**White-Collar Crime: The privileging of serious financial fraud in New Zealand**

**Abstract**

Bagaric and Alexander (2014) argue for fundamental reform of the sentencing process for white-collar offenders in Australia and other jurisdictions. This study has two objectives. First, it challenges Bagaric and Alexander’s proposals. Second, using data from cases prosecuted by the New Zealand Serious Fraud Office, it instead proposes that white-collar offenders should not receive more lenient treatment in the justice system, due to the privileged position from which the offending commences. This article suggests that: an absence of restitution should be considered an aggravating factor, rather than the presence of restitution viewed as a mitigating factor; as an offender’s good character is often an enabler of the offending, this should not be considered as a mitigating factor; and as extra-curial punishments, such as reputation damage or loss of future employment opportunities, are short-term for white-collar offenders, there is little justification for reduced sentences and extra-curial punishments can be viewed as a natural corollary of the offending.

# Introduction

There has been considerable commentary in recent times on the different treatment of those who engage in crimes of the privileged (e.g. serious tax evasion) and crimes of the poor (e.g. welfare fraud) (Marriott, 2012, 2014a). It is generally agreed that treating different ‘types’ of people in different ways in the justice system, and in other spheres of society, is undesirable. However, there is yet to be much movement towards equalising the treatment of those who are more or less privileged. This article addresses the issue from a different perspective. Instead of focusing on the gap between the poor and the privileged, the article investigates dimensions of the privileged: those who engage in serious financial fraud.

The study has two objectives. First, it challenges proposals made by Bagaric and Alexander, who investigate the sentencing of white-collar criminals in Australia (Bagaric and Alexander, 2014). Bagaric and Alexander make a case for changing sentence practice in relation to white-collar crime. The changes proposed would have the ultimate outcome of generating more lenient sentences for white-collar criminals. There are five key components to Bagaric and Alexander’s proposals. These are that the sentencing process should give greater weighting to: the ‘good character’ of white-collar offenders, any restitution made, and future employment deprivations that result from the offending; less weighting should be given to the general deterrence factor in sentencing; and crimes against individuals should be regarded as more serious than crimes against corporations. The first four of these are discussed in this article.

While Bagaric and Alexander’s study is situated in Australia,[[1]](#footnote-1) the current study is located in New Zealand. The second objective of the study is to use Bagaric and Alexander’s proposals as a framework to challenge the sentencing process for serious white-collar crime prosecuted in New Zealand.

This study proposes that the ‘good character’ of white-collar offenders should not be considered as a mitigating factor, as it is this ‘good character’ that often facilitates the crime. The study also proposes that restitution made should not be treated as a mitigating factor of the offending, but rather the absence of restitution may be considered as an aggravating factor. With regard to employment deprivations, research suggests that any reputation damage resulting from white-collar crime is only short-term and white-collar offenders return to the same position as prior to their offending. Thus, there is no justification for taking this factor into account in sentencing decisions. Reducing the focus on general deterrence signals that deterrence is not a desired outcome of the sentencing process. Moreover, deterrence is more likely to be achieved by increasing efforts into detection and prosecution, rather than reducing the focus on deterrence. Therefore, the study proposes that greater investment is made into detection and prosecution, rather than reducing the focus on general deterrence.

The article commences in section two with an outline of the literature pertaining to white-collar crime. This study does not extend to ‘corporate crime’. Instead, it focuses on crime committed by individuals in positions of power or privilege, usually involving significant sums of money. Section two also discusses the legislation in New Zealand that is relevant for sentencing serious financial crime. Section three outlines the data that is used for analysis in this study, which is collected from prosecutions taken by the New Zealand Serious Fraud Office (SFO) over the 5-year period from 2014 to 2018. Section four discusses the issues raised from sections two and three. Conclusions are drawn in section five.

# Background

This section has two objectives. First, it discusses the literature pertaining to white-collar crime. Second, it outlines the New Zealand legislation that is relevant to the sentencing process.

## White-Collar Crime

Bagaric and Alexander note the factors that differentiate white-collar offences from other types of crime, including: those who engage in white-collar offending are not usually from a socially-deprived background; often white-collar crimes are first offences and involve a breach of trust; white-collar crimes can typically be rectified with financial restitution; the harm generated from white-collar crime may be wide-reaching; and additional sanctions may be suffered by white-collar criminals as a result of their offending, such as reputation damage (Bagaric and Alexander, 2014). Moreover, white-collar crime often requires some degree of sophistication and is typically undertaken over a long period of time. Croall (2001) notes that white-collar crime can be relatively invisible and more easily concealed than more traditional crime. Perhaps one of the key differences with some white-collar crimes is the tendency to view them as ‘victimless’, particularly where the victim is the state or large corporations, which may be able to claim insurance reimbursements from fraudulent activity. It is perhaps more accurate to view some crimes as having diffused, rather than individual, impact. However, this diffused impact ultimately results in wide-ranging impact, such as higher insurance premiums or higher tax rates for society.

The objectives of white-collar crimes frequently differ from other more conventional offending, whereby the offender seeks some personal financial gain from the behaviour, at the expense of someone else (Bequai, 1978). Wheeler, Weisburd, Waring and Bode (1987: 339-341) highlight some of the complexities and other differences in ‘common’ (non-violent) crime and white-collar crime. These are outlined in Table 1 (adapted from Wheeler, et al. 1987:339-341):

**Table 1: Differences in (Non-Violent) Common and White-Collar Crime**

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

Table 1 illustrates some of the distinctive differences in white-collar and other criminals, showing that the two categories of offenders draw from different sectors of the population (Wheeler et al. 1987). Different patterns of the offending are also visible. The figures in Table 1 show that white-collar criminals have higher levels of education and employment than ‘common’ criminals. Moreover, white-collar criminals have higher levels of education and employment than the general population.

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

There is little research that challenges the finding that white-collar criminals are privileged in the justice system. From the time that Sutherland suggested this in the 1940s (Sutherland, 1940), there have been only a handful of research outputs that suggest this is no longer the case (Wheeler, Weisburd and Bode, 1982). Instead the key findings in relation to white-collar crime and punishment tend to agree that white-collar offending is treated less harshly in the courts than blue-collar offending (Croall, 2001; Gustafson, 2009; Hudson, 1993; Nelken, 1997; Pavlich, 2013; Poveda, 1994; Snider, 1982). Various explanations have been suggested for why this is the case, including the policing and punishment associated with their crimes (Buell, 2014; Shapiro, 1990); the ability to afford better (or any) legal representation (Shapiro, 1990; Snider, 1982; Wheeler, Mann and Sarat, 1988); and the complexity of the crimes themselves (Freiberg, 2000).

