Johnston* (2008) 186 A Crim R 345, 349–50 [15]–[21] (Nettle JA). For an application of these principles, see *Dan Ning Wang v The Queen* [2010] NSWCCA 319 (17 December 2010); *Yue Ma v The Queen* [2010] NSWCCA 320 (17 December 2010); *R v Nguyen* [2010] NSWCCA 331 (21 December 2010). This contrasts with the decision in *R v Sahari* (2007) 17 VR 269 where it was held undesirable to specify a specific discount for cooperating with authorities.

¹³⁹ One of the most fundamental rights, the right to a fair trial, is itself subject to a host of competing principles which delimit the scope and content of that right: see Mirko Bagaric, Theo Alexander and Marlene Ebejer, 'The Illusion That Is the Right to a Fair Trial in Australia' (2011) 17(2) *Australian Journal of Human Rights* 59.

who can make restitution. This is justified on the basis of the practical improvement to the lives of victims and the inherent logic in prioritising victim prosperity over abstract purity in sentencing.

*C Previous Good Character is Relevant: the Need for Doctrinal Coherency
in Light of the Progressive Loss of Mitigation Theory*

As discussed in part III of this paper, the prevailing approach to the relevance of previous good character in relation to white-collar offending is that it only marginally mitigates. The argument is that most white-collar offenders do not have prior convictions, and it is this very characteristic that enables them to secure status and positions that later provide the opportunity to offend. This analysis is flawed, at least in terms of consistency with the conventional treatment of prior offending, or lack of it, in the sentencing calculus.

Prior convictions have their most significant role in sentencing where offenders have a long criminal history, in which case they can lead to a considerably longer penalty.¹⁴⁰ This has fuelled criticism on the basis that it amounts to punishing the accused again for their previous crimes, that is, it constitutes double punishment and involves punishing people for their character, as opposed to what they have done.¹⁴¹

These criticisms have been met with the endorsement of the ‘progressive loss of mitigation’ theory, which is the view that a degree of mitigation should be accorded to first-time offenders or those with a minor criminal record. This mitigation is ‘used up’ by offenders who repeatedly come before the courts, thereby resulting in ever-increasing penalties for recidivists.

Hence, it is not that offenders with prior convictions are being punished more heavily, rather, that first-time offenders are treated more leniently. Recidivism disentitles repeat offenders to the leniency which is normally afforded the first-time offender.¹⁴²

In *Veen v The Queen [No 2]*¹⁴³ the High Court set out three other grounds for imposing harsher penalties on recidivists:

the antecedent criminal history is relevant ... to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested

¹⁴⁰ Approximately 60 per cent of imprisoned offenders have been to prison previously: see Australian Bureau of Statistics, ‘An Analysis of Repeat Imprisonment Trends in Australia’ (Research Paper No 1351.0.55.031, Australian Bureau of Statistics, August 2010) 12 <<http://www.ausstats.abs.gov.au/>>. Hence, this is a common aggravating factor.

¹⁴¹ Mirko Bagaric, ‘Double Punishment and Punishing Character: The Unfairness of Prior Convictions’ (2000) 19(1) *Criminal Justice Ethics* 10.

¹⁴² See, eg, *Baumer v The Queen* (1988) 166 CLR 51, 58.

¹⁴³ (1988) 164 CLR 465.

in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of the society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it *illuminates the moral culpability* of the offender in the instant case, or *shows his dangerous propensity* or shows a need to impose condign punishment to *deter the offender* and other offenders from committing further offences of a like kind.¹⁴⁴

Thus, it is well settled that, in general, good character results in less punishment. The fact that many offenders in a certain category of offending share this trait is no basis for diminishing its relevance. Rarity or commonality of a trait in relation to an offence type is not a basis for determining its role in the sentencing calculus. More than 90% of offenders plead guilty,¹⁴⁵ yet this does not diminish the weight given to the guilty plea discount. It follows that in relation to white-collar offending, good character should be accorded as much weight as in other types of offending.

