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Inquiry Secretary
Inquiry into the value of a justice reinvestment approach to criminal justice in Australia
Standing Committee on Legal & Constitutional Affairs
PO Box 6100
Parliament House
Cberra ACT 2600

Dear

Committee Chair & Inquiry Secretary,

Re Justice Re-investment - Criminal Justice - Victims of Crime

How Australia's States and Territories respond to criminal offenders is both challenging and complex. To paraphrase Mitchell J (1973), to state what needs to be done seems obvious; obvious at least to those who are concerned with sentencing offenders, yet not obvious to the public at large, to the media and to many politicians. Across Australia, formal responses to guilty offenders range from police caution to imprisonment, which is often said to be a punishment of 'last resort'. Such punishment is applied and administered in different ways, although there are commonalities, for instance, no jurisdiction has the death penalty.

Those who perpetrate conventional crimes are drawn disproportionately from communities impacted by social, health and other problems. In other words, people in marginalised communities appear to be high risk of becoming offenders. Thus, such offenders are not representative of Australia's population as a whole.

How jurisdictions respond to victims of crime is a politically important problem. Over the past three decades, victims and their advocates have demanded greater attention to victims' needs and stronger rights. Poor treatment of victims discourages their co-operation with the criminal justice system. Dissatisfied victims are less likely to report crime and more likely to be unwilling to give evidence in criminal proceedings. Without victims' co-operation, it is suggested that the system would probably collapse. Thus, forging victims' confidence (hence co-operation) is crucial to the success of the criminal justice system.

Crime hurts individuals. Its ripple effect impacts family, friends and others. Crime destabilises communities. Sentencing offenders gives rise to strong emotions that frequently evoke simple solutions.

Justice Re-investment is (arguably) yet another policy endeavour to forge a more sophisticated set of solutions to reducing recidivism, crime prevention and preventing victimisation. It is defined (in the United States) as “efforts to use funds spent on imprisoning offenders more productively ... through local community based initiatives designed to tackle the underlying problems which give rise to criminal behaviour” (Allen 2007: 5). Allen (2007: 5) says Justice Reinvestment has two elements: the development of policies and measures to improve the prospects of individuals and of places; and, a strategic approach to prevent offending and to reduce recidivism. Justice Reinvestment relies on the collection and analysis of data to “inform decisions about how and where best to allocate public funds to reduce crime”. It also requires a more balanced approach between local and state, even national, justice decision-making.

In the United States, several States have adopted Justice Reinvestment to counter the rapid growth in their prison populations and the resultant financial burden. In Hawaii (2012), for instance, the Governor, the Chief Justice and parliamentarians “sought ways to reduce the number of prisoners and dollars being sent out of state” Justice Centre 2012: 1). A number of inefficiencies in justice administration were identified by data collection and analysis. Much of the court delays in the pre-trial process were determined unnecessary; and, rehabilitation and other programmes intended to reduce recidivism were not ‘targeted’ on those most likely to re-offend. The remedies included timely risk assessment of pre-trial defendants and a stronger focus on probation and parole resources by directing such resources at those most likely to re-offend.

Furthermore, it is decided to hold offenders accountable for the harm they did by increasing the number of restitution orders and ensuring enforcement of the orders. As Hon Chris Sumner as then Attorney-General for South Australia (1987: 215) said, “Direct restitution to the victim from the offender should be given a higher status as a sentencing option, and be seen as a more natural part of the process.” Restitution is an important issue that I address below.

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) acknowledges offender-paid restitution as a fundamental entitlement but also regarding victims of violent crime states that where restitution is unable to be attained from the offender, the state should compensate the victim. Every jurisdiction in Australia has a state-funded victim compensation scheme. Providing limited compensation to the direct victim of violent crime and immediate family members is a common element of the schemes. Indeed, governments assert that they meet the requirement of the aforementioned United Nations Declaration. Yet, as the cost of these schemes has increased, various governments have introduced ways to constrain expenditure, such as narrowing the definition of ‘eligible victim’, introducing a ‘mains table’ and ‘scale’ to assess ‘damages. There has also been a shift away from the concept of compensation to financial assistance, which peaked in the mid-1990s with the abolition of payments for non-tangible loss (for instance, pain and suffering) in Victoria.