Research also generally concurs that white-collar offenders receive more lenient sentences for their white-collar crimes; a practice that does not extend to blue-collar offenders committing white-collar crimes (Croall, 2001; Gustafson, 2009; Hagan, Nagel and Albonetti, 1980; Hudson, 1993; Nelken, 1997; Poveda, 1994; Snider, 1982; Weisburd, Wheeler, Waring and Bode, 1991), with white-collar offenders being less likely to receive a custodial sentence than other offenders (Levi, 1989). Studies also indicate that the public are generally less concerned about specific white-collar crimes against the state such as taxation fraud than they are about welfare fraud (Marston and Walsh, 2008; Smith, Button, Johnston and Frimpong, 2011). This is despite the crimes producing the same outcome and impacting on the same victims (the state and society as a whole).

Despite this apparent historical and ongoing acceptance that white-collar crime is of less importance in society than blue-collar crime, throughout this time it has also been generally accepted that white-collar crime not only has the potential to be significantly greater in magnitude, it also has the potential to generate broader societal issues (Sutherland, 1940). By way of illustration of the impact of financial fraud against the state, in New Zealand the total welfare benefit fraud value in 2016/17 was $24,000,000 (Ministry of Social Development, 2017), while detected tax evasion was 50 times this value at $1.2 billion (Inland Revenue, 2017).

The forms of offending discussed in this study are typically committed by those in positions of privilege or by people who have resources. Tax evasion, for example, usually requires an advanced understanding of the tax system in order to effectively engage in the activity. Serious financial fraud also requires some degree of sophistication.

## Sentencing in New Zealand

The purposes of sentencing in New Zealand are set out in the *Sentencing Act 2002* (SA 2002). The purposes are similar to those in other common law jurisdictions and include: holding the offender accountable for harm done; promoting responsibility for harm; providing for interests of the victim; providing reparation; denouncing the conduct; creating deterrence; protecting the community; and assisting in rehabilitation.[[2]](#footnote-2) All of these are relevant for white-collar financial offending. While some factors, such as rehabilitation and incapacitation may not readily be associated with financial crimes, they remain relevant. For example, incapacitation may take the form of disqualification of directorships, which protects others from the potential influence of the convicted offender.

The issue of deterrence is canvassed in greater detail, as one of the proposals discussed later in this study is that less weight should be given to the general deterrence objective in the sentencing process. Deterrence theory was initially developed by Beccaria (1767) and Bentham (1789). However, Becker is one of the more well-known authors who have raised the profile of the theory in recent times (Polinsky and Shavell, 1999). Becker’s economic theory of crime is economically focused with the fundamental idea that penalties will deter criminal activity, where they are sufficiently certain and sufficiently harsh (Becker, 1968). The theory suggests that decisions on criminal behaviour are made by rational individuals, taking into account costs and benefits associated with the criminal activity, with the aim of maximising the outcome for the individual. The costs of the crime include the cost of punishment, while the benefits include the potential gain from the activity and the likelihood that the offending will not be detected. Thus, the theory proposes that deterrence is increased where the cost of committing the crime increases, which may be achieved by harsher penalties or increased potential of detection.

Notwithstanding economic theory, research to date is undecided on the extent to which penalties deter crime. There is a large body of literature that supports the view that harsh punishment is not effective (Alm and McKee, 2006; Alm, Jackson and McKee, 2009; Callanan, 1971; Pogarsky and Piquero, 2003; Slemrod, Blumenthal and Christian, 2001; Spicer and Everett, 1982; Weigel, Hessing and Elffers, 1987). The literature suggests that factors such as an increased likelihood of detection and certainty of punishment are more effective as deterrents than increasingly harsh penalties (Andenaes, 1966; Bagaric, Alexander and Pathinayake, 2011; Devos, 2002; Mendes, 2004; Paternoster, 2010; Scheider, 2001; Varma and Doog, 1998). Notwithstanding this observation, severity of punishment is still important, as harsher punishments can result in moderating behaviour (Polinsky and Shavell, 1999). However, *‘it is very difficult to state with any precision how strong a deterrent effect the criminal justice system provides’* (Paternoster, 2010: 765). Nonetheless, deterrence remains a key component of the criminal justice system in New Zealand.

The SA 2002 outlines a number of factors that must be taken into account by the court in the sentencing process. These include: the gravity of the offending; whether imposing the maximum penalty is appropriate under the circumstances; consistency with similar offenders committing similar offences; the impact of the offending on the victim; imposing the least restrictive outcome that is appropriate in the circumstances; personal circumstances of the offender and their family; and the outcomes of any restorative justice processes.[[3]](#footnote-3)

The SA 2002 also outlines aggravating and mitigating factors that must be taken into account in the sentencing process. Relevant aggravating factors for financial offending include: the loss or harm resulting from the offence; where there was an abuse of trust; where the victim was particularly vulnerable; any premeditation; and any previous convictions of the offender.[[4]](#footnote-4) Relevant mitigating factors for financial offending include: the age of the offender; whether and when the offender pleaded guilty; whether there was limited involvement in the offence by the offender; any remorse shown by the offender; and evidence of the offender’s previous good character.[[5]](#footnote-5) The court must also take into account any offers or agreements to make amends for the offending. This may take the form of financial reparation or other work or service undertaken by the offender.[[6]](#footnote-6)

# Data

The *Serious Fraud Office Act 1990* determines the powers of the Director of the SFO. Factors that are taken into account in determining whether the Director of the SFO will undertake a prosecution include: the nature and consequences of the fraudulent activity; the suspected scale of the fraud; the legal, factual and evidential complexity of the matter; and any relevant public interest considerations.[[7]](#footnote-7)

Data used in this study was compiled from prosecuted cases by the SFO over the five-year period from 2014-2018. The process for compiling the data commenced with an Official Information Act 1982 request to the SFO on 31 October 2018, requesting the sentencing notes for all SFO prosecuted cases over the past five years. This request was declined by the SFO, who advised that the Sentencing Notes are held by the Court in which the matter was held. However, the SFO did provide a list of sentencing decisions relating to matters prosecuted by the SFO from 1 January 2014 to the time of correspondence (26 November 2018). The SFO also provided details of the court in which the matter was heard and the Court reference number. Therefore, each court was approached to provide the sentencing notes.

The process of applying to each Court separately resulted in requests to 10 courts. The ‘Application for access to court documents’ form was completed for each set of sentencing notes required. Most courts charged $30 for each file provided.

The SFO provided case names, numbers and court details for 35 cases. Two cases were heard together, reducing the total number of case files to 33. After follow-up requests, responses were received from all but one court. This resulted in collection of 30 of the possible 33 case files. Where the cases had been appealed, the sentencing notes from the Court of Appeal were those used for analysis. The 33 cases were coded in NVivo using the factors that influenced the sentencing outcome as the primary coding nodes.

A further Official Information Act 1982 request was made to the Ministry of Justice in May 2019 for information on the ethnic group and age of the offenders. This request was declined as the Ministry advised that this information is not passed on to them from the Courts. Gender could be ascertained from the Sentencing Notes. Of the total 39 offenders, 34 (87%) were male and 5 (13%) female. Appendices I and II provide further detail from the 30 cases. Appendix I outlines the charges, the maximum sentence, the sentencing starting point, the sentence decision, the value of the fraud and the gender of the offender. Appendix II outlines the discounts for various factors in the sentencing process.

