Restoring Victims of Crime

Jocelynne A. Scutt

Australian Institute of Criminology

Restoring Victims of Crime

A Basis for the Reintroduction of Restitution into the Australian Criminal Justice System

Jocelynne A. Scutt

Research Criminologist
Australian Institute of Criminology

Australian Institute of Criminology • Canberra 1980

Published and printed by the Australian Institute of Criminology, 10-18 Colbee Court, Phillip, A.C.T. Australia, 2606.

The J.V. Barry Memorial Library has catalogued this work as follows :

SCUTT, Jocelynne A. 364.680994

Restoring victims of crime ; a basis for the reintroduction of restitution into the Australian criminal justice system
Canberra : Australian Institute of Criminology 1980

Includes bibliography

1. Reparation - Australia. 2. Sentencing (criminal procedure) - Australia.
I. Australian Institute of Criminology. II. Title.

ISBN 0 642 90203 8

FOREWORD

At the conference of Ministers in Charge of Prisons, Probation and Parole held in Broome, Western Australia on 29th June 1979, a paper prepared by Andy Duckworth, Acting Co-ordinator of Community Programmes, Western Australian Department of Corrections and titled "Restitution : An Analysis of the Victim-Offender Relationship was reviewed. The Ministers decided to seek from the Australian Institute of Criminology further advice on this subject for consideration at their 1980 conference.

In response to this request David Biles of the Institute sought up-to-date information on restitution programmes from a number of authorities in the United States. These sources responded with a great deal of information. Thanks are particularly due to Professor Burt Galaway of the School of Social Development, University of Minnesota who together with Joe Hudson of the Minnesota Department of Corrections has researched, written and edited a number of authoritative works on restitution in criminal justice.

My thanks are also due to members of the staff of the Institute of Criminology who kindly read the original draft of this paper and constructively criticised - Col Bevan, David Biles, Ivan Potas, John Seymour and Grant Wardlaw. In addition I must acknowledge the assistance of the original paper prepared by Andy Duckworth. Sincere thanks for competent typing skills are due to Jocelyn Terry, Annette Waters and Barbara Jubb. Errors and omissions are, of course, my own.

Jocelynne A. Scutt, 1980

FOREWORD

At the conference of Ministers in Charge of Prisons, Probation and Parole held in Broome, Western Australia on 29th June 1979, a paper prepared by Andy Duckworth, Acting Co-ordinator of Community Programmes, Western Australian Department of Corrections and titled "Restitution : An Analysis of the Victim-Offender Relationship was reviewed. The Ministers decided to seek from the Australian Institute of Criminology further advice on this subject for consideration at their 1980 conference.

In response to this request David Biles of the Institute sought up-to-date information on restitution programmes from a number of authorities in the United States. These sources responded with a great deal of information. Thanks are particularly due to Professor Burt Galaway of the School of Social Development, University of Minnesota who together with Joe Hudson of the Minnesota Department of Corrections has researched, written and edited a number of authoritative works on restitution in criminal justice.

My thanks are also due to members of the staff of the Institute of Criminology who kindly read the original draft of this paper and constructively criticised - Col Bevan, David Biles, Ivan Potas, John Seymour and Grant Wardlaw. In addition I must acknowledge the assistance of the original paper prepared by Andy Duckworth. Sincere thanks for competent typing skills are due to Jocelyn Terry, Annette Waters and Barbara Jubb. Errors and omissions are, of course, my own.

Jocelynne A. Scutt, 1980

INDEX TO CONTENTS

SUMMARY

"Mounting evidence discrediting the effectiveness of coerced therapy in the criminal justice system, increasing costs of imposing traditional justice sanctions, and the tendency of criminal justice officials to ignore the victims of crime have all contributed during the past few years to a renewed interest in the ancient concept of restitution."

Burt Galaway, 1979

Today the destructive quality of imprisonment is recognised in an increasing search for appropriate methods of dealing with offenders not by incarceration, but by enabling them to remain in the community whilst serving out a penalty for a crime. That old standby, the fine, continues to be the most frequently used penalty; however community-based treatment programmes such as probation are now being joined by the community work order, attendance centres, weekend imprisonment, work-release. The search for alternatives to imprisonment, so that prison may truly be used as a last resort, continues.

In conjunction with efforts to seek out alternatives, an increased concern for victims has become apparent. To date this concern has been met by way of provision for State-run compensation schemes. The maximum limit of compensation under such schemes is not high, ranging in the various Australian jurisdictions from $4,000 to $20,000, however the philosophy is clear : persons who have been injured by criminal acts should receive some recompense - even if only a token gesture.

A combination of both streams - concern for the victim and a perceived need for community based corrections - has led to a renewed interest in the concept of restitution : the idea that the offender should make direct reparation for the offence, to the victim. Goods stolen should be returned; monies embezzled should be paid back; property damaged should be repaired. In accordance with this philosophy, in the United States in particular and also in Canada, formalised restitution programmes have been introduced, whereby offender and victim come to an agreement as to the value of goods or the damage suffered, and a programme for repair or repayment is drawn-up under the guidance of a mediator.

In Australia, in December 1977 the number of persons in prison reached "an all time low"; since that time there has been an increase in the number of persons sent to prison. Furthermore, recent studies enquiring as to victims' perceptions of crime and the criminal justice system show clearly that victims do not consider the system to be of much assistance to them. It is therefore timely to introduce a disposition that may serve two purposes - that of keeping individuals out of prison and having them take direct responsibility for their crime by "paying back", and that of involving victims directly in the criminal justice process by enabling them to work through, with the defendant, a programme designed to restore them to the position held prior to the offence.

A pilot scheme (or pilot schemes) should be set up to re-introduce the idea of restitution into the Australian criminal justice system in a formalised way, rather than leaving the question of restitution to chance, as is currently the case. Magistrates and judges should be required to consider at the outset whether a particular individual would be better placed in a community programme than in prison, and a demonstrated desire to repay the victim should have some influence on final disposition. Restitution ought not to become another mechanism for imposing coercive measures upon the offender, but should be seen as an equitable way of having an offender face up to the crime without being removed from society. If the offence warrants more than simple restitution, a restitution order could be awarded in conjunction with another - or other - order/s or penalty, such as a probation order (with formal supervision), a recognizance, a fine. Sentences of imprisonment should be capable of being deferred or suspended whilst a restitution programme is negotiated, and if the programme is properly concluded, the prison term should lapse. Where an offender is not possessed of funds sufficient to make complete restitution, a partial restitution order could be combined with an order for "symbolic restitution" - being an order for community work agreed upon as "cancelling out" the damage caused by the offence.

However in our haste to find acceptable alternatives to imprisonment and other coercive measures, and to care for victims, we must abjure the desire to find all answers to corrections problems in restitution. Unfortunately, extravagant claims have been made as to the role that restitution might play in restoring to the system some "equilibrium" and "equity". These claims are likely to lead to expectations that cannot be fulfilled - with inevitable disenchantment at the failure of the disposition to "pay off".

Problems lie in the very nature of restitution schemes -

* what is the philosophy of restitution, and how should it be effected?
* is the major beneficiary of formalised restitution to be the offender, in that rehabilitation should be the main aim?
* is the major beneficiary to be the victim, in that victim-involvement and assistance should be the main aim?
* is the major beneficiary to be the State, in that imprisonment problems are to be lessened, and victims no longer are a State responsibility through compensation schemes?

There are, additionally, problems specific to the victim and problems particularly related to the offender, as well as ethical issues for the criminal justice system itself. For the offender, these include -

* the question of ability to pay - should payment be based on resources, or is provision of "symbolic restitution" enough?
* will the offender be persuaded to "admit" to an offence and return goods in the hope that the matter will be thus resolved, although he or she is in fact not guilty?
* will the offender suffer inflated claims from the victim?

For the victim, problems are many -

* will delay in restitution negotiations cause the victim to suffer from tardy return of goods and/or monies?
* should the victim be required to participate in a face-to-face confrontation with the offender?
* should the victim be held in somewise accountable as "precipitating" a crime? is "contributory negligence" relevant?
* is the victim to be involved only in making an assessment of damage, or should a greater role be written in to the system?
* what of victims where no offender can be found - is there a danger that current crime compensation schemes may become even less generous if restitution schemes are pursued?

From the perspective of the criminal justice system, issues include -

* at what point in the system should restitution schemes be introduced- before arrest?
  - at the police station?
  - at plea-bargaining/pre-trial stage?
  - at a finding of guilt?
  - after a conviction?
* how can the system guard against too easy acquiesance by an offender if restitution is programmed to take place at any stage prior to a finding of guilt by a court?
* is "consent" relevant to the disposition, as is allegedly the case with probation orders, community work orders and the like?
* should a restitution order be combined with other orders or penalties, or should it stand alone?

In setting up a pilot scheme, regard should be had to these issues. It would be preferable to commence with a formal restitution scheme that takes in offenders upon whom a finding of guilt has been made, with no conviction, as well as those offenders who have been convicted. Once the scheme is in operation, consideration might be given to extending the idea to persons who have not appeared in court, as a pre-trial diversionary scheme with stringent safeguards. In setting up the scheme, however, particular attention should be paid to -

* adequate funding for proper operation of the scheme
* adequate funding for a continuing monitoring of the operation of the scheme
* thorough training of personnel, particularly those who are to act as mediators/negotiators
* victims using the scheme - that is, if the scheme is set up with individuals in mind, so that they might gain redress, it would be wrong if insurance companies and the like became the major users of the system
* the underlying philosophy of the particular restitution programme

As well, sight must not be lost of the fact that one of the major impetuses behind the drive toward the reintroduction of restitution as a formalised mechanism in the criminal justice system is that of concern for the victim. Restitution schemes alone cannot absolve the system from this concern. Major problems confronting the victim in the criminal justice process are those of formality, lack of information as to how the case is going, time spent waiting in courtrooms and in corridors for the case to come on, loss of pay in addition to the losses suffered by the initial crime, difficulties in securing child-care for dependants when coming to court, and the like. Here, there is a necessity to reassess court administration, to introduce victim services and services for witnesses generally, so that those defects in the system that militate against victims reporting crimes to police, and that militate against victims carrying their cases through to ultimate resolution in the courtroom may be eliminated - or at least lessened.

RECOMMENDATIONS

1. A Pilot Scheme should be set up to test the potential of restitution as a formalised mechanism operating as a means of keeping offenders in the community. The scheme should not replace or be seen in competition with current work order schemes, but should concentrate upon the victim, taking into consideration two types of victim involvement -

   (a) direct victim-offender negotiation under the guidance of a neutral mediator/negotiator;

   (b) indirect involvement of the victim with the offender, in that personnel running the restitution scheme must consult with the victim as to the damage suffered and the type (and amount) of restitution required, yet without the necessity for bringing about a face-to-face confrontation.

2. Restitution Orders should be made at the finding of guilt, with release without conviction, and after the time of conviction. Consideration should later be given to introducing restitution as a pre-trial diversionary method, with strict guidelines to guard against too easy acquiesance of individuals in the scheme as an "easy way out", although they may not have committed an offence in fact.

3. Full and Adequate Funding should be made available so that the scheme may operate effectively, and also in order that a continuing evaluation may be made, taking into account the effect of the programme on offenders and on victims.

4. Thorough Training of Personnel - particularly of those persons who are to act as mediators/negotiators in the scheme should be undertaken. The scheme could founder if personnel adhere to philosophies of the past and fail to come to terms with the rationale of restitution schemes.

5. Crimes Compensation Schemes should continue to be seen as an integral part of any criminal justice system and should continue to be improved.

6. Victim/Witness Assistance Programmes and improved court administration should be seen as priorities so that concern for the victim and other persons caught up in the criminal justice system may have some fruitful results.

RESTORING VICTIMS OF CRIME : A BASIS FOR THE REINTRODUCTION OF RESTITUTION INTO THE AUSTRALIAN CRIMINAL JUSTICE SYSTEM ?

Introduction

The debate as to the efficacy of the corrections system in Australia has, as overseas, revolved of late about two major propositions. First there is a growing recognition of the inappropriateness of imprisonment as a punishment, except as the last resort. This has led to a search for alternative methods of punishment that might better serve the role of assisting offenders, in as productive a manner as possible, to recognise the unacceptability of their conduct and to modify it, whilst continuing to fulfil a community need for "denunciation" of wrongdoing. Second and complementary to this is a concern for victims of crime : the victim has long been forgotten in efforts of the State to deal with the problem of criminality in the person of the offender; today it is increasingly acknowledged that the interests of the victim cannot be ignored.

That in principle the victim should not be ignored is bolstered by a further factor : that passing over the legitimate interests of the victim may well increase the ineffectiveness of the criminal justice system in one of its primary aspects - that of certainty of punishment on the part of the offender. If the victim of a crime is uncertain that the system will serve his or her needs; if the victim believes the system will be impervious to those needs, or may run counter to them; if the victim in previous times has discovered that the system is ignorant of his or her legitimate interests, the victim will be reluctant to co-operate with law enforcement agencies. A lack of co-operation on the part of victims will inevitably severely hamper the system in bringing those who have offended to account for their crimes.

Evidence that victims are not enamoured of the criminal justice system is not difficult to discover. In Australia, the reluctance of victims to involve themselves in the justice process is clearly illustrated by the findings of the first national survey on victimisation. Analysing figures produced by the Australian Bureau of Statistics, Biles and Braithwaite found that "... over half of all the crimes which occur in Australia are not reported to the police". A breakdown of offences reported or becoming known to police produced the following table :

	Male%	Female%	Total%
Assault	52.9	19.9	46.4
Robbery with violence	53.9	68.4	60.4
Rape, attempted rape	0.0	32.7	32.7
Break and enter	69.5	64.6	68.4
Motor vehicle theft	90.1	90.4	90.1
Fraud, forgery, false pretences	20.4	40.0	24.5
Theft	36.3	35.1	35.8
Nuisance calls	15.9	13.5	14.0

Source : David Biles and John Braithwaite, "Crime Victims and the Police" (1979) 14(3) Australian Psychologist 345, at 348.

Note : "Don't knows" and "Not stateds" are excluded from these percentages.

One of the major reasons given for not reporting the offence to police was that "... police could not do anything about it". Others were that the matter was "too trivial"; that it was a "private, not a criminal matter" (although the events listed in the questionnaire were clearly criminal matters); that "... police would not bother to do anything about it".[1] The authors conclude :

> "... the most striking findings stem from the fact that well over half of all criminal events are 'absorbed' by the victims. Presumably, some degree of trauma is associated with criminal victimisations, yet in the majority of cases no official expression of this trauma is sought. Certainly, in many cases the victims thought the offences were 'Too trivial', but there still remains a vast number of serious crimes in which the victim obviously suffered injury and/or affront and took no action. One can only speculate on the short and long term consequences of this 'absorption' on the individual's personality and interpersonal functioning. In some cases no action may well be preferable to police questioning and a possible court appearance, but one wonders how much frustration, embitterment and perhaps distortion of reality has been engendered by not reporting crimes to the police."[2]

Also to be speculated upon is the effect of failure to report upon those who have committed the offences. Failure to report may well lead offenders to continue a pattern of criminality because they have not been confronted with the realisation, by way of police interrogation, court

appearance and a finding of "guilty" with consequent punishment, that they have transgressed. Indeed, the effect of not reporting crimes becomes the more significant when studies exploring the deterrence theory of punishment are regarded : in examining the effects of information on individual's perceptions of the certainty of arrest in a given community, Parker and Grasmick found that newspaper crime stories had no effect on perceptions, whilst personal experiences with crimes and personal experiences of acquaintences "... appeared to influence people's estimates of the certainty of arrest."[3]

Reluctance in reporting crimes may be matched by a failure to persevere where a victim has originally reported the crime, yet has been faced with the inability of the system to be supportive to victims and witnesses in bringing the case to a satisfactory conclusion. It may also be mirrored in disenchantment with the system and consequent determination not to take the time to report future crimes. Data indicate that victim attitudes toward the criminal justice system "... are more influenced by their contact with the police and the outcomes of their case (that is, what happens to the offenders) than by their contact with any other part of the system."[4]

Although no Australian research has been undertaken as to the reactions to the system of persons reporting crimes, nor of their reactions to the particular form of punishment meted out for the crime to which they have fallen victim, United States' studies in this field are noteworthy. Without exception research has shown disillusionment on the part of victims. This has frequently led to their dropping the case or failing to appear in court as a witness. A United States' Department of Justice study[5] found the victim as witness "... becomes vulnerable to ... inconvenience and distress". Victims perceived themselves as "pieces of evidence" in the system. They regretted sacrificing work-days and having to secure transport to court and child-care for their dependents "... for seemingly endless court appearances, many of which may be postponed or cancelled with no advance notice." To compound the failure of the system to evince interest in them, victims did not "profit" from appearance by way of any monetary reward equivalent to their losses. As a result of these factors, witness non-co-operation with case prosecution was seen as "... a serious problem ... the high no-show rate in many large jurisdictions suggests that the results of victim neglect are substantial."[6] A study conducted in Milwaukee in 1975 found many victim/witnesses dropping out as a result of time loss and associated loss of income.[7] Similarly a study of successful prosecutions in courts utilising computer recording of cases and their outcomes "... graphically illustrated the correlation between successful prosecutions and co-operative, effective witnesses"; there was a substantial correlation between failure of the victim to appear, or dissatisfaction victims experienced with the court process, and findings of "not guilty". The rates were sufficient to lead to the introduction of extensive programmes of victim and witness assistance.[8]

As the major complaints coming from victims relate to the failure of the system to pay attention to their needs, both in terms of loss of time and in relation to loss of pay, in addition to those losses directly experienced as a result of the crime, United States' authorities have

begun looking at ways to involve the victim more genuinely in the process, as well as methods of properly recompensing victims for direct and indirect losses suffered. As a result, many jurisdictions have proposed and/or introduced schemes providing for victim/witness assistance and programmes designed to have offenders restore, as far as they are able, victims to a precrime position : this is achieved by way of restitution from offenders to victims.

Sometimes restitution may be symbolic, where "payment" does not equate exactly with the loss suffered, but is calculated in terms of a service to be rendered to make up for that loss. Sometimes restitution is "direct" in that it comprises a sum of money equal to the sum stolen, or is comprised of goods unlawfully obtained and the like. Restitution differs from compensation in that it comes out of the offender's pocket rather than from the coffers of the State : rather than taking the approach that all the victim requires is "money back" whatever the source, restitution programmes are formulated with a view to "personalising" the return of losses suffered ; victim gains directly from offender; offender must pay directly to victim.

The rationale of this approach to restoring the victim is threefold. First there is a belief in the potential of restitution for "... providing the client-offender with all of the key ingredients for positive change and success : by establishing a success identity; by providing the offender with a responsible course of action which is remedial in nature; and through regular interaction which is constructive in nature."[9] Second, restitution programmes are favoured for the possibility that they may serve "... a reintegrating function". That is, the damage that has been caused to a victim may, by way of restitution, be rectified, thus restoring the victim to a position akin to that which he or she possessed prior to the offence. As well, the offender is restored to a position relative to that which he or she held prior to committing the offence, without being removed from society. Third, it is hoped that restitution programmes "... may provide increased public awareness and renewed confidence" in community based corrections.[10]

Historical Basis for the Reintroduction of Restitution Programmes

Those seeking to restore to the criminal justice system the idea that victims should in some way be compensated, by the offender, for harm and loss frequently recall the function played by restitution in ancient and primitive societies. In early civilisation and in those communities classed "primitive" in traditional terms, restitution played a significant role in resolving those conflicts that today we class "criminal". Indeed restitution was in many civilisations (and today in some remains) the primary form for resolution of conflict.

In a comprehensive recounting of restitution as described in anthropoligical studies, Nader and Combs-Schilling point out :

> "... although it is widely held to be true, it is unlikely that the 'eye-for-an-eye' theory ever really held for preliterate peoples. It is not retaliation but rather a

> desire to replace the loss or damage that characterises preliterates. And still today it is restitution, not social retaliation or retribution, that is widespread."[11]

Major components of the restitution process as operating in preliterate societies are, according to Nader and Combs-Schilling, five. First, there is the collectivity or individuality question. That is, is the individual who committed the offence alone liable in accordance with the restitution process, or is there a collective responsibility - for example the offender's family sharing responsibility, kin of the offender, the village group? Second, what types of offences or acts are rendered susceptible to negotiation by way of restitution - are they "serious" offences, or are they minor acts, serious offences being left for redress by other means? Third, what form does restitution take? Is the usual procedure such that there should be restitution "in kind" as in the process where a life is given in return for taking a life, or is restitution measured "in equivalence" - as where a wife is given in exchange for a life? Fourth, Nader and Combs-Schilling consider the process by which a particular form of restitution is agreed upon. Here, the issues are those of who pays the restitution, who receives the restitution, and which parties are participants in the process of negotiation, payment and receipt. Finally, the function of the restitution process is intrinsic to any analysis of the role of restitution in pre-literate societies. What function does it play in dealing with unacceptable or antisocial acts? Can restitution in pre-literate societies be regarded in the same light as we today regard our various mechanisms for dealing with offenders - that is, as retributive, rehabilitatory or reformatory, denunciatory, or as a deterrent?

