Justice and the Justice System: A Comparison of Tax Evasion and Welfare Fraud in Australasia

Lisa Marriott

ABSTRACT: This article investigates the extent to which conceptually similar financial offending (tax evasion and welfare fraud) is treated differently in the justice systems in New Zealand and Australia. Two junctures of the justice system are explored: prosecution and sentencing. The study finds that welfare fraud is significantly more likely to be prosecuted than tax evasion. In addition, prosecuted welfare fraud is likely to receive a harsher penalty than financially equivalent tax evasion.

A range of theoretical approaches are investigated in search of explanatory assistance into the different treatments of these financially equivalent offences. Specifically, theories of justice (Rawls and Walzer); punishment (retribution, deterrence and restitution); and social exchange theory are explored. Theories of justice and punishment provide little in the way of explanatory power into the different treatments of the two offences. Social exchange theory offers insights into differences in the offences (such as an absence of reciprocity) and differences in the offender (such as status and effort). However, as with the theories of justice and punishment, the differences in the offences and the offenders made visible by social exchange theory do not provide a robust explanation for the differences in the treatments of the offences in the justice system. Moreover, none of the theoretical frameworks investigated provide any justification for the different treatments observed. This inability to reconcile theory and practice leads to two possible conclusions: either the justice system does not meet the requirements of theories of justice and punishment or theories of justice and punishment are insufficient to explain practices in the justice system.

1. INTRODUCTION
This study investigates the extent to which tax evasion and welfare fraud are treated equally in the New Zealand and Australian justice systems. Two critical junctures of the justice system are explored: prosecution and sentencing. Prior research indicates that crime that is viewed as ‘blue-collar’, such as welfare fraud, is more likely to receive harsher treatment in the justice system. Data collected for, and analysed in, this research supports this finding. The article adopts a theoretical approach to attempt to provide an explanatory framework for these different treatments.

The offences of tax evasion and welfare fraud are conceptually similar: both are non-violent and financial in nature. Importantly, they have the same ‘victim’ (the government and society). One is the deliberate act of taking money from the state that one is not entitled to; the other is the deliberate act of not giving money to the state that one is obliged to. However, an important distinction is that serious cases of tax evasion are typically undertaken by individuals in privileged positions, while benefit fraud is typically undertaken by those less advantaged in society. Moreover, there is often a perception that tax offenders are ‘elite criminals’, with minimal stigma attached to tax evasion when compared to welfare fraud (Snider, 1982). Tax offending does not gain the same level of media attention, or generate similar levels of public outrage and social disapproval, as benefit fraud (Prenzler, 2011; Smith, Button, Johnston and Frimpong, 2011). Indeed, tax evasion is tolerated, and in some cases actively admired in a way that welfare fraud is

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generally not (Croall, 2001; Chunn and Gavigan, 2004; Marston and Walsh, 2008). This is despite the greater economic significance of tax collection.  

A society of equal citizens forms the basis of a civil society (Franklin, 1998:40). While justice does not require equal treatment of all individuals in all circumstances, the extent to which inequalities are acceptable needs to be justified. It is this component that the current study seeks to address. In exploring justice, this study investigates dominant concepts of justice and punishment, together with social exchange theory, in an attempt to explain the unequal treatment of individuals in the justice system. Specifically, Rawls’s and Walzer’s theories of justice are explored, together with the more commonly known ‘justifications’ for punishment: retribution, deterrence and restitution. Punishment theories are necessary to make visible society’s validation of why it may be desirable to treat individuals unequally in the justice system. The justice perspective is necessary to examine how well the practice of punishment meets the theory of justice. A third perspective, that of social exchange, is included to provide an alternative lens through which to analyse observed practice.

There is sufficient intersection between the theories of justice and theories of punishment that necessitates their joint inclusion in a study on punishment. Moreover, their intended connections in practice are evident in law; for example, the prosecution frameworks in New Zealand and Australia both discuss fairness in their opening sentences (Commonwealth Director of Public Prosecutions, 2008; Crown Law, 2010). However, a theory of justice must do more than exemplify perfectly just societies: it must incorporate ways of judging how injustice can be minimised and justice enhanced (Sen, 2009). This study attempts to fulfil both of these criteria by highlighting potential injustices in the ‘justice’ system and encouraging critical reflection on these practices.

The article commences in section two with a discussion on the differences in tax evasion and welfare fraud; both in their characteristics, treatments in the justice system, and public perceptions of each act. This is followed by section three, which provides data on the outcomes of sentencing and prosecutions for tax evasion and benefit fraud in New Zealand and Australia. Section four discusses the theoretical frameworks that are used for analytical purposes in section five. Section six concludes the article.

2. TAX EVASION AND WELFARE FRAUD
This section outlines the literature on the treatment of tax evasion and welfare fraud in the justice system. Much of this literature is discussed using the terminology of white- and blue-collar crime as some of the research investigates a range of offences and therefore a broader categorisation of the offending is necessary. For the purposes of this study, tax evasion may be considered as a white-collar offence, while welfare fraud may be considered as a blue-collar offence. The section also outlines prosecution process and policy in New Zealand and Australia before briefly discussing issues relating to sentencing.

2.1 Tax Evasion versus Welfare Fraud
For the purposes of this research, welfare fraud is defined as ‘those cases where customers deliberately claim money to which they are not entitled’ (Prenzer, 2011:2). The definition adopted for tax evasion is the deliberate non-payment of obligations to the tax authority. This broad definition of tax evasion incorporates situations where ‘people don’t report all of their income or they overstate their deductions’ ³ as well as capturing circumstances when taxes are deducted or charged (such as withholding taxes or goods and services tax) and not passed through to the tax authority. Thus, both welfare fraud and tax evasion are knowingly committed, with the primary difference that one is deliberately taking money from the government where there is no entitlement

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² New Zealand Treasury (2011) and Australian Government (2012). While tax revenue is the greatest source of government income, social security and welfare is the greatest single component of government expenditure. Welfare payments account for 31 per cent of New Zealand government spending, while tax revenue accounts for 90 per cent of government income.

to it, and the other is deliberately not giving money to the government when there is an obligation to do so.

Meier and Short propose that the impact of white-collar offending can be categorised in three ways: economic harm; physical harm; and damage to the social fabric (1982:39). Perhaps the easiest of these to measure is economic harm. Both tax evasion and welfare fraud are financial crimes and can be quantified by the extent of the funds either not provided to the government (in the case of tax evasion) or taken from the government without entitlement (in the case of welfare fraud). In addition, neither of these crimes results in any physical harm. However, both reduce the resources that the government has to provide services, therefore indirectly harming members of society, albeit in a non-physical manner. Potential damage to the social fabric is more difficult to identify and measure. A number of researchers have suggested that it is this component that is most significant. Over 70 years ago, Sutherland proposed that while the financial loss from white-collar crime is significant, it is ‘less important than the damage to social relations. White-collar crimes violate trust and therefore create distrust, which lowers social morale and produces social disorganization on a large scale’ (1940:5).

While Meier and Short’s framework provides a useful starting point for investigating the potential impact resulting from offending, a number of other important similarities and differences exist in tax evasion and welfare fraud. For example, tax offending is often facilitated by some form of knowledge, which makes the offending complex (Croall, 2001). Typically, serious tax evasion requires a sophisticated knowledge of the tax regime. In addition, tax offending requires financial resources to engage in the activity: in order to evade tax, the taxable income must be earned or the withholding tax deducted. Conversely, benefit fraud is typically committed by lower wealth individuals and often has an absence of the power that is typically attributed to white-collar offending (Leap, 2007).

Historically, white- and blue-collar crime has had class connotations. In Sutherland’s seminal article of 1940, he suggests that ‘respectable, or at least respected, business and professional’ people have had access to resources and power that has facilitated committing financial crime, something that is not available to ‘crime in the lower class, composed of persons of low socioeconomic status’ (Sutherland, 1940:1). This view, while contestable, remains today in much of the language that is used in relation to the two different offences. For example, Marston and Walsh suggest that those who evade tax are viewed by the public as ‘indulgent’ while those who engage in welfare fraud are perceived as ‘scroungers or cheats’ (2008:287). Cook (1989:11) similarly observes that society views ‘most welfare benefit claimants as wilfully idle, ‘undeserving’ and lacking in moral fibre. By contrast, taxpayers are represented as victims: victims of the idle poor (who are financed by the taxpayer) and victims of the state bureaucracy of taxation itself’.

2.2 Treatment in the Justice System
The previous sub-section identified a number of important similarities and differences in tax evasion and welfare fraud. A further difference in the offences is visible in their treatments in the justice system.

