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—Tuesday, 24 August 2021

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WITNESSES *(via videoconference)*

Ms Monique Hurley, Senior Lawyer, and

Ms Amala Ramarathinam, Senior Lawyer, Human Rights Law Centre.

The CHAIR: Hello, everyone, and welcome back. You have tuned into the Legislative Council's Legal and Social Issues Committee public hearing on Victoria's criminal justice system. I am delighted that we have with us right now Monique Hurley and Amala Ramarathinam—

Ms RAMARATHINAM: Ramarathinam—thank you, Chair.

The CHAIR: Thank you. I apologise. I should have checked that—from the Human Rights Law Centre.

I am Fiona Patten, the Chair. I am joined by Kaushaliya Vaghela, Tania Maxwell and Sheena Watt. Again, thank you so much for joining us.

Could I just explain that all evidence taken is protected by parliamentary privilege, and that is under our *Constitution Act* but also under the standing orders of the Legislative Council. Therefore any information that you provide to us today is protected by law. You are protected by that privilege for any action or anything that you say during the hearing, but if you were to go elsewhere and repeat those same things, you may not have the same protection. Any deliberately false evidence or misleading of the committee may be considered a contempt of Parliament.

We very much appreciate that you have given us the time today. Hansard will be recording every word that you say. We will be sending you a transcript in a few days, and I just encourage you to have a look at that and make sure that we have not misheard you or misrepresented you. Ultimately the transcript will form part of our report, and obviously the information that you share with us today will form part of the proceedings and part of our deliberations for our inquiry.

I would welcome you to make some opening remarks, and then we will open it up to a committee discussion. Thank you.

Ms HURLEY: Thank you very much, Chair, and good afternoon, everybody. Thank you for having me and my colleague Amala here today to give evidence to the Inquiry into Victoria's Criminal Justice System. To start, we would just like to acknowledge the traditional owners of the land on which we come to you today, the land of the Wurundjeri, Woiwurring and Boon Wurrung peoples, and pay our respects to elders past and present. Sovereignty over the land has never been ceded, and it always was and always will be Aboriginal land. This acknowledgement is particularly pertinent today as we give evidence to an inquiry examining a legal system that has played a significant role in entrenching and continuing the injustice experienced by First Nations people. First Nations advocates have been fighting for justice since invasion, and we encourage the committee to engage with the Victorian Aboriginal Legal Service, Djirra and other Aboriginal community-controlled organisations during the course of the inquiry. We also encourage the committee to hear from people with lived experience of the criminal justice system.

We are here today from the Human Rights Law Centre, and we use a combination of strategic legal action, policy solutions and advocacy to support the work of Aboriginal and Torres Strait Islander organisations to help create a fairer legal system for everyone and one that is free from racial injustice. Our submission and evidence to this inquiry is informed by our work at the centre, with a focus on what the government can do to address Victoria's growing prison population. Victoria is in the midst of a mass imprisonment crisis. The prison population has increased by almost 60 per cent over the last 10 years. The number of women in Victorian prisons who are unsentenced has skyrocketed, and the number of children behind bars has increased. The number of Aboriginal and Torres Strait Islander people in prisons has nearly tripled over that same 10-year period. This spiralling growth in prison populations has happened during a time when the rates of recorded offences and criminal incidents have remained relatively flat.

Years of tough-on-crime politics have got us to this point, and we now have a criminal legal system that turbocharges injustice. Increasingly prisons are being used as a catch-all for all social problems and serving as warehouses for people experiencing poverty, family violence, housing instability, mental health conditions and

addiction issues. Due to the ongoing impacts of colonisation, systemic racism and discriminatory policing, Aboriginal and Torres Strait Islander people remain significantly over-represented at all points in the criminal legal system. We need to stop funnelling people into prisons, and we need to stop building more of them. This inquiry has an opportunity to reimagine our legal system and make really brave recommendations to create a fairer legal system for everyone in Victoria. Our submission sets out a number of recommendations that we think would help achieve this, and we would just like to briefly draw the committee's attention to three key recommendations now.

