T R A N S C R I P T

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

Inquiry into youth justice centres in Victoria

Melbourne — 30 May 2017

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Ms Nina Springle — Deputy Chair
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Witness

Ms Helen Fatouros, executive director, criminal law services, Victoria Legal Aid.

The CHAIR — Thank you for coming to give evidence today. All evidence taken at this hearing is protected by parliamentary privilege. Therefore you are protected against any action for what you may say here today, but if you go outside and repeat the same things, those comments may not be protected by this privilege.

Thank you for coming today. What we have generally asked people to do, if they wish to do so, is to make a few brief comments, no more than about 5 minutes or so, and then we will open it up to questions. If that is what you would like to do, we might proceed on that basis.

Ms FATOUROS — I would like to in turn thank the committee for its work and for inviting Victoria Legal Aid to be present and provide an oral submission. I will be amplifying some of the matters we set out in our written submission, but of course there are a whole lot of other things about the system that you may be interested in. Having been both a prosecutor and a defender and now leading the largest criminal defence practice in the state, there is a lot of systemic knowledge there that I may be able to assist the committee with.

I thought I would sort of frame my comments just around how Victoria Legal Aid services are provided in the youth crime space. We are the largest provider of youth crime legal services in the state. We do that through grants of legal aid, which is the most intensive service offering we provide — that is provided both by in-house lawyers as well as by private practitioners. Private practitioners are required to be part of a panel which sets out certain standards around their expertise and qualifications to do legal aid work. Obviously our in-house practice has all of the employee controls that go with having an employee practice. We have a large number of accredited children's law specialists who are both on our panels and in our in-house practice. In the last financial year we delivered 4000 grants of aid and just under 4000 duty lawyer services, which is a less intensive type of legal service.

Our in-house practice also provides outreach services to all of the detention facilities. It became quite challenging over the last six months, spread across three sites, obviously with the addition of the Grevillea unit. We do so irrespective of whether we have a client relationship with remandees or sentenced young people. It is a welfare check approach. We either connect them with their lawyers or make sure they do not require any further legal assistance, and we go out physically to all of the detention facilities.

I thought I would start out by making some general comments around the adversarial process. Having prosecuted for more of my career than I have defended, what I know about the sentencing process is that although the adversarial system is imperfect, when working with victims and particularly children who have been victims of serious offending — and I have worked with victims of child sexual assault and other serious offending — the impact of that trauma can have a long effect on the life of an individual going into adulthood, and it can create a whole complexity around the way they cope with that trauma.

Often victims can become the accused and vice versa. That is certainly very prominent in the Children's Court jurisdiction, a specialist jurisdiction where you have highly vulnerable victims and are often accused of wearing both hats at different points in terms of their pathway through the criminal justice system. Although the adversarial system pits one side against the other, prosecution against defence, and it is seen as a bit of a contest, it is more complex than that and we have to be careful not to reduce the discussion about how the criminal justice process works for the victim and the accused, particularly in the Children's Court jurisdiction.

That is clearly borne out by the Youth Parole Board's annual report in terms of the profile of the most serious young offenders that they deal with in terms of the backgrounds of disadvantage: child protection, sexual abuse et cetera that they come from. They have a multitude of complex issues that often play out in their offending and drive their offending, but also require very different approaches — non-traditional criminal justice approaches — in terms of how we handle their offending and how we handle them as they progress through the system.

I think it is also important to note what the sentencing process does, and in particular it is a balancing act. It is not about tough and soft; it is not about good and bad. It is a balancing act that is often designed to manage competing objectives — for example, punishment, rehabilitation, which do not always sit comfortably together. It is a complex process that necessarily involves an individualised response to the case before a judge or a magistrate.

But we cannot design our youth justice system or design our criminal justice response to complex youth crime issues based on the individual high-profile case. Necessarily the fair and effective delivery of justice means that

in every individual case we must look at the victim and the impact on the victim individually, and we must look at the accused person individually as well. What makes them? What are both the serious objective factors of their offending, as well as the personal factors that make that person up and have got them to that point in the criminal justice system?

That balancing act is a very important one, and the Children, Youth and Families Act and many decades of law recognise that children, quite appropriately, are to be treated differently in the criminal justice system. I think as a society we have a choice to make in terms of how we achieve that balance and how we come up with thoughtful responses to youth crime. It is a specialised area, and we can either choose to apply ourselves to the complexity of that balancing task or we can reduce it to a simple binary of punishment versus being soft on crime.