In preliterate societies the major sanction in favour of parties giving attention to restitution procedures was the feud.[12] A feud between members of a particular clan or village group would have severe detrimental effects upon the economy and general structure of the society. It was to the advantage not only of the relatives of the victim to seek amends by way of restitution, nor solely of the offender and offender's kin, but also of the village as a whole. Negotiations preceding payment of restitution were frequently carried out under the guidance of village elders or saints, or other persons believed to be possessed of supernatural powers. Some tribes had permanent specialised mediating personnel, others choosing the process of selecting a "go-between" for a particular conflict when it arose, selection being made by the parties involved in the dispute. In other instances restitution negotiations would be arranged by the disputing parties and/or their kin, without the assistance of an intermediary. In most instances, the direct victim and offender were not face-to-face parties to the negotiations, maintaining a separate stance in order that the conflict should not be exacerbated. (A further reason might have been pride or embarrassment on the part of one or other or both of the parties.)[13]

As for the type and amount of compensation restored to the victim, Nader and Combs-Schilling state that there is "... usually some form of compromise made by the offending and the offended group" :

> "However, this compromise is not arbitrarily arrived at, but rather is an adjustment of an ideal standard of what the compromise should be, given the seriousness of the crime, the status of the victim, and several other variables ... restitution [often] took the form of various types of wealth and service, the amount of restitution depended on the harm done to the victim rather than the economic status of the offender. In fact, it was the harm done to the victim plus status of the victim that served to determine the amount of compensation in any given case."[14]

In providing for restitution as a means of resolving conflict, preliterate societies appear to have concentrated upon more serious rather than less serious acts. Thus, the restitution process was frequently used for sanctioning the killing of tribes-people, the amount of restitution being determined by the harm and status of the party killed. A "common person" would be "worth less" in restitution terms than a "man of social standing". Some tribes devised codes with a sliding scale of payment dependent upon social position. Restitution was also used in cases involving theft and wounding. Wounding in the instance of Arab Law in Sinai was estimated in relation to the type of damage, categories being made according to loss of limb/s, broken bones, wounds to the face, and wounds elsewhere than the face.[15] No concept of "compensation" - to be paid from an entity such as "the State" or from the village or community as a whole - existed; rather, restoration was made by the offender (and sometimes his/her family or kin) to the victim (and sometimes his/her family or kin) in accordance with the set scale.

Restitution played a part not only in the living arrangements of tribes described by Nader and Combs-Schilling : in early Anglo-Saxon times restitution was an accepted mode of dealing with transgressions. A scale of monetary payments was devised under the reign of King Alfred whereby the knocking out of the front teeth was calculated at a rate of eight shillings, the knocking out of an eye tooth or a molar being calculated at four shillings and fifteen shillings respectively. During the time of King Alfred the earlier system whereby revenge by the victim and/or the victim's family was accepted as the usual repayment for harm done was replaced by the restitution system; with the coming into being of the latter system, it became the generally required preliminary procedure. If restitution was not able to be negotiated or was simply refused, then resort could be had to retribution or revenge, or the offender could be rendered an "outlaw". This meant deprivation of all civil rights.[16]

Just as the retributive response of the revenge system had been replaced by the restitution system, however, the restitution system was in turn replaced by a system wherein it was to the State, rather than to the victim, that the offender was required to pay his or her dues. This development was not confined to Britain but came into being throughout Europe. As Jacob points out,[17] the evolutionary process followed in the Western nations consists of several stages that are easily mapped out.

The primary step is that of private vengeance, to be replaced by collective vengeance. Following on from this, negotiation and restitution become the accepted mechanism. As societies became more sophisticated codes were generally adopted outlining compensation scales to be applied in the restitution process, and according to which the victim should receive just compensation. The midway stage between the restitution procedure and the processes of the present day is that of a growing intervention by persons in power - lords, other rulers and eventually the king as mediators in the dispute. This eventually led to payment to the mediator of a percentage of the restitution award. Finally there has today been an almost total[18] disappearance of structured or formalised restitution from the criminal justice system, the process being entirely taken over by the State :

> "In this evolutionary process, the central government became stronger. Familial groups were replaced by the sovereign as the central authority in matters of criminal law. During this process the interests of the State gradually overshadowed and supplanted those of the victim. The connection between restitution and punishment was severed. Restitution to the victim came to play an insignificant role in the administration of the criminal law. The victim's rights and the concept of composition and restitution were separated from the criminal law and instead became incorporated into the civil law of the courts."[19]

Although today it is theoretically possible for the victim of a crime to proceed by way of a civil action in order to gain recompense for a criminal injury done to him or her, in fact the civil process is rarely taken advantage of. Furthermore, although in some crime statutes[20] provision is made for victims to gain restitution and/or compensation during the criminal proceedings, there is no indication in such provisions as to upon whom the responsibility lies for ensuring that the victim gains advantage of them; the provisions are inadequate and rarely effective.[21]

The passing of the formalised restitution process has not, however, gone unnoticed. In 1516 the suggestion was made that offenders should undertake labour on public works to raise funds in order to make payments to their victims by way of restitution.[22] Restitution in monetary terms and restitution in kind were suggested during the eighteenth century as necessarily to be introduced as mandatory for property offences, but Jeremy Bentham recognised the inadequacy of restitution programmes standing alone : he "... identified the need for public victim-compensation funds to assist victims of offenders who were not apprehended or convicted."[23] In putting this proposal, he further acknowledged the difficulty of providing for restitution where offenders were indigent or without access to funds sufficient to pay for the extent of harm done or financial losses suffered.

Again in the late nineteenth century suggestion was made at various

crime congresses that restitution should be reinstated as a formal and integral part of all criminal justice systems.[24] In 1900 the Brussels Penitentiary Congress devoted a deal of discussion time to the concept of restitution as a means of dealing with crime. The view was put :

> "In the case of prisoners having property, steps should be taken to secure it, and to prevent illegal transfer. As to insolvent offenders, other methods of constraint must be sought. The minimum term of imprisonment being sufficiently high, its execution should be suspended in the case of offenders who beyond the cost of the process have paid a sum fixed by the judge as reparation for the injured party, exception being made in the case of professional criminals and recidivists. The State Treasury would gain, since it would not only be spared the expense of supporting the prisoner, but would be reimbursed for all other expenses. The delinquent would be punished and the injured party reimbursed.
> In the case of serious offenses in which imprisonment is deemed necessary ... parole after a certain time of imprisonment [should] depend on the willingness of the prisoner to reimburse his victim from his earnings saved in prison.
> ... a public fund [would] assure reparation for those who cannot obtain it in any other manner."[25]

Geis[26] has commented that this proposal was the subject of little agreement, the final "solution" being to pass a resolution that merely urged reforms in procedure to give to the victim of crime more power vis-a-vis the system in terms of using civil remedies. Thus the Congress "... effectively managed to bury the subject of victim compesnation as a significant agenda topic at international penological gatherings from thence forth to the present time."[27]

The Revival of Formalised Restitution

In 1951 the British penologist Margery Fry advocated a return to restitution,[28] this call being taken up in a White Paper produced in Britain in 1959 :

> "The basis of early law was personal reparation by the offender to the victim, a concept of which modern criminal law has almost completely lost sight. The assumption that the claims of the victim are sufficiently satisfied if the offender is punished by society becomes less persuasive as society in its dealings with offenders increasingly emphasises the reformative aspects of punishment. Indeed in the public

> mind the interests of the offender may not infrequently seem to be placed before those of the victim. This is certainly not the correct emphasis. It may well be that our penal system would not only provide a more effective deterrent to crime, but would also find a greater moral value, if the concept of personal reparation to the victim were added to the concepts of deterrence by punishment and of reformation by training. It is also possible to hold that the redemptive value of punishment to the individual offender would be greater if it were made to include a realisation of the injury he had done to his victim as well as to the order of society, and the need to make personal reparation for that injury."[29]

A contemporary call by a second British penologist[30] advocated the introduction of a restitution scheme where the length of time of imprisonment would be shortened by the amount of restitution made by the offender to the victim. That is, the scheme contemplated that the offender should be placed in a position to exercise some control over his or her own situation : if an effort were made to pay restitution, the offender should be rewarded by a proportionately shortened term of imprisonment; if the offender made no attempt, length of imprisonment would not be affected. The original term of imprisonment should be set in monetary terms so that prison work (or work carried out on work release) and the wages paid for it could be deployed against the term. The scheme could be expanded to cover payment of compensation, by the offender, to relatives of victims deceased as a result of the crime.

Yet despite the emphasis in British writings upon the need for re-introducing programmed restitution, it is not in the United Kingdom that the major thrust toward a return to that mechanism in the criminal justice system has been experienced. Rather it is in the United States that various authorities have attempted to put into effect restitution schemes.

As Harland states, in the United States (as in other jurisdictions, to a greater or lesser degree), informal restitution has "... traditionally played an extensive and largely unpublicised role at various stages of the criminal justice process."[31] It has been used in informal settlements between offender and victim, as where the victim comes to an arrangement, outside the criminal justice system, not to report to the police or not to press for prosecution, if the offender restores the stolen goods, the missing funds, or pays hospital expenses and the like. Restitution has also been employed in "bargaining" in police stations and in plea-bargaining, where authorities agree not to prosecute, or to prosecute for a lesser crime, with return of the goods. Other forms of pre-trial diversion have similarly used restitution as a justification for taking a route different from that which would have been pursued had the goods not been restored. At the sentencing level, restitution

has been utilised as a sentencing option, most frequently together with a suspended sentence or as a condition of a probation order; it has also been coupled with work release or parol.[32] Yet despite the field in which restitution may have informally been employed (and of which there is no official recording), there has until recently been no systematic programming of restitution into the criminal justice process :

> "... restitution ... has been employed largely in an unsystematic manner at the discretion and initiative of individual decision-makers throughout the criminal justice process. Relevant statutory language typically has been of a broad enabling nature, stating that restitution may be ordered, without specifying the circumstances under which it might be appropriate."[33]

Today, however, particularly in the United States processes are becoming more formalised and there is a tendency to establish agencies whose task it is to develop restitution programmes within policy guidelines, to be used before or after the trial process.[34]

a. Restitution Programmes in General. In conjunction with revived interest in restitution as a disposition, pilot restitution programmes were established both in the United States and in Canada at the beginning of the 1970s.[35] In 1977-1978 a "more concerted effort" was being undertaken to develop programmes in California, Colorado, Connecticut, Georgia, Maine, Massachusetts and Oregon, plans were formulated for a multi-level approach to restitution as a component of the criminal justice system :

> "As part of a national restitution experiment funded by the Law Enforcement Assistance Administration, programs are being developed in these States at the prosecutorial stage, to make restitution information available to prosecutors for plea bargaining and sentence recommendations; at the judicial stage, to make restitution a more viable sentencing option; in probation settings as a supervision condition; in institutions and in work release as an incentive for early release; and as a condition of parole."[36]

The proliferation of restitution programmes is noteworthy, in that in 1976 only thirteen restitution projects serving adult offenders were identified, whilst in 1977 the number was forty-six.[37] In 1978 the first national assessment of restitution programmes in the Unites States was undertaken of both those models placing "... an explicit emphasis upon the use of monetary restitution" and those using community service as a sanction for adult offenders being included in the study.[38] Although the response rate was described as "disappointing", no less than eighty three projects were identified for inclusion. In analysing these projects it was found that 33 per cent involved monetary restitution alone; 43 per

cent involved community service for restitution purposes without monetary restitution; 13 per cent utilised a combination of monetary and community service restitution; 10 per cent used monetary restitution for some offenders, community service restitution for other offenders in the programme. 36 per cent of the predominantly monetary restitution projects were residential, offenders living in "half-way houses" and the like. None of the projects predominantly utilising community service restitution were residential, whilst 56 per cent of those projects utilising both monetary restitution and a community service obligation were residential.[39]

b. Pre-Trial Restitution Programmes. Informal procedures are unlikely to be documented when restitution is used as a means of escaping trial, and it is therefore difficult to estimate the extent of the use of restitution on this level. However six formal programmes incorporating restitution are outlined by Galaway in a comprehensive study of United States' restitution programmes.[40] Two of these, the Citizen Dispute Settlement Centers of the American Arbitration Association and the Night Prosecutor Program in Columbus, Ohio "... were established to develop dispute-settlement procedures by means other than use of the criminal justice system and to provide noncriminal justice alternatives for handling private criminal complaints."[41] Both programmes endeavour to bring the offender together with the victim, restitution being seen as a possible (or probable) means of resolving the dispute. Another programme concentrates specifically upon juvenile offenders, "... providing services ... as an alternative to juvenile court referral".[42] Cases are vetted by a review panel - the "Community Panel" - comprising juveniles and adults from the neighbourhood. Restitution may be required, the sanction being possible referral to the juvenile court.

A fourth programme deals with non-serious, first-time defendants. In this, the Pima County Adult Diversion Project, the offender must volunteer[43] for the project in order to be included; participation must also be approved by the victim, arresting officer/s, and the prosecutor. Where all are in agreement, a face-to-face meeting of offender and victim is held to determine the restitution component of the programme to be followed by the defendant as a condition of diversion.[44] Two further programmes, one in Minneapolis and one in St. Paul deal with juveniles, misdemeanants and felons. Defendants are diverted into a system involving a work evaluation, training, and job placement. Restitution often figures highly in the process, particularly where offences are committed against property.[45]

c. Programmes Involving Restitution After Trial. Edelhertz[46] describes a juvenile court programme in South Dakota where restitution is a component of probation orders, on the basis that it has "therapeutic" value. In Iowa probation officers are under a duty to formulate restitution plans in much the sameway as they write pre-sentence reports. Restitution has been adopted as a policy in the instance of any deferred or suspended sentence. Also in one Iowa programme the practice has been adopted of bringing together offender, victim and probation officer. Where the three can reach agreement as to a plan for restitution, the plan is presented for the court's consideration.[47]

A second form of post-trial restitution has been established in conjunction with halfway house developments. Galaway and Hudson[48] and Harland[49] succinctly describe the form such programmes take : most are shaped upon the original Minnesota plan (the first formal restitution programme set up in the United States), where prison inmates formally negotiated a restitution agreement and on that basis were paroled to the Restitution Center, a residential half-way house.[50] (The Minnesota scheme has since been disbanded : funding ceased and there was a suggestion that the scheme would be reconstituted on a more ambitious basis; however this has not yet come to pass, perhaps as a result of some disillusionment as to the "success" or potential for success harboured within the concept of restitution and/or its realisation.)[51] Some programmes of a similar type include probationers as inmates in addition to parolees.[52] According to Galaway :

> "Most of the restitution agreements have involved a monetary exchange between the offender and the victim; in situations where the victim could not be located, was unwilling to participate, or had not suffered damage, restitution in the form of community service or a contribution to some community agency has been used. The trend has been away from community service toward payment of money to a community organization as the preferred form of symbolic restitution."[53]

Problems of Restitution as a Disposition

Following the initial flush of enthusiasm as to the possible scope of a revived mechanism for dealing with crime, some disenchantment appears, however, to have set in. Galaway, one of the leading criminologists in the field, has recently alluded to the withdrawal of funds from some schemes, which may signify scepticism on the part of authorities as to the value of restitution as a disposition.[54] Perhaps dissatisfaction was inevitable when restitution was seen as having a potential for resolving many of the imbalances of the current system - MacNamara and Sullivan[55] contended it brought an "ethical and logical equilibrium" to the criminal justice system - an extravagant claim. As with other "innovations" in corrections, no doubt too much has been expected of this particular measure. Nonetheless it is important to analyse the concept of restitution and its possible effectiveness within the current framework of the criminal justice system. It may be that all-encompassing claims are unrealistic and incapable of realisation, but that more modest estimates of the value of restitution-as-disposition are based in reality, and that restitution could serve a valuable role as disposition within certain limits.

At the outset it is important to determine the basic rationale for any restititution programme. Although it may seem "ethical and logical" to attempt to maintain an equilibrium in the criminal justice system between competing claims - that is, between the claims of the victim, the interests of the State, and the interests of the offender, it may be inappropriate to expect that any single form of disposition can completely

fulfil this need.

It is also essential to lay down at which point in the system the process will come into operation. As appearing from the United States' experience (and as may be occurring even today, on an informal basis, within the Australian criminal justice system), restitution may be utilised as a pre-trial diversional disposition. If restitution is used in an informal manner at this stage, ethical considerations are raised. Should offenders be informally allowed to escape the criminal justice process, to escape conviction and punishment, simply because they are possessed of funds sufficient to repay the damage, to restore the goods, to repay embezzled or stolen funds, or to pay for the victim's hospitalisation expenses? If formal pre-trial diversionary programmes involving restitution are introduced, problems are also present : there may be a danger of compromise on the part of defendants. Some defendants may choose what they see as "an easy way out" when in reality had they gone through the trial process, they may well have been found "not guilty". Dangers here may be even greater than those surrounding the plea of "guilty" where the offender hopes to have the matter "over and done with", possibly with a lesser penalty than had the plea been "not guilty" with a conviction following trial.[56] Furthermore by not proceeding to trial, the State will be saved the expenses consequent upon taking criminal matters to court; this may serve as a valuable incentive to the prosecution to settle out of court by way of restitution without too close an enquiry as to whether there is a secure foundation for the case, and without ensuring that the particular individual is in fact responsible for the taking of goods or monies which he or she undertakes to return if no court proceedings are initiated.

As a post-trial measure there appears to be less likelihood of ethical problems arising, in that once a finding of guilt has been recorded, or a conviction, it seems appropriate to require offenders, where possible, to restore their victims to a position similar to or as near as possible to that which they held prior to the offence. Certainly an argument appears to lie in favour of repayment being made to the victim prior to any payment by way of a fine to the State. However difficulties arise where offenders are not in possession of funds sufficient to restore the victim. Frequently in the case of monetary offences the embezzled funds, stolen goods, proceeds of forged cheques have long since been dissipated. If, for example, restitution were to be made a mandatory condition of a probation or similar order, then this would draw a seemingly unfair distinction between those persons of financial standing as contrasted with those having no such standing.[57]

Ability to pay arises also in relation to the suggestion that release from prison, or release on parole, should be granted only (or in some way be dependent) where there is a displayed desire to make reparation to the victim. Again, those persons who are in a financial position to repay will secure parole or release more easily than those who are not so fortunately situated, unless some provision is made for taking means into account (as is so in the case of the fine in some jurisdictions).[58]

Problems arise also from the perspective of the victim. If restitution is to become an intergral part of the criminal justice process, this could mean that the victim's position is harmed rather than improved. In the case of restitution taking place prior to trial, a restitution programme may be negotiated with some speed. However in the case of post-trial restitution, delay may be the key word. Although at present delay through civil proceedings for recovery of moneys from individuals is acknowledged to be severe,[59] as is delay in proceedings to gain victims compensation through victim compensation schemes,[60] this seems not to justify making the victim wait for a restitution programme to be negotiated as part of a sentence, simply in order that the system should gain some "equilibrium" on its face. Yet civil delays may be worse.

There is the further issue of the offender who is not caught or who is not convicted, despite the victim having clearly suffered criminal loss. In such cases restitution may not take place, but obviously the criminal justice system must make adequate provision for the victims involved, so that they are not unfairly treated. In most Australian jurisdictions victim compensation schemes of greater or lesser value are in operation or are planned.[61] The Australian Capital Territory alone lags in this regard. However it may be preferable to revamp these schemes, so that they may be adequate to the task of assisting <u>all</u> victims of crime, rather than devoting resources to setting up restitution programmes that may not be as satisfactory from the victim viewpoint.

Further, should restitution be paid in full, or should it be made possible for courts to order partial restitution only? As well, should schemes contain provision for "symbolic restitution" : restitution that does not specifically equate with the harm done to the victim, but which involves carrying out some particular task fixed upon by the court (or restitution negotiator, or negotiator in concert with victim and/or offender) as "equivalent" to the harm? Should the victim have any decision making power in this regard?

Finally in relation to the victim, what of the idea of confrontation between victim and offender? For some victims this may be too onerous a duty, and the victim's wishes are essentially worthy of respect. However if the aspect given highest regard is that of the offender's rehabilitation, an argument could be made that the offender would be assisted by meeting with the victim. A second aspect of the problem is whether the victim should be involved in negotiations with the offender and a probation officer (or other mediator), each present together, in order to reach an agreement as to the form or amount of restitution. Again, this may be detrimental to a victim who does not wish to participate. From the offender's perspective, the victim may judge too harshly; negotiation for restitution may fail due to the personality of the victim and through no fault of the offender. Should a disposition be directly connected with the character of the victim?

Two further matters frequently arise in relation to similar forms of disposition. Should restitution be a sole "punishment", not being combined with other orders, or should it be possible for a probation order to be given together with a restitution order and, say, a fine? Second, should participation in a restitution programme be dependent upon full

consent of the offender? These issues are akin to those arising in the issuance of probation orders and community work orders ; should they be combined with ancillary orders? Is it relevant to talk of "consent" in relation to any such disposition? The general approach in the United Kingdom has been that such orders should not be combined with a fine, for this would act against the rehabilitory spirit of the probation/ community work order;[62] in Australia, however, such combination has long been accepted. As to consent, the general principle has been that a person shall be placed on a probation/work order only with consent. Some questions have, however, been raised as to the lack of "voluntariness" where any individual participates in a punishment programme, whatever its nature and whatever the formal words surrounding its allocation. It may not be relevant to talk of "consent" in such a context.

Finally, Galaway and Hudson have raised the question of victim responsibility. They contend :

> "... certain categories of people tend to be more susceptible to victimisation than others, and, in some cases, may precipitate the crime against themselves. An implication of this is that some of the responsibility for these offences should be placed on the victim ..."[63]

They suggest two possible approaches. First, a concept of "contributory negligence" could be introduced into the criminal law, so that wherever an offender was adjudged a precipitator in the offence, any order for restitution could be reduced or eliminated completely in accordance with the degree to which the victim "precipitated or contributed to" the offence. A full scale hearing with counsel for both sides would have to be introduced in order to implement this proposal.[64] As for the second approach, Galaway and Hudson advocate that a position could be retained whereby "... people are individually responsible for their behavior and even in precipitative or provocative situations there [is] ... more than one way of responding."[65] Taking this approach, the offender would be held accountable on the basis that even if another is "provocative" a variety of responses is possible. If the offender has chosen to select the criminal rather than the non-criminal response, the criminal justice system should register this in the appropriate way, holding the offender rather than the victim liable. They conclude :

> "The latter solution protects the essential dignity of the offender by supporting a view of him as an individual capable of making decisions."[66]

This approach fits well with the concept of restitution as put into effect in some jurisdictions, in that the underlying philosophy of many of the schemes is that the offender will be rehabilitated by being required to confront his or her actions and the harm these have caused, and to regain self-respect by restoring the damage to the victim. This envisages responsibility lying with the offender, rather than transferring "guilt" to the victim of the offence.

