

# TRANSCRIPT

## LEGISLATIVE COUNCIL LEGAL AND SOCIAL ISSUES COMMITTEE

### Inquiry into Victoria's Criminal Justice System

Melbourne—Thursday, 21 October 2021

#### MEMBERS

Ms Fiona Patten—Chair

Dr Tien Kieu—Deputy Chair

Ms Jane Garrett

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Dr Matthew Bach

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Mr Stuart Grimley

Mr David Limbrick

Mr Edward O'Donohue

Mr Tim Quilty

Dr Samantha Ratnam

Ms Harriet Shing

Mr Lee Tarlamis

Ms Sheena Watt

**WITNESSES** (*via videoconference*)

Mr George Selvanera, Acting Chief Executive Officer,

Mr Kin Leong, Acting Director of Legal Services, and

Ms Andreea Lachsz, Head of Policy, Communications and Strategy, Victorian Aboriginal Legal Service.

**The CHAIR:** Good afternoon, everyone, and welcome back. As I am sure you are aware, this is the Legislative Council Legal and Social Issues Committee's public hearing into Victoria's criminal justice system. We are very pleased to be joined by the Victorian Aboriginal Legal Service. Here we have George Selvanera, who is the Acting CEO; Kin Leong, who is the Acting Director of Legal Services; and Andreea Lachsz, who is the Head of Policy, Communications and Strategy. Welcome, and thank you very much for joining us.

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

As I am sure, having done it many times before, you would be aware, that Hansard are recording our session today, and they will send a transcript. We would encourage you to have a look at that transcript and make sure that we have not misrepresented or misheard anything that you have said today.

We would welcome some opening remarks from you, George, and then I will open it up to a committee discussion. Thanks again.

**Mr SELVANERA:** Firstly, thank you very much, Chair, and let me start by acknowledging that I am coming to you today from our offices in Melbourne on the unceded lands of the Wurundjeri people. I pay respect to their elders past, present and emerging and to all of the Aboriginal people that might be on this call—if I guess you call it a call—and indeed to all of the Aboriginal nations here in Victoria.

As you know, the Aboriginal community established VALS for the Aboriginal community nearly 50 years ago. Our initial focus was the gross over-representation of Aboriginal people in custody and ensuring culturally safe legal assistance and support to help Aboriginal people navigate the criminal justice system. Services have expanded significantly since then, although demand for our services far outstrips our available resources. At the same time our assistance in criminal law matters continues to be as important as ever, because unfortunately the Victorian criminal justice system does not work for Aboriginal and Torres Strait Islander people. We welcome the committee inquiry and the opportunity that it affords to recommend changes that address the unprecedented and costly expansion of the incarcerated population and the over-representation of Aboriginal people of all ages and genders at each stage of the criminal justice system.

For this committee it is a chance to make recommendations for improving trust and the confidence of Aboriginal people in the criminal justice system. That requires five main actions. Firstly, it is working with Aboriginal people and organisations to decide how a criminal justice system works for Aboriginal people, and I use the word 'decide' deliberately. Self-determination is not simply consultation with Aboriginal people, but rather it is Aboriginal people deciding what matters in the way and what of reform.

Secondly, it is recognising that our criminal justice system is rooted in Australia's violent colonial history. When you consider that much of our criminal justice system was established and evolved during an era that nearly everyone concedes was endemic with racism, from dispossessing Aboriginal people from their lands and criminalising trespass, removing children from families in the stolen generations and where out-of-home care then and now remains one of the single most important markers of whether someone will interact with police and prisons and so on, it is pretty intuitive to accept that intergenerational trauma and disadvantage flows from this and that Aboriginal people are over-represented at every stage of it. Systemic racism means that we have systems and institutions that produce racially different outcomes, regardless of the intentions of the people who

work within them. What we need is Aboriginal people deciding how to craft a criminal justice system that meets its objectives of prevention, deterrence and offender accountability.