Firstly, we think the inquiry should recommend that we stop building more prisons in Victoria. The Human Rights Law Centre supports the campaign led by Flat Out calling on the Victorian government to stop the proposed 106-bed expansion of the Dame Phyllis Frost women's prison. This is because prisons do not rehabilitate or remedy disadvantage; they only really compound and exacerbate it. They are places where abuse often thrives behind bars, as highlighted by the Independent Broad-based Anti-corruption Commission, IBAC, special report on corrections, which was recently tabled before the Victorian Parliament. That report painted a shocking picture of what goes on in prisons and how human rights are easily disregarded behind closed doors. The significant amounts of money allocated to building and expanding prisons would be better invested in services that divert people away from the criminal legal system and address the underlying causes of people's offending so that they do not offend again. This includes investing in early intervention and prevention services, building more social housing, a better mental health system and resourcing Aboriginal and Torres Strait Islander community controlled organisations to keep doing the incredibly important work they do delivering culturally safe and responsive support services.

Secondly, we need to fix Victoria's broken bail laws to reduce the number of people who are currently being pipelined in and out of prisons. We imagine prisons as a place where people are sent to be punished once they are found guilty of a crime—a serious one at that—but at the moment this is too often not the case. Overly punitive bail laws, which were intended to target men who commit violent offences, have contributed to escalating imprisonment rates and impacted women experiencing poverty and Aboriginal and Torres Strait Islander people the most. Alarmingly, the most recent data from Corrections Victoria for June 2021 shows that over half the women in prison are unsentenced and have yet to be found guilty of the alleged offending that they were arrested for. Criminalising women instead of supporting them only serves to further entrench them in the criminal legal system. Many women in prison are mothers, and even just a short time in prison means that they risk losing their children as well as their homes, their jobs and their connection to the community. Time is overdue to remedy this injustice, and this inquiry should recommend bail reform in the form endorsed by us, the Victorian Aboriginal Legal Service and the Fitzroy Legal Service among others in the Victorian legal sector. That reform involves repealing the reverse onus provisions of the *Bail Act* and creating a presumption in favour of bail, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person or the person posing a demonstrable flight risk.

Thirdly, we need to reimagine our youth legal system. This starts with raising the age of criminal responsibility from 10 to at least 14 years old, with no exemptions. Right now children as young as 10 years old can be locked away in prisons across Victoria. No child belongs in prison, but recent data shows that there were 623 children in prison between July 2019 and July 2020 and that 29 of these children were under the age of 14. The overall number of children in prison represents an increase from 560 children in prison in the previous year, which is despite the impacts of the COVID-19 pandemic and a decrease nationally in the number of children in prisons over the same period. Aboriginal and Torres Strait Islander children are over-represented in these numbers, making up 15 per cent of children under youth justice supervision in Victoria.

The commissioner for children and young people has described the current very low age of criminal responsibility in Victoria as having devastating consequences for Aboriginal children and their families. We agree, and we endorse the recommendations made in their recent report, which was the inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system. We need to divert children away from the criminal legal system, because every child should be free to go to school, have a safe home to live in and be supported to learn from their mistakes. This is important because we know that engagement with the legal system only serves to compound a child's disadvantage and trauma and increase the likelihood of them going on to commit further offending in future.

Instead of locking children away we need to invest in community programs and alternatives to prison that are already working. This inquiry should listen to the calls of many people, including Aboriginal and Torres Strait Islander organisations, medical bodies, United Nations experts, the commissioner for children and young people and a lot of the organisations who have already given evidence today, and raise the age of criminal responsibility to at least 14 years old, and all reforms moving forward should be focused on diverting children away from the criminal legal system at every opportunity. The time for us to reimagine and create a fairer legal system for us all is now. Thank you.

The CHAIR: Thanks very much, Monique. Just over the lunch hour when I was looking at your submission I noted that the cost of the expansion of Dame Phyllis Frost was $1.782 million per cell. We could build a lot of houses for that much.

Ms HURLEY: We could build a lot of houses. And it is interesting, because at the moment the Dame Phyllis Frost prison is not at capacity. I think it has capacity for around 600 people, and it is sitting around 400. I think 400 women are in prison across Dame Phyllis Frost and Tarrengower at the moment. But if we were to do bail reform and the number of women in prison could reduce by 50 per cent, which is the 50 per cent or around that that are currently on remand, then there would be absolutely no need for there to be an expansion to the centre.

