

**Submission  
No 153**

## **INQUIRY INTO VICTORIA'S CRIMINAL JUSTICE SYSTEM**

**Organisation:** Office of the Public Advocate

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Safeguarding the rights and interests of people with disability

# Submission to the Legal and Social Issues Committee

Inquiry into Victoria's Criminal Justice System

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## Abbreviations

ABI	Acquired Brain Injury
AHRC	Australian Human Rights Commission
ALRC	Australian Law Reform Commission
APTOS	Applied Principles and Tables of Support
ARF	Access Request Form
CALD	Culturally and Linguistically Diverse
CISO	Corrections Independent Support Officer
CRPD	Convention on the Rights of Persons with Disabilities
DSP	Disability Support Pension
FCLC	Federation of Community Legal Centres
ITP	Independent Third Person
LIV	Law Institute of Victoria
NDIS	National Disability Insurance Scheme
OPA	Office of the Public Advocate
Victorian Charter	Charter of Human Rights & Responsibilities Act

## Recommendations

This submission responds to Terms of Reference 1, 2 and 3 of the Inquiry into Victoria's Criminal Justice System by the Legal and Social Issues Committee, Parliament of Victoria. The Office of the Public Advocate (OPA) makes the following recommendations:

### Recommendation 1

**The Victorian government should develop a Disability Justice Strategy, as proposed in the Australian Human Rights Commission report *Equal before the law*.**

### Recommendation 2

**The Victorian government should improve data collection relating to people with disability who are in contact with policing and custodial services. Data collection should be guided by the United Nations Convention on the Rights of Persons with Disabilities.**

### Recommendation 3

**The Victorian government should publish human rights principles and guidelines for Corrections Services.**

### Recommendation 4

**The Victorian Government should advocate to the National Disability Insurance Agency that it should consult on, publish and implement its Maintaining Critical Supports and Immediate Support Response policy and framework as a matter of urgency. This policy and framework should ensure that:**

- multiple designated providers of last resort are clearly identified
- providers of last resort are adequately resourced to enable them to respond immediately in situations of market failure which includes having staff available on short notice
- the providers and their staff have specialised experience, skill and expertise that are relevant to the specific needs of participants
- clear procedures exist to guide planners, local area coordinators and support coordinators when the need arises for a provider of last resort to provide any approved support (not just 'critical' supports)
- participant plans have built-in flexibility for situations in which a provider of last resort is required, including the ability to access contingency funding
- participants are transitioned back to support outside provider of last resort arrangements, as soon as possible
- provider of last resort mechanisms are established as an ongoing component of the National Disability Insurance Scheme market (ie they continue to exist once the transition to the scheme is fully completed).

### Recommendation 5

**The Victorian Government should amend s.61 of the *Personal Safety Intervention Order 2010 (Vic)* and s.74 of the *Family Violence Protection Act 2008 (Vic)* to state that, in deciding whether it is appropriate to make an intervention order in relation to a person with cognitive impairment, the courts *must* have regard to the respondent's ability to understand the nature and effect of the order, and to comply with its conditions.**

### **Recommendation 6**

- **The Victorian Government should amend the *Bail Act 1977* to repeal the reverse-onus provision in the Act, particularly the “show compelling reason” and “exceptional circumstances” provisions (ss 4AA, 4A, 4C, 4D and schedules 1 and 2 of the Act).**
- **The Victorian Government should create a presumption in favour of bail for all offences, except in circumstances where there is a specific and immediate risk to the physical safety of another person. This should be accompanied by an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.**
- **The Victorian Government should repeal the offences of committing an indictable offence while on bail (s 30B), breaching bail conditions (s 30A) and failure to answer bail (s 30).**

### **Recommendation 7**

**The Victorian Government should encourage all Victoria Police stations to apply for accreditation for the Communications Access Symbol.**

### **Recommendation 8**

**Victoria Police should increase the capacity and availability of its disability liaison officers.**

### **Recommendation 9**

**The Victorian Government should introduce legislative reform to require Victoria Police to have an Independent Third Person (ITP) present when interviewing a person with a cognitive impairment or mental illness, irrespective of age. This should include alleged offenders, victims, and witnesses.**

**The legislative provisions should include:**

- **A requirement for an ITP to be present when interviewing a person with an apparent cognitive impairment or mental illness:**
  - **Irrespective of age**
  - **Whether they are an alleged offender, victim, or witness**
  - **A requirement for the ITP Program to be adequately resourced to meet its legislated functions, based on modelling of demand.**

### **Recommendation 10**

**The Victorian Government should adequately resource the Independent Third Person Program to respond to current and future demand, based on modelling.**

### **Recommendation 11**

**The Victorian Government should expand the role of the Independent Third Person Program to provide referrals to service and support agencies.**

## **Recommendation 12**

**The Victorian Government should fund the continuation of the Communication Intermediaries Pilot Program to allow sufficient time for an outcomes review to be completed. If it proves successful, the program should continue and expand to:**

- **be available at all proceedings in all courts and tribunals**
- **be available for victims and alleged perpetrators.**

## **Recommendation 13**

**The Victorian Government should amend the *Criminal Procedure Act 2009* to remove the requirement for Victoria Police or prosecutions to consent to a diversion (s 59(2)(c)) and instead allow diversions to be granted at the discretion of the magistrate.**

## **Recommendation 14**

**The Victorian Government should establish and invest in a dedicated team within the department to be responsible for conducting prison disciplinary hearings and related internal reviews, including staff with relevant operational and administrative decision-making expertise.**

## **Recommendation 15**

**The Victorian Government should develop and implement a strategy to reduce the number of minor offences that proceed to the hearing stage, including through a formalised and consistent minor offence process, behaviour management plans and other alternatives to disciplinary hearings in recognition of the benefits in prisons conducting fewer and better-quality disciplinary hearings.**

## **Recommendation 16**

**The Victorian Government should amend Commissioner's Requirement 2.3.3 and related materials to require that Hearing Officers record brief, written reasons for disciplinary hearing outcomes and penalties and make these available to prisoners on request.**

## **Recommendation 17**

**In consultation with the Office of the Public Advocate, the Victorian Government should develop and implement measures to improve prisoner understanding and experiences of the prison disciplinary hearing process and available supports, including through:**

- a) development of plain English materials explaining the disciplinary hearing process and available supports;**
- b) expansion of the Corrections Independent Support Officer program to provide assistance to prisoners with other forms of cognitive impairment; and**
- c) identification of further opportunities to promote the Corrections Independent Support Officer program within prisons and relevant specialist units.**

### **Recommendation 18**

**In consultation with the Office of the Public Advocate, the Victorian Government should expand the Corrections Independent Support Officer program to enable prisoners to speak with a Corrections Independent Support Officer on receiving notice that a hearing will occur, so that the person is able to consider what rights they have prior to the day of the scheduled hearing. This may increase the opportunity for prisoners with intellectual disability to call witnesses if they wish to plead not guilty, and to make an informed decision about the presence of a Corrections Independent Support Officer at the hearing.**

### **Recommendation 19**

**The Victorian Government should increase funding of the Corrections Independent Support Officer program to ensure that it is adequately resourced to meet the current and proposed additional demands of the program.**

### **Recommendation 20**

**The Victorian Government should develop and implement an internal review mechanism for prison disciplinary hearings, including, if necessary, through amendment to the Corrections Act 1986 (Vic) in recognition that a robust merits review of decisions is likely to substantially mitigate the risk of unfair outcomes.**

### **Recommendation 21**

**The Victorian Government should implement or review practices and procedures for identifying and screening prisoners with a cognitive impairment to ensure that these functions are carried out by staff with specialist knowledge.**

### **Recommendation 22**

**Corrections Victoria should adopt protocols to identify whether individuals entering its services are potentially eligible to access the National Disability Insurance Scheme and facilitate access requests at the earliest opportunity.**

### **Recommendation 23**

**The Victorian Government should urge National Cabinet Disability Reform Council to review the *Applied Principles and Tables of Support* (the APTOS principles) to ensure they provide clear guidance to resolve interface questions.**

### **Recommendation 24**

**Corrections Victoria should develop and implement a policy, applicable in all correctional facilities, that allows National Disability Insurance Scheme funded support providers to enter the premises.**

### **Recommendation 25**

**The Victorian Government should ensure better integration of services and coordination between the justice, disability, mental health systems and housing to ensure a person is fully supported while in detention and on release.**

**Recommendation 26**

**The Victorian Government should fund the expansion of transition and community based mental health services for former prisoners.**

**Recommendation 27**

**The Victorian Government should expand funding for independent, legal and non-legal advice and advocacy services to help people with disability to navigate and access the justice system.**

**Recommendation 28**

**The Victorian Government should fund mandatory disability awareness training for all justice staff to enable them to fulfil their obligations under the United Nations' *Convention on the Rights of Persons with Disabilities*. The training should be developed in consultation with people with disability.**

# 1. Introduction

## 1.1 About the Office of the Public Advocate

The Office of the Public Advocate (OPA) is a Victorian statutory office, independent of government and government services that works to safeguard the rights and interests of people with disability. The Public Advocate is appointed by the Governor in Council and is answerable to the Victorian State Parliament.

The Public Advocate has seven functions under the *Guardianship and Administration Act 2019* (Vic), all of which relate to promoting the independence and human rights of people with disability and protecting people with disability from abuse, neglect and exploitation.

To this end, OPA provides a range of critical services for people with cognitive impairment or mental illness, including guardianship, advocacy, and investigation services. In 2019-20, OPA was involved in 1792 guardianship matters (950 which were new), 430 investigations, and 284 cases requiring advocacy.

A key function of the Public Advocate is to promote and facilitate public awareness and understanding about the *Guardianship and Administration Act 2019* (Vic), and any other legislation affecting persons with disability or persons who may not have decision-making capacity. To do so, OPA maintains a full-service communications function including media outreach, and runs an Advice Service which took 12,624 requests for advice or information during the 2019-20 financial year. OPA also coordinates a community education program for professional and community audiences across Victoria on a range of topics such as the role of OPA, guardianship and administration, and enduring powers of attorney.

OPA is supported by more than 600 volunteers across four volunteer programs: the Community Visitors Program, the Independent Third Person Program (ITP Program) and the Corrections Independent Support Officer (CISO) Program. The ITP Program is a 24/7, state-wide volunteer service operating in all police stations in Victoria. ITPs assist persons with cognitive impairment when giving interviews and making formal statements to Victoria Police. In 2019-20, ITPs attended a total of 3718 interviews and statements. CISOs are experienced ITPs who support prisoners who have an intellectual disability at General Manager's Disciplinary Hearings at Victorian prisons and/or remand centres. In 2019-20, CISOs were invited to attend 170 hearings.

## 1.2 About this submission

OPA welcomes the inquiry by the Legal and Social Issues Committee of the Victorian Parliament into Victoria's Criminal Justice System. This submission is written in response to Terms of Reference 1, 2 and 3, being the most relevant to OPA's functions and statutory obligations.

OPA notes that there are many significant aspects of Victoria's criminal justice system that need to be resourced adequately and operate well to enable full realisation of the insights of this inquiry. Furthermore, there are many issues at the interface of the criminal justice system and other service systems, particularly the National Disability Insurance Scheme (NDIS) and housing and homelessness supports.

This submission responds to the Parliament of Victoria's Legal and Social Issues Committee inquiry into the Victoria's criminal justice system and is based on examples gathered across OPA's program areas, particularly from the Advocate Guardian Program, the ITP Program, and the CISO Program.

OPA understands that the Legal and Social Issues Committee is seeking, among other areas of interest, strategies to reduce rates of criminal recidivism. In this submission, OPA will identify systemic problems that disadvantage people with disability that contribute to a person engaging with the justice system and recidivism.

The submission will illustrate that the justice system is often unable to meet the needs of a person with disability who is imprisoned or at risk of being indefinitely detained. This failure to meet the needs of a person with disability should be understood as a collective failure of systems, not solely attributed to the criminal justice system. While the need to protect community members is valid, it should be balanced with more rigorous and best practice treatment approaches, a skilled workforce and a wider range of accommodation support options. While attempts have been made to limit this submission to the criminal justice system, it inevitably refers to other intersecting systems when necessary.

OPA has written about many of these issues previously. For the benefit of the committee, OPA highlights in this submission matters raised in previous OPA submissions and reports that are relevant to the terms of reference for this inquiry.<sup>1</sup>

## 2. A human rights approach

This submission applies a human rights approach that:

- holds that all people with disability have the right to enjoy equality of opportunity and to effectively participate in, and be fully included in, society
- recognises that most challenges experienced by people with disability are a result of disabling systems and environments, rather than being due to an inherent 'lack' in the individual
- considers impairment as an expected dimension of human diversity
- seeks for people with disability to be supported and resourced to have the capabilities to lead a dignifying and flourishing life.

This submission is founded on the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD), as well the *Disability Discrimination Act 1992* (Cth) and the *National Disability Insurance Scheme Act 2013* (Cth).