Thirdly, it is about recognising that we need to invest in prevention. As the corrections commissioner and Victoria Police said at the royal commission into mental health, the underfunding of community services is a key driver of growing police contacts and incarceration numbers. This failure is hugely costly, as the committee well knows—literally billions of dollars each year—but it is also expecting too much of prisons and the police. They are high-cost residual services, not low-cost prevention services.

Fourthly, it is about embedding deterrence of people at each stage or each step of the pathway through criminal justice, not, spiderweb like, trapping people deeper within it. So, for instance, when a 10- to 13-year-old engages in offending behaviour, this should trigger an immediate examination of what is happening with that child and family and what early help can be provided in a culturally safe and relevant way to prevent and deter that child from entering criminal justice processes. Yet in Victoria that child can be criminalised, removed from their family and placed in youth detention, which then increases their likelihood of future offending and incarceration.

Fifthly and finally, we need evidence-based policymaking and much more transparency about how decisions are made. For instance, we need public health approaches to public health problems such as addiction. Similarly, the broken bail system now means that the main reason Aboriginal people are in custody is that they are on remand, mostly for alleged low-level offences which in instances where the person is found guilty would almost never result in a custodial term. To make matters worse, this has disproportionately impacted Aboriginal women, 80 per cent of them mums, who are then separated from their children—those children then being at risk of being placed in out-of-home care, a staging post for more interaction with police and criminal justice. As we say in our written submission, given the plethora of inquiries and royal commissions into the criminal justice system, it seems safe to say that we have reached a consensus, and that is that the current system and approaches are not working. We need serious reform that respects Aboriginal self-determination, is free from racism and discrimination, is grounded in evidence and is accountable then to the community it serves. Thank you very much.

**The CHAIR:** Thank you very much, George. I think you saw the other committee members nodding at what you were saying. And you are absolutely right: I think we have had enough inquiries to recognise that now we need to be making those solutions and now we need to be introducing those changes to the system, as you far more eloquently than I said. The expectations that we put on prisons to fix everything is setting them up to fail, and as it has turned out they have. Turning to that idea, certainly around that trust and confidence and in I guess that area of early intervention and prevention, that obviously is so important in the Aboriginal community. So I am wondering if you can talk about the impacts of the incarceration of Aboriginal people and the solutions in that early intervention.

**Mr SELVANERA:** I mean, that is a huge question to answer, Chair. Let's get straight to the heart of it.

**The CHAIR:** I know, sorry—yes, can you just fix everything? It puts everything in one question.

**Mr SELVANERA:** Not at all. Look, my colleagues, and particularly Andreea, will be able to add more to specifically sum up the outcomes associated with custody. But we know that prisons themselves are a criminogenic factor, so you are more likely to go to prison again if you have been to prison. Prisons as a solution, as you claimed and actually put in the foreword to your question, are not working. It is not to blame them in some senses, because it is expecting them to solve a whole range of intergenerational disadvantages and intergenerational trauma and to kind of live I guess to some extent with the consequences of whatever the laws are that put people into prison to start with.

So in terms of the early intervention and prevention part, I mean, I guess what we would say is it is a number of things. Firstly, particularly as it relates to Aboriginal and Torres Strait Islander people, it is very much about needing to work with Aboriginal people and Aboriginal organisations themselves—and I know you are meeting with other members, for instance, of the Aboriginal Justice Caucus and other ACCOs as well, and that is essential. Aboriginal people know the solutions to their challenges, and so they absolutely need to be not just a partner but a decision-maker within, if you like, system-wide reform, because that is what systemic racism is—it is the production of those racially disparate outcomes.

**The CHAIR:** Is it all about funding, George? I know you were talking about being the decision-makers. Are there changes that we can recommend to ensure that that is the case?

**Mr SELVANERA:** Definitely; no, definitely, there are. All of the recommendations that VALS has made in its submission would be ones that you could simply just rewrite.