Research overwhelmingly indicates that white-collar offending is treated less harshly in the courts than blue-collar offending (Snider, 1982; Hudson, 1993; Poveda, 1994; Nelken, 1997; Croall, 2001; Gustafson, 2009). Studies also find that white-collar offenders receive more lenient sentences for their white-collar crimes; a practice that does not extend to blue-collar offenders committing white-collar crimes (Hagan, Nagel and Albonetti, 1980). Hagan, Nagel and Albonetti’s study observes a general tendency for white-collar crimes to result in lighter sentences than ‘common crimes’ and common crimes of common criminals to result in the most severe sentences (1980:809). This last finding corresponds with the view that individuals with a higher social status are treated less harshly in the justice system than those of a lower social status (Weisburd, Wheeler, Waring and Bode, 1991; Hudson, 1993; Nelken, 1997) or may avoid prosecution altogether (Sutherland, 1949). Marston and Walsh (2008:292) report that case law in Australia indicates that ‘a sentence of imprisonment is generally considered to be the starting point by the courts in social security fraud cases’ (Marston and Walsh, 2008:292). This is despite the fact that financial
offending undertaken by the wealthy is ‘often much greater than that of common criminals’ (Weisburd, Wheeler, Waring and Bode, 1991:7). Research by Weisburd, Wheeler, Waring and Bode investigates a range of white-collar offending including securities fraud, false claims, mail fraud, credit fraud and bank embezzlement, as well as tax fraud. The findings show that ‘when our common criminals are sentenced to prison they get longer sentences than the white-collar offenders’ (1991:130) and conclude that with reference to ‘common criminals’ that ‘we suspect that they would benefit greatly if white collar crime sentencing criteria were applied to them’ (1991:163).

There are few examples of research that provides conflicting results to those previously discussed. One example is research by Wheeler, Weisburd and Bode (1982), which finds that ‘the probability of imprisonment rises with the occupational status of the defendant’ (1982:641). However, by 1991 the authors were producing research that concurred with the generally accepted view that white-collar offending was treated more leniently in the justice system, as outlined in the previous paragraph.

Not only do stronger sentences appear to result from blue-collar offending, there are considerably greater resources involved in the investigation and prosecution of welfare fraud. Henman and Marston (2008) observe that the majority of public resources for fraud against the state in Australia are in pursing cases of welfare fraud. This is despite the relatively small amounts of welfare fraud offending that take place.

2.3 Perceptions of Offending

There appears to be a general acceptance among society that tax evasion is somewhat of a lesser offence than other financially equivalent crimes. Research indicates that individuals view white-collar crime and specifically tax offending as less serious than other offences involving similar financial amounts (Cullen, Link and Polanzi, 1982; Australian Institute of Criminology, 1986; McIntosh and Veal, 2001; Karlinsky, Burton and Blanthorne, 2004; Gupta, 2006; Smith, Button, Johnston and Frimpong, 2011). Meanwhile white-collar crime is often viewed as not ‘really criminal’ (Croall, 2001:127). Indeed, the title of Sutherland’s seminal article in 1944 questions whether white-collar crime is in fact crime: Is “White-Collar Crime” Crime? (Sutherland, 1944).

A number of studies have taken place where individuals are asked to rank different types of offences. These studies indicate that the public are generally less concerned about taxation frauds than they are about benefit fraud (Marston and Walsh, 2008; Smith, Button, Johnston and Frimpong, 2011) and that tax evasion is considered as less serious than other forms of financial fraud. For example, a study by the Australian Institute of Criminology (1986) includes social security fraud, income tax evasion and Medicare fraud as financial fraud categories. Social security fraud was considered significantly more serious than tax evasion or Medicare fraud in this study; despite that the amount of money obtained in the scenario was only 20 per cent of that in the tax and Medicare examples. Further studies have asked individuals to provide a ranking of different types of crime in order of seriousness. Gupta (2006) uses this approach in her study in New Zealand, which ranks welfare fraud 8th in seriousness, while accounting fraud is 9th, insurance fraud is 11th and tax evasion is 12th – just ahead of running a red traffic light at 13th. However, Gupta’s study replicates that of Karlinsky, Burton and Blanthorne (2004), which uses similar categorisations of offences, but ranks accounting fraud as 8th most serious, with welfare fraud and tax evasion ranked equally 10th. The study by Karlinsky, Burton and Blanthorne is situated in the United States of America, and occurred when Enron and other similar cases were still like to be topical in this jurisdiction, which may account for the high ranking of accounting fraud. The similar perceptions of welfare fraud and tax evasion are at odds with most other studies that find significant differences in perceptions of seriousness of these offences.

A high level of public tolerance of tax evasion is also visible (Bright, 1978). This view appears to extend beyond the practices of tax evasion and welfare fraud, into welfare receipt in general. There are numerous examples of the demonization of welfare recipients. Bright (1978) observes the backlash of society’s reaction ‘against the hedonistic transgressions of the unemployed’, noting that welfare recipients are ‘presented as parasites demanding social security while making no
contribution to the economy’ (1978:161). Meanwhile, tax evasion is thought of as ‘elite crime or crimes of the powerful’ (Croall, 2011:11).

There is some indication of a social consensus on the relative seriousness of crimes, which correlates to the average sentences imposed by the New Zealand courts (Davis and Kemp, 1994), suggesting that sentences given to offences reflect the views of society. This is supported by research that questions whether ‘the judges were merely reproducing (unconsciously or deliberately) the biases of the wider population’ when differences are found in sentencing decisions of white- and blue-collar offending (Nelkin, 1997:916). This view is supported by others, such as the Australian Institute of Criminology (1986:2) who suggest that it has been ‘judicial or political perceptions of the public mood in relation to crime and punishment that exerted a far greater influence on policy than public opinion itself’.

2.4 Perceptions of Offenders
The manner in which those who commit welfare fraud are constructed in the media and by politicians supports, and potentially exacerbates, the view that welfare fraud is more serious than other financial offences, such as tax evasion. Marston and Walsh (2008) examine the extent of welfare fraud in Australia, and the sentencing outcomes in a sample of prosecuted cases. Marston and Walsh report that ‘the characteristics of those prosecuted for social security fraud challenge the media driven stereotype of the organised criminal willingly defrauding the government for large sums of money’ (2008:285).

The media are a strong influencing factor on the public image of welfare fraud. In the Australian context, Marston and Walsh (2008:285) make the observation that ‘judging from the amount of media attention that attaches to the issue of social security benefit fraud in Australia, one could be forgiven for thinking that the incidence of deliberate social security benefit fraud is at epidemic proportions in Australia, and that the culprits are street-smart, savvy criminals’. The authors conclude that individuals who are prosecuted for welfare fraud have a high conviction rate, while the offending is of relatively small value (Marston and Walsh, 2008). Moreover, the drivers for the offending are deeper than the media portrayal of ‘welfare cheats’.

Gustafson (2009:646) observes the tendency for toughness on welfare recipients who do not comply with welfare rules, writing: ‘policing the poor and protecting taxpayer dollars from misuse have taken priority over providing for the poor’. Gustafson continues to note that considerable resources are invested in the United States of America in regulating the behaviour of those on benefit frauds, despite a lack of evidence to demonstrate the value of such exercises. Similar observations are made by Chunn and Gavigan (2004:220) in Canada, who claim that ‘welfare fraud became welfare as fraud. Thus, poverty, welfare and crime were linked’.

The demonization of welfare further extends to the language that is used in relation to the different types of offenders and offences. Those using the welfare system are known as “dole bludgers” or “scroungers”, and “dole cheats” when found to be misusing the system. Prenzler (2010:2) notes that in Australia ‘public opinion was also set firmly against “dole cheats” and others allegedly defrauding social security’. This language appears indicative of society’s views on welfare fraud.

When cases of welfare fraud are bought to public attention, the legitimacy of the welfare system is bought in to question. As observed by Prenzler (2011:2), media attention has also ‘fuelled popular opinion against welfare cheats’. Moreover, certain crimes ‘lend themselves more easily than others to public outrage’, which then results in a political response (Smith, Button, Johnston and Frimpong, 2011:61). The authors continue to observe that, with the exception of benefit fraud, other types of fraud such as tax evasion do not have the same level of public profile and public concern.

The political attention placed on welfare fraud when compared to tax evasion is evident in Australia and New Zealand, but also extends to other jurisdictions. By way of example, Smith, Button, Johnston and Frimpong (2011) report that in the United Kingdom ‘politicians have generally shown more interest in tackling social security fraud than many others’ (2011:154).
In the mid-19th century, crime was understood to have ‘a high incidence in the lower socio-economic class and a low incidence in the upper socio-economic class’ (Sutherland, 1949:3). Sutherland continues to suggest that:

persons of the upper socio-economic class are more powerful politically and financially and escape arrest and conviction to a greater extent than persons who lack such power, even when guilty of crimes. Wealthy persons can employ skilled attorneys and in other ways influence the administration of justice in their own favour more effectively than can persons of the lower socio-economic class (Sutherland, 1949:8).

Thus, 60 years ago Sutherland was suggesting that the criminal justice system is biased in favour of the more powerful in society. Despite reports that community attitudes toward white-collar crime have been becoming increasingly punitive (e.g. Braithwaite, 1985) the gap in the treatment of blue- and white-collar offending appears to remain.