Justice Re-investment in Australia

Gooda (2010), Aboriginal and Torres Strait Islander Social Justice Commissioner and his predecessor Tom Cama (2009), are among the strong advocates for Justice Reinvestment approaches being used to negate the increasing rates of violence in Indigenous communities and imprisonment rate for these people. The remoteness of some Indigenous communities, the abuse of alcohol and/or other drugs, the high levels of violence and that violence often being directed towards family members (especially women and children) were, and remain, factors that Gooda (2010), Cama (2009) and others point at when presenting their cases for justice reinvestment. They propose reallocating a portion of funds that would have been

spent on imprisonment to invest in community programmes and activities, as well as services that address the underlying causes of crime in the particular community.

It seems to me that there is much in the Justice Reinvestment literature that resembles the discourse on social and developmental approaches to crime prevention. Such approaches were popular in the 1980s and 1990s but seem to have lost favour with labour, liberal and conservative governments. The Australia National Crime Prevention 'Pathways' report (1998) espouses an ecological approach to early intervention in crime prevention. The authors point out that many early intervention programmes are conducted under the auspices of health and welfare as well as education and the crime prevention outcomes are sometimes over-looked but often not emphasised. The Mullighan Commission in South Australia recommended greater investment in health, welfare and education on the APY Lands but also greater deployment of police and other justice resources. A Mullighan Task-force, among others, have been over-seeing the implementation of those recommendations approved by the Government. I urge that any pursuit of Justice Re-investment in South Australia not run contrary to such reinvestment.

Gooda (2010) says, "[I]f crime in particular communities can be connected to problems with drugs and alcohol, then services [should be established] to address these problems". In South Australia, about a decade and one half ago, the then Government allocated funding to employ 14 police officers to set-up Drug Action Teams in each police local service area. These Teams engage in problem-oriented preventive approaches. Much of their work is under-stated and not properly evaluated.

Gooda (2010) queries whether imprisonment is 'value for money'. This is a constant question in criminology and penology; but there is a broad consensus that prisons are not the most efficient way to control crime. That said, it is evident that imprisoning offenders prevents them from committing crime for the period of their incarceration. Moreover, reductions in crime can be attributed to 'longer' and more frequent prison terms; albeit that such reductions are attained at considerable expense and tend to be temporary rather than prolonged. Nevertheless, the UK-based 'think-tank' Civitas (2010) maintained that releasing prisoners early or giving them community-based punishments instead of prison does "nothing to reduce crime or the cost of crime". Former Home Office criminologist, Ken Pease is quoted by Civitas as saying,

"Someone convicted four times in the year after getting a community penalty is regarded as an equal success or failure as someone convicted four times in the year after being released from one year in prison, despite the fact that in the one year in prison, no convictions occurred. The one year of respite that prison gave the community is, and always has been, simply spirited out of reconviction statistics, leaving the impression that imprisonment and community sentences are equivalent purveyors of public protection." (See http://www.publicservice.co.uk/news_story.asp?id=13986)

Targeting resources to rehabilitating offenders in communities as well as victims and their families is also raised as an option. Gooda (2010: 3) says, "The rationale is to stop the causes of crime at their root." He seems, however, to assume that dysfunctional communities with intergenerational unemployment and disenfranchised individuals have the capacity to devise sustainable preventive programmes and activities; and, that the community are ready to take ownership of the problem and ownership of the solutions.

It is difficult to dispute the evidence that crime can be reduced by providing children and young people with the opportunity to live good lives; by supporting reintegration of young offenders into the community; and, fostering a safe community. Children, young people and women, amongst others, are entitled to live in safe and supportive families and communities.