**The CHAIR:** Yes.

**Mr SELVANERA:** But I think it is some of those core principles around: what is self-determination? Self-determination in a real sense is not just consulting with Aboriginal people. So, you know, there are some really great governance mechanisms that are in place, like the Aboriginal Justice Caucus, the Aboriginal justice agreement and then meeting with government partners. But that is still largely a very consultative body. The caucus has a series of recommendations, whether it is increased funding for VALS, which we would encourage the committee as well to take a positive view of, to have an Aboriginal social justice commissioner, to reform the bail laws that are broken, leading to all of these Aboriginal women and others going into custody. Those ideas, I suppose, or those proposals, are put to government, who will think about them. That is not to say that those meetings do not happen in a very respectful way, but Aboriginal people are not the decision-makers in that meeting or in those sorts of fora. So there is something which is about recognising that Aboriginal people need to be at the centre of the decision-making about what happens for Aboriginal people.

So I think that is a single, crucial first step. And then there is, of course, a raft of sorts of other issues. So one can think about reforming. Whilst on one hand it is tinkering with the system, these are important things to stop people from going into custody, and we know where it is not working. So it could be about changing the bail laws, for instance. It can be about raising the age of criminal responsibility, and it can be about using public health responses to public health problems like addiction so that we do not criminalise people who have got problems in terms of substance misuse. It is a huge agenda, Chair, that you have.

**The CHAIR:** Yes. Thank you. And that would be with thanks to Tania Maxwell, who provided us with this reference, so I will turn to her for the next questions and then to Sheena.

**Ms MAXWELL:** Thank you, Chair, and thank you everyone for joining us today and providing submissions and providing us the opportunity to ask you further questions. I just wanted to touch base on early intervention, particularly for our young Aboriginal children. What do you see as being the most important and the highest of priorities in diverting our young Aboriginal children from being incarcerated? What do you think that we need to consider as alternative options?

**Mr SELVANERA:** The single quickest thing that could make a difference is to raise the age of criminal responsibility in line with what happens internationally. Australia—it is not just Victoria—with the exception of the ACT, which is looking to make change in this respect, has a very low age of criminal responsibility that does not accord, really, with medical advice in terms of child development.

I guess it is that point that I made earlier that if a child is engaging in offending behaviour of whatever type that might be, that should be an immediate call to action, like, what is going on for that particular family and child? What can be done to support that family and support that child? To the credit of the Victorian government there have been, obviously, reductions in the number of young children, and Aboriginal children particularly, coming into detention. But at the same time, what we need are more of those early supports, and that is really wideranging. It is about ensuring, I guess, voluntariness; it is about confidentiality; it is about ensuring that they really get to the heart of what the needs of that particular child and family are, about connection to culture, having cultural plans. I mean, again, I guess this is inevitable in this type of inquiry. These are big questions that you are asking that have got big answers. But at their heart, I guess, it is about working then with the Aboriginal community themselves to frame those responses. But certainly a quick thing you could do is recommend raising the age of criminal responsibility.

**Ms MAXWELL:** Thank you. That is all from me at the moment, Chair.

**The CHAIR:** Thank you. Sheena.

**Ms LACHSZ:** Sorry, Fiona, do you mind if I quickly jump in?

**The CHAIR:** Of course not, Andreea.

**Ms LACHSZ:** Sorry, I do not know what the protocols are, so I am sorry if I have been rude.

**The CHAIR:** No, jump in whenever you like.

**Ms LACHSZ:** I suppose I just want to add to what George was just talking to because I know this inquiry is really focused on early intervention and prevention. I just think it is really important when we are talking about that, that we do not just look at what programs could be developed but at having a more holistic approach. Part of interrogating what is happening for that child or family that George was talking to is whether that child has stopped engaging with their education and then asking the question, why? What supports need to be provided, but also what needs to change at the school? We know there have been instances where children disengage in school because there is racism. They are subject to racist behaviour and then it is not a safe place for them. We know that risk factors can also be families living in poverty, and that actually raises this bigger question, which is I suppose an issue for the commonwealth: are welfare benefits sufficient? It is very hard for a child to want to go to school or be able to go to school if their living situation is really precarious or there are added stresses in their families that might lead to family violence. I think when we are talking about prevention and intervention it is having this more holistic approach and looking at what the failures are in social security nets.

