Office of the Public Advocate

Safeguarding the rights and interests of people with disability

Submission to the

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

The Criminal Justice System Issues Paper

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Abbreviations

ABI	Acquired Brain Injury
AHRC	Australian Human Rights Commission
Applied Principles	*Applied Principles to Determine the Responsibilities of the NDIS and Other Service Systems*
ARF	Access Request Form
CRPD	United Nations *Convention on the Rights of Persons with Disabilities*
DHHS	Victorian Department of Health and Human Services
CISO	Correctional Independent Support Officer
CMIA	*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)
DFATS	Disability Forensic Assessment and Treatment Service
ITP	Independent Third Person
IVO	Intervention Order
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
NPM	National Preventive Mechanism
OPA	Office of the Public Advocate
OPCAT	Optional Protocol to the Convention Against Torture
Royal Commission	Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with Disability
SDA	Specialist Disability Accommodation
STO	Supervised Treatment Order
UNCAT	United Nations *Convention Against Torture*
Victorian Charter	*Charter of Human Rights and Responsibilities Act 2006* (Vic)
VLRC	Victorian Law Reform Commission

Recommendations

Recommendation 1

The Council of Australian Governments (COAG) Disability Reform Council should direct State and Territory governments to develop a Disability Justice Strategy, as proposed in the Australian Human Rights Commission report, *Equal before the law*.

Recommendation 2

Australian jurisdictions 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 encourage all Victoria Police stations to apply for the Communications Access Symbol accreditation.

Recommendation 4

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

Recommendation 5

The Victorian Government should amend the *Personal Safety Intervention Order 2010* (Vic) and 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

Australian jurisdictions 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 7

Australian jurisdictions should legislate and establish Independent Third Persons (ITP) Programs. The legislative provisions should include:

- a requirement for an ITP to be present when police interview a person with an apparent cognitive impairment or mental illness
    - irrespective of age
    - whether they are an alleged offender, victim, or witness
- a penalty to be imposed when the requirement for an ITP is not complied with – e.g. evidence from an interview may be inadmissible if the procedure was not compliant with the ITP requirement
- a requirement for the ITP program to be adequately resourced to meet its legislated functions, based on modelling of demand.

Recommendation 8

The Victorian Government should adequately resource the Independent Third Person Program to respond to demand.

Recommendation 9

The Victorian Government should expand the role of the Independent Third Person Program to:

- provide support in hearings in courts and tribunals
- provide referrals to service and support agencies.

Recommendation 10

Australian jurisdictions should consider implementing programs similar to Victoria's Corrections Independent Support Officers (CISO) Program to support prisoners with a cognitive impairment in disciplinary hearings.

Recommendation 11

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 12

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

Recommendation 13

The Council of Australian Governments (COAG) Disability Reform Council should review the *Principles to Determine the Responsibilities of the NDIS and Other Service Systems* to ensure they provide clear guidance to resolve interface questions.

Recommendation 14

The National Disability Insurance Agency should publish, consult on, 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:

- provider of last resort mechanisms are established as an ongoing component of the NDIS market
- 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 (as recommended earlier)
- as soon as possible, participants are transitioned back to support outside provider of last resort arrangements.

Recommendation 15

Australian jurisdictions should consider whether legislation enabling treatment-based detention should be enacted. This could be based on the model contained in Victoria's *Disability Act 2006* (Vic).

Recommendation 16

The *Disability Act 2006* (Vic) should be amended to extend compulsory treatment provisions to include all forms of cognitive impairment.

Recommendation 17

The Victorian Government should coordinate the design and implementation of a deprivation of liberty authorisation and regulation framework.

Recommendation 18

Australian jurisdictions should consider enacting (or amending) legislation based on Victoria's *Crimes (Mental Impairment and Unfitness to be Tried) Bill 2020* (Vic) and ensure adequate resourcing of government departments responsible for clients under that Act to meet their legislated functions.

Recommendation 19

Australian jurisdictions should publish human rights principles and guidelines for Corrections Services. In Victoria, this should build upon the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Recommendation 20

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

Recommendation 21

The Victorian Government should commission an independent longitudinal evaluation of treatment provided at Victoria's Disability Forensic Assessment and Treatment Service (DFATS) to ensure programs are consistent with best practice. Any evaluation should be examined with a view of potential application to other Australian jurisdictions.