Gooda (2010) describes the 'Finding Your Warrior' programme run in Canada by first Nation people. Offenders can be admitted to the programme if they accept their guilt and admit the crime. Restorative practices are used, when appropriate, to bring the victim and the offender together. In South Australia Family Conferencing is a process that augments the Youth Court that is available to young offenders who admit the crime. These conferences have elements of restorative justice. An early evaluation showed conferences as not appropriate in dealing with many adolescent Aboriginal offenders. Consistent with this, Sherman and Strang reported that the RISE project that was affiliated with policing and ran in Canberra was "toxic" for Aboriginal youth. In reply to the Mullighan Commission's recommendation to examine the appropriateness of using restorative justice to deal with sex offences on the APY Lands and other places, a cross-government work-group, who consulted various stakeholders, cautioned against the recommendation and stated principles that should be fundamental to any restorative programme. Those principles include where appropriate such programmes should seek to represent victims' interests as a priority; should emphasise the need for acceptance by the offender of his or her responsibility for the offence and an acknowledgment of the adverse impact for the victim; should provide that the victim has a choice whether to participate; and, should the victim agree to participate, the process must accord with respect for victims' dignity and other rights, as well as provide for rehabilitation of both the victim and the offender. Victims' safety and privacy are said to be paramount.

Like the workgroup, I warn against creating false expectations regarding restorative justice and Justice Re-investment. Like restorative justice, it seems to me that Justice Re-investment has grown out of concern for offenders and worry about the public cost of justice; however, concern for victims' rights and worry about the cost of crime for victims seems to have been added in the hope of making the concept more broadly acceptable.

Smart Justice (a precursor to Justice Re-investment)

It seems to me that justice implies regard for the rights of the accused, for the interests of victims, for the rehabilitation of offenders and for the well-being of society at large. It is a concept rooted in South Australia's culture and traditions. Justice is also strongly associated with the formal investigative, prosecution and judicial mechanisms as well as correctional mechanisms that collectively is known as the criminal-justice system. The adjective 'criminal' refers also to acts and omissions that are embodied in our criminal law, as well as treatment of offenders (young and not so young) and victims.

Ms Hora (a retired USA Judge) as 'Thinker in Residence' in South Australia articulated substantive and procedural requirements, amongst other elements, that she saw as necessary for the administration of 'smart justice'. No offence intended, much of her collective message was not new but when presented by an 'outsider' it appeared fresh, possibly innovative. As she stated, there was (and is) evidence to support many of her contentions and recommendations; however, there are also practical implications. I offer similar criticism of Justice Re-investment as it currently stands.

I concur with some proponents of Justice Re-investment that the most effective way to reduce crime and stop the cycle of incarceration is to address the root causes of crime through an integrative approach to justice; and that confinement alone should not be the only strategy. However, the proposition that confinement should be used sparingly ignores the fact that many prisoners are 'repeat offenders'. South Australia's law states that imprisonment should be utilised as a 'last resort'. Thus, it is implicit that alternatives to incarceration have been tried but failed.

Any significant shift away from a criminal justice / law and order approach would need to be supported by community awareness raising. For example, if proponents of Justice Re-

investment want the community to accept it as a new approach, they need to explain the underlying principles and promote the evidence-based good practices that might be adapted, rather than simply transplanted, into Australia. I am mindful that in the 1960s and 1970s, rehabilitation was popularised and an array of programmes were devised and tried. Like a frozen lake, once cracks began to appear between the promises and the realities, even the strongest, most successful programmes were discredited (and collapsed into the abyss of the 'criminal justice' lake).

My staff and I, as well as the former Victims of Crime Ministerial Advisory Committee, have made submissions on the need for a greater focus crime prevention and preventing victimisation. We also recommended more investment in early intervention but avoided promoting education as a panacea. Those who are disenfranchised often have a multitude of issues that require multi-faceted responses.

It is important that there is 'certainty of negative sanctions' (which is not the same as longer terms of imprisonment) being imposed to deter offenders and give victims confidence in the criminal justice system. Rewarding appropriate behaviour, such as offenders who accept responsibility for their behaviour and seek to make genuine amends should also feature in the criminal justice tool-kit. The debate on sentencing discounts for early guilty pleas is said by some to be a prime example.

Victims' views on sentencing offenders in South Australia

Gardner (1990) reported on a (face-to-face) survey of crime victims in South Australia. Several questions were posed on victims' views on sentencing offenders. Three-quarters of the victim-respondents (263 of total of 350 who answered the question) felt they would like or should receive restitution (repaying the crime victim for damages or harm) from the offender. Most (144) thought this would hold the offender responsible for his or her crime and the resultant harm. The likelihood that the offender would not pay was given as the main reason for not wanting restitution.

Victims were also asked their view on non-monetary 'punishments' such as community service or the offender working for the victim. The majority (69.4%) approved the offender working in the community without payment as an alternative to restitution.