2.5 The Prosecution Process
The New Zealand Prosecution Guidelines specify that prosecutions should occur only when the ‘test for prosecution’ is met (Crown Law, 2010:7). The test for prosecution is twofold: first, sufficient evidence to provide a reasonable prospect of conviction (the evidential test), and second, prosecution is required in the public interest (the public interest test). The prosecution guidelines require each test to be considered separately, and satisfied before the decision to prosecute is taken. The evidential test must be satisfied before the public interest test is considered. However, ‘it is not the rule that all offences for which there are sufficient evidence must be prosecuted’ (Crown Law, 2010:9). The prosecution guidelines specify a number of criteria that may be taken into account in relation to the public interest test. The most important consideration is the seriousness of the offence. Other factors (that are relevant for financial crimes) are the existence of any position of authority or trust; whether the offence was premeditated; and whether the offence has resulted in serious financial loss. Factors are also outlined to explain public interest considerations against prosecutions. Those that are relevant for offences such as tax evasion and welfare fraud include those where the Court is likely to impose a small penalty; where the loss or harm is minor; and where the victim accepts that the defendant has rectified the loss that was caused.

The Australian Prosecution Policy of the Commonwealth starts by introducing the ‘principles of fairness, openness, consistency, accountability and efficiency that the Office of the Director of Public Prosecutions (DPP) seeks to apply in prosecuting offences’ (Commonwealth Director of Public Prosecutions, 2008:3). In a similar way to New Zealand, the policy recognises that not all criminal offences must result in a prosecution: ‘the resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue with appropriate vigour those cases worthy of prosecution’ (2008:5).

The Australian Prosecution Policy also notes the importance of the prosecution policy in providing confidence to society in the criminal justice system. Similarly to New Zealand, the Australian policy commences with the need for sufficient evidence to exist to justify prosecution. This is followed with consideration of the prospects of conviction. When these two criteria are satisfied ‘the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued’ (2008:5). Again, as with New Zealand, factors that require consideration in determining whether public interest requires a prosecution are outlined, such as the seriousness of the offence and the need for deterrence. Other specific factors are also provided.

In addition to the Prosecution Guidelines, the Inland Revenue Department in New Zealand publish a Prosecution Framework outlining a range of factors and behaviours that contribute to the prosecution decisions. Specific acts include:

- Falsification of documents;
- False representation;
- Misuse of revenue collected and held in trust (e.g. pay-as-you-earn, goods and services tax, or employee superannuation contributions);
• Non-filing of returns with intent to evade establishment of a tax liability;
• Facilitating, aiding or abetting an offence; and,
• Misuse of a corporate entity (Inland Revenue Department, 2009a:5).

While specific circumstances include:
• The extent of planning and degree of deliberation;
• The tax dollar value;
• Regularity of the act;
• Scale and/or repetitiveness of the offending;
• Relative impact on compliance behaviour of decision made; and
• Financial and resource effect on the Inland Revenue Department (Inland Revenue Department, 2009a:5, 2009b:9).

Croall (2001) observes the tendency for there to be few prosecutions for tax frauds in the United Kingdom. This pattern is also visible in New Zealand and Australia. Incorrect tax claims are regularly managed through administrative channels, whereas welfare fraud is more usually managed through the Commonwealth Department of Public Prosecutions in Australia (Henman and Marston, 2008). The reason for this difference is the focus on revenue collection by the tax authority (Croall, 2001). To the extent that tax evaders pay the amounts owed, prosecution is unlikely to follow. This does not appear to be the case with welfare fraud.

2.6 Sentencing
A range of factors will be taken into account by the courts when determining appropriate sentences. While it is an artificial simplification to assume that all offenders’ circumstances are similar, court reports often provide little additional information on the extent to which offences are repeated, or other mitigating or aggravating factors are present. A primary consideration in the sentence outcome is the seriousness of the crime. To the extent that financially equivalent offending occurs, then the measure of harm is the same, and only other aggravating or mitigating factors would impact on the sentencing outcome.

As observed by Wheeler, Mann and Sarat (1988), the sentencing process and outcome is one of the most pivotal events in the administration of justice. Not only does the sentence determine the short- and/or long-term future of the offender, for society it ‘gives expression to our sentiments and understandings regarding crime and criminals’ (1988:1). However, where it is difficult to explain or justify sentences awarded, this challenges the ‘fundamental sense of justice’ in society (Wheeler, Mann and Sarat, 1988:1).

While guideline judgments are becoming more prevalent, these do not currently extend to tax offences, but may be useful as they assist with transparency and ‘promote consistency and uniformity by providing direction and guidance in the exercise of the sentencing discretion’ (Hall, 2004:12). It is acknowledged that there is resistance to introducing guideline judgments for ‘everyday’ types of offences, as there may be considerable variation in the offence (New Zealand Law Commission, 2006). Furthermore, guideline judgments may have the opposite impact and limit judicial discretion in some situations (Wheeler, Mann and Sarat, 1988).

The following section outlines data on the prosecution and sentencing of tax evasion and welfare fraud in New Zealand and Australia.

3. DATA
This section outlines the data relating to the prosecution and sentencing of tax evasion and welfare fraud in Australia and New Zealand. Data is not always available using identical measures in the two countries and between the two offence categories. However, the data is suitably comparable to

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4 This explanation was also provided by the New Zealand Inland Revenue Department in communications.

5 Guideline judgments are ‘judicial narrative guidelines that are intended to give authoritative guidance to trial Judges in a certain sphere of sentencing’ (Hall, 2007:8).
make generalised observations about overall trends. The data is not used for statistical analysis; instead it provides the contextual background for the theoretical analysis in section five.

3.1 Prosecution

The Ministry of Social Development administers NZ$16 billion in income assistance to over one million New Zealanders each year.6 These figures include those in receipt of New Zealand Superannuation, the universal retirement pension provided in New Zealand. However, the following discussion excludes superannuation, as this is not income- or asset-tested in New Zealand, and instead focuses on income-tested benefits, such as the unemployment benefit, sickness benefit and domestic purposes benefit.

Investigation and prosecution information of welfare offences for the three years ended June 2010 is outlined in Table 1. In the year ending June 2010 there were nearly 20,000 investigations undertaken by the Ministry of Social Development in New Zealand. Of these investigations, 2,996 (or 15 per cent) were found to involve substantiated cases of benefit overpayment resulting from benefit fraud. Of the 2,996 cases, 789 (or 26 per cent) were prosecuted, with a success rate of 90 per cent. The average value of overpayments for the 2,996 cases is $13,130. Prosecutions as a proportion of those on income-tested benefits are 0.4, 0.24 and 0.24 per cent of those on an income-tested benefit in 2007-08, 2008-09 and 2009-10 respectively in New Zealand.

Table 1: Welfare Fraud Prosecutions in New Zealand (2007 – 2009)7

<table>
<thead>
<tr>
<th>Year</th>
<th>Customers</th>
<th>Investigations</th>
<th>Substantiated benefit overpayment due to benefit fraud (%)</th>
<th>Total value of benefit overpayments (NZ$)</th>
<th>Prosecutions</th>
<th>Convictions (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007-08</td>
<td>258,317</td>
<td>26,736</td>
<td>4.407</td>
<td>$34M</td>
<td>1,028</td>
<td>94%</td>
</tr>
<tr>
<td>2008-09</td>
<td>310,296</td>
<td>26,400</td>
<td>3.327</td>
<td>$34M</td>
<td>735</td>
<td>95%</td>
</tr>
<tr>
<td>2009-10</td>
<td>332,924</td>
<td>19,9359</td>
<td>2.996</td>
<td>$39M</td>
<td>789</td>
<td>90%</td>
</tr>
</tbody>
</table>

Prosecutions for welfare fraud for the three years from 2007 to 2009 in Australia are outlined in Table 2. In Australia, the social welfare system administered A$84.2 billion in payments to 7.02 million customers in 2009-10 (Lindley, Jorna and Smith, 2010). Of the 3.5 million reviews undertaken in 2009-10, 613,498 or 17.5 per cent resulted in cancelled or reduced payments, and generated customer debts of nearly A$500 million (Lindley, Jorna and Smith, 2010:3). In the same period 4,608 cases of serious non-compliance or fraud were referred to the Commonwealth Director of Public Prosecutions, and 3,461 were prosecuted. The conviction rate from prosecutions was 99 per cent (Lindley, Jorna and Smith, 2010:4). Around one-tenth of one per cent of reviews are referred to the Director of Public Prosecutions. The average saving per prosecuted offence over the period outlined in Table 2 is between A$29,413 (in 2009-10) and A$52,746 (in 2007-08). However, the average saving per cancellation or adjustment ranges between A$165 and A$199 over the three year period outlined in Table 2, indicating that a large number of reviews and investigations occur in relation to small amounts of offending. Prosecutions in Australia as a proportion of customers are 0.04, 0.05 and 0.05 per cent in the 2007-08, 2008-09 and 2009-10 years respectively. That is, either four or five in every 10,000 customers are found to be engaging in welfare fraud.