Recommendation 22

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

Recommendation 23

Australian jurisdictions 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 24

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.

Recommendation 25

The Australian Government should, in its implementation of the Optional Protocol to the UN *Convention Against Torture* (OPCAT), ensure that deprivations of liberty and places of detention are understood to include informally imposed detention and restrictive practices in social care and residential settings.

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),[1] 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 2018-19, OPA was involved in 1,823 guardianship matters (978 which were new), 404 investigations, and 258 cases requiring advocacy.[2] Forty-nine per cent of OPA's new guardianship clients were over the age of 65 and approximately half (58 per cent) of OPA eligible guardianship clients were National Disability Insurance Scheme (NDIS) participants.[3]

OPA's two Disability Act officers assist the Office to fulfil its advocacy and safeguarding roles in relation to tenancy rights of people living in disability residential services, including NDIS-funded Specialist Disability Accommodation (SDA). The officers also provide individual advocacy in relation to safeguard protections involving civil detention and compulsory treatment contained within the *Disability Act 2006* (Vic). The officers' interventions remain the largest single contributor to OPA's individual advocacy.[4]

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 runs a telephone advice service, which answered 13,644 calls in 2018-19. OPA also coordinates a community education program for professional and community audiences across Victoria to engage on a range of topics such as the role of OPA, guardianship and administration, and enduring powers of attorney. In 2018, OPA co-hosted a forum for stakeholders entitled *Disabling Justice: Why the system fails people with disability and mental illness.*[5]

OPA is supported by more than 700 volunteers across four volunteer programs: The Community Visitors Program, the Community Guardian 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 making formal statements to Victoria Police. In 2018-19, ITPs attended a total of 3222 interviews. CISOs are experienced ITPs who support prisoners who have an intellectual disability at

[1] *Guardianship and Administration Act 2019* (Vic) s 15.
[2] Office of the Public Advocate (Vic), *Annual Report 2018-19*, 9.
[3] Office of the Public Advocate (Vic)internal program data.
[4] Office of the Public Advocate (Vic), *Annual Report 2018-19*,
[5] https://www.publicadvocate.vic.gov.au/media-releases/318-forum-disabling-justice-why-the-system-fails-people-with-disability-and-mental-illness

Governor's disciplinary hearings at Victorian prisons and/or remand centres. In 2018-19, CISOs were invited to attend 299 hearings, assisting 164 clients.

Community Visitors are independent volunteers empowered by law to visit Victorian accommodation facilities for people with disability or mental illness. They monitor and report on the adequacy of services provided in the interests of residents and patients. They ensure that the human rights of residents or patients are being upheld and that they are not subject to abuse, neglect or exploitation. In their annual report, Community Visitors relate their observations on the quality and safety of the services they visit and make recommendations to the Victorian State Government. More than 400 Community Visitors visit across three streams: disability services, supported residential services (SRS), and mental health services. In 2018-19, Community Visitors made 5527 statutory visits, including to sites of criminal and civil detention.[6]

1.2. OPA's engagement with the Royal Commission

OPA welcomes the continued opportunity to contribute to the Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with Disability (Royal Commission).

The Public Advocate and two Community Visitors appeared as witnesses before the Royal Commission at its December 2019 hearings in Melbourne to speak about violence in group homes. In November 2019, OPA released a report, *I'm too scared to come out of my room,* that was submitted to the Royal Commission in response to the *Group Homes* Issues Paper. In March 2020, OPA contributed a written submission to the Issues Paper on *Health care for people with cognitive disability*.

This submission responds to the Royal Commission's Issues Paper on *The Criminal Justice System* and is based on experience gathered across OPA's program areas, particularly the Advocate Guardian Program, the Independent Third Persons (ITP) Program, and the Corrections Independent Support Officers (CISO) Program.

1.3. About this submission

OPA understands that the Royal Commission is seeking to understand the link between disability and contact with the criminal justice system, and to identify the systemic and structural problems that prevent people with disability from accessing justice and participating in the criminal justice system on an equal basis with others.[7]

OPA acknowledges that the experiences of people with disability in relation to other specific issues concerning the justice system will be considered in future undertakings by the Royal Commission. It is challenging to discern between possible topics of later interest—legal capacity, unequal access to justice, and ineffective complaint processes—and issues for people with disability particular to the criminal justice system. The Issues Paper hints that these and other relevant areas, including the civil justice system and the housing sector, are inextricably linked. For example, 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, which should be understood as a collective failure of systems, not solely attributable to the

[6] Office of the Public Advocate (Vic), *Community Visitors Annual Report 2018-19*.
[7] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *The criminal justice system* (2020), 6.