In 2014, the Australian Law Reform Commission (ALRC) undertook a review of existing laws and legal frameworks to establish the extent to which people with disability have an equal right to make decisions for themselves, including in the administration of justice. OPA commends the ALRC's final report, *Equality, capacity, and disability in Commonwealth laws* and refers the Committee to it. In the context of OPA's description of a human rights approach, the ALRC's national decision-making principles are of importance. They are:

**Principle 1:** The equal right to make decisions

All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

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<sup>1</sup> See in particular, *I'm too scared to come out of my room* (2019); Submission to the Royal Commission into Victoria's mental health system (2019); Submission in response to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Criminal Justice System Issues Paper (2020); Submission to Victorian Parliamentary Inquiry into Homelessness in Victoria (2020); and Victorian Law Reform Commission in response to its Inquiry into Improving the Response of the Justice System to Sexual Offences (2021) The submissions are located on OPA's website: <https://www.publicadvocate.vic.gov.au/>

**Principle 2: Support**

Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

**Principle 3: Will, preferences and rights**

The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

**Principle 4: Safeguards**

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.<sup>2</sup>

In Victoria, the new *Guardianship and Administration Act 2019* (Vic) commenced on 1 March 2020 and incorporates the proposed principles.

In addition to this, the following are key Victorian documents for the advancement of the rights of people with disability in Victoria. The *Disability Act 2006* (Vic) articulates important safeguards for people with disability. Importantly, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Victorian Charter) imparts human rights obligations on public authorities, including those in the justice system. Applicable protected rights under the Charter include:

- the right to recognition and equality before the law<sup>3</sup>
- the right to liberty and security of person<sup>4</sup>
- the right to humane treatment when deprived of liberty<sup>5</sup>
- the right to a fair hearing<sup>6</sup>
- various rights in criminal proceedings.<sup>7</sup>

In preparing this submission, OPA also takes into account the Optional Protocol to the Convention Against Torture (2006), the *Mental Health Act 2014* (Vic) and the *Medical Treatment Planning and Decisions Act 2016* (Vic).

## 2.1 Disability Justice Strategy

In 2012, the Australian Human Rights Commission (AHRC) published the landmark report, *Equal before the law*. The report applies a human rights approach in the context of the administration of justice and people with disability and all Australians.

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<sup>2</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (2014) 11 (ALRC Equality Report)

<sup>3</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 8.

<sup>4</sup> *Ibid* s 21.

<sup>5</sup> *Ibid* s 22.

<sup>6</sup> *Ibid* s 24.

<sup>7</sup> *Ibid* s 25.

*Equal before the law* identifies five barriers that prevent people with disability from accessing justice on equal footing with others. They are:

1. Negative attitudes and assumptions about people with disabilities often resulting in people with disabilities being viewed as unreliable, not credible or not capable of giving evidence, making legal decisions or participating in legal proceedings.
2. Criminalisation of people with disability whereby the justice system steps in where another system may have been better-placed to respond because community support, programs and assistance to prevent violence and disadvantage and address a range of health and social risk factors may not be available to some people with disabilities.
3. People with disabilities do not receive the support, adjustments or aids they need to access protections, to begin or defend criminal matters, or to participate in criminal justice processes.
4. Specialist support, accommodation and programs may not be provided to people with disabilities when they are considered unable to understand or respond to criminal charges made against them ('unfit to plead').
5. Support, adjustments and aids may not be provided to prisoners with disabilities so that they can meet basic human needs and participate in prison life.<sup>8</sup>

The report exposes the many ways in which people with disability have unequal access to justice, increasing their risk of ongoing discrimination or abuse. The AHRC recommends the development of State or Territory-administered disability justice strategies to address some of the inequities faced by people with disability. The strategies would be broad in their scope with the aim of reducing the number of people with disability and/or mental illness who are incarcerated as a result of inadequate supports in the community. *Equal before the law* outlines key elements that should be included in the strategies and OPA notes that any strategy should of course be aligned with existing policy.

OPA endorses the AHRC's recommendation and encourages the Committee to consider the *Equal before the law* report. OPA refers to and repeats an amended version of recommendation 1 in its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper (DRC criminal justice submission)<sup>9</sup>:

### **Recommendation 1**

**The Victorian Government should develop a Disability Justice Strategy, as proposed in the Australian Human Rights Commission report *Equal before the law*.**

In particular, OPA notes the importance of Article 31 of the CRPD on gathering and reporting on data to advance the social, economic and legal rights of persons with disability. Article 31 obliges State Parties to:

- undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.
- The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of States Parties'

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<sup>8</sup> Australian Human Rights Commission, *Equal before the law* (2012) 8 ('*Equal before the law*')

<sup>9</sup> Office of the Public Advocate (Vic), *Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper* (March 2020) 12. ('*DRC criminal justice submission*')

obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.

Across the justice system, there is a need for significant improvement in data collection and reporting, requiring a whole of government approach. Data collection will enable analysis of rates of disability within corrections and effective planning to meet disability-related needs.

A Disability Justice Strategy would provide a whole-of-government approach to fulfilling Article 31. Data collection should be guided by the CRPD.

OPA refers to and repeats an amended version of recommendation 2 in its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability<sup>10</sup>: The Criminal Justice System Issues Paper

### **Recommendation 2**

**The Victorian Government should improve data collection relating to people with disability who are in contact with policing and custodial services. Data collection should be guided by the United Nations Convention on the Rights of Persons with Disabilities.**

## **2.2 Human rights framework for Corrections Services**

In addition to the Disability Justice Strategy, OPA brings the committee's attention to the Human Rights Principles for ACT Correctional Centres, published in January 2019.<sup>11</sup> The principles align with Australia's obligations under international human rights commitments and give effect to obligations articulated under the Territory's *Human Rights Act 2004* (ACT).

The document highlights the many ways that the human rights of people with disability and/or mental illness can be promoted and protected while in custody. OPA highlights the following requirement which sits under the principle of respect and dignity:

Reasonable adjustments should be made to ensure persons with a disability can enjoy and exercise their human rights on an equal basis with others, including appropriate measures to support persons with a disability in exercising their legal decision-making capacity.<sup>12</sup>

OPA considers that there is a need for similar human rights principles in Victoria's correctional centres. While Victorian correctional facilities are bound by the Victorian Charter, the Victorian Ombudsman's report of the *Investigation into the imprisonment of a woman found unfit to stand trial*<sup>13</sup> demonstrates that the State does not always act in a manner that is compatible with the rights articulated in the Charter. The Victorian Ombudsman recommended that the Department of Justice and Community Safety provide, or commission, guidance about acting in compatibility with the Victorian Charter for all public

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<sup>10</sup> Ibid, 13.

<sup>11</sup> ACT Government, *Human Rights Principles of ACT Correctional Centres* (2019).

<sup>12</sup> ACT Government, *Human Rights Principles of ACT Correctional Centres* (2019) 9, Principle 5. Respect and dignity

<sup>13</sup> Victorian Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (2018) ('*Imprisonment of a woman report*')

authorities providing mental health and disability services.<sup>14</sup> OPA sees value in similar guidance for the corrections systems in Victoria that builds on the Victorian Charter.

OPA refers to and repeats an amended version of recommendation 19 from its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper<sup>15</sup>:

### **Recommendation 3**

**The Victorian government should publish human rights principles and guidelines for Corrections Services.**

## **3. Factors influencing Victoria's growing remand and prison populations**

### **3.1 The Victorian prison system and people with a disability**

OPA is concerned that prisons have become de-facto institutions for people with cognitive disability or mental illness who have been failed by other service systems unable to meet their complex support needs.

Existing research suggests that about 40 per cent of prisoners have a mental illness, while 42 per cent of male prisoners and 33 per cent of female prisoners have an acquired brain injury (ABI).<sup>16</sup> Prisoners with an intellectual disability are also over-represented in the system.<sup>17</sup>

#### **Case story: Mark**

OPA received a letter from 'Mark' (a pseudonym), who identified as having autism, mental health issues, and substance abuse. For many years, he cycled in and out of prison.

Mark has good insight into the risk he can pose if he is not well-supported when living in the community. He expresses a strong desire to contribute positively to his community but acknowledges that he needs supports to do this and is proactive in seeking them. For instance, in preparation for a previous release from prison, he asked a prison support worker to establish a transition support plan to provide assistance with housing, Centrelink, mental health, and substance abuse services. However, a few days before his release, he had not yet heard back from the support worker to know how to access the supports on release. He reminded the prison staff of his request but did not ever receive an answer. Mark was released in the evening with none of the supports he identified and nowhere to go.

When OPA spoke to Mark, in response to his letter, he was in custody in a maximum-security prison with an upcoming release date. He was distressed about returning to the community, and while he hoped this release would be more successful than the last, he had not received any support from prison staff to set himself up for a successful transition back to the community. OPA asked Mark whether he had an NDIS plan, but he was not aware of the scheme or

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<sup>14</sup> Ibid 67 rec 8.

<sup>15</sup> *DRC criminal justice submission* (n 9) 42.

<sup>16</sup> The sources of this information are cited in Victorian Ombudsman, *Investigation into good practice when conducting prison disciplinary hearings* (Melbourne, 2021), 54 and references in n.15.

<sup>17</sup> Victoria Ombudsman, *Investigation into good practice when conducting prison disciplinary hearings*, 54. ('*Ombudsman's Disciplinary hearings report*')

how to access it. He remained optimistic and sought assistance from OPA in the absence of any pre-release planning.

## 3.2 The criminalisation of disability

Article 5 of the CRPD, 'Equality and non-discrimination' sets out that 'States Parties shall prohibit discrimination on the basis of disability,' and that to achieve equality States Parties shall 'take all appropriate steps to ensure that reasonable accommodation is provided.' A failure to provide a functional system of community-based supports is a failure to comply with Article 5 of the CRPD and contributes to the ongoing criminalisation of disability.

Inadequate pre-release planning, the lack of access to community-based supports, lack of continuity of NDIS supports between places of detention and in the community and lack of appropriate accommodation demonstrates that the criminal justice and other systems are ill-equipped and under-resourced to effectively respond to the needs of people with disability. This is despite often meaningful efforts and ongoing reform. This can amplify the risk for further disadvantages such as homelessness, substance use, and future offending behaviours.

### 3.2.1 Context

The Burdekin report of 1993,<sup>18</sup> provides important historical context by identifying de-institutionalisation as a major turning point in the trajectory of the human rights of people with disability. De-institutionalisation resulted in a significant and essential shift in the delivery of supports and services to people with disability and mental illness, representing a momentous advancement of the rights of people with disability.

However, governments did not anticipate or provide the necessary resources for the community sector to take on its new mandate, the impact of which has been disproportionately felt by individuals with dual or multiple diagnoses (now often referred to as 'individuals with complex needs'). The systematic criminalisation of some disadvantaged people with mental and cognitive disability, in particular First Nations People, has been a devastating consequence of the absence of early and appropriate diagnosis, intervention and support in the community.<sup>19</sup>

OPA understands that behaviours of concern exhibited by individuals with complex needs are very often linked to the inequities they have endured throughout their lives. OPA understands that behaviours of concern may be linked to childhood experiences of institutionalisation or trauma that have not been addressed. Children with disability are at greater risk of coming in contact with the child protection system and being placed in out-of-home care than children without disability, even though this is a highly inappropriate setting to support a child with high needs.

On reaching adulthood, it is common for children with disability to be relinquished by their foster family. OPA observes that many children with disability transition from child protection to adult guardianship, with the misconception that the two systems support people in similar ways. Adult guardianship does not provide a service safety net in the same way that child protection is intended to. There is usually a common thread in the stories of people with disability coming into contact with the justice system that they have been repeatedly failed by service systems.

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<sup>18</sup> Human Rights and Equal Opportunity Commission (Cth), *Human Rights and Mental Illness: report of the national inquiry into the human rights of people with mental illness* (Canberra, 1993). ('Burdekin report')

<sup>19</sup> Ruth McCausland and Eileen Baldry, 'I feel like I failed him by ringing the police': Criminalising disability in Australia' (2017) 19 (3) *Punishment & Society*, 290.

Alarming, the justice system is often employed to “manage” people with complex needs when other systems have failed, but is not built to respond to deep-rooted systemic abuse. The criminal justice system is, historically, founded on a punitive and rights restricting approach, and in many cases, causes more harm to individuals within this cohort. The very real consequence is that people with cognitive impairment and mental illness are imprisoned or detained and are subject to repeated cycles of custody and increased supervision.

A lot has already been done to recognise the human rights of people with disability, particularly in the services sector, across government and in law reform. Despite this, OPA's previous submissions and reports have highlighted that there is more to do within the criminal justice system. By and large, the system continues to use punitive measures, such as disciplinary hearings and fines, to manage the behavioural needs of prisoners with disability rather than offering therapeutic solutions. The continued difficulty in accessing NDIS services and supports in prison is an example of this and reinforces the need to address the interface issues between the NDIS and criminal justice system.

### 3.2.2 Cultural representations of disability

As Mark's story demonstrates, the lack of through-care and access to disability-specific supports, particularly in the context of pre-release planning, does little to help reduce rates of reoffending for prisoners with disability.<sup>20</sup> Corrections Victoria's most recent disability framework lists addressing recidivism among vulnerable cohorts and providing responsive intervention strategies for prisoners with disability as primary objectives.<sup>21</sup> However, prisoners with disability remain over-represented in Victorian prisons<sup>22</sup> and the stories in this submission show they do not receive appropriate support and care.