The other really important piece of the puzzle that I think is often missed is we often talk about how we can reduce criminal reoffending instead how we can reduce criminalisation of certain groups of people. A lot of that goes to things like policing practices—you have already heard George talk about systemic racism—so having that sort of consistency in policing practices in marginalised communities or Aboriginal communities. So that people with disability are not particularly targeted or overpoliced. I think that is really critical. That is also linking into having Aboriginal community trust in police, but it is also looking at the disproportionate impact of certain laws that criminalise Aboriginal people. I suppose I wanted to quickly flag that I would urge the committee not to focus entirely on discrete programs but to have that bigger look at how the systems are complicit in creating this criminalisation of Aboriginal people.

**The CHAIR:** Well said. Thank you, Andreea. Sheena.

**Ms WATT:** Lovely. Thank you to VALS for joining us today and of course your continued work on issues very dear to me. I have a question that goes to our terms of reference around the appointment of judicial officers. I just wondered if you had a view about access to self-determination in the criminal justice system and whether you believe that there is appropriate expertise and knowledge of self-determination with our judicial officers, and if not, what needs to be done to improve knowledge and awareness of self-determination and the rights of Indigenous people in our judicial officers across our state? As simple as that, but there we go!

**Mr SELVANERA:** Well, Sheena, the first part of your question actually was a closed one, which was a yes or no, and the answer is no. There is not sufficient cultural competence within the judiciary, and it is really interesting to us. When I say ‘really interesting to us’ what I mean is it is deeply concerning to us that only members of the Koori Court are expected to undergo or undertake cultural awareness training. That should not be the case. It should be the case that anyone involved in any kind of tribunal or any kind of judicial function undertake not just cultural awareness training, which is promoting some level of understanding—2-hour e-learning or whatever it might be, even if it is one day or whatever it is—but I think, to the sorts of points you were just raising, Sheena, it needs to be substantial. It needs to give real insight about what the impact of systemic racism is and what that means, then, for Aboriginal people as they present in whatever context, I guess, it is that they come into contact with judicial processes. So there is a need to develop not just that awareness but that cultural competence and to equip everyone who is involved in judicial processes—and that is not just even the judicial officers themselves; it is the people supporting them, because they often act as workers interacting, then, with the Aboriginal people coming into courtrooms or tribunals or whatever it might be—and ensure that they have that cultural competence, that they understand what self-determination means, they understand the impact of the colonial history on today’s Aboriginal people and they understand the different kinds of ways of interacting that will support that person to participate in the process more, to feel more confident, I guess, in terms of the engagement with that process.

Also I guess almost implicit in your question is: what is it also about the judges that we have? It is not a particularly diverse group of people. They do not look like this committee, for instance. They certainly do not

look like VALS; I can assure you of that. Now, that is a long-term project, to increase the number of Indigenous people, for instance, that might be in the judiciary. So we would encourage, for instance, judicial appointments that bring in, I guess, more of the expertise of people who have actually worked directly in Aboriginal legal services or providing direct support to people who are Aboriginal, to help to improve—equipping, I guess, judges with that know-how.

**Mr LEONG:** If I could just jump in, too, I think there are three really clear, for me, success stories in the criminal justice system: the Koori Court, the Drug Court and ARC. I think that if you take Koori Court as a real success story, being able to expand Koori Court to encompass Drug Court and the assessment and referral court structure—I think I raised this at the last inquiry—

**The CHAIR:** You did, yes.

**Mr LEONG:** The fact is that someone can go through Koori Court in a culturally safe environment and really confront their elders but—also it is an opportunity for victims and complainants to be part of that process—at the end of all of that they cannot get a drug treatment order. Another easy fix—I mean, I say it is easy; I do not work in government—would be to take these three great successful jurisdictions and expand them to include each other, I would say.