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 OPA attempts to limit this submission to the criminal justice system, it inevitably refers to other intersecting systems when necessary.

1.4. Structure of this submission

In 2012, the Australian Human Rights Commission (AHRC) published its landmark report, *Equal before the law*. It offers a useful application of a human rights approach in the context of the administration of justice to people with disability and all Australians. In the course of its consultation, the AHRC heard stories wherein the criminal justice system failed people with disability and compounded disadvantage, in addition to some positive examples of where best practice was occurring.

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

1. **Negative attitudes and assumptions about people with disabilities** often result 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**.[8]

In this submission, OPA delivers contemporary evidence to the Royal Commission on the ways in which these five barriers continue to lead to the greater interaction of people with disability and the criminal justice system. Evidence will also be provided of instances of systemic neglect of the needs of people with disability.

Following a description of OPA’s human rights approach, the submission is organised according to the above five themes, with a focus on the Victorian context. Where relevant, OPA makes recommendations that could apply to other Australian jurisdictions. The submission includes six case stories drawn from OPA’s program areas. OPA has obtained consent to publish these stories, where possible and practicable. All case stories have been de-identified and the names of the individuals have been changed to maintain confidentiality.

[8] Australian Human Rights Commission, *Equal before the law* (2014), 8.

2. A human rights approach

The 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 the vast majority of 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.

The Issues Paper draws on the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) and the United Nations *Convention Against Torture* (UNCAT). In the Australian context, two federal pieces of legislation are important in safeguarding the human rights of people with disability; the *Disability Discrimination Act 1992* (Cth) and the *National Disability Insurance Scheme Act 2013* (Cth).

In 2014, the Australian Law Reform Commission undertook a review of existing laws and legal frameworks to establish how to establish the extent to which people with disability are granted 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 Royal Commission 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.
>
> **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.[9]

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

The administration of justice falls within the jurisdiction of States and Territories, therefore, OPA encourages the Royal Commission to consider State and Territory-based legislation. This submission will explicitly reference legislation where relevant, but 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 (as discussed in more detail throughout this submission). Importantly, Victoria is one of very

[9] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (2014), 24.

few Australian jurisdictions with a human rights charter; 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 Victorian Charter include:

- the right to recognition and equality before the law
- the right to liberty and security of person
- the right to humane treatment when deprived of liberty
- the right to a fair hearing
- various rights in criminal proceedings.[10]

2.1. Disability Justice Strategies

The aforementioned AHRC report, *Equal before the law,* exposes the many ways in which people with disability have unequal access to effective justice, thereby increasing their risk of ongoing discrimination or abuse. The AHRC recommends the development of State or Territory-administered disability justice strategies as a beneficial and holistic approach 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 due to inadequate supports. *Equal before the law* outlines key elements that should be included in the strategies and OPA adds that any strategy should of course be aligned with existing policy.

OPA endorses the AHRC's recommendation and encourages the Royal Commission to consider the *Equal before the law* report.

Recommendation 1

The Council of Australian Governments (COAG) Disability Reform Council should direct State and Territory governments to develop a Disability Justice Strategy, as proposed in the Australian Human Rights Commission report *Equal before the law*.

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' 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 advancement in data collection and reporting, which requires a whole of government approach. In this submission, OPA identifies the need for specific entities (i.e. Victoria Police and custodial facilities) to improve

[10] *Charter of Human Rights and Responsibilities' Act 2006* (Vic) ss 8, 24.

data collection, but a disability justice strategy would provide a whole-of-government approach to fulfilling Article 31.

Recommendation 2

Australian jurisdictions 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*.

3. Negative attitudes towards people with disability

Several CRPD articles seek to ensure people with disability, when involved in criminal offenses as victims or other, to receive equitable responses from the justice system. Articles 5 (equality and non-discrimination), 12 (equal recognition before the law), and 13 (access to justice) are particularly relevant. Similar rights are contained within the Victorian Charter.

