



# Submission to the Senate Inquiry into White-Collar Crime Penalties

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## About the Authors

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## Introduction

On 25 November 2015 the Senate referred an Inquiry to the Senate Economics References Committee. This Inquiry, due to report in July 2016, focuses on the ‘inconsistencies of current criminal, civil and administrative penalties’ for white-collar crime.

More generally this inquiry stems from the belief that penalties for crimes throughout the Global Financial Crisis, and the several financial planning and white-collar crime scandals in Australia since, are inconsistent and inadequate. The current inquiry also follows both the Senate Inquiry into ASIC and the Financial System Inquiry.<sup>1</sup>

Greens spokesperson for Finance, Senator Peter Whish-Wilson said in relation to the Inquiry:

*The current system of white-collar crime penalties in Australia are not providing the deterrence we need to stop the ongoing financial scandals. The United States, for instance has double the potential jail-term available as compared to Australia in cases of fraud, insider trading and market manipulation.*<sup>2</sup>

Our submission specifically addresses this and other similar calls to increase incarceration penalties for white-collar crimes.<sup>3</sup>

We believe this incarceration-based approach to white-collar crime is an illiberal use of government force and will be ineffective at achieving its aim of general deterrence. Criminal justice reform should not be based on anti-market populism.

## What, precisely, is a white-collar crime?

Ambiguity around white-collar crime has continued since the phrase’s coining in the mid-20<sup>th</sup> century.<sup>4</sup> The original definitions were more criminal or class based, with white-collar criminals being of high social status.<sup>5</sup> White-collar crime can also be defined by the underlying criminal action—that is, non-violent and financially motivated crimes—rather than by whom they are committed.

What constitutes a white-collar crime remains extremely broad. From fudging a pay slip to embezzling millions of dollars, the breadth of white-collar crime has come to mean something it is not—violent street crime—rather than something that it is.

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<sup>1</sup> See Senate Economics References Committee (2014). *Performance of the Australian Securities and Investments Commission*, Available at:

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/ASIC/Final\\_Report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/index)

and The Australian Government the Treasury (2014). *Financial System Inquiry Final Report*, Available at:

<http://fsi.gov.au/>

<sup>2</sup> Whish-Wilson, P. (2015) Greens secure inquiry into white collar crime penalties. The Greens Tasmania Media Release, Available at: <http://greens.org.au/news/tas/greens-secure-inquiry-white-collar-crime-penalties>

<sup>3</sup> For instance, see Mitchell, S. (2014). Australia ‘paradise’ for white-collar criminals, says ASIC chairman Greg Medcraft. *The Sydney Morning Herald*, 21 October 2014, <http://www.smh.com.au/business/australia-paradise-for-white-collar-criminals-says-asic-chairman-greg-medcraft-20141021-119d99.html>

<sup>4</sup> Sutherland, E. H. (1940) White-collar criminality. *American Sociological Review* 5(1). Available at:

[http://www.asanet.org/images/asa/docs/pdf/1939%20Presidential%20Address%20\(Edwin%20Sutherland\).pdf](http://www.asanet.org/images/asa/docs/pdf/1939%20Presidential%20Address%20(Edwin%20Sutherland).pdf)

<sup>5</sup> Shover, N., & Hochstetler, A. (2005). *Choosing white-collar crime*. Cambridge University Press.

One effect of the broad heterogeneous set of white-collar crimes is that public debates often speak generally of sentencing and penalising 'white-collar criminals'. This approach has little understanding of the underlying complexities and intricacies of individual cases, nor of the role of the judiciary in determining the appropriate sentence. This has also led to what can be called a 'political movement within the legal system.'<sup>6</sup> Another effect of this is the lack of robust data, which has remained particularly elusive in the Australian context, and has only exacerbated the calls for retribution.

## Retribution for the Global Financial Crisis

Since the Global Financial Crisis, a series of cases of white-collar crime have catalysed calls for retribution. A populist political campaign has grown around the notion that white-collar crime is under-regulated, under-deterred and under-enforced, and that the penalties of white-collar crime are inconsistent and inadequate. Claims have been made of Australia being a 'paradise for white collar crime'.<sup>7</sup>

It is undeniable that there is pressure from regulators and some lawmakers for longer, harsher, and more liberally applied jail terms for white-collar crime. However, changing the intricately complex lines of criminal penalties in the midst of such pressure is an unstable footing on which to achieve just reform.

It is particularly important not to legislate or reform our criminal justice system based largely on anecdotal evidence.<sup>8</sup> Crafting a robust, fair, and consistent criminal justice system will only be achieved through a cautious reform approach, which includes the possibility of balancing too far on the side of general symbolic deterrence.

