T R A N S C R I P T

LEGISLATIVE COUNCIL LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into Victoria's Criminal Justice System

Melbourne—Monday, 6 September 2021

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WITNESS *(via videoconference)*

Dr Natalia Antolak-Saper, Fellow, Australian Centre for Justice Innovation, Monash University.

The CHAIR: Welcome back. I am very pleased the committee is now going to be joined by Dr Natalia Antolak-Saper, who is a Fellow at the Australian Centre for Justice Innovation and this is at Monash University. Welcome, Natalia. Thank you so much for joining us.

I am Fiona Patten, the Chair. I am joined by Ms Kaushaliya Vaghela, Ms Tania Maxwell and Ms Sheena Watt.

Just to let you know that all evidence taken is protected by parliamentary privilege, and that is provided under our *Constitution Act* but also under the standing orders of the Legislative Council; therefore any information that you provide today is protected by law. You are protected against any action for what you say here; of course if you were to repeat those comments outside this hearing, you would not have the same protection. Any deliberately false evidence or misleading of the committee may be considered a contempt of Parliament.

We have got Hansard here today working in the background, transcribing everything that you say. You will receive a transcript of today, and I would encourage you to have a look at that to make sure that we have not misheard you or misrepresented you. Ultimately that transcript will become public on our website, but also it will form part of the committee's final report.

I understand you have some slides to present to us. It would be great if you could share your screen, and then we will open it up to a committee conversation after. Thanks.

Visual presentation.

Dr ANTOLAK-SAPER: Thank you, Chairperson and committee members. I am delighted to be here today. Hopefully the screen there is working. Before we begin I would like to acknowledge the traditional owners of the lands on which we meet and pay my respects to their elders past and present.

I am here speaking as a representative of the Australian Centre for Justice Innovation at the Faculty of Law at Monash University, and they thank the committee for providing an opportunity to speak at the inquiry today. I am a lecturer at the Faculty of Law at Monash, and my areas of research include comparative criminal law and procedure, sentencing and unrepresented accused in criminal matters. I am delighted to be participating today and of course offer my assistance in any way I can.

Today I will be addressing two of the terms of reference, and the comments I make are based on my research to date. My significant focus is on the issue of the 2017 and 2018 bail reforms and their connection with terms of reference (1) and (2). Although not a specific focus of the comments I make today, there will be some that inherently impact on terms of reference (3) as well.

Victoria's current bail laws are arguably the most onerous in the country, and in 2017 and 2018 Victoria had the largest increase in prisoners held on remand of any Australian state or territory. Largely motivated by escalating concerns about community protection, the amendments notably constrained the availability of bail by, for example, increasing the range of offences for which there could be a presumption against granting bail and subjecting an accused to stringent reverse onus in addition to unacceptable risk tests.

My focus today is on the short-term and long-term effects of these bail reforms. In the short term the 2017 and 2018 reforms led to a significant increase in the number of persons held on remand. For example, on 28 February 2017 data from Corrections Victoria indicated that there were 2294 unsentenced adult prisoners in Victorian prisons, which is approximately 33 per cent of the adult prison population, and this reflected the circumstances as they were just prior to the enactment of the reforms. On 21 July 2021, which is the most up to date data we have, there were 3192 unsentenced adult prisoners, which makes up 44 per cent of the adult prison population.

Notably, remand issues are also gendered, with higher rates for women. For example, in July 2021, 54 per cent of adult women who were in imprisonment were on remand, in comparison with 43 per cent of men, and the most common offences that were committed by women were property, drug and burglary offences.

Remand also has a disproportionate effect on vulnerable groups in our community. For example, pre-trial detention contributes to the incarceration crisis of our Indigenous population. In 2017 the National Congress of Australia's First Peoples identified that bail laws contributed to the over-representation of Indigenous persons in Australian prisons through the overuse and abuse of remand, particularly for non-violent and low-level offences. And of course earlier this year we had the Sentencing Advisory Council publish its report on children being held on remand, indicating that there had been a 150 per cent increase in the number of children held on remand in Victoria from 2014 to 2019. In 2017 to 2018, 442 children were on remand, and only one-third of them received a custodial sentence; two-thirds did not.