Table 2 provides a count for some of the primary factors identified in this study. The value of the offending was mentioned in 20 (67%) of the cases. However, as these are the most serious financial offences in New Zealand, this is unsurprising. Similarly, other aggravating factors such as the offending occurring over a long period of time (73%), or the systematic and planned nature of the offending (93%), are also factors that are likely to contribute towards SFO involvement in the case. In 80% of the cases, a breach of trust was raised. Many cases involved individuals acting in a role where they had significant influence and/or information asymmetry over the victim. Again, these are factors that are likely to contribute to the involvement of the SFO in the prosecution process.

**Table 2: New Zealand Serious Fraud Office Cases**

|  |  |  |
| --- | --- | --- |
| **Mitigating Factors** | **Number** | **%** |
| Guilty plea:   * Early * Late * Unspecified | 5  6  6 | 57% |
| Remorse shown | 20 | 67% |
| Reference to the good character of the offender | 30 | 100% |
| Reference to the quality of references/testimonials | 15 | 50% |
| Reference to reputation damage/loss of community standing/shame | 8 | 27% |
| Reparation made | 8 | 27% |
| **Aggravating Factors** | | |
| Vulnerable victim(s) | 20 | 67% |
| Value of offending/harm | 20 | 67% |
| Time period of offending | 22 | 73% |
| Systematic offending | 28 | 93% |
| Breach of trust | 24 | 80% |

Bagaric and Alexander (2014) note that in Australia factors that will impact on the penalty include the harm generated from the offending, any prior criminal record, remorse, the level of planning, hardship, any guilty plea and voluntary reparation made, among others. With the exception of hardship, these are all factors taken into account in the New Zealand SFO cases. These factors are discussed further in the following section.

It is worth observing the absence of discussion in New Zealand on hardship. While some cases referred to suffering that the offender would incur, this was not financial hardship. Instead, the suffering was in the form of extra-curial punishments, which is discussed further below.

# Discussion

Bagaric and Alexander (2014: 317) make a case for:

*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*.

These factors are used to frame the following discussion, using data from the SFO. Each of the points raised is outlined below, along with the early plea discount, which is also discussed by Bagaric and Alexander.

## Discount for Restitution

Bagaric and Alexander (2014) argue that restitution should be a strong mitigating factor as this provides an incentive for offenders to repay the victims of the crime. Bagaric and Alexander suggest that restitution should reduce any penalty given by up to 30%. In Australia, Bagaric and Alexander find that voluntary restitution is an important consideration in the sentencing outcome. However, restitution may not automatically result in a significant sentencing discount, in order to avoid the perception that an offender is buying a lighter sentence (Bagaric and Alexander, 2014). Instead, Bagaric and Alexander suggest that in Australia restitution is more likely to be accepted as a mitigating factor when it generates hardship to the offender.

The New Zealand cases did not discuss the potential for financial hardship to result from reparation. Few cases ordered reparation. There appeared to be two primary explanations given for an absence of a reparation order. First, judges noted that the defendant had few means, e.g. *I have seen a personal assets and liability statement and any reparation order would be pointless* (case 23). Second, judges observed that the defendant had made attempts to ensure they had few means, e.g. *you say that all your financial matters are out of your hands and in an account in your husband’s name. Some might argue that is very convenient because that way the money you stole cannot be clawed back* (case 28).

Eight of the SFO cases involved all or some reparation (1, 5, 7, 9, 16, 27, 29 and 30). In some cases, reparation was minimal, for example in case 16 the judge noted *a purely token order for reparation in the sum of $50,000*. In one case (case 1) full reparation was made. In five of the other cases, partial reparation was made. The two other cases involved two people: in case 5, one offender did not provide any reparation while the other provided partial reparation; in case 29, one offender provided no reparation and the other provided full reparation. Notwithstanding this relatively low level of reparation, commentary in many cases suggested that the defendant had the means to provide reparation but it was not offered, e.g. *your house, which I understand you own, is not being offered to repay any of the money* (case 4).

Where reparation was provided, it resulted in a sentence discount. It was sometimes not possible to ascertain the precise amount of the discount as the discount was calculated in conjunction with other factors, such as cooperation with the prosecution. However, the discount available for reparation was visible in Case 29, where there were two offenders. One was described by the judge as ‘*a rich enough man’*; the other ‘*currently on a benefit, technically insolvent and … recently applied for bankruptcy*’. As can be seen in Appendix II, the offender who offered some reparation received a 6-month sentence discount, which the other did not. Thus, the accusation of ‘buying justice’ is visible in such a situation where someone is sufficiently wealthy that reparation can be made.

As noted, there was only one case where full reparation was made (case 1). The uniqueness of full reparation was noted by the judge in this case:

*the most significant factor in this case is the fact that there will be full reparation made and there are very few cases where, in this area of imposition of penalty, particularly those prosecuted by Serious Fraud Office, that anything like full recovery of reparation is made.*

It is also notable that in four cases, there was no overall net loss (cases, 2, 6, 10 and 20). This was usually the case where the fraud was mortgage fraud against a large lending institution. Typically, these cases occurred at a time of rapidly escalating property prices in New Zealand. Therefore, despite the presence of the fraudulent activity, the gains on property when the fraud was discovered did not result in an overall financial loss to the lender.

In some cases, a sentence discount was provided for reparation when that reparation was not voluntary. For example, in Case 30, the judge noted:

*Taking into account the issues of reparation to which I referred and although it was not a voluntary reparation, it is nonetheless a repayment to McKay Shipping and must be taken into account as part of the net figure, I consider that a further reduction of 4 months should be made available…*

There were instances where judges noted the offenders were bankrupt or had no assets, therefore no order for reparation was made. In other cases, there was some suggestion that assets existed, but there was doubt as to whether this could or would be made available to victims. For example, in case 27, the judge made the following comment and continued to provide a sentence discount for restitution:

*It is suggested that you have divested yourself of all of your assets in order to make repayments to the victims but no information was forthcoming with regard to the equity in the house occupied by your wife, which as I understand the position, is owned by a trust. The agreed summary of facts makes reference to the use, the personal use by you, of over half a million dollars. Nothing like that sum has been repaid to the victims.*

As noted above, Bagaric and Alexander suggest that a significant sentence discount should be forthcoming when restitution is provided. For many cases of serious financial crime, repaying funds stolen will return the offender to the same or a similar position to prior to the offending. Wealthier offenders who have greater resources will suffer less from making restitution and yet, following Bagaric and Alexander’s proposal, would receive a reduced sentence from doing so.

Increasing the discount associated with restitution suggests that the only harm resulting from white-collar crimes is financial. Allowing a significant sentence discount where restitution is made ignores the non-financial harm suffered by vulnerable victims of crimes such as investment fraud. The harm from white-collar crime is perhaps best captured by Shapiro (1990: 346) when she writes *‘white-collar criminals violate norms of trust, enabling them to rob without violence and burgle without trespass.’* In 67% of the SFO cases, the victims were referred to as vulnerable or having other characteristics that reflected poorly on the offender. Many cases outlined the impact on victims, which extended beyond the financial harm, for example:

*It was their life savings and the loss in relation to all of your victims has caused significant harm not only financial but emotional and physical harm. … So it was their life savings, their investments that you stole* (case 26).