Yet, OPA is aware of many ways in which people with cognitive impairment chronically face significant barriers to justice at all levels of the system. In a 2014 study, the Victorian Equal Opportunity and Human Rights Commission explained that:

> Access to justice requires access to the legal system. Progression through the criminal justice system rests heavily on being believed and being believable at every stage. Primarily, this progress is reliant on an assessment of how successful the case is likely to be and how credible the witness is.[11]

OPA observes that justice systems remain inadequate to respond to victims of crime where the person has a cognitive impairment. Vulnerable witnesses and victims of crime are easily discredited and can be re-traumatised by the systemic discrimination. In this section of the submission, OPA illustrates the pervasiveness of negative attitudes towards people with disability which prevents them from accessing justice.

3.1. Violence between co-residents in disability services

The Royal Commission heard stories from people with lived experience, and the disability sector more broadly, relating the risk of violence that exists within residential services. The Public Advocate and Community Visitors provided written and verbal evidence on the serious incidents that lead some people with disability to live in fear within their own homes. For years, Community Visitors have reported countless examples of violence and abuse between residents in group homes that are not afforded dutiful responses from service providers or police. OPA's report, *I'm too scared to come out of my* room, provides an in-depth analysis of the issue which incorporates the voices of people with disability. Chapter 4 of the report makes recommendations as to the role of the justice system.

[11] Victorian Equal Opportunity and Human Rights Commission (Vic), *Beyond Doubt: The experiences of people with disabilities reporting crime – Research findings* (2014) 46.

OPA brings forth this topic, albeit from a different viewpoint, as it depicts one of many ways in which negative attitudes towards people with disability prevail. The following case story is a telling example of the severity of the issue where there is intersection with the justice system.

Case Story: Alex

> OPA received a phone call through its Advice Service from Alex, a group home resident. Alex was known to Community Visitors as having a history of behaviours of concern that were well-managed through a behaviour support plan.
>
> Recently, however, a new resident moved in, which triggered an escalation in Alex's behaviours. Violence ensued between the two, to the point of assault and serious property damage.
>
> Alex was charged and bailed back into the same group home, but contacted OPA wanting to refuse bail for fear of returning to his group home where he felt unsafe in the presence of the newer resident.
>
> OPA and Community Visitors questioned whether Alex's behaviour support plan was accurately adjusted to account for, and support him through, the change in his daily living situation.

In 2013, OPA collaborated with statutory agencies, family violence and sexual assault services, Victoria Police, and organisations from the disability and mental health sectors to publish the *Interagency Guideline for Addressing Violence, Neglect and Abuse* (IGUANA). IGUANA is a good practice guideline for organisations, staff members and volunteers working with adults with disability who are at risk of violence, neglect or abuse.

It should be read in conjunction with existing laws and organisational policies, which require organisations to report and respond to incidents of abuse that occur in their services. Despite being published in 2013, and notwithstanding the changed safeguarding arrangements, the principles behind the recommended course of action still hold currency.[12] IGUANA promotes timely, appropriate and empowering responses to incidents that may occur within services. It is clear in its directive that all violence and abuse matters should be reported to the police. Many organisations endorsed the guideline, but Community Visitors query whether providers and staff truly grasp the severity of the abuse and trauma occurring within disability residential services. Disturbingly, Community Visitors frequently learn of severe assaults against residents that have not been reported to police by staff.[13]

Among the 334 referrals made to the Disability Service Commissioner by the Community Visitors Program, between 1 July 2017 and 30 April 2020, in relation to severe abuse and neglect within services, only 76 (or 23 per cent) include reports of police involvement. This means that in three out of four cases of serious abuse, service providers do not report the matter to the police. Providers on occasion seek medical assistance, but in the majority of cases, police are only called on to intervene at the request of family or Community Visitors

[12] OPA recognises that IGUANA needs updating in light of the NDIS roll out and the transition to national safeguarding arrangements. (Specifically, the list of contacts in step 7 to take matters further is no longer accurate).
[13] Office of the Public Advocate (Vic), *Community Visitors Annual Report 2018-2019*, 40.

or when there is a threat to staff. Examples of incidents found by Community Visitors illustrate the severity of the abuse: a resident pouring boiling water on another, a resident repeatedly charging their wheelchair into a co-resident, as well as emotional abuse causing residents to live in a state of chronic fear.