Further, data suggests that reforms have not led to a reduction in the number of indictable offences that are committed while persons are on bail. For example, in 2017, prior to the amendments, 381 offences were recorded as indictable offences committed by persons who were living in the community on bail, and this is from the Crime Statistics Agency. This has increased to 414 in 2021. Further, offences involving a breach of a conduct condition whilst on bail have also steadily increased, with 7267 in 2017 and 7617 in 2021. This demonstrates that there is limited, if any, impact that the bail reforms have had on the very issue with which they were primarily concerned, which is curbing offending by those who are on bail, and this is consistent with, for example, the New South Wales Law Reform Commission, which suggests that the increase in remand rates does not suggest an effect in reducing crime on bail.

In terms of understanding the nexus here between bail and recidivism, it is important to note that remanding people in custody may actually decrease community safety, as even relatively short periods of time are associated with higher rates of subsequent criminal offending. Remand results in loss of liberty, loss of connection to community, loss of employment, loss of relationships, disruption of education and of work and abrupt cessation of treatment programs. Further, on-remand, unsentenced prisoners have limited access to a range of programs when compared to those available to sentenced prisoners, in part because they are not yet found guilty of an offence and because of the uncertainty around an unsentenced prisoner's period of incarceration. This means that remandees have access to a narrower range of programs that are typically more focused on their transition to prison rather than supporting them upon release. If sentenced, they would have had access to a broader range of programs that may have facilitated an opportunity to address underlying criminogenic circumstances. Without appropriate and targeted rehabilitation and support, remandees are likely to return to the community taking their unresolved behaviour and problems with them, which may in turn lead to potential reoffending.

Further, the long-term impact of remand may be criminogenic. To date we do not have an Australian study on this, and the New South Wales Law Reform Commission noted the absence of such literature, emphasising the importance of it. But what we do have is an ability to look to a number of studies conducted in the US. For example, a study conducted by Heaton in Texas found that pre-trial detention is associated with a 30 per cent increase in new indictable charges and a 20 per cent increase in new summary charges. Other studies from Florida and Pennsylvania also provide evidence of a criminogenic effect of pre-trial detention. So we can see here that the bail amendments have had an influence on Victoria's growing remand and prison population in two particular ways: first in the limitation of eligibility of accused who may be released on bail; and in being criminogenic itself by contributing to potential recidivism by the accused.

I now turn to a number of considerations of recommendations for reform against this background. The first two are primarily concerned with redrafting current legislation. The first is to focus on redrafting bail legislation and particularly emphasising the objectives that are listed in section 4E of the Act while simultaneously remembering the accused's presumption of innocence, an important inherent right of the accused. Recommendations from the Court of Appeal, the Law Institute of Victoria and the Victorian Law Reform Commission all endorse removing the reverse onus tests and making unacceptable risk the sole criteria for granting bail, as the system once previously was. Here it may be useful to remove the requirements for bail for relatively minor, non-violent offences, as put forward in the Coghlan review and as has been adopted as standard practice in England and Wales.

The introduction of a presumption against the imposition of a short sentence, and here I am defining a short sentence as under 12 months: the purpose of such presumption is to encourage greater use of community-based sanctions as an alternative to the imposition of a short-term sentence of imprisonment. Research from Scotland and Ireland demonstrates that defendants who are released from short-term prison sentences are twice as likely to re-offend when compared to those who are serving a community-based sanction, and both of those

jurisdictions contain a similar presumption. And then of course it is crucial to focus on expanding community-based sanctions as an alternative to remand and imprisonment. This is particularly important to decrease the number of prisoners in the remand and prison population whilst concurrently reducing recidivism. The purpose of these alternatives is to focus on addressing what we know to be criminogenic issues. Today I will mention a range of alternatives generally, and if it is of interest I am happy to expand in further detail during the question time.