Are there problems with restitution from the perspective of the rights of the State? Certainly an argument could be made that if restitution programmes are brought in and utilised to any effect, the State will lose in the way of revenue from fines ; a party paying restitution might not be able to pay a fine in addition to recompensing the victim.[67] An alternative view might ask why the victim should undergo detriment, forgoing restitution, for the benefit of the State receiving a fine. Again for the other side, the State may profit from victims receiving compensation to the exclusion of fines, in that currently in the majority of Australian jurisdictions[68] victim compensation schemes are in operation; funds for these must come out of State revenue. Rather than having to pay for a bureaucracy to operate victim compensation funds it may be preferable as, amongst other matters, less expensive, to negotiate restitution agreements between offender and victim and thus to dispense with the need, in many cases, for payment out of a central victim compensation fund. State victim compensation funds would be called upon only where no offender could be found or prosecuted, or where the offender was not in a position to restore goods or moneys - and in such case would not be in a position to pay fines, anyway.

However as in the latter cases some form of victim compensation will be necessary, costly bureaucracies will needs be set up. Furthermore restitution schemes will require funding - and a "bureaucracy" in the way of a staff of mediators and support workers. Some policing of payments will be necessary. Thus savings may be negligible; the cost may well exceed that of running a complete victim compensation programme covering all.

The interest of the State in having victims who are more willing to report offences may or may not be enhanced by the introduction of restitution programmes. This would seem to depend upon the perception gained by victims of restitution schemes. If victims perceive some value accruing to themselves in their reporting of offences, in that they consider there will be recompense for the damage done or goods lost, then the introduction of such schemes may be supportive to the criminal justice system as a whole. If, however, victims do not believe their interests will be in any way enhanced by the programmes, it is difficult to envisage any benefit accruing to the State. Even apart from visualising adequate recompense, it is important to guage whether problems faced by victims in approaching the criminal justice system for assistance will in any manner be overcome by the introduction of restitution programmes : it is a generalised lack of interest in the victim, exhibited by the State through the system, that has led many victims to "opt out" of reporting crimes or carrying through with the aftermath of reporting to trial and conviction stage; is formalised restitution the sole answer - or even one of a number of answers - to this?

Evaluating Restitution Schemes : The Problems

Difficulty inevitably arises in attempting to assess restitution in relation to these issues. Despite restitution having taken place within the system on an informal basis there has to date been little research into its operation. Where formal programmes have been introduced, these have been in operation for a limited time only, with the longest running

programmes having operated for little more than four years. It is therefore possible to make only a rudimentary analysis of any findings. Nonetheless, this may give guidance on the question of whether it would be of value to introduce formalised restitution schemes - or pilot projects for such schemes - into the various Australian jurisdictions.

a. The Basic Rationale of Restitution Programmes. Although revival of interest in the concept of restitution has seemingly been sparked off by renewed interest in the fate of the victim, it is evident that this has not been carried across into the various restitution schemes established as a result of this interest. A recent analysis of schemes in the United States concluded that the main thrust behind each of them is that of rehabilitation of the offender.[69] Once again the victim loses out.

It was reported :

> "With few exceptions, ... restitution and community service programs do not bring victims and offenders together to negotiate restitution agreements and victims are not consulted about their views concerning the appropriate disposition to be given the offender. Consequently, the potential use of restitution for victim involvement is not being exploited in existing programs."[70]

In their paper "Restitution as a Victim Service" Galaway and Hudson enumerate at least five, often conflicting, goals of restitution programmes :

* to benefit the offender
* to benefit the victim
* to benefit the criminal justice system
* to "help in doing justice"
* to benefit the programme itself

They contend that various combinations of these five goals "... are likely to be held by any particular restitution program" :

> "On a day-to-day operations level, however, they are likely to be in conflict with each other ... Ideally, of course, program goals should be made explicit and, in those cases where programs hold more than one of the five goals, these should be [set out in order of priority] and used to guide program managers in day-to-day operations [in relation to that order]. Political realities of securing financial support for the program and getting it established, however, frequently require a degree of planned ambiguity re-

> garding goals. When this occurs, as it frequently does, program managers probably [list priorities of] goals on pragmatic grounds by emphasizing alternative goals to different audiences or by resolving immediate program issues and, in the process, defining the relative importance of goals."[71]

Galaway and Hudson further note that the orientation of programme staff will have an important impact upon programme goals and operation, and may be crucial to the involvement of the victim - or lack of that involvement :

> "[Staff orientation] is an especially important issue in relation to victim assistance goals in restitution programs. Largely because of the offender orientation of restitution program staff, conflict between the goals of benefitting victims and rehabilitating offenders are likely to be resolved at the operational level in favour of rehabilitation. Consequently, the importance of the compensation goal is diminished."[72]

That staff are primarily offender-orientated is, perhaps, only to be expected in a system which in the past has solely concentrated upon rehabilitating or punishing offenders, with no attention being paid to the victim. Clearly, if benefits to victims are to accrue and if this is seen as a worthy goal, then retraining programmes for personnel will be vital to success of restitution schemes.

The basic proposition in established restitution programmes is that the offender should be made to "feel good" about the activity undertaken to repay the crime. The concept adopted is that of renewing or building the offender's self-confidence and self-esteem. The confidence and self-esteem of the victim is not generally referred to, although other studies as to the effect of crime upon victims show clearly that victims suffer loss of confidence and self-esteem as a direct consequence. Thus a study carried out in 1978 by the Home Office Research Unit in the United Kingdom found :

> "Half of the respondents [in the study] said they had experienced emotional distress in the aftermath of the [criminal] incident such as bouts of depression or fear at leaving the house - emotions which were strongest where the assailant was known to the victim. Three-quarters had been absent from work as a result of the injuries, in some cases losing pay during this time ..."[73]

If the approach taken in restitution programmes is at base that of a concern for the rehabilitation of the offender as a sole or predominant theme, then obviously restitution can hardly be expected to be enough to redeem the system in the eyes of the victim. Separate victim assistance programmes would seem necessarily to be established; otherwise the system will continue to suffer defects from the perspective of the victim, and there is no reason to suppose that by introducing restitution schemes victims will be any more likely to co-operate with the criminal justice system.

Certainly other aims of restitution schemes are laudable - such as keeping as many persons as possible out of the prison system, and "making the punishment fit the crime". However in coming to any decision as to embracing restitution schemes, it will be vital to their chances of successful operation that aims be clearly defined. Further it is important to guard against the fifth goal adumbrated by Galaway and Hudson taking the ascendent position : that of perpetuating the option of restitution for the sake of keeping a particular programme or programmes in train :

> "While often left unstated, this goal is based upon notions about the politically popular nature of the idea of restitution and the extent to which it can be used to build a base of support for program survival. A program that involves a variety of activities and components may emphasize the place given to restitution so as to gain credibility with the police, courts, and key officials within and outside of the justice system who are responsible for making decisions about the on-going life of the program. Possible outcome measures for this might include the extent of program support given by justice system officials, significant publics, and most crucially, continued financial support ... The critical measure of success ... [becomes] the continuation of the program ..."[74]

If restitution is to be structured into the system as an integral part of the punishment or rehabilitative process there will be a need for objective assessment at regular intervals to determine whether the goal or goals of the option are being met. To eliminate as far as possible the "keeping the programme for the sake of the programme" syndrome and to ensure that there is real value to the criminal justice system in retaining restitution schemes, it would seem justified to write into the terms of each programme an assessment plan; this stricture might be backed by a requirement to justify continuation of each scheme after a set time-lapse - perhaps every three or five years. This would in effect be to incorporate into legislation setting up programmes a "sunset clause", whereby the programme would automatically be brought to an end when the time limit expires, unless the legislature determines it should continue.[75]

b. Problems of the Offender in Restitution Programmes. It has been observed in some schemes that the estimate of loss suffered by the victim and set by that victim has exceeded the real loss suffered; some victims appear to inflate their claims.[76] Besides being unjust in relation to the system as a whole that victims should profit from a programme set up to redress actual loss and to rehabilitate offenders or make them embrace a fit punishment for the crime, requiring offenders to pay more than their actual liability may do little to enhance their regard for the fairness of the system. Furthermore, it enables (and may encourage) victims to themselves act in a dishonest manner by exaggerating the extent of their injuries.[77]

On the other hand it has been argued that alleged overestimation by the victim of a claim may not in fact be connected with bad faith. Rather, it may be that the defendant has under-estimated the loss. Galaway and Hudson suggest that offenders may subconsciously under-estimate the loss in order to assuage their guilt feelings.[78]

One suggestion as to how to overcome the problem is that the offender and victim should be brought together with a probation officer or a specially trained person as mediator to negotiate a restitution amount that is acceptable to both parties.[79] Otherwise, rather than adopt the pattern of monetary restitution, "symbolic restitution" could be introduced : again, repayment would be negotiated by a mediator, probation officer or other negotiator, and/or the victim, but repayment would be made by way of community work or direct restoration of damaged property (for example, as where damage to a school could be repaired by the offender/s).[80] Where no victim could be located, this would eliminate any charge of "overestimation" (at least from base motives), and symbolic restitution would be required to be negotiated between offender and probation officer or other mediator, estimate and agreement being reached by these parties alone (perhaps with final ruling being left to a judge).

As for whether defendants will always be in a position to make restitution, or whether such programmes would in effect operate against those individuals at the lower end of the socio-economic scale, according to research undertaken by Hudson and Galaway[81] most of the claims coming within the ambit of schemes did not exceed two hundred dollars.[82] According to the study, all persons were in a position to conform with the restitution requirement. Yet this raises a basic issue : what types of crime, what types of criminal are to be included within restitution programmes? It seems that in the United States, most or all restitution programmes concentrate upon petty crimes; they do not take into account those crimes involving large amounts which usually take place up the socio-economic scale. Commenting upon this bias of schemes, Nader and Combs-Schilling state :

> "Offenders may object because restitution is serving the interests of the rich in a legal system where the criminal law or at least the implementation of the criminal law is income biased against the poor and indigent ...
> If attempts to do something about crime in

> America are to be anything more than a ... program for middle-class and middle-range professionals or public relations for politicians, we have to face the possibility that our ambivalence about offenders stems from our awareness of the discrepancies in equality before the law in a democracy. If we are going to have restitution, we at least have to formulate it within a vertical slice - up and down the income ladder. We are working on restitution programs solely affecting lower-income groups ... Maybe it is the "least-worst" way to treat offenders, but it probably will not decrease the crime rate ..."[83]

They go on to point out that any analysis of the crime problem "... that focuses on lower-income offenders to the exclusion of other kinds of offenders is diversionary at best ..."[84] They suggest that many problems :

> "... that are now coming to restitution might better be handled through prevention and that some problems not being handled through restitution might be handled by restitutive means... [It is significant that] in all pre-literate societies where restitution is used, it is used to handle the most serious disputes, not all the disputes that are made public ..."[85]

It is Nader and Combs-Schilling's stand that any scheme concentrating upon one particular social group and ignoring another or others is suspect. For example, why are not landlords who perpetuate ghettos and slums subject to schemes requiring them to restore these areas to a standard that is legally acceptable?

Interwoven with this view is the issue of who will benefit from the introduction of restitution schemes focussing upon "small offenders" and petty offenders? Nader and Combs-Schilling contend that the United States' system is producing a restitution relationship that "... is grossly unequal" :

> "Individuals are being made responsible to collective, corporate groups ... In planning restitution systems, we too often proceed as if restitution would be used only in cases involving a single offender and a single victim. In these cases mutual benefits are not difficult to envision. However, it may be corporations who make full use of restitution systems, with individuals being found principally on the paying end (as

> offender). If the victim, for example, collects from an insurance company and the insurance company then collects from the offender, we have individuals being made responsible to collective groups. If in turn we do not also have insurance companies restituting individuals when caught in illegal dealing, then our restitution system is grossly unequal, and it is doubtful that the cause of 'reducing the crime rate' is in any way advanced by its implementation."[86]

Indeed, a system that fines rather than one which introduces schemes for restitution may in fact be more rather than less equitable : the fine will (at least on the surface) be used for the greater good of the society as a whole; restitution, where claimed on behalf of large companies, will be used not for the benefit of the entire society, but for the benefit of those large companies and the interests they serve :

> "We need to be wary. At the turn of the century small-claims courts were devised to meet the needs of the 'little guy'. By the 1960s we found that these small-claims courts were being used mainly by business for debt collection. We could be devising a system for compensating victims, thinking of victims as individual citizens, and end up compensating victims that are not individual citizens at all, but large-scale organizations such as insurance companies. In this case the function of the restitution system may well be class control. In societies where [identified] offenders belong to a single economic class, as for the most part of the United States, the burden of control may become economically intolerable ... When the victim is a member of the power class, as with the example of insurance company 'victims', the control function is complete and efficient."[87]

Again, rather than putting an end to the idea that restitution schemes might be devised for introduction into Australian jurisdictions, these warnings might better support a call for strict surveillance of the operation of the programmes. Indeed, were it to be found that the majority of "victims" utilising schemes were, say, insurance companies, a reassessment of criteria for coming within the system - both in relation to offenders and to victims - could be undertaken.

Further, these misgivings lend support to the idea that in cases where it could be deemed appropriate, partial rather than full restitution should be ordered. It is unrealistic to expect that in many petty

offences of a financial type stolen monies or goods will remain intact; mostly, they will be spent or otherwise dissipated prior to the capture of the offender.[88] Similarly with some larger monetary offences, funds are frequently dissipated. It would therefore be preferable to order restitution of an amount that is within the offender's means rather than ordering full restitution which in some cases may be an impossibility. In such cases partial restitution from the offender could be ordered, the remainder of the victim's losses being made up from a victim compensation fund. Partial restitution might alternatively be made up, by the offender, in the way of community work as "symbolic restitution".[89]

c. Victim/Offender Confrontation. As for bringing the parties together and the suggestion that under the circumstances some victims may act in an overbearing or revengeful manner toward the offender, what research has been done asserts that victims do not generally act in this way. Anecdotal material[90] shows victims gaining an understanding of the offence and of the offender. Meeting with the offender seems from reports to resolve fears of future attack and the like that may be harboured by victims, and that may develop into real problems without confrontation.

For the offender, anecdotal material[91] also appears to support the view that offenders come to a better realisation of the harm caused by their acts. The hope is expressed that personalisation of the victim - and thus of possible potential victims - may lead the offender to "reconsider his or her criminal ways".

One study reports :

> "A few restitution programs have provided victims with additional opportunities for involvement in the operations of the justice system. This involvement most commonly takes place in the process of determining the amount of restitution to be obligated and typically involves opportunities for victims to meet jointly with the offender and a representative of the justice system to negotiate."[92]

In the Minnesota Restitution Center scheme, victims went into prison to meet with the offender and to negotiate a restitution agreement in the presence of a member of the staff. In Massachusetts, Iowa, Ontario and Indiana similar efforts have been made to bring the parties together in like manner as in St. Cloud in Minnesota, where a juvenile programme has the offender meet with the victim, together with a member of the court staff, to negotiate a restitution plan.[93] However in assessing the value of these "negotiations", Hudson and Galaway comment :

> "Typically, victims are being treated as a source of information to determine the amount of losses and as a recipient of information and payment. There seems (sic)

> to be a number of reasons for not encouraging victim participation. First, this responsibility would typically fall upon probation officers who have heavy demands on their time to provide services to offenders with little time left to give to planning and structuring opportunities for victim participation."[94]

Taking into account current priorities and present organisation of the corrections system, this is not surprising. In order to overcome the problem, a reassessment of the role of probation officers should be undertaken :

> "What is needed is a careful and critical examination of the nature of probation work. Given such an analysis, models of probation practice might be developed so as to more fully integrate offender and victim interests. For example, if the justice system continues to move toward a just deserts orientation that involves more determinancy in sentencing, there is likely to be less need for probation staff to spend a great deal of time developing pre-sentence reports. This time might then be better utilized to provide opportunities for victims to participate in the operation of the system."[95]

A second problem that has been raised is that of differing power positions. Victim and offender are in unequal power situations, and this must be taken into account by mediators (or probation officers) generally, and by structuring of negotiating sessions between offender, victim and the mediator. Commenting upon the notion that power parity in confrontation situations is fundamental to success, Walton[96] points out :

> "Perceptions of power inequality undermine trust, inhibit dialogue, and decrease the likelihood of a constructive outcome from an attempted confrontation. Inequality tends to undermine trust on both ends of the imbalanced relationship, directly affecting both the person with the perceived power inferiority and the one with perceived superiority."[97]

In the Kitchener, Ontario restitution project, special attention has been given to this aspect of victim/offender confrontation. The project worker has the duty of assisting "... in finding a balance or equalization of this power and [assisting] ... the victim and the offender to reach an alliance or a point from where their interests can converge."[98] This is effected by workers suggesting the offender shake hands with the victim; that the offender apologise; then the worker making a positive personal

statement regarding the offender. The negotiation process will, however, be a learning process for the three parties, unless the mediator undergoes training in mediation and role playing.

It has been suggested that victims may not wish to meet offenders, and that these wishes should be respected rather than being subverted to the cause of offender rehabilitation, or to the belief that when the meeting comes about, both offender and victim will benefit, despite the victim's failure to realise this in advance. On this issue, the comment has been made that although such reluctance is "... probably true of some victims, we have no evidence as to the extent to which it applies to most victims" :

> "But even if a large proportion of victims do not want to be involved, the presumption of victim disinterest does not seem to be sufficient grounds for denying those victims who would like to participate from having the opportunity to do so. Some staff of current restitution programs seem to be reluctant to involve victims and offenders jointly in a process of negotiating the restitution plan because of fears about conflict. While there is likely to be some disagreement regarding the restitution amount and the payment schedule, those programs that have experimented with victim-offender contacts have not found this to be a serious problem. Conflict management skills can be taught so program staff are able to deal with conflicts as they occur."[99]

Possibly one of the major arguments in favour of involving the victim in the restitution process is that without such involvement, it is difficult to see that the offender will necessarily perceive the offence and the socio-legal rejoinder to that offence in any other than the traditional way. That is, the benefit of restitution as a disposition lies in its being brought home to the offender the extent of the damage caused to another individual; it lies in the offender's being able to perceive of the victim as a person, rather than seeing the punishment as owed to a faceless, nameless society. For the other side, however, if the victim of the offence is, say, a company, "personalisation" will not so easily be achieved. That is, the offender being confronted by an agent of the company does not give the same sense of "justice in confronting the victim" as is engendered by the picture of a lone offender facing a lone victim, the latter being directly injured by the crime.

The key to success of any programme designed to bring victims and offenders into contact must lie in the structuring of mediation sessions; in clear assessment of the goals of the overall programme and of individual negotiation sessions; and in thorough training of personnel involved. If these needs are sufficiently met, then involvement of victim and offender together may ultimately be of value. As previously noted, restitution as a disposition has been revived to a large degree as a result

of concern about the victim. Restitution provides "... a mechanism for enabling victims to have more meaningful participation within the justice system, ... [an] opportunity [that] is presently being missed in most operational restitution programs."[100] If concern about victims is genuine, then the opportunity should be taken up.

d. At What Stage in the Criminal Justice Process should Restitution as a Disposition Come into Effect? Is it "just" to require an alleged offender to restore stolen goods or monies, or to refund proceeds of forged cheques and the like, prior to any arrest or a charge being laid against that particular person? Again, should restitution be a possible "disposition" after arrest and charge, but prior to any court hearing? Third, should a restitution disposition be available after a court hearing, when a determination of guilt has been made, but prior to recording any conviction and without eventually recording any conviction, so long as restitution is made? Finally, is it feasible to require a disposition involving restitution to come into effect after conviction as a sole disposition, or alternatively can restitution be ordered in conjunction with other punishments - such as a fine, community service order, release on recognizance or probation, or even a term of imprisonment?

As previously pointed out, although little or no research has been done into procedures prior to arrest and charge or into what might follow arrest in the way of requirements of requirements of restitution, it is not to be doubted that in Australia as in other jurisdictions (such as the United States, the United Kingdom and Canada)[101] some use is made of restitution so as to eliminate any need for an alleged offender to appear in court. The most frequently cited cases of this nature are those involving white collar criminals who embezzle funds, particularly from banks and other finance houses.[102] Frequently the rationale here is that it is preferable for the employer to seek restitution of funds stolen and to keep the theft quiet; otherwise, confidence held by the public in the financial stability and/or security operations of the bank or finance house may be lost, obviously to the detriment of the organisation.

It seems impossible to devise any guidelines for the recovery, by way of restitution, of monies or goods unlawfully taken, where restoration is organised by a private party without recourse to the criminal justice system. Certainly there may be reason to consider that such a procedure is wrong. Two bases for this proposition arise. One is that corporate criminals may make use of the procedure with little real detriment to themselves.[103] They will by way of restitution escape discovery in the hands of criminal justice personnel, with consequent charge, prosecution and the normal course of going through the courts to be publicly shown to have committed criminal acts. On the other hand less fortunate offenders - those who do not come within the white collar or corporate criminal category where restitution at the early stage may be most easily effected - may not be in a position so easily to escape the criminal justice system and public denunciation. The second basis upon which restitution at this stage may be criticised is that it may mean that an individual who in fact is innocent of any criminal activity may be seen to have committed an offence because he or she determines that rather than confront the criminal justice system it is "better" to simply "admit" to a crime s/he

has not committed and return goods and/or monies that have neither been stolen nor otherwise unlawfully obtained by the particular party making admission.

For the otherside it may be argued that this form of restitution enables some persons to be kept out of the courts and thus provides for freeing the courts : courts at present are overloaded to the detriment of the system,[104] and would be more cluttered were all persons offending to be brought into the system in the (ostensibly) required way. If victims are to be encouraged, by the introduction of formalised restitution programmes, to participate more often in the system, then unless restitution is used in some circumstances as a diversionary measure, the result will be to add to court loads.