*Victim impact statements which in total represent 27 of your victims. These…make for unhappy reading. They reveal serious disruption to people’s lives and to their future plans and in some respects the need to change plans for children’s education* (case 33).

Thus, the suggestion that greater weight should be placed on restitution in the sentencing outcome, provides for justice to be, if not bought fully, then at least bought at a discount. Placing greater weight on restitution also minimises the wide-ranging non-financial impacts incurred by the often-vulnerable victims of such crimes.

Presently, restitution is viewed as a mitigating factor. An alternative perspective is to view non-restitution in New Zealand as an aggravating factor, particularly in cases where there is structuring of financial arrangements to ensure that reparation cannot be pursued through traditional channels. Such activity can be traced back, at least, to the time of Sutherland (1940) who suggests that those in positions of privilege have access to additional resources. In more modern times, these resources include financial structures and advice that can assist in ensuring that gains from white-collar financial crime are retained by the offender.

There is an argument to be made that non-reparation at the time of sentencing could instead generate a future debt for the offender. This is not without precedent. For example, in New Zealand, individuals convicted of welfare fraud are expected to repay any debts out of future income (Marriott, 2014b). Debts that arise from welfare fraud are not time-bound and usually remain with the offender until repaid. Welfare fraud debts are usually only written off when the fraudster dies, and the debt is unable to be collected from the fraudster’s estate (Marriott, 2014b). Thus, greater equality would be achieved if serious financial fraudsters were held to the same standard as welfare fraudsters and their debts were not, in effect, written off at sentencing.

## General Deterrence

Deterrence is one of the primary purposes of sentencing in New Zealand.[[8]](#footnote-8) Deterrence may either be a general deterrent for the entire population or a specific deterrent to the one individual who has committed the offence in question. As noted in the Background section, the literature suggests that punishment in isolation is not an effective deterrent to crime. Instead, sanctions are typically viewed as more effective when there is greater certainty of both detection of the crime and that a sanction will follow from this detection. This idea has been central to the concept of deterrence for decades.

Bagaric and Alexander (2014) note that in Australia general deterrence is a significant consideration in sentencing white-collar crime. This is, at least in part, due to the assumption that white-collar criminals are likely to be able to make rational decisions and have awareness of the potential impacts of their offending, the likelihood of punishment, and the potential and severity of punishment associated with the offending. Bagaric and Alexander (2014) argue that harsh penalties do not deter white-collar criminals, citing reference to the literature that suggests punishments in isolation are not a deterrent. Therefore, they suggest, the emphasis on general deterrence should be lessened.

As noted earlier, the purposes of sentencing in New Zealand include deterrence, along with a range of other factors. The need for deterrence in the sentencing process was noted in 60% of the Serious Fraud Office cases. Other factors, such as the need to hold the offender accountable and to denounce the conduct, were also frequently mentioned.

Bagaric and Alexander’s argument, put into the New Zealand context, centres on whether the penalties awarded may be considered as harsh. In the SFO cases used for analysis in this study, there were a total of 39 offenders. Of the 39 offenders, 14 (36%) received a sentence of home detention and one received a sentence of community detention. The other 24 received custodial sentences. The custodial sentences averaged 55 months per person. Only two had a non-parole period longer than the standard of one third. Assuming that all but two offenders would be released after serving one-third of their sentence, this is, on average, 18 months. Whether an 18-month custodial sentence is likely to be considered harsh, and therefore a deterrent to fraudulent behaviour, is not known.

An alternative proposal is instead of reducing the emphasis on general deterrence in the sentencing outcome, which signals to society that the crime is less serious, greater weighting could be placed on deterrence by increasing investment in detection and prosecution of white-collar crime. This would signal that the crime is more likely to be detected and punished. The importance of signalling must be acknowledged. In environments of information asymmetry, signalling provides relevant information to others in society with the aim of adjusting behaviour.

## Good Character

Bagaric and Alexander (2014: 323) observe that in Australia case law has established that *‘good character cannot be given undue significance as a mitigating factor, and plays a lesser part in the sentencing process*.’Thus, Bagaric and Alexander propose that previous good character should be considered in the sentencing decision. This is justified with reference to the approach that repeat offending removes an offender’s entitlement to leniency, and that it is a well settled principle that good character (which may be established by a first offence) results in reduced punishment. Bagaric and Alexander suggest that it is the ‘no prior conviction’ component of good character that allows individuals to offend. However, it is equally likely that other characteristics, such as positions of power and influence, access to resources and networks etc., facilitate the offending.

A sentence discount is frequently given in New Zealand for ‘good character’ and/or presenting as a first-time offender. Reference to the good character of the offender was made in all the SFO cases analysed in this study and a good character discount was given to all but two of the offenders.

There was evidence of some conflict on providing discounts for good character. For example, it was noted in case 4 that: *Credit for good character is problematic where the offending occurred over an extended period of time…and the Court of Appeal in Tonga v R found that previous good character is always a difficult concept in such cases where there is prolonged offending over more than two years.* However, there were many cases where good character discounts were given for offending that occurred over a long period of time. A similar point was made in case 32: *it is often said in these type of offences, persons cannot really claim a discount for previous good character because of the repetitive nature of the offending, but I will give you a credit.*

As noted, there was reference to the good character of the offender in all cases. Some examples of comments are below:

* *you are entitled to substantial credit for the work you do in the community and I accept unreservedly that aspect of the statements made in your support* (case 11).
* *the 15% credit that I give you is an amalgam of credit for previous good character, even though I note that serious repetitive offending of the type that you were involved in can often negate any discount for previous good character* (case 15).
* *You have given much of your life to service of the law and this is a feature which you can call to your aid today. This is described as being “completely out of character” and I have no doubt has come as a shock to those who know you. You can of course rely on your record, to which I have already referred* (case 16).
* *I do not overlook the Crown’s submission that any discount must be tempered by the fact that the offending took place over a two-year period. That is correct. But properly characterised, this was a single incident of fraud, and it does not reflect a propensity or a pattern of offending over a long period of time which would otherwise detract from your previous good character* (case 2).
* *Although the offending was persistent over a period of time, I consider it is appropriate to allow you a discount as a first offender. Despite the persistent nature of the offending, that discount should be greater than is sometimes allowed for, given your age* (case 21).
* *When offending spans a very long period of time it is very difficult to give people significant credit for being of otherwise good character. This is not one-off offending. This is offending over a long period of time and as I said you have effectively been living a life of deception for the past 21 years. I do have to note through that prior to 1992, the commencement of this offending, that you were of otherwise good character so I am prepared to give you 5% of that starting point* (case 26).