In New Zealand, 85.7 per cent of the benefit fraud cases (by value of overpayment) are less than NZ$10,000 in value, with two per cent in excess of NZ$50,000 (Controller and Auditor-General, 2008:14). Prosecutions as a proportion of customers in New Zealand are higher than in Australia, but this is driven by the different measure of ‘customer’ used in these two datasets. As mentioned at the start of this section, New Zealand customers include those on income-tested

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6 Official Information Act request, received 3 September 2012 from the Ministry of Social Development.
7 Data received under Official Information Request from the Ministry of Social Development (3 September 2012).
8 The Ministry of Social Development advise that the 2009/10 data may not be directly comparable with earlier years due to changes in what is reported as an investigation.
benefits only, and exclude those receiving New Zealand Superannuation, whereas Australian customers include all those in receipt of income distributed by the government. The New Zealand figures also exclude those who receive other benefits, such as Working for Families tax credits.

Table 2: Welfare Fraud Prosecutions in Australia (2007 – 2009)⁹

<table>
<thead>
<tr>
<th>Year</th>
<th>Customers '000</th>
<th>Reviews '000</th>
<th>Cancellations or adjustments</th>
<th>Referred to Director of Public Prosecutions</th>
<th>Prosecutions</th>
<th>Convictions (%)</th>
<th>Savings from investigations '000 (A$)</th>
<th>Average saving per prosecution (A$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007-08</td>
<td>6,520</td>
<td>4,431</td>
<td>702,624</td>
<td>5,312</td>
<td>2,658</td>
<td>98.6%</td>
<td>$140,200</td>
<td>$52,746</td>
</tr>
<tr>
<td>2008-09</td>
<td>6,840</td>
<td>3,867</td>
<td>641,504</td>
<td>5,082</td>
<td>3,388</td>
<td>98.9%</td>
<td>$113,400</td>
<td>$33,471</td>
</tr>
<tr>
<td>2009-10</td>
<td>7,020</td>
<td>3,500</td>
<td>613,498</td>
<td>4,608</td>
<td>3,461</td>
<td>99.3%</td>
<td>$101,800</td>
<td>$29,413</td>
</tr>
</tbody>
</table>

Table 3 outlines tax prosecutions in New Zealand over a three year period. Approximately five per cent of tax offences are prosecuted in New Zealand, where the criteria for prosecution is ‘serious non-compliance’ (Inland Revenue Department, 2011) whereas 26 per cent of established overpayments of benefits are prosecuted (Ministry of Social Development, 2011). Discrepancies identified as a proportion of total tax revenue collected are small. However, this may be representative of the ease of tax evasion in some situations, rather than a reflection that levels of tax evasion are low. Tax prosecutions as a proportion of total customers in New Zealand are insignificant (around 0.001 per cent). Discussions with Inland Revenue indicate that as revenue collection is the primary objective of the department, prosecution will proceed in only the most serious of cases. This differs to welfare fraud, where prosecution proceeds in around one-quarter of all cases detected.

Table 3: Tax Prosecutions in New Zealand (2007 – 2009)¹⁰

<table>
<thead>
<tr>
<th>Year</th>
<th>Customers ('000)¹¹</th>
<th>Evasion and fraud investigations</th>
<th>Net discrepancies identified NZ$M (all sources)</th>
<th>Prosecutions</th>
<th>Convictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007-08</td>
<td>6,965</td>
<td>Over 1,000</td>
<td>$1,449</td>
<td>54</td>
<td>100%</td>
</tr>
<tr>
<td>2008-09</td>
<td>6,810</td>
<td>Over 1,000</td>
<td>$1,269</td>
<td>55</td>
<td>100%</td>
</tr>
<tr>
<td>2009-10</td>
<td>6,518</td>
<td>651</td>
<td>$2,436¹²</td>
<td>62</td>
<td>100%</td>
</tr>
</tbody>
</table>

Tax prosecution data in Australia is outlined in Table 4. Only a small percentage of tax lodgements result in disputes and objections, with 0.02 per cent of tax returns filed resulting in prosecutions by the Australian Tax Office in the three years outlined below. Similarly to New Zealand, small numbers are referred to the Director of Public Prosecutions (DPP) for prosecution and the conviction rate of those prosecuted is high.

Table 4: Tax Prosecutions in Australia (2007 – 2009)¹³

<table>
<thead>
<tr>
<th>Year</th>
<th>Tax Returns Filed (million)</th>
<th>Tax Disputes, Objections and Reviews</th>
<th>Total Disputed (A$M)¹²</th>
<th>Tax Disputes by Australian Tax Office</th>
<th>Prosecutions by Australian Tax Office</th>
<th>Prosecutions by DPP</th>
<th>Convictions (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007-08</td>
<td>15.4</td>
<td>14,106 (0.09%)</td>
<td>1,262</td>
<td>3,022</td>
<td>76</td>
<td>88%</td>
<td></td>
</tr>
<tr>
<td>2008-09</td>
<td>16.6</td>
<td>15,124 (0.09%)</td>
<td>2,554</td>
<td>3,264</td>
<td>92</td>
<td>93%</td>
<td></td>
</tr>
<tr>
<td>2009-10</td>
<td>16.5</td>
<td>19,349 (0.1%)</td>
<td>1,595</td>
<td>2,578</td>
<td>57</td>
<td>98%</td>
<td></td>
</tr>
</tbody>
</table>

¹⁰ Data collected from Inland Revenue Department Annual Reports, with additional data provided under Official Information Act requests to the Inland Revenue Department.
¹¹ This figure includes individuals, partnerships, trusts, businesses and other entities.
¹² The amount in this year is significantly in excess of previous periods due to a number of structured finance cases that were resolved in this period, which accounted for $1,790 million in discrepancies.
¹³ Data collected from Australian Taxation Office Annual Reports.
¹⁴ These are amounts that are disputed through the court system.
3.2 Sentencing
Table 5 outlines data on welfare fraud sentencing in New Zealand from June 2008 to June 2011. Data in a comparable form to that provided by the Inland Revenue Department could not be provided by the Ministry of Social Welfare or the Ministry of Justice in New Zealand. Therefore, data on welfare fraud was manually collected. The Brookers New Zealand Sentencing Tracker database was used to identify offences and sentences in this category.15 This exercise returned 20 cases, therefore does not claim to be a full dataset of sentencing outcomes for the period. Instead, what it does reflect is the most serious of offences, which corresponds to the tax sentencing outcomes, which are also for the most serious of offences.

Table 5 shows a high proportion of offenders receive custodial sentences, with 60 per cent of those investigated in this study receiving prison sentences of, on average, 17 months. The average amount of offending for the welfare offences over the time period investigated was NZ$67,000, with a range of NZ$8,480 to NZ$148,640.

Table 5: Welfare Fraud Sentencing in New Zealand (2008-2010)

<table>
<thead>
<tr>
<th>Offence Type</th>
<th>Number</th>
<th>Average Amount of Offending NZ$</th>
<th>Community Work16</th>
<th>Community Detention17</th>
<th>Home Detention18</th>
<th>Prison Sentence Number and (Average)</th>
<th>Average Prison Sentence (months)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008-09</td>
<td>7</td>
<td>$48,961</td>
<td>4</td>
<td>1</td>
<td>2</td>
<td>2 (33%)</td>
<td>14</td>
</tr>
<tr>
<td>2009-10</td>
<td>7</td>
<td>$64,361</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>6 (86%)</td>
<td>23</td>
</tr>
<tr>
<td>2010-11</td>
<td>6</td>
<td>$91,977</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>4 (57%)</td>
<td>10</td>
</tr>
<tr>
<td>Total</td>
<td>20</td>
<td>$67,255</td>
<td>10 (50%)</td>
<td>2 (10%)</td>
<td>4 (20%)</td>
<td>12 (60%)</td>
<td>17</td>
</tr>
</tbody>
</table>

Table 6 outlines data on welfare fraud sentencing in Australia. Data was requested on offending that was in excess of A$50,000, in order to capture the most serious of offending. Data for a ten year period was provided, although just the 2008-2010 data is provided here to facilitate comparison. However, analysis of the full dataset produced similar results. The average amount of offending over the ten year period (not shown here) was A$80,048, with 57 per cent of offenders receiving prison sentences, and a further 28 per cent receiving suspended prison sentences. The most recent three year period shows 56 per cent of offenders receive prison sentences and a further 30 per cent receive suspended prison sentences, with average offending of A$77,761.

