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ARTICLE

Sentencing Corporations for Corruption and Bribery

CAMERON WOOD*

Much literature addresses the difficulty of obtaining convictions against corporations for corruption and bribery offences. However, academics have given less consideration to how courts sentence corporations for these crimes and whether these sentences are effective. The laws, procedures and policies that enable the effective identification, attribution and prosecution of corporate corruption and bribery in New Zealand are redundant if court-imposed sentences are ineffective. The purpose of this article is to critically assess the effectiveness of New Zealand's current sentencing regime for corporations convicted of corruption and bribery and to propose improvements. This article concluded that the current sentencing framework is inadequate after drawing on case law, academic literature, commissioned reports, statistical data and sentencing options currently available in comparable overseas jurisdictions. Current legislation only empowers New Zealand courts to impose fines for corruption and bribery offences, thus diminishing the criminal law's effectiveness because fines do not sufficiently deter or denounce corporate bribery and corruption. To make New Zealand's corporate sentencing regime more effective, probation orders, dissolution orders, and debarment should become options available to the courts at sentencing. Introducing deferred prosecution agreements and corporate pre-sentence reports will also contribute to more effective punishment, deterrence and rehabilitation of corporate offenders. If Parliament follows this article's recommendations, New Zealand will benefit from a more robust sentencing regime that generates long-term corporate behavioural change more effectively than the current one.

* BCom/LLB(Hons), University of Auckland. Strategic Business Developer (APAC) at Fever. I would like to acknowledge my father, Fraser, for inspiring me to go to law school and my mother, Jacqui, without whom this article would never have been completed. Your endless support will be forever appreciated. This article is dedicated to you both.

I Introduction

This article has four main parts. Part II: Effective Sentencing, will first contextualise corporate corruption and bribery in New Zealand by referencing statistics, laws and international obligations. Second, this Part will describe the nature of a company as a legal entity. Third, it will define sentencing effectiveness with reference to the purposes of sentencing. Part III: Pecuniary Penalties will discuss the inadequacy of fines as a sentencing option. Part IV: Proposed Non-Monetary Penalties will draw from comparable overseas jurisdictions to propose three new sentencing options: probationary orders, dissolution orders and debarment. These new options will improve the effectiveness of New Zealand's sentencing regime. Part V: Improving Sentencing Outcomes will examine the sentencing process and argue for adding deferred prosecution agreements and corporate pre-sentence reports to New Zealand's regulatory framework.

II Effective Sentencing

A *New Zealand in context*

In 2015, Deloitte published a study which revealed that of the New Zealand and Australian organisations surveyed 23 per cent had experienced one or more known instances of domestic corruption within the last five years. Additionally, 40 per cent of the organisations surveyed had operations in high-risk jurisdictions, with 35 per cent of those having experienced some form of bribery or corruption incident within the last five years.[1]

The study also reported an absence of formal compliance programmes in these same organisations with offshore operations.[2]

New Zealand is a signatory to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention), the United Nations Convention Against Corruption (UNCAC) and the United Nations Convention Against Transnational Organized Crime.[3] These treaties aim to ensure the effective prevention and punishment of corruption-related offences. They also obligate Parliament to make New Zealand's domestic law consistent with international norms to promote cohesion and consistency amongst the international community.

New Zealand's corruption and bribery offences, ss 101–105 of the Crimes Act 1961, can be brought against both legal and natural persons.[4] Historically, the courts determined corporate liability according to the "directing mind and will" principle that the House of Lords developed in *Tesco Supermarkets Limited v Nattrass*.[5] However, difficulties arose in attributing corporate liability for bribery-type offences since it was only where "very senior

1 Deloitte *Deloitte Bribery and Corruption Survey 2015 Australia & New Zealand: Separate the wheat from the chaff* (2015) at 8–9.

2 At 9.

3 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 2802 UNTS 225 (opened for signature 17 December 1997, entered into force 15 February 1999); United Nations Convention Against Corruption 2349 UNTS 41 (opened for signature 9 December 2003, entered into force 14 December 2005), art 1(a) [UNCAC]; and United Nations Convention against Transnational Organized Crime [2003] NZTS 3 (signed 14 December 2000, entered into force 29 September 2003).

4 Crimes Act 1961, s 2.

5 *Tesco Supermarkets Limited v Nattrass* [1972] AC 153 (HL).

levels of management or directors are involved in bribery that a company might also be charged".[6]

Parliament has amended the relevant provisions of the Crimes Act to reflect a more practical view of how corporations engage in corruption and bribery.[7] Currently, bribes or other corrupt actions undertaken by an employee of a company, acting within the scope of their authority and undertaken for the company's benefit, can be attributed to the company and attract a corporate conviction. The onus of proof then rests on the company to show it took reasonable steps to prevent the offence.

The Serious Fraud Office (SFO) undertakes almost all corruption investigations and prosecutions in New Zealand.[8] Since 2014, 40 per cent of its cases have concerned public sector corruption, a statistic expected to increase given the vast COVID-19-related government expenditure.[9]

While 40 per cent is a substantial proportion, the SFO only has 30–40 investigations open simultaneously[10]. This small number of investigations suggests New Zealand's reputation as a jurisdiction with minimal corruption may result from inadequate identification and prosecution of corrupt activities rather than their absence. These statistics led the lead examiners of New Zealand's stage three implementation of the *OECD Anti-Bribery Convention Report* to state they were:[11]

> … seriously concerned that the level of foreign bribery enforcement actions remains low. They [were] also very concerned that outdated perceptions held by some individuals [that New Zealanders] do not engage in bribery, may undermine detection efforts. The lead examiners recommend that New Zealand significantly step up efforts to detect, investigate and prosecute foreign bribery.

The purpose of the UNCAC is, among other things, to "promote and strengthen measures to prevent and combat corruption more efficiently and effectively".[12] Article 12 obliges signatories to "prevent corruption involving the private sector … and, where appropriate, provide effective, proportionate and dissuasive … penalties for failure to comply with such measures."

New Zealand's current sentencing regime for corporations convicted of corruption or bribery is not sufficiently effective, proportionate or dissuasive. Consequently, it does not satisfy New Zealand's UNCAC obligations.

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6 Ben Upton "New Zealand" in Jonathan Pickworth and Jo Dimmock (eds) *Bribery and Corruption* (3rd ed, Global Legal Group, 2013) 172 at 174.

7 Crimes (Bribery of Foreign Public Officials) Amendment Act 2008, s 8.

8 Serious Fraud Office *Briefing to the Incoming Minister* (November 2020) at 8.

9 At 3.

10 At 6.

11 Working Group on Bribery in International Business Transactions *New Zealand: Final Report – Final Report on the Implementation and Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Transactions* (OECD, DAF/WGB(2013)31/FINAL, 22 October 2013) [*OECD Anti-Bribery Convention Report*] at [9].

12 UNCAC, art 1(a).

B *The nature of a company*

As established in *Salomon v A Salomon & Co Ltd*, a company, as a legal person, is separate and distinct from its shareholders.[13] The separate personality principle is one of the most significant legal innovations of the 19th century and is crucial to understanding how New Zealand courts hold companies and natural persons accountable for breaking the law. A corporation cannot make decisions as it is the sum of the human actors within it.[14] As such, determining how to deter corporate wrongdoing effectively is problematic. While prosecutors should seek to attribute wrongdoing to natural persons involved with a corporation wherever possible, it cannot be the only response. Holding corporations to account is necessary to help regulators dissuade corporate cultures of criminal complicity, ensure victims are adequately compensated and ensure a regulatory response even where offending is not attributable to a specific individual.

Kent Greenfield describes separate legal personality as "not only a mechanism for the creation of wealth … [but] a mechanism for enforcing accountability".[15] However, accountability only *begins* at conviction. The effectiveness of a corporation's sentence determines whether the criminal law is either a deterrent force or a mere inconvenience.

C *The purposes of sentencing*

Section 7 of the Sentencing Act 2002 outlines the purposes courts should seek to achieve when sentencing an offender. This article is concerned with three of the sentencing purposes set out in s 7 and regards an effective sentence, in this context, as one that sufficiently satisfies these purposes.

(1) Just punishment and denunciation

Mark Cohen provides a helpful summary of the punishment sentencing purpose:[16]

> The final punishment philosophy in criminal law is retribution (often called "just punishment"). The idea behind retribution is that punishment is administered because the offender deserves to be punished – even if it is beyond the amount that might be needed to deter the offender.

