# Chapter 4

## Sentencing, deterrence and custodial sentences

4.1 In part, the varying views expressed by inquiry participants regarding the adequacy of penalties for white-collar crime and misconduct reflected equally divergent views as to the purpose of penalties within the broader compliance and enforcement framework. Some inquiry participants, including regulatory and enforcement agencies, argued that the primary purpose of penalties for white-collar crime and misconduct was one of deterrence, at both the individual level and the wider community level. However, others suggested that it was important not to overstate the relationship between penalty settings and deterrence, and cautioned that doing so risked setting and imposing penalties that were disproportionate to the wrongdoing, ineffective in deterring wrongdoing, or both.

4.2 These competing perspectives were apparent in the different views expressed by inquiry participants regarding the effectiveness and appropriateness of custodial sentences for white-collar criminals. Some submitters argued that imprisonment is the strongest deterrent available for white-collar criminals and would-be criminals. Others, however, countered that imprisonment is rarely justified in cases of non-violent crime—including white-collar crime—and is, at any rate, ineffective in deterring offenders.

4.3 This chapter outlines and considers the different views expressed by inquiry participants on the above matters.

### Purposes of penalties and sentencing

4.4 Penalties for white-collar crime, as is the case for penalties in the criminal justice system more broadly, serve multiple purposes. A number of inquiry participants pointed to these multiple purposes. For example, the Uniting Church (JIMU) noted that a penalty regime in the criminal justice system should serve three purposes: protecting the community from further harm; rehabilitating the offender; and deterring both the offender and others from criminal activity.[1]

4.5 Just as penalties may be set with multiple purposes in mind, in sentencing criminal offenders courts will have regard to a range of considerations and purposes. A number of jurisdictions have set out in legislation the multiple purposes of sentencing and other matters to which a court should have regard in passing sentence. For example, in Victoria the *Sentencing Act 1991*, as Victoria's Sentencing Advisory Council has explained, summarises the purposes of sentencing as potentially including:

---

1 The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 39*, p. 10.

- just punishment – to punish the offender to an extent and in a way that is just in all the circumstances
- deterrence – to deter the offender (specific deterrence) or other people (general deterrence) from committing offences of the same or a similar character
- rehabilitation – to establish conditions that the court considers will enable the offender's rehabilitation
- denunciation – to denounce, condemn, or censure the type of conduct engaged in by the offender
- community protection – to protect the community from the offender
- a combination of two or more of these purposes.[2]

4.6 The Victorian Sentencing Advisory Council also points to a range of factors that must be taken into account when sentencing an adult, including (but not limited to) the maximum penalty for the offence, the nature and gravity of the offence, the offender's culpability and motivation, the harm caused by the offence, and so on.[3] Similarly, section 16A of the *Crimes Act 1914* (Commonwealth) outlines the matters to which a court should have regard when passing sentences in section 16A.

4.7 While legislation may guide courts on the matters they should have regard to in sentencing, the CDPP explained that in sentencing judges are ultimately required to 'instinctively synthesise' a broad range of factors in order to:

> …arrive at a sentence 'that is of a severity appropriate in all the circumstances to the offence'. They do so within the parameters of the maximum penalty prescribed by statute for the offence(s) and through the application of relevant common law sentencing principles.[4]

4.8 Indeed, as Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC noted in their joint submission, it is trite law that in setting an appropriate sentence, a judicial officer must have regard to the multiple purposes of sentencing.[5]

4.9 Some submitters pointed to the multiple purposes of penalties for white-collar crime specifically, both in terms of the maximum level of those penalties and the extent to which courts impose them. For example, Professor Haines, while noting the importance of setting penalties with a view to deterrence, also pointed to the

---

2 Sentencing Advisory Council, webpage, 'Sentencing principles, purposes, factors', https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-process/sentencing-principles-purposes-factors, accessed 1 February 2017. In New South Wales, section 3A of the *Crimes (Sentencing Procedure) Act 1999* sets out a similar range of 'purposes of sentence'.

3 Sentencing Advisory Council, webpage, 'Sentencing principles, purposes, factors', https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-process/sentencing-principles-purposes-factors, accessed 1 February 2017.

4 Commonwealth Director of Public Prosecutions, *Submission 53*, p. 2.

5 Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC, *Submission 5*, p. 1.

importance of setting penalties to a standard that was consistent with public expectations:

> So, in this regard, if there is a significant loss, where somebody has taken illegal financial advice and they are living a life of poverty—they may have lost their house and so on—they look at this and say, 'I have lost $500,000' or $100,000 or whatever it is, 'but this person who stole $20 shoplifting has gone to jail'—whatever the comparison is. There does need to be some kind of parity in terms of possible penalties between the two, otherwise there is an issue of public legitimacy in what is going on here.[6]

4.10 Other submitters, and in particular submissions provided by individuals who had suffered as a result of white-collar crime or misconduct, emphasised the importance of using the penalty system to provide 'justice' for victims.

4.11 More than any other factor, however, the evidence received suggested that, first and foremost, penalties should be designed and imposed with a view to deterring offenders and would-be offenders. The next part of this chapter considers the relationship between penalties for white-collar crime and misconduct and deterrence.

### *Penalties and deterrence*

4.12 The relationship between penalty settings and deterrence was, as noted above, a major focus of this inquiry. A range of submitters, including regulatory and enforcement authorities, emphasised that strong maximum penalties and tough sentencing were critical in deterring further misconduct by a specific offender—that is, 'specific deterrence'—and deterring would-be offenders in the wider community from committing offences—that is, 'general deterrence'.

