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*Understanding Tertiary Crime Prevention in Controlling Fraud:
The Effectiveness of Criminal Justice System Responses*

1. Introduction: Tertiary Crime Prevention

In this paper I've been asked to address the question of what is known as "tertiary crime prevention" – that is, the effectiveness of the criminal justice system in preventing crime, or in the present context fraud. I'll briefly describe the way in which tertiary crime prevention works, then look at the aims of sentencing in connection with fraud offenders and identify some of the problems which prosecutors face in taking these cases to court. I'll then provide some statistics on the types of sentences that have been imposed in Australia recently, look at how judges go about sentencing financial criminals, and conclude by suggesting some alternative legal responses that might be appropriate to deal with economic crime.

Crime prevention involves any action that causes a reduction in the level of criminal activity, or in the number of criminal offenders and their victims. It has been described in terms of three stages or levels - primary, secondary and tertiary (Cameron and Laycock 2002).

Primary crime prevention is directed at stopping the problem before it happens. This could involve reducing opportunities for crime, such as using fraud control policies, or strengthening community and social structures that influence an individual's likelihood of committing a crime. In the context of fraud offences this could relate to the control of problem gambling, or other addictive behaviours that can lead to financial strain in families and the subsequent commission of fraud offences. Situational prevention addresses the environment, for example, the design of online payment systems to ensure that they cannot be manipulated dishonestly, or the use of effective computer user authentication systems.

Secondary crime prevention seeks to change people, typically those at high risk of embarking on criminal activities. The focus can be on early intervention programs that seek to educate people in connection with ethics and honesty, or in high-risk environments in which crimes are most likely to occur, such as in IT or accounts departments within corporations.

Tertiary crime prevention focuses on the operation of the criminal justice system and deals with offending after it has happened. The primary focus is on intervening in the lives of known offenders in an attempt to prevent them from re-offending either through periods of incarceration, community-based sanctions, or monitoring during periods of

probation. Criminal justice system responses also seek to deter other potential offenders in the community by making an example of the convicted offender and educating the community concerning the penalties associated with crime.

2. Applying the Aims of Judicial Punishment to Fraud Offenders

There are seven generally recognised objectives of judicial punishment: retribution, proportionality, denunciation, incapacitation, deterrence, rehabilitation, and restitution. I'd like briefly to look at each of these and see how they apply to fraud offenders.

Retribution

Retribution is the justification for punishment based upon the idea of 'an eye for an eye and a tooth for a tooth'. This of course raises the problem of how we can match the seriousness of a fraud offence, or its moral blameworthiness, with the range of available sanctions.

Surveys that have been carried out of community perceptions of crime seriousness have found that the public do, in fact, regard white collar crimes as serious where they entail serious harm. The harm resulting from fraud offences lies not only in direct financial loss, but also in consequential losses associated with investigating incidents, recovering losses, and preventing re-victimisation. Retribution seeks to match the extent of the harm suffered with the punishment imposed.

Proportionality

The modern form of retribution is known as 'Just Deserts' or proportionality in punishment. This simply means that the severity of punishment should be commensurate with the seriousness of the wrong.

In the case of financial crime this raises difficulties as the consequences of some types of offending can be devastating, and yet the conduct itself involved no physical violence which traditionally attracts heavy sentences. The collapse of Barings Bank in 1995, for example, was caused by Nick Leeson, a trader with Britain's oldest merchant bank, who accumulated £791 million of debt in 1994-95. He had previously enjoyed enormous success and in an effort to buy his way out of the downward turn, found internal flaws in the bank's monitoring system which allowed him to conceal his losing streak from colleagues. Pleading guilty to fraud, he was imprisoned in Singapore for six and a half years. In his autobiography, *Rogue Trader*, Leeson condemned the practices that allowed him to gamble with such large amounts of money unchecked (BBC Online 1999; Leeson 1996).

Denunciation

Denunciation involves the imposition of sanctions in order to express the public's abhorrence of the crime committed. It acts as a symbolic statement that society considers a particular crime as being sufficiently serious to warrant punishment, and that society will not tolerate the law-breaking conduct of the offender.