Corruption and bribery undermine the fairness of the marketplace and erode public confidence in the administration of commerce and government. Perpetrators of crimes of this nature must receive punishment proportional to the social harm they cause. Where a natural person commits a crime, the state imposes limitations on their freedoms via imprisonment, surveillance, curfews or other remand conditions to limit their ability to offend again. It is challenging to place similar restrictions on companies because they are not imprisonable.[17] However, other criminal sanctions could exist to limit companies'

13 *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL).

14 See Nick Friedman "Corporations as Moral Agents: Trade-Offs in Criminal Liability and Human Rights for Corporations" (2020) 83 MLR 255 at 265–266.

15 Kent Greenfield "In Defense of Corporate Persons" (2015) 30 Constitutional Commentary 309 at 315.

16 Mark A Cohen "Punishing Corporations" in Melissa L Rorie (ed) *The Handbook of White-Collar Crime* (Wiley Blackwell, Hoboken, 2020) 314 at 317.

17 Criminal Procedure Act 2011, s 6.

freedoms. These might vary from minor reporting requirements and trading restrictions to the corporate death penalty: an offending company's dissolution.

Similarly, the denunciatory function of criminal sentencing must reflect the community's intolerance of corruption and bribery. Some academics question whether denunciation is a relevant purpose of sentencing in this context since corporations are legal rather than living entities.[18] However, it is the denunciatory power of the criminal law which justifies its application to a corporate body. The denunciation of actions attributable to companies, which are contrary to shared societal values, helps shape business practices and corporate values in New Zealand to the community's benefit.

(2) Deterrence and community protection[19]

Sentencing has a general and specific deterrent effect, with both being necessary for a sentencing regime to be effective.[20] General deterrence represents the deterrent impact the sentence will have on other corporations, whereas specific deterrence is concerned with the deterrent effect the offender experiences.

Traditional economic theories, such as neoclassical economics, assume corporations are rational actors who consider the expected punishment cost multiplied by the risk of apprehension and conviction, meaning "a potential offender will commit a crime only if the benefits exceed the expected sanction".[21] Therefore, "increasing the likelihood and amount of punishment should reduce the rate of offenses".[22] Thus, to prevent a corporation from engaging in illegal conduct, regulators must increase the financial cost of doing so through fines or other pecuniary penalties. However, more modern and practical assessments of neoclassical economics recognise the difficulties in accurately undertaking such an analysis, often questioning the presumption corporations are rational actors altogether.[23]

By contrast, the behavioural perspective views corporations as the sum of the human actors within them rather than purely rational entities that make decisions in a ruthlessly profit-maximising way.[24] Recognising the distinction between the corporation's and its employees' interests is critical to deterring corporate corruption. Corporation's management must adequately supervise and sufficiently deter individual employees from engaging in illicit behaviour by removing internal incentives and providing enhanced penalties where necessary.[25]

(3) Rehabilitation[26]

The third purpose of sentencing is to reduce the probability of recidivism by understanding the drivers for the original offending. John Hasnas states that "rehabilitation refers to

18 Sylvia Rich "Corporate Criminals and Punishment Theory" (2016) 29 CJLJ 97 at 97 and 100.
19 Sentencing Act 2002, ss 7(1)(f)–7(1)(g).
20 Peter J Henning "Is Deterrence Relevant in Sentencing White-Collar Criminals?" (2015) 61 Wayne L Rev 27 at 41.
21 At 40.
22 At 40.
23 John C Coffee "'No Soul to Damn: No Body to Kick': An Unscandalised Inquiry into the Problem of Corporate Punishment" (1981) 79 Mich L Rev at 393.
24 At 393.
25 Jonathan Clough and Carmel Mulhern *The Prosecution of Corporations* (Oxford University Press, Melbourne, 2002) at ch 5.
26 Sentencing Act, s 7(1)(h).

imposing treatment on a *wrongdoer* designed to reform his or her character to ensure better behavior in the future".[27] For corporations guilty of corruption, rehabilitation should involve reforming internal processes, structures, and culture, and removing staff who contributed to or facilitated the offending. Removing the offending's root causes should reduce the likelihood of it reoccurring.[28]

III Pecuniary Penalties

In New Zealand, criminal justice centres around the imposition of liability and the subsequent sentencing of criminal wrongdoers.[29] Where a court convicts a corporation of an offence under ss 101–105 of the Crimes Act, it will be subject to a maximum penalty of either $5,000,000 or three times the value of the commercial gain if that gain can be "readily ascertained", whichever sum would be larger.[30]

Courts' ability to effectively apply criminal law to corporations rests on whether they have the power to impose sanctions that achieve the purposes of sentencing. As the only penalty available for breaches of ss 101–105 is a monetary penalty, assessing whether fines effectively achieve these purposes is necessary.

How effective are pecuniary penalties at deterring corporate crime? From 1999 to 2012, in the United States, the average fine was only USD 7.4 million, with the median being an anaemic USD 120,000.[31] From 2012 to the present, the instances and size of penalty orders have consistently increased. In 2015, multiple financial service firms received penalties above USD 1 billion each for currency manipulation.[32] This growth in the size of fines is a trend that has continued in the United States, the biggest finer of corporates globally, which fined financial services firms over USD 10.4 billion in 2020 alone.[33]

Despite the size of these fines, they fail to achieve the deterrence objective because, as John Coffee has identified, it is nearly impossible to set an optimum penalty to deter misconduct. He argues that an effective fine would almost certainly outstrip an offending corporation's value, a phenomenon he names the "deterrence trap".[34] William Robert Thomas argues that the deterrence trap is "more of a problem than Coffee suspected" because:[35]

> … the interest of shareholders and managers diverge proportionally as a corporation approaches insolvency; officers become increasingly willing to act in their short-term interest, even if it is to the detriment of shareholders. A similar logic informs corporate

27 John Hasnas "The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability" (2009) 46 Am Crim L Rev 1329 at 1340 (emphasis in original).
28 At 1340.
29 Sentencing Act, s 7.
30 Crimes Act, s 105(c)(2e).
31 W Robert Thomas "The Ability and Responsibility of Corporate Law to Improve Criminal Fines" (2017) 78 Ohio St LJ 601 at 610.
32 William Robert Thomas "How and Why Should the Criminal Law Punish Corporations?" (PhD Dissertation, University of Michigan, 2015) at 113–114.
33 Jaclyn Jaeger "Fines against financial institutions hit $10.4B in 2020" (23 December 2020) Compliance Week <www.complianceweek.com>.
34 Coffee, above n 23, at 389.
35 Thomas, above n 31, at 611.

> crime. The closer a corporation moves towards insolvency, … the less a large fine acts as a deterrent.

Fines also discourage enforcement.[36] Judges may be particularly reluctant to enforce penalties that are terminal for the organisation, particularly where doing so would cut against the interests of preserving national economic competitiveness, jobs and shareholder wealth. Enforcement of such penalties is also politically unpopular, given the collateral damage following the bankruptcy of large corporates.[37]

Furthermore, the agency principle undermines these fines' deterrent and rehabilitative effects. The agency principle holds that the agent's and principal's interests are not always aligned. In this context, managers incur negligible personal costs when paying fines using shareholders' money. The former United States Treasury Secretary, Larry Summers, describes "paying with shareholders' money as the price of protecting themselves [as being] a very attractive trade-off".[38] The accuracy of this assertion has also been established empirically with an economic study into corporate crime, determining "there is little evidence that increasing the magnitude of monetary sanctions has a deterrent effect", with the agency principle being the reason.[39] Likewise, the negligible personal impact of these fines on managers fails to sufficiently incentivise the rehabilitation of their behaviour or disincentivise its continuation.

As fines often fail to deter offending, they also fail to effectively express the negative social judgement required to denounce corporate corruption and bribery. Under the expressive theory of law, the primary function of the law is to give effect to the moral judgements society has made on an activity.[40] Henry Hart wrote, "[w]hat distinguishes a criminal from a civil sanction … is the judgment of community condemnation which accompanies and justifies its imposition."[41] Consequently, when fines are insufficient in retributive and deterrent effect, the public conflates them with mere civil sanctions, and firms simply view them as a cost of doing business. Fines' deficiencies undermine the denunciatory power the criminal law purports to express at conviction and render pecuniary penalties an ineffective mode of sentencing.[42]

IV Proposed Non-Monetary Penalties

In New Zealand, specific non-monetary orders are available on a statute-by-statute basis. For example, courts may remove a financial service company's licenses pending compliance with court orders,[43] or make adverse publicity orders for breaches of the

36 Ehud Guttel and Doron Teichman "Criminal Sanctions in the Defense of the Innocent" (2012) 110 Mich L Rev 597 at 598.

37 Brandon L Garrett "Structural Reform Prosecution" (2007) 93 Va L Rev 853 at 880.

38 Lawrence Summers "Companies on trial: are they 'too big to jail'?" *Financial Times* (online ed, London, 22 November 2014).

