

# How does the criminal justice system respond to white collar and corporate crime?...

Law



HOW DOES THE CRIMINAL JUSTICE SYSTEM RESPOND TO WHITE COLLAR AND CORPORATE CRIME? White-collar crime poses a vexing problem for the criminal justice system (CJS). It is an enormously complex global issue that is growing rapidly and is a cross-border problem. White-collar crime is viewed differently in contrast to conventional crime as generally the public associate crime with street crimes such as robbery, burglary or homicide. Affluent and privileged persons who enjoy an elevated social status and who engage in crimes are rarely considered by the public. This paper discusses various ways in which the CJS addresses white-collar crime.

Firstly, the definition, types and characteristics of white-collar crime will be examined. Secondly, the extent and effects of this crime are outlined. The third area examines the problems encountered by the CJS. Finally, the CJS response to this form of crime is presented. In reality, white-collar crime is a global economic problem that is flourishing at unprecedented levels due to the exponential growth of technology and the use of computers. White-collar and corporate crime are fundamentally different from street crimes, hence it has always been a challenging and controversial topic for the CJS.

Therefore, the CJS needs to introduce more effective tools to combat such crimes. Firstly, the phrase 'white-collar crime' was introduced by Edwin Sutherland in 1939. Sutherland (1949) defined white-collar crime as 'crimes committed by a person of respectability and high social status in the course of his occupation'. Sutherland (1940) talks about the ambiguity in the term 'white-collar', and refers to it as corporate crime (being committed by an organisation) and occupational crime being any other form of crime, not involving violence.

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According to Sutherland (1949), most white-collar criminals were recidivist law-breakers especially in the areas of corporate and civil law. It was understood that these criminals flaunted their power and wealth to influence what makes up the criminal law, and to ensure minimal consequences for the breaches of other laws (Friedrichs, 2004). However, Sutherland's explanation failed to take into account differing forms of offense which may not actually be breaches of criminal law (Simon, 2006) or that this type of crime can be committed by people from divergent backgrounds.

Some criminologists (Simon, 2006) argue that 'elite deviance' is a better description, because it emphasises the power and class distinctions between 'suite crimes' and 'street crimes'. White-collar crimes are non-violent and involve a wide range of specific criminal acts which are defined in the criminal codes. As explained by Hayes and Prenzler (2009), white-collar crime is an illegal activity that is normally carried on within legal business transactions. It encompasses activities including embezzlement, tax evasion, money laundering, fraud, occupational crime (e. g. employee theft or tax evasion), workplace safety crimes (committed by employers, involving harm to the well-being of employees), corporate crime (crime committed by organisations using the corporate structure), environmental crimes (illegal harm to the environment) and computer- or technology-based crimes. These crimes are often surrounded in secrecy, may involve complex cover-ups, be ambiguous (as to the 'planned intent'), and be deliberately deceptive (Hayes ; Prenzler, 2009). Secondly, not all white-collar crime committed is detected, reported or recorded (Hayes ; Prenzler, 2009) and may be varied in its nature.

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However, some forms of crime remain difficult to measure because it is extremely difficult to detect and often victims are not aware that they have been victimized, such as fraud (Hayes ; Prenzler, 2003). White-collar and corporate crimes are often complex crimes which normally require high levels of skill and intelligence as they are regularly masked by routine organizational activity (Hayes ; Prenzler, 2009). Victims of white-collar crime experience financial losses and harm in various ways.

Victims can be an individual, a group of individuals, (such as customers of a bank), or an organization and any of them may experience astronomical financial losses (Hayes ; Prenzler, 2009). Some of the most notorious examples of the harmful effect of white-collar crime is the collapse of the US company Enron, with losses of over USD\$50 billion (Friedrichs, 2004) and in Australia, the collapse of insurer HIH Insurance with losses of over A\$4 billion (HIH Royal Commission, 2003. cited in Hayes ; Prenzler, 2009). Research indicates that crimes of this magnitude play a vital role in causing or contributing o a range of psychological disorders, including suicide, among its victims. However, it appears that the Australian justice system concerns itself primarily with the financial losses experienced by white-collar crime victims (ABS, 2006). The public may not perceive white-collar crimes as criminal due to the ‘ respectability’ or the status of the perpetrators. To establish whether a crime has been committed can be a costly affair as the crime may be very well hidden or involve convoluted paper-trails. The amount of time and persons involved in this discovery makes the task onerous.

Consequently, it is difficult to measure or prosecute white-collar crime because it is expensive and is a long drawn out process. Thirdly, the power and responsibilities of the CJS are divided into three arms that operate autonomously from each other to prevent bias, corruption and a monopoly of power. The three arms relate to the investigative (police), adjudicative (courts) and correctional arms (prisons) (Bryett et al. 1993). In Australia, there are federally, and in the States and Territories, separate and independent systems of CJS.

There are numerous inconsistencies across the CJS as well as the States and Territories that leads to differing messages delivered about the frequency and seriousness of white-collar crime (Sarre, 2007). The fragmented nature of the enforcement response to serious and complex crimes, especially where there is a global element, is often a major barrier to investigations and their consequence. The capability of the Australian CJS to identify white-collar crimes is sometimes weighed down by lack of resources and expertise (Hayes ; Prenzler, 2009). According to Smith (2001), resources for the investigation of economic crime are normally limited and inadequate especially for the investigation into computer related crime. Retaining highly trained individuals within the CJS is critical. The prospects of better salaries and conditions within the private sector often lure some of these people away from the CJS. Either government needs to allocate increased budgets for the investigation of economic crime or else the private sector will need to work cooperatively with law enforcement to conduct its own investigations (Smith, 2001). Funding of adequate resources for training and equipment within the CJS is often not given sufficient priority.