It is therefore interesting to note that in the Victim Offender Reconciliation Project located in Kitchener, Ontario, Canada and operated under the auspices of the Province of Ontario Ministry of Correctional Services,[105] the pilot project involved sixty-one offenders, twenty-four of whom were referred to the programme by the court, thirty of whom were referred from the probation office, two referred from lawyers and five from "other sources". The philosophy exercised in relation to this particular project was that "... conflict is so central to life that it cannot be eliminated without eliminating life as we know it" and that "... peacemaking ... does not require eliminating conflict ... [but] requires effectively handling and resolving conflicts ..."[106] In descriptions of the project no hesitation as to the identities of the parties in conflict finds expression; there is an assumption that each of the persons referred to the project - whether by court, lawyer, probation service or "others" was in fact guilty of the crime ("conflict")in question and therefore should participate in restitution negotiations. There is therefore no guidance in this particular project as to what requirements can be built into a restitution programme to ensure that, in cases where a court has not made a determination as to guilt, the alleged offender is in fact the person guilty of the particular offence.

Similarly with the Tucson, Arizona Pima County restitution programme. There, Pima County Attorney's Office administers a diversion project for non-serious, first-time adult defendants. The defendants are required to volunteer for the project and their participation must be approved by the victim, the arresting officers, and the prosecutor. Where approval of each is gained, victim and offender participate in a face-to-face confrontation where restitution obligations are negotiated together with "... other treatment obligations that the defendant undertakes as a condition of diversion."[107]

Although the Ontario and Arizona programmes have been described in glowing terms[108] it would seem essential that any Australian programme designed as a diversionary scheme without a court appearance and finding of guilty (with or without conviction)[109] should have inbuilt protections against too easy acquiesance of individuals, so that those who may not be guilty take what appears to them to be "an easy way out".

In those programmes that have been in train in the United States and Canada, restitution is most frequently used at the stage where a determin-

ation of guilt has been made be a court. Thus restitution is frequently ordered as a condition of probation in many schemes.[110] In addressing the question of at which stage in the process should restitution as a diversionary mechanism come into effect, Galaway and Hudson comment :

> "... 'restitution' [can] ... be defined ... as payment by the offender to the victims of crime, made within the jurisdiction of the criminal justice system. This implies that the criminal justice system is able to identify and convict the offender. While restitution usually follows conviction, this usage is broad enough to include restitution made to avoid conviction, as could conceivably occur in plea bargaining, provided the restitution planning is done with the approval and active involvement of the criminal justice system. Payments made by professional criminals to victims as a clandestine means of avoiding involvement with the criminal justice system are not consistent with this definition of restitution."[111]

Under such a scheme as described by Galaway and Hudson, probation officers may be appointed to negotiate and/or draw up a restitution programme for the particular offender, with payments being made to the clerk of the court who then forwards them to the victim.[112]

The use of restitution as a bargaining point in the plea bargaining system has sometimes been justified on the basis of reducing court overload and speeding up the process of going through the system. (With restitution, a less serious offence may be agreed upon by the prosecutor and defence counsel as that with which the defendant should be charged, and a plea of guilty to that offence will result in swifter passage through the courts.)[113] However so long as the myth that plea bargaining does not occur in Australia is adhered to, clearly no guidelines for the utilisation of restitution in the criminal justice system at the plea bargaining stage can be formulated. A formalised restitution programme at such a point in the process could be instituted in Australia only where plea bargaining was to be granted official acknowledgement and guidelines were provided for the operation of plea bargaining itself.

Implementation of Restitution Schemes in Australia

The fictional nature of any real "consent" to punishment (or "treatment") by a person who is placed in a coercive situation has been raised in relation to the Australian Law Reform Commission's Reference relating to Sentencing and Alternatives to Imprisonment. It was said :

> "It is open to argument that a probation order can hardly be regarded as consensual where the offender probably has an understandable suspicion that if he ex-

> presses dissatisfaction about the terms of it, the court will find a less congenial manner of disposing of his case."[114]

It was concluded, however, that although agreement to be placed on a probation order, or on a community service order, or to be placed on any type of disposition involving conditions could not truly be said to involve "free consent", and therefore such orders should be classified as "sentences", to be appealable, with restitution orders a slightly different situation existed. That is, it would be equitable for a person who was found guilty of an offence to be ordered to return goods or monies related to that offence, although no formal sentence was passed. In accord with this, the Commission suggested :

> "Where possible, the emphasis in terms and conditions of [a discharge without conviction and/or recognizance without conviction] ... should be upon restitution by offender to victim. To this end, [the relevant] sections [of the relevant legislation] ... should be amended to ensure that in every case where it is possible, the offender should be required to make reparation to the victim in respect of the offence."[115]

In putting forward the proposal that restitution should more often be utilised by Australian courts, recourse was had to the statement made by the Canadian Law Reform Commission in a recent report on sentencing as a general issue, and in relation to alternatives to imprisonment in particular :

> "Because so much is expected of criminal law and its agencies today, we have laid stress on less formal means of conflict resolution where this is possible ... the possible range of dispositions and sentences is directed primarily towards a resolution of problems caused by an offence. In the past, an overwhelming emphasis was placed on the punishment or treatment of the offender; little attention was paid to the needs of the victim or the community in terms of reparative measures. The assignment of responsibility, which is at the heart of the criminal law, has mainly been directed towards establishing guilt and not towards undoing the harm done. [We should today expect responsibility] from the offender and call for his active efforts to make reparation in the form of restitution or service or by improving his own behaviour and conditions ..."[116]

Commenting upon this philosophy, the Australian Law Reform Commission stated that consideration should be given to a "... new emphasis upon seeking to restore the victim where possible, and having the offender understand the consequences of his/her offence, in relation to its effect on the victim ..." :

> "Such a reorientation may serve to restore confidence of the public in the system, at the same time promoting responsibility in offenders. It would also, at least as far as restitution was possible on the part of the offender, ensure that the party responsible bears the expense of restoring the victim."[117]

The view was strongly put, however, that it would be wrong to create a system whereby "guilt" was tacitly established outside the courtroom in order that restitution could be ordered to take place. In accordance with principles of criminal justice, indeed, it would seem that for the return of property a formal hearing and finding of guilt would be a minimum requirement : if this determination is not made by a court, then clearly it is being made elsewhere - by probation officers, mediators, prosecutors or other personnel referring the alleged offender to the diversionary restitution scheme. If this is the case, persons alleged to have committed offences are not being afforded protections said to exist in the criminal justice system - that of being considered innocent until a court has made a finding of guilt; that of being afforded legal representation;[118] or at least of having a person sit in judgment who is required to be neutral.

a. "Restitution" without Finding of Guilt or Conviction. Provision is generally made for return of goods that are deemed, at the discretion of the court, to have been stolen or otherwise unlawfully obtained, although a particular person has not been found to have been guilty of any offence in relation thereto. Thus under section 438 Crimes Act 1900 it is provided :

> "(2) Where any person indicted for any such offence [as stealing, embezzling, or receiving stolen property] is acquitted, the Court in its discretion, on being satisfied that any property mentioned in the indictment has been stolen, embezzled, or received, contrary to this Act, may order in like manner [as where a person has been found guilty] the restitution of such property."

Restitution may be ordered in such instance in respect of any property obtained in violation of any provision of the Crimes Act.[119] However the strictures placed on the exercise of this discretion are tight : it appears to be designed to cover the case where the person prosecuted does not make any claim of ownership. In such case the order for restitution is not being made against any individual who might therefore be effectiv-

ely deemed to have been guilty of unlawfully obtaining the goods, despite lack of a conviction, but rather the provision is made for the case where goods are held by the police or prosecutor.[120]

In The King v. Elliot[121] it was held that where any difficulties arise as to the ownership of such goods, it should be left to the parties concerned to pursue civil remedies. This supports the idea that the law views seriously any suggestion that individuals should be compromised by being ordered to return goods alleged to have been unlawfully obtained, where those individuals have not at law been found to have in fact obtained goods in that fashion.

Furthermore, numerous matters arise in relation to the operation of restitution programmes - involving training of personnel, assessment of amount involved, bringing offender and victim together; questions arise as to whether the disposition will be effective - will it operate to have the victim become more involved with the system? will it operate to promote responsibility in the offender? It therefore seems preferable to commence pilot projects for restitution at the stage following at least a finding of guilt, in order to make an assessment of the disposition in operation. If the disposition can be shown to be effective, it may then be timely to consider further the issue of restitution programmes being introduced as a pre-trial measure.

b. Restitution Order Following Determination of Guilt. Where a determination of guilt has been made by a court, guidelines could be drawn up and applied where persons have been charged and prosecuted in respect of offences committed that lend themselves to some form of restitution (such as theft, or damage to property). It is at this stage that any scheme to introduce formalised restitution programmes is immediately capable of implementation in the various Australian jurisdictions.

Currently in Australia jurisdictions provide variously for a "discharge without conviction", "absolute discharge", or "dismissal without conviction"; it is feasible to combine a restitution order with this type of disposition. Where there is such a discharge, the party is found guilty of the offence charged, however due to the existence of various mitigating factors adumbrated in a statutory provision[122] the judge or magistrate, at his or her discretion, is empowered to release the party without having proceeded to a conviction. For example, under the Crimes Act (Cwth) 1914 section 19B, dismissal without conviction is provided for in the following terms :

> "(1) Where -
>
> (a) a person is charged before a Court of Summary Jurisdiction with an offence against the laws of the Commonwealth; and
>
> (b) the Court is satisfied that the charge is proved but is of opinion, having regard to -

(i) character, antecedents, age, health or mental condition of the person;
(ii) the extent, if any, to which the offence was of a trivial nature; or
(iii) the extent, if any, to which the offence was committed under extenuating circumstances,

that it is inexpedient to release the person on probation, the court may, without proceeding to a conviction, by order -

(c) dismiss the charge; ..."

This provision is based on that contained in the Crimes Act (N.S.W.) 1900 as it applies to the Australian Capital Territory (and replicated in other jurisdictions), whereby section 556A provides :

"(1) Where any person is charged before a Court of Petty Sessions with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment, or other than nominal punishment, or that it is inexpedient to release the offender on probation, the court may, without proceeding to a conviction, make an order ...

(a) dismissing the charge ..."

In addition in New South Wales this provision is drafted so that all courts, not only courts of summary jurisdiction, may exercise the power of discharge without conviction. Furthermore, the Australian Law Reform Commission in a Research Paper produced in conjunction with its Reference on Sentencing has put the view that the power should be extended to all courts along the lines of the New South Wales' provision.[123]

It seems appropriate to utilize a restitution procedure in conjunction with the power of discharge without a conviction. That is, where an offender is found guilty by a court, although discharged, it seems just and equitable that he or she should restore those goods and/or monies that have been the profit of the proved offence.

In accordance with this, the courts should be required more often to have regard to restitution provisions already existing in legislation in the various Australian jurisdictions. Those sections under the Crimes Act (N.S.W.) and Crimes Act (Cwth)[124] as well as those existing under similar legislation in other States, could frequently be utilised to order restitution. Section 556A Crimes Act (N.S.W.) 1900 provides :

> "(2) Where an order is made under this section the order shall, for the purpose of revesting or restoring stolen property, and of enabling the court to make orders as to restitution or delivery of property to the owner, and as to the payment of money upon or in connection with such restitution or delivery, and for the purpose of the exercise of any power conferred by subsection 3 of section 554 [damages and compensation], have the like effect as a conviction."

The Commonwealth provision under section 21B simply vests a discretion in the court to order an offender to make reparation to the Commonwealth or public authority. Thus provisions already exist that require a person to make restitution or that grant to the court a discretion to order restitution or delivery of property, and are operable in relation to those persons who have not been subjected to a conviction, but upon whom a finding of guilt has been made.

c. Restitution Order Following Conviction. Similarly following conviction, one of the priorities should be that of re-establishing the victim to the position in which he or she stood prior to the offence. Thus, where it is possible in terms of the current finances or prospective finances of the offender, recompense in the way of restitution should be given high priority. This would be particularly appropriate in the case of suspension of punishment on first conviction, as under section 558 of the New South Wales Crimes Act 1900 where it is provided :

> "When a person, who has not been previously convicted of an indictable offence in New South Wales or elsewhere in so far as is known to the Court, is convicted of a minor offence, and is sentenced upon such conviction to penal servitude, or imprisonment, the following provisions shall have effect -
>
> (1) The Court shall proceed to pass sentence upon the offender in the usual form.
>
> (2) The Court may, if it thinks fit, suspend the execution of the sentence, upon the offender entering into a recognizance ..."

Under section 559 the Act provides that upon suspension of the execution of the sentence under section 558, the court may, "... if it thinks fit, ... order the offender to make restitution of the property in respect of which the offence was committed, or to pay compensation for the injury done to such property, or compensation for the injury done to the person injured, as the case may be ..."

Restitution should not, however, be restricted only to first offenders. It would be appropriate to order restitution in the instance of

a suspended sentence such as that provided for under the South Australian Offenders Probation Act 1913. Under section 4(2a) a court in exercise of its criminal jurisdiction may suspend for a period of up to three years the operation of a sentence of imprisonment which it has imposed. A term of suspension could be the acknowledgement by the offender that restitution should be made, and the carrying out of restitution.[125] Similar provisions existing in other States could be utilised in the same way, and where no such provision exists States should incorporate the disposition into their crime statutes. For example, under the New South Wales Crimes Act 1900 there is provision for suspension and/or deferment of sentence. In section 440B specific provision is made for the payment of a fine in combination with such suspension or deferment :

> "(1) Where a person is convicted on indictment of an offence, not being the offence of homicide, rape, or other offence punishable ... by penal servitude for life, and the Court defers sentence, or suspends the execution of a sentence in accordance with the provisions of this Act and, in either case, requires the offender to enter into a recognizance conditioned that he be of good behaviour, the Court may, in addition, impose a fine not exceeding two thousand dollars."

The provisions of section 438 giving the court discretion to order restitution should be similarly drawn to the attention of the court on the basis that the carrying out by the offender of restitution would be good reason, in many cases, for suspending or deferring the sentence.[126] One of the major problems presently existing in the field of restitution is that although powers are clearly given to the court, those powers are not incorporated into sentencing provisions in a comprehensive way. Thus the court's attention is drawn to the fact that a fine may be combined with a suspended sentence, but is not specifically directed to the idea that restitution itself might be ordered together with that disposition.

Again, where an offender is convicted but is released on a bond or placed on a probation order, one of the first conditions to which the court should have regard is that of ordering restitution. In a Research Paper dealing with the question of probation, the Australian Law Reform Commission has concentrated upon the equity of ordering restitution as the least serious of coercive measures laid upon offenders.[127] Second in line after the discharge without a conviction (where restitution may be ordered) should be the conditional discharge, followed by release on recognizance with conviction, and ultimately to release on supervised probation.[128] In relation to each of these, restitution should be given weighty consideration.

d. Programming Restitution into the System. One of the major problems with embracing the idea that restitution ought to become a more significant feature of the criminal justice system is, however, how to ensure that courts will have regard to the disposition. As previously pointed out, provisions currently exist in the various Crimes Acts that

enable courts to make orders for restitution. There is, however, no obligation upon any particular person to raise the issue. A representative example of a restitution provision is that contained in section 554 (3) Crimes Act (N.S.W.) 1900. Under that provision the court may on conviction for any offence under the Act where imprisonment is awarded and/or release on recognizance substituted for imprisonment, on such conviction or any time thereafter :

> "... upon notice given to the offender direct that a sum not exceeding three hundred dollars be paid to the person aggrieved by way of compensation for injury or loss sustained by reason of the commission of such offence."

Who will raise the issue on behalf of the victim? Is it encumbent upon counsel for the defence to raise the matter in the hope that showing the defendant as a person who wishes to make redress may have some influence on sentence? Is it the duty of the court itself to give regard to the issue without having been prompted by other parties?

The problems thus raised are similar to those surrounding the question of release on probation : in this case, special officers have been appointed to give advice to the court as to the suitability or otherwise of particular individuals for being placed on probation; officers also give background information that may assist the court in deciding what type of conditions would be appropriate in the individual case.[129] With restitution, presumably the reason it has not been widely made use of is that no formal procedures have been laid down whereby judges and magistrates may receive information as to whether restitution is appropriate in the particular case; what harm and loss has been suffered by the victim; what is the ability of the defendant to make restitution.

An office should be set up, staffed by suitably trained personnel, to enquire into the terms and conditions appropriate for the individual offender and the individual victim where restitution may be ordered by the court. Initially, however, the onus will lie on the prosecution to alert the court and the office to the fact that the crime is one that may be susceptible to restitution. An onus will also lie on the counsel for defence to take into account the possiblity that restitution may be ordered and that this will have some bearing on the out come of the case. Finally, it will be for the magistrate or judge to involve the office in the same way as probation officers are called in to conduct investigations for pre-sentence reports.

As for the way in which money should be paid and/or goods returned, provision currently exists in criminal legislation covering restitution and compensation payments. Thus under section 554(3) monies are to be paid by the offender to the clerk of the court, to be paid by him or her to the person aggrieved. Under section 457 of the Crimes Act (N.S.W.) 1900, where monies have been directed to be paid by defendant to the victim :

> "... every such direction shall be entered

> by the Prothonotary, in a book to be kept in his office, and, after such entry, shall be deemed to be of record, and shall have the effect of a judgment of the Supreme Court at law, and be enforceable by execution as any such judgment is ordinarily enforced."

There is no reason for assuming that this form of regulation of restitution payments should not be adhered to where restitution programmes are negotiated through a special office. For convenience the negotiating office should be located nearby the clear of court to whom payments should be made for transmission to the victim. Alternatively, payments could be required to be made through the office where the restitution plan is negotiated.

e. Setting up a Pilot Scheme. Obviously a generalised move to reincorporate restitution as a formalised part of the criminal justice process cannot be expected to develop in every jurisdiction. Furthermore, if restitution is not to be seen as yet another example of a society grasping at an apparently "liberal" measure in order to appear more humane, but ill-prepared to make the disposition operate with maximum potential being realised, the introduction of a formalised system must be closely guarded. In order to gain the most from the measure, a pilot scheme (or pilot schemes) should first be set up to test the possibilities and hopefully to lead to optimum use of the disposition throughout the criminal justice system.

However in setting up any pilot scheme, particular attention must be paid to the philosophy underlying the disposition and to the form of the particular programme. Currently community work order schemes (or community service schemes) are operating in Western Australia and Tasmania, and are imminent in New South Wales and Victoria; suggestion has also been made that they should be introduced into the Australian Capital Territory. These programmes incorporate the idea that the offender should carry out community work in direct relation to the damage caused by way of the criminal act, or should undertake "symbolic restitution" in the way of work in the community to "make up" for the crime.[130] In setting up any restitution pilot scheme, therefore, it is preferable to concentrate on issues more closely related to the position of the victim. Otherwise, any restitution programme will merely be duplicating current work order schemes.

The pilot scheme(s) should concentrate upon the victim, taking into consideration two types of victim involvement :

(a) direct victim-offender negotiation under the guidance of a neutral mediator;

(b) indirect involvement of victim with offender, in that the personnel running the restitution scheme must consult with the victim as to damage suffered and the type (and amount) of restitution required, yet without necessarily bringing the victim and the off-

ender face-to-face in any confront-
ation or negotiation.

It seems essential that both methods should be capable of being followed, in that no victim should be required to face an offender; nevertheless such an option should be made clearly available to both parties.

The scheme should also take into consideration the inability of some offenders to make direct restitution by way of return of exact sums of money or return of stolen goods which have since been disposed of. In negotiating agreements, victims and offenders should be encouraged to accept the notion of symbolic restitution : the programme could include community work which both parties agree "cancels out" the offence.

No restitution scheme should be put into operation without adequate and thorough training being given to the mediators or negotiators : quite clearly, the role played by mediators/negotiators will differ substantially from that played in the normal course by probation officers, parole officers and similar personnel already utilised within the criminal justice system. A restitution scheme could well founder because personnel are not sufficiently trained to deal with offender/victim relationships, or are not sufficiently skilled in negotiating agreements for restitution. Furthermore, training programmes should include instruction as to the rationale and philosophy of restitution schemes; without this instruction, United States' experience clearly shows persons who are participating in a worker capacity in projects can cause restitution schemes to falter.[131]

Any scheme should be sufficiently funded for the proper carrying out of the objectives. Built into any grant for a pilot project must be funding earmarked for carrying out an evaluation of the scheme. The evaluation should not be periodic, but should proceed together with the scheme itself. Provision has already been made in Australian legislation for restitution to be made use of, but the novelty of the pilot project will be that it is to be conducted on a regulated basis. It is therefore essential to monitor the scheme if an assessment is to be made as to the efficacy of restitution as a "new" measure for sentencing.

Additionally in the evaluation of the pilot scheme, attention cannot alone be paid to the effects of the programme on the offender. The effects of the programme upon the victims - their reaction to meeting with offenders, their acceptance (or otherwise) of negotiated restitution programmes, their reaction to the criminal justice system in taking into account (ostensibly) their interests and needs - must form an equally important part of any monitoring and evaluation.

f. The Role of Compensation. In some cases victims may be in a difficult position where they wish to participate in a restitution programme but require return of monies or goods urgently. In the case of court ordered payments from offenders to victims, for example, the operation of any such order is suspended in most jurisdictions until the time of appealing to the higher court has expired.[132] On the other hand, civil recovery of damages and gaining of compensation under Crime Compensation Acts is not a speedy process. Therefore it would not seem to be

justified to suggest that victims will not wish to participate because of slowness of recovery. It might be pointed out to them that recovery may in fact be more rapid through the restitution programme.

Nonetheless at the same time as instituting restitution programmes the State must continue to improve victim compensation schemes to deal with those cases where no offender is prosecuted, or where offenders are unable to make restitution due to lack of finances, or are unable to make satisfactory symbolic restitution to the victim. There will also be instances where a victim-offender negotiated agreement is impossible, due to personalities, or to differing opinions as to the value set on the offence. As well, there will be cases that are not susceptible to settlement by way of restitution : few programmes in the United States deal with crimes against the person by way of restitution,[133] and gross crimes against the person would not seem (at least currently) to lend themselves to inclusion in any pilot restitution scheme.