The CHAIR: Thank you. I know you have not mentioned it in your opening remarks, but I actually just got to the section in your submission around parole and the changes that we had made to parole. It is something that we have not sort of talked a lot about today, and I was just wondering if you could expand on what changes we need to make to parole. I am assuming that that would obviously mean that we would be embedding services in prisons but we would also be providing services when people are on parole—not to put words in your mouth.

Ms HURLEY: No, thank you for that. Parole laws have been tightened in Victoria, and it has been a similar story to how bail reform came around in Victoria, with decision-making really informed by some really horrific events that happened and that reform being enacted and then having a lot of unintended flow-on effects that have really impacted women and Aboriginal and Torres Strait Islander people disproportionately. So you have got the issue of high numbers of people churning through the system on remand and coming in and out, and then with parole on the back end of the criminal justice system, things have tightened up. And so now it is a lot harder for people to access parole on that end.

There are three key reasons why parole has become harder for people to access and be eligible for, and that is the removal of automatic consideration for parole when your non-parole period comes up. That has been removed, and it means that the onus is on the individual person now to make an application and to put in the work to navigate all of the internal systems in the prison to make that happen. The second reason is that you need to complete programs in prison in order to be eligible for parole, and that is particularly difficult for women—and Aboriginal and Torres Strait Islander women in particular—to do because of the lack of culturally safe and gender-responsive programs on offer in the prisons.

And then thirdly, you need to have housing to be able to access parole. As we know, a lot of people that are going into the criminal justice system and into prisons do not have stable housing when they go in, so unless they have been able to make arrangements while they are in prison they are often faced with a situation where they do not have housing secured on the back end. That is the biggest contributing factor, I think, for women not being able to access parole, and that has a really perverse outcome because it means that people cannot get parole because they do not have housing but then we are seeing a lot of people who are exiting prison at the end of their full sentence into homelessness anyway. So there is a real need for bigger investment in social housing to be able to meet those needs both so that women have housing and they do not need to come into contact with the criminal legal system in the first place and also so that they are able to successfully transition out of prison and have the best chance of reintegrating into the community. That is why that investment is really, really integral because it means that people are missing out on parole, which can offer a kind of supported pathway back into the community where they still might need to complete certain requirements and be attached to certain services. So that is really not an ideal situation at all.

The CHAIR: Yes. I mean, you have got really vulnerable people anyway. And I think there is this perverse situation that you cannot get bail because you do not have secure housing, but then we are releasing people from jail directly into homelessness. Kaushaliya.

Ms VAGHELA: Thanks, Chair. Thanks, Monique and Amala, for your time today joining us and also for your submission. Monique, you mentioned in your opening remarks that over the last 10-year period there has been an increase by 60 per cent in the prison population, and that includes also women and children, and you mentioned that for people from an Aboriginal background it has tripled and also that this has had an impact particularly on Aboriginal and Torres Strait Islander women. My question is about our judges and magistrates: do you think that they have enough knowledge and skills that are required to sensitively and fairly manage the criminal law issues relating to a cohort such as Aboriginal and Torres Strait Islander people?

Ms HURLEY: I am not an expert in what kind of qualifications it is good for judges to have. But in relation to what you are talking about, I think that a lot of judges are trying to do the best that they can within a legal framework that is quite rigid and quite geared towards denying bail to people, and particularly women and particularly Aboriginal and Torres Strait Islander women, at the moment. We see that through the bail reforms that happened. There are the reverse onus thresholds. If you cannot meet those legal tests, then bail has to be denied. Then there has been a widening of the net in terms of offending that has been caught by those reverse onus provisions. So if people are committing maybe crimes related to poverty or they are experiencing family violence and their offending might be connected to breaching orders in the context of maybe being misidentified as a perpetrator of family violence, women are really quickly escalating through the thresholds and then judges are really stuck in terms of what they are able to do because the system is really geared towards bail becoming really difficult to get and remand being the default response.