Table 6: Welfare Fraud Sentencing in Australia (2008-2010)19

<table>
<thead>
<tr>
<th>Offence Type</th>
<th>Number</th>
<th>Average Amount of Offending A$</th>
<th>Community Service Order20</th>
<th>Periodic Detention 21</th>
<th>Prison Sentence (Suspended)</th>
<th>Prison Sentence Number and (Average)</th>
<th>Average Prison Sentence (months)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008-09</td>
<td>91</td>
<td>$76,291</td>
<td>10 (11%)</td>
<td>3 (3%)</td>
<td>25 (28%)</td>
<td>51 (56%)</td>
<td>Not known</td>
</tr>
<tr>
<td>2009-10</td>
<td>62</td>
<td>$76,388</td>
<td>5 (8%)</td>
<td>1 (2%)</td>
<td>18 (29%)</td>
<td>37 (60%)</td>
<td>Not known</td>
</tr>
</tbody>
</table>

15 The Brookers New Zealand Sentencing Tracker database contains summaries of over 8,000 New Zealand cases.
16 Community work requires offenders to do unpaid work in the community. Offenders can be required to undertake between 40 and 400 hours of community work. New Zealand Department of Corrections, Corrections in the Community, Available at www.corrections.govt.nz, retrieved November 2011.
17 Community detention is a community based sentence where offenders are electronically monitored and must comply with a curfew. The maximum sentence for community detention is six months.
18 Home detention requires offenders to remain at an approved residence at all times. Offenders are electronically monitored to ensure they do not leave the approved residence.
19 Data provided by the Commonwealth Director of Public Prosecutions in Australia, July 2012.
20 A community service order is similar to community work in New Zealand. An offender is required to undertake between 16 and 320 hours of community work. Where an offender does not complete a community service order, a custodial sentence may be awarded instead, with one day of custodial sentence for eight hours of uncompleted community service.
21 Periodic detention allows offenders to live within the community, while completing a custodial sentence two days per week for up to three years.
The Inland Revenue Department provided data on three years of tax prosecutions. This data is outlined in Table 7. A total of 176 cases were taken over the three years: 55 in 2009; 62 in 2010; and 59 in 2009.

The range of the offending in New Zealand is NZ$7,000 to NZ$13,000,000. As illustrated in Table 7, some cases received multiple sentence types, such as home detention and community work. In New Zealand, 22 per cent of tax offenders received custodial sentences. The average amount of offending of those receiving custodial sentences is NZ$805,000, with a median level of NZ$262,000. Where custodial sentences were awarded these were, on average, for a period of 25 months. In some cases full (18) or partial (13) reparation was required, averaging NZ$124,183. In a small number of cases (7), additional fines were made, although these were typically not large amounts, averaging $7,000.

Table 7: Tax Sentencing Data in New Zealand (2008-2010)\textsuperscript{22}

<table>
<thead>
<tr>
<th>Year</th>
<th>No of Cases</th>
<th>Average Offending (A$)</th>
<th>Community Work</th>
<th>Community Detention</th>
<th>Home Detention</th>
<th>Prison</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008-09</td>
<td>55</td>
<td>$193,539</td>
<td>23</td>
<td>5</td>
<td>19</td>
<td>14</td>
</tr>
<tr>
<td>2009-10</td>
<td>62</td>
<td>$413,793</td>
<td>28</td>
<td>9</td>
<td>29</td>
<td>13</td>
</tr>
<tr>
<td>2010-11</td>
<td>59</td>
<td>$242,164</td>
<td>27</td>
<td>12</td>
<td>28</td>
<td>12</td>
</tr>
<tr>
<td>Total</td>
<td>176</td>
<td>$287,429</td>
<td>78 (44%)</td>
<td>26 (15%)</td>
<td>76 (43%)</td>
<td>39 (22%)</td>
</tr>
</tbody>
</table>

The Australian Tax Office was asked to provide a similar dataset to that provided by the Inland Revenue Department in Table 7. This data is outlined in Table 8. However, as the information requested was not traditionally collected in a central repository, some of the data was not obtainable. Specifically, some cases had sentence information, but the quantum of offending was not recorded. Therefore, an extra column is in Table 8, showing the total number of cases, and the number of cases where the offending data was provided.

Table 8: Tax Sentencing Data in Australia (2008-2010)\textsuperscript{23}

<table>
<thead>
<tr>
<th>Year</th>
<th>No of Cases</th>
<th>Cases with Offending Data</th>
<th>Average Offending (A$)</th>
<th>Community Service</th>
<th>Good Behaviour Bond</th>
<th>Prison (Fully Suspended Sentence)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008-09</td>
<td>54</td>
<td>32</td>
<td>$268,238</td>
<td>3</td>
<td>24</td>
<td>28 (28%)</td>
</tr>
<tr>
<td>2009-10</td>
<td>54</td>
<td>44</td>
<td>$608,170</td>
<td>1</td>
<td>17</td>
<td>41 (41%)</td>
</tr>
<tr>
<td>2010-11</td>
<td>54</td>
<td>30</td>
<td>$815,515</td>
<td>2</td>
<td>29</td>
<td>34 (34%)</td>
</tr>
<tr>
<td>Total</td>
<td>162</td>
<td>106</td>
<td>$564,232</td>
<td>6 (4%)</td>
<td>70 (43%)</td>
<td>103 (64%)</td>
</tr>
</tbody>
</table>

The data suffers from similar problems as the New Zealand dataset, where a small number of large offences distort the average results. The range of offending is similarly spread to New Zealand, ranging from A$8,000 to A$9,500,000. An additional issue with the Australian dataset is when the sample is reduced by the cases where the quantum of offending is unknown and those who received a suspended sentence, the dataset is reduced to 75 cases.

Of all the offending, 85 per cent of Australian tax offenders received a custodial sentence. This proportion increased slightly to 87 per cent of the subset for which the amount of offending is known. However, some of these sentences were suspended, reducing the overall proportion to 64 per cent for all offenders, or 70 per cent for the subset for which the quantum of offending is known. The average amount of offending resulting in a custodial sentence in Australia is

\textsuperscript{22} Data provided by the Inland Revenue Department.
\textsuperscript{23} Data provided by the Australian Tax Office under a Freedom of Information Act request.
A$589,000. However, when suspended sentences are removed, this reduces to A$484,000. The average custodial sentence is 580 days (19 months) for the average offending of A$484,000.

In nine cases additional fines were awarded. Most fines were small with seven ranging between $1,000 and $5,000, but with two of around A$7 million. Reparation was awarded in 44 per cent of cases (27 in 2008/09, 21 in 2009/10, and 23 in 2010/11). Reparation had a considerable range, but over the three years averaged A$522,000.

### 3.3 Summary

While the overall prosecution policy appears to be similar for tax evasion and welfare fraud, i.e., the most serious of cases are prosecuted, the definition of ‘serious’ appears to be different for tax evasion and welfare fraud. Higher proportions of welfare fraud are investigated in both countries. There is a high level of benefit overpayment and adjustments for welfare fraud, but the average values are low in both countries. Conviction rates are high for both welfare fraud offending and taxation. The average level of offending for prosecuted welfare fraud in New Zealand is NZ$67,000, and in Australia is A$78,000. This compares to NZ$287,000 for tax evasion in New Zealand and A$564,000 for tax evasion in Australia.

In New Zealand over the last three years, 22 per cent of prosecuted and convicted tax offenders received custodial sentences, while 60 per cent of people convicted of benefit fraud received custodial sentences. This is despite the average quantum of benefit fraud offending being lower than that of tax offending. This is one area where New Zealand and Australia differ. In Australia, 64 per cent of prosecuted and convicted tax offenders received custodial sentences over the same period, suggesting a different approach to white-collar offending in this jurisdiction. However, this is likely to reflect that only the most serious cases are prosecuted in Australia. As a proportion of population, based on the information provided by the Australian Tax Office, significantly fewer tax cases are prosecuted in Australia; indeed, the numbers of prosecutions by the DPP in Australia are similar to that of New Zealand, despite a five-fold greater population base. In addition, the threshold of offending is significantly higher at A$564,000 on average for prosecuted tax offending, or around seven times that of welfare fraud.

Over 250 years ago Beccaria suggested that ‘if the benefits of the legal system failed to be equitably distributed, so that the law promoted the happiness of some rather more than others, then it would not only justify but positively promote crime’ Bellamy (1995:xxiv). This is despite the fact that one of the objectives of punishment is to act as a deterrent to potential future offenders. The discussion above indicates that the legal systems in New Zealand and Australia are not producing equal outcomes for similar offences. Only the most significant cases of tax evasion reach the court system, with the majority instead managed by individual negotiation with the tax authority. Conversely, welfare fraud has a reasonably high likelihood of prosecution. Thus, while tax offenders with the financial means to reimburse for their offending are more likely to avoid the prosecution process, those with fewer financial resources are more likely to suffer the ‘publicity and effective criminalisation suffered by benefit fraudsters, who are far more likely to undergo court proceedings’ (Cook, 1989:160).

The following section outlines a range of theoretical perspectives that will be used for analytical purposes in an attempt to explain the findings outlined in this section.