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One solution may be for a specified portion of assets confiscated from offenders each year to be dedicated to improving training and equipment (Smith, 2001). Resourcing of white-collar crimes by police departments in the States and Territories may not always be considered a priority. When an investigation is found to be warranted and evidence obtained, the prosecutors will review the case according to their own set of guidelines. Ultimately, this may or may not result in a case being presented to the courts or result in punishing the offender (ABS, 2006).

Sentencing of white-collar offenders is complicated, and as in common crime, most cases will be settled by a guilty plea. Sentencing poses a problem with white-collar criminals because in spite of frequently committing offenses of long duration and great economic magnitude, they are more likely to have a spotless prior record. Subsequently, judges are torn between the desire to be lenient to such offenders because of their previous good behaviour, and the desire to show severity because the white-collar criminal has abused a position of trust (ABS, 2006).

Whether a crime is brought to the court system, and under what charge, is determined solely by the prosecutors. In some circumstances, civil penalties may be available. If so, then the prosecutor might decide that criminal charges are unwarranted (ABS, 2006). Alternatively, punishment may constitute probation, a fine or imprisonment, or may even include paying restitution to the victim (Braithwaite, 1992). This is usually determined by the offender's previous record and is commensurate with other crimes.

Should a white-collar offender be incarcerated, the cost to the public is often perceived to be wasteful as the perpetrators are usually deterred merely by being caught. Incarceration is only useful as a punishment when the crime is significant or the chances of recidivating, such as in organised crime (Payne, 2003). Conversely, the public then perceive a lack of incarceration as favouring the white-collar offender. When a white-collar criminal is imprisoned, it is problematic how they should be housed.

The length of sentence often plays a part in determining the security level of the prison required however it is questioned whether there is benefit in housing a white-collar criminal with mid to high-level violent criminals and similar (ABS, 2006). The alternative of housing them in minimum security prisons though can be seen as being lenient. Finally, the primary aim of the CJS is to bring offenders before the courts for adjudication and then dispense justice. Conventionally, criminal law has various objectives, such as incarceration, retribution, rehabilitation and deterrence.

Incarceration for white-collar criminals facing imprisonment may be viewed as a stigma and therefore used as a deterrent for others (Tomasic, 2005). It is with this view that the courts will consider imprisonment for white-collar offenders. To ensure the CJS can effectively deal with white-collar crime, the various Australian governments empower them via legal Acts. The Federal CJS is better equipped to deal with white-collar crimes on a large scale, e. g. cases where the crimes often have a multijurisdictional scope.

The Federal Bureau of Investigation (FBI) and other State, Territory and Federal agencies in Australia have massive investigative and prosecuting

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powers to bring white-collar criminals to justice (ABS, 2006), as recently evidenced in Western Australia with former lobbyists Brian Burke and Julian Grill. The use of coercive powers is an effective tool for gaining a deliberate understanding of serious and organised crime. Coercive powers allow an examiner to summon any witness to appear, and provide evidence/documents to the examiner (Broome, 1998).

This power is limited to specialist investigative agencies and is not available to conventional police. Each jurisdiction has formed a specialised body to manage the use of these powers, for example National Crime Authority, NSW Independent Commission against Corruption, Queensland Criminal Justice Commission, Australian Securities Investment Commission (ASIC) and the Corruption and Crime Commission (WA). The principal ‘white-collar’ regulator for companies within Australia is ASIC (ACC, 2010).

These bodies have the authority to delve into the financial machinations which may lead to potential prosecution. Another difference held by these overseeing agencies, compared to the standard CJS processes, is the power for these bodies to enforce witnesses and accused to answer all questions irrespective of whether their answers may incriminate themselves. However these questions do not need to be based on substantiated evidence, as per a legal court’s requirement. This has raised many ethical debates throughout the legal industry as well as the general public (Broome, 1998).

Cross-jurisdictional crimes and those of an international nature fall under the auspice of the Australian Federal Police (AFP). The AFP has needed to evolve in how it has handled these crimes in response to the increasing

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sophistication of the white-collar criminal. This has fuelled intelligence-led policing (ABS, 2006), which has led to a greater number of cases being sent to the prosecutors. Whilst it can be seen that the police and legal systems have responded at times to the growing level of white-collar crime, the correctional system remains impassive. (ABS, 2006)

In summation, white-collar crime is viewed differently by the public irrespective of the dramatic and extensive impact it has on society as a whole. This crime has become a global economic problem and has taken its toll on the CJS because of the exponential growth of technology and technically-savvy environments. White-collar and corporate crimes of varying types and magnitude are costly and time-consuming to investigate and prosecute. Special investigative skills are required by police officers and prosecutors as the investigation and trials of this nature are often lengthy and complex.

A consolidated effort to target white-collar crime will be difficult because the Australian CJS is split across various jurisdictions and each arm works independently of each other with the exception of the AFP, who has greater resources dedicated to their resolve. Until the CJS and Australian jurisdictional bodies commit to a unified approach within each arm of the system, there will never be a cohesive system within Australia and as such the CJS will remain in its current state. As noted by various governments and professional bodies, a genuine need for reform into a single system exists.

The introduction and use of coercive powers as an investigative tool has proved to be a powerful weapon against serious crimes but with the growing

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sophistication of the white collar criminals and the rapid spread of their crimes, there is an increasing demand for the CJS to respond at a national and international level accordingly. Therefore standardising laws relevant to white-collar crime and providing sufficient funding to the various CJS components to support the investigation and prosecution is integral.

The CJS needs expanded legal powers and more effective tools required by the law enforcement bodies to combat white-collar crimes. References

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