Australia's largest investment fraud was perpetrated by an accountant, David Gibson, who defrauded 600 clients out of \$43 million in the 1980s, using managed investment funds and employing a Ponzi scheme in which early investors were paid dividends out of the investments of subsequent investors. Gibson was sentenced to 12 years' imprisonment with a non-parole period of nine years (Brown 1998).

In order to be effective in this sense, the imposition of a sanction must be widely publicised, and unlike in some other types of crime, fraud invariably attracts wide media attention. The risk arises, however, that notoriety, such as that obtained by famous individuals such as Rene Rivkin, could undermine the seriousness of the crime involved and be seen as attractive to some people keen to make their mark in the world.

Incapacitation

Incapacitation simply means that because the offender is isolated from society, generally through imprisonment, he or she will be prevented from committing further crimes of the same or similar nature while in isolation.

In the case of some fraud offenders, however, prison has sometimes allowed them to continue their activities, and we have seen cases of fraudulent scams being carried on from prisons, sometimes through the use of prison computers and mobile telephones smuggled into prison.

The other problem with incapacitation is that although offenders may not repeat their offence while in prison, they often re-offend immediately upon release.

Deterrence

Deterrence can take two forms which were concisely summarised by Cesare Beccaria in 1764: 'punishment aims to dissuade the criminal from doing fresh harm to his compatriots (special deterrence), and to keep other people from doing the same (general deterrence)' (Young 1986).

In determining whether punishment is an effective deterrent for financial crime, evidence is needed of both the extent to which individuals are aware of the possible punishments which may result from their criminal conduct and also, whether or not individuals are minded to act upon any such knowledge by modifying their propensity to commit crime. Unfortunately, serious doubts have been raised about both of these matters.

Surveys of offenders have found that they rarely know what penalties govern their conduct. It has also been found that offenders rarely make a rational decision to carry out their offence or to desist, based upon the possibility of being punished. Unfortunately, the many impediments standing in the way of a successful investigation and prosecution of economic crime mean that the probability of detection and punishment is generally low.

A further problem with achieving deterrence lies in the fact that often individuals believe that what they have done is not improper or can be justified. Sykes and Matza (1957)

studied juvenile delinquents' law-breaking in the 1950s in America, and identified five techniques used to neutralise guilt: denial of responsibility (I didn't mean it); denial of injury (I didn't really hurt anyone); denial of victim (they had it coming to them); condemnation of the condemners (everybody is picking on me); and appeal to higher loyalties (I didn't do it for myself).

In the study of 183 persons convicted of serious fraud offences in Australia and New Zealand undertaken by the Australian Institute of Criminology and PricewaterhouseCoopers (2003), 31 offered some form of rationalisation for the commission of their activities. The most frequently occurring rationalisation was an intention to conduct a legitimate business followed by an intention to repay the sums stolen. Such rationalisations were often present where professional advisers misappropriated client funds for investment purposes in the hope that they could realise a profit and repay the amount taken without being discovered. Invariably, the expected profits were not realised.

Nonetheless, the courts in many cases have identified deterrence as one of the aims of punishment when sentencing. The role of deterrence has also motivated some legislatures to increase maximum penalties in the hope of reducing crime.

Rehabilitation

Rehabilitation has gone through periods of support and criticism throughout history as an objective of punishment but still remains one of the main purposes relied upon by the courts in sentencing offenders.

Prisons see their role as being, amongst other things, places which provide opportunities for rehabilitation, by encouraging offenders to be productive, law abiding citizens. They seek to achieve this aim by challenging the offence-related behaviour; encouraging responsibility for one's actions; promoting self-esteem and developing educational, social and living skills.

On some occasions, it seems that punishment has, indeed, had a rehabilitative effect on fraud offenders. Frank Abagnale, for example, whose autobiography *Catch Me If You Can*, was recently filmed, changed from being a serial fraudster to assisting the FBI with their investigations and is now running a successful security and risk management business (see Abagnale & Associates 2004).