4.13 Regulatory and enforcement agencies were as one in arguing the importance of penalties in deterring white-collar crime and misconduct. For example, the ACCC submitted that both specific and general deterrence relied on penalty settings, and this in turn was critical in encouraging compliance with the Competition and Consumer Act. It added:

> To prevent infringing behaviour both the theoretical maximum penalty and the penalties obtained must have a strong deterrent effect. To be effective, the prohibitions must be able to be efficiently enforced by the ACCC and private litigants, and the penalties achieved must outweigh the gains that businesses obtain from anti-competitive or unfair conduct.[7]

4.14 The CDPP advised that 'general deterrence' was, in fact, the primary sentencing objective in cases of white-collar crime, and explained that this was particularly true given the nature of offending and offenders in white-collar cases. It submitted that there is:

---

6 Professor Fiona Haines, Private capacity, *Proof Committee Hansard*, 6 December 2016, p. 28.

7 Australian Competition and Consumer Commission, *Submission 40*, p. 9.

> …a very considerable body of appellate level case law which underscores the seriousness of white-collar crime and its impacts on the community. That case law also entrenches the principle that 'general deterrence' is the primary sentencing objective. This is very important because white-collar offenders typically come before sentencing courts with evidence of impressive character and no prior criminal convictions. In different circumstances, 'prior good character' may operate to significantly mitigate an offender's sentence. However, courts recognise that it is often this factor which enabled the offence by allowing white-collar offenders to obtain and exploit a position of trust. Accordingly, sentencing courts give little weight to prior good character when sentencing white-collar offences.[8]

4.15 As such, the CDPP explained, many individuals convicted of serious white-collar crime offences are routinely sentenced to significant terms of imprisonment.[9] (The deterrent effect of imprisonment is discussed in the next part of this chapter.)

4.16 One of the arguments put to the committee during the inquiry was that because white-collar crime and misconduct is difficult to detect and prove, there is a particularly pressing need to set penalties at a level that will deter misconduct. For example, in making the case for introducing stronger civil penalties in relation to insider trading, Dr Overland highlighted the difficulties in detecting and proving such cases:

> Accordingly, those who might be tempted to engage in insider trading, on the assumption that they are unlikely to be caught or convicted, or severely punished if they are, need to be deterred from considering such activity. If those who are convicted or found liable in civil penalty proceedings are seen to be subject to serious and significant penalties, the deterrent effect will be much greater.[10]

4.17 In contrast, Professor Bagaric dismissed the theory of general deterrence as an 'absolute myth'. He argued that while it might seem counterintuitive, the severity of penalties had little effect on the thinking of offenders, unlike the risk of detection (a matter covered in the previous chapter):

> Ninety-three per cent of criminologists around the world know that there is no correlation between the severity of the penalty and a reduction in crime. Common sense tells us that there is. We all think that people act rationally and prudently when they are considering what actions to do next. We make the assumption that when people are about to commit a crime, whether it is an assault or a white-collar crime, that they sit back and reflect, 'If I do this, what is going to happen to me?' and that if the consequence is really bad—it could be jail for 10 years—they will not do it. It does not work. The empirical evidence shows that it does not work.

---

8 Commonwealth Director of Public Prosecutions, *Submission 53*, p. 3.

9 Commonwealth Director of Public Prosecutions, *Submission 53*, p. 3.

10 Dr Juliette Overland, *Submission 9*, p. 11.

> We could escalate white-collar sentences to a mandatory 30 years imprisonment for every white-collar crime. Do you know how much crime that would reduce? Zero. The only thing that will reduce white-collar crime is to increase the perception in people's minds that if they do something wrong they will get caught.[11]

4.18 Clarifying his argument, Professor Bagaric suggested that deterrence worked in an absolute sense, but not in a marginal sense. Absolute deterrence, he explained:

> …contends that, in order for the risk of detection to be effective, people need to understand that if they are caught there needs to be a hardship and unpleasantness that is going to be associated with that. But the unpleasantness does not have to be something that is going to damage the taxpayer even more by five years imprisonment. The unpleasantness can be a community-based order. That would be sufficient. The unpleasantness can be stripping of their assets. That would be sufficient. The unpleasantness just needs to be something that the person would seek to avoid. It does not have to be grotesquely over the top compared to the level of harm of their crime. Deterrence does work in an absolute sense but not in a marginal sense.[12]

4.19 The IPA was also critical of the concept of 'general deterrence'.[13] The IPA suggested that it was widely accepted that 'general deterrence is a weak justification for increasing penalties because it effectively punishes someone for the potential crimes of others'.[14]

## Custodial sentences for white-collar offences

4.20 Differences between submitters about the purpose of penalties and their relationship to deterrence found their clearest expression in evidence concerning the use of custodial sentences in white-collar crime cases. Some submitters argued that imprisonment was a critical part of the criminal penalty framework, particularly because of its strong deterrent effect. The committee also received a large number of submissions from individuals who had suffered a loss due to white-collar crime or

---

11 Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology *Proof Committee Hansard*, 6 December 2016, p. 21.

12 Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology, *Proof Committee Hansard*, 6 December 2016, p. 21.

