

TRANSCRIPT

LEGISLATIVE COUNCIL LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into Victoria's Criminal Justice System

Melbourne—Tuesday, 24 August 2021

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WITNESS (*via videoconference*)

Emeritus Professor Arie Freiberg, AM, Chair, Sentencing Advisory Council.

The CHAIR: Hello, everyone. Welcome back. We are very pleased to be joined by Professor Arie Freiberg from the Sentencing Advisory Council. Welcome, Professor.

My name is Fiona Patten. I am the Chair of the committee. With me I have Kaushaliya Vaghela, Tania Maxwell, Harriet Shing, Sheena Watt and Ed O'Donohue.

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

Thank you, Professor. This is also being recorded by Hansard. If you would like to make some opening remarks, then we will open it up for committee discussion.

Prof. FREIBERG: Thank you for the opportunity to give evidence to the inquiry. I also acknowledge the traditional owners of the lands on which we meet, wherever we are.

My written submission provides an overview of some of the Sentencing Advisory Council's recently published research that is relevant to this inquiry, and I do commend you also to the countless other reports on the criminal justice system on sentencing which precede you. As you know, you will stand on the shoulders of giants when you come to this work, which has been an issue for countless decades.

We have heard a lot about evidence-based reform. I do think that is important, but unfortunately much reform is based on emotion, and there is a danger that too many policies are not based on evidence but on what are perceived to be public attitudes that are not in fact the views of the public if the public is adequately informed. And I do also commend you and your researchers to the growing body of research on public attitudes to sentencing and to parole, which show a much more nuanced view of what the criminal justice system and its responses should be.

In the time that I have got I can only highlight some of the key findings of the council's research. We have put a submission to you on our research, and of course there is the website, which contains many of the statistics and well over 60 reports.

As you know, we have had a longstanding interest in sentencing and corrections. In terms of term of reference (1), the factors influencing Victoria's growing remand and prison populations, you have heard extensive submissions this morning on this. What I can add is to identify some of the things that we have found in terms of the growing remand and prison populations. They involve a complex interplay between detected crime, including family violence, which is a really growing problem showing up in our police statistics, in our sentencing statistics and in corrections; bail has been a major feature today, and you must pay attention to that—you have heard that over half of our prison population is people on remand, and particularly for female offenders it is a critical factor; and another factor is the sentencing practices, including the phasing out of suspended sentences and the use of orders combining imprisonment with community corrections. Perhaps in anticipation of one of the questions about what we might do better, there was a reduction in the combined sentences from two years plus a three-year community correction order to one year, and I do believe that a reversion to that previous combination of a two-year imprisonment and a CCO expands the options that are available to judges, which gives them more flexibility. I know it sounds paradoxical to say, 'Increase the length of imprisonment', but it does encompass a greater range of offences.

Then there are the parole reforms which have led to major changes following the Callinan committee, and certainly jail populations are part of who goes in and who goes out, and there has been a big delay in people going out as we have tightened up the parole reforms in response to those terrible crises that we had a number of years ago. It is common knowledge that our remand population has been a major driver. Our past research

has suggested that the growth in the remand population is not a cumulative effect of people spending longer periods but of more people coming in charged with offences, and particularly the serious offences against the person and drug offences. So the offences have got more serious, and many of them are remanded for shorter periods of time. This is the problem about the presumption against bail and the cultural factors. We have become a very risk-averse society, and we have been scarred by our experiences that we have had in the past, and Ms Maxwell mentioned one recently of people who commit offences on bail, people who commit offences on parole. That is seared into our conscience, because the argument, as Tania Maxwell will say, is if they were in custody, they would not be committing those offences. The problem is that we may get some of those wrong, but keeping a lot of people in, who would not otherwise offend, for longer than they need to be is similarly a problem. It is not one that appears in the newspapers. We would rather not take the risk. 'When in doubt, don't let them out'.