The fact that so many white-collar offenders share the trait of having a ‘good character’ is, according to Bagaric and Alexander *‘no basis for diminishing its relevance’* (2014: 344). As is evident from the data provided in Table 2, all the serious financial offenders in New Zealand have the requisite good character.

It is important to recognise that in the cases reviewed in this study the presence of a good character was frequently an enabler of the offending. For example, many of the offenders in the SFO cases held positions of responsibility, which subsequently enabled the criminal activity to take place. As noted in Table 2, 80% of the cases involved a breach of trust and 67% involved a vulnerable victim. These figures illustrate the predatory nature of the serious financial frauds. Thus, it appears anomalous that an offender should benefit from a sentence discount for a factor that assisted with the criminal act.

When factors such as a good character are considered as mitigating factors, it suggests that good behaviour can be traded off against bad behaviour. Rather than regarding a previous good character as a mitigating factor, consideration should be given to viewing this as an aggravating factor where it is exploited to facilitate criminal behaviour.

## Extra-Curial Punishments

Also of interest in this study is the weighting attached to reputation damage and/or loss of status in the sentencing outcome. These issues were raised over 200 years ago by Bentham (1789: 33), who identified the *‘pains of an ill name’*, where the pains of an ill name were expressed as *‘the pains of ill-repute, the pains of dishonour, or the pains of the moral sanction’* (Bentham, 179: 39).

Bagaric and Alexander (2014) suggest that the Courts give little weight to personal factors, such as loss of reputation. Other burdens that may fall within this category are the shame associated with the offending, the potential for reduced future income due to limited employment opportunities resulting from the criminal prosecution and professional institution disqualifications. This is in contrast with other research, which suggests that judges may perceive defendants from privileged backgrounds as being more affected by the stigma associated with prosecution and punishment, than they actually are (Levi, 2014).

Bagaric and Alexander (2014) argue that other punishments, such as reputation damage, should be taken into account in the penalty reduction process. Adopting a criminological perspective of punishment, Bagaric and Alexander argue that negative consequences resulting from a criminal conviction also constitute punishment, which should then be taken into account in the overall sentencing decision.

Research by Kerley and Copes (2004) suggests that white-collar offenders are better able to recover after involvement with the criminal justice system. Kerley and Copes (2004) cite studies showing that when white-collar offenders return to society after completing custodial sentences, they typically return to similar positions to those held prior to the conviction. Moreover, the authors suggest that white-collar criminals benefit from higher status and reduced sigma in the community than other types of offenders when they return back into society after conviction.

Other studies suggest that when white-collar offenders *‘fall from grace’* they are better able to recover from their involvement with the criminal justice system than ‘common criminal’ offenders (Benson, 1984: 573). Benson (1984: 585) writes that *‘after the immediate effects of conviction have been weathered, many offenders regain all or part of their former status’.* One of the factors likely to assist with the ability to recover after conviction is due to the characteristics of white-collar offenders. As white-collar criminals are more likely to be older and hold steady employment (refer Table 1), then they are better placed to return back to similar environments. Kerley and Copes (2004) also suggest that white-collar offenders are more likely to have additional resources and developed networks that will assist with returning to society. Examples of comments from the SFO cases are below:

* *As for career repercussions, while this factor is to some extent an aspect of your “fall from grace”, I accept as a result of this conviction you may be unable to develop property personally. But there are also indications in two letters of support that this conviction will not do irrevocable damage to your employment prospects in the property sector* (case 6).
* *Relatively selfless support for others in the community is a clear theme in a number of the letters that Mr Coffey has provided in support of his position. Mr Coffey continues to enjoy the support of entities for whom he could work …* (case 11).
* *I turn now to discuss personal characteristics. I have been presented with no fewer than 76 character references which attest to your prior good character and your involvement in business, the law and the community. The references make impressive reading* (case 25).

Given the literature and the data from court sentencing files, the question arises as to whether extra-curial punishments should be taken into account during the sentencing process. This is not a new question and has been raised by other researchers, who question whether a ‘fall from grace’ should be a relevant factor in the sentencing process (for example, Levi, 2014).

The New Zealand cases showed examples of both ‘exercise of mercy’ and sentence discounts given for personal losses that result from the offending. Examples include:

* *To be transparent, it is also fair to say that within that credit there is a degree of exercise of mercy, which is usually regarded as the prerogative of a trial Judge* (case 25).
* *I consider that the additional humiliation and loss of reputation, and reduction in income you will suffer as a result of your conviction, through being disciplined by the Law Society, is a personal factor which justifies a discount from the starting point* (case 10).
* *I also consider a discount for your prior good character, and your significant fall from grace is warranted. …The fall from grace is accordingly a significant one for you. I accept that this is a form of punishment in and of itself, and the consequences of conviction will be felt well beyond completion of your sentence, irrespective of the length of it* (case 2).

In contrast to Bagaric and Alexander’s (2014) suggestion, extra-curial punishments are taken into account in the sentencing process in New Zealand. However, the types of extra-curial punishments taken into account are of the type that are most likely to be experienced by those who are most privileged. Bagaric and Alexander acknowledge the paradox that the unemployed or socially deprived are not entitled to such a discount in the sentencing process, as *‘it would undermine the deterrent effect of criminal sanctions’* (Bagaric and Alexander, 2014: 346). While Bagaric and Alexander (2014: 346) acknowledge that the sentencing process is not the place to *‘redress social disparity’,* it is also not the place to amplify social disparity.

## Guilty Plea Discount

Bagaric and Alexander note that, in general, large discounts on sentences are available to those who plead guilty. There are multiple reasons for this, but the key one is the cost and time that is saved when a lengthy court process is avoided. This reason is evident from commentary in the SFO cases. However, a further factor contributing to the discount on sentencing is the suggestion of remorse that is associated with a guilty plea. Many of the SFO cases either referred explicitly to remorse shown (67%) and/or a guilty plea (57%). Sentencing notes refer to discounts of up to 25% for a guilty plea. In some cases, remorse was taken into account as an additional factor. However, it was not always clear that remorse was genuine, as can be seen in the following comments from judges:

* *The remorse stated in Mr O’Brien’s letter to me is at odds with his demeanour as I observed it throughout the trial. The tone of numerous comments by Mr O’Brien in the period the SFO was intercepting communications suggests that he was dismissive of the regulator, and unconcerned that he might be breaking their rules. Despite those reservations, I consider that the interests of Mr O’Brien’s ultimate rehabilitation warrant a discount from the starting point to give a measure of recognition for his previous good character, the unusual extent of stress that a prison sentence will impose on his family, his preparedness to address his gambling addiction and his unqualified recent expression of remorse for the conduct that has resulted in these conviction* (case 11).
* *However you do not have a guilty plea discount to call upon. Also, somewhat problematically, you have not fully accepted responsibility for your role in the operation. That said, I do accept that you are ashamed and embarrassed by your offending. I accept that most of the time you, in your words, “detested” the work you were doing. Although I do not have a medical certificate about your depression, I accept that you are and have been for some time, as you said to the police when you were arrested and I note that you are in receipt of a sickness benefit. Taking everything into account I have concluded that you are genuinely remorseful* (case 21).
* *As far as remorse is concerned, I believe your remorse is a mixture of self-pity and genuine remorse. I think it is far too easily said that remorse is for an offender’s predicament. I am sure that you both feel dreadfully sorry for what has occurred. I intend to give each of you an adjustment for remorse* (case 29).
* *I am prepared to give you a limited discount for remorse, but this is restricted by the fact that I view your remorse as being primarily for the position in which you now find yourself and your concern for the effect your offending has had on your family* (case 9)*.*

## Summary

Proportionality is the principle that the punishment must fit the crime (Bagaric and Alexander, 2014). This is also the difficulty for the sentencing judge (McClellan, 2011). As noted by Bagaric and Alexander (2014), there are two components to proportionality in relation to sentencing: ensuring that the sentence is not overly punitive, but also ensuring that the sentence is not too light.