Restitution

Restitution aims to compensate the victim for the injury caused by the criminal act.

The main problem with restitution is that offenders rarely have the means available to them to pay compensation. Often fraudsters will have spent the proceeds of their crime, or sometimes transferred funds to others or to overseas locations making it unavailable for the settlement of compensation orders. The expenses involved in confiscating assets often outweigh the potential benefits to be derived.

3. Identifying the Difficulties of Prosecuting Fraud

Identifying suspects

One of the foremost problems that face financial crime investigators is the identification of suspects. Occasionally, this can create considerable problems when the wrong person is arrested, as occurred last year in South Africa.

In March 2003, the FBI were investigating a 72-year old man in connection with alleged telemarketing fraud involving millions of dollars in the United States. Since 1989, he had been making use of the identity of a 72-year old retired businessman from Bristol in the United Kingdom who had never met the alleged fraudster, and had no connection with his alleged crimes at all. The FBI issued a warrant for the arrest of the suspect and this was executed by South African Police in Durban on 6 February 2003 in the name of the retired English businessman. Unfortunately, the retired businessman, who was on holiday with his wife, was arrested instead of the American suspect. The police relied on the fact that the warrant was in the correct name, he was the correct age, looked similar, and had the same passport number. He was held in custody at police headquarters in Durban until 26 February 2003 when he was released following the arrest of the real suspect the day before in Las Vegas (BBC News 2003).

Where computers are used in the commission of fraud, the problems are even worse. Digital technologies enable people to disguise their identity in a wide range of ways making it difficult to know with certainty who was using a computer from which illegal communications came. This problem is more prevalent in business environments where multiple people may have access to a personal computer and where passwords are known or shared, than in private homes where it can reasonably be assumed that a given person was using the computer because of the circumstantial evidence that is present.

Search and seizure

Various difficulties arise in relation to search and seizure in financial crime investigations largely because of the extent and complexity of business transactions that need to be examined. Framing search warrants with precision is difficult especially if evidence is kept on computers where key documents may be embedded in gigabytes of data. Where a law enforcement examination of a computer hard drive in 1990 involved 50,000 pages of text, a contemporary examination would involve between 5 and 50 million pages of text (Geurts 2000). This increase in investigative capacity has created considerable resource implications for police that will no doubt increase in the years to come.

Extradition

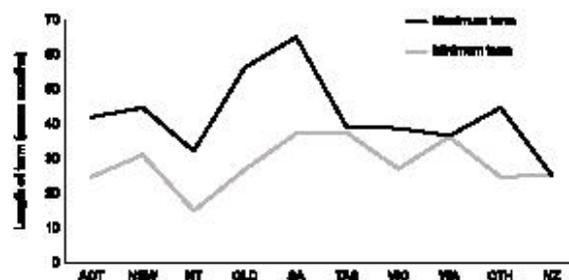
Where an accused person is resident in a country other than the one in which criminal proceedings are to be taken, it is possible for that person to be extradited to that country to stand trial. Extradition requires not only that an appropriate treaty exist between the two countries concerned, but also that the conduct in question be criminalised in both the referring and receiving country. In the case of economic crime, particularly where computer offences are involved, this is often not the case.

4. Quantifying the Use of Individual Sanctions for Financial Crime

Little research has been carried out in Australia on the manner in which white-collar offenders are dealt with following a criminal trial. One recent study of serious fraud cases in Australia and New Zealand was undertaken by the Australian Institute of Criminology and PricewaterhouseCoopers in 2003. Some 155 completed files were analysed relating to 208 accused persons (165 males and 43 females), 183 of whom were convicted of offences.

Of the sentences imposed, full-time custodial orders were given in respect of three-quarters of those sentenced. The mean maximum term of custodial sentences was approximately 3.4 years, while the mean minimum custodial term was almost 2.3 years. The longest custodial sentence was 11 years maximum with a non-parole period of 8 years, awarded by the District Court of New South Wales following a trial of more than four weeks. The case involved the investment of over \$10.3 million a proportion of which had been fraudulently obtained from almost 300 victims. Mean maximum and minimum sentences for each jurisdiction are shown in Figure 1.