39 Cindy R Alexander and Mark A Cohen "The Causes of Corporate Crime: An Economic Perspective" in Anthony S Barkow and Rachel E Barkow (eds) *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (New York University Press, New York, 2011) 11 at 24.

40 Thomas, above n 31, at 615.

41 Henry M Hart "The Aims of the Criminal Law" (1958) 23 LCP 401 at 404.

42 Samuel W Buell "The Blaming Function of Entity Criminal Liability" (2006) 81 Ind LJ 473 at 494–495.

43 Financial Markets Conduct Act 2013, s 208.

Health and Safety at Work Act 2015.[44] However, a general power to impose non-monetary penalties to punish corruption and bribery does not exist. The European Council in 1988[45] and the Australian Law Reform Commission (ALRC) in 2020[46] have proposed non-pecuniary sentencing options similar to the ones in this article.

The severity of bribery and corruption crimes can vary significantly, creating a sliding scale of corporate culpability. Courts should thus have a range of options when sentencing corporations to account for different levels of culpability. New sentencing options should include probation orders, dissolution orders and debarments for breaches of ss 101–105 of the Crimes Act.

A *Probation orders*

Fines focus too heavily on punishment rather than rehabilitation. More focus on rehabilitation will better promote the sentencing purposes and limit excessively adverse effects on third parties. Much like those for natural persons, probation orders for corporations involve the imposition of court-ordered conditions the corporation must comply with for a specified period. Courts in the United States have had the power to impose corrective orders since the late 1970s, and courts in Canada during the last decade.[47] Coffee argues that despite the availability of probation orders in the United States, courts use them infrequently, and when courts do use them, they often do so ineffectively. He argues that the professional focus of prosecution teams on "winning trials" leads to a lack of focus on the type of probation orders they seek and a lack of consideration of how to tailor an order most effectively to an offending corporation.[48] Coffee believes "the focus at the sentencing of a large corporation should be on the prevention of recidivism".[49]

Numerous studies have identified that corporations are far more likely to become recidivist offenders than their executives.[50] The law frequently bars offending executives from their industries because of their convictions. In contrast, the law often does not typically bar offending large corporations from their industries because of the inevitably significant economic detriments that would ensue.[51] As a result, some large companies, like banks or airlines, receive repeat convictions for similar offences.[52]

Courts can use probation orders to instigate cultural change within an organisation. For example, Coffee suggests removing or altering certain aspects of a corporation's executive incentive programme as part of a probation order, where the programme has incentivised unacceptable risk-taking in pursuit of short-term profit maximisation.[53]

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44 Health and Safety at Work Act 2015, s 153.

45 Council of Europe *Liability of enterprises for offences: Recommendation No R (88) 18 adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 and explanatory memorandum* (Strasbourg, 1990) at 7–8.

46 Australian Law Reform Commission *Corporate Criminal Responsibility: Final Report* (Australian Government, ALRC Report 136, April 2020) at 347.

47 At 356.

48 John C Coffee *Corporate Crime and Punishment* (Berrett-Koehler, Oakland, 2020) at 131.

49 At 131.

50 Garrett, above n 37, at 67.

51 Mary Kreiner Ramirez and Steven A Ramirez *The Case for the Corporate Death Penalty: Restoring Law and Order on Wall Street* (New York University Press, New York, 2017).

52 Coffee, above n 48, at 131.

53 At 132.

He argues such an order more effectively fulfils the deterrence sentencing purpose and stops the cost of fines from being passed on to shareholders.[54]

Coffee also advocates for periodic certification throughout the probationary term. Periodic certification would involve executives regularly notifying regulatory bodies that, to their knowledge, they are complying with all relevant orders and regulations, with severe sanctions, both for the individual and the corporation, following omissions or misleading assertions. Irresponsible incentive programmes within corporations should be prohibited given the causal relationship such programs and excessive executive risk taking through deliberate misreporting and active circumvention of the law.[55]

Courts should be empowered to make probation orders to punish firms that commit corruption and bribery offences. Courts should be able to make any order necessary to correct the corporation's offending and reduce the risk of recidivism. For example, in *United States v Norwood Industries Inc*, as part of a probation agreement, the corporation was required to research how to reduce the air pollution one of their facilities was causing and hire new pollution monitoring staff.[56] These orders were directly linked to the nature and quality of the offending (creating excessive and unmonitored air pollution) and tangibly contributed to reducing the risk of similar offending.

Probation orders encompass a range of options, including staff training, changing internal processes and incentive schemes and requiring disciplinary action. Such orders are consistent with UNCAC provisions, which promote the development of standards and procedures to safeguard the integrity of private entities through the development of codes of conduct and positive commercial practices.[57]

Probation orders do not come without criticism. Christopher Wray, the director of the United States Federal Bureau of Investigation, believes probation orders to be redundant given:[58]

> Companies will fear each sanction because of its expense and, especially, because of the unpredictability of that expense. "No matter what form the penalty takes, its ultimate impact on the organization is likely to be evaluated in monetary or economic terms—by investors, competitors, and others—because financial results are the only purpose of the organization and the only measure of its performance in the marketplace."

However, Wray's critique of probation orders conflates the deterrence and rehabilitation sentencing purposes. Probation orders do not purport to punish convicted corporations financially. Instead, they rehabilitate offending firms and thus reduce the risk of recidivism. While Wray does not entirely ignore rehabilitation as a sentencing purpose, he proposes that "[i]n most circumstances, probation under the new guidelines will promote such

54 At 132.

55 Christopher S Armstrong and others "The relation between equity incentives and misreporting: The role of risk-taking incentives" (2013) 109 Journal of Financial Economics 327 at 349.

56 *United States v Norwood Industries Inc* Crim 00034-1 (ED Pa 1994) as cited in Martin Harrell "Organisational Environmental Crime and the Sentencing Reform Act of 1984: Combining Fines with Restitution, Remedial Orders, Community Service, and Probation to Benefit the Environment While Punishing the Guilty" (1995) 6 Vill Envtl L J 243 at 251.

57 UNCAC, art 12(2)(b).

58 Christopher A Wray "Corporate Probation Under the New Organizational Sentencing Guidelines" (1992) 101 Yale LJ 2017 at 2032 citing Jeffrey S Parker "Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties" (1989) 26 Am Crim L Rev 513 at 571.

corporate rehabilitation less efficiently than fines will."[59] There are three problems with Wray's critique. First, he places too much faith in the effectiveness of monetary fines as a form of deterrence. He states corporations "fear each sanction because of its expense".[60] This article has already illustrated the inadequacy of fines.

Second, his critique mischaracterises corporations as amoral actors. Corporations are the sum of their human actors and are not simply amoral entities.[61] To effectively deter corporate crime, courts must recognise the distinction between the firm's and its employees' interests. Adequately supervising and educating staff and removing internal incentives that encourage criminal conduct is critical, in addition to imposing more severe penalties.[62]

Third, Wray has considered the effects of probation orders in a vacuum. It is easy to view probation orders that require members of staff, management or directors to personally engage in the rehabilitation process as constraining their professional autonomy to only a limited extent as being, at best, a mildly punitive administrative burden.[63] However, probation orders should always accompany other sanctions, including monetary penalties, director disqualification or the imprisonment of culpable staff. Their purpose is not to deliver further punishment but to reduce criminogenic pressures and incentives.

An additional criticism which may be levelled against probation orders is that in their successful application judges will require a robust understanding of organisational structures, culture and general business acumen, beyond what can reasonably be expected of a judge. Furthermore, where information on the additional costs likely to be incurred by a company in the performance of an order is unavailable, it becomes difficult to ascertain whether the court is adhering to the principles of proportionality and consistency. However, corporate pre-sentence reports, which this article discusses later, can alleviate these concerns.