In returning to the purposes of sentencing outlined in section two, these may be summarised as: holding the offender accountable; taking into account the victim; providing reparation; denouncing the offending; deterring other offending; incapacitation; and rehabilitation. Of these, the first five are the most relevant to financial offending. Incapacitation and rehabilitation remain relevant but are less significant for white-collar crime. The primary suggestions raised by Bagaric and Alexander are to discount the sentence further where restitution is made, to reduce the weighting for deterrence, to add further weight to the good character of white-collar offenders; and to increase the weight attached to any fall from grace of a white-collar offender. Table 3 below maps each of these suggestions against the five key purposes of sentencing.

**Table 3: Mapping of Proposals against Purposes of Sentencing**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | **Purpose of Sentencing** | | | | |
|  | **Hold Offender Accountable** | **Acknowledge Victim** | **Reparation** | **Denounce Offending** | **Deter Offending** |
| Discount for restitution | No | No | Possible | No | No |
| Reduce weighting given to general deterrence | No | No | No | No | No |
| Discount for good character | No | No | No | No | No |
| Take extra-curial punishment into account | No | No | No | No | No |

There is one purpose of sentencing that may be partially met by Bagaric and Alexander’s proposed reforms, with another 19 that are not met. The one objective that may be met in part, is providing reparation, whereby increasing the sentencing discount for restitution may provide an incentive to increase reparation made. However, it is noted that a discount is currently available for restitution, which in New Zealand still does not result in a high proportion of reparation. Thus, this objective is rated as ‘possible’ as it appears theoretically possible only.

White-collar crime has historically been considered as less serious than other forms of offending. This may be because, in some cases, it can be difficult to point to a specific victim. However, in other cases a specific victim or victims are evident. There can be no argument that white-collar crime is different, but this does not make it less serious than other forms of offending. Indeed, this has been previously acknowledged in the courts. Illustrative comments are below. Note that these comments are not made in cases used for analytical purposes in this study:

*It is often thought that financial blows are not to* [sic] *serious as physical blows but a financial blow is often as sharp as a physical blow and its effects may last a lot longer than the physical assault of some sort and you can see the effects and the long-term effects on some of the former clients*.[[9]](#footnote-9)

*This type of fraud, often referred to as white-collar crime, is an insidious and destructive force. It leaves misery and distress in its wake and consequences for victims that are often life long*.[[10]](#footnote-10)

# Conclusion

Wheeler, Mann and Sarat (1988) note that the sentencing process and outcome is one of the most pivotal events in the administration of justice. The sentence determines the short- and/or long-term future of the offender. Moreover, for society it *‘gives expression to our sentiments and understandings regarding crime and criminals’* (Wheeler, Mann and Sarat, 1988: 1). Thus, increased debate on this important component of the justice system is welcome.

Bagaric and Alexander’s study is theoretical. Theoretical studies have the advantage of extending the debates in relation to sentencing. However, to extend our understanding of the dynamics of sentencing it is necessary to look to data. This is particularly the case when, as suggested by Bagaric and Alexander, the proposals may be extended to other jurisdictions.

The focus of this study is not to suggest that those less privileged should be treated more leniently. Nor is it to propose that those who are more privileged should be treated more harshly. Instead, it is to recommend that people are treated with equivalence: where equivalent harms result from a crime, then equivalent punishments should be the expected consequence. In one SFO case the judge noted that:

*Your counsel suggests your culpability is akin to offending involving benefit fraud where a party has failed to disclose a particular aspect of their relationship in order to receive a benefit. I consider that to be a good analogy in your case. Starting points of two years imprisonment have been applied in relation to welfare fraud in sums around the $80,000 mark, and with 15 months adopted for offending totalling $51,000* (case 17)*.*

In this case, the value of the offending was $1.8 million, with a net loss of $60,000 at the time of trial. The $60,000 net loss was calculated by taking into account other mechanisms that the victim had to minimise their losses, such as not paying for other goods supplied. However, the sentence outcome does not appear to place weight on the value of the actual offence. This suggests, that where offenders repay or otherwise compensate for their crime, that significant benefit will follow. In case 17, a starting point of 2 years, 2 months prison was discounted to 9 months home detention. The primary difference between this case and welfare fraud cases, is that welfare fraud cases are never of a similar value to the crime in this case. Indeed, the total value of welfare fraud in New Zealand in most years is around $24 million – or only 13 times the value of the fraud in this one Serious Fraud Office case (Ministry of Social Development, 2017).

There is a case to be made that offending by those who are among the most privileged in society is more serious than offending by those who are least privileged. Thus, this study makes four policy recommendations that arise from the above data analysis and contrast with those proposed by Bagaric and Alexander.

First, consider absence of restitution as an aggravating factor, rather than the presence of restitution as a mitigating factor. Restitution is currently taken into account in the sentencing decision, but in the New Zealand environment results in few cases where reparation is made. Generating an incentive for repayment can be achieved by increasing the weighting for an absence of reparation, without achieving the potential for wealthy offenders to be able to ‘buy justice’ in the form of a reduced sentence when stolen funds are repaid. In economic terms, this has the advantage of increasing the costs of the crime to the offender.

In many of the SFO cases, no restitution was forthcoming. However, offenders have the benefit of the illegally obtained funds, regardless of whether those funds are now available to provide restitution. A greater deterrent effect may exist if offenders were required to provide reparation out of future income. This would have the further benefit of achieving greater equality with other financial fraudsters who are expected to repay their obligations after sentencing, such as those who commit welfare fraud.

Second, increase investment in detecting and prosecuting white-collar crime to increase the deterrent effect, rather than minimising the focus on general deterrence from the sentencing process. Reducing the focus on general deterrence signals that deterrence is not a desired outcome of the sentencing process. Prior research has shown that in New Zealand, funding for investigation of serious financial fraud has reduced in the two primary government agencies who are tasked with this role (the Financial Markets Authority and the SFO) (Marriott, 2018).

Third, question why good character is a mitigating factor in white-collar crime sentencing in New Zealand, as it is frequently this good character that enables the offending. All but two of the SFO cases received a sentence discount for the good character of the offender. Many inconsistencies were noted, where judges observed good characters alongside factors such as systematic or long-term offending, abuse of trust or exploitation of a vulnerable victim.