13 'General deterrence' is distinct from 'specific deterrence', which is 'aimed at reducing crime by applying a criminal sanction to a specific offender, in order to dissuade him or her from reoffending'. Donald Ritchie, 'Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence', Sentencing Advisory Council (April 2011), https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Does%20Imprisonment%20Deter%20A%20Review%20of%20the%20Evidence.pdf, p. 1.

14 Mr Andrew Bushnell, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, 6 December 2016, p. 8.

misconduct, and many of these individuals emphasised what they regarded as a need for stronger custodial penalties. In contrast, some witnesses argued that prison was rarely an appropriate or proportionate response to white-collar crime, and some also argued that it was not an effective deterrent.

4.21 This part of the chapter examines these various views, starting with a consideration of the availability and use of custodial sentences for white-collar crime in Australia.

### *Availability and use of custodial sentences for white-collar crime*

4.22 In its submission, the CDPP noted that in considering whether or not penalties for white-collar crime are adequate, there are two main issues:

> …first, whether courts are discharging their existing sentencing discretion appropriately; and second, whether the statutory maximum penalty for the offence is appropriate.[15]

4.23 On the whole, the evidence received by the committee would suggest that the maximum terms of imprisonment available for white-collar crime are broadly consistent with settings in foreign jurisdictions. In this sense at least, the maximum penalties would appear adequate, although some submitters, and in particular victims of white-collar crime and their advocates, nonetheless argued that higher maximum terms of imprisonment should be introduced. However, for the most part, inquiry participants suggested that, to the extent sufficiently strong custodial sentences are not being handed down to white-collar criminals, this might be attributed to a reluctance on the part of enforcement agencies and prosecutors to seek custodial sentences or a failure by the courts to impose adequate custodial sentences.

4.24 According to ASIC, maximum terms of imprisonment available in Australia are broadly consistent with settings in comparable foreign jurisdictions. The exception, it noted, was the United States, which has significantly higher maximum prison terms compared to other jurisdictions.[16] ASIC provided a table comparing maximum prison terms across various jurisdictions for a range of white-collar offences demonstrating this point (reproduced as Table 4.1 below).

**Table 4.1: Comparison of prison terms (years)**

| Country | Insider trading | Market manipulation | Disclosure | False statements | Unlicensed conduct | Fraud |
|---|---|---|---|---|---|---|
| Australia | 10 | 10 | 5 | 10 | 2 | 10 |
| Canada | 10 | 10 | 5 | 5 | 5 | 14 |
| Hong Kong | 10 | 10 | – | 10 | 7 | 10 |
| New Zealand | 5 | 5 | – | 5 | – | 7 |
| Singapore | 7 | 7 | 7 | 7 | 3 | Life* |

15 Commonwealth Director of Public Prosecutions, *Submission 53,* p. 2.

16 Australian Securities and Investments Commission, *Submission 49*, p. 7.

| | | | | | | |
|---|---|---|---|---|---|---|
| United Kingdom | 7 | 7 | – | 7 | 2 | 10 |
| United States | 20 | 20 | 20 | 20 | 20 | 20** |

* Under s409 of the *Singapore Penal Code*, criminal breach of trust by a public servant, or by a banker, merchant or agent, attracts imprisonment for life, or imprisonment for up to 20 years. Like the fraud provisions in a number of other jurisdictions, this offence is not specific to the provision of financial services.

** Fraud offences that amount to 'securities and commodities fraud' attract a maximum prison term of 25 years under the *Sarbanes-Oxley Act 2002* (US): see 18 U.S.C. § 1348.

**Source**: Australian Securities and Investments Commission, *Submission 49*, p. 8.

4.25 Dr Overland, addressing penalties for insider trading specifically, noted that maximum custodial sentences for insider were consistent with other jurisdictions (with the exception of the United States).[17] However, Dr Overland noted that the terms of imprisonment imposed in even the most serious cases of insider trading had not approached the maximum penalty. For example, Mr Luke Kamay, an NAB banker who had conspired with an Australian Bureau of Statistics employee to access and trade on embargoed data, was sentenced to seven years and three months' imprisonment, for what the judge called the 'worst case' of insider trading he had seen in Australia. Dr Overland submitted that if 'offenders who engage in the "worst" and "most serious" cases of insider trading do not receive the maximum available sentence, it is hard to argue that the criminal penalties need to be increased'.[18]

4.26 The Australian Shareholders' Association (ASA) allowed that current maximum terms of imprisonment and fines in Australia for white-collar crime were 'broadly consistent' with those available in foreign jurisdictions. However, the ASA suggested that there:

> …appears to be a reluctance to pursue and/or impose custodial sentences other than in very exceptional cases. In some cases, even where a custodial sentence is imposed, it is wholly or partially suspended. What we have seen is a penchant for weak punishments such as good behaviour bonds or community service orders even when the admitted wrongdoing has been serious, deliberate and systematic (for example, fraud). There is also a lack of clear consistency in the sentencing of offenders.
>
> Thus, whilst there is a framework in Australia that might be considered comparable to overseas jurisdictions in terms of criminal penalties, the fact that the actual penalties imposed are towards the lower end of the spectrum produces an outcome that is both inadequate to deter offenders and encourage proper compliance by individuals. It also attacks public confidence and the integrity of markets and the financial system as a whole.[19]

17 Dr Overland notes, in this regard, that the maximum term of imprisonment was increased in Australia was increased from five years to 10 years in 2010.