### 4. THEORETICAL VIEWS OF JUSTICE

In order to explore potential explanatory frameworks for the differences witnessed in prosecution and sentencing of tax evasion and welfare fraud, theories of justice, punishment and social exchange are examined. This approach allows for a multi-theoretical investigation of how well the explanatory models of justice and punishment incorporate both the normative demands of impartiality and objectivity, and the fundamental equality of treatment demanded by justice (Sen, 2009). Specifically, Rawls’s theory of justice and Walzer’s approach of complex equality are investigated; as are the retribution, deterrence and restitution views of punishment. Two other primary concepts of punishment (rehabilitation and incapacitation) are excluded, as they are less relevant to economic (i.e., non-violent) crime.
Theories of justice are typically viewed from the perspective of allocation of resources, rather than the revocation of rights and resources that punishment entails. However, theories of justice have a strong link to punishment and well-known justice theorists (e.g., Rawls, 1955) include punishment in their theories. This discussion starts with an outline of Rawls’s seminal theory of justice. While this theory has been critiqued since its inception, some of the fundamental concepts remain throughout many other theories of justice.

This study is concerned with social justice. Social justice is ‘concerned not in the narrow focus of what is just for the individual alone, but what is just for the social whole’ (Capeheart and Milovanovic, 2007:2). Social justice is connected with the distributions of benefits and burdens in society and ‘includes developing an understanding of distributive principles (fair allocation of rewards and burdens) and retributive principles (appropriate responses to harm)’ (Capeheart and Milovanovic, 2007:2). Miller (1976:20) suggests that ‘the most valuable general definition of justice is what which brings out its distributive character most plainly: justice is suum cuique, to each his due’.

Distributive justice is an important component of this study. Distributive justice is concerned with the distribution of rewards and burdens in society. The basic concept of distributive justice is where individuals have the ‘benefits and burdens which are due to him by virtue of his personal characteristics and circumstances’ (Miller, 1976:20). The similarity to the concept of justice raised in the previous paragraph is evident. The basic notion of distributive justice is that ‘rewards are allocated to actors on the basis of one or more socially defined and evaluated characteristics ... if two actors have similar states of similar characteristics they have a right to expect similar rewards as well; if similar actors have dissimilar rewards, or dissimilar actors have similar rewards, normative expectations are violated’ (Berger, Zelditch, Anderson and Cohen, 1972:119). This violation of expectations is known as, among other names, inequity or injustice. For the purposes of this study, the burdens are the punishments awarded in the justice system, and the personal characteristics and circumstances are the type of offending and the amount of harm created from the offending.

4.1 Rawls’s Theory of Justice
Rawls’s theory of justice as fairness is concerned with the way that social institutions determine the division of rights, duties and advantages (Rawls, 1999; Farrelly, 2004). However, as well as being concerned with a fair allocation of resources or rights, it is also concerned with a fair allocation of disadvantages or burdens, such as punishment. Rawls’s theory commences from a veil of ignorance, where individuals deciding on outcomes have no knowledge of their own position. In the absence of knowing what will advantage oneself, the assumption is made that decisions will attempt to maximise the outcome for the majority. Rawls’s conditions suggest two principles of justice: concern for equal liberty and the difference principle. It is the difference principle that is the core of Rawls’s theory of justice (Lebacqz, 1986). It is also the difference principle that is most relevant to investigation of punishment, as it promotes the idea that inequality in distribution is permissible, but only to the extent that it will protect or improve the position of those least advantaged in society.

Rawls discusses procedural justice, where justice applies to the system, rather than the outcome. Lebacqz describes Rawls's principles as ‘geared towards the basic structure of society, not toward every act or every level’ (1986:40). This relates to the fair equality of opportunity that is raised in Rawls’s theory of justice. In the context of this study, this manifests itself as the opportunity to have equal opportunity in the justice system.

Rawls rejects the desert argument from an allocation of resources perspective. Instead, he suggests that no individual should be considered deserving on aspects such as natural talents or initial social position, on the basis that these items are not deserving in the first instance and therefore individuals are not deserving of the benefits that flow from them (Mapel, 1989). This leads to Rawls’s position that ‘principles of justice must therefore rest on some other, nonarbitrary grounds’ (Mapel, 1989:20). Thus, reference to Rawls’s theoretical framework indicates that those who are privileged in life, such as those who have more resources, and the improved social
positions that are supported with greater resources, are not deserving of privileged treatment in society. However, as property rights protection does not allow for redistribution of all resources, the argument is whether there is any basis under Rawls’s theoretical position for different treatment for those with greater resources; whether this is in the court system or in society in general.

4.2 Walzer’s Complex Equality
Michael Walzer proposes that instead of looking at an isolated measure for equality, we should consider the spheres that cover distinct areas that allocate benefits or burdens. Walzer’s approach is known as ‘spheres of justice’ and allows a different measure of when distributions are fair, by adopting a ‘global assessment of their circumstances rather than on a separate sphere-by-sphere accounting’ (Arneson, 2000:500). This approach has the potential to highlight when individual spheres may appear unfair, but can combine to reveal a fair allocation. Thus, advantages and disadvantages in different spheres are balanced to provide a holistic view of fairness across ‘social life’. Thus, Walzer’s complex equality suggests that inequality within ‘spheres’ of society may be acceptable, but only to the extent that the overall result is just (Walzer, 1983). Extension of Walzer’s view would potentially result in those already advantaged in society (such as those with greater resources) receiving harsher penalties in the justice system, rather than the lighter penalties witnessed in practice.

Walzer uses the example of ostracism in Athens as a form of punishment that was influenced by society: individuals could identify others that they wished to see ostracised, and decisions were made on a plurality of votes (Walzer, 1983:270). This illustrates the influence of popular opinion versus other factors such as desert in the outcome of the punishment process. Present court practices appear to, if not actually take into account societal views; reflect these views in their prosecution choices and sentencing decisions.

4.3 Retribution
Retribution is perhaps the most well-known justification for punishment. The fundamental concept of retribution is that punishment is justified when, and only when, someone has done something to deserve it (Hall, 2004). This extends to the general principles of treating individuals that are equal in relevant respects in the same way; and proportionality, where a person’s due depends on an attribute that can be quantified, such as economic harm to society (Miller, 1976). In addition, ‘a just proportion between the gravity of the offence and the severity of the sentence’ should exist (Hall, 2004:49). This is reflected in sentencing policy that takes into consideration aggravating and mitigating factors in the prosecution and sentencing process.

Hall suggests that the focus of retribution is ‘restoring the balance or moral equilibrium disturbed by the offence’ (Hall, 2004:44). This ‘rebalancing’ approach leads to the assumption that the punishment must be proportional to redress the harm done by the offence. Moreover, while society has the right to impose punishment, it similarly has ‘the duty and responsibility to provide punishment of a kind and degree that will produce positive results for deterrence or reformation, punishment that will keep the negative results at a minimum’ (Middendorff, 1971:13).

4.4 Deterrence
The objective of creating a deterrence from punishment is twofold: to deter a specific offender from reoffending and to generally deter other people who may be inclined to undertake a similar offence (Hall, 2004). The rational view of deterrence suggests that compliance will increase to the extent to which the costs of offending outweigh the benefits. However, there is little evidence to support the view that increasing the harshness of sentences will deter the individual offender or would-be offenders in general (Ministry of Justice, 1997). Moreover, penalties are only an effective deterrent to the extent that individuals believe there is the likelihood of their offending being identified, with subsequent prosecution if detected.

Retribution and deterrence appear to be the primary motivators in the New Zealand tax environment. The Inland Revenue Department’s Prosecution Framework outlines the objective of promotion of compliance as minimising future tax offending; and denying the financial gains that
are the result of non-compliance with the tax regime (Inland Revenue Department, 2009a:4). Australia has similar policy, which acknowledges that prosecution is a ‘powerful instrument of deterrence and accountability and is the firmest of the compliance strategies available to the Tax Office’.\(^\text{24}\)

4.5 Restitution

The third justification of punishment, restitution, is the concept of putting right a wrong. Compensation, repayments of monetary amounts, apologies or specific acts of recompense (such as community service or charitable donations) are forms of restitution (Ministry of Justice, 1997). The objective of restitution is to compensate the victims of the crime or to provide ‘an assurance to the victim that the offender will not obtain an advantage which they are not entitled to out of their criminal conduct’ (Hall, 2004). In the case of tax evasion, the victims of the crime are indirect: society as a whole suffers either from an increased tax burden or from reduced service provision. While restitution in the form of repayment of unpaid tax obligations may be a factor in determining the appropriate sentence for tax offences, it is the state (as the victim) that gains from restitution.

4.6 Alternative Theoretical Approaches

Social exchange theory is investigated as an alternative theoretical approach that may provide some explanatory value to the different treatments of tax offending and welfare fraud. Social exchange theory is perhaps best described as ‘a collection of explanations, propositions and hypotheses, embodying certain general assumptions about social behaviour’ (Chadwick-Jones, 1976:1). While there are a number of different views of social exchange theory, they do share the common characteristic of an interest in relationships between individuals in social situations. Much of social exchange theory relates to dyadic relationships or small group interactions. Nonetheless, many of the concepts are generalizable to larger groups and society in general.