The researchers also found that sentenced prisoners were most likely to be in prison for an offence against the person—these are the people who are more likely to go into jail—and we have seen the increasing number of sexual assaults, and that has been a major driving factor over the last few years. The number of principal proven offences for injuries has tripled between 2005 and 2015, and they are a major factor. So we have got the minor offences as much as the growing number of offences against the person. A lot of those are driven by some of those drug problems, particularly the amphetamines—ice—and there was a whole parliamentary inquiry into the ice problem. Again, a lot of the research that you need to do has been done. The question is implementing it. Look at the Ombudsman's report—I mean, to use the famous phrase from Nike, 'Just do it'. You are not having to rediscover it.

So, strategies to reduce recidivism—again, you have heard from the justice initiative and others—are the same strategies as to reduce crime. At a macro level, poverty and homelessness—there was a report that came out yesterday about the importance of finding a home, and we know the social housing crisis and we know that there are many other people in the queue. Offenders are well down the list. Family violence, people who are in poverty, multiple families, refugees—we are, what, 50 000 houses behind? At the moment it is a major investment. We have seen discussed substance addiction, mental health. All the things that you have heard this morning I would just reiterate and emphasise—so investment in those.

Can I just make that point here—not a popular political point, I know—when we say there is no money for the expanded drug services, expanded housing, expanded mental health, there is money. How much are we putting into building the new prisons? Hundreds of millions of dollars—billions of dollars. If you look at a cost-benefit analysis, it is an opportunity cost. It is not a lack of money. Sadly we had a lot of money we spent on COVID, which we needed to. There is funding available. It is a question of priorities, not a question of lack.

We have also suggested the government should be investing in children and young people's services. You have seen our reports, or you will look at our reports, on the fact that early involvement predicts future offending—so steering away those young people. We have looked at a 24-hour bail system for children, expanding the Children's Court for specialised services and specialised programs especially for ATSI offenders. We come back again and again. There is the ALRC report. There is 15 or 20 times over-representation throughout the system. We can talk about self-determination, we can talk about Koori Court and lots of other mechanisms.

Child protection: people have talked about our 'Crossover kids' reports—very important. We have talked about a crossover list in the Children's Court to allow for a more holistic approach. We have talked about pre-trial youth justice family group conferencing, and that is another thing that we ought to look at that the justice initiative talked about. A different paradigm: restorative justice. We are failing compared to other jurisdictions. I think the question is, 'What can we learn from other jurisdictions?'. Adult restorative justice conferences—we have got some in the children's jurisdiction. This is a changed paradigm of the relationship between offenders and victims.

We have also said and you have highlighted the young offenders, 18 to 25. They are very difficult. Males 18 to 25 show a lack of compliance and are over-represented in so many offences. We have found this. They have got low completion rates on community sentence orders and reoffend at higher rates, so we have suggested adapting the community-based sentencing options for adult offenders, tailoring community correction orders with a specialised approach to them and perhaps a dual-track system going from 18 to 21 and 18 to 25 and specialised lists, and I know the Neighbourhood Justice Centre is thinking about how to do that. I am conscious of the time. The terms of reference:

(3) ... ensure that judges and magistrates have appropriate knowledge and expertise ...

Do not underestimate the knowledge and expertise that judges have. I think there is a danger of being overly critical of judges, knowing the kind of work that they have. You talk about how much judicial education. The Judicial College of Victoria—I am a member of the board of the judicial college—has extensive training programs. The National Judicial College of Australia has training programs. None of them are sufficient in and of themselves, but it is not that they are not available. We need to do more. I think it is important that we understand the complexities of the sentencing task.

I will make an offer to you all, if I may, and that is that for 30 or 40 years I have run, and the sentencing council runs, You Be the Judge sentencing. I do it twice a year with my own students. We have got those. I invite you all, together with your staff. You may well have done this before. I am happy to come to Parliament if we can or do it online to go through the complexities. It is easy to criticise judges, to say they get it wrong, but in fact it is harder than it looks, and the answer is not simply mandatory sentencing and take discretion away. I echo Tania Wolff's statement that we have to be very careful about reducing discretion given the cases.

Finally, we have recommended a sentencing guidelines council for Victoria about a broader body incorporating victims, judges and various other people. That is another report that would provide a consistency in approach and a transparency, which are very important. So there are lots and lots of ideas there. I have got lots more that I can share with you here or elsewhere, and I am happy to take questions.