18 Dr Juliette Overland, *Submission 9*, p. 6.

19 Australian Shareholders' Association, *Submission 34*, p. 2.

4.27 Mr Stephen Mayne, representing the ASA, suggested that ASIC was reluctant to pursue the 'big players' in policing white-collar crime, instead preferring to focus on the 'small fish'. Mr Mayne further argued that fewer and fewer white-collar criminals were going to jail as a result of an ASIC-led prosecution. Instead, he argued, ASIC tended 'to settle and go the civil route and do the infringement penalties and do the enforceable undertakings and not actually take the hard yards'.[20]

4.28 The evidence received from the ASA appeared to reinforce claims made elsewhere about the number of people being sent to prison as a result of action taken by ASIC. For example, as the United Church (JIMU) reported in its submission, an analysis of ASIC and court records undertaken by a journalist indicated that in the two financial years ending July 2015, 58 individuals had been convicted and sentenced for corporate crime. Of these, 46 per cent received a custodial sentence, although the majority of those individuals received suspended sentences, good behaviour bonds or intensive correction orders. Those imprisoned served an average of 20 months before become eligible for parole.[21]

4.29 However, the IPA challenged the notion that white-collar criminals are currently being treated leniently by the courts, suggesting the 'evidence for such leniency is unclear, and has a number of complexities'.[22]

### *Will 'doing time' deter white-collar crime?*

4.30 A range of submitters argued that there was no stronger deterrent for white-collar criminals than the risk of receiving a custodial sentence. For example, the CDPP submitted:

> Arguably, nothing deters would-be white collar criminals more than a realistic prospect of imprisonment. Whereas a fine can be factored into the 'cost of business' and potentially offset by profits from the offence, imprisonment impacts at a very direct and personal level.[23]

4.31 Noting the high costs of financial crime in Australia, and the harm such crime can have on individuals and society as a whole, the AFP submitted that criminal penalties, including imprisonment for individuals, are a 'proportionate and dissuasive measure to combat serious financial crime'.[24] The AFP expressed support for the CDPP's submission in relation to the deterrent effect of jail terms:

---

20 Mr Stephen David Mayne, Director, Australian Shareholders' Association, *Proof Committee Hansard*, 6 December 2016, p. 37.

21 Rebecca Urban, 'Corporate criminals escaping jail time', *The Australian*, 8 December 2015, as cited in The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 39*, p. 7.

22 Institute of Public Affairs, *Submission 33*, p. 3.

23 Commonwealth Director of Public Prosecutions, *Submission 53*, p. 3.

24 Australian Federal Police, *Submission 54*, p. 4. The AFP also noted that civil and administrative penalties are 'equally important' in addressing white-collar wrongdoing.

> Fines can be factored into the cost of business. I think a realistic prospect of imprisonment is a more effective deterrent in relation to this sort of criminality. We are talking about very serious criminality in the Commonwealth space, where taxpayers and the government are being defrauded of many millions of dollars. The point I make again is this: our focus is on those professional facilitators and organisers and our strong view is jail is a very effective deterrent in that space.[25]

4.32 ASIC also suggested that 'imprisonment is a significant deterrent' for white-collar criminals.[26] Mr Rowan Davis, Special Counsel at ASIC, told the committee that in his 22 years of experience investigating and prosecuting white-collar crime, he had found that the prospect of imprisonment provides a powerful deterrent to white-collar criminals. In making this point, Mr Davis explained that white-collar offending often involves significant and sophisticated pre-planning over a period of time, and in this context the threat of imprisonment:

> …rings loud and clear. I say that in terms of my experience, in part from seeing contemporaneous evidence of people in the process of committing crimes—including telephone intercepts, emails et cetera—where the fear of imprisonment will actually be spoken about it. Unfortunately, that has not necessarily had the effect of causing them to desist, but it is a real factor. In my view, the fact that we still have white-collar crime does not speak to those who are actually deterred as a result.[27]

4.33 Mr Davis also suggested that, aside from arguments regarding general deterrence, imprisonment played a role in registering the community's disapprobation for white-collar crime.[28]

4.34 While some witnesses argued that imprisonment was rarely the most appropriate or proportionate response to white-collar crime (as discussed further below), Dr Overland noted that jail, fines and restitution were not mutually exclusive. She noted, in particular, that in criminal proceedings, 'for the majority of white-collar crimes, there are fines that can be imposed in addition to the imposition of a jail term, and sometimes there is an emphasis on one over another'.[29]

---

25 Mr Ian McCartney, Assistant Commissioner and National Manager, Organised Crime and Cyber, Australian Federal Police, *Proof Committee Hansard*, 6 December 2016, p. 49.

26 Mr Tim Mullaly, Senior Executive Leader, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, p. 62; Mr Chris Savundra, Senior Executive Leader, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, p. 63.

27 Mr Rowan Davis, Special Counsel, Chief Legal Office, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, pp. 62–63.

28 Mr Rowan Davis, Special Counsel, Chief Legal Office, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, p. 63.

29 Dr Juliette Overland, Private capacity, *Proof Committee Hansard*, 6 December 2016, pp. 26–27.

*Victims of white-collar crime on imprisonment*

4.35 The committee received a large number of submissions from victims of white-collar crime and advocates writing on behalf of victims. The overwhelming view expressed in these submissions was that maximum terms of imprisonment should be higher, and more white-collar criminals should be receiving prison sentences.