Before doing so I would like to stress the ample opportunity to consider these results as an impact of COVID-19. A global analysis of prisoner release in the response to COVID-19 demonstrates that many overseas jurisdictions embraced a range of non-custodial sentencing measures to mitigate the risk that COVID-19 would pose to remandees and prisoners whilst simultaneously mitigating the risks that those offenders would pose in terms of community safety. Typically such measures were limited to non-violent, low-level offences. Examples include community-based treatment requirements, unpaid employment conditions and vocational programs, problem-solving courts and home detention. Of course I would be delighted to keep listing a number of recommendations, but in the interests of time I think I will pause there and take questions from the committee.

The CHAIR: Great. Thank you so much, Natalia. That was terrific. If I could start with the introduction of a presumption against the imposition of a short sentence, and we heard from a previous witness that Norway had certainly done this—I think two years was the minimum sentence. Now, there would be some pushback in establishing minimum sentencing as well. We talk about that and we talk about mandatory minimum sentencing as also not giving the courts and the magistrates the discretion that they need. Could you maybe expand on how you would see the introduction of a presumption against a short sentence?

Dr ANTOLAK-SAPER: Thank you so much for that question. One thing to know with the presumption is that it is focused on just trying to prompt the sentencing decision-maker to justify why, for example, the imprisonment is preferable to a community-based sanction. So, for example, in Ireland the language that is used in the legislation is actually to prompt the court to justify in circumstances: if they are of the opinion that a sentence of less than 12 months is appropriate, they shall consider an alternative to a sentence of imprisonment and release the person into a community setting. They found that that has been in place since 2011 and that that did not necessarily have as much of a strong impact on practice when compared to, for example, the Scotland provision, which says that the court must not pass a custodial sentence of less than 12 months unless it considers that there is no other method of dealing appropriate. I think in this regard it still maintains significant discretion for the sentencing decision-maker, but what it does is hopefully prompt them to consider, 'Have we worked through a checklist of thinking through some community-based alternatives?', recognising that particularly short imprisonment is detrimental to an offender and is just going to contribute to perhaps a revolving door of offending. So it is trying to perhaps clarify and allow persons to think through that first. These have only been in place since 2019, and of course it is a little bit tricky to have long-term studies in terms of its success rate. But in the short term they found that judges are now dealing in a lot more of these particular community-based sanctions, so the number of sentences has diminished by about 24 per cent, and they were replaced by community orders.

The CHAIR: Thank you for that. That is great, and it is something to keep an eye on. We will certainly be looking at Norway, which has had it in place for a longer time line so might have some other evaluations on that. Just going to bail reform—and you are not alone in speaking about bail reform—when we think about the outcry in the community for people to feel better protected from people on bail who have committed some really heinous and violent crimes, I guess I am trying to find out how we recommend that and bring the community with us, because at the moment the idea is that this is about protection, and as your data shows, it has not reduced the number of people committing crimes on bail. Have you got any thoughts about how we change that narrative for the community?

Dr ANTOLAK-SAPER: It is a difficult, challenging object, because of course the community so passionately cares about matters in respect of the criminal justice system, and there is such a highly emotive narrative when it comes to these case studies. I think it is a shame that the community sometimes are not involved more in terms of being taken along and it being explained to them that in the short term this is not going to translate to community safety. The media reports that somehow this is going to result in immense crime being committed and that this is the only way to protect us; that is not the case. It is an important dialogue to have with the community, to say, 'These are the realistic impacts of what you do, and this is what the policy is going to result in. And this is how it's going to impact on community safety in the long run'. So it is a shame

we cannot actually contradict the existing narrative to say, 'And these policies are also not going to lend themselves to this idea of community safety'. And of course it is a very challenging discussion to have with community members. It is such a highly passionate issue and is difficult to point to, when there have been those highly emotive case studies.

One thing that I think is useful to remember is that we have always had community safety be a priority in the legislation. I think somewhere along the way that dialogue got lost because of the way that it was portrayed in terms of the implementation of these reforms, that we were somehow prioritising community safety, and that is not the case; that requirement was always existing. One of the things that may assist in the bail process overall is to think about the way in which bail decisions are made, and they are often made in short periods of time where decision-makers may not be provided with sufficient, comprehensive and reliable information that could facilitate decision-making. My understanding is that in New South Wales they have trialled the introduction of pre-trial reports to try and assist bail decision-makers in that particular process.