The CHAIR: Thank you so much, Professor. I was hoping you would give us that invitation to take part in the judge and sentencing program. I am sure many of us, especially me, will definitely take you up on that invitation.

One of the points that you made in your submission is around the time-served prisoners, and certainly as a result of our bail conditions we have got people in remand and they are increasingly getting time-served sentences. I was just wondering: does that mean that some people are actually being given a sentence that was longer than they would have had had they not been on remand, had they been on bail? And do we have any idea of how many that may apply to?

Prof. FREIBERG: It is difficult to tell, but it depends on the timing of when they get to trial—and you heard before from Mel that trial dates have blown out. So if they have been refused bail, it may well be that they would have got a community correction order had they heard the case straightaway. So you will get sentences which look strange, maybe a 72½-day sentence, because that is the time served. There is an irony there that had they not been in custody, they would not have received a jail sentence, which will then appear on the record—so the next judge, who may not know what they have done if and when they recidivate, might say, 'Oh my goodness, I've already given you a chance. You've already had a jail sentence'. The chances of getting a community correction order next is reduced on their record. So I think more people are getting sentences which they otherwise would not have got. Secondly, I think anecdotally more people are pressured into pleading guilty so that they can get it over and done with, so they will not serve a longer time, and that is unconscionable. We ought not to have a system where people are coerced in a way to pleading guilty when they may have a case that they want to contest.

The CHAIR: What is the solution to that, Professor? Is it just rethinking our bail laws again, or are there other solutions?

Prof. FREIBERG: As you can see, there is a major crisis. Partly it is our bail laws, but it is Australia wide. It is a risk-averse society. It is also to be seen in parole. Anywhere where there is a conditional provision—bail, community correction orders, parole—we are fearful because of the few, always too many, catastrophic outcomes. So there might be a low risk but a very high catastrophic outcome, and because we are so risk averse we are prepared to keep those people in perhaps longer than they otherwise would, than a risk evaluation might show. Again, I think bail has driven these numbers in Victoria.

The CHAIR: Thank you. Kaushaliya.

Ms VAGHELA: Thanks, Chair. Thanks, Professor Freiberg, for your time today and for your submission. In your submission you mentioned one of the new options for dealing with young adult offenders, which is talking about the community-based sentencing option for adult offenders. Can you please elaborate a little bit more on that?

Prof. FREIBERG: Yes. Look, it is very much about a special or different stream. With the community correction orders we have got drug and alcohol assessment orders, we have got curfews, we have got movement restrictions. There are about 12 or more conditions on those. Some of them are supervision. But because of the high risk posed and the particular problems of, shall we say, immaturity—you know, this neurobiology that we are learning about, the neuroscience—it takes a long time for younger people to mature, to develop, particularly young males, who are high risk-taking populations. Because of their, if you like, future planning—they are very present oriented—it may be necessary or may be desirable for them to have a special stream with people who are particularly trained to work with young people, particular services they may require, particular counselling they may require. They are a different group, and it has been historical, unfortunately, that young males are a high-risk, high-offending population, so maybe we ought to respond in a way that is attuned to their problems. So you are not going to be looking at really long orders, five- or 10-year orders, because their time frames are very short indeed—like tomorrow, not, ‘What’s going to happen me? Maybe I won’t get a job in five years time’. It is, ‘What are my mates going to think? What am I going to do tomorrow? Where do I score my next hit?’. That is what we need.

Ms VAGHELA: Thanks. And just a quick one: how do we ensure we employ the principles of deterrence, rehabilitation and justice while sentencing?

Prof. FREIBERG: Are you okay until about 5 o’clock?

The CHAIR: Yes, ‘Just a quick one’.

Prof. FREIBERG: A quick one. Look, there is an overemphasis on deterrence, and especially general deterrence. Deterrence is about messaging, it is not about the maximum penalty. It is not what the judges are saying, because the people out there to whom the message has been sent are not listening. It is about communication, and those communications have to be heard by the people you are aiming at, and they are not the ones responding to that. They are assessing: what is the risk of getting caught? What is the risk of getting prosecuted? What is the risk of being sentenced? What is the risk of me getting a particular sanction? And a lot of them know that the risks are pretty low in many of the areas. So I would not be relying on principles of general deterrence in doing it. Jail can do some incapacitation. It can do a little bit about rehabilitation. But what we are looking at in these areas is the probability of being apprehended and it is the probability of something happening to them that may be constructive, not necessarily deterrent, because a lot of the people at risk discount the sanction altogether.