The following example, reported by Community Visitors, demonstrates the improvements that can occur when police respond and investigate appropriately. It goes without saying that an appropriate response to incidents of this nature includes a review of the supports that are in place for residents, which is implied but not explicit in NDIS incident management rules and guidelines for providers.[14]

> Over an extended period, police regularly visit a house to de-escalate situations and prevent staff and residents being harmed. Police worked with staff to provide ongoing support. This model has proven effective in decreasing the frequency and intensity of incidents involving a young male resident with autism. During episodes, staff took residents out to protect them. Incident reports were well-documented and discussed at care and house meetings. Despite the dynamics between residents at this house being very challenging, staff have worked hard to maintain a good balance and support all residents.[15]

The above descriptions demonstrate how negative attitudes held by service providers and staff can work to minimise the experiences of people with disability and can prevent them from enjoying equal recognition before the law by failing to fulfil their right to safety and justice. Everyone, including people with disability, has the right to be safe in their home and to expect an effective, respectful and just response if they have been subject to violence or abuse there.

3.2. Police

In 2014, the Victorian Equal Opportunity and Human Rights Commission published *Beyond Doubt*, a landmark research project documenting the experiences of people with disability reporting crime. The study identifies that police members make decisions about a person's credibility very early in their investigations.[16] This is critical because the initial interaction with police, or lack thereof, effectively steers the course of the ensuing response. If police fail to gather comprehensive evidence, the prosecution can be considerably compromised and risk placing persons with disability at a disadvantage. *Beyond Doubt* identifies the following barriers to equitable police investigation: discriminatory attitudes and culture, problems identifying disability, not knowing what adjustments to make, unfounded decisions about the credibility of the person and police concern for the person reporting the crime.[17]

The study establishes that "the experience of reporting crime is too dependent on the police member who happens to receive the initial report."[18] OPA staff and volunteers find this to be true, as they regularly see police members who are unable to engage with people with cognitive impairment, especially when the affected person does not use verbal

[14] *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018* (Cth)
[15] Office of the Public Advocate (Vic), Community Visitors Annual Report 2017-2018, 49.
[16] Victorian Equal Opportunity and Human Rights Commission (Vic), *Beyond Doubt: The experiences of people with disabilities reporting crime – Research findings* (July 2014) 9.
[17] Ibid 46-48.
[18] Ibid 9.

communication. For instance, OPA observes that the threshold required by some police to engage a person as a credible witness and to progress an investigation is limited.

The experience is variable from one police region to another, but OPA has many examples where police refrain from further pursuing an investigation. In one case, OPA was an advocate for an Aboriginal woman who was financially exploited by her son and sexually assaulted by a younger family member. The police were alerted but refused to investigate, despite the severity of the harm that she had endured. The involved police member claimed she would not, by way of her disability, be able to provide useful evidence. In another example, a resident in a group home sexually assaulted several of the residents there but the matter was not investigated. When questioned by Community Visitors, the service provider claimed that police refused to interview the victims because, in the police's view, they would not make credible witnesses. In a final and very striking example, a resident in a disability service was strangled by another, but police refused to escalate their response beyond attending the scene of the incident.

Beyond Doubt shed light on the experiences of people with disability and made a number of important recommendations. OPA welcomes the continued valuable efforts by Victoria Police to implement the recommendations and better support people with disability. The ongoing work to improve the training and skills of police officers, from recruit to more senior levels, is notable. There are many welcome initiatives like the *Ready Reckone*r, a guide developed in partnership with OPA to assist police members when responding to, supporting and communicating with a person who may have a cognitive impairment. Victoria Police confirms that this resource has been very practicable and appreciated by frontline members. Victoria Police has partnered with the Scope Communication Centre to successfully accredit some police stations with the Communication Access Symbol and OPA is aware that a disability liaison officer program is being developed and rolled out.

In recognition of its work, the Public Advocate presents annual awards to Victoria Police employees, work units, and stations that make outstanding contributions to improving outcomes for people with disability and/or delivering police services in accessible, inclusive and responsive ways. OPA is certainly encouraged by the dedication and commitment of Victoria Police to improving responses to persons with disability. Notwithstanding these achievements, some challenges remain and OPA repeats some recommendations made in *I'm too scared to come out of my room*.