These misconceptions are the result of many misunderstood problems faced by judges, including the competing purposes of sentencing.<sup>9</sup>

Underlying the pressure for increased jail time is the belief that white-collar criminals are dealt with leniently by the courts, and thus the statutory penalties for these crimes must be increased. However the evidence for such leniency is unclear, and has a number of complexities.<sup>10</sup>

Crimes should be penalised, within economic and societal constraints. This is necessary for social cohesion and fairness.

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<sup>6</sup> Baker, J. S. (2004). *The Sociological Origins of 'White-Collar Crime'*. Heritage Legal Memorandum 14, available at <http://www.heritage.org/research/reports/2004/10/the-sociological-origins-of-white-collar-crime>

<sup>7</sup> Mitchell, S. (2014). Australia 'paradise' for white-collar criminals, says ASIC chairman Greg Medcraft. *The Sydney Morning Herald*, 21 October 2014, <http://www.smh.com.au/business/australia-paradise-for-white-collar-criminals-says-asic-chairman-greg-medcraft-20141021-119d99.html>

<sup>8</sup> Weissmann, A. & Block, J. A. (2007). White-Collar Defendants and White-Collar Crimes. *Yale Law Journal* 116 Pocket Part 286, <http://yalelawjournal.org/forum/white-collar-defendants-and-white-collar-crimes>

<sup>9</sup> Freiberg, A. (1992). Sentencing white-collar criminals. *Australian Institute of Judicial Administration, Sentencing of Federal Offenders*, 1-19.

<sup>10</sup> Hagan, J., Nagel, I. H., & Albonetti, C. (1980). The differential sentencing of white-collar offenders in ten federal district courts. *American Sociological Review*, 802-820. See also: Rosenzweig, P. (2002). *Sentencing and Enforcement of White Collar Crimes*, Testimony before the Senate Subcommittee on Crime and Drugs, Available at: <http://www.heritage.org/research/testimony/sentencing-and-enforcement-of-white-collar-crimes>

However, the question is what reforming white-collar crime penalties is intended to achieve, rather than how Australian penalties compare with the rest of the world. International comparisons do not necessitate increasing penalties, especially incarceration.<sup>11</sup> In this context, the Senate needs to focus on whether higher rates of incarceration will achieve any policy goal.

## Why incarcerate?

Sentencing must balance real and symbolic acts.<sup>12</sup> Responding to the public's perceived problem of white-collar crime by increasing maximum incarceration sentences is largely centred around symbolism.

The community believes that sentencing has a purpose of both punishing past criminal acts and deterring future criminal acts.<sup>13</sup> The degree to which society should punish violations of a regulatory code is a moral question. However, the deterrence effect of punishment is an empirical one.

It is unclear whether increasingly incarcerating white-collar criminals will achieve specific deterrence (that is, reduce recidivism rates). Recidivism rates for Australian white-collar criminals are under-researched,<sup>14</sup> and the results in other countries are scarce.<sup>15</sup> Further research on the link between white-collar incarceration and recidivism is required.

Judges tend to rely on general deterrence as a rationale for sentencing.<sup>16</sup> Similarly, public rhetoric around increasing incarceration penalties for white-collar crimes is centred on there being a general deterrence effect (that is, making examples of some criminals to deter others).

However, academic evidence indicates sentence severity has no effect on the level of crime in society.<sup>17</sup> While evidence around deterrence effects of white-collar crime are lacking, we can look to the deterrence effects of sentence severity more broadly.

Across Australia and across the world, increasing the severity of sentences, including incarceration, has not achieved its general deterrence aim. The Sentencing Advisory Council in Victoria's own research indicates increasing imprisonment sentences do not achieve the deterrence effect:

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<sup>11</sup> Millan, L. (2015). *ASIC penalties 'like being hit with a lettuce leaf': Murray*. 25 March 2015, Financial Standard, <http://www.financialstandard.com.au/news/view/48614091>

<sup>12</sup> Freiberg, A. (1992). Sentencing white-collar criminals. *Australian Institute of Judicial Administration, Sentencing of Federal Offenders*, 1-19.

<sup>13</sup> It is true that there are other purposes of sentencing. However, some of these, such as rehabilitation, 'simply [do] not apply to white collar offenders.' Friedrichs, D. (2009). *Trusted criminals: White collar crime in contemporary society*. Wadsworth Publishing; 4 edition. Chapter 12.

<sup>14</sup> Payne, J. (2007) *Recidivism in Australia: Findings and Future Research*. Research and Public Policy Series 80. Available at [http://www.aic.gov.au/media\\_library/publications/rpp/80/rpp080.pdf](http://www.aic.gov.au/media_library/publications/rpp/80/rpp080.pdf)

<sup>15</sup> One example includes this paper from the US which suggests recidivism rates for white-collar crime sits around 48.3 per cent. <https://www.ncjrs.gov/App/publications/abstract.aspx?ID=145143>

<sup>16</sup> Mann, K., Wheeler, S. & Sarat, A. (1980). Sentencing the White-Collar Offender, Yale Law School Faculty Scholarship Series 4130. Available at: [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5129&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5129&context=fss_papers)

<sup>17</sup> Doob, A. N., & Webster, C. M. (2003). *Sentence severity and crime: Accepting the null hypothesis*. Crime and justice, 143-195.

