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14<sup>th</sup> March 2016

***RE: Submission on "Inquiry into penalties for white collar crime"***

Dear Dr Dermody,

Further to your email of 22 February 2016 inviting a submission to your Committee's above Inquiry. I invited some other learned colleagues to produce a joint submission to SEN Committee, as attached. We have decided to focus on two aspects - the use and duration of custodial sentences and the level of fine and other monetary penalties.

Introduction

1. There is some debate about the definition of white collar crime but in simple terms the offences that come within the generic description "white collar crime" are offences such as fraud, bribery, tax evasion, and multiple regulatory offences involving corporate entities. Inevitably, these offences are non-violent and, in the main, committed by educated and/or who can be described as "well off" individuals or corporations.
2. Similarly, the motive for the commission of these crimes is to obtain money or property or avoiding the payment of money or debts. Thus, generally, the aim is to obtain some form of financial advantage.

The issue

3. Accepting that white collar crime has been proven or admitted by an offender the major issue remaining is for a judicial officer to fix an appropriate sentence. The offender will be either an individual or a corporate offender. It is trite law that in "fixing" or setting an appropriate sentence one must have regard to the multiple purposes of sentencing.
4. In general, the purposes of sentencing are to ensure that an offender is adequately punished, deterred from re-offending and that the community is protected from the offender's actions (See s 3A *Crimes Sentencing procedure Act 1999* (NSW),

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<[http://www.austlii.edu.au/au/legis/nsw/consol\\_act/cpa1999278/s3a.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1999278/s3a.html)>, accessed 13/03/2016). In assessing an appropriate sentence in contemporary times one should take into account the cost to society of “housing” a prisoner in the custodial system.

5. Whilst such a cost cannot be accurately determined, data from the Australian Productivity Commission revealed that the average cost of housing an Australian prisoner in 2013-2014 was \$292 per day (around \$106,000 per year). (See Jason Thomas, ‘How much does it cost to keep people in Australian jails’, *SBS News* (online), 4 February 2015 citing ‘new justice data from the Productivity Commission’; see also, Productivity Commission, *Report on Government Services 2015*, ‘Corrective Services’, Chapter 8, Volume C,

<<http://www.pc.gov.au/research/ongoing/report-on-government-services/2015/justice/corrective-services#results>>, accessed 13/03/2016.)

6. In Victoria, for example, the Victorian Corrections, Prisons and Parole noted that ‘The Council of Australian Governments reports that net operating expenditure per prisoner per day in Victoria in 2014–15 was \$297.34’. (See ‘Corrections Statistics: quick reference’ (online), Victorian Corrections, Prisons and Parole, Department of Justice & Regulation, Victoria State Government,

<<http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/corrections+statistics+quick+reference>>, accessed 13/03/2016. In Western Australia, it was

reported in 2013 that ‘it costs \$317 per day - or more than \$115,000 a year - to keep each prisoner locked up in West Australian jails’. (See AAP, ‘WA prisoners cost \$115,000 a year each new figures show’, ‘Perth Now’, *Sunday Times* (Online), 1 October 2013,

<<http://www.perthnow.com.au/news/western-australia/wa-prisoners-cost-115000-a-year-each-new-figures-show/story-fnhocxo3-1226730978849>>, accessed 13/03/2016. In

the ACT, it was reported that ‘Canberra’s prisoner costs remain the highest in the country’ with ‘the ACT’s daily cost per prisoner in 2012-13 was almost \$465, while the national figure was \$297’. (See Kathleen Dyett, ‘Canberra prisoner costs highest in the country at \$465 per inmate per day’, *ABC News* (online)

30 January 2014, accessed 13/03/2016, <http://www.abc.net.au/news/2014-01-29/act-prisoner-costs-still-highest-in-the-country/5224292>, accessed 13/03/2016.)

7. Thus, there is a careful balancing act between the sentencing of white collar criminals and the costs associated for the state.

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### Major issues – punishment and deterrence

8. In the sentencing of the usual offender who has committed a crime of violence or a crime involving illegal narcotics, a sentence is fixed such that general and personal deterrence are adequately reflected. The level of sentence is intended to deter the offender from re-offending (specific deterrence) and to deter others from similarly offending (general deterrence). Yet anecdotal statistics suggest that imprisonment of offenders does little to lessen the rates of recidivism of offenders.

9. Research suggests that around 40 per cent of prisoners will be re-imprisoned within two years of release from prior offending (see Jason Payne, *Recidivism in Australia: Findings and Future Research*, Australian Institute of Criminology, Research and Public Policy Series, no. 80, Canberra, 2007,

[http://www.aic.gov.au/media\\_library/publications/rpp/80/rpp080.pdf](http://www.aic.gov.au/media_library/publications/rpp/80/rpp080.pdf)> accessed 13/03/2016.) If one of the aims of imposing a custodial sentence on an offender is rehabilitation of that offender, then current sentencing practices arguably fall woefully short of achieving that aim. This then begs the question of how and why a custodial sentence should apply to a white collar criminal. Quite clearly, by definition a corporate offender cannot be imprisoned, so the only sentencing option is the imposition of an appropriate fine and perhaps return of “ill-gotten gains”. For the individual white collar offender, however, the judge imposing the sentence needs to assess whether a custodial sentence is appropriate along with other sentencing options.