Recommendation 3

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

Recommendation 4

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

OPA cannot comment on the ability of police in other Australian jurisdictions to respond to people with cognitive impairment but the recommendations made above should certainly be considered elsewhere, if applicable.

4. Criminalisation of disability

Article 5 of the CRPD – equality and non-discrimination – upholds that all persons are entitled to equal and effective legal protection against discrimination on all grounds. The right of persons with disability to not be criminalised is embedded, albeit implicitly, within Article 5.

Empirical research is clear that cognitive disability and/or mental illness do not inherently lead to criminal or offending behaviours. Rather, it is the cumulative effect of social and economic disadvantages faced by many people with disability that can result in their involvement with the criminal justice system. Evidence provided in sections 6 and 7 of this submission confirms that the criminal justice system is ill-equipped and under-resourced to effectively respond to the needs of people with disability, despite often meaningful efforts and ongoing reform. This can amplify the risk for further disadvantages such as homelessness, substance use, and future offending behaviours.

The criminalisation of disability is a multi-faceted and complex issue to unpack and OPA points the Royal Commission to the great body of literature seeking to explain it. The Commissioners will no doubt also hear from people with lived experiences on this matter.

The Burdekin report of 1993, while now dated, nonetheless 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. It represents 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 was disproportionately felt by individuals with dual or multiple diagnoses (now often referred to as 'individuals with complex needs').

McCausland and Baldry identify a clear causal effect between the lack of services and the criminalisation of people with disability:

> In the absence of early and appropriate diagnosis, intervention and support in the community, some disadvantaged and poor persons with mental and cognitive disability, in particular Indigenous Australians, are being systematically criminalised.[19]

OPA acknowledges that the sector has come a long way since the Burdekin report and the importance of the NDIS reform should not be underestimated. Notwithstanding these advancements, OPA notices an anecdotal increase in the number of people with disability who are incarcerated since the start of the NDIS reform. OPA considers this as evidence that the support systems that are in place are not effective, as was the case with Alex where a more thorough adjustment to his behaviour support plan may have prevented the escalation in behaviours leading to his incarceration. It also speaks to the complexities that continue to emerge at the interface of the two systems and points to the need for better integration to create better outcomes for people with disability.

[19] 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.

OPA understands that 'challenging' behaviours (or behaviours of concern) exhibited by individuals with complex needs are very often linked to the inequities they have endured throughout their lives. Behaviours of concern may be linked to childhood experiences of institutionalisation or trauma that have not healed or been addressed. To this point, 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 individuals in similar ways. Adult guardianship does not provide a service safety net in the same way that child protection is intended to.[20]

Challenging behaviours could also be a result of more recent systemic hurdles like a lack of appropriate supports being place, as in Alex's story. It 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. OPA agrees with the Royal Commission that the justice system is often the option chosen to "manage people", as articulated in the Issues Paper. OPA stresses that the justice sector is not built to respond to deep-rooted systemic abuse, nor should it be. The criminal justice system is, historically, founded on a punitive and rights restricting approach, and in many cases, causes more harm than good to individuals within this cohort.[21] The very real consequence is that people with cognitive impairment and mental illness are imprisoned or detained sometimes for reasons not directly related to their crime, and are subject to repeated cycles of custody and increased supervision.

In this section of the submission, OPA identifies some of the known pathways into detention for people with disability. They illustrate the failings of adjacent service systems to respond to the needs of people with disability.

4.1. Intervention Orders

One of the pathways into the justice system for people with disability is through the making of Intervention Orders (IVOs). OPA has numerous examples of people with cognitive impairment being made subject to an IVO in circumstances where they do not understand and are not able to comply with the conditions. As a consequence of the inappropriate use of IVOs, a person may breach the order, be charged for it, and potentially remanded into custody. Data from across OPA's program areas shows the extent of the problem, for instance the ITP Program reveals that breaches of IVOs are the third most common type of offence recorded at ITP interviews.