The CHAIR: Yes, and I think that the idea that keeping someone in prison or locking someone up if they break the law on bail—you know, people think that that will reduce crime, but as the research shows, it can actually do the opposite. Thank you very much for that. Kaushaliya.

Ms VAGHELA: Thanks, Chair. Thanks, Natalia, for your time today. And thanks for providing the data, particularly regarding the bail reforms since 2017. You mentioned that 33 per cent in 2017 has gone to 44 per cent now. Have you had a look at the impact of these bail reforms on people with disability?

Dr ANTOLAK-SAPER: No, unfortunately that has been beyond the scope of my focus. I have tended to focus on the impact on vulnerable communities and particularly looking at the impact on women—being puzzled as to why women on remand have had such an increase—so unfortunately that is a little bit outside of my scope. I apologise.

Ms VAGHELA: No, that is okay. So from vulnerable cohorts have you looked at people from CALD communities, from Aboriginal and Torres Strait Islander background? Have you looked at those communities as well?

Dr ANTOLAK-SAPER: I have been drawing on the existing literature in terms of the recognition of the incarceration crisis amongst the Indigenous population and the over-representation through the overuse, and what we consistently see is that for these low-level offences and offences where the people do not pose a risk to community safety they are being nonetheless remanded partly in the way that the legislation is drafted, requiring, for example, someone who commits a number of low-level offences to now fall into a more serious category and therefore having to show an exceptional risk. So it is having a significant disproportionate effect on these communities.

Ms VAGHELA: Yes. And for them the reasons for entering the justice system, have you looked at them in detail? Are the reasons the same for people from different cohorts and also for youth, women, those from CALD communities? Are there different reasons for them offending or reoffending?

Dr ANTOLAK-SAPER: There will be of course a number of different reasons that are unique to all of the communities, or these different communities. One consistent issue though is this restriction and reverse onus test. In terms of what we see across the theme, it is difficult for people to meet this threshold, and the idea that it now lies on the accused to have to prove before we can get to the second stage is a consistent theme across the groups. There may be different socio-economic reasons and cultural reasons as to why that threshold cannot been satisfied, but that test is a limiting test in terms of eligibility.

Ms VAGHELA: Yes. And also the research that your centre does, which is access to justice through use of technology and innovation—can you please explain to us a little bit more how the use of technology will make it easier for people who are in the justice system?

Dr ANTOLAK-SAPER: So one interest I have had in recent times is really focusing on home detention as an alternative, and one thing I would say with caution here is I know that, for example, in Victoria we do not have this system. They do have a home detention option in New South Wales, the Northern Territory and South Australia. In New South Wales home detention is typically only imposed if the court finds that no other sanction other than imprisonment is appropriate—and again trying to target low-level offences and low risk to

the safety of the community. Electronic monitoring here plays a very important role in being able to monitor how offenders stay in the community, and their liberties are restricted to some extent, but at the same time what you can do is allow people to still maintain close connections with employment and maintain relationships with family and allow for offenders to address their rehabilitation and go to programs, and so that technology allows us to of course monitor the person but at the same time allow them to keep existing in the community and divert them from the repercussions that prison would otherwise have.

Ms VAGHELA: Thanks. I will come back, Chair, if time allows.

The CHAIR: Thank you. Tania.

Ms MAXWELL: Thank you, Chair. Thank you, Natalia. I am glad you touched base on electronic monitoring because it is something that we have not really elaborated on here in the community to date. Would you see it as beneficial for those who continue to breach perhaps their bail conditions to have, as the alternative to being incarcerated, the ability to have that electronic monitoring and home detention made available?

Dr ANTOLAK-SAPER: Personally I think that would be ideal. I am, for example, sort of interested—and we would be very keen on learning from our New South Wales colleague in this way—that their rate of use of home detention is not particularly enormous. It seems to be only approximately 2 per cent of their sanctions overall. One of these limitations I think is, because of the way in which the legislation is drafted, that it is almost one step below imprisonment. I would almost love to see it rolled out in the bail context or as a middle ground. Rather than requiring decision-makers to first work through 'Is imprisonment appropriate?' and then drop down to home detention, actually treat it as a really good middle ground to facilitate bail offenders who may breach conduct conditions or who may be in, you know, undesignated areas, so again breaching conduct conditions, or not in geographical areas—being able to still facilitate that and giving them an extra perhaps restriction in terms of the liberty without again sending them to a remand centre and sort of feeding into that criminogenic recidivism process.