D Extra-Curial Punishments Which Can Be Tangibly Measured Should Reduce Penalty

The other limb of the proportionality equation is the severity of penalty. Imprisonment is the harshest penalty in our system of law. However, a range of other deprivations can be imposed including partial loss of liberty or monetary exactions. For this article, the key issue is what types of losses should be regarded as relevant to this limb of the proportionality thesis: should this include only those losses directly imposed by the courts for sentencing purposes? Or should incidental hardships in the form of extra-curial hardship also be included?

As noted above, the main extra-curial penalty suffered by white-collar offenders is in the form of employment deprivation: either being dismissed from a job, being precluded from pursuing a certain career, such as a lawyer or accountant, or having those prospects severely curtailed as a result of a conviction. There is little doubt that these are damaging to the offender: ‘a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem’.¹⁴⁶

¹⁴⁴ Ibid 477 [14] (emphasis added). A similar approach was articulated in *Field v The Queen* [2011] NSWCCA 70 (21 April 2011). See also *Anderson v The Queen* [2010] NSWCCA 287 (7 December 2010); *Murphy v The Queen* (2005) 158 A Crim R 375; *Tsakonas v The Queen* (2009) 197 A Crim R 581; *Graham v The Queen* [2009] NSWCCA 212 (31 August 2009); *Wright v The Queen* [2008] NSWCCA 282 (15 December 2008); *R v Riddle* [2010] ACTCA 8 (25 May 2010); *Griffith v Tasmania* [2010] TASCRA 19 (11 November 2010) [14].

¹⁴⁵ Australian Bureau of Statistics, ‘Criminal Courts, Australia, 2009–2010’ (Statistics Publication No 4513.0, Australian Bureau of Statistics, 27 January 2011) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02009-10>>.

¹⁴⁶ *Johnson v Unisys Ltd* [2003] 1 AC 518, 539 [35] (Lord Hoffmann).

The correct approach to factoring employment deprivations into the sentencing equation requires consideration of the very nature of punishment. Criminologists and philosophers generally adopt expansive definitions of punishment, recognising that incidental negative consequences flowing from a finding of guilt may constitute punishment. Antony Duff defines punishment as ‘the infliction of suffering on a member of the community who has broken its laws’.¹⁴⁷ Andrew von Hirsch states that ‘punishing someone consists of visiting a deprivation (hard treatment) on him, because he has committed a wrong, in a manner that expresses disapprobation on the person for his conduct’.¹⁴⁸ Similarly, punishment has been described as pain delivery.¹⁴⁹ Further, it has been asserted that ‘the intrinsic point of punishment is that it should hurt — that it should inflict suffering, hardship or burdens’.¹⁵⁰ Thus, drawing a line through the contemporary terminology, it would seem that punishment is a hardship or deprivation; the taking away of something of value for a wrong actually or perceived to have been committed. Notably, the definition does not take account of the forum (for example, a court, other institution or employer) which inflicts the hardship.

Thus it follows that although the experience of hardship by the offender in the form of employment deprivations may not be *intended* as punishment (but instead is, for example, to maintain the integrity of a profession) or may only be a *consequence* of punishment (for example, a statutory requirement), it does not mean that such deprivations do not of themselves constitute a punishment. As is evident from the definition above, what is crucial in this respect is the effect on the person, not the reason for which the hardship is inflicted. To ignore those hardships in the sentencing calculus is both illogical and contrary to the principle of proportionality.

The loss of a job or exclusion from an occupation tangibly sets back an individual's interests and there does not seem to be a justifiable reason for ignoring that aspect of a sentence on an offender. Thus, job status is a relevant criterion that should be recognised in the sentencing calculus. It has been argued that discrimination between offenders already exists in the form of (the privilege of) holding a job.¹⁵¹ To then allow that job to result in a sentencing discount only further compounds the disadvantage that is experienced by the unemployed offender. To this end, it has been argued that an offender who comes from a deprived social background should receive a sentencing discount because they have had less opportunity to lead

¹⁴⁷ R A Duff, *Trials and Punishments* (Cambridge University Press, 1985) 267.

¹⁴⁸ Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Rutgers University Press, 1985) 35.

¹⁴⁹ Nils Christie, *Limits to Pain* (Martin Robertson, 1981) 19, 48.