*The research also indicates that increases in the severity of penalties, such as increasing the length of imprisonment, do not produce a corresponding increase in the general deterrent effect.*<sup>18</sup>

Similarly, the New South Wales Bureau of Crime Statistics also found that longer prison sentences have no effect on criminal behaviour.<sup>19</sup>

The use of the prison system should be reserved for the most fearful and threatening offenders, those who must be incapacitated to reduce harms to society. By definition, white-collar criminals are non-violent who pose no physical threat to society. Incarceration—the most severe removal of civil liberties in this country—is a solution for only the most threatening to society.

In the case of white-collar criminals, the aims of punishment can be equally achieved through other means. There are other less expensive and extreme penalties than incarceration. Many of these may be more effective at incapacitating white-collar criminals from recidivism. Professor Sandeep Gopalan argues that:

*To the extent that criminalization is necessary, the societal goals the law articulates through the criminal law can be realized through conviction alone without the need for imprisonment. Conviction is sufficiently liberty depriving for corporate governance offenders insofar as it destroys their ability to hold fiduciary positions, thereby eliminating the possibility for further social harm.*<sup>20</sup>

Other penalties remove white-collar criminals from the positions—of authority and of social standing—which enabled the criminal behaviour in the first instance.<sup>21</sup> For example alternatives include community service, lecturing, disqualification from certain duties, bans from certain professions, and so on—many of which are outlined in the literature.<sup>22</sup>

## The costs of over-deterrence

It is possible to over-deter and over-punish criminal behaviour. In this section we briefly outline some of the costs of over-deterrence.

A crime-free world is logically both unattainable and unimaginable. Constantly pursuing criminal deterrence would mean devoting all of the resources in the economy towards writing, monitoring and enforcing crime. On the other hand, policing no crime at all would also result in sub-optimal outcomes.

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<sup>18</sup> Sentencing Advisory Council (2011). *Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence*. Sentencing Advisory Council, April 2011, Available at:

<https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Does%20Imprisonment%20Deter%20A%20Review%20of%20the%20Evidence.pdf>

<sup>19</sup> Foschia, L. (2012). *Touch prison terms don't reduce crime: NSW Study*. ABC, 13 March 2012, <http://www.abc.net.au/news/2012-03-13/tough-prison-terms-don27t-reduce-crime3a-study/3886402>

<sup>20</sup> Gopalan, S. (2009). *Skilling's Martyrdom: The Case for Criminalization Without Incarceration*. University of San Francisco Law Review 44, 459.

<sup>21</sup> Podgor, E. S. (2007). *Throwing Away the Key*. Yale Law Journal 116 Pocket Part 279, <http://yalelawjournal.org/forum/throwing-away-the-key>.

<sup>22</sup> For example, see Freiberg, A. (1992). *Sentencing white-collar criminals*. *Australian Institute of Judicial Administration, Sentencing of Federal Offenders*, 1-19.

An effective criminal justice system—including white-collar crime—is somewhere between these two extremes. All of the marginal benefits and costs of crime deterrence must be taken into account. The public movement underpinning calls for increased incarceration, however, falls almost solely on the side of the marginal benefits of increasing penalties.

While the benefits of enforcing fraudulent white-collar crimes are tangible—a retiree's life savings, a family home, a million dollar figure—the costs in monitoring and enforcing such crimes often fall silent. For instance, there are significant compliance costs (i.e., red tape) of deterring white-collar crime.

There is a high cost—both to regulators (such as the Australian Securities and Investments Commission), to businesses, and to the courts—of deterring white-collar crime through criminal proceedings. White-collar trials are complex, expensive and lengthy.<sup>23</sup> Focusing on white-collar crime also directs resources towards detection and enforcement which may distort the capital structure of the economy. The over-deterrence of white-collar crime may incentivise individuals and corporations to adjust normal business activities. Similarly, these distortions may prevent business innovation, entrepreneurship and dynamism.<sup>24</sup>

## Conclusion

Public pressure has catalysed calls for retribution of white-collar criminals through increased incarceration terms. However, symbolically increasing jail time for white-collar criminals is unlikely to achieve its aims of general and specific deterrence.

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<sup>23</sup> Garber, S. (2016). *Corporate crime sector heats up under regulatory scrutiny*, Lawyers Weekly, 23 February 2016, <http://www.lawyersweekly.com.au/news/18030-corporate-crime-sector-heats-up-under-regulatory-scrutiny>

<sup>24</sup> Yeung, K. (2004). *Securing compliance: A principled approach*. Bloomsbury Publishing.