Importantly for this study, social exchange theory aims to explain that which ‘is not economic in social behaviour’ (Chadwick-Jones, 1976:10). The delineation between social exchange and economic exchange ‘is in terms of contractual obligation in economic exchange transactions and moral obligations in social exchange transactions’ (Ekeh, 1974:173). Thus, the obligations rising from economic transactions are clearer than those from social transactions. The relevance of this point to this study is that reference to the quantum of economic harm from each offence type does not appear to explain either the prosecution of the event or the subsequent sentence. Therefore, this section focuses on the potential explanatory power of the ‘social’ component of the offence.

Social exchanges are influenced by norms and values that regulate behaviours (Ekeh, 1974:46). A norm is a behavioural rule that is accepted by most members of a group (Thibaut and Kelley, 1986:147). One of these norms is reciprocity, described as ‘a key intervening variable through which shared social rules are enabled to yield social stability’ (Gouldner, 1960:161). There are two generally agreed demands from the norm of reciprocity: people should help those who have helped them, and people should not harm those who have helped them (Gouldner, 1960:171). Therefore, when individuals have been assisted by others, such as by the welfare system, an obligation to help others is generated, together with an obligation to not harm the taxpayers that have indirectly assisted them.

A further consideration for this study is the proposal of Berger, Zelditch, Anderson and Cohen (1972:119) that ‘exchange formulations of justice are concerned with compensation for effort expended’. Moreover, distributive justice requires consideration of characteristics of actors in the exchange process to determine what a just outcome is. Effort may be a differentiating characteristic between the two types of offences examined in this study. Those engaging in welfare fraud may be viewed as not providing any effort for their reward (with the initial welfare payment as well as the fraudulently gained benefits). Conversely, tax evaders may be viewed as engaging in some effort, as typically some activity will have occurred for the evaded tax to be gained in the first instance (such as the operation of a business).

Cook (1989) adds a further dimension to the issue of social exchange in questioning whose money is being fraudulently used. Cook observes that ‘it is far easier to represent tax evaders as merely keeping their own money, than it is to represent them as taking money from the state (and fellow taxpayers). It is also simple to represent those who are already seen as takers (benefit claimants) as taking money from the hard-pressed taxpayer’. This sentiment links to both the reciprocity perspective and the effort argument.

A further factor of interest within social exchange is the status rule. The status rule is based on status congruence, or the tendency to ‘equilibrate people’s rank on different dimensions of status’ (Leventhal, 1980:33). Using the framework proposed by Leventhal, ‘the status rule dictates it is fair when persons of high social rank receive higher outcomes than those of low social rank’ (1980:33). The inclusion of status in the discussion of the differences in tax evasion and welfare fraud is relevant, as resources are a component of status determination and different resources are generally required to engage in each activity. Moreover the categorisation of tax evasion as ‘white-collar’ crime and welfare fraud as ‘blue-collar’ crime is indicative of perceptions of these forms of offences. This links to the concept of status as ‘a matter of social consensus’ (Thibaut and Kelley, 1986:223). Where there is consensus about comparisons between group members, a ‘status system’ is said to exist (Thibaut and Kelley, 1986:229). Each individual then has a ‘social status’ within the status system. Thibaut and Kelley suggest that such consensus on status develops in most groups over time (1986:230).

Over 60 years ago, Blau (1946:196) questioned this view, enquiring whether ‘the expectation that people who receive high rewards and occupy superior status in one respect will also do so in others is really based on moral judgments that justice requires this state of affairs’. Thus, Blau challenges the practice of rewarding people further, who are already rewarded in other ways, such as with status or resources. Rawls raises a similar challenge to the practice where individuals who have greater resources receive further rewards or, in the case of tax evasion, more lenient punishments than those who have fewer resources.

Chen and Choi (2005:4) propose four distinct types of social exchanges: negotiated exchanges, based on explicit agreements; reciprocal exchanges, based on sequential giving over time; generalised exchanges, where one member of a group receives from one or more other members of the group, who in turn receive from one or more other members; and co-productive exchanges, where resources are combined to achieve a joint outcome. The common theme among all these types of exchanges is that there is an element of mutuality in each exchange; i.e., no individual receives without giving. The two types of offences investigated in this study both breach the exchange condition: those engaging in welfare fraud receive without giving; tax evaders also receive without giving, with receipt in this instance being the goods provided in society that are funded through the tax system. Thus both activities appear to breach the norms of reciprocity inherent in social exchange, albeit in different ways and arguably to different extents, as one is directly receiving funds that are not deserved, while the other is indirectly not funding the goods and services that are provided to society.

4.7 Summary
As the topic of this study is prosecution and sentencing of different offences, it would seem reasonable to expect theories of justice and theories of punishment to provide insights into the different treatments afforded to the two offences. This is not the case. Instead, social exchange theory, and the principle of reciprocity appears to be more likely to provide explanatory assistance into the treatment of tax evasion and welfare fraud in the Antipodean justice systems. The following section discusses this suggestion, with reference to the theories outlined in this section.

5. DISCUSSION
The discussion in section three of this article highlights the different treatments of tax evasion and welfare fraud in the prosecution and sentencing processes of the justice system. This section investigates the theories of justice, punishment and social exchange outlined in the previous section, in search of possible explanations for these differences.
5.1 Theoretical Analysis
The general view of punishment is that the wrongdoer should suffer in proportion to the severity of the act (Hall, 2004; Golash, 2005; Paternoster, 2010), with severity measured by harm to society (Croall, 2001). Thus, variations in sentencing are a function of the perceived seriousness of the offence, and the consequential harm generated, taking into account relevant mitigating or aggravating factors (Poveda, 1994). However, what is unclear is the extent to which the seriousness of the offence becomes influenced by whether the crime is white-collar or blue-collar in nature and whether this, by implicit or explicit behaviour, becomes a factor in the decision to prosecute or the sanction awarded, i.e., why more or less retribution, deterrence, restitution or justice may be desirable for financially equivalent tax evasion or welfare fraud.

The concepts of proportionality and the basis of treating persons as equal at some level, which are present in all prominent theories of justice (Sen, 1992, 2009), appear to be missing in practice in the justice system in the cases examined in this study. When combined with the base standard of treating people as equals, theories of justice appear to challenge the practice of different treatments for similar offences in the justice system. Typically, theories of justice demand equality of something (Sen, 1992). However, there are multiple dimensions in which equality is important. Despite the range of potential measures of equality (including, but not limited to, needs, desert, ability, merit, efforts, sacrifices, or productive measures), and regardless of the perspective of justice that is adopted (a utilitarian approach (Bentham, 1789); a normative economic perspective (Posner, 1981); Sen’s capability approach (Sen, 1992); Dworkin’s equality of resources view (Dworkin, 2000); Rawls’s contractarian perspective (Rawls, 1955, 1971, 1999, 2001); Walzer’s complex equality view (Walzer, 1983); or Nozick’s entitlement theory (Nozick, 1974)), none of these theories of justice support the allocation of harsher punishments for blue-collar offending.

Reference to the justifications for punishment of retribution, deterrence and restitution do not assist with an explanation of the different treatments for the two offences. Retribution, deterrence and restitution are all likely to be, to a greater or lesser extent, desirable outcomes from the process of punishment. However, all these factors would appear to be equally as desirous for tax offending as for welfare fraud.

Not only do theoretical approaches not support the awarding of different penalties to similar offences, reference to the prosecution guidelines in Australia and New Zealand do not appear to provide support for this practice. Both countries prosecution guidelines require sufficient evidence, the measure of which is similar for both offending categories, and for prosecution to be in the public interest. Examples of when prosecution may be in the public interest are provided, but it is not clear why welfare fraud would meet any of these criteria to a greater extent than tax evasion. The prosecution guidelines refer to serious financial loss as one factor that may be relevant. However, this is likely to be higher in the case of tax evasion, indicating both a greater likelihood of prosecution and a higher penalty: neither of which is the outcome in practice.

Thus, the investigation of justice and punishment provides no support for the view that individuals should be punished to a greater extent for welfare fraud than for tax evasion. Instead, there is a general view that punishments should ‘fit’ crimes; prosecution guidelines are the same, the offending is similar and yet the outcomes from the court system remain different. Thus, perhaps it is necessary to consider the differences in the offenders and differences in the offences, in order to provide greater insights into this situation.

5.2 Differences in Offences or Differences in Offenders?
Generally, those who are engaging in tax evasion are not those least advantaged in society. Indeed, in many cases they are those more advantaged, as the funds associated with the non-payment of tax have been collected or earned before the non-payment event occurs. Conversely, those who are engaging in welfare fraud are typically not either high-wealth individuals or fraudulently collecting large sums (as the average value of prosecuted offending is $13,000 in New Zealand). Thus, those engaging in tax evasion are often those more privileged in society. However, this also does not provide support for harsher penalties and higher levels of prosecution for those engaging in welfare
fraud. Rawls’s ‘justice as fairness’ approach requires distributions by social institutions to benefit the least advantaged in society. Therefore, assuming that social inequalities should be taken into account in the allocation of punishments, as well as benefits, harsher penalties would appear to be warranted for tax evaders in the court system.

