

# TRANSCRIPT

## LEGISLATIVE COUNCIL LEGAL AND SOCIAL ISSUES COMMITTEE

### **Inquiry into Children Affected by Parental Incarceration**

Melbourne—Monday, 9 May 2022

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**WITNESS**

Ms Melinda Walker, Criminal Lawyer.

**The CHAIR:** Welcome back, everyone. As I am sure you know, this is the Legal and Social Issues Committee's public hearing for the Inquiry into Children Impacted by Parental Incarceration.

We are very pleased for this session to be joined by Melinda Walker, a criminal lawyer. Melinda is here as Melinda Walker, criminal law solicitor.

Melinda, I am not sure if you got to meet, but we have got Nina Taylor online, Cathrine Burnett-Wake, Rod Barton and Fiona Patten—myself.

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

As you can see, we are listening to every word. We are recording every word that you say. You will receive a transcript of this after this hearing. Please have a look at it and make sure we did not mishear you or misrepresent you. Ultimately it will form part of our report and make its way onto our website.

Melinda, I would love it if you could make some opening remarks, and then I will open it up to a committee discussion.

**Ms WALKER:** Thank you so much. Thank you very much for inviting me. If I could start by acknowledging the traditional owners of the land upon which we sit—usually I am in Wathaurong land up in sunny Ballarat. I acknowledge the traditional owners and pay my respects to elders past, present and emerging.

Given that I am doing this as an accredited specialist today instead of as a law institute member, I gave some thought as to what would be of benefit to the inquiry from the capacity that I work in. As I work in the criminal law section of the criminal justice system, I thought I would look in terms of sentencing options and in terms of the bail laws—you know I am very passionate about that—and also the sentencing considerations. I am sure you have heard a lot of evidence from other organisations who support children when their parents go into custody. I am at the beginning when that parent does go into custody, so it is what we can achieve as criminal lawyers, and also just acknowledging the consequences that flow from something like that.

I will speak briefly as to my involvement many, many years ago when I was part of a group of individuals who started the Mirabel Foundation. Mirabel is a foundation that started in 1998, and that was set up as a foundation to support children. Primarily it started to support children whose parents died of drug overdose but obviously very quickly expanded to assist children whose parents not only died from drug use but also were imprisoned as a result of their drug use. Mirabel is still going today, but it was to support the supporters. It was to assist grandparents to pay for school fees and other things like that. The foundation, as I understand it, is now also in New South Wales and doing some terrific work. You can get the information from them as to where they are going. But that was back in 1998 to show the gaps that were there for the children who were being adversely affected by parental drug use and then parental death and also parental imprisonment.

So we all know that when somebody goes into prison, whether it be pre trial or at a sentencing stage, that can affect their capacity to care for their children and what happens to their children. I am sure you have had a lot of evidence now from other organisations as to what things they can do to support those children, but the fact remains that a child being taken away from parental care is damaging. It is about what we can do about that in the criminal justice sector to prevent that, rather than agreeing or accepting that a child can go into prison, for example, until a certain age, to keep that bonding for those young children, or whether or not we need to look at other options. Certainly in sentencing I believe that that can be done.

As you know, suspended sentences, for example, were abolished in 2014 and left for the courts very limited options as to their sentencing dispositions. Certainly where a person is at the end of the road, if I could say something like that, then imprisonment is sometimes a likely occurrence or a likely outcome. We do have

specialist courts, such as the Drug Courts, which look at offenders who are offending due to their drug addiction and manage that person through the Drug Court rather than send that person immediately to prison, so as to address the underlying causes of that drug use and try to manage them in that way. But that Drug Court is a punitive sentence, and so it does not necessarily directly address the drug problem. Also there are sanctions that you can get in Drug Court, which again are punitive.