If concern for the victim in the criminal justice system is genuine, compensation programmes must be introduced or improved to cover these cases and to properly and adequately recompense crime victims for losses. (For example, it has been suggested that current limits set on sums capable of recovery through State run compensation schemes are inadequate - ranging as they do from $4,000 to $20,000 - and that the idea of a flat rate of compensation should be done away with, to be replaced by a scheme calculating damage to the person and to property on a scale similar to the concept of workers' compensation legislation scales.)[134] Care must be taken that the belief in the "good" of restitution programmes does not lead to a complacency as to the lesser need for comprehensive victim compensation coverage as a responsibility of the State.

Conclusion

There has been a renewed interest in the fate of the victim in the criminal justice process, as well as a revived interest in assisting offenders to take responsibility for their own criminal acts, particularly as a means of utilising alternatives to imprisonment to the optimum. That "prison should be a last resort" is becoming a catch-cry ... as well it might.[135] If corrections authorities in Australia are serious about an oft stated desire to "improve the system" from perspective both of the offender and the victim, they must take the initiative by regarding seriously programmes that may lead to improvement. The introduction of a pilot scheme (or schemes) for testing the potential of restitution as a formalised mechanism in corrections would be one such programme.

Where it is possible in terms of the finances or prospective finances of the offender, recompense in the way of restitution to the victim should be given high priority by the courts. A special office of "restitution programme negotiators" should be set up, with adequate funding, so that the possibility may become a reality.

Nonetheless it is well to recall at this point the warning of Nader and Combs-Schilling[136]; it would be detrimental to the system if those parties receiving restitution were always viewed in the common mind and

in corrections philosophy in terms of the individual victim who has suffered loss at the hands of the individual offender. From the perspective of the social good, in some instances it may be preferable not to give priority to restitution, but to give priority to the fine as a penal measure, so long as fines are used for the betterment of the greater society. It therefore seems imperative that any programming into the criminal justice system of formalised restitution schemes should contain a requirement of consistent and stringent monitoring in order that the desired results of restitution are achieved, rather than restitution schemes being used not for the good of individual victims, but as a simple method for large companies and corporations to dominate recovery of monies and goods under the criminal justice system.

Finally, if it is the disenchantment that has been experienced by persons who have been victimised that is a major impetus behind the wish to "reintroduce" or to exploit restitution as a criminal justice mechanism, it is insufficient simply to introduce pilot schemes for formalised restitution. Attention must increasingly be paid to defects within the system that militate against victims reporting crimes to police or other authorities, and that militate against victims carrying their cases through to ultimate resolution in the courtroom. Here, the necessity for reassessing court administration, for introducing victim services - such as notifying victims and other witnesses of what will occur in the court room, of the way in which the case is proceeding and the like - must earnestly be regarded in all Australian jurisdictions. It cannot be considered that the introduction of formalised restitution can in any way act as a panacea for ills experienced with the criminal justice system, nor, in particular, for those ills sorely felt by victims and witnesses of crime.

FOOTNOTES

[1] David Biles and John Braithwaite, "Crime Victims and the Police" (1979) 14 (3) *Australian Psychologist* 345, at 348.

[2] Ibid, at 355.

[3] Jerry Parker and Harold G. Grasmick, "Linking Actual and Perceived Certainty of Punishment - An Exploratory Study of an Untested Proposition in Deterrence Theory" (1979) 17 (3) *Criminology* 366.

[4] Robert H. Rosenblum and Carol Holliday Blew, *Victim/Witness Assistance* (July, 1979, U.S. Department of Justice, L.E.A.A., National Institute of Law Enforcement and Criminal Justice), at 62.

[5] U.S. Department of Justice, L.E.A.A., *Improving Witness Cooperation* (by Frank J. Cannavale, Jr. and William D. Falcon, ed., Washington, D.C., Government Printing Office, 1976).

[6] U.S. Department of Justice, L.E.A.A., *Victim/Witness Assistance* (by Robert H. Rosenblum and Carol Holliday Blew, Washington, D.C., Government Printing Office, 1979), at pp. 1-2.

[7] U.S. Department of Justice, L.E.A.A., *Victims and Witnesses: Their Experiences with Crime and the Criminal Justice System* (Executive Summary, by Richard Knudten, Washington, D.C., Government Printing Office, 1977), at p. 3.

[8] Prosecutor's Management Information Service, cited Richard Hofrichter, "Techniques of Victim Involvement in Restitution" (Paper presented at the Third National Restitution Symposium, September 26-28 1979; Criminal Justice and the Elderly Program, National Council of Senior Citizens, Washington, D.C.), at p. 2; see also *Elderly Crime Victims Compensation*, Hearing before the Select Committee on Aging, House of Representatives Ninety-Fifth Congress First Session, February 16, 1977 in New York (U.S. Government Printing Office, Washington, D.C., Comm. Pub. No. 95-94, 1977); F. Heinzelmann, "Summary of the Final Report on Victims and Witnesses: The Impact of Crime and Their Experience with the Criminal Justice System" in *Elderly Crime Victims Compensation*, op. cit., at p. 57 et. seq.

[9] See Wm. Gene Matthews, "Restitution Programming: Reality Therapy Operationalized" (1979) 3 (4) *Offender Rehabilitation* 319.

[10] Ibid.

[11] Laura Nader and Elaine Combs-Schilling, "Restitution in Cross-Cultural Perspective" in *Restitution in Criminal Justice - A Critical Assessment of Sanctions* (Joe Hudson and Burt Galaway, eds., Lexington Books, Mass., 1977) 27.

[12] Ibid. This section is closely based on the work of Nader and Combs-Schilling (1977) op. cit.

[13] The writer thanks Ivan Potas, Senior Research Officer with the Australian Institute of Criminology for raising this.

[14] Ibid.

[15] Ibid.

[16] See generally, Bruce Jacobs, "The Concept of Restitution: An Historical Overview in *Restitution in Criminal Justice - A Critical Assessment of Sanctions* (Joe Hudson and Burt Galaway, eds., Lexington Books, Mass., 1977) 45; see also Burt Galaway and Joe Hudson, "Restitution and Rehabilitation - Some Central Issues" (1972) *Crime and Delinquency* 403; Burt Galaway, "The Use of Restitution" (1977) *Crime and Delinquency* 57; Richard E. Laster, "Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefullness" (1970) *University of Richmond Law Review* 71, also in *Considering the Victim: Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway, eds., Charles C. Thomas, Springfield, Ill., 1975) 19, 311.

[17] Provisions are made in various legislation for restitution in Australia today, e.g. s.438 *Crimes Act* (Cwth) 1900 provides:
"(1) Where a person is convicted under this Act of stealing, embezzling, or receiving property, the Court may order the restitution thereof, in a summary manner, to the owner, or his representative.
(2) Where any person indicted for any such offence is acquitted, the Court in its discretion, on being satisfied that the property mentioned in the indictment has been stolen, embezzled, or received, contrary to this Act, may order in like manner the restitution of such property.
(3) Where any valuable security has been paid by some person liable to the payment thereof, or, being a negotiable instrument, has been taken for a valuable considerable, without notice, or caused to suspect, that the same has been dishonestly come by, the Court shall not order such restitution.
(4) This section shall equally apply to property in any manner taken, or otherwise acquired, received, retained, or disposed of, in violation of any provision of this Act."
Also s.9 *Criminal Appeal Act* (N.S.W.) 1912 s.9 provides for the revesting and restitution of property on conviction and pending appeal. Unfortunately, restitution in relation to the private citizen is rarely ordered, although in relation in Commonwealth property it seems that restitution is generally required as a matter of course. Obviously the problem here is that the prosecution when acting in relation to Commonwealth property will

ensure that as a matter of course property belonging to the Commonwealth is recovered. There is no such effort made on behalf of private citizens who are victims of the types of offence for which restitution may be ordered by the court. On this issue, see further post.

[18] Bruce Jacobs, "The Concept of Restitution: An Historical Overview" in *Restitution in Criminal Justice - A Critical Assessment of Sanctions* (Joe Hudson and Burt Galaway, eds., Lexington Books, 1977) 45, at 47.

[19] See fn. 17, ante.

[20] See further on this issue post.

[21] Sir Thomas More, *Utopia* (1516) (J.C. Collins ed. 1904), 23-24.

[22] Bruce Jacobs, op. cit., at 48; see Stephen Schafer, *Compensation and Restitution to Victims of Crime* (1970, Patterson Smith, Montclair), at 4.

[23] On this, see generally Bruce Jacobs, op. cit., at 48 et. seq.; also comments Burt Galaway and Joe Hudson, "Restitution and Rehabilitation - Some Central Issues" (1972) *Crime and Delinquency* 403; Hans von Hentig, *The Criminal and His Victim* (1948, Yale University Press, New Haven); Burt Galaway, "The Use of Restitution" (1977) *Crime and Delinquency* 57; Burt Galaway, "Is Restitution Practical?" (1977) 41 *Federal Probation* 3 and references cited therein.

[24] Samual Barrows, *Report on the Sixth International Prison Congress, Brussels, 1900.* (1903, U.S. Government Printing Office, Washington, D.C.) at 25-26; cited Bruce Jacobs, op. cit., at 49.

[25] Gilbert Geis, "State Compensation to Victims of Violent Crime", U.S. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Crime and Its Impact - An Assessment* (1967, U.S. Government Printing Office, Washington, D.C.).

[26] Ibid, at 106; cited Bruce Jacobs, op. cit., at 49.

[27] Margery Fry, *Arms of Law* (1951, Victor Gollancz, London) at 126 et. seq.; Margery Fry, "Justice for Victims", *The Observer* (July 7, 1957, London).

[28] Home Office, *Penal Practice in a Changing Society* (1959, Cmnd. No. 645, H.M.S.O., London) 17; see also Gilbert Geis, "State Compensation to Victims of Violent Crime", op. cit., at 163.

[29] Kathleen Smith, *A Cure for Crime* (1965 , Duckworth, London) at 91 et. seq.; see also Bruce Jacobs, op. cit., at 53 et. seq.; Mohler, "Convict Labour Policies" (1925) 15 *Journal of Criminal Law, Criminology and Police Science* 530.

[30] Alan T. Harland, *Restitution to Victims of Personal and Household Crimes* (Working Paper 15, 1978, Criminal Justice Research Centre, Albany, N.Y.); also Alan T. Harland, Marguerite Q. Warren and Edward J. Brown, *A Guide to Restitution Programming* (Working Paper 17, 1979, Criminal Justice Research Centre, Albany, N.Y.).

[31] See Burt Galaway, "The Use of Restitution" (1977) *Crime and Delinquency* 57, at 60 et. seq.; also Joe Hudson and Burt Galaway, "Restitution and the Justice Model for Corrections" (unpublished paper, n.d.); Joe Hudson and Burt Galaway, "National Assessment of Adult Restitution Programmes - Preliminary Report I and II" (unpublished papers, April 1, 1979, Grant No. 78-NI-AX-0110, National Institute of Law Enforcement and Criminal Justice, L.E.A.A., U.S. Department of Justice).

[32] Alan T. Harland, op. cit., at 5-6.

[33] See generally Alan T. Harland, op. cit.; Alan T. Harland, Marguerite Q. Warren and Edward J. Brown, op. cit.; Anthony A. Cain and Marjorie Kravitz, *Victims/Witness Assistance - A Selected Bibliography* (1978, National Criminal Justice Reference Service, National Institute of Law Enforcement and Criminal Justice, L.E.A.A., U.S. Department of Justice); Emilio C. Viano, *Victims/Witness Services: A Review of the Literature* (1979, L.E.A.A., U.S. Department of Justice); Robert H. Rosenblum and Carol Holliday Blew, *Victims/Witness Assistance* (1979, National Institute of Law Enforcement and Criminal Justice, L.E.A.A., U.S. Department of Justice); James Garofalo L. Paul Sutton, *Compensating Victims of Violent Crime: Potential Costs and Coverage of a National Program* (Applications of the National Crime Survey Victimisation and Attitude Data, Analytical Report SD-VAD-5, 1977, Criminal Justice Research Centre, Albany, N.Y., L.E.A.A., U.S. Department of Justice).

[34] For an assessment of these programmes see National District Attornies Association, Commission on Victim Witness Assistance, *The Victim Advocate* (A periodical, issue re Special Services to Victims); also L.E.A.A., *Concern* (monthly victim/witness newsletter); and Joe Hudson and Burt Galaway, "National Assessment of Adult Restitution Programmes, Preliminary Report I and II" (unpublished papers, April 1, 1979, Grant No. 78-NI-AX-0110, National Institute of Law Enforcement and Criminal Justice, L.E.A.A., U.S. Department of Justice).

[35] Alan T. Harland, op. cit., at 7.

[36] See Joe Hudson and Burt Galaway, "Restitution and the Justice Model for Correction" (unpublished paper, n.d.); also Alan T. Harland, op. cit.

[37] Joe Hudson and Burt Galaway, "National Assessment of Adult Restitution Programmes, Preliminary Report I and II" (April 1, 1979, Grant No. 78-NI-AX-0110, National Institute of Law Enforcement and Criminal Justice, L.E.A.A., U.S. Department of Justice).

[38] Symbolic restitution through community service is also currently in operation in the United Kingdom and in some jurisdictions in Australia. For an overview and for references in relation both to the United Kingdom programmes and those in Australia, see Jocelynne A. Scutt, *Community Work Orders as an Option for Sentencing* (1979, Australian Law Reform Commission, Research Paper No. 4, Sentencing Reference). On this see further post.

[39] See Joe Hudson and Burt Galaway, "Restitution and the Justice Model for Correction" (unpublished paper, n.d.) at 7-8.

[40] Burt Galaway, "The Use of Restitution" (1977) *Crime and Delinquency* 57.

[41] Ibid, at 60.

[42] Id. See also John W. Palmer, "Pre-Arrest Diversion" (1975) *Crime and Delinquency* (April 1975); U.S. Department of Justice, L.E.A.A., *An Exemplary Project: Citizen Dispute Settlement* (1974, U.S. Government Printing Office, Washington, D.C.).

[43] The question of "voluntariness" where a person (the offender) is in a coercive situation and is alleged to "agree" to a particular form of disposition is reviewed *post* "Problems of Restitution as a Disposition" and "Implementation of Restitution Schemes in Australia".

[44] Burt Galaway (1977) op. cit., at 60.

[45] Ibid.

[46] Herbert Edelhertz, *Restitutive Justice: A General Survey and Analysis* (1975, Batelle Human Affairs Research Centre , Seattle, Washington) at 57-59; Burt Galaway, "The Use of Restitution" (1977) *Crime and Delinquency* 57, at 59.

[47] Herbert Edelhortz (1975) op. cit.

[48] Burt Galaway and Joe Hudson, "Issues in the Correctional Implementation of Restitution to Victims of Crime" (paper presented at the American Society of Criminology Annual Meeting, New York City, November, 1973) also published as Chapter 24 in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway, eds., 1975, Charles C. Thomas, Springfield, Ill.).

[49] Alan T. Harland, *Restitution to Victims of Personal and Household Crimes* (Working Paper 15, 1978, Criminal Justice Research Centre, Albany, N.Y.).

[50] See Iowa Senate Files 26, 65th General Assembly (1973); Burt Galaway, "The Use of Restitution" (1977) *Crime and Delinquency* 57, at 61.

[51] Letter to the writer from Professor Burt Galaway, University of Minnesota.

[52] See Alan T. Harland, op. cit., at 6; Burt Galaway and Joe Hudson, "Issues in the Correctional Implementation of Restitution to Victims of Crime" (paper presented at the American Society of Criminology Annual Meeting, New York City, November, 1973) also published as Chapter 24 in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway, eds., 1975, Charles C. Thomas, Springfield, Ill.); also Alan T. Harland, Marguerite Q. Warren and Edward J. Brown, *A Guide to Restitution Programming* (Working Paper 17, 1979, Criminal Justice Research Centre, Albany, N.Y.). Burt Galaway, "The Use of Restitution" (1977) *Crime and Delinquency* 57; Burt Galaway and Joe Hudson, "Restitution and Rehabilitation - Some Central Issues" (1972) 403; Joe Hudson and Burt Galaway, "National Assessment of Adult Restitution Programmes - Preliminary Report 1: Overview of Restitution Programming Project Selection" (Grant No. 78-NI-AX-0110, National Institute of Law Enforcement and Criminal Justice, L.E.A.A., U.S. Department of Justice, n.d.).

[53] Burt Galaway, "The Use of Restitution" (1977) *Crime and Delinquency* 57, at 62.

[54] Letter held by the writer.

[55] D. Macnamara and J. Sullivan, "Making the Victim Whole: Composition, Restitution, Compensation" (1971) 6 *Urban Review* 21.

[56] See generally Jerome Skolnik, *Justice Without Trial* (1967, Wiley, N.Y.).

[57] This could perhaps be overcome by taking into account defendant's ability to pay, as has been suggested in relation to the setting of fines. On this issue, see Jocelynne A. Scutt, "The Fine as a Penal Measure in the United States of America, Canada and Australia" in *Die Geldstrafe im deutschen und ausländischen Recht* (Hans-Heinrich Jescheck and Gerhardt Grebing, eds., 1979 Nomos Verlagsgesell-Schaft, Baden-Baden, West Germany) 1061, at 1100 et. seq.

[58] See note 57 ante.

[59] See generally David Neubauer, "Reducing Delay in the Courts - An Introduction to this Issue" (1978) 62 (3) *Judicature* 111; Stuart Nagel, Marian Neef and Nancy Munshaw, "Bringing Management Science to the Courts to Reduce Delay" (1978) 62 (3) *Judicature* 280; and see generally New South Wales Law Reform Commission, *The Legal Profession, Background Paper No. 1* (1979, Government Printer, N.S.W.); New South Wales Law Reform Commission, *The Legal Profession - Discussion Paper No. 2, Complaints, Discipline and Professional Standards, Part 1* (1979, Government Printer, N.S.W.).

[60] See e.g. B. Childers, "Compensation for Criminally Inflicted Personal Injury" (1964) 39 *New York University Law Review* 463; Helen Silving, "Compensation for Victims of Criminal Violence - A Round Table" (1959) 8 *Journal of Public Law* 236, also in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway, eds., 1975, Charles C. Thomas, Springfield,

Ill.) 198; John Willis, "Compensation for Victims of Crime" (unpublished paper presented to Australian Institute of Criminology conference - Children and Family Violence, 1979, Canberra, A.C.T.).

[61] See generally John Willis (1979) op. cit., Australian Law Reform Commission, Discussion Paper No. 10, *Sentencing: Reform Options* (A.G.P.S., Canberra 1979), at 104 et. seq.

[62] See discussion of this issue Jocelynne A. Scutt, *Community Work Orders as an Option for Sentencing* (Research Paper No. 4, Australian Law Reform Commission, 1979) and Jocelynne A. Scutt, *Probation as an Option for Sentencing* (Research Paper No. 8, Australian Law Reform Commission, 1979).

[63] Burt Galaway and Joe Hudson, "Restitution and Rehabilitation - Some Central Issues" (1972) *Crime and Delinquency* 403, at 409.

[64] Ibid, at 409-410.

[65] Ibid, at 410.

[66] Id.

[67] With the fine, suggestion has been made that the Swedish Day Fine System should be introduced, so that the fine can be made to fit the means of the offender. Furthermore, other proposals have been put forward as to matching offender's means with the fine - see generally Jocelynne A. Scutt, *The Fine as an Option for Sentencing* (1979, Australian Law Reform Commission, Discussion Paper No. 3); Jocelynne A. Scutt, "The Fine as a Penal Measure in the United States of America, Canada and Australia" in *Die Geldstrafe im deutschen und auslandischen Recht* (Hans-Heinrich Jescheck and Gerhardt Grebing, eds., 1979, Nomos Verlagsgesellschast, Baden-Baden, West Germany) 1061. However, the problem with restitution may well be more complex: that is, if the idea is that restitution in full should be made by the offender, then there will be no question of matching the restitution to the means of the offender, then there will be no question of matching the restitution to the means of the offender; rather, the offender will simply have to pay. On the other hand, it may be impracticable to order an offender to pay restitution in full if he or she does not have the means. In such a case, it may be possible to order partial restitution, and also to order payment of a fine taking into account the offender's means. However, there may be objection to this, in that restitution should take priority over a fine, and partial restitution should be to the full extent of the offender's means. See further discussion on this post.

[68] See generally discussion in Australian Law Reform Commission, Discussion Paper No. 10, *Options for Sentencing* (1979, A.L.R.C., Sydney); also forthcoming *Interim Report* A.L.R.C. Reference on Sentencing.

69 See Joe Hudson and Burt Galaway, "National Assessment of Adult Restitution Programmes - Preliminary Report I and II" (Grant No. 78-NI-AX-0110, National Institute of Law Enforcement and Criminal Justice, L.E.A.A., U.S. Department of Justice); see also Dorothy J. Edmonds) McKnight, "The Victim Offender Reconciliation Project" in *Perspectives on Crime Victims* (Burt Galaway and Joe Hudson, eds., C.V. Mosby Press, St. Louis, forthcoming).

70 Joe Hudson and Burt Galaway, "Restitution and Justice Model for Corrections" (unpublished paper, n.d.), at 20.

71 Burt Galaway and Joe Hudson, "Restitution as a Victim Service" (unpublished paper, n.d. to be published in *Evaluation and Change*), at 5-6.

72 Ibid, at 6.

73 Julie Vennard, "Compensation by the Offender: The Victim's Perspective" (1978) 3 (1-2) *Victimology* 154, at 155-156.

74 Burt Galaway and Joe Hudson, "Restitution as a Victim Service" (unpublished paper, n.d. to be published in *Evaluation and Change*), at 4-5.

75 "Sun set" legislation has become popular in some United States' jurisdictions, and in Australia the *Human Rights Commission Bill* (Cwth) 1979 contains such a clause. For a survey of sun set legislation in the United States, see Peter Phillips, "Sunset Legislation" (1979) 51 (4) *The Australian Quarterly* 85.

76 See Burt Galaway, "Is Restitution Practical?" (1977) 41 *Federal Probation* 3-4.

77 Note that this would not be a problem exclusive to claims for criminal compensation or restitution, but may arise also in the sphere of claims for civil damages, etc.