One approach to explain the inconsistency between the policy goals of Corrections Victoria and what the evidence shows, is to consider the experience of incarceration for prisoners with disability. This requires questioning the cultural meanings attached to our understanding of prisoners with disability. The work of Dowse, Baldry and Snoyman,<sup>23</sup> and critical disability studies more broadly, is particularly helpful in explaining how peoples' understandings of disability are conceptualised. By thinking culturally, it is clear how understandings of disability are informed by many things: personal stories, popular culture, news media and peoples' own experiences are some examples. All these create cultural references and representations of disability. Some may be accurate, some less so. Likewise, some might be more believable, but others not so much. Ultimately, this means that dominant and marginalised representations of disability exist in culture.<sup>24</sup>

Turning to the criminal justice system, there is a similar process at work, but one that significantly disadvantages prisoners with disability. Looking at how 'disability related behaviours of concern' are conflated with 'criminogenic behaviours' within the system is a useful starting point. This submission's focus on 'disability related behaviours of concern' is deliberate because these behaviours are considered to pose a significant risk to the prisoner

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<sup>20</sup> Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, 87. ('*Rehabilitation and reintegration of prisoners report*')

<sup>21</sup> Corrections Victoria, *Corrections Victoria Disability Framework 2016-2019: Expanding the opportunities*, 6. Note that work on development of a new Corrections and Justice Services Disability Framework 2020-2022 is underway, see Department of Justice and Community Safety, *Disability action plan Framework 2019-2021 Implementation plan*, Action 2.3

<sup>22</sup> *Rehabilitation and reintegration of prisoners report* (n 20) 7.

<sup>23</sup> Leanne Dowse, Eileen Baldry & Phillip Snoyman, 'Disabling criminology: conceptualising the intersections of critical disability studies and critical criminology for people with mental health and cognitive disabilities in the criminal justice system' (2009) 15 (1) *Australian Journal of Human Rights*.

<sup>24</sup> Simi Linton, 'Disability Studies/Not Disability Studies' (1998) 13 (4) *Disability & Society*, 533.

with disability, other people and the community at large.<sup>25</sup> The idea of prisoners with disability as 'risky' also contributes to broader cultural meanings of this vulnerable cohort as pathological. Put differently, the criminal wrongdoing of prisoners with disability ends up becoming confused with disability-specific behaviours such that *the behaviour itself is seen to be criminal*. In a criminal justice context, this means these behaviours are taken to be a criminogenic trait that needs to be 'managed' rather than recognised as a characteristic of a cognitive impairment that might require therapeutic support.

A recent Ombudsman investigation contains multiple examples of prisoners with disability not receiving adequate institutional support in disciplinary hearings because their conduct was taken to be either: (1) an intentional breach of prison rules or (2) unrelated to their disability.<sup>26</sup> In these case stories, the sanctions levied against the prisoner with disability are typically harsh because the behaviour is interpreted as an offence against the prison system, rather than symptomatic of a cognitive impairment. As such, the action taken by the justice system is punitive instead of therapeutic. These responses underscore how the criminal justice system continues to misidentify disability-specific behaviours because they are considered entirely criminogenic.

This lack of awareness illustrates the critical need to call-out culturally problematic representations of disability. This is particularly the case in the criminal justice system, where prisoners with disability are at higher risk of cycling in and out of prison. The use of critical disability studies to explore some of the cultural assumptions that underlie the relationship between disability and crime helps explain how some behavioural traits are stigmatised. More effort to educate the community about people with disability is required if we are to achieve justice for people with disability.

### 3.3 Lack of supports and housing

The unacceptable and ongoing criminalisation of people with disability is, in part, linked to the lack of appropriate community-based supports. The dearth of specialist accommodation and supports can result in some people being held in restrictive environments, whether that be in custody or under conditions of strict supervision. In other words, prisons have become the new disability institutions.

OPA now draws the attention of this inquiry to the way in which the pathway out of a custodial setting is dependent on community-based supports, which often do not exist, resulting in continued incarceration, as was the case for 'Rebecca' (a pseudonym):

#### **Case story: Rebecca**

In 2018, the Victorian Ombudsman reported on the 'saddest case' she had investigated during her time as Ombudsman. The case concerned 'Rebecca', a 39-year-old woman who enjoys listening to music, going on drives and swimming at the beach. She has 'pervasive developmental disorder' and 'borderline intellectual function'.<sup>27</sup>

Rebecca was found unfit to stand trial and subsequently spent a total of 18 months on remand because alternative accommodation could not be sourced. Rebecca had experienced behavioural difficulties for her entire life, but medical professionals had been unable to agree whether she had a mental illness or disability. As a result, she fell into a service gap, not fitting the criteria for the disability or mental health systems.

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<sup>25</sup> Kim Chandler, Ben White & Lindy Willmott, 'What role for adult guardianship in authorising restrictive practices' (2017) 43 (2) *Monash University Law Review*, 494

<sup>26</sup> *Ombudsman's Disciplinary hearing report* (n 17), 54-68

<sup>27</sup> Victorian Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (2018) 6. ('*Ombudsman's Unfit to stand trial report*')

Rebecca cycled in and out of prison, and, on most occasions, was returned to custody for breaching an intervention order that was taken out by her parents who could not cope with her challenging behaviours. Despite the difficulties they faced in supporting their daughter, Rebecca's parents wished to maintain a relationship with her.

Rebecca's situation is one example of a person with disability being subject to unnecessary detention for an extended period of time (in this case, for more than 18 months) for the devastatingly simple reason that no suitable accommodation was available. Sadly, Rebecca is not alone. OPA is aware of this happening to many people with disability who often have sizeable amounts of funding in their NDIS package, but are met with a market that is simply unable to respond to their needs. OPA's report, *The Illusion of Choice and Control*, presents 12 real case stories where NDIS participants experience challenges in obtaining adequate supports under the NDIS. In the majority of the stories, the person had contact with the criminal justice system.<sup>28</sup>

The absence of specialist supports and/or accommodation can result in a person with a disability facing a sentence that is disproportionate to their offence. When a person is sentenced on a custodial supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), the pathway out of custody is, in the first instance, to successfully step down to a non-custodial supervision order before transitioning to a community setting. However, with limited vacancies and so few providers offering non-custodial supervision arrangements, courts are sometimes left with little choice but to renew a custodial supervision order, maintaining the person in an overly restrictive environment through no fault of their own.

OPA has grave concerns about the ability of NDIS participants with complex needs and a history of offending behaviours to access specialist supports. Some specialist providers are leaving the market altogether, and others refuse to accept clients with complex behaviours of concern on the basis that they are too great a risk to the occupational health and safety of their staff, or as a result of concerns that they may be held responsible for the actions of the participant if they cause harm to others in the community. While there are often financial incentives for providers to take on participants with substantial NDIS funding, it appears that, for many providers, the perceived risks outweigh the financial benefits.

Previously, in Victoria, service provision for this cohort was managed by the Department of Health and Human Services (now the Families, Fairness and Housing or DFFH), with responsibility for coordinating Disability Justice services. However, DFFH has relinquished its vacancy management functions and is incrementally retreating from the provision of disability services and the market is thin and failing. This means that there is no single entity that can be compelled or held to account to provide accommodation, or indeed, any other services in the event of market failure. There is urgent need for government intervention to ensure a provider of last resort can fill gaps in the market.

OPA refers to and repeats an amended version of recommendation 14 in its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper:<sup>29</sup>

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<sup>28</sup> Office of the Public Advocate, *The illusion of 'Choice and Control'* (2018) (*The Illusion of Choice and Control*)

<sup>29</sup> *DRC criminal justice submission* (n 9) 5.

## Recommendation 4

**The Victorian Government should advocate to the National Disability Insurance Agency that it should consult on, publish and implement its Maintaining Critical Supports and Immediate Support Response policy and framework as a matter of urgency. This policy and framework should ensure that:**

- **multiple designated providers of last resort are clearly identified**
- **providers of last resort are adequately resourced to enable them to respond immediately in situations of market failure which includes having staff available on short notice**
- **the providers and their staff have specialised experience, skill and expertise that are relevant to the specific needs of participants**
- **clear procedures exist to guide planners, local area coordinators and support coordinators when the need arises for a provider of last resort to provide any approved support (not just 'critical' supports)**
- **participant plans have built-in flexibility for situations in which a provider of last resort is required, including the ability to access contingency funding**
- **participants are transitioned back to support outside provider of last resort arrangements, as soon as possible**
- **provider of last resort mechanisms are established as an ongoing component of the National Disability Insurance Scheme market (ie they continue to exist once the transition to the scheme is fully completed).**

### 3.4 Family Violence and Personal Safety Intervention Orders

One avoidable pathway into the justice system for people with disability is through the making of intervention orders (IVOs). OPA has experience of numerous examples of IVOs being made in relation to respondents with a cognitive impairment in circumstances where the person does not understand, and is not able to comply with the conditions of the order. As a consequence, the person is likely to breach the order because they do not understand it, be charged in relation to the breach, and potentially remanded into custody. Data from across OPA's program areas shows the extent of the problem. For example, the ITP Program data reveals that breaches of IVOs are the third most common type of offence recorded at ITP interviews.<sup>30</sup>

Rebecca was one such person. She cycled in and out of prison, and, on most occasions, was returned to custody for breaching an intervention order that was taken out by her parents who could not cope with her challenging behaviours.

It was obvious to OPA and other involved parties that Rebecca did not understand the purpose or conditions of the intervention order. This was evidenced by the repeated breaches of the order when Rebecca would return to her family home to see her parents. On some occasions her parents allowed her to visit, on other occasions they would alert the police of the breach. OPA contends the intervention order was altogether inappropriate and an ineffective response to Rebecca's 'difficult behaviours'. It led to her incarcerations, where severe restrictions were imposed on her liberty, her rights were seriously infringed, and she received little to no supports. It also did not achieve the purpose of the order, to ensure that Rebecca did not attend her parents' home.

In a similar case in 2019, the Coroner's Court handed down findings<sup>31</sup> following an inquest into the death of a young woman with intellectual disability and borderline personality

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<sup>30</sup> Ibid, 18.

<sup>31</sup> Coroner's Court of Victoria, *Finding into Death with Inquest, COR 2013 2883* (6 June 2019) 11 in relation to the death of Laura Mosca ('*Coroner's finding*').

disorder who had breached a family violence IVO by attending her parents' house. The woman was subsequently remanded in custody and tragically, she died five days after her release on bail. Like Rebecca, the Coroner found that the woman "did not grasp the conditions and consequences of breaching an IVO".<sup>32</sup>

In Victoria, intervention orders can be made under two different Acts: the *Personal Safety Intervention Orders Act 2010 (Vic)* or the *Family Violence Protection Act 2008 (Vic)*. However, the two are not equivalent in terms of the protections they offer people with cognitive impairment. The Personal Safety Act includes a discretionary power to enable courts to determine whether making an order in relation to a person with cognitive impairment is appropriate. In making such an order, the court *may* have regard to the respondent's ability to understand the nature and effect of the final order and comply with its conditions where the respondent has a cognitive disability. There is no similar requirement in the Family Violence Act.<sup>33</sup>

The purpose of the legislation is to maximise the safety of those who have experienced family violence, prevent and reduce family violence and promote the accountability of perpetrators of family violence for their actions.<sup>34</sup> The Coroner found that making a family violence intervention order in circumstances where the respondent is unable to understand the nature and effects of the order or to comply with its conditions, is not consistent with the purposes of the Act and may also breach the person's rights to equal recognition and equality before the law.<sup>35</sup>

Intervention orders can also be used *against* family members, intimate partners, or carers who pose a risk to the safety of a person with disability. Several of OPA's guardianship clients have intervention orders to protect them from a known perpetrator. Usually, although not always, guardians are appointed by VCAT with powers to make decisions about access to the person. And yet, both the intervention order and the role of the guardian can prove to be ineffective in preventing further abuse or exploitation. This is because people with cognitive impairment do not always perceive the abusive aspects of the relationship and cannot be compelled to decline the company of a person, even if they are instructed by the guardian to cease contact.<sup>36</sup>

For example, OPA is guardian for a young woman who is known to engage in risky and inappropriate intimate relationships, which result in her sexual and financial exploitation. In this situation, one of the suspected perpetrators of the exploitation is a close family member. The intervention order and the guardian's explanation of the inappropriateness of these sexual encounters are not sufficient to protect her, as she repeatedly absconds from her home, sometimes travelling interstate to be with the family member where the abuse is repeated.<sup>37</sup>

As a result, where an intervention order applies to a person with cognitive impairment, OPA considers it is unlikely to achieve its intended statutory purpose, which is to prevent and ultimately reduce violence and maximise safety. Rather, the risk is high that people with cognitive disability will be subject to intervention orders which they do not fully understand and/or are unable to comply with, in which case it is likely that they will breach them. This results in the criminalisation of disability related behaviours and a breach of a person's human rights, perhaps most notably the right to equality before the law, as espoused in both the CRPD and the Victorian Charter.<sup>38</sup>

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<sup>32</sup> Ibid 11.

<sup>33</sup> *DRC criminal justice submission* (n 9) 19.

<sup>34</sup> *Family Violence Protection Act 2008 (Vic)* s1.

<sup>35</sup> Ibid, 14-17.

<sup>36</sup> *DRC criminal justice submission* (n 9) 20.

<sup>37</sup> Id.

<sup>38</sup> Id.

In the case referred to above, the Coroner recommended that the Attorney-General review the Family Violence Act and, as part of that review, consider the inclusion of provisions that would encourage or require courts to take into account the respondent's ability to understand the nature and effect of the final order and comply with its conditions where the respondent has a cognitive disability. The inclusion of such a provision may reduce the likelihood of people with cognitive impairment being subject to an order that they do not understand, and the associated risk of breaching the order and being subject to criminal proceedings, remanded in custody or incarcerated.<sup>39</sup>

OPA refers to and repeats recommendation 5 from its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper<sup>40</sup>:

### **Recommendation 5**

**The Victorian Government should amend s.61 of the *Personal Safety Intervention Order 2010 (Vic)* and s.74 of the *Family Violence Protection Act 2008 (Vic)* to state that, in deciding whether it is appropriate to make an intervention order in relation to a person with cognitive impairment, the courts *must* have regard to the respondent's ability to understand the nature and effect of the order, and to comply with its conditions.**

## **3.5 Impact of changes to bail laws**

The changes to bail laws — the second tranche of which were made in response to the Bourke Street tragedy — have “led to escalating remand rates in Victoria”.<sup>41</sup> Changes to the *Bail Act 1977 (Vic)* in 2013 and 2018, respectively, have made obtaining bail more difficult.