Ms VAGHELA: So you are saying it is about the laws rather than the judges and the magistrates having enough knowledge to deal with these vulnerable cohorts. Is there any particular or special ongoing training required for them so that they do have an understanding of cultural sensitivity when people are coming from different backgrounds? Is that what is causing it or is it just the bail laws that you are saying are causing the rise in prison numbers?

Ms HURLEY: I think it is probably both. I think that the legal framework is really what we need to tackle as a matter of priority, and I would really defer to the Victorian Aboriginal Legal Service and Djirra and I would be really interested to hear their thoughts on what training judges and magistrates can and should be accessing in order to provide more culturally safe services or more culturally informed decision-making around those decisions that are having really significant impacts on people's lives. Because, yes, many of the women who are interacting with these systems are mothers, and even just a really short time in prison can really interrupt someone's life significantly and set it on a completely different course. Reform of the bail laws is a priority, and then I think also training of judges is really important.

Ms VAGHELA: So it is a combination of things. Do you see that the increase is just in women who are Aboriginal and Torres Strait Islanders or is it in women in general?

Ms HURLEY: It is women becoming increasingly over-represented, and then because Aboriginal and Torres Strait Islander women are over-represented generally in the prison population they are also being over-represented in remand rates. So it is both.

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

The CHAIR: Thanks, Kaushaliya—hopefully. Tania.

Ms MAXWELL: Thank you, Chair. Thank you, Monique and Amala, for joining us today. It is very much appreciated. Monique, you talked about the bail laws being harder and over-representation of particularly Aboriginal and Torres Strait Islander women in our prisons. I am really scratching to try and find ways in which we can prevent that over-representation. Other witnesses today have talked about those early intervention strategies that are required to not only prevent offending in the first place but also to change that trajectory of that offending. Now, correct me if I am wrong, because you will probably know this far better than I do, but there is apparently $30 billion spent every year in Australia on approximately 500 000 Indigenous people. Where is that money going if that is not being prioritised to support Aboriginal people and Torres Strait Islanders from becoming immersed in the justice system? Where is that money going? That is an extraordinary amount of money—$30 billion spent every year.

Ms HURLEY: I am not familiar with those figures, but I think that there are a lot of terrific programs that are being run at the moment by Aboriginal and Torres Strait Islander organisations in Victoria—and I am

thinking particularly of Djirra—in the space of helping women and victim-survivors of family violence that need more funding in order to be able to operate and operate successfully. I think in the submission we drew some attention to two particular programs that Djirra runs. It would be particularly good for them to have further funding in order to expand their ability to deliver those services to more women. I am just trying to find them.

Ms RAMARATHINAM: I can jump in, Monique.

Ms HURLEY: Yes.

Ms RAMARATHINAM: Just in relation to those two programs that you have talked about that have been addressed in our submissions, one of those is Dilly Bag, which is a small group residential workshop, and that draws on cultural principles and the strength of Aboriginal heritage in order to promote healing; and Young Luv, which is designed for Aboriginal women aged 13 to 18—so for Aboriginal children and young people—is a half-day activity that is facilitated by Aboriginal women to engage teenagers in culturally safe spaces where they can talk about, reflect and better understand important issues affecting their lives, including relationships. So these two work particularly well and are examples of culturally appropriate, culturally safe programs that are early intervention and prevention programs that work.

The CHAIR: Tania, I might come back. Great. Sheena.

Ms WATT: Good afternoon. Hi, Monique and Amala. It is good to have you with us, and thank you for your introductory remarks and your submission. I must confess there was a lot to read in that, and it is one that I am sure I will have to go back to more than once. But thanks for all the efforts in doing that. I had a question particularly about—which will be of no surprise to anyone—the Aboriginal over-representation in the justice system. I know that the Human Rights Law Centre has been very vocal about this for quite some time. Labor governments have been working hard to reduce this through a range of measures, including the Aboriginal Justice Forum and associated works as well as repealing the offence of public drunkenness and other things.