[20] OPA is preparing a future submission to the Royal Commission which looks into the experiences of both parents and children with disability in their interactions with the child protection system.
[21] OPA notes that the recent Special Issue Newsletter on Adapting to COVID-19 Prison Oversight and Monitoring During a Pandemic, 20 April 2020, expressed that the current crisis may, in time, turn out to be a wake-up call to the need for a fundamental reappraisal of the use of detention and to reconsider responses to a whole host of deep-seated problems within our detention systems: https://myemail.constantcontact.com/SPECIAL-ISSUE--W-CORRECTION---Adapting-Prison-Oversight-During-a-Pandemic.html?soid=1131254454797&aid=eq294ojnLR8.

Case story: Rebecca

In 2018, the Victorian Ombudsman reported on the case of a woman with disability,[22] Rebecca, who was found unfit to stand trial and subsequently spent a total of 18 months on remand because alternative accommodation could not be sought. OPA was appointed as a guardian for her at the time.

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.

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 where Rebecca would return to her family home to see her parents – on some occasions, they allowed it and on others, they would alert the police of the breach.

When Rebecca was in prison, the intervention order was the source of more serious restrictions on the contact between her and her parents. They repeatedly called the facility, but were denied permission to speak to their daughter, based on the reasonable though erroneous assumption from prison staff that the intervention order prevented any contact between the two parties. Prison staff also withheld a Christmas card that was sent by Rebecca's mother. While the misunderstanding was eventually resolved, the lack of contact caused distress to Rebecca who began to fear her parents had passed away.[23]

OPA contends the intervention order was altogether inappropriate and, more specifically, 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.

In Victoria, IVOs can be made under two different acts, namely the *Personal Safety Intervention Orders Act 2010* (Vic) or the *Family Violence Protection Act 2008* (Vic). However, the two are not equivalent in the protections they offer for people with cognitive impairment. The Personal Safety Act accords discretionary powers to the courts to determine whether making an IVO 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. The Family Violence Act imposes no such considerations. The provision is not always useful as OPA often observes that the presence of a cognitive impairment does not always result in the consideration or application of alternative options, even where the IVO is inappropriate.

[22] Victorian Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (October 2018).
[23] Ibid 21.

The purpose of an IVO is "to protect the safety of victims of assault, sexual assault, harassment, property damage or interference with property, stalking and serious threats",[24] to "promote and assist in the resolution of disputes through mediation where appropriate", and/or to promote the accountability of perpetrators.[25] OPA argues that in the following circumstances, IVOs are contrary to these purposes and can be blunt instruments that are unlikely to affect behavioural change in the absence of additional and proper supports.

Courts have been known to propose IVOs as a response to different types of threats to safety. In Rebecca's case, an IVO was used *by* family members to cope with behaviours of concern but is evident to OPA that less-restrictive strategies could have been trialled. In *I'm too scared to come out of my room*, OPA explored the use of IVOs in response to violence between residents in a group home. In short, unless the victim or perpetrator of violence is relocated to another home, the two continue to share common living spaces and the IVO is likely to be easily breached by the simple nature of co-habitation. Alternative strategies to an IVO are more likely to increase the safety of residents.

IVOs 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 IVOs of this nature to protect them from a known perpetrator. Usually, although not always, guardians are appointed by VCAT with powers to make decisions around access to persons. And yet, both the IVO 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 therefore cannot be compelled to decline the company of anyone, even if they are instructed by the guardian to cease contact.

For example, OPA is guardian for a young woman who is known to engage in risky and inappropriate intimate relationships, which lead to her sexual and financial exploitation. In this situation, one of the suspected perpetrators of the exploitation is a close family member of hers. The IVO 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.

In summary, where an IVO applies to a person with cognitive impairment, OPA considers it is unlikely to achieve its intended statutory purposes, which is to prevent and ultimately reduce violence and maximise safety. The risk is high that people with cognitive disability will be subject to IVOs which they do not fully understand and/or are unable to comply with, in which case it is likely that they will breach the order. 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.

In her investigation of Rebecca's case, the Victorian Ombudsman did not make a recommendation in relation to the use of IVOs, although she did comment that they are be used inappropriately. OPA makes the following recommendation, noting that *I'm too scared to come out of my room* goes into more detail on this topic.

[24] *Personal Safety Intervention Orders Act 2010* (Vic) s 1.
[25] *Family Violence Protection Act 2008* (Vic) s 1(c).

Recommendation 5

The Victorian Government should amend the *Personal Safety Intervention Order 2010* (Vic) and 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.