78 See Joe Hudson and Burt Galaway, "Undoing the Wrong: The Minnesota Restitution Center" (1974) 19 *Social Work* 313; Robert Mowatt, "The Minnesota Restitution Center: Paying Off the Ripped Off" in *Restitution in Criminal Justice* (Joe Hudson, ed., 1976, Minnesota Department of Corrections, St. Paul) 190.

79 Ibid.

80 For an account of proposals currently before the Australian Law Reform Commission in relation to community work as "symbolic restitution", or direct restoration of damaged property, see Jocelynne A. Scutt, *Community Work Orders as an Option for Sentencing* (1979, A.L.R.C. Research Paper No. 4, Sydney).

81 Joe Hudson and Burt Galaway, "Undoing the Wrong: The Minnesota Restitution Center" (1974) 19 *Social Work* 313; Burt Galaway, "Is Restitution Practical?" (1977) 41 *Federal Probation* 3, at 4;

Burt Galaway and Joe Hudson, "Issues in the Correctional Implementation of Restitution to Victims of Crime" in *Considering the Victim: Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway, eds., 1975, Charles C. Thomas Publisher, Springfield, Ill.) 351; Roger O. Steggerda and Susan P. Dolphin, *Victim Restitution: Assessment of Restitution in Probation Experiment* (1975, Department of Program Evaluation, Des Moines, Polk County, Iowa).

[82] For a comprehensive outline of the types of property crimes contemplated as susceptible to settlement by restitution on the basis of not exceeding about $500, see Western Australian Department of Corrections, *Restitution: An Analysis of the Victim - Offender Relationship* (1979, Perth, Western Australia), at 4.8 "Initial Scope". On setting out figures showing that for a four year period up to 1976 in Western Australia "... show that between 74 and 80 percent of the breaking and entering charges involved values of less than $100", it is concluded that "... a high percentage of recorded crime is against property, and that in the great majority of these cases the amount stolen, or value of damage, is rather small. There is therefore a very large number of potential cases which may be amenable to resolution through restitution.

[83] Laura Nader and Elaine Combs-Schilling, op. cit., at 41-43.

[84] Ibid, at 42.

[85] Id.

[86] Laura Nader and Elaine Combs-Schilling, op. cit., at 41.

[87] Id.

[88] On this issue in relation to the fine, see sources cited at fn. 67 ante.

[89] "Symbolic restitution" could also be made direct to the victim: an agreement could be made under the guidance of a mediator that the offender should, for example, repair the broken window of a shop he or she has burgled; mow the lawn of the house broken and entered, and the like. Note, however, that from the studies it does not appear that symbolic restitution is often made to the victims; rather it is made in the way of work to the State (the community). On this see for example Peter R. Schneider and Anne L. Schneider, *Monthly Report of the National Juvenile Restitution Evaluation Project: May 1979* (1979, Institute of Policy Analysis, Eugene, Oregon): "The data submitted by the twenty three programs through the end of March 1979 indicate that nearly $18,200 in monetary restitution has been paid, *more than 1,200 hours of community service have been completed, and about 16 hours of work for victims have been performed.* Monetary restitution remains the type of restitution most frequently used, although the proportion of plans including community service has increased steadily over the past few months ..." For an account of the concept of symbolic restitution, see Albert Eglash, "Beyond Restitution - Creative Restitution" in

Restitution in Criminal Justice - A Critical Assessment of Sanctions (Joe Hudson and Burt Galaway, eds., 1975, Lexington Books, Lexington, Mass.) 91. See also John A. Seymour, "Restitution and Reparation" (paper presented at a seminar organised by the Queensland Branch of the Australian Crime Prevention Council, Brisbane, May 1978).

90 See e.g. Dorothy J. (Edmonds) McKnight, "The Victim Offender Reconciliation Project" in *Perspectives on Crime Victims* (Burt Galaway and Joe Hudson, eds., C.B. Mosby Press, St. Louis, forthcoming. McKnight reports: "Some victims needed help in working through their emotions and other victims had resolved the issue on their own. Occasionally a victim would tell about himself or a relative having been in trouble with the law as a youth. In such cases the attitude was 'any body can made a mistake'. Rarely was the victim totally vindictive ... the first few minutes of the victim offender meeting set the stage for what followed. A positive approach was essential ... eye contact was another component. Frequently, the victim or the offender would look at the third party worker while speaking to the other person. Whenever this happened, it should be pointed out. In at least one instance this situation boomeranged! When the ... worker called to the offender's attention that he was not looking at the victim when he spoke to him, the offender said, 'sorry I didn't realize that' but, the victim said 'listen, lady, get off the kid's back. Don't you realize how difficult this is for the kid? It took a lot of guts for him to meet me and you should understand that.'"

91 Dorothy J. (Edmonds) McKnight, op. cit.: "Frequently 'saying' was different from 'doing' a victim might say that when he met the offender he was going to tell him ... when confronted with the offender, however, the victim seldom followed through, or, if he did, it was usually with a much weaker statement. Sometimes the offender reacted similarly. One case had to be returned to court because the victim was claiming a much larger amount of cash than originally reported to the police. The offender, waiting outside the courtroom, was nervous and apprehensive, and said 'I'm not going to speak to that guy (the victim). Don't you suggest that I shake hands with him because I won't.' In a few minutes the victim appeared. He spoke and offered his hands. The offender responded to both gestures." Another case involved theft of money from a vending machine. McKnight reports: 'the three offenders arrived and were introduced [to the victim]. The offenders shook hands and apologised to Mr Great [the victim] then all four looked quite uncomfortable and uneasy. A pregnant pause followed. The worker said, 'Mr Great knows the end result of your offence but he doesn't know the details. Would you please fill him in.' The offenders took turns telling the story and undoubtedly exaggerated a bit. Mr Great laughed, asked questions, and laughed again. Don asked Mr Great about his insurance. Mr Great explained that he was unable to buy insurance because of the large amount of theft and vandalism in his business. The offenders were amazed - they thought everybody had insurance for everything. Don said, 'you mean you just lost all that money yourself?' Mr Great explained that it came out of that particular week's profits. This appeared to have an effect on the

offenders.' Restitution was agreed upon by the victim and the offenders. 'The offenders then asked if they could leave and were given permission.' Mr Great said that his driver would not be picking him up for another ten minutes. The offenders looked at each other and then one said, 'oh, well, we'll stay and keep you company.' The conversation picked up speed and Mr Great forgot the time and ended up keeping his driver waiting fifteen minutes. Later that month the offenders paid Mr Great the amount agreed upon. Mr Great thanked them and said it was nice to receive money he hadn't expected. Don said, 'you know, Mr Great is a real neat guy' and the other two agreed." McKnight comments upon this: "Perhaps the offenders were motivated at the onset because the meeting was court ordered and there was the possibility of their sentence being less severe if they followed through with the victim-offender meeting. By all appearances, however, something impalpable happened to the offenders along the way. Walton described what happened as 'an integration phase where the parties appreciate their similarities, acknowledge their common goals, own up to positive aspects of their ambivalence, express warmth and respect, and/or engage in other positive actions to manage their conflicts.'" (Richard Walton, *Interpersonal-Peacemaking: Confrontation and Third Party Consultation* (1969, Addison-Wesley Publishing Company Inc., Reading, Mass.) 98, at 105.)

92 Burt Galaway and Joe Hudson, "Restitution as a Victim Service" op. cit. at 11.

93 Id.; see also Joe Hudson and Burt Galaway, "Restitution and the Justice Model for Corrections", op. cit. at 20-21.

94 Burt Galaway and Joe Hudson, "Restitution as a Victim Service", op. cit., at 12.

95 Id.

96 Richard Walton, *Interperson Peacemaking: Confrontation and Third Party Consultation* (1969 , Addison-Wesley Publishing Company, Inc., Reading, Mass.).

97 Ibid, at 98.

98 Dorothy J. (Edmonds) McKnight, "The Victim Offender Reconciliation Project", op. cit., at 583, 584.

99 Burt Galaway and Joe Hudson, "Restitution as a Victim Service", op. cit., at 12-13.

100 Ibid, at 14.

101 e.g. Burt Galaway, "The Use of Restitution" (1977) *Crime and Delinquency* 57; Burt Galaway and Joe Hudson, "Issues in the Correctional Instrumentation of Restitution to Victims", op. cit.; and see generally discussion in Australian Law Reform Commission Discussion Paper No. 10, op. cit.

102 See e.g. John W. Palmer, "Pre-Arrest Diversion" (1975) *Crime and Delinquency* (April 1975); E.H. Sutherland, "Is 'white collar crime' Crime" (1945) 10 *American Sociological Review* 32; E.H. Sutherland, *White Collar Crime* (1949, Holt, Reinhart and Wilson, N.Y.); and generally E.H. Sutherland and Donald R. Cressey, *Principles of Criminology* (1966, 7th ed., Lippincott, N.Y.).

103 See sources cited at fn. 102 above.

104 It is interesting to note the findings of a new study, *Volume and Delay in State Appellate Courts: Problems and Responses* (1979, National Center State Courts) that following a review of available statistics on appellate court dispositions the authors in that study have noted that in accordance with the bench marks of the American Bar Association or the National Advisory Commission on Criminal Justice Standards and Goals, "delay on appeal seems to be a problem in this country". Of the 37 appeal courts studied in 29 States, only four met the A.B.A. standards' goal that decisions should occur within five or six months from notice of appeal. In all, the greater majority took at least nine months, and there was an average of eighteen months or more for either civil or criminal appeals, or both, in nine courts. There is no doubt, too, that at the initial level of the first hearing, delays are frequent in U.S.A. courts. Furthermore, there is no doubt that delays are an issue in Australian courts. Thus it is considered necessary that the Institute of Criminology (Sydney University Law School) should hold a seminar on the issue of delay in trial courts. See also Jocelynne A. Scutt, "Problems Related to the Jury and Court Administration: An Overview" (forthcoming Law Society Journal).

105 Dorothy J. (Edmonds) McKnight, op. cit.

106 Ibid.

107 Burt Galaway, "The Use of Restitution" (1977) *Crime and Delinquency* 57, at 59.

108 See e.g. Dorothy J. (Edmonds) McKnight, "The Victim Offender Reconciliation Project" in *Perspectives on Crime Victims* (Burt Galaway and Joe Hudson, eds., St. Louis, C.V. Mosby Press, forthcoming); Burt Galaway, "The Use of Restitution", op. cit.; Burt Galaway and Joe Hudson, "Restitution and Rehabilitation - Some Central Issues" (1972) *Crime and Delinquency* 403.

109 Further on the issue of whether restitution should be applied only following conviction, or where a finding of guilt is made and a conviction does not proceed from this, see this paper at "Implementation of Restitution Schemes in Australia" post.

110 See generally Dorothy J. (Edmonds) McKnight, "The Victim Offender Reconciliation Project", op. cit.; Burt Galaway and Joe Hudson, "Restitution and Rehabilitation - Some Central Issues", op. cit.; Burt Galaway, "The Use of Restitution", op. cit.; Joe Hudson and Burt Galaway, "Restitution and the Justice Model for Corrections"

(unpublished paper); Alan T. Harland, Marguerite Q. Warren and Edward J. Brown, *A Guide to Restitution Programming* (Working Paper 17, Criminal Justice Research Center, January 1979, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice); Alan T. Harland, *Restitution to Victims of Personal and Household Crimes* (Working Paper 15, Criminal Justice Research Center, November 1978, National Criminal Justice Information and Statistics Service, Law Enforcement Assistance Administration, U.S. Department of Justice).

111 Burt Galaway and Joe Hudson, "Restitution and Rehabilitation - Some Central Issues" (1972) *Crime and Delinquency* 403, at 404.

112 Ibid. See also sources cited fn. 111 above.

113 On this, see generally Burt Galaway and Joe Hudson, "Restitution and Rehabilitation - Some Central Issues", op. cit.; Burt Galaway, "The Use of Restitution", op. cit. For the position in Australia, where plea bargaining is not admitted to occur, see generally Wayne T. Westling, "Plea Bargaining : A Forecast for the Future?" (1976) 7 *Sydney University Law Review* 424.

114 Mary Daunton-Fear, *Sentencing in Western Australia* (1977, University of Queensland Press, Qld.), at 132; cited A.L.R.C. Research Paper No. 8, *Probation as an Option for Sentencing* (Sydney, 1979), at pp. 39-40.

115 See Jocelynne A. Scutt, *Probation as an Option for Sentencing*, op. cit., Recommendation 4, at 22.

116 Law Reform Commission of Canada, *Guidelines - A Report on Dispositions and Sentences in the Criminal Process* (n.d.), at 1; cited A.L.R.C., *Probation as an Option for Sentencing*, op. cit., at 21.

117 Ibid, at 22.

118 Although on the question of legal representation it has recently been held by the High Court that no general obligation exists that a person should be legally represented - even in the case of an indictable offence with a possible maximum penalty of life imprisonment.

119 See section 438(4) *Crimes Act* (N.S.W.) 1900.

120 Section 30 *Police Offences Act* (N.S.W.) 1901 provides for return of goods held by police where no criminal proceedings have taken place.

121 [1908] 2 K.B. 452.

122 Note that the discharge without conviction is not necessarily a statutory animal, but has existed at common law, frequently in the form of a common law bond, etc. On this issue see generally Jocelynne A. Scutt, *Probation as an Option for Sentencing* (A.L.R.C.,

Research Paper No. 8, September 1979, Sydney) and Jocelynne A. Scutt, *Community Work Orders as an Option for Sentencing* (A.L.R.C. Research Paper No. 4, April 1979, Sydney). Also see further this paper post.

[123] See Jocelynne A. Scutt, *Probation as an Option for Sentencing*, op. cit., at 11 et. seq.

[124] s. 556A *Crimes Act* (N.S.W.) 1900 and s. 21B *Crimes Act* (Cwth) 1914.

[125] For discussion as to the suspended sentence, see Criminal Law and Penal Methods Reform Committee of South Australia, *First Report - Sentencing and Corrections* (S.A. Government Printer, July, 1973), at 140 et. seq.

[126] Note also section 437 *Crimes Act* (N.S.W.) 1900 where compensation for injuries, hospital expenses and the like may be ordered by the court to be paid to a victim in respect of any felony or misdemeanour. Again this provision should be required to be utilised by the courts with a view to keeping offenders out of prison as far as possible, and looking at the "return the parties to the status quo" idea as a starting point in sentencing.

[127] See Recommendations 4 and 5, *Probation as an Option for Sentencing*, op. cit.

[128] Ibid, at paras. 43-44.

[129] See generally J.F.S. King, *The Probation Service* (1958, Butterworth, London); J. St. John, *Probation: The Second Chance* (1961, Vista Books, London).

[130] See generally Jocelynne A. Scutt, *Community Work Orders as an Option for Sentencing* (A.L.R.C. Research Paper No. 4, April, 1979, Sydney); J.G. Mackay and M.K. Rook, *The Work Order Scheme - An Evaluation of Tasmania's Work Order Scheme* (A Report to the Criminology Research Council, Canberra, undated); I. Potas, "Alternatives to Imprisonment" in *Crime and Justice in Australia* (1977, D. Biles, ed., Sun Books, Melbourne) 102, at 122 et. seq.; M.K. Rook, "Tasmania's Work-Order Scheme: A Reply to Varne" (1977) 11 *A.N.Z. Journal of Criminology*; June Varne, "Saturday Work: A Real Alternative" (1976) 10 *A.N.Z. Journal of Criminology* 95; Victorian Sentencing Alternative Committee, *Sentencing Alternatives Involving Community Service* (April, 1979 Melbourne).

[131] See sources cited fns. 36, 37 and 49 ante.

[132] See e.g. s. 9 *Criminal Appeal Act* (N.S.W.) 1912.

[133] See sources cited fns. 36, 37 and 49 ante.

[134] See Women's Electoral Lobby (Sydney), *Draft Bill on Sexual Offences* (1978, Sydney), at "Reform of Compensation Programmes and Legislation"; also resolutions passed at Canberra, A.C.T. Mid-Decade for Women Conference (October 6, 1979) and Sydney Mid-Decade for Women Convention (December 1, 1979).

[135] See e.g. findings of the Royal Commission into New South Wales Prisons, 1979; also comments in Australian Law Reform Commission, *Discussion Paper No. 10, Sentencing: Reform Options* (A.G.P.S., Canberra, 1979).

[136] Laura Nader and Eleanor Combs-Schilling, op. cit.

NOTE TO APPENDICES

For the interest of the reader, two further "models" for compensation/ restitution schemes are included as appendices.

The first, a model drawn-up by the Canadian Corrections Association, concentrates upon *compensation* as a mechanism for "restoring victims of crime", taking the approach that the State should have the major responsibility for recovering *restitution* from the offender. Thus, victim and offender would not be obliged to come into contact with one another (although this may be overridden in some instances) : the victim would recover from the impersonal State; the offender would pay to the impersonal State. The scheme envisages, however, that offenders should take responsibility, where possible, for the damage their crimes have caused, by paying "profits of crime" into a general compensation fund from which victims might claim.

The second model, drawn-up in the Western Australian Department of Corrections by the Acting Co-ordinator of Community Programmes, takes a more direct approach : victim and offender should be brought together, where possible, to negotiate a restitution programme that is acceptable to both parties; mediators will assist in negotiations, but will have no power to set conditions or to reject the terms of any settlement. Rather, parties themselves will determine exactly what payment or "symbolic restitution" is appropriate in relation to the damage caused by the offence. The paper looks upon the introduction of restitution as capable of assisting both victim and offender, as well as reducing prison-numbers. Once implemented, restitution programmes may be extended to cover more serious crimes than simple offences of larceny and damage to property.

Appendix three is included as an example of the dearth of restitution orders and/or orders for compensation made in Australian jurisdictions. The figures are prepared by M.G. Josephs of the Research Section of the Law Department of the Government of Victoria, and show the number of orders made for the period 1-1-1979 to 31-12-1979, in relation to offences taken through the Higher Criminal Courts in Victoria.

APPENDIX I

COMPENSATION TO VICTIMS OF CRIME AND RESTITUTION BY OFFENDERS*

Canadian Corrections Association

Definitions - In this report the term *compensation* refers to payments by the state to the victim of a crime or to his dependents to make up the loss incurred. The term *restitution* refers to the contribution made by the criminal.

Nature of the Proposals - The Canadian public is becoming increasingly concerned over the lack of attention given by our law to the hardship suffered by victims of crime. We are most active in catching and punishing the criminal and growing attention is being given to his rehabilitation. Little or nothing is done apart from general welfare provisions to assist the victim of crime who may be physically incapacitated or financially ruined thereby and whose dependents may be deprived of his support if he is killed or permanently injured.

The scheme proposed in this report aims at rehabilitation of both the victim and the offender, but is not a piece of welfare legislation. It is not concerned with the financial position of the victim. It covers a grey area between civil and criminal law, which together represent the principles of justice, but which leave a gap to be filled by the proposed scheme. In this respect, the suggested plan goes beyond present compensation schemes, which are more restrictive because they merely represent an extension of the narrowly conceived welfare state. The proposed plan acknowledges the fact that justice represents an important element of welfare and no citizen can feel happy if he believes he has suffered injustice.

It is suggested that compensation may overcome public apathy in relation to both the victim and the criminal and may help law enforcement by encouraging the laying of criminal charges; individuals with information about a case might volunteer evidence. It would seem, too, that the availability of compensation encourages members of the public to try to prevent crime[1]; individuals with information about a case might be encouraged to come forward and give evidence.

Should the availability of compensation help overcome the hesitancy some employers feel about hiring a person with a criminal record, or in some cases do away with the necessity of bonding a person with a criminal record would be all to the good. Also the additional information that would be available on what crime costs the victims might lead to increased interest in preventive programs.

The fear is sometimes expressed that the availability of compensation might remove the inhibition some potential criminals feel about stealing from an individual. Similar unsubstantiated reservations are express-

about other schemes intended to meet human problems, such as welfare, health insurance or free education, but there is no evidence to support such fears. The small potential dangers are outweighed by large known benefits.

Closely related to compensation is restitution on the part of the criminal, both as a step in his own rehabilitation and as a means of ensuring that he does not profit from his crime.

Compensation

Recommendation 1

It is recommended that each province introduce a publicly administered system of compensation to cover loss or injury suffered by the following :
a) victims of crime or their surviving dependents
b) persons who suffer injury or loss while assisting in enforcing federal or provincial legislation that provides for sanction or punishment, preventing a crime or reducing injury or loss to its victim.

The term "crime" as used in this recommendation is defined in Recommendation 2. It will be noted that the meaning is restricted to offences under the Criminal code. No such restriction is recommended in relation to those who are injured or suffer loss while assisting in enforcing the law.

Such a system of compensation should be financed out of general revenue, rather than out of a contributory fund.

Protection for the individual against injury or loss as a result of crime is closely related to protection against risks of other kinds. It does not matter whether a person is injured through an accident or through a criminal act; his loss and needs are the same. Industrial accidents are generally covered through Worker's Compensation. It is, therefore, recognized that compensation to victims of crime could well form part of a wider scheme of protection for the public. However, this report is restricted to a consideration of compensation for injury or loss that flows from a criminal act.

There is another group of innocent people who sometimes suffer considerable loss and hardship when they become involved in the aftermath of a crime. These are innocent people who are prosecuted for, or even convicted of, a crime. If the charge is a serious one, the individual may be held in custody for several months awaiting trial or appeal and his legal and related fees may run into several thousands of dollars. If he is convicted, he may spend several years in prison.

It is difficult to establish rules covering compensation to such individuals without becoming involved in compensation to all persons charged with an offense and found not guilty, but consideration should be given to finding a solution to this dilemma. However, this issue is considered outside the scope of this report.

Recommendation 2

Crime should be defined for these purposes as any offense involving loss or injury to a person under the Criminal Code of Canada.

The definition of "crime" is restricted to offences under the Criminal Code partly because these seem to be the major offenses that might bring injury or loss to a specific victim or his dependents and partly because it might be prudent to introduce a limited scheme in the beginning.