4.36 The Banking & Finance Consumers Support Association (BFCSA) pointed to the Icelandic example of prosecuting and, in many cases, imprisoning executive officers of banks and financial institutions in the aftermath of the global financial crisis (GFC). According to the BFCSA, the use of custodial sentences in Iceland has served as a powerful deterrent to would-be white-collar criminals in the Icelandic banking sector. The BFCSA submitted that a similar 'zero tolerance' approach, and the use of 'tough penalties' (along with improved enforcement and a better understanding of predatory lending, mortgage fraud and other 'control frauds'), should apply in Australia.[30] The BFCSA argued, on behalf of its members, for:

> …heavy custodial sentences as strong deterrents for the future. We collectively seek the most appropriate penalties to match the magnitude of damage to people's lives, the homelessness, and the stress of financial loss. It is time to get serious for the sake of future generations in terms of housing and general financial stability.[31]

4.37 More specifically, and addressing what it suggested was criminal activity on the part of lenders and other participants in the banking and financial sector, the BFCSA submitted:

> In the public interest and with the clear intention to stop these activities, we believe 25 years with a non-parole period is a fair sentence and a significant deterrent. Given the magnitude of the criminal intent, the Cartel activity and, the staggering loss of homes, which will continue well into the future, after the last Low Doc Mortgage is sold and signed up, no lesser sentence is adequate.
>
> BFCSA Members also recommend 20 years with a non-parole period for regulatory executives found guilty of criminal neglect.[32]

4.38 Ms Merilyn Swan noted that, as of January 2016, 29 bankers in Iceland had been sentenced to prison for their roles in Iceland's banking crisis during the GFC. Ms Swan, while emphasising the central importance of a strong corporate regulator, submitted:

> Iceland's approach to breaches of fiduciary duties by CEOs and senior bank management would be welcomed by many in Australia who feel CEOs

30 Banking and Finance Consumers Support Association, *Submission 23*, p. 6.

31 Banking and Finance Consumers Support Association, *Submission 23*, p. 11.

32 Banking and Finance Consumers Support Association, *Submission 23*, p. 12.

> expressing their apologies for widespread financial misconduct within their organisations is simply not good enough.[33]

4.39 The HNAB-Action Group argued that white-collar criminals should face prison time 'for at least as long as it takes all the offender's victims to receive restitution and compensation'.[34]

4.40 A large number of submissions received by individuals relaying their own experiences with alleged predatory lending and mortgage fraud, also called for increasing the incidence and duration of custodial sentences for white-collar criminals in banks and other financial institutions.

***Is imprisonment a proportionate and effective response to white-collar crime?***

4.41 Not all inquiry participants agreed that sending a larger number of white-collar criminals to prison for longer periods of time would be effective or proportionate. Some questioned why white-collar criminals should be subject to different treatment than other non-violent offenders, questioned whether imprisonment was a proportionate or cost-effective response to the offending in most instances, and challenged the idea that stronger custodial penalties would have a meaningful deterrent effect. These views are summarised below.

4.42 Some submitters stressed that custodial sentences should always be considered a punishment of last resort. For example, Dr Zirnsak explained that the Uniting Church (JIMU) regarded imprisonment as an appropriate penalty only in 'extreme cases' where there was a need to protect the community or 'send a signal about deterrence in some cases for really egregious crimes being committed'.[35] Dr Zirnsak suggested that deterrence could be provided through other sanctions:

> In these kinds of crimes, if there is transparency, the potential for that public disclosure does in itself add a penalty, in addition to what we think should be adequate civil penalties, to ensure that there is no profit out of the crime. Other sanctions might be being banned from certain roles, certain industries, not being able to be a director, depending on the type of crime. There are a range of sanctions that could be applied, in the case of white-collar crime.[36]

4.43 Dr Zirnsak told the committee that criminological research appeared to suggest that when it came to deterrence, the likelihood of detection (a matter discussed in chapter 3) was more important than the threat of imprisonment:

---

33 Ms Merilyn Swan, *Submission 50*, p. 8.

34 HNAB Action Group, *Submission 41*, p. 9.

35 Dr Mark Zirnsak, Director, Justice and International Mission Unit, Uniting Church in Australia, Synod of Victoria and Tasmania, *Proof Committee Hansard*, 6 December 2016, p. 4.

36 Dr Mark Zirnsak, Director, Justice and International Mission Unit, Uniting Church in Australia, Synod of Victoria and Tasmania, *Proof Committee Hansard*, 6 December 2016, p. 2.

> If you had the choice between having a handful of high profile, very strong imprisonment sentences versus lots of detection with more middle level sanctions, then our understanding would be the system where you have more detection and more middle level sanctions is probably a much greater deterrent and far more effective than simply: 'I'll take my chances. It's about one chance in a 100 I get caught, but if I get caught I'm going to go to prison for a long time.' Our understanding is that the research increasingly suggests that is not as effective as the other one.[37]

4.44 The Queensland Law Society acknowledged that white-collar crime can and has 'damaged whole industries and devalued entire markets, and in such circumstances the enormity of the crime, the harm caused and the informed intent behind the wrongdoing will justify custodial sentences of significant length'.[38] Nonetheless, the Queensland Law Society maintained that in many instances white-collar crime arises through ignorance, performance pressure or poor decision-making, and in such circumstances, and unless there is a physical threat to the community, imprisonment is unlikely to achieve the objectives of sentencing. Alternative, non-custodial sentences, including community service orders, are likely to be more appropriate, and far less costly to the taxpayer. The Queensland Law Society added that non-custodial sentences can also be used in conjunction with fines and compensation orders to enhance deterrence.[39]