Some felt community service would benefit the public and the offender; some felt that it would act as a deterrent and, if hard labour was involved, also act as a punishment. Those who queried community service felt the system would be abused or that it was a soft option. Some were worried due to the violent nature of the crime committed against them that the offender would not be a suitable candidate for community service. Victims of property crimes were more in favour of community service than victims of violent crimes. Only a few victims (15.5%) supported the idea of the offender doing work directly for them.

Among those victims who knew the court outcome, the majority of victims who knew that the offender had been acquitted or dismissed were not satisfied while only 10.8% of victims who knew their offender had been convicted felt so negatively.

Erez & others (1994) reported on a (posted questionnaire) survey of crime victims in South Australia. When victims knew the outcome of their court case, satisfaction with the criminal justice system was highly correlated with the level of satisfaction with the sentence. In addition, satisfaction with the sentence improved when the offender was known to the victim and when the offence was against that person as the victim. Satisfaction, however, decreased when victims reported a higher level of distress resulting from the offence and the victim stated that they viewed the offence as serious.

As the majority of victims thought the sentence was too lenient, their satisfaction with justice was subsequently low, despite their feeling high satisfaction with most of the components (police, prosecution etc) of the criminal justice system.

Victims who knew the court outcome were asked to state the penalty that was actually imposed on the offender and then to nominate the penalty that in their opinion should have been imposed. Victims requested imprisonment and community service orders more frequently than had actually been imposed by the courts. Victims also requested that restitution orders be made more frequently than the courts ordered. Victims also favoured a reduction in the use of suspended sentences.

Justice Strategy Unit (2000) reported on a (telephone) survey of crime victims in South Australia. Only one third of victim respondents (35.6%) knew the court outcome. In 79 cases, the victim stated knowing the court outcome and were subsequently asked to state the penalty. For example, 17 respondents stated 'prison'; 8 respondents stated 'suspended sentence'; 10 respondents stated 'good behaviour bond'; 6 stated 'fine'; 4 stated 'community service'; and, 2 respondents stated 'restitution'. These same 79 respondents were next asked to comment on their level of satisfaction with the outcome they stated. Almost two thirds (62.%) said they were dissatisfied with the outcome; and most of these were very dissatisfied. Alternatively, a substantially lesser number of victims (15.2%) were satisfied or very satisfied with the court outcome.

Less than 10% of victim respondents recalled restitution being discussed. In 16 instances where the case went to court, restitution was ordered and 12 victims stated that the sum ordered was paid in full.

Regarding offender paid restitution that is a central victim-oriented response in some jurisdictions that have adopted Justice Re-investment (such as Hawaii) I urge (as I said above) caution. Several articles on the federal mandatory compensation law in the USA raises valid questions about the usefulness of the law. Mandatory compensation for property crime exists in Tasmania, Australia, and has done so in New Zealand for several years. Jurisdictions across Australia are struggling to recover from offenders and governments are subject to public criticism for the failings.

Conversely, I hasten to add that an appeal court in Victoria held that offender-paid compensation could be a human right entitlement for crime victims.

Victims' suggestions to improve the criminal justice system in South Australia

Victims suggestions to improve the criminal justice system (Erez et al 1994)—

- More information should be provided on the way the system works and victims' rights.
- Making the process faster, more efficient and less intimidating.
- Another obvious area of concern was sentencing.
 - About 13% of respondents desired harsher penalties and sentences to be served in full.
- A great emphasis on compensation.
- Persistent young offenders to be treated as adults in the court system, and
- To disclose to the judge or jury any prior convictions.

Victim-respondents to the 1999 telephone victim survey favoured—

- More information about preventing victimisation, victim support, victims' legal rights / legal position, progress of investigation & prosecution, and ways to obtain compensation.

- In addition, a combination of state-funded victim-support and victim-compensation. (Many victims, as in a previous survey (OCS 1985) stated holding offenders accountable for the harm they did as a rationale for state-funded victim compensation.)