While the imperative for the amendments concerned the high risk associated with violent offenders on bail, the changes have disproportionately affected women and low-level and non-violent offenders. Given their overrepresentation in the criminal justice system generally, it is likely that people with cognitive disability and mental illness are also overrepresented in this cohort.

In *A Pathway to decarceration: A Justice system response to COVID-19*, the Law Institute of Victoria (LIV) and the Federation of Community Legal Centre (FCLC) argued for urgent bail reform to reduce the number of vulnerable people on remand and who are a low risk to the community. OPA notes that there is consensus among advocacy bodies about the problems caused by the 2013 and 2018 changes to bail laws and how to fix them, including by abandoning the reverse onus categories in the *Bail Act* and replacing this with a single test of unacceptable risk.

OPA endorses the recommendations below, made by the Victorian Aboriginal Legal Service, Human Rights Law Centre and Fitzroy Legal Centre and published by LIV and VCOSS in *A Pathway to decarceration*:

### **Recommendation 6**

- **The Victorian Government should amend the *Bail Act 1977* to repeal the reverse-onus provision in the Act, particularly the ‘show compelling reason’ and ‘exceptional circumstances’ provisions (ss 4AA, 4A, 4C, 4D and schedules 1 and 2 of the Act).**

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<sup>39</sup> *Coroner's finding* (n 31) 21.

<sup>40</sup> *DRC criminal justice submission* (n 9) 21.

<sup>41</sup> Federation of Community Legal Centres Vic and the Law Institute of Victoria, *Pathway to decarceration, A justice system response to COVID-19* (2021) 8. (*Pathway to decarceration*)

- **The Victorian Government should create a presumption in favour of bail for all offences, except in circumstances where there is a specific and immediate risk to the physical safety of another person. This should be accompanied by an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.**
- **The Victorian Government should repeal the offences of committing an indictable offence while on bail (s 30B), breaching bail conditions (s 30A) and failure to answer bail (s 30).<sup>42</sup>**

The proposed amendments to the Bail Act and related amendments proposed above will go some way towards ameliorating the number of Victorians held on remand. Reform of the legislation is urgent as the effects of the current restrictive bail provisions significantly disadvantage Victoria's most marginalised and vulnerable groups. Figures reported to this Parliamentary Inquiry on 24 August 2021 indicate that 44 per cent of the male and 55 per cent of the female prison population were on remand.<sup>43</sup> Many Victorians will pass more time on remand than the length of a sentence they could receive in response to their offending.<sup>44</sup> The reverse onus test renders attaining bail exceptionally difficult, particularly for low-level offenders who pose no community risk.

## **4. Reducing the number of people with disability in prisons**

People with a disability are entitled to enjoy and exercise their human rights on an equal basis with others and if required, measures to support them to do so. Ensuring that people with a disability are supported to assert their rights and to participate in the criminal justice process on an equal basis, will help to mitigate against the unnecessary criminalisation of disability and subsequent overrepresentation of people with a disability in custody.

### **4.1 Victoria Police**

The first point of contact that many people with a disability have with the criminal justice system is with Victoria Police. Victoria Police has introduced a number of measures and pilot programs to better support people with a disability, and in some cases, to divert people with a disability away from the criminal justice system to other service systems to access the supports that they need.

#### **4.1.1 Communication Access Symbol**

OPA is aware that Victoria Police and Scope Communication Centre have partnered and that some police stations have been successfully accredited with the Communication Access Symbol. OPA commends Victoria Police for this work and encourages all Victoria Police stations to apply for the Communications Access Symbol accreditation.<sup>45</sup>

OPA refers to and repeats recommendation 3 from its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper:<sup>46</sup>

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<sup>42</sup> Id.

<sup>43</sup> Tammy Mills, 'Lives on hold as the 'profound' effect of lockdowns is felt across the justice system', *The Age* (Melbourne, 30 August 2021) 15.

<sup>44</sup> *Pathway to decarceration* (n 41) 5.

<sup>45</sup> *DRC criminal justice submission* (n 9) 16.

<sup>46</sup> Ibid.

## Recommendation 7

**The Victorian Government should encourage Victoria Police to encourage all police stations to apply for the Communications Access Symbol accreditation.**

### 4.1.2 Disability Liaison Officers

From 2019, each region of Victoria Police has an appointed 'disability liaison officer'. The disability liaison officers provide a single point of contact and support members to translate policy into practice. However, these responsibilities are in addition to their existing responsibilities, raising concerns about the capacity to have champions and embed the system-wide change that the roles were designed to achieve.

The program should be resourced to ensure that there are sufficient numbers of disability liaison officers across the police force, and that those officers are provided the resources and support that they need to undertake this role'.<sup>47</sup>

OPA refers to and repeats recommendation 4 from its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper:<sup>48</sup>

## Recommendation 8

**Victoria Police should increase the capacity and availability of its disability liaison officers.**

### 4.1.3 Police cautioning programs

As noted above, in many instances, the criminalisation of people with disability represents a failure of the disability and other service sectors and systems in a person's life over many years. It is critical, therefore, that the criminal justice system actively diverts people with a disability to the services and supports that they need to address the underlying causes of the offending at every opportunity, starting from the person's first contact with the criminal justice system.

First contact with the criminal justice system is usually with Victoria Police. Early contact with police presents a critical opportunity to intervene to ensure that people with a disability, particularly young people, are diverted to programs where wrap around support is provided. In this way, in appropriate cases, Victoria Police should provide an important barrier to entry to the criminal justice system, rather than a facilitator of entry into the criminal justice system.

Victoria Police is currently piloting an Aboriginal Youth Cautioning Program (AYCP) in three pilot sites, with a view to rolling the program out state-wide. The goal of the pilot is for "[f]ewer Aboriginal people to enter the criminal justice system".<sup>49</sup> The pilot has been operating in a limited way as a result of the COVID-19 pandemic, however police in the three pilot sites have continued to monitor the use of Child Cautions for Aboriginal people, and Aboriginal Cultural Awareness Training encourages the use of cautions and diversion where this is appropriate. "State-wide roll out of the package is to commence in October."<sup>50</sup> OPA commends Victoria Police for this important work.

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<sup>47</sup> Office of the Public Advocate, *I'm too scared to come out of my room* (2019),72 ('*I'm too scared to come out of my room*')

<sup>48</sup> *DRC criminal justice submission* (n 9) 16.

<sup>49</sup> Department of Justice and Community Safety, *Victorian Aboriginal Justice Agreement, Aboriginal Justice Outcomes Framework*, Goal 2.2 Aboriginal Youth Cautioning (2021) Program <https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-justice-outcomes-framework/goal-22-fewer-aboriginal-people-enter-the-2>

<sup>50</sup> *Id.*

In addition to this, the Supreme Court's Senior Masters Office, in collaboration with Victoria Police, Barwon Disability Resource Centre Geelong, CORAS Colac, and a range of other agencies and community groups, is developing a pilot Youth Disability Cautioning Program. Under this model, which is based on the AYCP, Victoria Police will work in partnership with the disability sector to connect young people with a disability with relevant local agencies, services and their community to address the underlying causes of the offending behaviour, with a view to reducing further offending. The program targets young offenders engaging in lower-level offences at the early stage of their involvement with police or the justice system. Under the model, Victoria Police would consider issuing a Child Caution (in accordance with the *Victoria Police Manual – Cautions*) rather than another disposition.

If the matter proceeds by way of a caution, the member would make a referral to the intake service. The young person, disability service, the young person's support person or people, and a police officer then work together to develop a tailored support plan. Implementation of the plan would depend on fast-track referrals to relevant participating agencies including support programs, education or employment opportunities and mentoring. The pilot is anticipated to commence on 1 November 2021.

## 4.2 Independent Third Person Program

OPA's ITPs are an essential volunteer safeguard who support alleged offenders, offenders, victims and witnesses with a cognitive impairment including an intellectual disability, a mental illness or an Acquired Brain Injury (ABI) in police interviews and procedures. This role also supports the effective operation of the criminal justice system, and OPA believes, ultimately increases the integrity of the criminal justice system. OPA has found that there are a significant number of people with cognitive impairments, ABI and mental illness repeatedly presenting before the criminal justice system.

OPA has written extensively about its ITP Program, including most recently in response to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Criminal Justice System Issues Paper and to the Victorian Law Reform Commission in response to its Inquiry into Improving the Response of the Justice System to Sexual Offences.<sup>51</sup> For the benefit of the committee, OPA again highlights here the key elements of the ITP Program and the role of ITPs.

OPA's ITPs are trained volunteers who attend police interviews for adults and young people with disability to ensure that they are not disadvantaged during the police interview process. Police interviews often require people to comprehend complex issues and information quickly, understand their legal rights, and be able to communicate with people in positions of authority. ITPs are available 24/7 to attend any police station throughout Victoria. ITPs are independent of police and of the investigation, and act as a safeguard to ensure a person with disability is not disadvantaged when communicating with police.

The Victoria Police Manual sets out the circumstances in which ITPs are required to attend police interviews: "An ITP is to be present during the interview of any person with a cognitive impairment, who is fit to be interviewed or have a statement taken as a suspect, an accused, an offender, a victim or a witness."<sup>52</sup> The manual's definition of 'cognitive impairment' includes intellectual disability, ABI, mental illness, and neurological disorders. In determining whether a person may have a cognitive impairment, police members rely on experience and knowledge, observations of the person, and active questioning.<sup>53</sup>

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<sup>51</sup> The submissions are located on OPA's website: Office of the Public Advocate, Submissions <https://www.publicadvocate.vic.gov.au/opa-s-work/submissions> accessed September 2021.

<sup>52</sup> *Victoria Police Manual – Procedures and Guidelines*, 3.2 Independent third persons, 4.

<sup>53</sup> The manual also refers police officers to the Ready Reckoner guide (developed in collaboration with OPA and Victoria Police) for further guidance on the indicators of cognitive impairment, including questions that

In 2019-20, the ITP Program supported 2,689 clients in 3718 interviews with Victoria Police. ITPs attended interviews at 140 police stations as well as interviews at clients' homes, hospitals and disability facilities in Melbourne and regional Victoria.

The ITP Program supports victims and witnesses as well as offenders and alleged offenders. In 2019-20, 85 per cent of interviews were with alleged offenders, 8.2 per cent were with victims, 4.4 per cent were with sex offenders 2.4 per cent were with witnesses. The majority of ITP clients had intellectual disability (55.7 per cent), followed by mental illness (35.8 per cent) ABI (24.3 per cent), and physical (2.1 per cent) with the remaining 13.4 per cent unknown or unstated. Some people reported dual-disabilities. Dual disability, and indeed the intersectionality of various markers of disadvantage such as gender, age, ethnicity, being Aboriginal, and experiencing poverty commonly affect people interacting with the Victorian criminal justice system.

The number of Aboriginal ITP clients has increased over time, from 13 per cent in 2017-18 to 18 per cent in 2019-20. In the last three years, of 1,037 Aboriginal clients, 849 were repeat clients. The proportion of repeated clients is higher for Aboriginal clients than non-Aboriginal clients. This suggests a high degree of disadvantage experienced by Aboriginal Victorians with disability that requires targeted and adequate supports to keep this cohort out of the criminal justice system and supported in community.

#### 4.2.1 Legislating the ITP Program

The ITP Program plays a critical role in giving effect to the rights of people with disability to access justice, which includes the "provision of procedural accommodations in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages."<sup>54</sup>

OPA has long advocated for the ITP Program to be legislated to give full effect to Australia's obligations under the United Nations Convention on the Rights of Persons with Disability and to increase consistency in the use of ITPs across Victoria. Legislating the program would ensure it is adequately resourced.

OPA's comprehensive report *Breaking the Cycle: Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (2012) reported that not involving an ITP could compromise the integrity of the evidence raised in the interview.<sup>55</sup>

On this point, case law recognises the importance of ITPs in protecting the rights of people with disabilities during the police interview. For example, the Supreme Court of Victoria<sup>56</sup> has held that the failure of police to use an ITP when one is required may diminish the credibility of any evidence obtained in that interview. This is because the absence of an ITP raises serious questions regarding the "propriety, reliability and fairness" of the police interview. Accordingly, Victoria Police policy requires that members arrange for an ITP to be present during the interview with any person they believe may have a cognitive impairment or mental illness.<sup>57</sup>

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may assist in their assessment of the person. Victoria Police Manual – Procedures and Guidelines, 3. Persons affected by a cognitive impairment.

<sup>54</sup> Office of the Public Advocate (Victoria), report *Breaking the Cycle: Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (2012) 19. ('*Breaking the cycle*')

<sup>55</sup> This report can be found on OPA's website: Office of the Public Advocate, *Breaking the Cycle* < [Breaking the cycle - Office of the Public Advocate](#) >

<sup>56</sup> *R v Larcy* [2007] VSC 19 at [54].

<sup>57</sup> *Breaking the Cycle* 19.