Finally, question why extra-curial punishment is a factor in the sentencing decision, as the literature suggests there is no long-term impact on the offender from committing white-collar crime. Instead factors such as loss of reputation should be viewed as a natural corollary of white-collar offending, in the same way that they are for blue-collar offending. Adoption of these practices will assist with ensuring that those committing crimes of privilege are not advantaged in the justice system.

# Appendix I: Offence, Sentence and Other Details

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Case No.** | **Charges** | **Sentence** | **Other** | **Amount** | **Gender** |
| 1 | Charged with offences relating to fraud and dishonesty perpetrated against Government Departments | Maximum: 7 years  Starting point: 54 months prison (Mrs); 2 years, 9 months (Mr)  Sentence: Community detention, 200 hours Community work (CW) (Mr)  12 months home detention (HD) (Mrs) plus 300 hours CW  Expected full reparation | Accountant (Mrs) | $494,544 | 1 male  1 female |
| 2 | 3 charges of obtaining by deception and two representative charges of using a forged document  Bank fraud ($41M) | Maximum: 10 years  Starting point Ross: 5 years, 6 months  Starting point Weipeihana: 5 years  Sentence: Ross - 4 years, 4 months  Weipeihana – 4 years, 3 months | Legal executive (Weipeihana) | No net loss | Both male |
| 3 | 48 charges of obtaining by deception  Charges under the Secret Commissions Act  Xu (22 charges)  Chen (25 charges)  Jiang (9 charges) | Maximum: 7 years  Xu starting point: 2 years, 9 months  Sentence: 12 months HD  Chen starting point: 6 years  Sentence: 6 years  Jiang-starting point: 5 years  Sentence: 4 years, 9 months | Solicitor (Chen) | $427,000 overall shortfall  Bank fraud $54M | 2 males  1 female |
| 4 | 166 counts of theft in a relationship; obtaining by deception | Maximum: 7 years  Starting point: 4 years  Sentence: 2 years, 5 months |  | $171,378 | Male |
| 5 | Ryan – three charges of obtaining by deception, one charge of false accounting, a charge of forgery, two charges of reproducing a document with intent to deceive and a charge of theft by a person in a special relationship.  McNicholl – one charge of obtaining by deception | Maximum: 10 years  Ryan: Starting point: 9.5 years  Sentence: 7.5 years  McNicholl: Starting point 3.5 years  Sentence: 11 months HD, 350 hours CW, reparation $50,000 |  | $4.4 million  Shortfall for McNicholl $136,000 | 2 males |
| 6 | One charge of obtaining by deception | Maximum: 7 years  Starting point: 3 years  Final sentence: 10 months HD |  | $41M lending deception (with others)  No ultimate shortfall | Male |
| 7 | 14 charges of obtaining by deception | Maximum: 7 years  Starting point: 3 years 6 months, plus 6 month uplift for prior conviction, total 4 years  Final sentence: 2 years, 9 months |  | $300,828 | Male |
| 8 | A number of charges of dishonesty (sentencing notes not specific) | Starting point: 11 years  Sentence: 8 years |  | $17.5 million | Male |
| 9 | 8 charges of obtaining by deception, one charge of dishonest use of a loan application document, 1 charge of corruptly giving a bank agent consideration as an inducement for approving a loan application  Bank fraud ($52M) | Maximum: 7 years  Starting point: 6 years, 9 months  Final sentence: 4 years 10 months prison (minimum 50% non-parole period) |  | $394,000 shortfall at time of sentence | Male |
| 10 | 1 representative charge of obtaining by deception  ($41M with 3 others – separate cases) | Maximum: 7 years  Starting point: 4 years  Sentence: 10 months HD | Partner in law firm | No net loss | Male |
| 11 | O’Brien  Coffey  Max | Maximum penalty: 7 years  O’Brien: Starting point: 5 years  Sentence: 4 years, 6 months  Coffey: Starting point: 2 years, 6 months  Sentence: 12 months HD  Max: Starting point: 2 years, 6 months  Sentence: 12 months HD | Coffey - Police Officer & Corrections Officer | $3.3 million | Male |
| 12 | Secret commission pursuant to s 8 Secret Commissions Act; obtaining a pecuniary advantage; obtaining by deception | Maximum penalty: 7 years  Starting point: 3 years  Sentence: 8 months HD |  | $300,000 | Male |
| 15 | 16 charges of obtaining by deception (fraudulent mortgage applications) | Maximum penalty: 7 years  Starting point 5 and a half years  Sentence: 3 years, 2 months | Architect | Obtained $33M – loss of $17M | Male |
| 16 | Intent to obtain a pecuniary advantage dishonestly using a document.  Bank loan fraud. | Maximum penalty: 7 years  Starting point: 3 years  Sentence: 11 months HD | Solicitor | Over $500,000 | Male |
| 17 | Mr Rose – obtaining by deception (s 240 of the Crimes Act 1961) – 10 representative charges relating to offending in 2006 and 2010-2012  Mrs Rose – party to the offence – 9 representative charges | Maximum penalty: 7 years  Mr Rose – crime related to 174 payments. Loss to MRP complex and difficult to confirm.  Judge discusses ‘benefit obtained’ to give indication of culpability. So also calculates that as $618K – as total benefit.  Starting Point (Mr) – 3 years, 8 months  Sentence (Mr) – 3 years, 2 months  Starting point (Mrs) – 2 years, 2 months  Final sentence: 9 months HD |  | Offence – Mr $2.2M Mrs $1.8M  But see comments about overall loss – net loss $60K | 1 male  1 female |
| 18 | False entries in an account or other document required or used for accounting purposes; obtained possession of property by deception and without claim of right; used a forged document, knowing it to be forged. | Maximum: 10 years  Starting point: 69 months  End sentence: 36 months |  | $1.1 M none repaid | Male |
| 19 | 3 charges of theft by a person in a special relationship, seven charges of making or publishing a false statement | Maximum: 10 years  Essentially an uplift of 2 years on prior offending (offender is already in prison on other related matters) – no discounts |  | $1.2M | Male |
| 20 | 16 charges of dishonestly using a document to obtain a pecuniary advantage  1 charge of receiving a secret reward | Maximum: 7 years  Starting point: 18 months prison  8 months HD |  | No net financial loss | Male |
| 21 | 7 counts of reproducing a document with intent to cause loss | Maximum: 7 years  M – starting point: 3 years  Sentence: 3 years prison  B – starting point: 2 years, 6 months  12 months HD, 200 hrs CW |  | $470,000 | 1 male  1 female |
| 22 | 24 charges of reproducing a document with intent to cause loss | Maximum: 7 years  Starting point: 4 and a half years  Sentence: 4 years prison |  | $786,000 | Male |
| 23 | 4 counts of dishonestly using a document, one count of causing loss by deception and six counts of theft by a person in a special relationship | Maximum: 7 years  Starting point: 2 years  Final sentence: 8 months HD |  | $452,000 | Male |
| 24 | 19 counts in an indictment of theft by failing to account, 45 counts of theft by a person in a special relationship, one count of reproducing a document with intent to deceive; four counts each of obtaining by deception… one charge of obtaining by false pretence. | Maximum: 10 years  Sentence: 6 years with 9 month uplift  No discount |  | $500,000 | Male |
| 25 | 4 counts of making a false statement as a promoter  1 count of obtaining an advantage by deception | Maximum: 10 years  Starting point: 3 years 6 months Sentence: 12 months HD | Solicitor and Director | Part of South Canterbury Finance fraud (total $1.6 BN) | Male |
| 26 | 11 counts of theft of funds held under direction; 20 counts of theft by a person in a special relationship and three counts spanning theft of funds held under direction and theft by a person in a special relationship | Maximum: 10 years  Starting point: 9.5 years  Sentence: 8 years, 1 month | Lawyer | $2.3M losses | Male |
| 27 | 5 counts of theft by a person in a special relationship; 5 counts of making and/or publishing a false statement under s 242 of the Crimes Act | Maximum penalty: 10 years  Starting point: 7 years  End sentence: 6 years |  | $2.5M | Male |
| 28 | 5 counts of theft by a person in a special relationship; 4 counts f theft by a person required to account; 1 count of fraudulently using a document | Maximum penalty: 7 years  Starting point: 5 years  End sentence: 4 years 3 months |  | $1.2 M | Female |
| 29 | 41 charges of dishonestly using a document. | Maximum penalty: 7 years  Starting point: 5 and a half years  Rosenberg: 3 years + $400,000 reparation  Hunt: 3.5 years |  | $9.75M | Male |
| 30 | 55 counts involving dishonesty; 20 counts involved using a document with intent to defraud under an earlier provision of the CA 2000; 35 of them involved dishonest use of a document under a later provision of the CA | Maximum penalty: 4 years  Starting point: 4 years  Sentence: 3 years, 3 months |  | $384,658 | Male |
| 32 | A number of counts that can be categorised as fraud. These involved using a document with intent to obtain a pecuniary advantage and other counts of using a forged document. | Maximum sentence: 10 years  Starting point: 7 years  Final sentence: 6 years (minimum non-parole period of 3 years) |  | $19 M | Male |
| 33 | 14 charges: 3 charges of theft by a person in a special relationship; 2 charges of using a document under the CA 1961; 9 charges of making a false statement by a promoter | Maximum sentence: 10 years  Starting point: 6 years  Final sentence: 4 years, 3 months |  | $1.5-1.7M | Male |