There is a fabulous program that is running out of the Children's Court, which has nothing to do with criminal law. It is the Family Drug Treatment Court, out of Melbourne, Broadmeadows and Shepparton, and it has been going for some time now. I do not know why it has not been expanded to the Magistrates Court as such. It is a civil jurisdiction, of course, in the Children's Court family division, but it is a 12-month therapeutic, judicially monitored program in a highly supportive non-adversarial environment which encourages or supports that parent to gain the custody again of their children. It is generally when those children are in departmental care, but again that is before they get to prison.

So what happens to people who go to prison? We all know that that can be an extremely disruptive time, not only for that child but for the parent. There can be a loss of housing, a loss of income. It can affect their mental health. The child then goes into departmental care, whether that be in foster care with family or whether that be into foster care with foster carers, or if unable to go into foster care they go into residential care. And that can be an absolute disaster for that young child. Not only is that child away from the parent and the support of family but they end up going into a system where they may not come out the other side. The inquiry would already have access to *Crossover Kids*, the Sentencing Advisory Council's report into children who enter departmental care and quite rapidly will go into imprisonment. I think the statistic was quite a huge statistic. At around about the age of 22 they would be undergoing their first term of imprisonment.

If I could stop there. I think this is an important quote that you need to hear. It was not written by me; it was given in a paper presented at the Juvenile Crime and Juvenile Justice: Toward 2000 and Beyond conference in Adelaide. It was written by Y Korn in a paper called *Strategic Directions in the Prevention of Youth Crime*, and it goes like this:

If you were interested in creating a criminal you would have a pretty good chance if you took a young person from a seriously troubled home, put them into a series of foster or group homes, changed their primary worker on a regular basis, let them run away from 'home' at an early age, allowed them to drop out of school and enabled them to develop a drug and/alcohol addiction. Your chances would improve if, somewhere in their lonely and painful existence, they had been sexually, physically or emotionally abused. If in those few instances that they sought help you would ensure that there were no accessible services, that the workers they encountered were rushed and overwhelmed by heavy caseloads, and that they would be seen first and foremost as trouble rather than troubled, is it surprising then that these young people would become perpetrators or victims of crime?

I think that in terms of sentencing it is important to remember that the effects of sentencing do affect others in the family. There are sentencing considerations of hardship that the court is able to take into account, which is an exercise of mercy. The court can only mitigate a sentence, however, where there are exceptional circumstances. When a child is said to be taken away from his or her parental care and to go into departmental care the court's reaction sometimes to that is, 'Well, they're not homeless; they're not on the street. They're in departmental care. They're going to be cared for; therefore you cannot satisfy me of exceptional circumstances'. And mitigation could have been from a custodial to a non-custodial sentence. So there is nothing within the criminal law really that can assist in terms of that, but what I think in terms of a recommendation would be the revisiting of alternative sentencing dispositions again, particularly in circumstances where there is a family involved and a family who would be affected.

If I could just finish my introduction with this: our capacity to talk and think about rehabilitation—it is an important part of sentencing—about redemption and about recovery is essential and encompasses what it means to be cultured. Our determination to act will ultimately define our humanity. Our unwavering defence of the defenceless, of the vulnerable and of those in need will enshrine our place in history and confirm for those looking back that we did care, that we were ashamed, that we were outraged and that we were resolved to speak out when we saw injustices and to be the voice for those who had been muted. Thank you. I will invite questions.

**The CHAIR:** Thanks, Melinda. That is a very powerful quote. Prior to 2014, when we had suspended sentencing, in your experience did you see that quite often used for parents? So when they were the primary carer that was actually quite a common reason for a suspended sentence?

**Ms WALKER:** Absolutely—probably more often than not. Suspended sentences were used in a number of different ways, either as the last resort—for example, all other sentencing dispositions, ‘You’re at the precipice of going into prison. We’ll give you one more opportunity’—or to acknowledge somebody’s circumstances as they were. They may have undergone significant rehabilitation. You have got to remember this is before we had Drug Court and other more robust community corrections orders, because community corrections orders were brought in as a replacement for or to compensate—I think that is probably the better word—for suspended sentences being abolished. So it is a shame that there was not all of that work that had gone into corrections orders before the abolition of suspended sentences. A lot of times suspended sentences worked. They were a significant deterrent, particularly for people who were unable to comply with or had exhausted all of the assistance that could be given to them back in those days. But I think there is better assistance now that could certainly be utilised if suspended sentences or a type of—I know Professor Frieberg always says to me, ‘Mel, they’re not coming back, so don’t talk to me’.