OPA considers it necessary that legislative reform requiring police to have an ITP present when interviewing a person with an apparent cognitive impairment or mental illness would result in consistent application of the use of ITPs across Victoria.

Furthermore, this level of legislative protection for people requiring an ITP would be consistent with the legislative right for young people to have access to the support of an independent person in police interviews.<sup>58</sup>

### **Recommendation 9**

**The Victorian Government should introduce legislative reform to require Victoria Police to have an Independent Third Person (ITP) present when interviewing a person with a cognitive impairment or mental illness, irrespective of age. This should include alleged offenders, victims, and witnesses.**

**The legislative provisions should include:**

- **A requirement for an ITP to be present when interviewing a person with an apparent cognitive impairment or mental illness:**
  - **Irrespective of age**
  - **Whether they are an alleged offender, victim, or witness**
- **A requirement for the ITP program to be adequately resourced to meet its legislated functions, based on modelling of demand.**

#### **4.2.2 Demand and funding for the ITP Program**

Despite the steady and increasing demand for ITPs, funding for the program has not kept pace, hampering its ability to ensure trained ITPs are available when requested to attend face-to-face interviews.

The ITP Program is not sufficiently resourced to respond to the demand nor the increasing complexity of the ITP role. OPA considers that urgent increased funding is needed to recruit in areas of high demand and ensure the retention of existing volunteer numbers. Additional funding would also support the program to provide increased training, coaching and ongoing support to volunteers which would ensure continuing best practice and a high standard of service delivery in a rapidly changing environment.

The role of the ITP has continued to evolve and change over time. ITPs support people to:

- attend police interviews;
- attend annual sex offender register interviews;
- provide witness and victim statements.

ITPs are also able to be present:

- when a person is attending remand hearings with a Bail Justice;
- during forensic procedures such as collection of DNA;
- when being served with an order, such as a personal safety intervention order.

In all of these varied engagements with police, it is essential that people understand their obligations in relation to orders, registry conditions, or relevant bail conditions. The implications of breaching bail conditions for example, can lead to new criminal offences and an increased likelihood of returning to prison. The ITP program continues to adapt and support volunteers in the increasing complexities of their role, however, the resourcing of

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<sup>58</sup> *Crimes Act 1958* (Vic) s 464E.

the program must increase to reflect the changing landscape. OPA makes the following recommendation:

#### **Recommendation 10**

**The Victorian Government should adequately resource the Independent Third Person Program to respond to current and future demand based on modelling.**

OPA welcomed additional funding for the program in 2018. This increase in funding enabled the program to expand on its capabilities and to develop and distribute vital program improvements and resources to volunteers. It ensured that ITPs are well informed, and delivering a best practice model of service for all Victorians with an intellectual disability when engaged with police. It is imperative that this short-term funding become ongoing, as the program would not be able to provide the current level of community engagement or oversight should a reduction in resourcing occur.

#### **4.2.3 Referrals: preventing continued engagement with the criminal justice system**

The current role of an ITP is limited to the conduct of the interview, however, ITPs often see people with disability in their first contact with the criminal justice system and, therefore, are well placed to identify support needs and systemic issues, as well as make referrals. OPA has written about this potential expanded role numerous times, including the submissions and *Breaking the Cycle* report mentioned previously.

OPA notes with concern the lack of cohesion between victim support services for individuals with a disability. While the current victim support framework is complex, individuals with disability have unique needs and added difficulty in accessing the services vital to their continued inclusion in the trial process. One identified gap is that ITPs cannot refer victims (and alleged offenders and witness) to appropriate support services.

The involvement of an ITP, including the capacity to make referrals, would assist a range of people with cognitive impairment in police interviews to be supported to prevent further contact with the criminal justice system.

OPA's *Breaking the Cycle* reported that:

Police have identified the need to offer referrals to people who are believed to have cognitive impairments and mental illnesses. Most of the police who took part in this research indicated that volunteers should make referrals following an interview for ITP clients, rather than police. This is because ITP volunteers are perceived by clients to be independent and objective, and because they operate outside of the criminal investigation.<sup>59</sup>

OPA makes the following recommendation:

#### **Recommendation 11**

**The Victorian Government should expand the role of the Independent Third Person Program to provide referrals to service and support agencies.**

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<sup>59</sup> Office of the Public Advocate (Victoria), report *Breaking the Cycle: Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* (2012) 7.

#### 4.2.4 Remand hearings with a Bail Justice

ITPs have noted, when supporting people in remand hearings with a bail justice, the introduction of audio-visual technology in place of the bail justice attending a police station to conduct the hearing in person. While OPA welcomes sector flexibility and innovative practice that may increase availability of bail justices, there must be consideration given to the barriers audio-visual technology can create for people with cognitive impairment. It is imperative that in-person attendance of bail justices remains commonplace and available for people with cognitive impairment so that they have equal access to applications for bail.

OPA considers that a default position of remote attendance at remand hearings by bail justices may lead to an increase in time spent in custody for people with cognitive impairment, and also may lead to an increase in new criminal offences as a result of breaches of bail conditions if people do not fully comprehend the conditions imposed and communicated to them during a remote remand hearing.

#### 4.3 Intermediary pilot

If the matter ultimately proceeds to court, the State has an obligation to enable people with a disability to participate and access justice on an equal basis through the provision of necessary supports and adjustments. Where necessary, people with a disability must not only be supported to understand their rights, but also to assert them.

One such form of support to enable a person who needs support to communicate to give their best evidence in court is through a communication intermediary. 'An intermediary is a communications professional who assesses the witness's communication needs and advises the court on strategies to help the witness give their best evidence.

As noted in the OPA publication, *I'm too scared to come out of my room*, a Communication Intermediaries pilot commenced in Victoria on 1 July 2018.<sup>60</sup> The pilot, which applies to a limited type of criminal proceedings at court venues, aims to facilitate vulnerable witnesses with complex communication needs as well as people with a cognitive impairment, to give their best evidence in court."<sup>61</sup>

OPA considers that the Victorian Government should continue to fund the Communication Intermediaries Pilot Program for a period sufficient to enable the completion of an outcomes review. If the review finds that the pilot has been successful, the program should continue and be expanded to ensure that it is available at all proceedings in all courts and tribunals, and is available for victims as well as alleged perpetrators.

OPA repeats recommendation 11 in its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper:<sup>62</sup>

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<sup>60</sup> Department of Justice and Community Services website, Victorian intermediaries pilot program <https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/victorian-intermediaries-pilot-program>

<sup>61</sup> Office of the Public Advocate, *I'm too scared to come out of my room* (2019),72.

<sup>62</sup> *DRC criminal justice submission* (n 9) 27.

### **Recommendation 12**

**The Victorian Government should fund the continuation of the Communication Intermediaries Pilot Program to allow sufficient time for an outcomes review to be completed. If it proves successful, the program should continue and expand to:**

- **be available at all proceedings in all courts and tribunals**
- **be available for victims and alleged perpetrators.**

## **4.4 Court Diversion Programs**

The criminal justice system should at all points act as a barrier and push people with a disability back to the social service sector for the services and support that they need. Greater access to diversion away from court would allow for an expanded therapeutic response to address the causes of disadvantage that result in offending.

The Criminal Justice Diversion Program provides “mainly first time offenders with the opportunity to avoid a criminal record by undertaking conditions that benefit the offender, victim and community as a whole”. The program aims are to, amongst other things, “reduce the likelihood of reoffending,” “assist in the provision of rehabilitation services to the offender” and “increase the use of community resources to provide counselling and treatment services”.<sup>63</sup>

Diversion has the positive effect of diverting vulnerable Victorians away from the criminal justice system and instead towards behavioural supports and health and wellbeing pathways. Addressing disadvantage reduces rates of recidivism and is likely to consequently reduce the number of people held in custody.<sup>64</sup> In order for this to occur, it would be necessary to ensure the availability of supports and services to which the person with a disability can be diverted to. Any increase in the use of diversion would require adequate funding to meet current and future demand.

One means of expanding the reach of diversion programs, would be to allow the court to grant diversions (rather than require the diversion to be initiated by police). The Magistrates’ Court of Victoria Annual Report 2015-2016 stated that ‘diversion should be available at the instance of a magistrate and not initiated by notice of a member of Victoria Police.’<sup>65</sup> A review of diversion made recommendations to the Chief Magistrate including that diversion ‘should be a matter for the discretion of the magistrate and not subject to veto by the prosecution.’<sup>66</sup>

OPA highlights the consensus amongst peak advocacy bodies and echoes the below recommendation made by the Law Institute of Victoria and the Victorian Council of Social Service.<sup>67</sup>

### **Recommendation 13**

**The Victorian Government should amend the *Criminal Procedure Act 2009* to remove the requirement for Victoria Police or prosecutions to consent to a diversion (s 59(2)(c)) and instead allow diversions to be granted at the discretion of the magistrate.**

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<sup>63</sup> Magistrates Court, *Annual Report 2015-16* (2016) 58. (*MC annual report*)

<sup>64</sup> *Pathway to decarceration* (n 41) 7.

<sup>65</sup> *MC annual report* (n 63) 12.

<sup>66</sup> *Ibid*, 14.

<sup>67</sup> *Pathway to decarceration* (n 41) 7.

## 4.5 Corrections Independent Support Officers Program

### 4.5.1 The CISO Program

Corrections Independent Support Officers (CISOs) are experienced ITP volunteers who also volunteer in the CISO program. They provide support and assistance to prisoners who have a diagnosed Intellectual Disability during General Managers' Disciplinary Hearings at every adult prison in Victoria.

CISO volunteers explain what rights prisoners have and check that they understand them prior to and throughout the hearing process. CISOs will also support prisoners to exercise these rights if they wish to. The presence of a CISO can prevent unfair outcomes for prisoners with intellectual disability, that may have the potential to adversely affect the prisoner's prospects of obtaining parole.

OPA has held ongoing concerns about the number of prisoners taking up the opportunity for CISO support, including the alleged rate of prisoner refusal of a CISO. There has never been any advice provided to OPA about what information prisoners receive about the program or what a CISO could do to support them in a disciplinary hearing.

Individual prison CISO participation rates vary greatly across the state, with one of the most concerning being the Victoria's women's prison, the Dame Phyllis Frost Centre, which continually only facilitates one to two CISO attendances annually but had none in the last financial year.

In 2019-20, CISOs attended 170 hearings relating to 245 charges. One hundred and nine clients at six prisons in Victoria accessed a CISO, all but one of whom were male.<sup>68</sup> This is a significant reduction in hearings when compared with the past three years (2016/17 – 224 hearings, 2017/18 – 290 hearings and 2018/19 – 299).

It is reasonable that access to prisons has been impacted by the COVID-19 pandemic, thus the usage of CISOs was significantly lower over the last two financial years compared to previous years. It is, however, essential to consider that while the CISO Program is currently operating remotely via audio-visual link, that the preferred model of service delivery remains as face-to-face, with CISOs attending prisons in person so that they are able to communicate effectively with prisoners who may have complex communication needs.

The CISO program is generally only made available to prisoners with a registered intellectual disability. This means that other prisoners with undiagnosed intellectual disability or ABI, for example, who may benefit from support are not offered a CISO and are potentially disadvantaged during the hearing process. OPA has consistently advocated for expansion of the CISO program's eligibility criteria.

The CISO program currently receives \$15,500 in funding annually. Adequate funding of the CISO program must be urgently addressed to ensure the continuation and expansion of the program.

### 4.5.2 Prison disciplinary hearings

A prison disciplinary hearing occurs when a prisoner commits, or attempts to commit, an offence set out in reg 65(1)(a)–(zh) 'Prison offences' of the *Corrections Regulations 2019* (Vic). The list of offending behaviour is extensive and includes actions such as assault or threaten any person, possess an article or substance that is not permitted, access the

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<sup>68</sup> Office of the Public Advocate, *Annual report (2020)* 42.

internet and disobey a lawful instruction from an officer. Before charging a prisoner with an offence, the disciplinary officer investigating the alleged offence is required to 'consider whether the prisoner has any special needs of special circumstances' per reg 66(f) *Corrections Regulations 2019* (Vic). A registered intellectual disability or indeed a suspected intellectual disability, cognitive impairment, ABI or mental illness are special needs or circumstances and must be considered.

If the prisoner pleads or is found guilty, possible penalties are a reprimand, a fine not exceeding one penalty unit and loss of privileges per s 53(4)(a)-(c) 'Governor's hearing' of the *Corrections Act 1986* (Vic). While a reprimand has no immediate tangible effect, it may have ramifications when a prisoner applies for parole. As one prisoner noted, '[I]t doesn't seem fair to me. I've been pinning my hope on getting parole.'<sup>69</sup>

OPA is aware that prisoners sometimes opt to plead guilty at disciplinary hearings to 'get it over with' regardless of whether the prisoner considers themselves culpable or not, possibly without awareness of implications a guilty plea may have on future parole applications. For example, one CISO supported a prisoner with an intellectual disability who was charged with a trafficking contraband offence (cigarettes). After the conclusion of the hearing, the hearing officer asked the prisoner if he smoked, which he stated he did not. This example demonstrates that prisoners with intellectual disability are particularly vulnerable to being manipulated by other prisoners; in this case, the prisoner may have brought the cigarettes into the prison on behalf of someone else without fully comprehending the consequences. Trafficking offences are a serious prison violation and may impact on the prisoner's access to a lower security prison while serving their custodial sentence.