Ms MAXWELL: Natalia, just moving on from that, what do you see as the balance between preventing people from being incarcerated for that low-level offending and yet still meeting the needs of victims of crime?

Dr ANTOLAK-SAPER: I think the tension has to be drawn somewhere in terms of working through what purpose is behind the practice of the imposition of the relevant sanction—and I use here 'sanction' to mean both the sentencing and remand, despite the fact that I am aware that the terminology ought to be different—but really thinking about what behaviour it is that is trying to be curbed, because we have enough literature to demonstrate to us that low-level offences where people do not pose a risk to the community will benefit from remaining in the community. And something that is echoed quite a lot in the UK is a recognition that if crime is committed locally the sanction per se should be then served locally, and they have a big emphasis on trying to make sure that people contribute to the community where they have offended. So I think that purpose driving practice is very crucial to reflect upon. Something like home detention allows for us to say the limitation or the restriction of that person is curbed while simultaneously trying to ensure that their rehabilitation, a goal that I think the criminal justice system ought to always be focused on—'How do we make sure this person long term maintains a community connection?'—is still being achieved. The UK, for example, have demonstrated that people on home detention were less than half as likely to reoffend, so we have quite significant data showing us that the recidivism is going to be mitigated or curbed in those circumstances where we strike that balance.

Ms MAXWELL: Okay. Thank you. I have probably got more if—

The CHAIR: Yes, we will see how we go. Thank you. Sheena.

Ms WATT: Thanks, Chair. Thanks, Dr Antolak-Saper. Now, following on from Tania and asking something that we have not really explored before, I wanted to talk about unrepresented accused, and I understand that it is something that you have completed some research on. Do you have any data or evidence to share with us in the inquiry on unrepresented accused? Are we seeing any significant groups being more represented as unrepresented accused? What can you share about what we should be looking at when it comes to those people that are not fortunate enough to have representation in their court cases and others?

Dr ANTOLAK-SAPER: Thank you for that question. It is a tricky one to answer, because I have just finished a report that is sitting with the Australasian Institute of Judicial Administration, and it is about—

Ms WATT: I did know that.

Dr ANTOLAK-SAPER: It is about to be published, so I am not sure to what extent I can disclose those details, but I will just give perhaps as brief a summary as I can. So one of the things we have been focusing on is unrepresented accused in minor matters where perhaps legal aid is probably not going to be granted, because of its restrictive eligibility criteria, and what we are finding is that in the research that we have conducted to date approximately 48 per cent of matters were unrepresented. Although the caveat there I have is that they are the minor matters. The next study we are hoping to conduct is of course into the more serious contested matters.

So what we do know is that there are driving offences that are quite commonly unrepresented and minor drug offences where accused are commonly unrepresented, and what we are finding is that some of the perhaps hypotheses that we would have about the impact that that may have on the criminal justice system, such as timing for example, are not as evident as the assumptions we make. So we made an assumption that it would take longer, and for various reasons that may not always be the case. But what we are hoping is that that forms an evidence base for the way in which we can consider some solutions as to how to facilitate and assist unrepresented parties to the best of their abilities in criminal matters for those particular hearings where that support may not be otherwise provided, so accepting that legal aid funding may not be always be increased and looking at mechanisms for how you can address those parties. I will double-check with the AIJA CEO if we can maybe send a draft of the report in before its formal publication, if that would be of any use.

The CHAIR: That would be greatly appreciated, and maybe as a provision on that let them know that we are not reporting until February, so we would be happy to keep that information unpublished until it was published by them.

Dr ANTOLAK-SAPER: Wonderful.

The CHAIR: We have got a couple more—sorry, Sheena.

Ms WATT: I did just have a quick follow-up question. So you have spoken about there being particular cases where we have lots of under-representation. Does your work include a look at particular cohorts within that group, or is it mostly just around what the cases are? Are we finding it is, you know, regional people, or is it people from particular cultural backgrounds? I am just interested to know if there is any more research into that that we might expect.