**The CHAIR:** Yes, move on.

**Ms WALKER:** But I think in a different format—I mean, with a Drug Court order a sentence is suspended over that person’s head for the duration.

**The CHAIR:** So when a parent is being prosecuted, is their role as a primary carer, as a parent, taken into account? Is there a process for that to be taken into account under the current sentencing rules?

**Ms WALKER:** There is under common law. As I said, there is a sentencing consideration of hardship to family or third parties.

**The CHAIR:** But that hardship would have to be—it is a high bar, I think, from what you were saying—that that child would have to be homeless or on the streets if the parent received a custodial sentence.

**Ms WALKER:** Yes, exactly. And I think that, you know, you could think about what would be exceptional circumstances. You could perhaps have a child who is undergoing significant medical treatment, where the parent is required to provide that emotional support for the child. There may be children who have mental health difficulties who would decline if their parent did go to jail. So there are those considerations, and every court takes that evidence as it comes before it. But there must be evidence of that, so you go to great means. I have been doing this job now for over 25 years, and I have been successful in one argument of hardship.

**The CHAIR:** Right. So it is not really available in that case.

**Ms WALKER:** Is not readily available.

**The CHAIR:** It is there on paper.

**Ms WALKER:** It is available, but it is not readily available. You have to have the circumstances.

**The CHAIR:** Look, I am conscious of time, so I have just one really quick question. We heard about section 26 in New South Wales, which was a program that CRC and the Miranda Project are running where when someone is getting close to parole they can get basically kind of a pre-parole parole for parental care. I think it is section 26 of their—

**Ms BURNETT-WAKE:** *Crimes (Administration of Sentences Act) 1999.*

**The CHAIR:** Yes, that. Thank you, Cathrine. Do we have anything like that that we could hang a pilot off here?

**Ms WALKER:** We have. Certainly with Tarrengower with the female prisoners there are some programs for earlier release. In terms of males—sorry, but the name escapes me at the moment—there is a pre-parole program that they can go into where they do have day release. They can undergo parental programs as well. I will get back to you.

**The CHAIR:** Yes, thanks.

**Ms WALKER:** Sorry, the name just completely escapes me as I sit here. There are those programs that do it, but there are not enough programs that cater for those types of things, particularly pre release.

**The CHAIR:** Yes. And, sorry, just one more quick one looking at bail laws: if we are not going to get changes to them as much as some of us might like, is there something that we could do around some of those exceptional circumstances, including being the primary carer of a child?

**Ms WALKER:** It can always be taken into account, exceptional circumstances. And anything under section 3AAA is not exhaustive, so you can bring in anything that you need to and it can be certainly a consideration. Particularly where there is no alternative, it is one of the circumstances that can be taken into account when determining—either exceptional or compelling—or also looking at risk. Sometimes it can be counterintuitive for a decision-maker to say, ‘Well, I need to put you back with your child, and you’re somebody who is offending on a regular basis’. As I said to you at the outset, I am very passionate about bail laws, and I think that there need to be significant changes to the bail laws because, with pre-trial detention in circumstances of low-level offending, women in particular are caught up in that, because women, who are ordinary the primary carers for children, are more likely to commit low-level offences, which are being caught up in these exceptional circumstances and compelling reasons, and are having their bail refused for very low-level offending, which can completely shatter a family.

**The CHAIR:** Yes. Thank you. I will go to Rod, then Cathrine, then Nina.

**Mr BARTON:** Thanks, Mel.

**Ms WALKER:** Thank you.

**Mr BARTON:** I have a view.

**Ms WALKER:** Yes.

**Mr BARTON:** And my view is that if we are going to put a parent in custody the state has an obligation then to protect their child. That is my premise for where I am starting.