Greater CISO involvement in disciplinary hearings will ensure that the CISO Program works in a rights-affirming way as it is intended. It is possible that avoiding unfair findings of guilt will render parole more accessible. This, hypothetically, could contribute to a reduction in the prison population.

CISOs have observed the frequency at which prisoners with disability are charged with prison offences that may have occurred as a result of their disability. The most common contraventions relate to offences of aggression and property damage. CISOs report prisoners who have been charged with these types of offences despite having little understanding of the impact of their behaviours, or that they may be violating prison regulations. For example, CISOs comment on the difficulty for some prisoners with cognitive impairment to comprehend the fact that cigarettes are not permitted in prison, although they are legal in community settings.

### **Case story: Will**

A CISO attended a hearing to support 'Will', a prisoner with an intellectual disability. Will was known by prison staff to have challenging behaviours, yet he received no behaviour supports.

Will was charged by the prison with starting a fire in his prison cell. He had acquired a cigarette, considered contraband in Victorian prisons where smoking is not permitted, and, in an attempt to light it, started a small fire in his cell.

The fire brigade was called and the CISO hearing resulted in Will being issued with a very large fine to cover the cost. CISOs are also aware that, following that incident

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<sup>69</sup> Prisoner, complaint to the Ombudsman, cited in Victorian Ombudsman, *Investigation into good practice when conducting prison disciplinary hearings* (2021) 8.

and hearing, Will has continued to accumulate additional fines, all associated with disability-related behaviours of concern.

### 4.5.3 Ombudsman's report

In December 2019, the Victorian Ombudsman advised relevant parties of her intention to undertake an investigation of the prison disciplinary hearing process in Victoria. The Ombudsman's report of her *Investigation into good practice when conducting prison disciplinary hearings* was subsequently published in July 2021.

The Ombudsman's investigation found a multitude of issues 'with the treatment of prisoners with a cognitive impairment or mental illness during the disciplinary process,'<sup>70</sup> namely:

- relative over-representation of prisoners with a cognitive impairment or mental illness in the process
- failure to identify and consider the condition of some prisoners
- inconsistent consultation with relevant professionals
- limited independent support for many prisoners with a disability
- inconsistent use of CISO volunteers for prisoners with an intellectual disability
- lack of transparency where prisoners decline assistance from the CISO program.

In its submission to the Ombudsman, 'OPA recommended that:

- a screening tool be implemented at prison admission to identify prisoners eligible to receive support under the CISO program
- hearing files in each case identify the steps taken to assist eligible prisoners to access the CISO program
- eligible prisoners be provided with an Easy Read CISO guide at admission and thereafter annually or following transfer to a new prison
- similar posters be displayed at all prisons
- information sessions about the CISO program be conducted at least annually for all staff
- clear protocols be developed in the case of eligible prisoners who are transferred to another prison prior to their hearing.'<sup>71</sup>

### Central coordination and oversight of disciplinary hearings

The Ombudsman's report sets out the laws and policies that 'establish the legislative and operational requirements for the prison disciplinary process.'<sup>72</sup> These consist of: the *Corrections Act 1986* (Vic); *Corrections Regulations 2019* (Vic); Commissioner's Requirements; Deputy Commissioner's Instructions and Operating Instructions; and other policy documents including the Prison Disciplinary Handbook which provides guidance concerning the conduct of the hearings.<sup>73</sup>

While these laws and policies set out matters including the broad framework for the process, forms, procedures and provide guidance for Disciplinary Officers and Hearing Officers as to the conduct of disciplinary hearings, a central unit within the department of Justice and Community Safety responsible for the operation and oversight of the prison disciplinary system would work towards improving consistency in the organisation or administration of the hearing process across Victorian prisons.

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<sup>70</sup> *Ombudsman's Disciplinary hearings report* (n17) 61.

<sup>71</sup> *Ibid*, 63.

<sup>72</sup> *Ibid*, 20.

<sup>73</sup> *Id*.

While the CISO program provides services to all Victorian prisons, in the 2020-21 financial year OPA only attended hearings at four Victorian prisons, including at Port Philip Prison and the Metropolitan Remand Centre. OPA is not aware if prisoners with intellectual disability at other prisons are offered the support of a CISO when attending disciplinary hearings.

OPA holds concern regarding how the CISO program and the benefits of engagement with a CISO is offered to prisoners with intellectual disability. Prisons frequently advise the program that an individual prisoner has declined the support of a CISO, however it is never made clear why a person has declined a CISO and if the benefits of such have been explained to them in a way that they can make an informed decision, or indeed if they have made the decision free from external influence.

OPA is aware that some prisons engage disability liaison officers, employed by the prison to support people with intellectual disability in disciplinary hearings. OPA remains concerned about this practice, as employees of the prison provide no independent oversight of disciplinary hearings. CISO volunteers provide support that is independent and unbiased.

#### **Recommendation 14**

**The Victorian Government should establish and invest in a dedicated team within the department to be responsible for conducting prison disciplinary hearings and related internal reviews, including staff with relevant operational and administrative decision-making expertise.**

While noting that the issues covered in the following recommendations would be addressed by the establishment of a dedicated team with responsibility for oversight of the system of disciplinary hearings, OPA endorses the following recommendation made by the Victorian Ombudsman in relation to minor offences. CISOs have observed that many matters before disciplinary hearings could have been better dealt with as a minor offence. This would avoid any impact on the prisoner's prospects for parole in respect of minor violations of the prison rules.

#### **Recommendation 15**

**The Victorian Government should develop and implement a strategy to reduce the number of minor offences that proceed to the hearing stage, including through a formalised and consistent minor offence process, behaviour management plans and other alternatives to disciplinary hearings in recognition of the benefits in prisons conducting fewer and better-quality disciplinary hearings.**

The Government's response to this and the previous recommendation was to note that they will be considered as part of the Government's recently announced independent review into the culture of Victoria's prison system.<sup>74</sup> OPA notes the importance of this review and hopes that changes will result from it.

#### **Recommendation 16**

**The Victorian Government should amend Commissioner's Requirement 2.3.3 and related materials to require that Hearing Officers record brief written reasons for disciplinary hearing outcomes and penalties and make these available to prisoners on request.**

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<sup>74</sup> *Ombudsman's Disciplinary hearings report* (n17) 78.

The Victorian Government supported this recommendation in principle subject to budget deliberations.<sup>75</sup>

### **Expansion of the CISO program**

The CISO Program can generally only be accessed by prisoners with a registered intellectual disability, unlike the ITP Program which applies broader inclusion criteria. In practice, this means individuals with other cognitive impairments including mental illness, or ABI, who could greatly benefit from the support of a CISO, are currently ineligible to access the program.

There is urgent need for proper screening for disability on entry to the prison system, as raised in OPA's submission to the Ombudsman.

The Victorian Ombudsman recognised OPA's advocacy efforts, noting that 'OPA has consistently advocated for expansion of the CISO program eligibility criteria'. The report referenced OPA's observation that '[t]he CISO Program should include prisoners with any cognitive impairment, other than those with a primary diagnosis of mental illness, so this would include:

- registered intellectual disabilities
- undiagnosed intellectual disabilities
- Acquired Brain Injuries
- Autism Spectrum Disorder
- dementia.<sup>176</sup>

In its submission to the Ombudsman, OPA<sup>77</sup> reported that mental illness was only excluded from the above criteria 'because of the number prisoners likely to be involved and the fact it would expand the Program beyond OPA's current capacity to manage'.

Subject to an immediate and significant increase in funding, OPA supports the Ombudsman's recommendation that:

#### **Recommendation 17**

**In consultation with the Office of the Public Advocate, develop and implement measures to improve prisoner understanding and experiences of the prison disciplinary hearing process and available supports, including through:**

- a) development of plain English materials explaining the disciplinary hearing process and available supports;**
- b) expansion of the Corrections Independent Support Officer program to provide assistance to prisoners with other forms of cognitive impairment; and**
- c) identification of further opportunities to promote the Corrections Independent Support Officer program within prisons and relevant specialist units.**

The Victorian Government supported this recommendation in principle subject to budget deliberations.<sup>78</sup>

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<sup>75</sup> Id.

<sup>76</sup> *Ombudsman's Disciplinary hearings report* (n17) 61.

<sup>77</sup> Id.

<sup>78</sup> Victoria Ombudsman, *Investigation into good practice when conducting prison disciplinary hearings* (Melbourne, 2021) 79.

OPA goes further and makes the following additional recommendations:

#### **Recommendation 18**

**In consultation with the Office of the Public Advocate, the Victorian Government expand the CISO program to enable prisoners to speak with a Corrections Independent Support Officer upon receiving notice that a hearing will occur, so that the person is able to consider what rights they have prior to the day of the scheduled hearing. This may increase the opportunity for prisoners with intellectual disability to call witnesses if they wish to plead not guilty, and to make an informed decision about the presence of a Corrections Independent Support Officer at the hearing.**

#### **Recommendation 19**

**The Victorian Government should increase funding of the Corrections Independent Support Officer program to ensure that it is adequately resourced to meet the current and proposed additional demands of the program.**

#### **Recommendation 20**

**The Victorian Government should develop and implement an internal review mechanism for prison disciplinary hearings, including, if necessary, through amendment to the Corrections Act 1986 (Vic) in recognition that a robust merits review of decisions is likely to substantially mitigate the risk of unfair outcomes.**

## **5. Strategies to reduce rates of criminal recidivism**

### **5.1 Screening - disability**

OPA urges the committee to consider the importance of disability screening at the point of entering prison. This would enable prisoners to connect with services that meet their needs, provide therapeutic support around behaviours of concern and help to collect data. The provision of support would make it less likely that prisoners would re-offend where the criminalised behaviour is connected to their disability, for example, the prisoner cannot self-regulate their emotions resulting in aggression.

In Victoria, there is no systematic assessment of a person's disability, outside of a mental health screening, as they enter prison. (In Victoria, this usually takes place at the Melbourne Assessment Prison). The mental health assessment, to OPA's knowledge, is exceedingly focused on risk (for example, assessing a person's suicidality) and will not always trigger service delivery. There is no assessment of other forms of cognitive impairment and, therefore, Corrections Victoria generally relies on piecemeal sources of information, such as information from the courts, obvious signs of impairment, and/or individuals disclosing their disability status.<sup>79</sup>

A person may not want to identify as having a disability for fear of discrimination or retribution, or it may be that a person has a contested or an undiagnosed disability, which is often the case with ABIs. It is, therefore, near impossible to establish the real prevalence of disability in prisons, and, consequently, to ascertain the level of need for disability supports.<sup>80</sup>

Identifying a person's disability is, of course, a prerequisite to accessing their eligibility for the NDIS. Corrections Victoria should facilitate NDIS participation at all stages – at the point

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<sup>79</sup> *DRC criminal justice submission* (n 9) 47.

<sup>80</sup> *Id.*

of entering the prison system, during the prisoner's sentence and most crucially before the prisoner is released to ensure continuity of disability support between prison and living in the community. Identifying a person's disability is also an obligation of Article 31 of the CRPD that requires State Parties to:

undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.

This obligation remains unfulfilled by the justice system as a whole, but, in this instance, OPA builds on a recommendation made by the Victorian Ombudsman's report on the *Investigation into the rehabilitation and reintegration of prisoners in Victoria*<sup>81</sup> which was also made in OPA's submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper (recommendation 23):<sup>82</sup>

#### **Recommendation 21**

**The Victorian Government should implement or review practices and procedures for identifying and screening prisoners with a cognitive impairment to ensure that these functions are carried out by staff with specialist knowledge.**

Further to this recommendation, OPA appreciates that the task of identifying a person's cognitive impairment at prison intake is likely to become more straightforward as an increasing number of people enrol in the NDIS. Corrections Victoria would need to establish information-sharing protocols with the NDIA, but, as time goes on, the assessment may be simplified to the point of a query to know whether a person is an NDIS participant.

## **5.2 Screening - NDIS eligibility**

One of the primary aims of screening prisoners for disability is to trigger service provision. In the context of the NDIS, any identification of disability should result in the lodging of an NDIS access request, where the person is not yet a participant in the scheme. The correctional facility should facilitate the completion of an Access Request Form (ARF). In the event that a potential participant is required to undertake additional assessments for the completion of the ARF, Corrections Victoria should provide support to this effect. Connecting eligible prisoners with NDIS supports will address disability needs including behaviours of concern. Therapeutic services accessed via the NDIS will support the prisoner and, in turn, is likely to contribute to reduced rates of recidivism.<sup>83</sup>

OPA refers to and repeats recommendation 23 in its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper:<sup>84</sup>

#### **Recommendation 22**

**Corrections Victoria should adopt protocols to identify whether individuals entering its services are potentially eligible to access the NDIS and facilitate access requests at the earliest opportunity.**

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<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> *DRC criminal justice submission* (n 9) 47

<sup>84</sup> Id.

### 5.3 Interface issues with the NDIS

The Applied Principles and Tables of Support (the APTOS principles) are an intergovernmental agreement between the Commonwealth NDIA and the states and territories. The APTOS principles determine the responsibilities of the NDIA and the relevant State or Territory justice department in providing supports at key interfaces. The APTOS principles raise a significant definitional difficulty that affects eligibility for NDIS support while in prison. The definitional issues in defining and distinguishing between 'disability related behaviours of concern' and 'criminogenic behaviours' cause disagreements about the source of funding for supports for incarcerated Victorians. In the meantime, prisoners with disability languish without their human rights being met.