Figure 1 – Mean Period of Custodial Sentences by Jurisdiction



Source: Australian Institute of Criminology and PricewaterhouseCoopers (2003)

Overall, the following most serious sentences were imposed on the offenders (Table 1).

Table 1 – Most Serious Offence Imposed on Serious Fraud Offenders

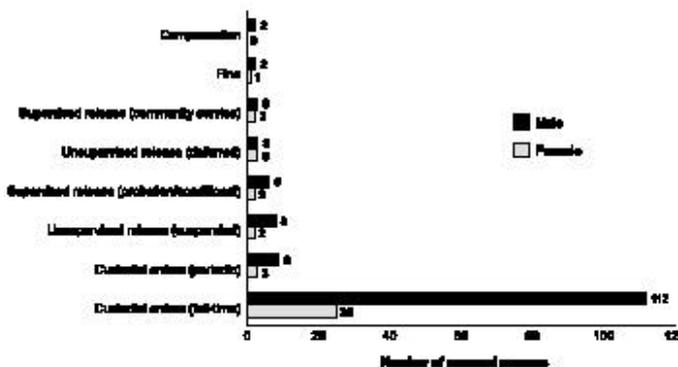
Most Serious Sentence	Offenders	Percentage
Custodial (full time)	137	74.9
Custodial (periodic)	12	6.6
Unsupervised release (suspended sentence)	10	5.5
Supervised release (probation)	8	4.4
Unsupervised release (deferred)	6	3.2
Supervised release (community service)	5	2.7
Fine	3	1.6
Compensation	2	1.1
Total	183	100.0

Source: Australian Institute of Criminology and PricewaterhouseCoopers (2003)

The amount of fines tended to be relatively low, although in one case the offender was fined \$100,000 for fraudulently obtaining over \$200,000 from the Commonwealth in respect of nursing home payments. Awards of compensation ranged from \$219 to \$2,361,777 with most of those offenders who were ordered to pay compensation having orders for sums between \$10,000 and \$100,000 made. In five cases, confiscation orders were noted ranging from \$2,100 to \$333,394, while in a further four files confiscation of other property was ordered including, in one case, all the equity in the offender's home.

Males received proportionally more full-time custodial orders than females as is apparent from Figure 2. Females, however, received higher proportions than males of supervised and unsupervised release orders. This does not necessarily reflect leniency toward female offenders in sentencing but rather is indicative of the nature of the offences committed, the amount of money involved and other aggravating and mitigating factors.

Figure 2 - Most serious sentence for offenders by gender



Source: Australian Institute of Criminology and PricewaterhouseCoopers (2003)

The results of this study, which admittedly involved the most serious fraud cases from around Australia and New Zealand in recent years, shows that offenders did receive heavy sentences on many occasions. Of course, this study only examined cases that had gone to court and as is well known, many instances of fraud are simply not reported to police.

5. Understanding the Sentencing Process

The process of sentencing is governed by a range of legislative and common law considerations that judges have to take into account in any given case. In the case of *R v Williscroft* [1975] VR 292, 300, Justices Adam and Crockett in the Court of Criminal Appeal of the Supreme Court of Victoria said:

Now, ultimately, every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects in the punitive process.

They cited the earlier case of *R v Geddes* (1936) 36 SR (NSW) 554, in which Sir Frederick Jordan observed in relation to sentencing that “the only golden rule is that there is no golden rule”.

In choosing an appropriate sentence the following relative values need to be considered (Victoria, Sentencing Task Force 1989: 119-22).

First, the degree of harm involved in the offence is relevant in that bodily harms are generally considered to be more serious than economic harms, although if substantial financial losses are caused this is also viewed seriously.

Secondly, the intention behind the commission of the offence is relevant. Offences which involve deliberate planning or malice are considered to be more serious than offences caused recklessly or negligently, while an attempt to commit an offence is considered to be as serious as committing the offence itself. Inciting the commission of an offence or conspiring to commit an offence is also considered to be as serious as committing the completed offence, while the commission of a second or subsequent offence should receive a more severe punishment than a first offence.