And can I say to you as parliamentarians: there is almost no use in what is called ‘marginal deterrence’—that is, going from five to 10 years or 10 to 15 years. It is a completely useless exercise. It may make the public feel good. It has absolutely no deterrent effect. And can I just add one other thing: we are talking a lot about imprisonment. Ninety-five per cent of cases are heard in the Magistrates Court. Only 8 per cent of the cases end up in prison. In the vast majority we are talking about the low-end orders. Twenty-eight per cent of those orders are adjournments, dismissals, discharges, deferred sentences. We have got so much to do in that area that can help rehabilitation early on, together with the problem-oriented court. So do not hang your hats on deterrence, please. Once again, as I would say to my students: we have got a terrific paper there on deterrence, on our website, and it shows it has got limited effect.

The CHAIR: Thank you. Tania.

Ms MAXWELL: Thank you, Chair. Thank you, Professor, for being here today. I just wanted to quickly say that earlier today when I did give the example of a young 18-year-old who was on bail and who has actually murdered another 18-year-old, I was not saying that he should have been in prison, but I was asking the question: what do we do to ensure that this reoffending does not occur? What are we missing with our community supports that is allowing this to happen? My second question is, and it has not really been raised today: whilst we do have people incarcerated we need to have improvements in what is being done within those facilities, because if they are not having the right education, if they are not having that trauma-informed practice, that mental health support, of course upon release they are more likely to reoffend. So I am really interested in what is happening inside our prisons that is not conducive to improved outcomes upon release?

Prof. FREIBERG: Sure—really, really important questions, as I said. Look, everything we do with bail, everything we do with community corrections and everything we do with parole is about risk management, not

risk elimination. We never promise to the community that we going to eliminate risks. It is probably likely we are not going to eliminate COVID. What we are trying to do is suppress risk, manage the risk. So it is about the risk management tools that we need to use at any of those levels, and we need to be able to improve that, and it is very hard because unpredictable things will happen. What I think is important in terms of the bail system is that we retain discretion with those who are making those decisions and provide them with as much time and information that is possible in allowing them to predict the risks. But presumptions against release are what is driving our population. We need to think about what the offences are and what the presumptions are and allow the risk management tools at all levels—presentence reports, parole reports—to be improved, and that requires good science and good resources. So what we do is unfortunately react to those terrible, terrible cases where the risk management fails. But if we try to go too far the other way, we end up with more people in custody.

And that leads to your second question. Look, I still think prisons, hard as they try, are the worst places to try to provide those services. They are just not conducive. The environment is difficult, and some of those are not transferable. The best place to learn how to live in the community is in the community, with those supports. What is useful, as you have heard before, are transition arrangements, housing and support in those first few days, providing people with some money to do it. Inside, I think there are valiant efforts, but how much counselling, how much drug counselling—as I think someone said before: what do you get out of six days or six weeks of counselling? If you have got a lifelong drug habit, you are not going to overcome it in a short time. If you have got lifelong illiteracy, it is difficult. In custody you are moving from low-security or high-security to medium; you are moved around. The environment is difficult. The staffing is difficult. Look, I think they are doing their best, and we should resource them, but my answer is the best way to keep out of prison is by being out of prison and providing those services. And we have the money. I am sorry to say we have the money. If we build them, possibly they will come. And we ought to redirect those resources. They are scarce, we know that. So yes, lots of that, but investment elsewhere is important, remembering that in the Magistrates Court I think we have got 12 000 people on community correction orders and 7000 in jail. That is where the resourcing should go. Keep them out.

The CHAIR: Thank you. Ed.