4.45 The IPA argued that that the imprisonment of non-violent criminals, including 'white-collar criminals'—a categorisation it suggested was problematic and risked undermining equality before the law[40]—was rarely rational or appropriate. The IPA pointed to evidence that suggesting that increasing sentence severity, including incarceration, has no effect on levels of criminal activity.[41] The issue, the IPA suggested, was not whether to punish non-violent criminals, but rather whether the punishment was proportionate to the offence. In this sense, it made the case for penalising white-collar crime in a way that was consistent with the treatment of other non-violent crimes:

> Violent offenders need to be incarcerated, but prison is expensive and strongly correlated with repeat and escalating offending. For this reason, non-violent offenders are increasingly given alternative punishments. This recognises that the costs of imprisonment for people whom we are merely mad at, as opposed to afraid of, are not justified by the benefits that you get from that punishment. This is the context for the central contention of our submission: white-collar crime is not special and white-collar criminals

---

37 Dr Mark Zirnsak, Director, Justice and International Mission Unit, Uniting Church in Australia, Synod of Victoria and Tasmania, *Proof Committee Hansard*, 6 December 2016, p. 4.

38 Queensland Law Society, *Submission 31*, p. 2.

39 Queensland Law Society, *Submission 31*, p. 2.

40 Mr Andrew Bushnell, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, 6 December 2016, p. 8.

41 Institute of Public Affairs, *Submission 33*, p. 4.

> should not be singled out for special treatment. The principles that apply to the punishment of non-violent offending also apply to white-collar crime.[42]

4.46 The IPA also argued that in cases of non-violent crime, imprisonment should be seen as a last resort and reserved for 'recidivists or people who have otherwise indicated through their behaviour that they simply will not respond to alternative punishments'.[43] In most cases, it argued, alternative punishments for white-collar criminals would be more effective and proportionate:

> Home detention and community service can be sufficiently punitive to deliver retribution for the victim and society. Professional disqualification is an effective specific deterrent that reduces the criminal's chance of reoffending. Restitution orders and fines can be used to make the victim whole, and this should be at the heart of the criminal justice system, especially in relation to crimes that involve money.[44]

4.47 As noted previously, the IPA was critical of the concept of 'general deterrence'. With regard to imprisonment as a form of general deterrence, the IPA submitted:

> Imprisonment as a penalty has a very specific purpose in sentencing—that is, to separate people from the public to protect the public. That is the unique feature of prison itself. General deterrence in any other circumstance is not an acceptable justification on its own. What we need is to achieve the other objectives with sentencing in punishing the criminal. Prison has not worked well to achieve the other objective of sentencing. It has not worked well to prevent recidivism. It does not provide any restitution to the victims of crime. There is a reason to believe that prison is also a poor mechanism for rehabilitation. On its own, prison would only be used as an idea of general deterrence, and we believe that is weak in and of itself.[45]

4.48 Some inquiry participants questioned whether the benefits to the community of imprisoning white-collar criminals justified the cost. For example, in their joint submission, Professor Adams, Dr Hickie and Mr Lloyd QC highlighted the high cost of incarceration, and emphasised the need for a 'careful balancing act between the

---

42 Mr Andrew Bushnell, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, 6 December 2016, p. 8. The IPA also submitted a copy of an IPA research essay, 'The use of prisons in Australia: Reform directions', which argues that Australia is over-incarcerating non-violent, low-risk offenders, in a manner that is disproportionate to the crimes committed, costly to the taxpayer, and ineffective in terms of deterring crime, rehabilitating offenders and providing restitution to victims. Institute of Public Affairs, *Submission 139*.

43 Mr Andrew Bushnell, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, 6 December 2016, p. 10.

44 Mr Andrew Bushnell, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, 6 December 2016, p. 8.

45 Mr Darcy Allen, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, 6 December 2016, p. 9.

sentencing of white-collar criminals and the costs associated for the state'.[46] They submitted:

> The argument has been made for many years that an affluent white collar criminal should not be treated more favourably than the traditional perpetrator of street crimes which perpetrator [sic] would in the main come from a less affluent socio-economic background. Whilst this proposition is perhaps self-evidently correct, it ignores the cost to society of housing the white collar criminal and the fact the white collar criminal poses no real threat to the physical well-being of the citizen in the street.[47]

4.49 Professor Adams, Dr Hickie and Mr Lloyd QC also submitted that there was little evidence to suggest that imprisonment of offenders was effective in reducing the rates of recidivism of offenders. They argued that:

> …if one of the aims of imposing a custodial sentence on an offender is rehabilitation of that offender, then current sentencing practices arguably fall woefully short of achieving that aim. This then begs the question of how and why a custodial sentence should apply to a white collar criminal.[48]

4.50 Professor Adams, Dr Hickie and Mr Lloyd QC argued that hitting the 'hip-pocket nerve' of offenders and retrieving ill-gotten gains would, along with the stigma of a conviction, were the major deterrent factors for white-collar criminals, and the threat of imprisonment was less relevant in this regard:

> The effects of a conviction on a white collar criminal are undoubtedly at the core of punishment and deterrence because they impact upon the offender's ability to carry on their business. Such effects may include travel visa denials and the inability to engage upon their licensed profession (disbarment for lawyers and licensing for traders and other business professionals) and the ability for such offenders to earn money and raise funds in the future. These effects flowing from a conviction [simply] do not normally apply to the usual non-white collar crime offender. It can be argued, save and except for financial punishment, the imposition of a prison term in reality does little to deter a white collar criminal for re-offending.[49]

4.51 Professor Bagaric argued that prison should be reserved for criminals who pose a physical risk to the community.[50] He added:

---

46 Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC, *Submission 5*, p. 2.