B *Dissolution orders*

Article 30(1) of UNCAC requires that signatories make "the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence". The ALRC states that "dissolution purports to permanently remove the capacity of the offender to reoffend—removing from the community a corporate entity which has flagrantly violated the rules of society".[64]

In the United States, a court imposes a dissolution order by requiring a convicted firm to pay a fine equal to the value of its net assets. The firm must completely divest to meet its obligation.[65] American courts may also impose a dissolution order by mandating, without an accompanying fine, the sale and distribution of all a company's assets to its shareholders. In New Zealand, s 318 of the Companies Act 1993 reserves the removal of a company director or the dissolution of a company to very limited circumstances.

59 Wray, above n 58, at 2035.
60 At 2032.
61 Coffee, above n 23, at 393.
62 Clough and Mulhern, above n 25, at ch 5.
63 Coffee, above n 23, at 452.
64 Australian Law Reform Commission, above n 46, at 360.
65 United States Sentencing Commission *Guidelines Manual 2021* (§3E1.1, November 2021) at 509.

For a corporate entity, dissolution is the equivalent of "capital punishment".[66] Most jurisdictions do not offer dissolution as a sentencing option. Where they do, courts seldom impose dissolution orders. The rarity of dissolution orders is a consequence of their unpopularity amongst academics. Coffee vocally dissents against their use, arguing that:[67]

> Dissolution and similar remedies are too extreme to be taken seriously, and seem patently absurd once we realize that most corporations sooner or later will be convicted of a nontrivial crime.

However, dissolution orders are the most severe penalty a corporate entity can face, comparable only to lengthy prison sentences or capital punishment for natural persons.[68] Coffee contends that "most corporations … will be convicted of a nontrivial crime".[69] Coffee's contention is almost certainly true; however, Coffee falsely equates "nontrivial crime" as a broad category of moderately serious to serious corporate crime, with the most grave crimes a corporation can commit. The law must reserve dissolution for the most extreme corruption offences.

Dianne Amann describes the trade in diamond and arms from Liberia as "vital pillars of support for rebel forces in Sierra Leone", where "shadowy companies" run mines and employ private security firms to repel government control efforts.[70] Upon illustrating the relationship between these companies and diamond markets in Beirut, Antwerp and New York, and arms dealers in Eastern Europe and Libya, she argues that their behaviour can "only be characterized as criminal".[71]

There is precedent for finding that a corporation is so entrenched in crime that it amounts to a criminal organisation. Andrew Clapham points to the findings of the 1945–1946 International Military Tribunal in Nuremberg, which concluded that various companies were inseparable from the Nazi regime and were thus criminal organisations.[72] Where a firm has actively and persistently circumvented the law, causing significant damage to societal safety, political processes or public trust, dissolution is the only appropriate response. Examples include circumvention of the law to undermine political stability, illegally selling weapons or resources, systematic money laundering for criminal syndicates or severe human rights violations.

The author of this article may be the first to suggest that in addition to these crimes New Zealand courts should have the power to sentence companies who commit grave corruption and bribery offences to dissolution. This power would extend to crimes committed by New Zealand companies overseas or any company operating within New Zealand's borders. Persistent criminal corruption and the systematic bribery of high-level public officials severely damage societal stability. Short of dissolution, no fine or asset divestment can effectively punish and deter such crimes. Corporations must face sanctions that befit the societal harm they cause.

66 Australian Law Reform Commission, above n 46, at 218.
67 Coffee, above n 23, at 449–450.
68 Australian Law Reform Commission, above n 46, at 360.
69 Coffee, above n 23, at 450.
70 Diane Marie Amann "Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights" (2001) 24 Hastings Int'l & Comp L Rev 327 at 331–332.
71 At 331.
72 At 331.

The ALRC recommended dissolution orders become available to Australian courts.[73] However, in submissions to the ALRC, the Australian Institute of Company Directors stated that "it is unnecessary to introduce additional court powers to dissolve a corporation [given the court can] … disqualify those involved in managing the corporation".[74] These submissions neglect the systematic nature of the most serious corporate crimes. A single director or manager does not simply decide to undermine a country's stability. Such a task requires a concerted effort across multiple levels of the organisation. The organised and persistent nature of this type of severe corporate wrongdoing represents widespread organisational culpability and the attribution of moral guilt across numerous levels of management. This degree of knowledge and intent, which such corporate defendants would satisfy, must invoke the strictest penal standards.[75]

Furthermore, as a function of the expressive theory discussed earlier, the law must impose a sentence that expresses the appropriate degree of moral condemnation these crimes deserve. Dissolution is the only sentencing option that sufficiently expresses the requisite societal condemnation of this offending, irrespective of whether proponents of the offending have faced prosecution at the individual level.

Dissolution orders damage third parties. Bankruptcy, layoffs and closing plants and offices will injure staff, shareholders and creditors' interests. Coffee describes these consequences as potentially "more harmful than the crime".[76] As such, in their application, a court should be satisfied dissolution is the only appropriate sentence available and that it is just regarding all relevant circumstances. Such a balancing exercise is little different to the one that courts must undertake when they seek to give effect to the sentencing purposes during the sentencing of a natural person.[77]

Furthermore, the threat of a dissolution order will effectively deter offending of this grave nature and incentivise shareholders to exercise greater oversight of directors. Shareholders will thus remove directors willing to engage in illegal conduct, given the increased risk they pose to the corporation. Directors facing this pressure from shareholders will, in turn, be quicker to dismiss staff who indicate a willingness to commit crimes. Despite the adverse effects of dissolution on third parties and the market, it will be the only sentence appropriate to sufficiently punish, denounce and deter the most serious instances of corruption and bribery in certain circumstances. Justin Davidson provides an excellent summary of this point:[78]

> … the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity.

73 Australian Law Reform Commission, above n 46, at 360.
74 At 360.
75 Amann, above n 70, at 336.
76 Coffee, above n 23, at 408.
77 Sentencing Act, s 16(2)(b).
78 Justin M Davidson "Polluting Without Consequence: How BP and Other Large Government Contractors Evade Suspension and Debarment for Environmental Crime and Misconduct" (2011) 29 Pace Envtl L Rev 257 at 285.

C *Debarment*

For some companies, government contracts represent significant portions of revenue. As such, these corporations often maintain close ties with governmental agencies tasked with procurement. Unfortunately, with the quantum of money often at stake and the close personal relations between actors, these relationships carry a higher risk of corruption. New Zealand currently sports a decentralised procurement regime where individual government agencies execute procurements.[79] However, the Ministry of Business, Innovation & Employment (MBIE) sets the *Government Procurement Rules: Rules for sustainable and inclusive procurement*, which all public service departments must follow.[80] Rule 44 allows agencies to "exclude a supplier from participating in a contract opportunity if there is a good reason for exclusion."[81] Rule 44 lists numerous sufficiently "good" reasons, including having "a conviction for a serious crime or offence".[82] The commentary MBIE provides alongside r 44 describes a "serious crime or offence" as including "a conviction for foreign bribery".[83]

These rules are inadequate. Despite governmental agencies' discretionary decision-making capabilities, there is no requirement for "tenderers to make a declaration that they have not been convicted of a serious crime or offence, including foreign bribery".[84] There is also no requirement for an agency to verify the criminal record of a tenderer or whether the debarment registers of any "multilateral developments banks or the NZP list of Designated Individuals and Organisations" currently list the tenderer.[85] Furthermore, MBIE does not periodically review tenderer exclusions or maintain relevant statistics. As a result, the lead examiners of New Zealand's stage three implementation of the *OECD Anti-Bribery Convention Report* called on the government to issue guidance to relevant agencies to ensure "rules on exclusion from public procurement, due to foreign bribery, is effectively implemented in practice".[86]

Allowing a corporation previously convicted of corruption or bribery (within a reasonable statute of limitation) to receive and perform state contracts undermines public trust in the procurement process's integrity, transparency and fairness. Article 9 of UNCAC reflects this reality, requiring that signatories "take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective at, inter alia, preventing corruption". Though art 9 is by nature preventative, increasing the severity of sanctions available for corruption and bribery at sentencing will contribute to the overall deterrence of corporate crime.[87] Susan Rose-Ackerman points out that bribery is deterred if at least one side of the corrupt transaction faces penalties exceeding its expected gains.[88]

Many foreign governments and international institutions have developed debarment regimes. The World Bank's scheme can "exclude contractors that have committed certain