**The CHAIR:** I am not in government, either, but I think that sounds like just such a great idea, Kin, and I really liked it when you first mentioned it when we saw you earlier this year. Sheena, did you have further—

**Ms WATT:** If we cycle back around, I can ask a second question.

**The CHAIR:** I think this probably ties on to that and it ties on to something that you were saying, George, before about the health response that quite often gets missed. It seems that a lot of VALS advocacy is around having a health response rather than a policing and justice response. I wonder if you could expand on that area.

**Mr SELVANERA:** Absolutely. Look, Kin will talk specifically around the criminalisation of drug use because we know that that is such a great example, really, of the failure of the response and what happens when you use the wrong type of response to deal with a public health issue. What you do is you then just create a system whereby you have again these high-cost residual services like prisons and the police doing the heavy lifting for something that they are not actually equipped to resolve.

**The CHAIR:** Exactly.

**Mr SELVANERA:** We have seen—and we are obviously hugely supportive of the fact—that there is the decriminalisation, finally, of public drunkenness in Victoria, and we look forward to seeing that being implemented. But it concerns us, for instance, when we hear about the police having a role within public drunkenness still, because with the best will in the world, for all of those reasons around systemic racism, there is an imbalance. That relationship is not an equal relationship. So the risk of escalation of problems is high when you start having interactions between Aboriginal people and the police—it is just high. It is borne out by the statistics. It is not us just engaging in some ideological advocacy; the facts speak for themselves. So it concerns us when we hear about and we see police involvement in what are essentially public health issues like addiction and like drunkenness. Kin possibly might want to talk a little bit more about the criminalisation of drug use, because notwithstanding, I guess, the inquiry earlier this year, if you are looking at the criminal justice system, you cannot not look again at issues of drug criminalisation.

**The CHAIR:** That is right.

**Mr LEONG:** I mean, I think unless there was anything specifically that I did not raise last time—

**The CHAIR:** Probably not. I am interested in, and I do not recall seeing it in the submission, certainly the idea of joining up those different courts. But I just wonder—there was some talk, I think it was Victoria Legal Aid, about suggesting a legislative cautioning approach.

**Mr LEONG:** Yes. At the risk of undermining the very purpose of this inquiry, I think less criminal justice intervention, really—and when we are talking particularly about drug use, less criminal justice intervention is surely a better answer, especially as George has rightly said things escalate quickly, and once you are talking about the custody of people, I think we can all accept that custody is not a safe environment for Aboriginal and

Torres Strait Islander people. So I think any situation that is likely to increase the chance of an Aboriginal or Torres Strait Islander person going into custody—surely any opportunity to avoid that should be encouraged. Also it is fundamentally a health issue in our view, and I think a health response and more a social service response is what we should be looking at. The criminal justice system is an incredibly blunt instrument at the end of the day, and this is a very nuanced issue.

**The CHAIR:** Yes.

**Mr SELVANERA:** Sorry, I am just going to add to what Kin said. Like I said in my opening statement, it was really telling to me when I read the royal commission into mental health report—we kind of quote that little part in our own submission—that actually the corrections commissioner and Victoria Police themselves acknowledge that the underinvestment in community services is a key driver for increased police contact and incarceration numbers. So we all agree—there is a consensus here.

**The CHAIR:** Absolutely, and the recent police *Drug Strategy* document goes to that almost for the majority of that document. You are absolutely right. Tania. No, Tania is quietly saying she is fine. Sheena.

**Ms MAXWELL:** Sorry!

**The CHAIR:** That is good. Thank you, Sheena.

**Ms WATT:** I read, very interestingly, in your submission around the misidentification of primary perpetrators of family violence and why that is over-represented when it comes to Aboriginal women. Of course your recommendation was about implementing the findings from the royal commission. Was there anything more to that that you wanted to add? There was a case study in there that I think was quite compelling, and we have heard from other witnesses that sort of misidentification piece and the impact that that has on family and children—and separation can be quite profound. Is there anything more on that piece particularly, because I really think it has certainly got us thinking at the committee around what more can be done in that area of misidentification of primary perpetrators of family violence?