Improving discourse on Justice Re-investment for victims of crime

- Involve victims and their advocates in all stages of the dialogue, planning and delivery of programs.
- Integrate victims into the dialogue, processes etc.
- Seek to represent victims' interests (including their perceived safety concerns) as a priority.
- Emphasise the need for acceptance by the offender of his or her responsibility for the offence and an acknowledgment of the adverse impact for the victim.
- Devise policies and practices that accord victims respect for their dignity.
- Strengthen victims' rights to enhance procedural and outcome justice for victims.
- Build upon the nexus between crime prevention and preventing victimisation.

Importantly, less crime implicitly suggests fewer victims; however, crime is not evenly distributed and reductions in some crime in some places might mask differing outcomes in other places. Likewise, reductions in crime against some groups of people might mask increases in crime against those groups most at risk.

Public views on crime and criminal justice

Signs of urban physical decay and social incivilities are among the cues often interpreted by members of the public as evidence that crime is 'out of control' and police are unable to provide for 'public safety'. Perceived safety concerns can heighten worry about crime and result in fear that negatively impacts people's standard of living and quality of life. Crime is often identified as a social issue of concern. Data on such concern can be both generalised and particularised. In South Australia, for instance, in 2001 about 20% of respondents to a survey on fear of crime, identified crime as a social issue that worried them. That 20% comprised 94 respondents who perceived crime in general as an issue but also 52 respondents who stated home invasions as their prime concern and 12 respondents who stated juvenile and/or youth crime as their prime concern; and, 49 respondents who stated other types of crime that concerned them.

Although 20% of respondents to an open ended question stated crime as a social issue, 80% of respondents stated other social issues as their prime concern. Some of the alternative responses are relevant to debate on Justice Re-investment. For example, 8% of respondents stated health care, 5% stated child and youth issues such as youth suicide, and 4% stated education, as well as 4% stated environmental issues. Over all, these concerns did not seem to vary by sex or age.

Of the 541 (of 1000) respondents who stated that they had been a victim of crime at some time in their lives, 21% stated crime as their prime concern, 15% stated drug abuse and 9% stated unemployment issues. Statistically, however, victims' responses did not differ markedly from non-victims' views.

Most respondents (81%) stated that the government was not solely responsible for reducing crime. Most also (82%) agreed that the media "whips up concern about crime".

Regarding the underlying causes of crime, drugs and/or drug abuse were cited by about one half of respondents, followed by unemployment, financial problems (including poverty), boredom (such as lack of activities and facilities), family and parenting issues, lack of discipline, lack of social values (including a sense of community and societal breakdown), lack of self-worth or self-direction, and lack of education (including problems with the education system).

Respondents were presented with seventeen strategies that might reduce crime. Of the seventeen, ten strategies were identified as either effective or very effective:

- More support for families in crisis
- More support for young people in crisis
- Building strong local communities
- More teaching of social values
- Reducing unemployment
- More effective parenting education
- Better life skills education
- Better job training opportunities for youth
- Better targeting of police resources
- More police officers

Longer terms of imprisonment for 'serious crime' was identified as a strategy that was "likely to be very effective in reducing crime" by 63% of respondents. Conversely, 15% of respondents identified such as likely "not to be effective" in reducing crime.

When asked what governments might do to reduce crime, respondents most often stated:

- Increase the number of police and/or better target police resources (19% total)
- Introduce tougher penalties and/or stricter laws (13%)
- Reduce unemployment (11%)
- Address drug problems (7%)
- Longer terms of imprisonment for serious offences (7%)
- Better job opportunities for youth (3%)
- Education (3%)

Mindful of the concept of Justice Re-investment, it is important to point out that many of the things respondents felt governments might do are related to social and economic issues. Criminal justice responses did, however, collectively account for about one half respondents' replies. About 9% of respondents did not know what governments might do to reduce crime. Within local communities, 21% of respondents felt building strong local communities was the "one thing" that could be done to reduce crime. Providing leisure activities for youth (12%), more effective parenting (2%) and reducing unemployment (2%) were among other responses.

I suggest that survey results such as above indicated a preparedness among many people to engage in a more sophisticated debate on reducing crime. Further, despite the most people favouring criminal justice responses there is broad acceptance of other strategies that are grounded on social and economic policy and practice.

Hopefully, my commentary will help to inform debate on how governments, business and civil society respond to crime as a social issue that is the prime concern of many citizens - male and female, young and old.

~~Michael~~ O'Connell | Commissioner
Commissioner for Victims' Rights