79 Ministry of Business, Innovation & Employment *Government Procurement Rules: Rules for sustainable and inclusive procurement* (June 2019) at 3–6.
80 At 18: referring to Rule 6.
81 At 55: referring to Rule 44.
82 At 55: referring to Rule 44(1)(d).
83 At 55.
84 *OECD Anti-Bribery Convention Report*, above n 11, at [141].
85 At [141].
86 OECD *New Zealand: Follow-up to the Phase 3 Report & Recommendations* (March 2016) at [5].
87 Susan Rose-Ackerman "Corruption and the Criminal Law" (2002) 2(1) Forum on Crime and Society 3 at 6–9.
88 At 6–7.

types of wrongs (like bribery or fraud)", and the United States' system can "exclude contractors that pose unacceptable performance or reputational risks because of bad acts or broken internal controls".[89] Similar arrangements also exist in Canada and the European Union.[90] Alix Town asserts that "a debarment system enhances the transparency … of the overarching procurement system [and] … is particularly important for procurement regimes attempting to improve the perception of corruption within their … systems".[91] Developing a debarment regime in New Zealand would contribute to effectively deterring firms interested in securing government contracts from engaging in corruption.[92]

Legislators in almost all jurisdictions that operate debarment regimes have opted to preserve state discretion throughout the procurement process despite the regime's existence. This band of discretion is unlikely to be narrowed due to procurement's sensitive economic, security and political nature,[93] leaving the formation of an automatic international debarment regime, where debarment in one country leads to debarment in others, politically untenable.[94] In the absence of such a regime, public registration and the sharing of information to allow procurement bodies to make informed decisions would be a positive addition to the global corruption fight.[95] Christopher Yukins advocates for an:[96]

> … approach … which ensure[s] that debarments are fully publicized, … [so] that officials in other nations [have] due notice of debarments, … [while leaving] those officials with flexibility and discretion in addressing a foreign blacklist.

The author of this article agrees with Yukins and proposes the creation of a register to which, upon conviction for corruption or bribery offences, a court would add a corporation. Officials may remove a company from this register if it demonstrates it has rectified the failures that led to its conviction. Upon registration, it would be the prerogative of governmental agencies to decide whether to contract with such firms, with a strong legislatively prescribed presumption against doing so, unless officials find that the public interest outweighs the risk of undermining public trust and confidence.

Such a register will be consistent with art 13 of the UNCAC, which requires signatories improve the transparency of decision-making processes to the public.[97] This approach recognises and effectively balances the tension between debarment as a court-imposed penalty and the government's administrative autonomy. Too sweeping an interference by the judiciary on the state's procurement processes would represent an encroachment on executive prerogative.

One of lawmakers' primary concerns in jurisdictions that operate debarment regimes is balancing the need to deter corruption and other crimes against the value of protecting

89 Christopher R Yukins "Cross-Debarment: A Stakeholder Analysis" (2013) 45 The Geo Wash Int'l L Rev 219 at 219–220.
90 Australian Law Reform Commission, above n 46, at 362.
91 Alix K Town "Ours is to Reason Why: Exploring Motivating Principles for Debarment Systems" (2021) 50 Public Contract Law Journal 523 at 525.
92 Emmanuelle Auriol and Tina Søreide "An economic analysis of debarment" (2017) 50 International Review of Law and Economics 36 at 36.
93 Yukins, above n 89, at 227.
94 At 230.
95 At 233–234.
96 At 233–234.
97 UNCAC, art 13(1)(a).

market competition.[98] In small countries like New Zealand, capital-intensive industries often have limited competition. Infrastructure and utility projects often have few tenderers, and given the degree of market consolidation in some sectors, "open tenders [in New Zealand] are the exception not the rule".[99] Emmanuelle Auriol and Tina Søreide note that:[100]

> Excluding a competitor leads to reduced competition, and this in turn may result in higher prices or lower quality, quite the opposite of what procurement rules are supposed to deliver.

As a matter of economic reality, the ability of the state to procure goods and services at competitive prices is essential. Even though the government may continue to contract with the company out of necessity, registration will still bring consequences to the offender. Domestically, registration may signal to potential competitors that if they were to tender for contracts, the tendering agency would prefer them over the registered company. A register may also prompt other firms to remove the offending corporation from their supply chain, prompt customers to seek alternatives or lead to divestment by KiwiSaver funds concerned with ethical investment. It may also cause the relevant government agency to impose more stringent conditions or oversight on the corporation throughout the contracting process. A company's registered status may also limit foreign governments' interest in contracting with it. Such ramifications will help fulfil the sentencing purposes of deterrence and punishment despite continued government contracting.

Furthermore, one must not ignore the potential rehabilitative effects of debarment on corporations. The possibility of an agency removing a company from the debarment register if it demonstrates it has rectified the failures that caused its offending would incentivise firms to undertake internal reforms. The European Union takes this approach, which Hans-Joachim Priess, a German procurement law expert, states improves market competition.[101] Similarly, Town considers that "a reform-based debarment system provides the government with greater flexibility in managing its contractors".[102] For firms that rely heavily on government contracts, deregistration will act as a powerful catalyst for internal change.

Matthew Stephenson, a critic of debarment, argues "that the collateral consequences of debarment … include the potentially devastating effects on a corporation [and third parties]".[103] Registration will impact shareholders, employees, managers, and directors of companies, as well as their customers and suppliers, many of whom can be considered innocent third parties. However, where a corporation's management or shareholders engaged in or were aware of the misconduct, and if they normalised that behaviour or

98 Auriol and Søreide, above n 92, at 24.

99 Nikki Mandow "Opaque, inefficient, unfair: Govt's $42b procurement regime report card" (12 May 2021) Newsroom <www.newsroom.co.nz>.

100 Auriol and Søreide, above n 92, at 37.

101 Hans-Joachim Priess "The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive" [2014] PPLR 112 at 121.

102 Town, above n 91, at 557.

103 Matthew C Stephenson "Beware blowback: how attempts to strengthen FCPA deterrence could narrow the statute's scope" in Jennifer Arlen (ed) *Research Handbook on Corporate Crime and Financial Misdealing* (Edward Elgar, Cheltenham, 2018) 175 at 190.

treated it as standard practice for a lengthy period, debarment should be considered a direct consequence of that misconduct.[104]

A corporate conviction reflects corporate fault, whether through a failure of prevention systems, toxic culture or active and systemic circumvention of the law. Because of this, the impact on third parties is an unfortunate reality of the fact corporate punishment must be sufficiently severe to deter offenders effectively. However, maximum registration periods or the removal of registration upon compliance with specified conditions may help limit the temporal dimension of third-party impact.

Auriol and Søreide concluded that debarment:[105]

> … will deter suppliers from offering bribes as long as the probability of corruption detection is not negligible and the bidders place a sufficiently high value on the profits from future public procurement contracts.

In sectors particularly vulnerable to public corruption, populated by corporations with large government contracts at stake, a debarment register is necessary to further deter and punish corporate bribery.

A more flexible sentencing regime that employs a broader range of sentencing mechanisms and considers rehabilitation where appropriate will more effectively generate long-term corporate behavioural change than fines alone.

V Improving Sentencing Outcomes

A *Deferred Prosecution Agreements*

A Deferred Prosecution Agreement (DPA) is an enforceable agreement between a defendant and the prosecution to suspend prosecution provided the defendant complies with specific conditions. DPAs are not available for corporations in New Zealand despite being used in jurisdictions such as the United States, the United Kingdom, Canada and France.[106] This article will describe the benefits of DPAs before critically analysing and assessing the value of the DPA regimes in the United States and the United Kingdom.

According to Lanny Breuer, a former United States Assistant Attorney General for the Criminal Division:[107]

> DPAs have had a truly transformative effect … on corporate culture across the globe … [resulting in] unequivocally … far greater accountability for corporate wrongdoing … and a sea of change in corporate compliance efforts.

DPAs have three primary functions in the corporate context: to promote self-reporting, to catalyse organisational transformation, and to reduce costs associated with proceedings.

104 Davidson, above n 78, at 285–286 .
105 Auriol and Søreide, above n 92, at 45.
106 Australian Law Reform Commission, above n 46 at 494.
107 Lanny A Breuer, United States Assistant Attorney General for the Criminal Division "Deferred Prosecution Agreements" (speech to the New York City Bar Association, New York, 13 September 2012).