47 Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC, *Submission 5*, p. 3.

48 Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC, *Submission 5*, p. 3.

49 Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC, *Submission 5*, pp. 3–4. The important of monetary penalties is covered in chapter six.

50 Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology, *Proof Committee Hansard*, 6 December 2016, p. 20.

> When it comes to sentencing white-collar offenders, in most situations, we should not put them in prison. We need to implement other more cost-effective sanctions in order to deal with them.[51]

4.52 Professor Bagaric also emphasised the need to have regard to the principle of proportionately in sentencing. He suggested that a custodial sentence was in most instances not a proportionate response to the harms caused by white-collar criminals:

> Imprisonment is a profoundly damaging sanction. People that go to prison not only suffer the hardship of deprivation of liberty while they are there, the chances of them being subject to a significant violent crime go up tenfold. When they get out, their life expectancy is reduced. When they get out, their lifetime earning is reduced by about 40 per cent. Imprisonment for any case of institutional types of insider or white-collar crime is almost always a grossly disproportionate penalty hardship for what they have done.[52]

4.53 In discussing the importance of the principle of proportionately, Professor Bagaric argued that a bifurcated response to white-collar crime was needed in which the focus was on harms caused:

> There are only two forms of basic white-collar crime. One is where mums and dads, and individuals get hurt and lose their life savings and their houses, and causes significant damage to people. In rare instances, the only appropriate response to that may be a jail term. But, for the institutional type of white-collar crime, in nearly no cases should any of those people come anywhere near a prison. There are other forms of sanctions that are proportionate to the harm that they do.[53]

4.54 Some witnesses and submitters suggested that calls for harsher prison sentences for white-collar offenders were based less on evidence and more, as the IPA put it, on 'anti-market populism'.[54] Similarly, Professor Bagaric told the committee that penalties should be based on evidence, rather than what 'feels right'. The starting point in a discussion about penalties, he argued, should be that:

> …the harshest penalties in our criminal justice system need to be reserved for the people we are scared of—not the people we are angry at.
>
> We and the community are angry at white-collar offenders. Why? Because they are greedy and quite often they are lazy. That does not justify us, in a logical and empirical manner, imposing the harshest penalties in our system—being imprisonment—on these people. The impact of imprisoning

---

51 Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology, *Proof Committee Hansard*, 6 December 2016, p. 21.

52 Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology, *Proof Committee Hansard*, 6 December 2016, p. 27.

53 Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology, *Proof Committee Hansard*, 6 December 2016, p. 30.

54 Institute of Public Affairs, *Submission 33*, p. 2.

> many white-collar offenders is that we, paradoxically, punish the taxpayer and ourselves even more.[55]

4.55 Some inquiry participants took issue with the notion that imprisonment was not a proportionate response to the harms caused by white-collar crime (and, as noted in the first chapter, many witnesses were keen to emphasise the extent of these harms). Making the case for imprisonment as a condign punishment in cases of white-collar crime, Mr Davis, ASIC Special Counsel, was critical of the underlying assumption in Professor Bagaric's suggestion that imprisonment should be saved for the worst type of offender, suggesting:

> …there is a risk there of perhaps underestimating the impact that financial crime can have on the victims of financial crime. In my experience, that can be devastating.[56]

4.56 Asked about the point made by some witnesses that imprisonment should always be a last resort, Mr Davis also indicated that it was already the case that prison sentences were only handed down when no other penalty was deemed appropriate:

> I might indicate that legislative guidance does exist in the Commonwealth Crimes Act in relation to imposing a sentence in prison: the court has to be satisfied that no other sentence is appropriate. So in a sense the court is required to go through that stepped reasoning process, as it were, of 'No, this is not appropriate; this is not appropriate,' and we end up at a sentence of imprisonment.[57]

## Mandatory sentencing

4.57 As summarised below, there was some discussion during the inquiry about whether mandatory minimum sentences might provide one way of better deterring white-collar offending, particularly in light of the difficulties involved in successfully prosecuting offenders.

4.58 Dr Overland suggested that, rather than increasing the maximum custodial sentence for insider trading, consideration should be given to a mandatory minimum sentence of six months imprisonment for all offenders convicted of insider trading, 'other than in the most extenuating circumstances'.[58] This, she submitted, would have a positive impact on general deterrence:

> While the availability of increasingly severe penalties may appear to have a general deterrent effect, it is the actual penalties imposed on those

---

55 Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology, *Proof Committee Hansard*, 6 December 2016, p. 20.