I, like Tania, am trying to work out the path ahead, and so I know that there are obviously some looks at the systems of the justice system and where the systemic bias is and where that exists and how we can change that. But I wonder if there are any other areas that you just want to put out there for discussion or for our consideration around Aboriginal over-representation in the justice system, including youth. Earlier I spoke to one of the witnesses and we talked about older offenders, and I am interested to know if there is anything around older offenders from Aboriginal and Torres Strait Islander backgrounds. I have read so much on young people. So I am a little bit all over the shop, but I would love to know if there is anything around older offenders and if there is any other part of that work that you think is worth drawing our attention to, apart from of course hearing from those important organisations that you already mentioned.

Ms HURLEY: I am not aware of any specific work that has been done on older offenders. This will not come as a surprise to you, but I think that the single thing that would have a really massive and generational impact on addressing the over-representation of Aboriginal and Torres Strait Islander people in prisons is raising the age of criminal responsibility, and I think Amala can talk to that a bit.

Ms WATT: I would welcome that.

Ms RAMARATHINAM: Thank you. Your earlier question asked to be addressed on the over-representation of Aboriginal people—women and children—in the criminal legal system. There are now two Closing the Gap targets that specifically address that, target 10 and target 11, and it is also worth addressing how raising the age intersects with Closing the Gap considerations. The Victorian government has a commitment under the new National Agreement on Closing the Gap to reduce the rates of incarceration of Aboriginal children and young people, and this recognises that Aboriginal children and young people are over-represented due to the ongoing effects of colonisation, including the effects of poverty and discriminatory policing. Target 11 requires a 30 per cent reduction in youth incarceration rates by 2030, and this is a whole-of-government commitment. Based on the latest figures provided by the Australian Institute of Health and Welfare, raising the age to 14 alone results, in our calculations, in a 13.7 per cent reduction in incarceration rates for Aboriginal children and young people. So that is almost half the target achieved through one single measure of reform. Raising the age to 14 will have an immediate and generational impact on reducing the over-incarceration of children, and this is a crucial first step to closing the gap in target 11.

Obviously there have been other jurisdictions that have made commitments to raising the age, including the ACT, and in July 2020 attorneys-general from every state and territory had the opportunity to act to raise the age across the country. Instead this has been put off and delayed and it looks as though that national process has somewhat failed, so it is time for the Victorian Parliament to take action, to show leadership and commit to raising the age. We can go this alone, and it is a crucial step towards Closing the Gap, especially in relation to target 11.

Ms WATT: Thank you. I too will have another question later on if we get to it.

The CHAIR: Great. Fantastic, thank you. Thank you so much for that, Amala, and it is almost poignant to think that we could achieve that Closing the Gap target, given that we have failed to meet any Closing the Gap targets up until now, by that one change of raising the age actually getting us to reducing by 30 per cent. I think that is an extraordinary and very important thing for us to remember in this.

I am wondering if you have given much thought to—and you spoke to it before, Monique, about women and the bail laws and how it is affecting them—is there some direction that you can give the committee as to when a person, particularly a woman, hits the justice system through low-level offending or through family violence, what we should be doing rather than arresting them and bringing them into our justice system? What else could we be doing while they are on bail?

Ms HURLEY: I think in terms of women coming into contact with the system we need to be able to get an understanding of what the underlying causes of the offending are and then connect them with diversion services that are gender and culturally appropriate in order to help address whatever that is. And so if it is connected to housing instability, then that needs to have a housing component as part of the response. If they are engaging in offending that is being driven by drug use or addiction issues, a criminal legal response is not going to help address those issues; it needs to have a real health-based component. There has been a lot of work done obviously with the mental health royal commission around if people are mentally struggling and have mental health conditions then there needs to be a response that also meets that particular need. And so I think that we need to build in a lot more opportunities for people to be diverted away from the system earlier on and also have those diversion opportunities available throughout the process. It should not just be, 'One strike, you're out; no more diversion for you', And I think a critical part of this is something that I think it was the Law Institute of Victoria touched on earlier today about police really being the gatekeeper for diversion opportunities. That is something that applies at the moment for adults and for children, and we think that that should be removed. Police should not be exerting influence over that. Being able to access a diversion program can be life changing for people, and that is something that should be prioritised at every point in the process.

The CHAIR: And accepting the expertise of the judiciary to sometimes make those calls rather than the informant. Thank you. Kaushaliya, did you have another question?