First, "self-reporting", in this context, is a complete and voluntary disclosure of wrongdoing.[108] DPAs incentivise offenders to self-report as they will likely receive a minor penalty in exchange for comprehensive cooperation. DPAs thus increase the number of corporate wrongdoers that face sanctions. Qingxiu Bu describes DPAs as "a sword over the [entity's] head" because prosecution will ensue if the corporation breaches its cooperation or disclosure obligations.[109] Hence, DPAs lead to greater corporate accountability as they empower the law to identify and punish more corporate crimes. In fact, prosecutors would likely never determine a material proportion of corporate crime without the DPA self-reporting incentive.[110] Additionally, corporate convictions often severely impact innocent staff, customers, suppliers, creditors and, if the company is large enough, the broader market.[111] Thus, the smaller penalties firms face when they self-report offending to enter a DPA "not only allays a financial burden but also ensures that innocent parties are not unduly punished".[112]

Second, DPAs provide an enforceable mechanism through which to introduce organisational reform. DPAs require that corporations establish effective compliance programmes as part of any agreement.[113] The imposition of corporate compliance programmes, staff training and the dismissal of culpable staff improves regulatory compliance and reduces the risk of recidivism.[114] By leveraging the rehabilitative characteristics of DPAs, regulators can reduce the likelihood of recidivism and enhance the corporate culture within firms and the broader market, contributing to the sentencing purpose of rehabilitation.

Third, prosecuting corporate crime is time-consuming and costly to the state and the offender. Hence, prosecutors and firms save significant time and money by using DPAs.[115] However, these savings are limited if authorities need to undertake a substantial investigation before concluding a DPA.[116] There is also the less quantifiable, but still significant, benefit to both parties of avoiding the uncertainty in the outcome of a criminal trial.[117]

(1) A comparative analysis

Before exploring the strengths of foreign DPA regimes, this article will consider the criticisms academics have levelled at them. David Uhlmann believes DPAs are inconsistent in their application and uncertain in their purpose.[118] First, he takes issue with

108 Rita Cheung "Deferred Prosecution Agreements: Cooperation and Confession" (2018) 77 CLJ 12 at 13.
109 Qingxiu Bu "The Viability of Deferred Prosecution Agreements (DPAs) in the UK: The Impact on Global Anti-Bribery Compliance" (2021) 22 EBOR 173 at 178.
110 Jacqueline L Bonneau "Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement" (2011) 49 Colum J Transnat'l L 365 at 410.
111 Bu, above n 109, at 175–177 .
112 At 178.
113 Nick Werle "Prosecuting Corporate Crime when Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review" (2019) 128 Yale LJ 1366 at 1438.
114 Bu, above n 109, at 179.
115 David M Uhlmann "Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability" (2013) 72 Md L Rev 1295 at 1303.
116 House of Lords Select Committee on the Bribery Act 2010 *The Bribery Act 2010: post-legislative scrutiny* (HL Paper 303, 14 March 2019) at [327].
117 Bu, above n 109, at 179.
118 Uhlmann, above n 115, at 1315 and 1331–1333.

inconsistencies in their application across different governmental enforcement bodies.[119] While DPAs enjoy frequent and consistent use by the Criminal Division of the United States Justice Department, they are less popular in others, such as the Environment and Natural Resources Division and the Antitrust Division.[120] He considers the proliferation of their use in the Criminal Division specifically to be "a disturbing trend where corporations avoid criminal charges".[121]

Brandon Garrett notes that agencies do not offer DPAs equally across corporations and more frequently offer them to large domestic companies,[122] thus bringing into question the degree to which agencies uphold equality under the law. Uhlmann also expresses concern about agencies' unequal offering of DPA, arguing that the Justice Department is failing to meet its fundamental obligation to enforce the law even-handedly, analogising the corporate situation with that faced by wealthy criminal defendants, who experience better criminal justice outcomes than their poorer peers.[123]

Uhlmann also criticises the apparent uncertainty in the purpose of DPAs.[124] He notes that before 2001, prosecutors rarely used DPAs and that this changed following the 2002 collapse of Anderson, an accounting giant embroiled in the Enron scandal.[125] He asserts that the post-2001 proliferation of DPAs stems from the criticism the Justice Department received after causing Anderson's collapse through excessively severe penalties, leading to the loss of almost 20,000 jobs.[126] Uhlmann contends this desire to avoid "the collateral consequences of criminal convictions" led to the popularity of DPAs in the US.[127] However, while Uhlmann appreciates the value of avoiding excessive impacts on innocent third parties, he proposes that American prosecutors are pursuing DPAs because of limited resources and power imbalances in favour of corporations throughout the negotiating process.[128]

This power imbalance primarily results from the information asymmetries between corporations and prosecution teams. Gregory Gilchrist describes the difficulty in attributing intent to corporations.[129] He points to the Volkswagen emissions scandal and describes the decompartmentalised nature of the corporation and how almost all the coders, engineers, designers and analysts who contributed to the emissions-cheating vehicles would not have known the true purpose of their work.[130] Information within these organisations is opaque, and while this may be by design in some organisations and simply a symptom of their size or organisational structure in others, for prosecutors, the difficulty of retrieving internal information from corporations consistently hinders prosecution.[131]

Uhlmann contends that, in the United States, this informational asymmetry was one of the dominant motivators for the growth of DPA use in cases where third-party collateral

119 At 1301.
120 At 1301.
121 At 1301.
122 Garrett, above n 37, at 854–859.
123 Uhlmann, above n 115, at 1327.
124 At 1331–1336.
125 At 1310.
126 At 1311.
127 At 1312.
128 At 1324.
129 Gregory M Gilchrist "Accountability Lost and the Problem(s) of Asymmetry" (2019) 50 Loy U Chi LJ 599 at 604–605.
130 At 604–605.
131 At 605.

consequences could not be considered a concern.[132] He observes that to gain access to this information, the Department of Justice aimed to "obtain privilege waivers through deferred prosecution and non-prosecution agreements", adding that this was the logical explanation for their growing use.[133]

As DPA growth has continued over the last decade in the United States, American corporations have been increasingly able to avoid some of the consequences of a criminal conviction. These mitigated consequences include receiving smaller financial penalties, the absence of admissions of guilt, less strenuous probationary conditions, and removing the criminal law's denunciatory power through the lack of a criminal conviction.[134] Uhlmann also flags the inability to express, as a function of the criminal law, the offender's conduct as being antisocial or contrary to collective community morality as being of particular concern.[135] He argues that less severe penalties, coupled with the absence of denunciation, prevent punishment and deterrence of criminal activity.[136]

However, these failings are symptomatic of structural inadequacies within the American DPA regime and are not attributable to flaws in the theoretical underpinnings of DPAs. The corporate DPA regime in the United States is not purpose-built. Instead, prosecutors originally developed it for use with natural persons. American prosecutors only began entering DPAs with corporations in the 1990s.[137] The United States does not have a statutory framework to govern prosecutors' use of DPAs. Instead, policy procedures, prior practice, and individual prosecutors' discretion govern their use of DPAs.[138]

The near complete absence of judicial oversight amplifies the negative effect of the lack of statutory guidance and excessive prosecutorial discretion.[139] As late as 2012, no court had ever rejected a DPA.[140]

While the issues with American DPAs may bring into question the value of DPAs more broadly, their use and effect in the United Kingdom is more encouraging. The United Kingdom had the advantage of observing the strengths and weaknesses of the American DPA regime before introducing its own in 2013. The Crime and Courts Act 2013 (UK) states the conditions British prosecutors may offer in DPAs and stipulates that prosecutors should offer them only in relation to a limited list of crimes.[141] The Act provides that any DPA penalty must be "broadly comparable" to that a court would impose on a convicted offender following a guilty plea.[142]

Unlike in the United States, only the Director of Public Prosecutions, the Serious Fraud Office Director or a prosecutor the Secretary of State authorises has the power to enter into a DPA with a firm in the United Kingdom unless the Secretary of State makes a specific order to the contrary.[143] Additionally, prosecutors must appear before a court in a closed

132 Uhlmann, above n 115, at 1322.
133 At 1322.
134 Uhlmann, above n 115.
135 At 1336.
136 At 1302 and 1336.
137 Alexander and Cohen, above n 39, at 9.
138 Simon Bronitt "Regulatory bargaining in the shadows of preventive justice: Deferred prosecution agreements" in Tamara Tulich and others (eds) *Regulating Preventive Justice* (Routledge, London, 2017) 211 at 212.
139 Garrett, above n 37, at 920–921.
140 At 893.
141 Crimes and Courts Act 2013 (UK), sch 17 pt 2.
142 Schedule 17 cl 5(4).
143 Schedule 17 cl 3(1).

hearing and demonstrate that the draft DPA is fair, reasonable, proportionate and likely to be in the best interests of justice, with the court's approval determining the agreement's validity.[144] Once prosecutors and the firm have finalised the DPA, the prosecutor must repeat this process, with a court required to find the deal is, in fact, in the best interest of justice.[145] If the court approves the DPA, "it must do so, and give its reasons, in open court"—in the interest of transparency.[146] The statutory requirement that the same judge preside over all DPA applications and guide the prosecution throughout the process helps ensure consistency and coherency across the regime.