A lot of work gets done in the Children's Court day in, day out by magistrates, practitioners and police prosecutors, often working very much in consensus and in agreement. Every day in that jurisdiction we are applying a more therapeutic approach to how we deal with young people committing offences. The criminal justice response cannot be divorced from the social context in which criminal offending takes place, and you will probably have heard countless hours of evidence before you. I have always said in the various policy advice roles that I play that what happens in the home, what happens in the classroom, what happens on the street, is just as important to our criminal justice response. We have to integrate our legal and non-legal responses, and we have to prevent, intervene early, as well as have a sharp response for the more serious offending.

I just want to turn to that now. We have very small cohort of serious offenders committing serious crimes that have a very profound impact on victims in the community. The fear in the community is entirely understandable, and when I say that we have to have a range of individualised responses to youth crime offending, one of those at the apex of the hierarchy of sentences must necessarily be detention. It will be unavoidable for some young offenders, but they are definitely in the minority.

What we really must turn our mind to is for those children who we detain, what are we doing with them for the time that we have them in custody? They will be released, so even if we lengthen their sentences — and that is a question of quantum and the legislation that we land on — what are we going to do with them whilst we have them in custody? Are we using that time productively or are we actually doing more harm, given what we know about young offenders and what their profiles are — the backgrounds of disadvantage and trauma that they come from? Or are we going to apply ourselves to creating smart detention centres that have lots of different ways of maximising the time we have that child in custody? And then importantly, what do we do upon release? Are we going to maximise their chance for rehabilitation by linking them in with meaningful employment, vocational training and education, or are we not going to focus on the importance of an end-to-end process that is in the best interests of the community ultimately if we reduce reoffending?

I might stop there, because I am sure you have got lots of questions.

Ms SPRINGLE — Thank you. Given all of what you have said and the importance of a nuanced response, I suppose, to what are incredibly complex problems, what is your feeling about the machinery of government move from DHHS to department of justice in terms of the youth justice system?

Ms FATOUROS — Look, as an institutional stakeholder I see an opportunity with concentrated effort around the machinery of government change actually enabling us to get more targeted solutions and perhaps work on what are some historical problems within government over many, many years. It remains to be seen. The department is very new. We work with all parts of government in a policy advisory role and also through the fact that we are the major funder of legal services, but it remains to be seen. I am looking at it in a positive sense in terms of how we can get really concentrated, targeted problem-solving around youth crime.

Ms SPRINGLE — Why do you think that was not possible under the Department of Health and Human Services?

Ms FATOUROS — I am not suggesting it was not, I am suggesting that over many years it may not have received all of the attention that it could have.

Ms SPRINGLE — Okay. All right.

Mr MULINO — One of the long-term trends that has been experienced by the youth justice system is the increase in the proportion of young people in the system on remand. I am just wondering what your thoughts are on funding going into the remand court and how you think it might work in practice.

Ms FATOUROS — Victoria Legal Aid partnered with the court and with Victoria Police in working through the remand court being one solution to address issues around increasing remand numbers. So I do not think it is a total solution but it is an important part of us addressing the issue. It is not just about speed; it is also about the attention that we can provide the most complex cases, which are the remand cases, and it is about being able to have dedicated resources for all of the institutional players to run a remand court that works effectively and efficiently. But I think we also have to look at the broader issues around what is causing more kids to come into detention centres through remand. It ranges from legislative changes to police practices to charging practices. There are a whole range of factors that go into why our remand numbers have increased, and the court is just one part of the solution.

Ms SYMES — Could you just elaborate a bit more on how the court will work, from your perspective?

Ms FATOUROS — We have just started this week, and it will have basically dedicated magistrates running a remand mention list, in effect, which means that you can get bail applications or remand hearings on much quicker, which is really important when we are talking about children. But the other thing we can do is we can start working through the court process around what are the supports or programs we want to link that child into as early as possible when they come into the system, and taking that more holistic approach will be possible when you have a dedicated court as opposed to the court that has a mixed case load of remands and other work, which means that it cannot prioritise effectively for the most critical serious cases. Does that help?

Ms SYMES — Yes, so effectively it is using the justice system as a point of contact for potentially the first time for people to direct them into the right services. Would there be a lot of people using it as positive rather than for treatment?

Ms FATOUROS — It is certainly an intervention point, but I would say that it is not the only intervention point. One of the really important aspects of a youth justice system and one of its strengths historically has been that often the pathway of a child coming into contact with the criminal justice system is it can happen through child protection, it can happen through their first contact or it can be a build-up, if you like, of issues in the child's life that keep bringing them back and they are now on remand because it is a more serious offence that has led them there. So I would caution against viewing the remand court as the first intervention point, because it is actually much further down the track often. Although there are some offenders — because of the impact of the drug ice, it creates some real complexity in all offending, including youth offending, where you can have a very young offender without any prior convictions or prior matters coming to the court for a first serious offence as their first offence. That presents a range of complexities for the criminal justice system and how we deal with those types of offenders and offences.