Dr ANTOLAK-SAPER: No. So unfortunately we are limited in being able to focus too much on the accused because of the ethics limitations that we have in terms of our research. And particularly because this was a pilot study we focused primarily on and we observed case studies in the Melbourne Magistrates Court of Victoria, so we had much, obviously, representation from quite an urban cohort. Thankfully, touch wood, we did this before COVID, so we were able to observe in person. We also interviewed magistrates for their perception about what their experiences with accused are. For example, we could not give accurate information about cultural communities, but what we did elicit from the interviews was an understanding of what, for example, level of mental health there is in the community and how that may contribute to that community being under- or unrepresented, the challenges that that may create when trying to deal with someone who is unrepresented and how you of course mitigate that whilst giving as much of a fair trial as possible to that person as well.

Ms WATT: That just goes to our earlier evidence from the Mental Health Legal Centre. I believe I might be out of time, Dr Antolak-Saper. Thanks.

The CHAIR: Yes. I am afraid so. Kaushaliya, did you have another quick question, or Tania?

Ms VAGHELA: Yes, just a quick one. Natalia, over a year and half the way we live, work and play has changed drastically due to the COVID-19 pandemic. Have you made any observations of where you think now after this year and a half of the pandemic maybe we should do a few things—or should not do a few things—to improve the justice system or do something which is going to help the victims?

Dr ANTOLAK-SAPER: That is a wonderful question. I have not had an opportunity to yet investigate the extent of the use of technology in a way that may assist across a broad range of issues. For example, I have a keen interest in following up on, you know: is the process of in person different to the way in which witnesses

give evidence via technology? So I do have an interest in that. But in terms of, for example, unrepresented accused I know that we can provide greater material through the use of technology to allow people to work through preliminary material and be able to perhaps educate people prior to their day in terms of their trial so that they are aware of what to expect, how to present their formation and what may be expected of them from the magistrate on that day. So there is a use of technology from an educational perspective, and my understanding from a lot of the magistrates is that there are certain items that also can be facilitated on the papers to some extent and some material that can be worked through that way rather than requiring a hearing after a hearing or adjournment after adjournment. So from that perspective I know that technology plays an important role, but I would like to see further how it has impacted on trials and particularly the sentencing of offenders and how offenders feel through that process.

Ms VAGHELA: Thank you. Thanks, Chair.

The CHAIR: Terrific, thank you. Tania, did you have a follow-up?

Ms MAXWELL: No. I shall just wait for that report to come through. Thank you, Natalia.

The CHAIR: Yes. Sheena, a quick one. Thank you.

Ms WATT: Do you have any recommendations for us on programming for people in remand at all? I noticed from your presentation there was not anything in there about, particularly, rehabilitative programs for people on remand, and given that is such a big cohort I just wonder if you have any to share with us.

Dr ANTOLAK-SAPER: I am happy to follow that up in a separate process.

Ms WATT: I would welcome that.

Dr ANTOLAK-SAPER: But in terms of further recommendations, one of the things that, for example, I have been very interested in is that there is a very limited range of programs that are available to those who are on remand—for understandable and perhaps obvious reasons. But one of the concerns, particularly during COVID, that I think is going to be exacerbated is those who have served time because of the extended deadline of some of their trials that they will be having. It is maintaining their status as remandees but they are only able to perhaps use a number of limited programs. I would be delighted to follow up on how we could perhaps expand that in a way that, of course, is still recognising the presumption of innocence. It is a very challenging balance to strike but a crucial one because of this perhaps even longer backlog of cases that will impact on the time that people will have served.

The CHAIR: Thank you. I think certainly on those breach-of-bail people as well who are then in the system because some of them may have been undertaking programs outside and then they have been cut off from those programs at the time. Yes, that would be great.

Thank you so much. That was fascinating, and we really appreciated your time today. As I mentioned, you will receive a transcript of today. Please have a look and make sure that we have not misrepresented or misheard you. We very much appreciate your willingness to provide the committee with some more information.

The committee will take a short break just to quickly reset for the next witness.

Witness withdrew.