56 Mr Rowan Davis, Special Counsel, Chief Legal Office, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, pp. 62–63.

57 Mr Rowan Davis, Special Counsel, Chief Legal Office, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, p. 63.

58 Dr Juliette Overland, *Submission 9*, p. 2.

> convicted of insider trading which are most likely to have an impact. Potential insider traders are unlikely to be deterred from engaging in insider trading just because a greater maximum sentence is possible, if they regularly see that those who are convicted of insider trading are not given a severe sentence. Thus, when the penalties imposed, even for the cases considered to be in the "worst category", do not approach the existing maximums, an arbitrary increase of maximum penalties is unlikely to have a significant impact on deterrence.
>
> While judicial discretion must be preserved in matters of sentencing, consideration should be given as to whether it is appropriate to legislate for a minimum sentence of six months' imprisonment, other than in the most extenuating circumstances, for those convicted of white collar crimes such as insider trading. This ensures that all potential offenders are aware that imprisonment is a certainty for those identified and convicted of insider trading, thus increasing the deterrent effect of the penalty.[59]

4.59 On the whole, witnesses appearing before the committee expressed caution or opposition to the concept of mandatory sentencing. The Queensland Law Society indicated that, in addition to viewing imprisonment as a last-resort punishment, mandatory sentencing restricts 'a court's ability to address issues specific to the offender and can result in harsh and unjustifiable sentences, as well as decreasing the likelihood of guilty pleas being entered'.[60]

4.60 Referring to Dr Overland's suggestion that consideration be given to a mandatory minimum sentence for insider trading, the CDPP also expressed concern about the impact this might have on encouraging offenders to plead guilty:

> One issue about that is that it can have an impact on whether persons plead or not, and that is certainly what happened in the people-smuggling space, where, once defendants realised that, no matter how good their mitigating circumstances, they were going to jail for X period—bearing in mind that was a minimum of three years—that did significantly impact on the plea rate. From the community's perspective, that means a lot more expensive trials have to be conducted. If there were to be a mandatory minimum, my personal view would be that there would need to be a get-out clause to cater for the special circumstances or the exceptional case, because there is always a case that comes along where one might feel that it is not appropriate that this individual go to jail.[61]

---

59 Dr Juliette Overland, *Submission 9*, p. 7. Also see Dr Juliette Overland, Private capacity, *Proof Committee Hansard*, 6 December 2016, p. 25.

60 Queensland Law Society, *Submission 31*, p. 1.

61 Mr Shane Kirne, Practice Group Leader, Commercial Financial and Corruption, Commonwealth Director of Public Prosecutions, *Proof Committee Hansard*, 6 December 2016, pp. 56–57.

4.61 For its part, the IPA argued that mandatory sentencing not only removes the judiciary's ability to properly consider the facts of a case in sentencing, but also leads to overincarceration which the taxpayer has to pay for.[62]

4.62 Mr Theo Alexander also sounded a note of caution in regard to mandatory sentencing, advising the committee that there was no evidence that mandatory sentencing was effective as a deterrent.[63]

4.63 Taking a different approach on the question of mandatory penalties, Dr Zirnsak suggested that consideration should be given to:

> …a mandatory limit to wipe out the profit that was made from the criminal activity, and the penalty should be higher than that, because clearly if all you do is lose what you gained, that is still not necessarily a significant enough deterrent. I do think that is the case. Also, those kinds of penalties are only going to be on what the detected benefit was as well, so there is some risk that a person may have gained a greater benefit that goes undetected. This is not unknown in Australian law. I know, for example, that in the antibribery section of the Criminal Code there already is this ability to level a penalty that is a multiple of the benefit gained through the bribe if that can be determined by the court.[64]

## Committee view

4.64 The committee acknowledges the concerns of some inquiry participants, and in particular of victims of white-collar crime and their advocates, that maximum prison terms for white-collar offences should be increased. However, the committee is satisfied that the maximum prison terms available in Australia are comparable to those available in similar foreign jurisdictions. While the committee does not preclude the possibility that maximum terms of imprisonment for certain offences should be increased, broadly speaking the committee considers current maximum terms of imprisonment for white-collar crime to be appropriate.

4.65 The committee considers that custodial sentences have an important role to play in deterring and punishing white-collar crime. Indeed, the committee is inclined to agree with the suggestion that arguably nothing deters a white-collar criminal more than the realistic prospect of imprisonment. Moreover, this inquiry has helped underline the harms caused by white-collar crime, both at the individual level and in the community more broadly, and agrees that imprisonment is often an appropriate and proportionate response to white-collar crime. Equally, the committee notes the

---

62 Mr Andrew Bushnell, Research Fellow, Institute of Public Affairs, *Proof Committee Hansard*, 6 December 2016, p. 10.

63 Mr Theo Alexander, Lecturer, Deakin University, *Proof Committee Hansard*, 6 December 2016, *Proof Committee Hansard*, 6 December 2016, p. 26.

64 Dr Mark Zirnsak, Director, Justice and International Mission Unit, Uniting Church in Australia, Synod of Victoria and Tasmania, *Proof Committee Hansard*, 6 December 2016, p. 7.

severity of imprisonment as a punishment, and agrees that the courts should only impose a term of imprisonment as a 'last resort' punishment. However, the committee has seen no evidence to suggest that the courts currently regard it otherwise.

4.66 The committee would have strong reservations in relation to any steps to introduce mandatory sentencing in relation to white-collar offences. While deterring, detecting and prosecuting white-collar crime and misconduct is often very challenging, this in itself would not justify steps that would remove the discretion of the courts in sentencing. Mandatory sentencing might also reduce the prospects of guilty pleas or cooperation in white-collar crime cases.