The CHAIR — One of the issues that was raised with us by a witness on an earlier occasion — not today — was their view that the police workload often results in a situation where children are repeatedly brought back to court and the police may say, 'We're not prepared, we're not ready', and the cycle goes. I do not intend to have go at the police. I make the point that this was raised by a witness — it was their view. What are your thoughts on that? Is that what you see?

Ms FATOUROS — I think there are varied experiences, but, as a general comment, the Children's Court jurisdiction and also the adult jurisdiction are both overburdened systems. We have got cumulative impacts of a lot of legislative change, a lot of sentencing change, and the demand pressures on both jurisdictions are significant. So it is not unusual — and I am not surprised by someone providing that example, because it is one we experience — but to be entirely frank, with all of the professionals working in the system, their resources are stretched and they are working under considerable pressure, and there is no doubt that we can all do better.

Mr MULINO — Just a general question on the youth justice review being undertaken by Penny Armytage and Professor Ogloff. Have you had any input into that, and what do you see as some of the key opportunities?

Ms FATOUROS — Yes, Victoria Legal Aid has had quite a lot of input into it, but the whole sector has — not most recently, as I understand the report has been prepared. We are really looking forward to it. It has taken an evidence-based approach, in particular around assessment of young people as they come into the system at

different entry points, and proper linkage with services and programs. But importantly it is also going to provide an evidence-based approach — I hope it is going to provide this; I have not seen it obviously — to how effective programs work and where we can make the best impact when it comes to rehabilitation and reducing reoffending on one end but preventing and diverting at the front end.

Mr MULINO — That just reinforces what you were talking about earlier — you have got a look at this holistically. There are a lot of programs that affect young people very early on before they even touch the criminal justice system.

Ms FATOUROS — That is exactly right, and we know that diversion is our best chance at prevention really early on if you get it right and we have it consistently available across the state. But it is about having a multifaceted criminal justice response. You need to be able to deal with the small number of offenders that are committing really serious offences at the top, but also with the majority of offenders at the bottom of the tree, so to speak, where you want to divert them and you actually do not want to drag them further into the criminal justice system, given what we know from decades of research now about how stigmatisation works with young offenders. Tough approaches actually have the opposite effect to some adult offending, and because of the immaturity and underdeveloped adolescent brain they can fuel more offending — and a lot of the research demonstrates that.

Ms SPRINGLE — Just as an extension on that, there is a bill that is coming through the Parliament currently on some reforms in the youth justice system, and it appears from a preliminary reading that it attempts to roll back the dual-track system for some of the more severe offences of offenders between 18 and 21. Have you got some thoughts that you might like to share on that?

Ms FATOUROS — I have not read the bill in detail yet, as it has just been introduced into Parliament. We are in the process of going through in some detail to understand what the impacts might be, but it is clear, from my perspective, that the parts of the bill that introduce complexity around which offences need to go upstairs or into the higher courts around the dual-track avenue are being weakened. Those features of the system are being weakened, and I think that is going to have a particularly adverse impact in terms of how we deal with those more difficult, complex offenders. It may affect rates of resolution depending on how the higher courts deal with it, and it remains to be seen. I think we have to see it in operation, but I certainly do not think it achieves the right balance in terms of punishment.

Ms SPRINGLE — You do, or you do not?

Ms FATOUROS — I do not think it achieves the right balance. I think some of the features of the bill around youth control orders and intensive bail supervision are really strong features which many of us in the sector have been talking about for a long time, so I think they are going to strengthen our existing youth justice system, but I think some of those other provisions introduce real complexity into the jurisdiction and erode some very well-established principles and safeguards. I am not as optimistic about what the impact of those changes will be.

Ms SPRINGLE — Do you have any thoughts about what those impacts might be on the ground?

Ms FATOUROS — I think it is going to be more expensive. I do not think it is necessarily going to result in more effective rehabilitation or reducing the reoffending rate. I think it could result in less resolutions, which is not good for victims or offenders or the system or the community, and I think we are going to have potentially longer, more expensive hearings at all levels of the higher court jurisdictions, depending on also how police approach their charging of young offenders under the new regime. So there is a potential for lots of different impacts, and we will just have to wait and see.

Ms SPRINGLE — On the same topic but a different matter, in terms of diversion programs and community-based early intervention prevention programs, do you think there is enough of it?

Ms FATOUROS — No. I think we have got what I call the patchwork quilt of diversion programs. We have certainly improved them in recent times, and Victoria Legal Aid certainly welcomes a legislated scheme, although there is one feature of the scheme which will not address this issue of postcode justice — differential access to programs, country kids who miss out on programs that city kids have access to. So I think we are not doing enough. We need to do better with the ones we have, and we need to fund across the state and have a

consistent response both in the courtroom and in the program sector. I do not think we are doing as well as we could be.