Finally, if there is some element of aggravation in relation to the commission of the offence, such as the threat of physical harm to a victim, it should receive a higher penalty.

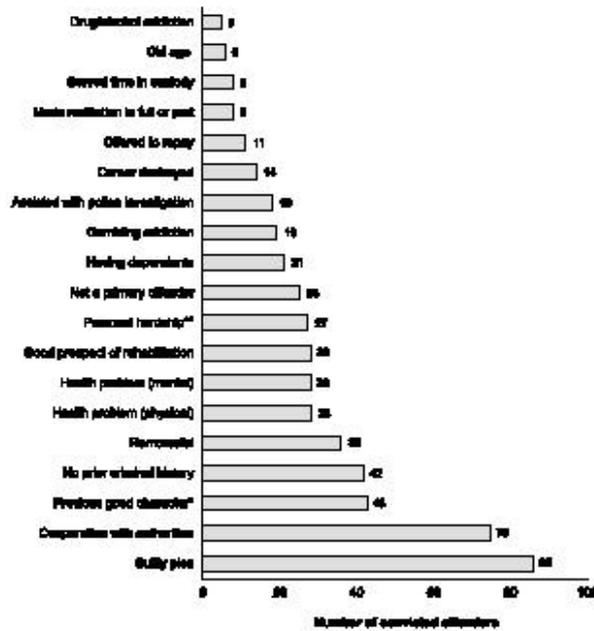
The sentencing process involves balancing both mitigating factors raised by the defendant as well as aggravating factors and then choosing a punishment that complies with the relevant statutory limitations that exist for the offence charged in the jurisdiction in question as well as the sentencing rules that have been developed in the courts.

Mitigating Factors

In the study of serious fraud cases in Australia and New Zealand undertaken by the Australian Institute of Criminology and PricewaterhouseCoopers (2003), the most frequently raised mitigating factors were that the offender had pleaded guilty and had cooperated with authorities. In fact, some 72% of accused persons pleaded guilty, with one half of accused pleading guilty at the earliest available opportunity.

Previous good character, the absence of a criminal history and remorse were also frequently raised in mitigation as we can see in Figure 3.

Figure 3 - Mitigating Factors Raised by Convicted Serious Fraud Offenders

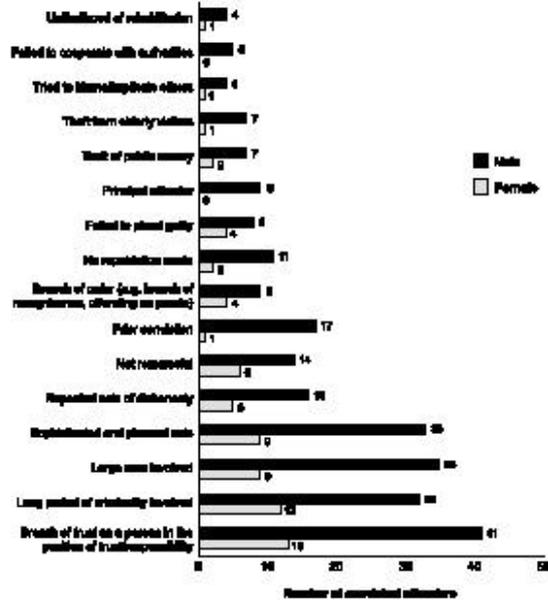


Source: Australian Institute of Criminology and PricewaterhouseCoopers (2003)

Aggravating Factors

In the study of serious fraud cases in Australia and New Zealand undertaken by the Australian Institute of Criminology and PricewaterhouseCoopers (2003), the top 3 aggravating factors mentioned by courts in sentencing were: a breach of trust as a person in a position of trust or responsibility; offending over a long period of time, and the fact that a large sum had been taken. Other aggravating factors are shown in Figure 4.