Under this definition most motoring offenses would be excluded, since they are usually a matter of provincial jurisdiction. Motoring offences are generally covered by insurance and such schemes as unsatisfied judgment funds.

There seems to be no logical justification for restricting compensation to victims of crimes of violence as is done in all present schemes. Nonviolent crimes can cause more serious and more permanent hardship to the victim and his dependents that those crimes of violence that cause only temporary physical injury.

A victim of a criminal act should be compensated even if the act in question does not lead to any prosecution or conviction, either because the offender cannot be found or because the evidence against the accused is injsufficient, or because the offender is legally innocent owing to his young age, insanity, or similar factor.

Recommendation 3

"Victim" should be defined in terms that exclude corporations as victims.

Corporations and business firms generally should carry insurance against loss through crime and should, therefore, be excluded from this scheme.

Recommendation 4

A limit should be set on the amount of compensation that could be claimed by a shareholder for a crime committed by the corporation.

A maximum should be set for compensation to shareholders for an offence committed by the corporation that would protect the small investor while avoiding overprotection for the large shareholder. The depositor insurance schemes now being developed in various parts of the country might serve as a pattern.

Recommendation 5

The province should establish a Board to hear claims under this scheme and to approve or deny compensation in any case. There should be no appeal from the Board's decision except in the question of denial of natural justice. Procedures for hearings before the Board would have to be worked out, but within them, the Board should have wide discretion within its jurisdiction.

The hearing of any claim for compensation need not await completion of the criminal trial providing that, in the opinion of the Board, there is prima facie evidence that a crime has been committed. All claim hearings would be in private so the evidence given there would not influence the criminal trial. No evidence related to compensation would be introduced in the criminal trial, although the evidence given at the criminal trial would be considered by the Board in claim hearings.

Persons applying for compensation should have the right to be represented by counsel and legal aid should be available.

Where the Board has established prima facie evidence that a crime has been committed the victim should be eligible for compensation whether or not a criminal charge is laid against any person.

Recommendation 6

Compensation should include payment for property loss, physical injury, pain and suffering, loss of income, and legal fees and similar expenses.

In cases involving loss of, or damage to, property, the victim should be compensated to the value of the property, plus such matters as loss of business during repairs.

In cases involving physical injury or pain and suffering, the following should be included in a consideration of the amount of compensation :

a) Medical and Hospital Expenses.

b) Loss of Income. This should be related to actual loss, so that a person with ahigh income would be eligible for higher compensation than a person with a low income for the same period of incapacitation. Expected salary increments and anticipated drop in the value of the dollar should be taken into consideration in determining the amount of compensation. In assessing the period of incapacitation, mental and emotional factors should be considered and such social factors as the difficulties of switching to new forms of employment in cases where permanent disability makes continuation of old forms of employment impossible.

Complications would arise in cases where the victim is insured. Medical or hospital insurance might cover medical or hospital expenses. Worker's Compensation might apply where the victim was injured while engaged in regular employment and this might cover both medical costs and income maintenance. Private insurance, either medical or income maintenance, presents a particular difficulty because it would not be desirable to penalize the person who has been provident enough to cover himself under private insurance. The aim is to restore the situation as nearly as possible to what it was before the crime was committed and the Board would have to take into consideration the full effect of insurance. The victim might be compensated for premiums paid and for any loss of coverage or sick leave privileges. It should also be kept in mind that private insurances may not pay one hundred percent of damages.

The Board should not become involved in any situation where continu-

ing reassessment of a case over the years is required. Instead, the Board should aim for final disposition of the case within a reasonable period. Interim awards would be made to meet immediate needs while final assessment of the claim is pending. Such interim awards might be repeated in cases where final disposition is delayed. Final compensation might take the form of a lump sum or, in rare cases (for instance to the family of a victim who dies as a result of criminal action), in the form of periodic payments, but in either instance, the case would be closed as far as reconsideration later by the Board is concerned.

In cases involving injury or loss suffered while assisting in enforcing the law, it must be remembered that the citizen has a responsibility to assist the police if requrest by the police to do so; if the citizen refuses, he can be charged.

In cases where the victim has gained a judgment through a civil suit before making an application for compensation, such judgment should be taken into consideration in determining whether further compensation is indicated.

In making an award, the Board should take into consideration the conduct of the victim in cases where the crime is partly victim-precipitated through either provocation or carelessness.

Recommendation 7

Where compensation is awarded, the Board shall be subrogated to the extent of its payment to any right of civil action which the victim may have against any third party.

This places authority to proceed with civil action against the criminal in the hands of the Board who might be more active in pressing any claim. Also, it would avoid double payment to the victim, once from compensation and once from the proceeds of the civil suit. However, if the victim feels he can collect more in a civil suit than the compensation awarded him, he should have the right to join with the Board on its civil suit or launch a civil suit of his own.

If the Board recovers more from the civil suit than it paid the victim, the additional money would be turned over to the victim.

Recommendation 8

Each province should establish a fund out of which compensation awards would be paid.

There is little reliable evidence to serve as a guide to the cost of such a scheme. The schemes now in operation are all confined to compensation of victims of crimes of violence, and in some instances to those in "need". The experience in Great Britain and New Zealand is that costs have been unexpectedly low.

Possibly many small claims will not be pressed; indeed, perhaps a lower limit might be placed on the amount of any award,[2] such as the low-

er limit of the loss of three weeks' wages in the British legislation. Some claims would be recoverable by the Board through civil action, others would be paid through some form of public indemnity such as Worker's Compensation. Some of the money might be recovered through restitution by the criminal.

This scheme, when introduced, should not apply retroactively. Such a provision would protect the fund against the risk of a large number of immediate claims.

Most of these costs are being paid now with the burden resting on the individual victim; this scheme would only shift the burden onto society as a whole. However, some of this burden is paid in suffering, and its translation into cash would mean an added financial strain. Administration costs would also be extra.

Recommendation 9

The general principle of cash restitution through an impersonal relationship between the state and offender is recommended, although there should be provision for other creative forms of restitution.

A system whereby the state pays compensation and then receives whatever restitution is available is, in our opinion, preferable in most instances to having the criminal pay restitution direct to the victim. We believe this to be true because of the negative emotions that might be engendered by a direct and personal relationship between the criminal and his victim.

There are instances, however, particularly with juvenile and young adult offenders, where restitution in forms other than cash and, in some instances directly to the victim, can have a salutary effect. Legislation should provide a general framework for such forms of restitution.

Restitution that is undertaken willingly by the offender may have a better effect in terms of his rehabilitation than restitution that is enforced by the court against his wishes. However, restitution is seldom either fully voluntary or fully involuntary; both elements are usually present and both have a proper place.

Recommendation 10

Legislation should be framed to provide that all assets a criminal possesses may be seized as restitution.

One way to deter financial crimes is to ensure that the criminal makes no profit from his crime. If the criminal has assets, these possessions should be made available for restitution up to the amount of the compensation awarded, plus the cost to the state of apprehending, convicting and punishing him if some additional punishment, such as a period of imprisonment, is ordered by the court.

However, the amount of restitution ordered should always be related to the ability to pay. To load the offender with a large restitution debt he cannot discharge would hinder his rehabilitation. To deprive his family of the necessities of life would create more problems than it would solve.

The advisability of making conviction for certain indictable offences an act of bankruptcy should be considered, if it is thought an amendment to the Cirminal Code giving the court the power to seize all personal assets of the criminal for restitution would not be effective. A proposal that bankruptcy be used was made by the Council of the Law Society of England to the Royal Commission on the Penal System.[3]

Restitution, once ordered, should be enforced. The power to vary the order should rest with the court alone, and not with some administrative authority. The onus of proving inability to pay should rest with the offender.

Restitution can be in either a lump sum or in payments spread over a period of time. Restitution that involves payment over a period of time is best tied to probation, where the supervising officer can ensure that payments are kept up and can interpret to the criminal the importance of keeping up the payments, both in terms of his own rehabilitation and in avoiding trouble with the court.

Restitution over a period of time by a prison inmate is impractical under present conditions, although that situation might change if wages approaching those on the outside are eventually paid in our prisons.

---

* "Compensation to Victims of Crime and Restitution by Offenders" reprinted from the October (Volume 10, No. 4) issue of the *Canadian Journal of Corrections* (now the *Canadian Journal of Criminology*) published by the Canadian Corrections Association (now the Canadian Association for the Prevention of Crime), 55 Parkdale Avenue, Ottawa, Ontario, Canada K1Y 1E5.

Sincere thanks are due to the publishers for their kind permission to reproduce this article.

FOOTNOTES

[1] See a statement by Sir Edmund Davies, Lord Justice of the English Court of Appeal, appearing in the *Winnipeg Free Press*, December 12, 1966.

[2] Such as the lower limit of the loss of three weeks' wages in the British legislation.

[3] See "Crime Often Pays" (1967) 15(4) *Chitty's Law Journal* (April, 1967) for discussion of this proposal and how it can be adapted to Canada.

APPENDIX II

RESTITUTION : AN ANALYSIS OF THE VICTIM-OFFENDER RELATIONSHIP*

Andy Duckworth#

(Sections of this paper dealing with the history of restitution and current schemes in the United States and Canada have been omitted.)

Victim-Offender Restitution in Australia : A Possible Model

A provisional model of how victim offender restitution might operate in Australia will now be outlined, followed by a discussion of some of the problems and objections which such a proposal inevitably incurs.

It is important to realize that there are several ways in which restitution programmes can operate, depending on such factors as focus, scope, basic philosophy, available funds and manpower. The model outlined below therefore represents one possibility amongst many, though hopefully for those who are interested in the principle of restitution, it will provide a basis for discussion which may lead to the creation of a more refined model.

The Rationale of the Model

Philosophically, it is based on the belief that restitution, whenever possible, should be the major principle of conflict resolution between parties to an offence, rather than simply a measure which is tacked on to more traditional modes of sentencing as an additional form of punishment. In short, it is viewed as a desirable basic rather than an optional extra. Consequently, it should be a process enacted at the pre-trial or post-hearing stage, rather than post-incarceration or parole stages.

Initial Scope

In common with programmes recently instituted elsewhere, initially only straightforward cases should be dealt with; in other words cases which :

1) involve identifiable victims (individuals or corporate bodies)

2) are relatively minor (and to begin with) property offences such as petty theft, malicious damage, breaking and entering, unlawful use of motor vehicles. If necessary, a dollar figure could be used to define "relatively minor", for example, theft or damage up to a value of $500

3). involve defendants who choose to plead guilty in court.

Where such conditions prevail, restitution should be tried as a first measure in preference to traditional sentences such as heavy fines, imprisonment, or probation.

There are sound reasons why initially a victim-offender restitution programme in Australia should limit its operation to the above conditions. Firstly, it would be unwise to test the viability of a (re)new(ed) concept in impossibly difficult conditions. By deferring the inclusion of complex and difficult cases, the kinds of problems which inevitably accompany the creation of any new system are not exacerbated.

Secondly, and perhaps more importantly, the types of offence listed above as most easily amendable to restitution, make up a significant percentage of all offences which come before the courts. Statistics taken from the Western Australian Police Department Annual Reports for the four years up to 1976 show that between 74 and 80 percent of the breaking and entering charges involved values of less than $100.

A number of United States' sources reveal a similar picture. Dodge, Lentzner and Shenk[16] discovered through a major victimization survey that thefts, or attempted thefts of property or cash, accounted for 84 percent of reported crimes. Economic loss occurred in 80 percent of personal victimizations, though typically amounts were small. Seventy percent of personal victimizations and 66 percent of household victimizations involved losses of less than $US50 in value.

Finally, looking at imprisonment statistics, in Western Australia for example in 1977-1978,[17] commitments to prison for the offences of wilful damage and arson, breaking and entering, stealing and receiving, and unlawful use of a motor vehicle were 3,160 or 30 percent of all commitments. Similarly, in New South Wales during 1976[18], 24.9 percent of all receptions under sentence were property offenders. Taken together, these figures suggest quite strongly that a very high percentage of recorded crime is against property, and that in the great majority of these cases the amount stolen, or value of damage, is rather small. There is therefore a very large number of potential cases which may be amendable to resolution through restitution.

Suggested Processes and Procedures

The first requirement of the process is that both the offender and the victim should consent to meet together with a third party in order to work out a universally acceptable restitution plan. If either party refuses to participate, the sentence should revert to the normal court process.

Ideally, initial approaches could be made to both the offender and victim prior to the court hearing, in order to establish whether both with to attempt to negotiate restitution. This would represent a far greater time saving than if such approaches are made at or after the court hearing.

In cases where both parties agree to negotiate restitution, the dis-

cussions should be held in a comfortable but relatively informal setting. It is most important that the programme should be seen as a genuine alternative to orthodox court procedures. It is therefore essential that the locus of negotiation is totally unlike the courts, both in appearance and atmosphere.

The form that the restitution payment might take should be left to the victim and the offender, with advice and suggestions from the third party. Reparations could be straight cash payments, a service of equivalent value to the loss sustained, or a mixture of money and services. In addition, offenders should meet any court costs associated with the initial hearing and pay a small fine.

Example One :

A thief takes $50 from a shop and in so doing breaks a window, the replacement of which is valued at $50. Outcome - the thief pays the victim $100, a small fine, and meets court expenses. Payment might be made over a mutually agreed time span.

Example Two :

A drunken man causes malicious damage to a public building. Outcome - the man should either pay for the damage over an agreed period, or help to repair it by working on weekends, and paying off the costs of building materials. He also pays a fine and any court costs.

If, after a reasonable length of time no agreement on terms can be reached by the parties involved, the case would have to revert to court and a traditional sentence for the offender. It would also be necessary to bring the offenders back to court if they fail to comply with the negotiated restitution agreement in order to face an alternative mod of sentencing.

Procedurally, a number of options could exist for the courts. One possibility would be the imposition of a suspended prison sentence, conditional probation order or conditional fine on the offender, to be invoked if he or she fails to meet the restitution agreement. Alternatively, prosecution might be deferred altogether whilst the offender is participating in the programme. This means that the charges could be dropped entirely on successful completion. Both procedures have been used in the "Earn-it" restitution programme in Massachusetts.[19]

The Role of the Third Party or Facilitator

The role of the third party should be purely that of a facilitator who can advise or persuade, but not threaten or overrule either party to the negotiations. To give the third party the power of final decision in situations of deadlock would alter the purpose of the procedure, which is for victims and offenders to generate their own acceptable solutions. To create an arbitrator with the power of final decision might be the first step to recreating an orthodox court procedure.

In a paper entitled "Third Party Functions in the Victim-Offender

Conflict",[20] Yantzi and Miller of the Kitchener [restitution] project outline the role and required skills of third parties in some detail. They argue that although the third party cannot aling himself with either the victim or the offender -

> "... his role is not that of an impartial mediator or judge who is detached and distant from the particpants. He is an active particpant in the process, functioning in a distinguishable role. He is there to facilitate the interaction of the other two principals in a non-coercive manner. While monitoring the interaction, he does not direct the exchange or impose a solution on the principals."

Documentation and Administration

Documentation would consist of a record of the agreed restitution plan signed by both the victim and the offender and witnessed by the third party. Copies would be held by the victim, the offender, the court at which the case was initially heard and the authority responsible for administering the restitution programme. A space would be left on the document to record the outcome (e.g. "successfully completed" and the date or "conditions not met - return to court"). One possibility would be for administration of such programmes to be under the jurisdiction of Probation Services.

Such a programme would represent a limited but valuable beginning to the establishment of restitution as the basis of justice and corrections policies as an alternative to the present punitive or rehabilitative model. It would be suitable only for clear-cut minor cases in which both parties hold a genuine desire to work out a mutually acceptable solution in preference to an orthodox hearing.

Nevertheless, significant numbers of such crimes are committed each year, most of which leave the victim with little or no recompense and many of which inflict prison sentences which are pointless to the offender and costly to the community.

(The paper goes on to discuss problems in introducing restitution programmes and possible extension of the restitution principle to more complex areas of corrections.)

---

* Paper prepared within the Western Australian Department of Corrections.

Acting Co-ordinator, Community Programmes, Western Australian Department of Corrections, "Ardross House", 1004 Hay Street, Perth, W.A. 6000.

Sincere thanks are due to the author for his kind permission to reproduce a portion of his paper.

FOOTNOTES

16 R.W. Dodge, H. Lentzner and F. Shenk, "Crime in the United States : A Report on the National Crime Survey" in *Sample Surveys of the Victims of Crime* (W.G. Skogan, ed, 1976, Ballinger, Cambridge Mass.).

17 Western Australian Department of Corrections, *Annual Report, 1977-1978.*

18 New South Wales' Department of Corrective Services, *Annual Report, 1975-1976.*

19 J. Ciner, "If You Want a Second Chance, Earn-It" (1978) *Corrections Magazine* (December, 1978) 64-67.

20 M. Yantzi and E. Miller, *Third Party Functions in the Victim-Offender Conflict,* unpublished personal communication.

SUMMARY OF RESTITUTION AND COMPENSATION ORDERS FOR THE PERIOD 1-1-1979 to 31-12-1979 : HIGHER CRIMINAL COURTS VICTORIA

PRINCIPAL OFFENCE	$1.00 to 500	501/ 1000	1001/ 3000	3001/ 5000	5001/ 10,000	10.001/ 20,000	20,001/ 1000,000	100,001 +	TOTAL	Stay or Instal-ment(nos.)	In Favour Of	
											Individ.	Other
Armed Robbery	1								1		1	
Robbery	4								4		4	
Theft	6	1	3		3		1	1	15		3	12
Burglary	3	1	2				2		8	3	4	4
Handling Stolen Goods		1	1	2	1				5	3	1	4
Obtaining Property by Deception			1			1			2		2	
Obtaining Financial Advantage by Deception					1				1	1		1
Uttering	2								2			2
Arson	2	2	1	6	2		2		15	4	2	13
Malicious Damage	2	3	1	1					7	4	5	2
Imposition			1						1			1
Other (Theft by deception)				1					1			1
TOTAL	20	8	10	10	7	1	5	1	62	15	22	40

Prepared by M.G. Josephs, 22.2.1980

BIBLIOGRAPHY

Australian Law Reform Commission, *Discussion Paper No. 10 - Sentencing : Reform Options* (A.G.P.S., Canberra, 1979)

Samuel Barrows, *Report on the Sixth International Prison Congress, Brussels, 1900* (1903, U.S. Government Printing Office, Washington D.C.)

Jeremy Bentham, "Political Remedies for the Evil of Offenses" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 29

David Biles and John Braithwaite, "Crime Victims and the Police" (1979) 14(3) *Australian Psychologist* 345

A.E. Bottoms, "The Advisory Council and the Suspended Sentence" (1979) *Criminal Law Review* 347

James H. Bridges, John T. Gandy and James D. Jorgensen, "The Case for Creative Restitution in Corrections" (1979) 43(3) *Federal Probation* 28

Stephen Brody, "Research into the Aims and Effectiveness of Sentencing" (1978) XVII(3) *Howard Journal*

Anthony A. Cain and Marjorie Kravitz, *Victim/Witness Assistance - A Selected Bibliography* (1978, U.S. Department of Justice, L.E.A.A., Government Printing Office, Washington D.C.)

Canadian Corrections Association, "Compensation to Victims of Crime and Restitution by Offenders" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 412

Frank J. Cannavale, Jr. and William D. Falcon eds, *Improving Witness Co-operation* (1976, U.S. Department of Justice, L.E.A.A., Government Printing Office, Washington D.C.)

Case Note, "*Jane Ruth Starie; R.* v. - Combination of Community Service Order and Suspended Sentence : Bad Sentencing Practice" (1979) 143 *Justice of the Peace* 424

Case Note, "*Cline; R.* v. - Suspended Sentence of Imprisonment - Subsequent Offence of Relatively Minor Character - Whether Sentence Should be Activated - Whether Term of Sentence Should be Reduced" (1979) *Criminal Law Review* 469

Case Note, "Sentence - *R.* v. *Williams* - Community Service Order - Power of Crown Court to Deal with Offender for Offence for which Community Service Order was Imposed" (1979)

H. Paul Chalfant, "Professionalization and the Medicalization of Deviance : The Case of Probation Officers" (1972) 2(1) *Offender Rehabilitation* 77

B. Childres, "Compensation for Criminally Inflicted Personal Injury" (1964) 39 *New York University Law Review* 463; also in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 363

N. Christie, "Conflicts as Property" (1977) 17(1) *British Journal of Criminology*

A.T. Clarke, "Probation and Mitigation" (1979) 143 *Justice of the Peace* 668, 671

A.T. Clarke, "Volunteer Work with the Probation Service" (1979) 143 *Justice of the Peace* 37

A.T. Clarke, "Volunteer Work with the Probation Service" (1979) 143 *Justice of the Peace* 51, 55

Steven H. Clarke, "What is the Purpose of Probation and Why Do We Revoke It?" (1979) 25(4) *Crime and Delinquency* 409

Fred Cohen, "How and Why to Use Experts at Sentencing : A Comment" (1979) *Criminal Law Bulletin* 151

Irving E. Cohen, "The Integration of Restitution in Probation" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 332

Comment, "Breach of Community Service" (1979) 143 *Justice of the Peace* 329

Comment, "L.E.A.A.'s Office of Juvenile Justice and Delinquencey Prevention Maps Out Priorities for 1980" (1979) *L.E.A.A. Newsletter* 10

Comment, "New York City Victim Service Agency - Counsellors Help Ease Fears and Frustrations of Crime Victims and Witnesses" (1979) *The New York Times*

Joan M. Covey, "Alternatives to a Compensation Plan for Victims of Physical Violence" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 220

Criminal Law and Penal Methods Reform Committee of South Australia, *First Report - Sentencing and Corrections* (S.A. Government Printer, July, 1973)

Gerald Cromer, "Doing Hours Instead of Time ..." (1978) 11 *A.N.Z. Journal of Criminology* 54

Mary Daunton-Fear, *Sentencing in Western Australia* (1977, University of Queensland Press, Qld.)

R.W. Dodge, H. Lentzner and F. Schenck, "Crime in the United States : A Report on the National Crime Survey" in *Sample Surveys of the Victims of Crime* (W.G. Skogan ed, 1976, Ballinger, Cambridge, Mass.)