Allowing the Director of Prosecutions and the SFO to be, in practice, the only entities capable of offering DPAs puts their use in the hands of specialist bodies. The judicial oversight, procedural transparency and statutory guidance concerning process and sanction create a regime that addresses many of the flaws of the American system.[147]

British prosecutors have entered DPAs sparingly, only agreeing to nine since Parliament made them available to prosecutors in 2014.[148] The United States, by comparison, has averaged over 20 DPAs per year over the same period.[149] As previously discussed, one of the criticisms of the American regime is that the proliferation of DPAs dilutes the punitive force of the criminal law. The more restrained approach in the United Kingdom, paired with the fact that a limited number of British prosecutors can enter DPAs, allows for more targeted use of the agreements where it is in the public interest. As a result, the limited number of DPAs agreed upon has been received favourably in the United Kingdom, which PwC describes as a "positive development".[150]

Of the nine DPAs British prosecutors have entered, only one has received significant criticism. *Serious Fraud Office v Rolls-Royce*, the United Kingdom's largest foreign bribery case, concerned persistent bribery by executives across three decades, multiple business divisions, and seven countries to secure contracts for Rolls-Royce.[151] Academics criticised the nearly £500 million penalty Sir Brian Leveson P approved as it was closer to a half discount than the one-third that would typically accompany a guilty plea, as sch 17 cl 5(4) requires.[152] Sir Brian Leveson P's decision raised concerns that he gave excessive weight to the economic and strategic significance of Rolls-Royce to the United Kingdom. Rita Cheung argues there was little evidence for this and that Leveson P's decision to order a penalty towards the lower end of the penalty range was to ensure it was proportionate to the criminality.[153] She points out that although Leveson P allowed a discounted penalty, it remains the largest for bribery ever ordered in the United Kingdom and far outweighed the commercial gains Rolls-Royce obtained through its corruption. However, a company's national economic significance and subsequent interaction with a DPA warrants discussion.

Article 5 of the OECD Anti-Bribery Convention is essential to the global fight against bribery because it requires that states prosecute companies irrespective of, among other

144 Schedule 17 cl 7.
145 Schedule 17 cl 8.
146 Schedule 17 cl 8(6).
147 *Serious Fraud Office v Standard Bank Plc* [2016] Lloyd's Rep FC 102 (Crown Ct) at [2].
148 Josie Welland "Deferred Prosecution Agreements: A Comparison of the US and UK" (15 January 2021) Chambers and Partners <https://chambers.com>.
149 Welland, above n 148.
150 House of Lords Select Committee on the Bribery Act 2010, above n 116, at [327].
151 *Serious Fraud Office v Rolls-Royce Plc* [2017] Lloyd's Rep FC 249 (Crown Ct).
152 Cheung, above n 108, at 15.
153 At 14.

things, the national economic interest of the prosecuting state. As a provision, it is the international corporate law equivalent of "all persons must be treated equally under the law". The British DPA code of practice requires judicial assessment of a DPA's likely effect on employees, shareholders, stakeholders or institutional pension funds invested in the company.[154] This requirement creates tension between British prosecutors' responsibility to treat companies equally under art 5 of the OECD Anti-Bribery Convention and their obligation to consider the public interest under the British DPA code. Clearly, a decision not to prosecute a large corporation because they are supposedly too important to damage violates art 5. However, prosecutors must view art 5 pragmatically. Its purpose is to ensure courts hold practitioners of corruption and bribery to account under all circumstances. Though Rolls-Royce avoided prosecution, it was subject to record fines, record disgorgements of profits, the removal of culpable staff, the imposition of compliance regimes, the loss of overseas contracts and a proliferation of negative publicity. This article finds it difficult to view such penalties as not proportionate to Rolls-Royce's offending.

Additionally, critics of the *Rolls-Royce* decision and DPAs more generally often focus too heavily on their punitive elements. If DPAs solely acted to reduce penalty sizes or severity, they would significantly undermine deterrence and public trust in the administration of justice.[155] However, while DPAs' punitive force must be sufficient to achieve specific and general deterrence, it is DPAs' rehabilitative and preventative force that makes them an attractive proposition to regulators.[156]

Monitors supervise all ten currently authorised British DPAs, including conditions that mandate the implementation of compliance programmes, which the monitors report to the court at the corporation's cost.[157] These programmes are formulated by experts to promote lasting structural and cultural organisational reforms and to allow regulators to reduce the likelihood of recidivism.[158] By contributing to the sentencing purpose of rehabilitation, DPAs can help regulators achieve long-term regulatory compliance for the betterment of both the offender and the marketplace, more generally. Somewhat less severe sanctions are a pragmatic compromise to accomplish these ends.

DPAs, in the British context, have also allowed prosecutors to identify and pursue individuals within corporations for corruption and bribery. In *Serious Fraud Office v Sarclad Ltd*,[159] Serious *Fraud Office v Tesco Ltd*,[160] and *Serious Fraud Office v XYZ Ltd*,[161] multiple individuals faced criminal charges in relation to wrongdoing in their professional capacities at those companies. These cases have likely put the British private sector on notice that prosecutors will pursue individuals using information collected both in DPA negotiations and from resulting ongoing disclosure and cooperation obligations. Given the practical incentives for corporations to pursue DPAs, they should act as a strong deterrent against individual circumvention of the law within a corporate context.

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154 United Kingdom Serious Fraud Office and Crown Prosecution Service *Deferred Prosecution Agreements Code of Practice: Crime and Courts Act 2013* (11 February 2014) at [2.8.2].

155 Jennifer Arlen *The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the US* (New York University School of Law, July 2019) at 2.

156 Garrett, above n 37, at 886–891.

157 United Kingdom Serious Fraud Office "Deferred Prosecution Agreements" (2023) <www.sfo.gov.uk>.

158 At [7.15].

159 *Serious Fraud Office v Sarclad Ltd* Crown Ct Southwark U20150856, 11 July 2016.

160 *Serious Fraud Office v Tesco Stores Ltd* [2019] Lloyd's Rep FC 283 (Crown Ct).

161 *Serious Fraud Office v XZY Ltd and others* [2018] EWHC 865.

However, one failure of the British DPA regime is more difficult to reconcile. As previously discussed, one of the tenets of DPAs is that they incentivise self-reporting. In fact, all cases before *Rolls-Royce* had stressed that self-reporting was a precondition for receiving a DPA. Yet *Rolls-Royce* departed from this precedent with Sir Brian Leveson P authorising the DPA without Rolls-Royce having reported its misconduct.[162] Leveson cited the company's "extraordinary cooperation" as justification for the agreement.[163] However, if self-reporting is not compulsory to obtain a DPA, corporations will not self-report; instead, they opt to provide maximum cooperation upon identification of their criminality by regulators. Such a result would lead to continued difficulties in identifying corporate crime and undermine one of the regime's primary purposes.

The equivalence of self-reporting and cooperation by Sir Brian Leveson P also neglects that the DPA Code of Practice clearly describes cooperation as including self-reporting (however, this is not explicit in the legislation).[164] However, before criticising the regime itself, it must be recognised that not requiring self-reporting was contrary to precedent and inconsistent with the DPA Code of Practice. The decision in *Serious Fraud Office v Serco Geografix* is reassuring. In the decision that followed *Rolls-Royce*, Davis J reaffirmed the original position on self-reporting.[165] Therefore, Sir Brian Leveson P's judgment in *Rolls-Royce* is more of a judicial miscalculation than a defect in the DPA regime.