**Ms WALKER:** I agree with that.

**Mr BARTON:** Okay. So if we go back, I just want to know about your own experience, because we have heard conflicting things around this. At the point of arrest do the police have an obligation to check whether there are kids in their care?

**Ms WALKER:** I would have thought so, yes.

**Mr BARTON:** Well, I have got a police officer who works for me. In his many years of being in the police force, I asked him, ‘How many times did you check how the kids are?’, and he goes, ‘Never. We were never trained to do it. It wasn’t our responsibility’.

**Ms WALKER:** And I think that is extraordinary. I think certainly there would be a primary obligation if police say, ‘We’re going to execute a warrant’, to have information as to whether or not children would be present or could be present at the time, because it is quite a traumatic experience to have police come in.

**Mr BARTON:** We have heard some terrible things this morning.

**Ms WALKER:** Yes. And I would have thought that that, if it is not, should be part of their training.

**Mr BARTON:** Let us go to the next stage.

**Ms WALKER:** Sure.

**Mr BARTON:** We are in court, and we have just put Mum away for three years—or vice versa, put Dad away. If Mum is the primary carer, which is usually the case, does anyone reach out to her and say, ‘How are you going to pay the rent next week?’.

**Ms WALKER:** There are some organisations within the prison who will support the rent at a reduced rate—well, not for three years, I beg your pardon—for a short period of time. Generally we get those calls with a person on remand—‘How much longer do you think they’ll be there?’—because we can maintain her property or his property for a short period of time at a reduced rate so that they can maintain that housing for potential release within that six months. For that three-year period, no, there is nothing that will—

**Mr BARTON:** So there is nothing the government has to step in and think about—‘What are our requirements here? What have we just done to this family?’.

**Ms WALKER:** No, I do not think there are. I think that she is going away for three years, or he is going away for three years. Let us put it on the premise that it is a female, because women are generally the primary carers. Dad is probably not doing as well either if we are in that situation. Dad would get a little bit of support from the organisations, as would Mum if the shoe was on the other foot. But I think from my experience generally the children are removed to see whether or not Dad is capable of looking after the children on his own. You know, it depends on any of the relationships. If you have parents who have both been in prison in the past, there is a presumption that that parent would need support and would have to prove themselves beforehand. We know that with the changes to family violence that where there is an allegation of family violence the department will step in immediately and remove those children if an intervention order is not taken out or consented to by the primary carer.

So I think in answer to your question: if Mum went away for three years and Dad is incapable of looking after the children, then the department will step in, as they should, and see whether or not there are any alternatives for that child. The child will be assisted, I think, and Mum may get some contact with the child on days that they are able to. I was reading back on some of the transcript that you already have. I remember Fairlea. I remember the family days at Fairlea, and why that is not happening still is because we have more of a focus on punishment now.

**The CHAIR:** Yes.

**Mr BARTON:** Have another go.

**The CHAIR:** Cathrine.

**Ms BURNETT-WAKE:** You have answered most of the questions that I had. Just quickly, you said if there was a recommendation that it would be to revisit alternative sentencing. Any other recommendations, while we have got you, that you would like to put on the record?

**Ms WALKER:** Definitely bail. I think that there needs to be. And this is not specific to this subject, but the bail laws affect everything. If a person goes into custody for a short period of time, that can have the most catastrophic effect upon a family, upon that person’s housing, for example, or the ability to maintain a safe home for their children. It would have to be accepted that it is a traumatic experience for a child to be taken away from a parent, and who are we to say what a good or a bad parent is? You know, there are parents that do not cope, and those children will either sink or swim within the system, but I think that the primary objective should be that children must have access or at least an opportunity to have that parent. So again, as I was saying before, the bail laws will pick up people on low-level offending who should not be in custody and the people who may not end up getting a term of imprisonment. And that short effect can be, as I said, catastrophic.