The vagueness or lack of real distinction between these concepts is highly problematic. For the NDIS to apply, the applicant must demonstrate disability-related behaviours of concern that are distinguished from criminogenic behaviours, support for which is the responsibility of the relevant state or territory justice department. In reality, the behaviours that are considered 'criminogenic' are synonymous with the disability-related behaviours of concern – for example difficulty regulating emotions and subsequent physical aggression. Making a distinction between the two is exceptionally difficult and a somewhat theoretical exercise for the purpose of funding decisions. Unclear delineations often become the subject of complex funding disputes between the two entities, leading to inefficiencies and delays for participants.

By way of example, the principles identify the following as being within the scope of the NDIS (for services provided in non-custodial settings):

supports that address behaviours of concern and reduce the risk of offending and re-offending such as social, communication and self-regulation skills, where these are additional to the needs of the general population and are required due to the impact of the person's impairment/s on their functional capacity and are additional to reasonable adjustment.<sup>85</sup>

On this basis, much, if not all, of the content of the clinical services provided to people under a civil detention regime clearly fall into the category of reasonable and necessary NDIS supports. For example, the treatment plan of one participant subject to civil detention specifies the goals of his clinical treatment as helping the client "manage the challenges of living with others", developing "healthy and adaptive relationship skills" and increasing their ability to self-manage behaviours – all of which speak to both disability-related needs as well as reducing risks of reoffending.

Clinical supports provided to people who present with offending behaviours simultaneously to the need for support in the development of prosocial, communication and self-regulation skills (all of which would help reduce their risk of offending), should, in accordance with the APTOS, be funded by the NDIA. Yet, the NDIA has on multiple occasions refused to fund those types of supports. The principles do not reflect the inherent and human complexity of the needs of some people with disability, nor does the underlying policy recognise that it may not be possible or desirable to have a clear demarcation of such needs, serviced by different service systems.

OPA repeats the following recommendation, amended from recommendation its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation<sup>86</sup> to improve coordination issues at the interface between the NDIS and Corrections Victoria.

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<sup>85</sup> Council of Australian Governments (COAG) *Principles to determine the responsibilities of the NDIS and other service systems* (November 2015) 23.

<sup>86</sup> *DRC criminal justice submission* (n 9) 7.

## Recommendation 23

**The Victorian Government should urge National Cabinet Disability Reform Council to review the *Applied Principles and Tables of Support* (the APTOS principles) to ensure they provide clear guidance to resolve interface questions.**

### 5.4 NDIS services in prisons

The provision of NDIS-funded supports in prisons is guided by the Applied Principles in relation to supports for participants subject to custodial sentences. The Applied Principles determine that the NDIS is responsible for:

- the coordination of NDIS supports with the supports offered by the justice and other service systems
- For people in a custodial setting (including remand) the only supports funded by the NDIS are those required due to the impact of the person's impairment/s on their functional capacity and additional to reasonable adjustment, and are limited to:
  - aids and equipment
  - allied health and other therapy directly related to a person's disability, including for people with disability who have complex challenging behaviours
  - disability-specific capacity and skills-building supports which relate to a person's ability to live in the community post-release
  - supports to enable people to successfully re-enter the community
  - training for staff in custodial settings where this relates to an individual participant's needs.<sup>87</sup>

According to OPA's interpretation of the Applied Principles, it is clear that NDIS supports, like speech pathology and behaviour support, can be provided in prison. The Applied Principles, however, continue to be inconsistently applied by prisons and providers, resulting in uncertainty as to which NDIS supports can be provided in prisons, and under what circumstances. OPA has observed an attitude that commencing behaviour support interventions is not seen as valuable until the prisoner has a release date, as illustrated by Andy's story.<sup>88</sup>

#### **Case Story: Andy**

OPA is guardian for 'Andy', a young man who is on remand awaiting sentencing. Andy has a long history of offending (including sexual offences) and of being incarcerated.

Andy has an NDIS plan, in part thanks to the OPA guardian advocating for and consenting to the assessments required for planning to be completed. Due to being incarcerated, his NDIS plan is quite minimal, with only support coordination, speech pathology, and behaviour support.

Andy has received many services from correctional or offence-related services but OPA has found that he does not respond well to the 'justice' paradigm. In contrast, the time spent with the NDIS-funded speech pathologist is often the most positive time in his day and he is much more engaged during these sessions. Otherwise, Andy can generally be quite agitated.

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<sup>87</sup> *DRC criminal justice submission* (n 9) 45.

<sup>88</sup> *Ibid*, 46.

A behaviour support specialist is engaged to support Andy, a worker who knows him well from having worked with him in the past. The practitioner has been able to complete some assessments, but faces some difficulty in starting to deliver the behaviour support interventions. The resistance comes from an alleged view that, once Andy receives his sentence or release date, there will be a significant change in his circumstances and, therefore, it is “useless” to begin service delivery beforehand.<sup>89</sup>

For Andy, and in many cases where the prisoner has received advocacy support, NDIS-funded supports are ultimately provided in prisons. In other cases, however, the request is altogether denied.

The NDIA has not published a definitive position on this issue, and the Victorian Government advises that the decision to determine whether NDIS supports can enter its premises sits with each individual custodial facility.

OPA notes that the 2016-2019 *Corrections Victoria Disability Framework* lists as actions to “deliver the necessary and relevant support to meet the needs of prisoners and offenders with a disability” as well as “improve system and processes, including enhanced assessment processes, refinement of program and service pathways for persons with a disability, and improving data collection and reporting.”<sup>90</sup> Work has commenced on the development of a new *Corrections and Justice Services Disability Framework 2019-2022* that articulates an integrated approach to supporting offenders and prisoners with disability.<sup>91</sup>

While these actions are not specific to the NDIS, OPA, nonetheless argues that the outcome of being “responsive to the diverse needs” of prisoners with disability remains unfulfilled until NDIS supports can be provided in all Victorian prisons. OPA has observed that implementation of NDIS-funded supports to prisoners are slow, and that there are limited providers who are prepared to work with prisoners. Finding an agency that is prepared to be a coordinator, and that provider then finding adequate staff who are appropriately trained are challenges. Increased delivery of therapeutic supports in prison will render prisoners better-skilled and prepared for their re-entry into the community, creating the conditions to reduce rates of recidivism.

OPA refers to and repeats recommendation 22 in its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper:<sup>92</sup>

#### **Recommendation 24**

**Corrections Victoria should develop and implement a policy, applicable in all correctional facilities, that allows NDIS-funded support providers to enter the premises.**

## **5.5 The importance of pre-release planning**

Providing continued care in the transition from prison to the community, known as through care’ and ideally initiated in the weeks before a prisoner’s release, as well as pre-release planning are critical in the rehabilitation of prisoners. Appropriately supporting people

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<sup>89</sup> Id.

<sup>90</sup> Department of Justice and Regulation (Vic) *Corrections Victoria Disability Framework 2016-2019* (2015)9.

<sup>91</sup> Department of Justice and Community Services, *Disability Action Plan* (2020) Initiative 2.3, 13.

<sup>92</sup> *DRC criminal justice submission* (n 9) 47.

through this significant transition helps to reduce the risk of re-offending and subsequent return to custody.<sup>93</sup>

In order to be successful, correctional staff must engage prisoners in the process and community-based specialised supports must be available post-release, but often they are hard to source. Shortages may be due to limited funding, an unwillingness of NDIS providers to take on clients with offending behaviours, and the significant proportion of people with mental illness and disability in Victorian prisons.<sup>94</sup>

Pre-release planning should, of course, involve the NDIA, where applicable, whether that be through the lodging of an access request or scheduling a plan review in preparation for a prisoner's release. OPA and many others have lobbied the NDIA to allow NDIS plans to be established prior to a prisoner's release from custody, but there are many challenges.

As identified by Forensicare below, the release date is often unknown for prisoners on remand, causing resistance from the NDIA and providers to engage in the planning process prior to the person's release from prison. Some prisoners may find it difficult to provide therapeutic input to their therapy prior to their return to mainstream society, especially if they have been in custody for a long time; they may not know what supports they will need or even what is available through an NDIS plan. Specialist planning and advocacy can be useful to assist with this.<sup>95</sup>

Mark's story above illustrates what happens with correctional staff who do not engage with prisoners to ensure that community-based specialised supports are available post-release. Mark had a history of cycling in and out of prison. Despite asking a prison support worker to establish a transition support plan including assistance to access housing, Centrelink, mental health and substance abuse services, he was released in the evening with no supports in place and nowhere to go.

The Victorian Ombudsman's 2015 report<sup>96</sup> examined the rehabilitation and reintegration of prisoners. The report identifies the many risks faced by individuals on prison release. The report found that there is a high risk of death in the few months post release, with the two most frequent causes of death being related to mental health, namely drug overdose and suicide. Housing insecurity is one of the main factors that predicts a person's subsequent return to prison. The Ombudsman links the high mortality rate and risks of re-offending to a failure to organise wrap-around supports at a time when individuals are rebuilding their lives and simultaneously learning to manage their mental health in a starkly different setting.

It is all the more alarming that through care is not comprehensively provided to prisoners with a known mental illness who are leaving a forensic facility. Forensicare, Victoria's leading provider of forensic mental health care, recognises the flaws in the current model. By way of example, the following excerpt from its submission to the Royal Commission into Victoria's mental health system raises some important gaps:

With an increasingly high proportion of prisoners on remand the timing of release from prison is often uncertain. It is relatively common for a person on

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<sup>93</sup> Ibid, 27.

<sup>94</sup> Id.

<sup>95</sup> Office of the Public Advocate (Vic), *Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper* (March 2020) 29.

<sup>96</sup> Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015).

remand to leave prison to attend court, and then be released directly from court into the community. We understand this creates considerable problems and risks issues for AMHS (Area Mental Health Services) who may not be equipped to manage this. The Community Integration Program provided by Forensicare only operates in some prisons. This program could be expanded to support the successful transition of people released from prison who require mental health follow up.<sup>97</sup>

There is a need for systems to be integrated to better support people who are leaving prison who, in the absence of community supports, risk cycling back into custody or civil detention. In relation to the latter, OPA is aware of prisoners presenting obvious signs of mental illness who, following assessment by forensic mental health staff in preparation for release or bail, are placed on a compulsory assessment order under the *Mental Health Act 2014* (Vic). In effect, they are transported directly from the prison to a mental health hospital service where they are generally admitted.

OPA continues to notice a stark contrast in pre-release planning between prisoners with and without a network of informal supports. Prisoners without natural or informal supports are disadvantaged in that they are less likely to be released because they lack the community supports and as a result, remain in restrictive environments.<sup>98</sup>

Mark's story of being released in the evening with no supports in place and nowhere to go, illustrates how the release from prison can be distressing when there are limited dedicated support programs. Unsurprisingly, some people would rather remain in custody than face homelessness or return to an unsafe home. OPA urges the committee to consider recommending better integration of services and coordination between the justice, disability, and mental health systems to ensure a person is fully supported while in detention and on release. Importantly, this would require cross-jurisdictional coordination between the Victorian justice system and the Australian Government's NDIS.<sup>99</sup>

## **Recommendation 25**

**The Victorian Government should ensure better integration of services and coordination between the justice, disability, mental health systems and housing to ensure a person is fully supported while in detention and on release.**

Pre-release planning, however, will be of little utility if there are no services to provide the necessary support. While it is the justice system's responsibility to regulate correctional services, governments more broadly have a duty of care to adequately fund and resource community-based services to prevent injustice and support all people to avoid unnecessary detention and deprivations of liberty. The need to protect the community is valid but it should be addressed by rigorous and best-practice treatment approaches, adequately priced services offered by skilled workers, and perhaps, most importantly, secure community accommodation options.<sup>100</sup>

Recent research from the Australian and Urban Research Institute (AHURI) entitled 'Exiting prison with complex support needs: the role of housing assistance' paints a picture of prisoners with cognitive disability and the barriers they experience while in prison and when accessing support services on release.<sup>101</sup> The AHURI report then argues for an increase in

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<sup>97</sup> Forensicare, *Formal submission: Royal Commission into Victoria's Mental Health System* (July 2019) 15.

<sup>98</sup> *DRC criminal justice submission* (n 9) 28.

<sup>99</sup> *Id.*

<sup>100</sup> *DRC criminal justice submission* (n 9) 29

<sup>101</sup> Australian Housing and Urban Research Institute *Exiting prison with complex support needs: the role of housing assistance*. (Melbourne, 2021), 14-24 (chapter 2) and 25-33 (chapter 3).

social housing for ex-prisoners with complex support needs alongside the specialised support services they need for a successful transition to the community. OPA's experience would support AHURI's findings and it agrees that governments need to increase social housing and the support services available for ex-prisoners with complex needs.

OPA repeats a recommendation made in its submission to the Royal Commission into Victoria's mental health system (recommendation 18), noting that it was first made by the Victorian Ombudsman in 2015,<sup>102</sup> but has not yet been implemented:

### **Recommendation 26**

**The Victorian Government should fund the expansion of transition and community-based mental health services for former prisoners.**

## **5.6 Disability support pension**

The ability of ex-prisoners to pay for housing has become even more difficult as a result of changes to the eligibility provisions for the Disability Support Pension (DSP). Most people with disability who have come into contact with the criminal justice system would be eligible for the DSP. The changes to the eligibility for the DSP that commenced on 1 January 2019 affect people in prison (including those on remand) and make it more difficult for people with disability to access the DSP once they are released. Under the new provisions, a person's DSP is cancelled after 13 weeks in prison compared to the previous cut-off date of two years. The person would have to re-apply after that period and meet any new eligibility criteria, which may be more onerous than those conditions under which they had previously applied.<sup>103</sup>

As a result, even if the person had accommodation prior to going to prison, the lack of income would mean that the person would not be able to pay their rent and would, more than likely, lose their housing. The clock starts ticking once a person is placed on remand. In effect, a person released from prison, including those people on remand, not yet found guilty of an offence, could be released with nowhere to live and no income. These changes to the DSP further disadvantage people with cognitive disability and could increase the risk of re-offending, recidivism and homelessness.