¹⁵⁰ R A Duff, ‘Punishment, Citizenship and Responsibility’ in Henry Tam (ed), *Punishment, Excuses and Moral Development* (Ashgate Publishing, 1996) 17, 18. A similar view was adopted by Jeremy Bentham who declared that ‘all punishment is mischief, all punishment in itself is evil’: Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (J H Burns and H L A Hart eds, Oxford University Press, 1970) 158.

¹⁵¹ See above, part III.

law-abiding lives and, hence, are less morally blameworthy. There is significant force in this argument. However, this is an argument which has not found favour with law-makers. Social deprivation is not, of itself, a mitigating factor because of the assumption that it would undermine the deterrent effect of criminal sanctions.¹⁵² Thus, the basic approach of sentencing law is that sentencing is not the place to redress social disparity and offenders must be taken as they are found at the time of sentencing. This is consistent with the approach to victims — they must be taken as they are, and offenders are liable for both the intended and the remote consequences of their conduct.¹⁵³

As noted in part III of this paper, there is some inconsistency and uncertainty regarding the impact of criminal wrongdoing on employment. This area of law is in need of fundamental reform. Employment deprivations are a form of punishment and, consequently, they should be recognised in the overall sanction meted out to an offender and subject to the normal sentencing practices and principles governing the infliction of criminal punishment.

This would also make sentencing law more consistent. In other instances, incidental deprivations stemming from offending are normally regarded as mitigatory. For example, a strong mitigating factor is incidental harm suffered by the offender, in the form of trauma associated with injuring or killing a friend or relative or also suffering serious injury.¹⁵⁴

Offenders who are not Australian citizens or permanent residents can be deported if they fail a ‘character test’; being sentenced to a term of imprisonment of a year or more can constitute evidence of bad character. Deportation or the risk of deportation is an additional burden that would then be faced by such an offender. Hence, logically it should be mitigatory. This was the position taken in *Valayamkandathil v The Queen*,¹⁵⁵ *Guden v The Queen*¹⁵⁶ and *Director of Public Prosecutions v Yildirim*.¹⁵⁷

Where an offender is harmed in the course of committing an offence, this can also reduce the penalty. In *Alameddine v The Queen*¹⁵⁸ the Court regarded the fact that the offender was injured when his drug-making laboratory exploded as a matter to be taken into account in mitigation.

To be clear, what should mitigate is not only the loss of a job as a result of a criminal sanction but also any employment deprivation. This extends to the diminished

¹⁵² Bagaric and Edney, above n 10.

¹⁵³ *DPP (Vic) v Eli* [2008] VSCA 209 (27 October 2008).

¹⁵⁴ See *R v Teh* (2003) 40 MVR 195.

¹⁵⁵ [2010] VSCA 260 (4 October 2010).

¹⁵⁶ (2010) 28 VR 288.

¹⁵⁷ [2011] VSCA 219 (28 July 2011).

¹⁵⁸ [2006] NSWCCA 317 (10 October 2006).

capacity of an offender to secure employment and the disqualification or suspension of a professional or similar qualification (such as in the areas of law, medicine or accounting) that often stems from a criminal sanction. These further hardships are normally less certain than the loss of a job and hence should carry less weight as penalty reductions than where it is clear that an offender will lose his or her job as a consequence of being found guilty of an offence. Moreover, the mitigatory impact of employment deprivations should apply even where the offence occurred in the employment setting.¹⁵⁹

The other form of incidental non-curial punishment is the censure that an offender may receive from family, friends, associates or the wider community. The extent of this sanction varies markedly according to such matters as the social connections and personal antecedents of the offender and the offence in question. This form of ‘punishment’ is too obscure and too hard to measure to be factored into the sentencing process. There is considerable logical force in the comments by Hayne J in *Ryan v The Queen*¹⁶⁰ where he stated:

There is an irreducible tension between the proposition that offending behaviour is worthy of punishment and condemnation according to its gravity, and the proposition that the offender is entitled to leniency on account of that condemnation.¹⁶¹

Although the public opprobrium and social ostracism suffered by an offender may be palpable to both the offender and the court, it should not factor into sentencing. However, this can only be a provisional view in the absence of a more extensive enquiry. It may be that bringing white-collar offenders publicly before the law constitutes both punishment and deterrence. Kahan and Posner suggest that, in certain circumstances, shaming might itself ‘provide sufficient deterrence to white-collar crime offenders’.¹⁶² But even if that is so, acting on such an assumption may result in an unjustifiable differential treatment between classes of offender.