**Ms BURNETT-WAKE:** Okay, thanks.

**The CHAIR:** Nina.

**Ms TAYLOR:** Yes, thank you. So one thing I was just interested in, because there has been a lot of discussion about it, are your insights into some of the difficulties in navigating family violence and court orders when maintaining contact between people in custody and their parents, because I understand that has come up quite a bit, how this can understandably interrupt those connections.

**Ms WALKER:** Completely. You would have to ask corrections this question, but from my experience and my clients’ experience there seems to be a policy that where there is an intervention order in place, the access to the children is severely restricted, notwithstanding that that intervention order may not prohibit any contact

between the children at all. Some clients that I have also fall foul of that because there has been in existence an intervention order. We are at pains then to provide to corrections either the expiry of that intervention order or a variation on that intervention order before they will allow any contact. It is all very well to say that COVID has given an opportunity for children to have opportunities to see their parents and the parents to see them, help them with their homework and pat the dog and things like that, but it does not replace that one-on-one contact, and the prisons are just not designed for it. The prisons just cannot provide an environment that is conducive to parents and children having that positive contact.

I am not sure if it is still there, because I have not been to prison for nearly three years now, but Port Phillip Prison have got a clown at the entrance. It is a donation box. It is a huge 2-metre clown. You can put money in there to assist—I think to have toys for the kids and things like that. I could be wrong about the reason for it, but the clown's name is Clip in the Nick. It is a children's figure that would attract children. Prisons should not be an ideal place for children to go to, but there can be ways of doing it in a better way so children can have positive interactions with their parents when they are in prison, particularly if they are there for a long period of time. We may not be comfortable with children going into prison, and we should not be comfortable about children going into prison to visit their parents, but unfortunately there are a lot of children who are in that position and they do want to see their parents, and it is important that we can facilitate that in a positive environment—if prison can be a positive environment at all.

But to go back to Fairlea again, they had outdoor activities, they had barbecues. It was a family day, and that was far better than the restricted contact that the women have now at Dame Phyllis Frost, for example, let alone at any of the other prisons. There is no designated area for children to visit their parents at Barwon or Port Phillip Prison or anything like that. It is in the main area where all of the other prisoners have visits. There is a small corner where there are some toys and an area for climbing and swings out the back—not even a swing; I do not think they have swings because they are too dangerous.

**Ms TAYLOR:** On that point, I think there was some commentary around newer versus older prisons, that there seems to be a shift in some of the attitudes with regard to the way they are designed—speaking very broadly and generally in making that comment. The only other thing—what is the other point? Oh, my goodness. I was listening to you and then I got distracted, so I might leave it there. Sorry, I had a question, but I was listening. Anyway, it is all good.

**The CHAIR:** That is great. Thanks, Nina. If it comes to you, jump in. Mel, have you had a client where they have been able to maintain good connections with their family and they have been able to, at the end of that custodial sentence, carry on and move on with their lives and never be seen again?

**Ms WALKER:** Yes, absolutely. I have. As you were saying that, though, I think that one thing that does happen with those children when the parent is released from custody is that the child ends up parenting the parent because the child has to make sure that the parent maintains their appointments and goes to see whoever they need to see, stays off drugs and things of that nature. I have a client—he is about to turn 50—and he lived at the Gatwick with his mum. She was in and out of prison, and he was in and out of departmental care from a very early age and in and out of what we then had, boys homes, and thankfully we do not have them anymore. He knows nothing but prison. That is the danger, I think. The real danger is that not only are we severing those connections between parent and child but there is a real danger of that child then progressing. The crossover kids report clearly shows that that is a real risk to that child. As I said, I think changes to bail laws so that there is some pretrial support, not having to have that parent go into custody when presumed innocent and other alternatives to sentencing, particularly something similar to the family drug court, would be far more beneficial, and they would be including the children. They are pulled into it anyway. Anyway, that is my wish list.

**The CHAIR:** Great. On that, Mel, thank you so much. Again, this committee has really appreciated and benefited from your counsel over the last three and a half years. As I mentioned, you will receive a transcript. Please have a look. It will form part of the report.

**Ms WALKER:** Thank you.

**Witness withdrew.**