Mr O'DONOHUE: Thank you, Chair. Thank you, Professor, for being with us and for your evidence today. I was actually going to talk about community corrections, and you just referenced it at the end of your last answer. If you are looking at the risk matrix, and you spoke about the risk matrix, obviously having a robust community corrections system that mitigates risk within limitations is very important. There have been several Auditor-General's reports, Ombudsman's reports, that have highlighted perhaps that community corrections have not done always the best job in mitigating or managing risk. Given your view that we should keep people out of jail where possible, it is critical we have a community corrections system that does the job as best as possible. Could you comment on that, please?

Prof. FREIBERG: Yes. Terrific question. Look, I have seen some of those reports, and I know it is particularly difficult. There was a huge investment in community corrections, and there are problems. We do a monitoring report quite often, and what we have found there is that the non-compliance rate is about 48 per cent, so it is similar to prison. But a lot of that is breaches of conditions, so it is not further offending. So what we find is that again the requirement of adequate support, adequately trained people—finding community correction officers, that is difficult. I think one of the problems that we have is the community work. I think the Auditor-General and others found, especially now, with COVID, that a lot of the orders are for community work, and that must be difficult in times when no-one can go out. And it has got to be meaningful work; it has got to be useful work. I think our figures show that the judges are in fact losing confidence in the community correction orders. In fact the numbers are receding, orders are dropping, as the jailed populations are going up. So I think that that requires further investment, better training, more experienced people. I think they are working incredibly hard, but it is not a perfect system by any means.

I think we need to be creative in that area, by the way. I chair the Tasmania Sentencing Advisory Council. We are looking at the introduction of home detention as another non-custodial option. I think we need to be creative about some of the options that we are doing. But you are right, it is not a perfect system. It really is problematic at the moment, and the numbers are going down. So whether it is investment in resourcing, staff or training, I have not looked at that, but I would rather put my money there than in the prisons.

Mr O'DONOHUE: Thank you.

The CHAIR: Thank you. Harriet.

Ms SHING: Thanks, Chair. Thanks, Professor Freiberg, for your contribution today. I am keen to understand where the *Sentencing Act*, the guidelines and the relevant factors can be refined to in fact not just achieve the ends that you have talked about—in a long horizon, rather than a case-by-case example of what community protection or better safety or rehabilitation looks like—but then also to understand how we can potentially engage with those factors and with those guidelines around the exercise of discretion. And I note your point about how judges and magistrates are not coming down in the last shower. They do know what they are talking about. But to go back to a point that was made by the law institute earlier, there was a discussion around deploying expertise and legal knowledge and experience. How do we make sure that continuing professional development, not just through the judicial college but through other means, makes the right points around vulnerable cohorts, around offending behaviour and around trauma-informed decision-making, care and support to achieve that long horizon? And how do we reach back into legal education in order to achieve those ends? Just a little one, again, for you.

Prof. FREIBERG: No, no. Love it—absolutely spot on. Look, I know that as well as the judicial college each of the courts has their own seminars and training and the like, so they are not unaware of all this. They are seeing the mental disorders, drug addiction and family violence every day. I mean, when people say they are in ivory towers—it is the rest of us who are in ivory towers. We are not seeing it every day. They are, and they are concerned.

So the broader question is in relation to the *Sentencing Act*. The *Sentencing Act* is from 1991, so we are nearly 30 years in, and it is in urgent need of renovation. There is a renovation project going on, and I understand that there will be a Bill coming your way some time in the future. You can talk to the Attorney about that, but I am involved in that renovation process. That will involve looking at the guidelines, the objectives, the relevant factors and the sentencing methodology. It is now an overgrown Act.

Can I just raise some of the issues that I see that I have said publicly recently? The sentencing restrictions in the Act are overly complex, inconsistent and unduly restrictive of judicial discretion. The growth of these category 1 and 2 and category A and B youth offences are complex and making the sentencing exercise too difficult. I am sorry to say to parliamentarians, but the mandatory sentencing provisions are often inappropriate, meaning that some people who should not be in jail are in there. The Act is unwieldy. It has got countless amendments.