Numbers 13, 14 and 31 are the cases that were not received from the courts

# Appendix II: Details of Discounts Given to Sentence Starting Point

\* Indicates that the discount was combined with other factors as noted by (\*)

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Case No.** | **Discount for restitution** | **Cooperation** | **Good character** | **Guilty plea** | **Health / personal / fall from grace** | **Remorse** |
| 1 | 8 months (15%) |  | 6 months | Early-25% | 3mths |  |
| 2 |  | 2 months each | Ross 4 months  Mr W 3 months | No | Ross 3 months | Ross 5 months  Mr W 4 months |
| 3 - Xu |  |  |  | No | 25%\* | \* |
| 3 – Chen |  |  | \* | No | 6 mths\* |  |
| 3-Jiang |  |  | \* | No | 9 mths\* | \* |
| 4 |  | Y\* | Y | Yes-25% |  | 15% (with \*) |
| 5 | Ryan - no  McNicholl – shortfall for him $136,000 – and ongoing reparation to $50K - 5% | Rynn – no  McNicholl – 10% | Ryan – No - previous 63 charges of obtaining by deception  McNicholl  Some prior convictions – 5% | Yes-15%  each |  | 5% Ryan  10% McNicholl |
| 6 |  |  | 31% \* | Yes-15% | \* | \* |
| 7 | 4 months for partial payment $10,500 |  | No - previous conviction for dishonesty | Yes-25% |  |  |
| 8 | No |  | 3 months | Yes-25% \* |  | \* |
| 9 | \* | 9 months\* | Y | Late - 14 months |  | 3 months |
| 10 |  | 8 months |  | Early - 10 months | \* | 8 months\* |
| 11 |  |  | \* | No |  | 10%\* |
| Coffey |  |  | \* | No | 20%\* |  |
| Max |  |  | 20% | No |  |  |
| 12 |  |  | 10%\* | Yes - 7.2 months | 4 mths | \* |
| 15 |  | \* | \* | Early-25%\* |  | 17%\* |
| 16 | $50,000 |  | 6 months | Late-25% |  |  |
| 17 |  |  | 3 months | No |  | 3 months |
| 18 |  | 10% (7 months)\* | 6 months | Early-25% | 10% (7 months) | \* |
| 19 |  |  | No | At end of trial-no discount |  | No |
| 20 |  |  | 2 mths | No | Y |  |
| 21 |  |  | \* | No | \* | Y – despite pleading not guilty – total \* 6 months |
| 22 |  |  | Multiple previous convictions | Late – 6 months |  |  |
| 23 |  |  | 20%\* | No |  | \* |
| 24 |  |  | No | No |  | No |
| 25 |  |  | 18 months | No |  |  |
| 26 |  | No | 5% (6 months) | Late-10% |  | No |
| 27 | \* |  | 4 months\* | Late-10% | \* |  |
| 28 |  |  | 15\* | No | \* |  |
| 29 | Rosenberg – 6 months  Hunt – no |  | 18 months\* | No | \* | \* |
| 30 | 4 months |  | 10% | No |  |  |
| 32 |  | \* | 12%\* | No |  |  |
| 33 |  | \* | 3.5 months\* | Early-25% (17 months) |  |  |

Numbers 13, 14 and 31 are the cases that were not received from the courts

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1. While Bagaric and Alexander’s study focuses on Australian law, the authors do note the reforms proposed could be applied to all jurisdictions (2014: 317). [↑](#footnote-ref-1)
2. *Sentencing Act 2002* (SA 2002), s 7(1)(a)-(i). [↑](#footnote-ref-2)
3. SA 2002, s 8(a)-(j). [↑](#footnote-ref-3)
4. SA 2002, s 9(1)(d),(f),(g), (i) and (j). [↑](#footnote-ref-4)
5. SA 2002, s 9(2) (a), (b), (d), (f), (g). [↑](#footnote-ref-5)
6. SA 2002, s 10(1)(a). [↑](#footnote-ref-6)
7. Serious Fraud Office Act 1990, s 8. [↑](#footnote-ref-7)
8. SA 2002, s 7(1)(f). [↑](#footnote-ref-8)
9. *Serious Fraud Office v Philip Gerald Anthony Coburn* (unreported, 28 March 2003, District Court, Christchurch, CRN 3009009139/91467). [↑](#footnote-ref-9)
10. *R v Alan Victor Jones* (unreported, 12 December 2006, High Court, Auckland, CRI-2004-004-12785). [↑](#footnote-ref-10)