E Curial Incidental Sanctions

The current legal position is that curial incidental sanctions are mitigatory. This position is correct and not in need of reform.

¹⁵⁹ This is to be contrasted with comments in *R v Liddy [No 2]* (2002) 84 SASR 231.

¹⁶⁰ (2001) 206 CLR 267.

¹⁶¹ *Ibid* 314 [157].

¹⁶² Dan Kahan and Eric Posner, ‘Shaming White-Collar Criminals: a Proposal for Reform of the Federal Sentencing Guidelines’ (1999) 42 *Journal of Law and Economics* 365, 368–72, cited in John B Owens, ‘Have We No Shame?: Thoughts on Shaming “White-Collar” Criminals, and the Federal Sentencing Guidelines’ (2001) 49 *American University Law Review* 1047, 1048.

*F Heavy Penalties Do Not Deter Other White-Collar Criminals:
Abolish the Emphasis on General Deterrence*

The strong emphasis by the courts on general deterrence when sentencing white-collar offenders is logically sound — especially in light of the assumption that such offenders are more likely to engage in a cost–benefit analysis than other offenders.

However, the assumption underlying this approach is not validated by the empirical evidence. The evidence on this front has been considered in a number of recent reviews. The studies show that harsh penalties, in the form of imprisonment generally and clearly disproportionate penalties, do not discourage crime.¹⁶³ The greatest deterrence against crime is not the size of the penalty, but the perceived likelihood of detection.¹⁶⁴ Of particular relevance is research establishing that this also applies to white-collar offences.¹⁶⁵ The upshot is that penalties for white-collar crime should not be increased in order to discourage other would-be offenders.

This does not mean that severe punishment is never suitable for white-collar offences. Rather, it means that a justification for severe sanctions must be located within other sentencing objectives. Moreover, if tough sanctions do not deter white-collar offences, there is a need for the criminal justice system to implement other measures which will achieve this outcome. It has been suggested that the answer rests in greater monitoring of areas where white-collar offences are often committed. Thus, in the context of tax crime, it might be that more audits should be undertaken. In other areas it might mean that greater measures to monitor compliance are implemented. More generally, a greater proportion of resources should be deployed in the areas of policing and crime detection, and even the pathology of white-collar offending warrants further investigation.¹⁶⁶

¹⁶³ See, eg, Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence?’ (2010) 100 *Journal of Criminal Law & Criminology* 765; Michael Tonry, ‘Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings’ (2009) 38 *Crime and Justice* 65, 69; Cheryl Marie Webster, Anthony N Doob, and Franklin E Zimring, ‘Proposition 8 and Crime Rates in California: The Case of the Disappearing Deterrent’ (2006) 5 *Criminology & Public Policy* 417.

¹⁶⁴ Donald Ritchie, ‘Does Imprisonment Deter? A Review of the Evidence’ (Report, Sentencing Advisory Council, April 2011).

¹⁶⁵ 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.

¹⁶⁶ Marilyn Price and Donna M Norris, ‘White-Collar Crime: Corporate and Securities and Commodities Fraud’ (2009) 37 *Journal of the American Academy of Psychiatry and the Law* 538.

V CONCLUSION

Our analysis suggests that a doctrinally-sound approach to sentencing white-collar offenders requires a number of legislative reforms. The key reforms are:

- Providing a numerical and large discount for restitution — the argument that restitution allows offenders to buy their way out of gaol is outweighed by the good that comes from restoration for victims;
- Abolishing the pursuit of general deterrence and the increases in sentences which follow;
- Providing a greater discount for previous good character, consistent with other areas of sentencing;
- Providing a greater discount for non-curial harm in the form of employment deprivations; and
- Placing more emphasis on the harm caused by the offence to guide the sentence: crimes against individuals should be treated more seriously than those against the revenue or large corporations.