While a new disability support pension application is being assessed, the person is placed on a Newstart payment. This payment has 'mutual obligations' (such as applying for a certain number of jobs a fortnight) which often people with intellectual disability, cognitive impairment, ABI or mental illness are unable to meet. This situation means that people with disability who are leaving prison are exceptionally vulnerable to homelessness. Addressing this issue will reduce risks of recidivism.

## **5.7 Housing and homelessness**

Exiting prison is often a pathway to homelessness, or, alternatively, results in longer periods of custody. In its 2020 submission to the Victorian Senate Parliamentary Inquiry on homelessness, OPA noted that:

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<sup>102</sup> *Rehabilitation and reintegration of prisoners report* (n20) 156, recommendation 22.

<sup>103</sup> 'Department of Human Services 'Budget 2018-19: Disability Support Pension — aligning suspension periods for imprisoned recipients. [www.humanservices.gov.au](http://www.humanservices.gov.au) May 2019.

The correlation between involvement in the criminal justice system and homelessness is clear. A recent report by the Australian Institute of Health and Welfare shows that this issue is an ongoing problem: one in three persons entering prison report being homeless in the four weeks before prison<sup>104</sup> and over half of the persons being discharged from prison expect to be homeless upon release....<sup>105</sup> At the time of an arrest, some OPA clients are not granted bail because there is no appropriate supported accommodation that meets their specific needs to be bailed to. As a result, some people are spending more time on remand in custody awaiting their day in court than they would if they had been sentenced to a term of imprisonment. In these cases, people are released from court without the opportunity for any discharge planning at all. Whilst on remand they typically have had no access to discharge planning to arrange accommodation and other supports.<sup>106</sup>

Some prisoners then remain in custody after having served their sentence because they do not have an address to be released to nor do they have the necessary supports. This is especially true for people with high and complex needs. Some OPA clients find themselves caught in a cycle where their release is contingent upon locating supports, yet it is hard to enlist supports from within a custodial setting. On the larger scale, this may contribute to the high proportion of Victorian prisoners on remand....<sup>107</sup>

'Rebecca' found herself in just this situation. There was no specialist treatment facility suitable for her disability needs and as a result, she spent 18 months on remand in prison, mostly in 23-hour lockdown, before a suitable placement was found.<sup>108</sup> Rebecca ultimately became an NDIS participant, but the processes for accessing the NDIS and other services for her were lengthy. OPA notes, however, that while there are still issues with the operation of the NDIS, it has improved since the date of the Ombudsman's report and 'Rebecca's' life did eventually improve as a result of her access to the scheme.

If the person is released, irrespective of whether the release is from remand or from serving a sentence, as discussed above, they are likely to have little or no income and be at risk of becoming homeless. Poor pre-release and post-release planning for people with disability who are leaving custody can put them in a position of having to accept inappropriate supports, including accommodation, in turn increasing the risk of reoffending.

Importantly, a 2015 Victorian Ombudsman report<sup>109</sup> on the rehabilitation of prisoners found that housing instability is a factor predicting a return to prison. Transitional supports for prisoners are effective in reducing this risk of recidivism, but the Ombudsman estimated that only 1.7 per cent of Victorian prisoners have access to housing through the two existing State Government programs for former prisoners. As a result, the risk of reoffending is elevated, especially if no other supports are arranged for the person.

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<sup>104</sup> Australian Institute of Health and Welfare, *The health of Australia's prisoners 2018*. Cat. no. PHE 246. Canberra: AIHW 2019, 22.

<sup>105</sup> *Ibid.*

<sup>106</sup> Office of the Public Advocate (Vic), *Submission to the Parliamentary Inquiry into Homelessness in Victoria* (February 2020) 15. ('*Homelessness submission*')

<sup>107</sup> *Id.*

<sup>108</sup> *Ombudsman's Unfit to stand trial report* (n 27)

<sup>109</sup> Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015).

'Mark's' case story above also highlights the impact of a lack of supports including housing to ensure his transition from prison was successful, Mark did not receive the support he needed and returned to prison a short while later.

In its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability responding to its criminal justice system issues paper, OPA set out that one factor contributing to the criminalisation of disability is 'the shortage or unavailability of specialist supports and accommodation for people with disability. For many reasons, this leads the justice system to 'step in' in the place of alternative, less restrictive, supports.'<sup>110</sup>

In this regard, OPA notes that there are just two bail houses for people with intellectual disabilities. A number of OPA clients cannot live with others; they require stand-alone supported accommodation. Before the implementation of the NDIS, OPA would have approached the Department of Health and Human Services, now DFFH, with this issue, however this avenue is no longer available. When someone is in prison, the responsibility belongs to the justice system and when they are out, responsibility lies with the NDIS. Lack of coordination at the interface prevents beneficial through-planning.

OPA urges the Parliamentary Inquiry to consider the challenges faced by people with disability in accessing supports that could potentially divert them from the justice system, namely specialist supports and accommodation.

## 6. Knowledge and expertise of judges and magistrates

The Judicial College of Victoria has the legislatively prescribed purpose of 'assisting the professional development of judicial officers and providing continuing education and training for judicial officers.'<sup>111</sup> It follows that the college has some responsibility to ensure that judges and magistrates have appropriate knowledge and expertise when sentencing and dealing with offenders, including an understanding of recidivism and the causes of crime.

If this Parliamentary Inquiry is ultimately unsatisfied with the level of judicial knowledge and the availability of judicial education in this area, OPA's view is that the Legal and Social Issues Committee should recommend that the college design appropriate training. Given the over-representation of cognitive disability, ABI and mental illness among Victoria's remand and prison population, OPA's view is that judicial training in this area should specifically consider the factor of disability in relation to sentencing, dealing with offenders, recidivism and causes of crime. Education should consider the ways in which the criminal justice system discriminates on the basis of disability when disability is not actively taken into account within the criminal justice system, or adjacent systems such as housing and supports for behaviours of concern, effectively criminalising disability including punishing it by incarceration. New training modules should be co-designed, delivered and evaluated by people with lived experience of the criminal justice system, including people with a cognitive impairment, ABI and mental illness. Co-design, delivery and evaluation, or at the very least, consultation with and contribution by those with lived experience, will ensure that educational materials are created with direct and full participation of the class of people who will be affected by judicial educative outcomes.

Conversely, this Parliamentary Inquiry may decide that it is satisfied with the level of understanding among the judiciary and the availability of appropriate educative resources. For example, the 'Disability Access Bench Book'<sup>112</sup> developed by the college in collaboration with the Victorian Equal Opportunity and Human Rights Commission (VEOHRC). The book

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<sup>110</sup> *DRC criminal justice submission* (n 9) 27.

<sup>111</sup> *Judicial College of Victoria Act 2001* (Vic) s 1.

<sup>112</sup> Judicial College of Victoria, *Disability Access Bench Book* (Melbourne, 2016) <<https://www.judicialcollege.vic.edu.au/eManuals/DABB/index.htm#59523.htm>>.

adopts the social model of disability, in which the barriers faced by people with disability to full participation on an equal basis with others do not arise from an inherent lack in the body or mind of the person with disability. Instead, barriers arise from the physical environment and attitudinal barriers posed both by individuals and on a systemic level. The book acknowledges intersectional disadvantage, stating that 'women, Aboriginal and Torres Strait Islander peoples and people from Culturally and Linguistically Diverse (CALD) backgrounds with a disability, can face additional and distinct barriers.'<sup>113</sup> The book recognises the role of the judicial officer in ameliorating environmental and attitudinal barriers for people with disabilities within the justice system. It provides the Victorian judiciary with an understanding of the demographic context and barriers faced by people with disability, the obligations around protecting the right to equality, realising the rights of people with disability within court processes and adjustments to ensure people with disability can participate on an equal basis with people without disability throughout the court process. The book helps judges and magistrates understand the experience of disability, including cognitive impairment, ABI and mental illness and covers how to run a trial to enable full participation of people with disability.

The Supreme Court of Victoria's Senior Masters Office has also produced Court Disability Advice Sheets in relation to ABIs and Neurodevelopmental disorders for use by judicial officers. The sheets provide information about diagnoses, presentation and symptoms, courtroom implications, and approaches and potential actions that the court can take.

However, OPA has observed that magistrates in regional courts have a poorer understanding of disability in relation to sentencing, dealing with offenders, recidivism and the causes of crime than those sitting at Melbourne Magistrates' Court. The Assessment and Referral Court (ARC) specifically provides for accused persons who have a mental illness and/or a cognitive impairment, including an intellectual disability, ABI or Autism Spectrum Disorder.<sup>114</sup> ARC has only five venues which serve only five catchment areas. If an alleged offender's criminal behaviour occurs in a location without an ARC, they cannot have the matter heard on an ARC list. OPA considers that the ARC should be rolled out across all magistrates' courts across Victoria to ameliorate this blatant occurrence of 'postcode justice.'

OPA has also observed that, in many cases, judges and magistrates do not have adequate alternatives to prison when dealing with offenders with disability. For example, when an offender with disability is not coping in the community and is demonstrating behaviours that are threatening or dangerous, judicial officers have little choice but to incarcerate the offender. The level of rehabilitation and support for behaviours of concern that is required to assist offenders with cognitive disability, ABI and mental illness does not occur to a satisfactory degree in prison.

Issues that contribute to this problem are that there are few NDIS staff who are willing to, and have the skills to work with, complex and violent offenders; often, NDIS supports do not follow a prisoner into custody; and the NDIS is reluctant to commence behavioural supports until the prisoner has a release date. This is of particular concern in instances where receiving a release date is dependent on the prisoner making progress addressing their behaviours of concern. As discussed above, there are only two purpose-built bail houses for people with intellectual disability. This is insufficient, particularly given that some OPA clients are unable to live with others and need stand-alone supported accommodation. Regardless of a judge or magistrate's understanding of disability, without appropriate accommodation, there is often no option available but to send the offender to prison.

Judicial education about recidivism and the causes of crime, including in relation to people with cognitive impairment, ABI and mental illness alone is insufficient to address the

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<sup>113</sup> Ibid.

<sup>114</sup> Magistrates' Court of Victoria, *Assessment and Referral Court (ARC)* <https://www.mcv.vic.gov.au/about-us/assessment-and-referral-court-arc>

overrepresentation of people with a disability in the prison population. In order to achieve this, it would be necessary to address all of the barriers identified in this submission, including restrictive bail laws, the fact that bail cannot be granted if the person has no address, and the lack of appropriate housing for the group of people OPA is concerned about.

## 7. Other matters

### 7.1 Disability advocacy

Article 13 of the CRPD – Access to justice – states that:

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

Individuals with cognitive impairment often require support to participate in justice processes; many people who find themselves in these situations are often socially isolated and without a network of support to assist them to navigate the justice and/or service system. Advocacy is one of the supports that can enable equitable access to justice for people with disability, and it should be available at every point of interaction with the justice system, regardless of whether a person is a victim, witness, or alleged offender. Advocacy and assistance are also relevant to enable greater access to early intervention and diversion supports.<sup>115</sup> In turn, interventions and diversion will enable people to have their disability needs met and be supported to remain in the community.

In this submission, OPA has looked at existing assistance programs that give effect to Article 13 of the CRPD, namely the IPT and CISO programs, police cautioning program, intermediary pilot and court diversion program. Additionally, OPA refers the Royal Commission once more to the ALRC's report *Equality, Capacity and Disability in Commonwealth Laws* and specifically to Chapter 7 on access to justice.

OPA refers to and repeats an amended version of recommendation 6<sup>116</sup> in its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper:

#### **Recommendation 28**

**The Victorian Government should expand funding for independent, legal and non-legal advice and advocacy services to help people with disability to navigate and access the justice system.**

### 7.2 Workforce training

While the inquiry's terms of reference focus on the knowledge and expertise of judges and magistrates, it is essential that all justice staff have an understanding of cognitive impairment including how it may present, and how people may be impacted in different ways by their disability. "All justice system personnel need comprehensive training so that they know how to communicate with people with disability and can make appropriate adjustments".<sup>117</sup>

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<sup>115</sup> *DRC criminal justice submission* (n 9) 22.

<sup>116</sup> *Ibid* 4.

<sup>117</sup> *I'm too scared to come out of my room* (n 47) 72.

Whilst Corrections Victoria Disability Framework lists workforce development as one of its main objectives, so far as OPA is aware, specialist training for correctional staff is offered on a limited basis to staff in select roles, for example, disability portfolio holders. Whilst this work is to be commended, OPA recommends a more comprehensive approach to enlived Article 13(2) of the CRPD that State Parties “promote appropriate training for those working in the field of administration of justice, including police and prison staff”.<sup>118</sup>

OPA repeats a recommendation made in its report, *I'm too scared to come out of my room* and in its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper:

### **Recommendation 29**

**The Victorian Government should fund mandatory disability awareness training for all justice staff to enable them to fulfil their obligations under the United Nations' *Convention on the Rights of Persons with Disabilities*. The training should be developed in consultation with people with disability.**

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<sup>118</sup> *DRC criminal justice submission* (n 9) 43.