We do need new intermediate sentencing options. I think there is a gap between the prison and the CCOs. We did abolish the suspended sentences. It is time to think about our intermediate options. We have to think about the way sentencing factors are adversely affecting female offenders, and that is a really serious issue. The Centre for Innovative Justice just did a terrific report. We have mentioned the new youth CCO. There will be a new youth justice Act coming down the track—I think the sentencing guidelines council, age of criminal responsibility. There are big issues around the NDIA and justice plans for the intellectually disabled. All of those issues, if it is of any comfort to you, are under consideration at the moment with a review of the Act, and that is the foundation of the sentencing system in Victoria. So the government is aware, I am aware, the profession is aware, the judges are aware and you are aware that a review is needed, and in fact it is underway.

Ms SHING: Can I just follow that up very quickly, Chair?

The CHAIR: Please.

Ms SHING: Again, with vulnerable cohorts, when we look at specific characteristics and we note the Koori Court's work associated with understanding the differential impact of specific factors on offenders and on reparation, as far as that is delivered, to what extent, in your mind, do refinements to the guidelines, to the factors and to the Act overall enable us to look at opportunities for those vulnerable cohorts more broadly in order to achieve better ends as far as the objectives of the sentencing framework?

Prof. FREIBERG: Sure. Look, I think there are two parts to that. One is that I have been committed for a long time to this notion of non-adversarial justice throughout the system, and that includes the things you heard about before—the CISP system, the liaison officers, all of the specialist jurisdictions and the Koori Courts. I mean, they can only deal with a small number of cases with the ARC, family violence. Neighbourhood Justice Centre is a great example of linking things, and it bewilders me why that has not been rolled out to other

jurisdictions, so I think joining together those services. Some of the underlying principles of self-determination, recognising the colonial history that we have had with Indigenous offenders, are going to be very important. We also now have an experiment that is called the Gladue reports or the Aboriginal background reports. There is a trial with that, and that will provide contextual arrangements. There have been some interesting judgements recently about the role of trauma and the role of history, colonialism, and that that can be built into legislation, which is partly about culture. So it is not that the courts are not aware of them and the profession is not aware of them. I think we have to articulate them, we have to concretise them in legislation and we have to operationalise them, and that is what is coming. So, look, all of those things you are talking about are there, and they are in plenty of reports. So if your report can add strength to that and build on that, then it is a question of action. There is no end of ideas. If you want ideas, you will be going for the next 50 years.

Ms SHING: Thanks, Professor Freiberg. I really appreciate that answer.

The CHAIR: Thank you. Sheena Watt.

Ms WATT: Thanks, Chair. And thank you, Professor, for coming today. I really do appreciate you sharing your expertise and significant knowledge with us. I have a question about offenders aged over 60. I understand that you are undertaking some current projects, one of which is looking at an analysis of offenders over 60. We have not talked so much about older offenders, and I would be interested to hear from your perspective what is going on in the older offender space.

Prof. FREIBERG: If you just hang on a second, we are about to release a report on that. If you look at the screen carefully, I objected to older offenders being over 60—I thought about 90, depending on your perspective!

Ms WATT: Okay, perfect.

Prof. FREIBERG: But we are looking at that at the moment. We are looking at what offences they commit and what sentencing factors are relevant. We have had some preliminary findings on that. I am just having a look at it. So we are looking at the fact that the proportion aged over 60 has increased over recent years from 13 to 21 per cent, and we are going to look at the trends in the number of offenders. We are looking at age, gender and offence profiles, what sentences have been imposed, prior offending and the relevance of age as a sentencing consideration, particularly illness, ill health and the effects of imprisonment on them. We have found that a lot of those have to do with traffic offences, interestingly, and it is not the major violent offenders that are the problem. The big issue for the prison system and the courts is of course the historical sex offences, and so there are a lot of offenders who are coming out, especially post royal commission. So we have got people in their 70s, 80s and even older in jail for offences committed 40 or 50 years ago, and that raises significant problems. But watch this space. It is a terrific report coming to a bookshop near you soon.

Ms WATT: Thank you.

The CHAIR: Thank you. I am afraid to say we are out of time. Professor Freiberg, thank you so much for your input today—it was really useful and really enlightening—as well as your submission, and yes, we will hopefully see you again, taking you up on your invitation.

Prof. FREIBERG: I look forward to seeing you, and do not worry, it will not be marked. There are no assessments.

The CHAIR: Okay, great. Thank you. Thanks, everyone.

Witness withdrew.