Figure 4 - Aggravating Factors Present in Serious Fraud Cases by Gender



Source: Australian Institute of Criminology and PricewaterhouseCoopers (2003)

Male offenders tended to have a higher proportion of prior convictions than females, while females tended to have longer periods of criminality involved and repeated acts of criminality. Males showed remorse less often than females and males tended to be less cooperative with the authorities than females.

6. Determining Alternative Legal Strategies for Responding to Fraud

Judicial punishments have been described as operating within an enforcement pyramid in which the most severe penalties, which are seldom used, sit at the top of the pyramid, while the least severe penalties, which are frequently used, fall near the base of the pyramid (Figure 5). Thus, non-judicial regulatory responses such as warnings appear at the base of the pyramid in that they are used most often (see Ayres & Braithwaite 1992: 35).

Figure 5 – Enforcement Pyramid



It has been argued that compliance with laws can be maximised where a hierarchy of sanctions exists in which the most severe forms of punishment, such as incarceration, are available but seldom used. In the words of Ayres and Braithwaite (1992: 19), “the more sanctions can be kept in the background, the more regulation can be transacted through moral suasion, the more effective regulation will be”.

Arguably, more imaginative sanctions than the conventional judicial punishments which are available should be considered even for serious white-collar offenders. These include adverse publicity, professional disciplinary sanctions, disqualification as a company director, community service, injunctive orders and, most recently, various forms of reconciliation or community conferencing.

For example, restorative justice approaches were used in the case of Colonial Mutual Life Insurance agents who had fraudulently sold insurance policies to impoverished Aboriginal people in remote communities. During the settlement process, senior executives were forced to meet the victims of the scam and to live with them for a period in the Third World conditions in which they lived (Fisse & Braithwaite 1993: 236).

Various benefits could also accrue from the use of civil recovery proceedings taken in conjunction with criminal action. Such proceedings differ from restitution orders in that they enable costs additional to the cost of the property stolen to be claimed, such as court costs, processing time, staff costs for arrest, and the cost of ongoing measures to prevent fraud. Clearly civil recovery would only be appropriate where an offender has assets and so some initial review of the offender’s financial circumstances would be required. In the United States and the United Kingdom, the use of civil recovery action has apparently led to considerable reductions in property crime.

These alternative orders can all generally be used within the existing sanctioning structure, although they may require a little imagination from prosecutors and judges.

In addition, instead of looking only to sanctions, it has been suggested that those who demonstrate high professional standards of conduct should be given praise and rewards that would help to foster an ethical professional culture within the workplace (Sampford & Blencowe 2002). This idea is not new in discussions of compliance but could be used to positive effect in preventing financial crime (see Grabosky 1995).

7. Conclusions

Taking criminal action in the area of fraud and white-collar crime is, however, neither simple nor quick. In the study of serious fraud cases in Australia and New Zealand undertaken by the Australian Institute of Criminology and PricewaterhouseCoopers (2003: 49), the average time that occurred between the commencement of the criminal conduct and the imposition of sentence was over four years. In one case approximately 16 years occurred between the commencement of the criminal conduct and the final determination of court proceedings which included an appeal.

Financial considerations mean that only the most serious cases involving substantial monetary losses are likely to be investigated and tried, with the attendant possibility of convicted offenders receiving the most severe sanction of a term of imprisonment. The legal response to fraud control has, therefore, been severely restricted, although the possibility of criminal prosecution and sanction has always remained open.

The extent to which severe sentences should be used for fraud offences has been subject to considerable debate over the years. It has been argued that sentences imposed on white-collar criminals have sometimes been inadequate, although as we have seen, lengthy terms of imprisonment have been imposed in serious cases.

Criminal prosecution and punishment should, and will, always remain an option for serious fraud offenders, but there are compelling reasons to suggest other remedies to supplement traditional forms of punishment. The use of professional disqualification, licensure restrictions, adverse publicity, and shaming are all worthy of consideration as additional ways in which individuals may be deterred from acting dishonestly. If alternative approaches are to be used, it is, however, essential that they be carefully evaluated to see if, in fact, they are more or less effective in reducing fraud than conventional responses.

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