The data outlined in section three indicates that ‘we create and perpetuate cultural and political practices that stigmatize and punish the dependent among us’ (Walzer, 1983:268). There is certainly a view that current welfare practices have moved from promoting the welfare of low-income families to demonizing those who are recipients of the welfare system. Gustafson (2009:644) captures this sentiment when writing ‘while welfare has always borne the stigma of poverty, it now also bears the stigma of criminality’. Moreover, historically the belief existed that ‘the poor and the lower class constituted the criminal and dangerous elements of the population’ (Poveda, 1994:37). While the extent of white-collar offences such as tax evasion have challenged this belief, outcomes from the judicial process appear to either reflect out-dated views on crimes, criminals and associated punishments; or, perhaps more concerning, current views on offences and offenders and their concomitant punishments reflect society’s preference to treat these two offences differently.

Governments in Australia and New Zealand frequently promote tough stances on welfare fraud. Prenzler (2010:2) highlights a number of government announcements associated with tightening the focus on welfare fraud, including those of the Howard Government (1996-2007) and the Rudd Government (in 2007). Measures include introducing fraud tip-off lines, media campaigns, increased data matching, and greater numbers of investigations. New Zealand is no different, with statements by the New Zealand Prime Minister in November 2011 announcing measures to ‘tackle welfare fraud’ and review the Social Security Act 1964 with the aim of ‘making it easier for authorities to prosecute people who abuse the welfare system’.25

These different views of tax evasion and welfare fraud appear to dominate despite the evidence that tax evasion is significantly more serious in terms of economic damage than welfare fraud. While both tax evasion and welfare fraud are difficult to measure, the Tax Justice Network (2011) has recently attempted to estimate tax evasion in a range of countries covering 92 per cent of the world’s population. While neither Australia nor New Zealand rank among the highest of offending countries, the estimated amounts of evaded tax remain significant. Australia’s estimate of total tax evasion is US$39,879M, or US$1,768 per capita (Tax Justice Network, 2011), which is 13.3 per cent of total tax revenue collected. New Zealand’s estimate of total tax evasion is US$5,419M or US$1,226 per capita (Tax Justice Network, 2011), which is 11.4 per cent of the total tax revenue. By way of contrast, the Ministry of Social Development estimate that benefit fraud as a percentage of the total level of Ministry of Social Development expenditure on income support (welfare) payments is around one-tenth of one per cent (Ministry of Social Development, 2011). Similarly, in the Australian context, Prenzler (2011:1) writes that ‘substantiated fraud represents a very small fraction of all welfare allocations’. This is a pattern observed in other countries, for example, in 2008-09 in the United Kingdom, fraud related to the welfare system is £1.6 billion, while tax fraud is reported at £15 billion: ten times the amount of welfare fraud (Croall, 2001). In addition, the potential cost of tax offending in the United Kingdom is five or six times as much as all conventional crime combined (Croall, 2001).

There are differences in the characteristics of tax evasion and welfare fraud offenders. Moreover, there are significant differences in the economic values of the offence categories that would appear to support harsher penalties for tax evasion, as the more economically significant offending category. However, the above discussion indicates that this does not occur in practice. The following sub-section explores the potential for social exchange theory to provide greater insights into this situation.

5.3 Social Exchange Theory

If the offences of tax evasion and welfare fraud are considered solely from their financial impact on society, they have the potential to be similar. However, if societal norms such as reciprocity are taken into account, differences become more visible. Reciprocity requires a receiver to first, return the obligation and second, not harm the giver. Welfare fraud breaches both these principles. First, the reciprocal societal contract is weakened due to the arrangements around the receipt of welfare, which is provided without expectation of reimbursement or exchange of service. Second, this arrangement becomes further weakened when not only is reciprocity forgone, but the recipient of welfare exploits the welfare system by taking more than is deserved. The second act of taking more than one is entitled to can be viewed as harming society. The relationships in relation to welfare receipt and welfare fraud, with the absence of obligations, potentially impact on the stability of the social relationship. Conversely, when tax evasion is viewed through this lens, the first premise is not as clearly broken. Non-payment of tax breaches the second principle: it harms society. The first principle does not have the same strong nexus with tax evasion as with welfare fraud: the non-payment of tax implies not contributing towards the goods and services funded by taxes, rather than directly taking goods and services. Thus, the act of tax evasion does not have the same strong absence of reciprocity as that of welfare fraud.

Norms such as reciprocity allow for indirect transactions in society to be possible. However, a number of problems are generated when reciprocity is not present. Ekeh (1974:48) observes that ‘equality of partnership in social exchange is needed for continuity of social interaction; when this expectation is frustrated the social exchange situation is threatened’ (Ekeh, 1974:48). However, it is not readily apparent that equality of partnership relates to tax payment as well as to not engaging in welfare fraud. Similarly, Blau notes that society requires ‘shared values that define common objectives’, but again it is not clear why shared values would be different for two forms of financial offending (1946:205).

In section two, the reasons for prosecution were investigated. A common theme in New Zealand and Australia was that factors such as ‘public interest’ were relevant in the prosecution decision. However, there were no factors in the prosecution guidelines to indicate why prosecution of welfare fraud may be more in the public interest than prosecution of tax evasion. Nonetheless, the harsher treatment of welfare fraud in the prosecution process indicates that some characteristic of the offence results in it becoming more important for public interest.

The inclusion of reward for effort may also be a relevant factor. As outlined in section 4.6, exchange formulations of justice are also concerned with compensation for effort. As different exertions of effort may be considered to be present for tax evasion and welfare fraud, this characteristic may be a further differentiating factor that creates the perception of differences in society. As noted by Berger, Zelditch, Anderson and Cohen (1972:121) ‘if the effort/reward ratios of the two are equal, their rewards are fair’. By extension, if the effort/punishment ratios of the two are equal, they may be considered fair. Thus, to the extent that effort is viewed as unequal in the two situations, then perhaps unequal punishments are warranted. A further issue is for the potential for ‘social disapproval’ to result when just dealings are not present in an exchange situation. Common standards of fairness and justice ‘have the result that a person’s direct transactions with specific exchange partners also involve him in indirect transactions with other members of the community whose social approval for his fair and just dealings he earns or fails to earn (Blau, 1946:205). The difference in welfare fraud and tax evasion appears to reside with the level of social approval or disapproval for the particular offence.

A further variable raised by social exchange theory is status. Fineman (2006:135) suggests that we ‘venerate the autonomous, independent, and self-sufficient individual as our ideal’. It is evident from the language used in relation to those on welfare that much of society does not view those receiving welfare as high in the social status. The difficulty with making allowances for status in the prosecution and sentencing process is that it takes into account the characteristics of the offender, rather than those of the offence. Thus, there would appear to be no justifiable basis for considering an offender’s status in society when prosecution and sentencing decisions are made.
Cook (1989:10) observes that tax evasion and welfare fraud are not commonly linked in the public rhetoric and therefore the problem of what appears to be differential response ‘fails to surface in popular discourse as a problem at all’. This may in part be due to the construction of those engaging in welfare fraud as taking from society while those engaging in tax evasion are failing to give. Society exchange theory provides an alternative lens through which these offences can be viewed. This helps to highlight some of the differences in the offences that theories of justice and punishment do not. However, none of the theories investigated in this study provide any robust way of explaining or perhaps more importantly justifying the different treatments observed in the New Zealand and Australian justice systems.

5.4 Summary
The theoretical frameworks discussed over the previous sections provide few explanatory insights for the different treatments of welfare fraud and tax evasion. This is of concern, particularly in relation to the theories of justice and punishment. The conclusion that must be made from the inability to reconcile practice and theory is that one is lacking: either the justice system does not meet the requirements of theories of justice and punishment; or theories of justice and punishment are insufficient to explain the behaviour in practice.

Reference to social exchange theory highlights perspectives that may result in the offences (in relation to reciprocity) or the offenders (in relation to status and effort) being viewed differently. However, these differences in isolation do not make the practices that are visible from the data outlined in section three of this article just. Moreover, it leads to the potential for what Bequai refers to as a ‘dual system of justice’ in the Antipodean justice system: ‘one for the masses, who commit traditional offenses, and the other for a small select group of white-collar felons’ (1978:4).

6. CONCLUSION
This article highlights two important components related to tax, welfare fraud and the justice system. First, different treatments of tax evasion and welfare fraud are evident in the prosecution and sentencing processes in the New Zealand and Australian justice systems. Second, theories of justice and punishment do not provide insights or explanatory power in relation to why these different treatments exist. This leads to the conclusion that either the justice system does not meet the frameworks provided by theories of justice and punishment, or theories of justice and punishment are insufficient to explain the outcomes from the justice system. Furthermore, reference to other theoretical approaches, such as social exchange theory, provide only weak insights relating to differences in the offences (reciprocity), and differences in the offender (status and effort). None of the differences made visible from reference to social exchange theory justify the different treatments of the two offences in the justice system.
REFERENCES