**Ms LACHSZ:** I might jump in if that is all right with my colleagues. Yes, thanks for raising that, Sheena, because I know across Australia there are really important discussions happening around domestic and family violence and what an appropriate response should be. In some ways I am repeating what we have already said—so if you can bear with me—but a really important piece of this puzzle is the policing response and what it can and cannot do, the training of the police and those kinds of really entrenched distrusting, difficult relationships between the police force and the Aboriginal community. So we cannot really talk about this, particularly if we are talking about Aboriginal people but I am certain in other communities as well, without talking about racism across the police force and the sorts of assumptions that are made about, for example, Aboriginal women that would not necessarily be made around non-Aboriginal women. One piece around that is training, but that is certainly not enough in any event.

Police accountability is a really important piece of that puzzle, and so there have been concerns across the sector—it is certainly not only VALS—around the really broken police accountability mechanisms in this state. At the moment IBAC is responsible for adjudicating complaints that are sent to it, but we know that the vast majority of the complaints that it receives are then reverted back to Victoria Police, so you end up in a position where police are investigating police, and there is no independence in that. So there are going to be missed opportunities, not having that independent oversight, to recognise not only individual instances where these sorts of errors have been made but those sort of entrenched, systemic cultural issues within police as well. And that is important in terms of accountability, it is important in terms of collecting evidence, it is important in terms of Aboriginal people feeling comfortable and confident to make those complaints knowing that they if they go through this process something will come of it. So that is one really important piece of the puzzle.

Another one is—we have kind of said it repeatedly already today—that the criminal justice system or the criminal legal system is a very blunt instrument, and so often social issues, economic issues, health issues are criminalised and the response is, ‘Oh, well, we’ll just create new laws. We’ll widen the net of what we call criminal offending and then we’ll just deal with it with police and with prisons’. That is such a flawed approach. We have seen it does not work, and when we know that certain communities are already overpoliced it just opens up another way in which that can happen. So even though you asked me quite a discrete question,

all of these things are interlinked. I think police accountability, dealing with systemic racism, not always relying on that blunt instrument of the criminal justice system to deal with these issues.

Another really important part, if you are also focusing on prevention and early intervention, is that it is really key that there is culturally safe community legal education that is rolled out across the state. We do have that within VALS, but it is underfunded. It is really important for Aboriginal people and communities and organisations to have a really clear understanding of what sort of conduct would constitute family violence. I think that is another important part of it, because it is flawed to make an assumption that everyone understands that certain conduct could constitute family violence as well—so many pieces to the puzzle.

**Ms WATT:** Thank you for that.

**The CHAIR:** Thank you. We are reaching the end of our time. Is there any final point that you want us to take away? Your submission is extremely robust, and it is beautifully done, so do not think by the short time that we have had together that we have not had a chance to consider the very vast range of issues that you are addressing. But is there something that you think that we really should not leave you without hearing?

**Mr SELVANERA:** I think that we have covered it all, and we are really grateful to the committee for asking us questions and for taking the time to read our very detailed submission. That is obviously the result of a lot of people's work within VALS, and so I pay tribute to them for the work that they have done. To leave you with, I guess, those sorts of key principles from the outset, Aboriginal people and communities need to be in the driving seat of deciding how to make this system that is not working for them work.

**The CHAIR:** Thank you. Certainly, reflecting on all of the submissions we have seen, the work of VALS is reflected in many of those submissions or directly quoted in many of those submissions. So we thank you again for all the work that you have done. We look forward to talking more about this and talking more about the solutions when we release our report.

A transcript of today will be with you shortly. Please have a look at it and make sure that we have not misheard you. But I think we heard you loud and clear. Again, thank you very much for your time today and for your submission. The committee will take a very short break just to reset for the next witnesses.

**Mr SELVANERA:** Thank you very much.

**Ms LACHSZ:** Thank you.

**Witnesses withdrew.**