10. The argument has been made for many years that an affluent white collar criminal should not be treated more favourably than the traditional perpetrator of street crimes which perpetrator would in the main come from a less affluent socio-economic background. Whilst this proposition is perhaps self-evidently correct, it ignores the cost to society of housing the white collar criminal and the fact that the white collar criminal poses no real threat to the physical well-being of the citizen in the street.

11. Surely the major deterrent factors in the sentencing of a white collar criminal would be the stigma of the recording of a conviction together with sentencing options hitting the “hip-pocket nerve” of the offender and retrieving the ill-gotten gains. The effects of a conviction on a white collar criminal are undoubtedly at the core of punishment and deterrence because they impact upon the offender’s ability to carry on their business. Such effects may include travel visa denials and the inability to engage upon their licensed profession (disbarment for lawyers and licensing for traders and other business professionals) and the ability for such offenders to earn money and raise funds in the

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future. These effects flowing from a conviction simpliciter do not normally apply to the usual non-white collar crime offender. It can be argued, save and except for financial punishment, the imposition of a prison term in reality does little to deter a white collar criminal from re-offending.

12. Legislation governing the placement of prisoners within a custodial system place prisoners assessed as “dangerous” in harsher, high security, custodial settings than those at lower levels of risk. Clearly, maximum security prisons house offenders who have committed serious crimes of violence and who pose risks to other prisoners and other members of society.

13. In the main, white collar criminals are assessed as posing no physical risk to fellow prisoners and to society in general and are usually housed in minimum security prisons such as prison farms. Ironically, all this really achieves is provide the ability for the white collar criminal to recover from perhaps the adverse effects of a lavish lifestyle and to markedly improve their health by exercise and the inability to partake of such things as alcohol.

14. Anecdotally, prison sentences imposed upon white collar criminals have been at the lower end of available range of sentences for white collar crimes and, as such, to attract public opprobrium of the sentence imposed. In response, in some jurisdictions, steps have been taken to increase the levels of sentences for white collar crime such as devising harsher sentencing guidelines (see, for example, Sentencing Council UK, *Fraud, Bribery and Money Laundering Offences*, October 2014, <[https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud\\_bribery\\_and\\_money\\_laundering\\_offences\\_-\\_Definitive\\_guideline.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf)>, accessed 13/03/2016.)

15. But, in reality, what is really achieved by the imposition of a harsh custodial sentence on a white collar offender?

16. Arguably, a conviction alone would probably be the major factor deterring the white collar criminal from re-offending. As for general deterrence, logic would suggest that an offender whose motive is large personal gain would be highly unlikely to be deterred by the imposition of a lengthy custodial term on a fellow businessman/businesswoman.

### The imposition of fines and confiscation of proceeds of crime

17. By definition the motive of a white collar criminal is financial gain. The “hip-pocket” argument as a major goal of sentencing a white collar criminal must be correct. The

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integrity of business institutions and probity in individual and corporate enterprises can only be enhanced by sentencing options which include the imposition of large and effective fines together with retrieving the proceeds of crime from a white collar offender.

18. Whilst the level of fines for white collar offending (particularly in relation to cartels) have increased within Australia (see levels of fines now found in the *Competition and Consumer Act 2010* (CCA) and the Australian Consumer Law – Australian Competition and Consumer Commission, ‘Fines & penalties’,

<<https://www.accc.gov.au/business/business-rights-protections/fines-penalties>>, accessed 13/03/2016), as Braithwaite observed over 20 years ago, Australian legislation does not appear to reflect American statutes that allow for the imposition of fines to the tune of tens of millions of dollars (see, for example, John Braithwaite, Penalties for White-Collar Crime in P. Grabosky (ed.), *Complex Commercial Fraud*, Canberra: Australian Institute of Criminology, 1992, <[http://www.anu.edu.au/fellows/jbraithwaite/\\_documents/Articles/Penalties\\_White\\_1992.pdf](http://www.anu.edu.au/fellows/jbraithwaite/_documents/Articles/Penalties_White_1992.pdf)>, accessed 13/03/2016.) Instead, available legislation in Australia provides for the ability to attack the white collar criminal in providing for the recovery of the ill-gotten gains the subject of the crime for which the offender is being sentenced. (See *Proceeds of Crime Act 1987* (Cth), <[http://www.austlii.edu.au/au/legis/cth/consol\\_act/pocal987160/](http://www.austlii.edu.au/au/legis/cth/consol_act/pocal987160/)>, accessed 13/03/2016; and *Confiscation of Proceeds of Crime Act 1989* (NSW), <[http://www.austlii.edu.au/au/legis/nsw/consol\\_act/copocal989295/](http://www.austlii.edu.au/au/legis/nsw/consol_act/copocal989295/)>, accessed 13/03/2016.)

19. In the authors’ opinion, the most effective sentence to be imposed upon a white collar criminal would be, if appropriate, the imposition of a short custodial term of imprisonment together with the imposition of a higher level of fine and a thorough application of proceeds of crime legislation. In this way, the purposes of sentencing, in particular personal and general deterrence, would be achieved. Consideration should also be given to extended parole periods and conditions of parole aimed at limiting the offender’s ability to re-offend and aimed at the offender “giving back” to the community such as the imposition of an intensive correction order and/or some form of community service when released on parole (See *Crimes Sentencing Procedure Act 1999* (NSW)).

20. We are happy to provide any further evidence as is felt useful to the Senate Committee or its Secretariat to substantiate our points.

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Yours sincerely,

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Signed on our behalf:

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