Ms SPRINGLE — When you say doing better with the ones we have, what do you mean?

Ms FATOUROS — I think a lot of program providers would say that there is an uncertainty around their funding and that it makes it very difficult to plan in the long term. I think we probably have to build in more evaluation so we can take a really rigorous evidence-based approach — what works, what does not. There is a lot of expertise in the sector, but it is inconsistently applied. The announcements around diversion come with funding for it to be rolled out statewide, but that is heavily focused towards the court response, and of course that comes with a very unusual feature, which is the police veto, where police actually act as the prosecution agency because that is what police prosecutors are in the lower jurisdictions. They act as the gatekeeper.

It is a very unusual feature not seen anywhere else in the law. As an adult offender you have access to adult diversion without the police playing that role, and yet in the youth justice system we have that feature. Our on-the-ground experience from our lawyers is that depending on where you are in the state you will either have access to diversion in a nuanced, sensible way or you might not have access to it for similar offending and similar profiles of offenders. So that is not a great experience for clients, victims and the community.

Ms SPRINGLE — In your view what would remedy that?

Ms FATOUROS — It should, like all other sanctions or sentences — and I use the two phrases because it depends: diversion can be pre-charge; there are different versions of it — lie with the court, and the parties, just as in the normal course of proceedings, should be able to make submissions one way or the other if there is a contest. I should point out that a lot of the time what members of the community but perhaps also other parts of the sector may not realise is that there is a high degree of consensus between the parties in the Children's Court, so there is a lot of agreement and there is a lot of work that happens between prosecutors and offenders and the court to get a good diversion plan in place. But in relation to keeping the discretion opaque and within the prosecutorial space, you do not get a transparent approach to how decisions are made around diversion as an outcome, and it really should lie with the court.

The CHAIR — If I could follow up on that, if I may. Is Victoria different to other states in the way youth diversion has that gatekeeping function for police? I think that is a paraphrase of what you said.

Ms FATOUROS — It varies, and it is an unusual feature of the Victorian system.

The CHAIR — And you said that obviously outcomes of that process vary around the state. Is that quantified anywhere or is it captured anywhere?

Ms FATOUROS — I think the short answer is no, but it is a bit more complex than that. Like a lot of criminal justice data it is fragmented and it is sort of spread across different agencies. So it is captured in some places, but it is not complete data. The president of the Children's Court actually runs a committee around diversion, and all of the sector is represented and there have been discussions around how we quantify this particular issue.

The CHAIR — Thank you. Ms Fatouros, is there anything further that you want to say to us today?

Ms FATOUROS — Only to reiterate that we have to look at the youth justice system holistically. We have to look at it as a system, and we have to link it to all of the early interventions which come well before we hit the justice system, so where you have your universal health education systems which have their own challenges, how we link in schools, how we link kids back into education much earlier, because we know that that is a particular feature. Disengagement with education can often be a precursor to other issues which lead a child into trouble. So the earlier we can intervene the better. The more preventative work we can do the better, and that means working within communities and looking at community-driven responses to the triggers for youth offending.

We have to work on the inescapable link between socio-economic disadvantage and what some of the risk factors there are in terms of youth offending. Then at the other end we have got to get the post-release detention settings right, and they have to be designed specifically for children because children have different needs. The care we provide in detention can be a mixture of discipline and appropriate punishment but balanced with

trauma-informed care by specialist providers who know how to work with kids. Our experience in the detention centres is that over the last six months with the many challenges that the system has faced in detention there has been a marked shift in the quality of care, and it is a trigger to some of the disruption we are seeing in detention centres. We are seeing a change in the attitude of those that work with children, and we must guard against that becoming entrenched through cultures that do not actually support rehabilitation within detention, particularly when we know that kids that are in residential care are often over-represented in the criminal justice system.

I would recommend our *Care not Custody* report that Victoria Legal Aid recently released, which shows the link in terms of kids in residential care often being charged with criminal offences in a way that drags them further into the system and criminalises behaviour that should not be addressed by the criminal justice system. I guess our further research in that area shows that if we have a child that comes into our services through the child protection system when they are young — 10 to 12 — they are three times more likely, because of their early childhood trauma, to come back as criminal law clients in the youth crime division and then to graduate, if we do not intervene properly, into the adult system. So we want to stop that cycle, which means you have got to look at the response end to end, outside of the courtroom and inside the courtroom.

The CHAIR — Thank you very much. You will be provided with a copy of the draft transcript of your evidence today so that you can have input into that. You should receive that within a few weeks.

Ms FATOUROS — Thank you for your time.

The CHAIR — On behalf of everyone, thank you very much for your time and your submission today.

Witness withdrew.