Mary C. Donnellan and Harvey A. Moore, "Rehabilitation and Protection : The Goals and Orientations of Probation and Parole Workers" (1979) 3(3) *Offender Rehabilitation* 207

Andy Duckworth, *Restitution : An Analysis of the Victim-Offender Relationship* (1979, Western Australian Department of Corrections)

Herbert Edelhertz, "Legal and Operational Issues in the Implementation of Restitution within the Criminal Justice System" in *Restitution in Criminal Justice - A Critical Assessment of Sanctions* (Joe Hudson and Burt Galaway eds, 1977, Lexington Books, Lexington, Mass.) 63

Herbert Edelherts, *Restitution Justice : A General Survey and Analysis* (1975, Batelle Human Affairs Research Center, Seattle, Washington)

Editorial, "Fine Enforcement" (1979) 143 *Justice of the Peace* 688

Albert Eglash, "Beyond Restitution - Creative Restitution" in *Restitution in Criminal Justice - A Critical Assessment of Sanctions* (Joe Hudson and Burt Galaway eds, 1977, Lexington Books, Lexington, Mass.) 91

J. Finer, "If You Want A Second Chance - Earn It" (1978) *Corrections Magazine* 64

Joseph P. Fried, "New York City Victim Services Agency - Counsellors Help Ease the Fears and Frustrations of Crime Victims and Witnesses" (1979) *L.E.A.A. Newsletter* 4

Margery Fry, *Arms of the Law* (1951. Victor Gallancz, London)

Margery Fry, "Justice for Victims" *The Observer* (July 7, 1967, London)

Burt Galaway, "Is Restitution Practical?" (1977) 41 *Federal Probation* 3

Burt Galaway, "The Use of Restitution" (1977) *Crime and Delinquency*

Burt Galaway, "Toward the Rational Development of Restitution Programming" in *Restitution in Criminal Justice - A Critical Assessment of Sanctions* (Joe Hudson and Burt Galaway eds, 1977, Lexington Books, Lexington, Mass.) 77

Burt Galaway and Joe Hudson, "Issues in the Correctional Implementation of Restitution to Victims of Crime" in *Considering the Victim : Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas Publishers, Springfield, Ill.) 351

Burt Galaway and Joe Hudson, eds, *Perspectives on Crime Victims* (C.V. Mosby Press, St. Louis, forthcoming)

Burt Galaway and Joe Hudson, "Restitution and Rehabilitation - Some Central Issues" (1972) *Crime and Delinquency* 403

Burt Galaway and Joe Hudson, "Restitution and Victim Service" (to be published in *Evaluation and Change*, forthcoming)

Burt Galaway and Joe Hudson, "Sin, Sickness, Restitution" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 59

Burt Galaway and Leonard Rutman, "Victim Compensation : An Analysis of Substantive Issues" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 421

James Garafalo and L. Paul Sutton, *Compensating Victims of Violent Crime : Potential Costs and Coverages of a National Program"* (U.S. Department of Justice, L.E.A.A., National Criminal Justice Information and Statistics Service, 1977)

Raffaele Garofalo, "Enforced Reparation as a Substitute for Imprisonment" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1977, Lexington Books, Lexington, Mass.) 147

Gilbert Geis, "State Compensation to Victims of Violent Crime" in *U.S. President's Commission on Law Enforcement and Administration of Justice, Task Force Report : Crime and Its Impact - An Assessment* (1967, U.S. Government Printing Office, Washington D.C.)

Maygene Giaria, "In Oklahoma, Building More Prisons has Solved No Problems" (1979) 25(4) *Crime and Delinqeuncy* 450

Stanley E. Grupp, "Work Furlough and Punishment Theory" (1970) *Criminology* 63

John Harding, "Community Service Restitution by Offenders" in *Restitution in Criminal Justice - A Critical Assessment of Sanctions* (Joe Hudson and Burt Galaway eds, 1977, Lexington Books, Lexington, Mass.) 101

J.K. Harding, "The Place of Voluntary Hostels within the Community" (1977) 21(2) *International Journal of Offender Therapy and Comparative Criminology* 124

Alan T. Harland, *Restitution to Victims of Personal and Household Crime* (1978, Working Paper 15, Criminal Justice Research Center, Albany, N.Y.)

Alan T. Harland, Marguerite Q. Warren and Edward J. Brown, *A Guide to Restitution Programming* (1979, Working Paper 17, Criminal Justice Research Center, Albany, N.Y.)

Margery Heath, "The Fine Option Program : An Alternative to Prison for Fine Defaulters" (1979) *Federal Probation* 22

S. Heinzelmann, "Summary of the Final Report on VIctims and Witnesses : The Impact of Crime and Their Experience with the Criminal Justice System" in *Elderly Crime Victims Compensation, Hearings before the Select Committee on Aging, House of Representatives 90-6 Congress First Session, February 16, 1977 in New York* (U.S. Government Printing Office, Washington D.C., Comm. Pub. No. 95-94, 1977)

Hans von Hentig, *The Criminal and His Victim* (1948, Yale University Press, New Haven, Conn.)

Steve Hill, "Probation : Develop or Stagnate?" (1977) 24(4) *Probation Journal* 54

Michael J. Hindelang, Michael R. Gottfredson and James Garofalo, *Victims of Personal Crime : An Empirical Foundation for a Theory of Personal Victimization* (1978, Ballinger Publishing Co., Cambridge, Mass.)

Leonard J. Hippchen, "Developing Guidelines for Classification Treatment Decisions" (1978) 2(4) *Offender Rehabilitation* 371

L.T. Hobhouse, "Law and Justice" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 5

Richard Hofrichter, "Techniques of Victim Involvement in Restitution" (Paper presented at the Third National Restitution Symposium, September 26-28, 1979, Criminal Justice and the Elderly Program, National Council of Senior Citizens, Washington D.C.)

Roy Holden, "Early Discharge of Probation and Supervision Orders" (1977) 24(4) *Probation Journal* 23

Home Office, *Penal Practice in a Changing Society* (1959, Cmnd. No. 645, H.M.S.O., London)

D. Hoxley, *Probation : A Changing Service* (1978, Constable, London)

Joe Hudson, ed, *Restitution in Criminal Justice* (1976, Minnesota Department of Corrections, St. Paul, Minn.)

Joe Hudson and Burt Galaway, eds, *Considering the Victim - Readings in Restitution and Victim Compensation* (1975, Charles C. Thomas, Springfield, Ill.)

Joe Hudson and Burt Galaway, "National Assessment of Adult Restitution Programs - Preliminary Report I : Overview of Restitution Programming and Project Selection"(Unpublished paper, April 1, 1979, Grant No. 78-NI-AX-0110, National Institute of Law Enforcement and Criminal Justice, L.E.A.A., U.S. Department of Justice, Washington D.C.)

Joe Hudson andBurt Galaway, "National Assessment of Adult Restitution Programs - Preliminary Report II : A Review of Restitution Research" (Unpublished paper, 1979, Grant No. 78-NI-AX-0110, National Institute of Law Enforcement and Criminal Justice, L.E.A.A., U.S. Department of Justice, Washington D.C.)

Joe Hudson and Burt Galaway, *Restitution in Criminal Justice - A Critical Assessment of Sanctions* (1977, Lexington Books, Lexington, Mass.)

Joe Hudson and Burt Galaway, "Restitution and the Justice Model for Corrections" (Unpublished paper, n.d.)

Joe Hudson and Burt Galaway, "Undoing the Wrong : The Minnesota Restitution Center" (1974) 19 *Social Work* 313

Joe Hudson, Burt Galaway and S. Chesney, "When Criminals Repay Their Victims" (1977) 60(7) *Judicature* 313

Bruce Jacobs, "Reparation or Restitution by the Criminal Offender to his Victim : Applicability of an Ancient Concept in the Modern Correctional Process" in *Victimology* (I. Drapkin and Emilio Viano eds, 1974, Lexington Books, Lexington, Mass.)

Bruce Jacobs, "The Concept of Restitution : An Historical Overview" in *Restitution in Criminal Justice - A Critical Assessment of Sanctions* (Joe Hudson and Burt Galaway eds, 1975, Lexington Books, Lexington, Mass.) 45

Harry Joe Jaffe, "Probation with Flair : A Look at Some Out-of-the-Ordinary Conditions" (1979) *Federal Probation* 25

Wayne Kerstetter and Ann N. Heinz, *Pre-Trial Settlement Conference : An Evaluation Report* (1978, Center in Studies in Criminal Justice, University of Chicago Law School)

Joan F.S. King, *The Probation Service* (1958, Butterworth, London)

Eric Knapman, "Probation Hostel - Which Direction Now?" (1979) 143 *Justice of the Peace* 422

Richard Knudten, *Victims and Witnesses : Their Experiences with Crime and the Criminal Justice System* (U.S. Department of Justice, L.E.A.A., Washington D.C., 1977)

LeRoy L. Lamborn, "Toward a Victim Orientation in Criminal Theory" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 19

Richard E. Laster, "Criminal Restitution : A Survey of its Past History in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 19

Richard E. Laster, "Criminal Restitution : An Analysis of Its Present Usefulness" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 311

Law Reform Commission of Canada, *Guidelines - A Report on Dispositions and Sentences in the Criminal Process* (n.d.)

L.E.A.A., *Concern - A Montly Victim/Witness Newsletter* (1979) 1(1)

Allen M. Linden, "Victims of Crime and Tort Law" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 238

L.F. Lowenstein, "Are There and Should There be Alternatives to Present Forms of Sentencing and Imprisonment?" (1979) *Journal of Criminal Law* 165

Stewart Macauley and Elaine Walster, "Legal Structures and Restoring Equity" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 291

W.F. McDonald ed, *Criminal Justice and the Victim* (1976, Sage Publications, Beverley Hills, Calif.)

Jenny McEwan, "Assessing the Value of Community Service" (1978) *New Law Journal* 772

J.G. MacKay and M.K. Rook, *The Work Order Scheme - An Evaluation of Tasmania's Work Order Scheme* (Report to the Australian Criminology Research Council, Canberra, A.C.T., n.d.)

Dorothy M. (Edmonds) McKnight, "The Victim Offender Reconciliation Project" in *Perspectives on CrimeVictims* (Burt Galaway and Joe Hudson eds, C.V. Mosby Press, St. Louis, forthcoming)

D. MacNamara and J. Sullivan, "Making the Victim Whole : Composition, Restitution, Compensation" (1971) 6 *Urban Law Review* 21

J.H. Manners, *Community-Based Alternatives to Incarceration for Offenders : A Review of the Literature to 1973* (Western Australian Department of Corrections)

Wm. Gene Matthews, "Restitution Programming : Reality Therapy Operationalized" (1979) 3(4) *Offender Rehabilitation* 319

Roger E. Meiners, *Victim Compensation - Economic, Legal and Political Aspects* (1978, Lexington Books, Lexington, Mass.)

David Miers, *Responses to Victimisation - A Comparative Study of Compensation for Criminal Violence in Great Britain and Ontario* (1978, Professional Books, Milton Trading Estate, Abingdon, Oxon, England)

Hans Mohler, "Convict Labour Policies" (1925) 15 *Journal of Criminal Law, Criminology and Police Science* 530

Murray A. Morash and Etta A. Anderson, "Liberal Thinking on Rehabilitation : A Work-Able Solution to Crime?" (1978) 25(5) *Social Problems* 556

Sir Thomas More, *Utopia* (1516, J.C. Collins edition, 1904)

Robert Mowatt, "The Minnesota Restitution Center : Paying Off the Ripped Off" in *Restitution in Criminal Justice* (Joe Hudson ed, 1976, Minnesota Department of Corrections, St. Paul, Minn.) 190

O. Herbert Mowrer, "Loss and Recovery of Community" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 265

Neil Murphy, "Community Service - Whither?" (1979) 143 *Justice of the Peace* 391

Laura Nader and Elaine Combs-Schilling, "Restitution in Cross-Cultural Perspective" in *Restitution in Criminal Justice - A Critical Assessment of Sanctions* (Joe Hudson and Burt Galaway eds, 1977, Lexington Books, Lexington, Mass.) 27

Stuart Nagel, Marian Neef and Nancy Munshaw, "Bringing Management Science to the Court to Reduce Delay" (1978) 62(3) *Judicature* 280

National Center State Court, *Volume and Delay in State Appellate Courts : Problems and Responses* (1979, National Center State Court)

National District Attornies Association, Commission on Victim/Witness Assistance, *THe Victim Advocate - A Periodical* (Journal dealing with special services to victims, commencement year 1979)

David Neubauer, "Reducing Delay in Courts - An Introduction to the Issue" (1978) 2(3) *Judicature* 111

New South Wales Department of Corrections, *Annual Report 1975-1976* (N.S.W. Government Printer, Sydney, 1977)

New South Wales Law Reform Commission, *The Legal Profession - Discussion Paper No. 2, Complaints, Discipline and Professional Standards Part 1* (1979, N.S.W. Government Printer, Sydney)

New South Wales Law Reform Commission, *The Legal Profession - Background Paper No. 1* (1979, N.S.W. Government Printer, SYdney)

Anne Newton, "Sentencing to Community Service and Restitution" (1979) *Criminal Justice Abstracts* 435

Note, "New York City Victim Services Agency - Counsellors Help Ease Fears amd Frustrations of Crime Victims and Witnesses" (1979) *L.E.A.A. Newsletter* 4

Note, "The Probation Officer and the Magistrate" (1979) 143 *Justice of the Peace* 476

Note, "The Use of Probation" (1979) 143 *Justice of the Peace* 1

John W. Palmer, "Pre-Arrest Diversion" (1975) *Crime and Delinquency* (April, 1975)

Jerry Parker and Harold G. Grasmick, "Linking Actual and Perceived Certainty of Punishment - An Exploratory Study of the Untested Proposition in Deterrence Theory" (1979) 17(3) *Criminology* 366

Ken Pease and Bill McWilliams, "Assessing Community Service Schemes : Pitfalls for the Unwary" (1977) 24(4) *Probation Journal*

Ken Pease, et. al, *Community Service Reassessed in 1976* (1977, Home Office Research Study No. 39, H.M.S.O., London)

Peter Phillips, "Sunset Legislation" (1979) 51(4) *The Australian Quarterly* 85

Ivan Potas, "Alternatives to Imprisonment" in *Crime and Justice in Australia* (D. Biles ed, 1977, Sun Books, Melbourne) 102

P. Prisgrove, *Periodic Detention* (Western Australian Department of Corrections).

Prison Research Education Action Project, *Instead of Prisons - A Handbook for Abolitionists* (1976, Syracuse, N.Y.)

Richard Quinney, "Who is the Victim?" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 189

Bill Read, "How Restitution Works in Georgia" (1977) 60(7) *Judicature*

Ronald Roesch, "The Evaluation of Pre-Trial Diversion : A Response" (1979) 25(4) *Crime and Delinquency* 503

M.K. Rook, "Proposals for Work/Fine Option Programme" (Unpublished paper, March, 1978)

M.K. Rook, "Tasmania's Work Order Scheme : A Reply to Varne" (1978) *A.N.Z. Journal of Criminology* 81

Robert H. Rosenblum and Carol Holliday Blew, *Victim/Witness Assistance* (July, 1979, U.S. Department of Justice, L.E.A.A., National Institute of Law Enforcement and Criminal Justice)

Royal Commission into New South Wales' Prisons, *Report* (1979, N.S.W. Government Printer, Sydney)

Stephen Schafer, *Compensation and Restitution to Victims of Crime* (1970, Patterson Smith, Montclair, U.S.A.)

Stephen Schafer, "The Restitution Concept of Punishment" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 102

Stephen Schafer, "The Victim and Correctional Theory : Integrating Victim Reparation with Offender Rehabilitation" in *Criminal Justice and the Victim* (W.F. McDonald ed, 1976, Sage Publications, Beverley Hills, Calif.)

Peter R. Schneider and Anne L. Schneider, *Monthly Report of the National Juvenile Restitution Evaluation Project : May 1979* (1979, Institute of Policy Analysis, Eugene, Oregon)

Le Roy G. Schults, "The Violated : A Proposal to Compensate Victims of Violent Crime" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 130

Jocelynne A. Scutt, "Corrections in the Australian Capital Territory - Some Alternatives" (Paper presented to the Australian Institute of Criminology Conference on Corrections in the A.C.T., 1978)

Jocelynne A. Scutt, *Community Work Orders as an Option for Sentencing* (A.L.R.C. Research Paper No. 4, Sydney)

Jocelynne A. Scutt, *Probation as an Option for Sentencing* (A.L.R.C. Research Paper No. 8, Sydney)

Jocelynne A. Scutt, *The Fine as an Option for Sentencing* (A.L.R.C. Research Paper No. 3, Sydney)

Jocelynne A. Scutt, "The Fine as a Penal Measure : United States, Canada and Australia" in *Die Geldstrafe im deutschen und ausländischen Recht* (The Fine in German and Foreign Law)(Hans-Heinrich Jexcheck and Gerhardt Grebing eds, 1979, Nomos Verlagsgeselleschaft, Baden-Baden, West Germany)1061

Jocelynne A. Scutt, "Problems Related to the Jury and Court Administration : An Overview of Research" (forthcoming 1980 *Law Society Journal*)

M.J. Seavers and M. Collins, "Community Service in the Hospital Setting" (1977) 24(4) *Probation Journal*

Select Committee on Aging, *Elderly Crime Victims Compensation, Hearings before the Select Committee on Aging, House of Representatives 95th Congress, 1st session* (February 16, 1977)(Publication No. 95-94, U.S. Government Printing Office, Washington D.C., 1977)

John A. Seymour, "Restitution and Reparation" (1978) 1(3) *Australian Crime Prevention Council Quarterly Journal* (Paper presented to a seminar organised by the Queensland Branch of the Australian Crime Prevention Council, Brisbane, May 1978)

Helen Silving, "Compensation for Victims of Criminal Violence - A Round Table" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 198

Jerome Skolnick, *Justice Without Trial ; Law Enforcement in a Democratic Society* (1967, John Wiley and Sons Inc., N.Y.)

Kathleen Smith, *A Cure for Crime* (1965, Duckworth, London)

Kathleen V. Smith, "Implementing Restitution Within a Penal Setting : The Case for a Self-Determinate Sentence" in *Restitution in Criminal Justice - A Critical Assessment of Sanctions* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 71

Herbert Spencer, "Prison Ethics" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 71

Roger O. Steggerda and Susan P. Dolphin, *Victim Restitution : Assessment of Restitution in Probation Experiment* (1975, Department of Program Evaluation, De Moines, Polk County, Iowa)

J. St. John, *Probation : The Second Chance* (1961, Vista Books, London)

Joe Stookey, "The Victim's Perspective on American Criminal Justice" in *Restitution in Criminal Justice - A Critical Assessment of Sanctions* (Joe Hudson and Burt Galaway eds, 1977, Lexington Books, Lexington, Mass.)

David R. Stuckhoff, "Deprofessionalizing Corrections is Bad Business" (1978) 2(4) *Offender Rehabilitation* 233

E.H. Sutherland, "Is 'white collar crime' Crime?" (1945) 10 *American Sociological Review* 32

E.H. Sutherland, *White Collar Crime* (1949, Holt Reinhart and Wilson, N.Y.)

E.H. Sutherland and Donald R. Cressey, *Principles of Criminology* (1966, 7th edition, Lippencott, N.Y.)

Barbara Swain, "SVV - A Probation Experiment" (1979) 143 *Justice of the Peace* 175

Colin Thomas, "Supervision in the Community" (1978) XVII(1) *Howard Journal* 23

U.S. Department of Justice, L.E.A.A., *An Exemplary Project : Citizen Dispute Settlement* (1974, U.S. Government Printing Office, Washington D.C.)

Sheila Varne, "Saturday Work : A Real Alternative?" (1976) 9 *A.N.Z. Journal of Criminology* 95

Giorgio del Vecchio, "The Problem of Penal Justice" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 85

Julie Vennard, "Compensation by the Offender : The Victim's Perspective" (1978) 3 (1&2) *Victimology* 154

Emilio C. Viano, *Victim/Witness Services : A Review of the Model* (L.E.A.A. U.S. Department of Justice, Washington D.C., 1979)

Loren Waite, "The Role of the Main Grade Officer in Community Service" (1977) 24(4) *Probation Journal* 134

Richard Walton, *Interperson Peacemeking : Confrontation and Third Party Confrontation* (1969, Addison-Wesley Publishing Company, Inc., Reading, Mass.)

Richard J. Ward and David Vandergoot, "Correctional Officers with Case Loads" (1977) 2(1) *Offender Rehabilitation* 31

Jenny West, "Community Service Orders - How Different?" (1977) 24(4) *Probation Journal* 112

Western Australian Department of Corrections, *Annual Report 1977-1978* (1979, Western Australian Government Printer, Perth)

Wayne T. Westling, "Plea Bargaining: A Forecast for the Future?" (1976) 7 *Sydney University Law Review* 424

Geoffrey Wicks, "Reducing the Prison Population" (1977) 24(4) *Probation Journal* 74

Andrew Willis, "Community Service as an Alternative to Imprisonment : A Cautionary View" (1977) 24(4) *Probation Journal* 120

John Willis, "Compensation for Victims of Crime" in *Violence in the Family - Proceedings of a Conference held at the Australian Institute of Criminology* (Jocelynne A. Scutt ed, 1980, Australian Institute of Criminology, Canberra A.C.T.0

Sue Winfield, "What has the Probation Service Done to Community Service?" (1977) 24(4) *Probation Journal* 126

Marvin E. Wolfgang, "Victim Compensation in Crimes of Personal Violence" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 116

Women's Electoral Lobby (Sydney), *Draft Bill on Sexual Offences and Notes on Related Law Reforms* (1978, Women's Electoral Lobby, Sydney)

Boyd L. Wright, "What About the Victim?" in *Considering the Victim - Readings in Restitution and Victim Compensation* (Joe Hudson and Burt Galaway eds, 1975, Charles C. Thomas, Springfield, Ill.) 392