Any law, provision or programme is only effective when applied appropriately. Statutory oversight and legislative guidance are essential to ensure the appropriate application of a DPA regime. For these reasons, Canada and Australia have endorsed the British approach instead of the American one.[166] Canada has drawn upon the success of the British regime while possibly noting Sir Brian Leveson P's self-reporting discrepancy. While Canadian DPA agreements also require a judge to be satisfied with their public benefit, unlike the British provisions, s 715.31 of the Canadian Criminal Code RSC 1985 c C-46 codifies the purpose of DPAs to provide greater clarity. These objectives include incentivising voluntary disclosures, denouncing wrongdoing, ensuring accountability, promoting corrective measures and providing reparations for victims.[167] Notably, these purposes do not include protecting national economic interests or protecting corporations of strategic importance.

Therefore, while its drafters modelled the Canadian regime off the United Kingdom's, Canadian lawmakers have made improvements in some areas. However, because Canadian prosecutors have yet to enter a DPA, this article has no Canadian DPAs to evaluate. Similarly, the ALRC has recommended that Australia adopt a United Kingdom-style DPA regime, though, as Australia has yet to implement it, this article cannot assess it.

In summary, criticisms of DPAs can be nullified by carefully constructing their enabling frameworks. While there are punitive elements to DPAs, they are not merely instruments of punishment. Prosecutors should enter and implement them where negotiated terms reflect the company's culpability. DPAs are tools that promote cooperation through penalty mitigation and act as a method of rehabilitation and preventative justice. DPAs work to prevent future harm through education and monitoring and subsequently

162 Cheung, above n 108, at 13.
163 At 13.
164 United Kingdom Serious Fraud Office and Crown Prosecution Service, above n 154, at [2.8.1].
165 *Serious Fraud Office v Serco Geografix Ltd* [2019] Lloyd's Rep FC 519 (Crown Ct) at [47].
166 Australia Law Reform Commission *Corporate Criminal Responsibility: Discussion Paper* (Australian Government, ALRC Discussion Paper 87, November 2019) at 188–191.
167 Criminal Code RSC 1985 c C-46, s 715.31.

hold the potential to transform corporate cultures and structures to prevent corruption and bribery in ways that orthodox pecuniary penalties cannot.

If New Zealand implemented a DPA regime modelled on the success of the British model, New Zealand prosecutors would be able to more effectively identify and rehabilitate corporate criminals, avoid long, expensive and uncertain prosecutions, and provide certainty for corporations wishing to self-report.

B *Corporate pre-sentence reports*

A probation officer usually carries out a pre-sentence report to fulfil the requirements of an order by a judge.[168] They are essential when a court requires further information about the factors contributing to the offending, an offender's financial position, employment, family relationships or living conditions, to ensure a sentence is appropriate on a case-specific basis. Statute requires that a court order a pre-sentence report when considering imposing a custodial sentence.[169] The information helps the court identify what resources could help the offender avoid recidivism. These reports should be provided alongside victim impact statements to aid judges in better understanding a crime's impact on the victim and community.

In New Zealand, the Sentencing Act codifies pre-sentence rules. It provides that a court may only direct a probation officer to prepare a pre-sentence report for an offender convicted of an imprisonable offence.[170] As corporations are not imprisonable, courts cannot order pre-sentence reports upon their conviction. The same is true in Australia, and in 2020, the ALRC recommended that Australian courts be able to order pre-sentence reports for corporate offenders. The Commission justified such a power as being helpful to understanding:[171]

> … the financial circumstances of the corporation; the corporation's compliance culture; and what steps the corporation has taken to improve its internal controls, discipline relevant personnel, and compensate victims or repair harm caused by the offence.

A robust understanding of these factors is necessary to determine whether a sanction will likely be effective. Therefore, the inability of courts to order pre-sentence reports undermines the effectiveness of sentencing. Furthermore, the efficacy of the recommendations proposed in this article depends on the court's ability to understand the root causes of offending. Dissolution and probation orders require an in-depth assessment of all the factors contributing to the offending to determine whether rehabilitative measures are likely to succeed. The ALRC echoes this sentiment.[172]

Pre-sentence reports will be most effective where report writers receive information by encouraging maximum engagement from the corporate offender's executives. The reports must include thorough details about the corporation's compliance systems, culture, internal controls, personnel discipline and financial circumstances. Participation in the reporting process should be a condition for a corporation receiving a DPA. Similarly, judges should incorporate an absence of cooperation into the sentence they hand down because a lack of complete information would render the reporting process ineffective,

168 Sentencing Act, s 26.
169 Section 26A(1).
170 Section 26.
171 Australian Law Reform Commission, above n 46, at 366.
172 At 366.

as such information is critical for identifying the root causes of wrongdoing within a corporation.

Due to the informational complexity, particularly in large, sophisticated corporations, experts must make the relevant assessment of these factors.[173] The ALRC also recognised this need.[174] Depending on the relevant issues, an independent expert, likely a lawyer, consultant or organisational culture expert, should compile the report. This independent expert would report information to the court relevant to the sentencing orders it is considering.[175] Given the infrequency of such cases in New Zealand, this information will be particularly valuable in sentencing corporations convicted of corruption and bribery. Judges who may be inexperienced or unfamiliar with this type of offending will significantly benefit from professionally crafted reports.

Introducing corporate pre-sentence reports would also be a robust response to criticism that Judges may not have the skills to create effective corporate probation orders. Giving courts the power to order corporate pre-sentence reports would provide them with independently obtained information to improve their ability to assess matters relevant to the imposition of sentences—particularly non-monetary penalties.[176] Empowering the courts to approve DPAs would allow judges to develop a robust understanding of organisational structures, processes and culture beyond that currently available to a judge overseeing a corporate corruption case.[177]

The Australian Securities and Exchange Commission expressed concerns in submissions to the ALRC that the costs involved in acquiring pre-sentence reports may outweigh the benefits of pre-sentence reports, particularly if professional third-party assessors are to prepare the reports as the ALRC suggests they should.[178] While the preparation of pre-sentence reports will involve costs and delays, the power to order them would be discretionary, only to be used where the court must have further information before sentencing. Likewise, in circumstances where submissions by counsel provide sufficient information to make a pre-sentence report unnecessary, the court should not order one.

Additionally, the corporation bearing the cost of the pre-sentence report's creation is of little concern. Given that, at this stage, the court has already convicted the corporation of the offence, the cost of having the report prepared constitutes part of the overall monetary penalties ordered at sentencing. Sentencing judges must weigh the costs of creating these reports against the less quantifiable but equally significant societal benefits gained through the successful rehabilitation of some corporate offenders and the more stringent sentencing of others. The author of this article certainly believes judges should give weight to the latter.

In conclusion, corporate pre-sentence reports are a crucial tool that would aid New Zealand courts in imposing more effective non-monetary penalties.

173 At 429.
174 At 366.
175 Coffee, above n 23, at 429–430.
176 At 429.
177 Andrew Burke "Fairness, Justice and Repairing Environmental Harm; Reconciling the Reparative Approach to the Sentencing of Environmental Crimes with Sentencing Principles" (2018) 35 EPLJ 529 at 529.
178 Australian Law Reform Commission, above n 46, at 367.

VI Conclusion

The imposition of fines has a crucial normative function as a signal of public condemnation. However, Part II: Effective Sentencing, demonstrated that fines are not sufficiently effective in deterring or denouncing corporate corruption. As fines are the only sentencing option currently available to New Zealand courts for corporations that commit these crimes, the criminal justice regime is weak. To make New Zealand's sentencing regime more effective, Part IV: Proposed Non-Monetary Penalties, argued that probation orders, dissolution orders and debarment should be available to the Courts at sentencing. Part V: Improving Sentencing Outcomes argued that introducing deferred prosecution agreements and corporate pre-sentence reports will also contribute to more effective punishment, deterrence and rehabilitation of corporate offenders.

A flexible sentencing regime will generate long-term corporate behavioural change more effectively. Consequences for the most egregious cases must be severe; however, having a mixture of sentencing mechanisms will better equip the courts to respond to the idiosyncrasies of each case. The availability of rehabilitative sentences will help foster engagement from corporate offenders and help drive cultural reforms where the current sentencing regime, overrepresented by pecuniary penalties, cannot. If Parliament makes this article's recommendations law, New Zealand will enjoy a more robust sentencing regime, improving sentencing outcomes and more effectively deterring corporate bribery and corruption.