Ms VAGHELA: Just a quick one. Let us follow on from what you were just saying, Monique, regarding the police. One of the recommendations in your submission is that the Victorian government properly resource an effective and independent police oversight body. How do you see that working, and what would that look like?

Ms HURLEY: That is a really good question. I think that currently we have a lot of complaints against police that get investigated internally by police, and that is really problematic for a number of reasons. I think that police have been able to get away with really inappropriate behaviour for way too long. We have the Independent Broad-based Anti-corruption Commission, which can be referred more serious matters in relation to police behaviour that they can investigate, and they have limited resourcing to be able to do that. I think that all of this is kind of being examined in light of the recent royal commission into police informants with a view to thinking about: is there a better way to do this? It comes up a lot in our work around Aboriginal deaths in custody. Police play the role as investigator of those really horrific and often completely unnecessary deaths in custody, and we are really firmly of the view that the status quo of police investigating the actions of other police officers is not working in terms of police accountability. We are really keen for the Victorian government to consult with Aboriginal organisations and the families of people who have died in custody so that there can be a process where there is really independent and robust oversight of police conduct in the future.

The CHAIR: Thank you. Tania, did you have another question?

Ms MAXWELL: I am just very curious, given the figures of the over-representation in prisons of Aboriginal people and Torres Strait Islanders: should all offenders be treated the same, irrespective of their race—that is, treated as a human being—in whatever decision is made in those courts?

Ms HURLEY: I think that the intersectional needs of people need to be taken into account. If we really want to create safer communities, then we need to look at every person who comes before the criminal legal system and understand what their intersecting needs are in order to be able to support them to deal with the underlying causes of whatever is causing them to offend so that they will not go on to reoffend in the future.

I think that if you are a white person, your interactions with the legal system will be different from an Aboriginal woman, and those experiences will be different to people who are trans or have a disability or have all different kinds of attributes. If we want to move to a system that is best practice, then yes, I think we need to really look at all of those things to understand that their journey to the legal system is different. Particularly with Aboriginal and Torres Strait Islander people, they have often been racially profiled by police and they have been arrested for crimes that other people would not be arrested for. We saw that with Tanya Day, the Yorta Yorta woman who was arrested for being drunk in a public place, for falling asleep on a train. That does not happen to white women in the same way that it happens to Aboriginal women, and it is terrific that the Victorian government are taking steps at the moment to decriminalise that offending. I think that that should be kind of the start of us moving towards decriminalising more minor offending that has similar impacts for Aboriginal and Torres Strait Islander people.

Ms MAXWELL: Thank you, Monique.

The CHAIR: Sheena.

Ms WATT: I just had a question about the sort of structural privilege that already exists in our legal system, and I wonder if you have any commentary on that. I am thinking about the fact that particular cohorts of our community are far more likely to be criminalised by virtue of their background and intersections, and I am thinking about what best practice looks like. How do we actually apply a lens over it where we give some sort of critical thought to whiteness and the privilege of whiteness in our legal system? Is there anywhere that we should look? Are there any places that are doing this better than anywhere else, and what are some of the things that we should be taking away from that? There is certainly something in that. If there is not, then maybe that is something too.

Ms HURLEY: Well, I think Koori Court is an example of something that is working really well, and it is unfortunate that the jurisdiction of that court at the moment is limited to people who are choosing to plead guilty. I do not need to tell you this, Ms Watt, but I think Aboriginal people have all of the solutions to this, and I think we just need to really invest and support them to be able to develop and deliver the programs that are already in the works to support people and to further develop the Koori Court. Someone earlier today was giving evidence about the Gladue reports. All that work is being done. It is being done by VALS at the moment, and they are so under-resourced. I think we can make all of that happen if we really want to.

Ms WATT: Thank you so much.

The CHAIR: Thank you. Well, that was almost a positive note to end on. We can do it if we really want to. Thank you again, Amala and Monique, for your time today and for your submission. And personally, I thank you for the work that your organisation does. As I said from the outset, you will receive a transcript of today. Please check it over and make sure that we have not made any glaring errors. Again, this has been another great session. It has been another great public hearing. We will bring it to a close. Thank you to all the committee members. Thank you to anyone who has been watching online. I will now call this hearing to an end.

Committee adjourned.