4.2. Police responding to mental health crises

In 2017-18, Victoria Police attended approximately 43,000 events relating to mental health crises or suicide attempt/threats.[26] Estimates from Victoria Police show that, on average, this equates to police responding to a mental health incident every 12 minutes.[27] At this level of occurrence, police have effectively become frontline mental health first responders.

An interaction with police can be frightening for someone who is experiencing heightened symptoms of mental illness. The encounter can quickly escalate and become more hostile than would be if the responder was a mental health clinician. More to the point, police are trained within a justice paradigm, which is by nature more punitive than therapeutic. To have police respond to a mental health crisis creates an avoidable first point of contact with the justice system, where there is no need or benefit to the individual for the justice system to be involved.

OPA welcomes Victorian initiatives, like the PACER and RAPID programs, where a police member can enlist a mental health clinician to support them in responding to high-risk calls related to mental health issues in order to determine the appropriate course of action. Community Visitors commend PACER units on being well-skilled in de-escalation and view the initiative as one that relieves hospital emergency departments by offering clinical assessments to help determine whether an individual in crisis requires a hospital admission. Notwithstanding their success, police interventions fill a gap left in the absence or retraction of mental health crisis services, like Crisis Assessment Teams or dedicated mental health emergency departments. To have a police officer act as the first response in a mental health crisis is a significant expansion of their remit and is, in some fundamental ways inappropriate.

There is an increasing complexity in clinical presentations and symptoms of consumers accessing specialist mental health services, and yet the sector is generally under-resourced and not necessarily designed to respond to individuals with complex or intersecting needs. In its submission to the Royal Commission into Victoria's mental health system, Victoria Police readily recognises that its interventions serve to fill a gap in the mental health system, but that a better solution would be to adequately resource the mental health sector to respond to mental health crises:

> It is generally agreed that unnecessary contact between police and people experiencing mental health issues should be minimised as this can compound stigma and add to their trauma, leading to suboptimal outcomes.[28]

[26] Victoria Police, *Submission to the Royal Commission into Victoria's mental health system*, (July 2019).
[27] Ibid 5.
[28] Ibid 9.

> Victoria Police believes an optimised outcome for Victorians experiencing mental health issues would be timely access to appropriate and sustainable mental health interventions, and other required health and support services, prior to a situation escalating to police attention.[29]

OPA hopes the Royal Commission into Victoria's mental health system will consider the impact of police involvement not only on the human rights of persons with mental illness, but on their overall wellbeing.

5. Supports and adjustments for people with disability to participate in justice processes

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.

Recommendation 6

Australian jurisdictions 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.

In this section of the submission, OPA looks at existing assistance programs that give effect to Article 13 of the CRPD. It should be noted that there are many existing programs that are not mentioned here that should not be overlooked by the Royal Commission. OPA hopes the sector will speak to their experiences with other programs and 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.

5.1. Independent Third Persons Program

To participate in a police interview can be demanding; a person has to take in complex information quickly, understand their legal rights, and communicate with people in positions of authority. The setting in itself can be distressing, and the tasks required challenging, especially for people with cognitive disability and/or communication needs.

[29] Ibid 16.

OPA's Independent Third Persons (ITP) Programaims to support people with cognitive impairment and mental illness who are interviewed by Victoria Police. ITPs are available 24/7 to attend any police station throughout Victoria. ITPs are trained volunteers who support alleged offenders, victims, and witnesses of any age with disability or mental illness at a Victoria Police Interview. 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."[30] The manual's definition of 'cognitive impairment' is inclusive of intellectual disability, Acquired Brain Injury (ABI), mental illness, and neurological disorders.[31] In determining whether a person may have a cognitive impairment, police members rely on experience and knowledge, observations of the person, and active questioning. The manual also refers police officers to the *Ready Reckoner* guide for further guidance on the indicators of cognitive impairment, including questions that may assist in their assessment of the person.

In the 31 years of the program, ITPs have completed more than 40,000 interviews. Anecdotally, the program observes that the ability of people with disability and/or mental illness to communicate their experience and understand their rights increases with the assistance of an ITP. Volunteers are pleased to see a growing awareness and understanding of disability among police members, although there are some improvements that could be made.[32]

OPA identifies an underutilisation of the program by police members to support people with mental illness, despite the requirement to be present. While this may not prevent a matter from being heard in court if there are other sources of evidence, it does imply that the prosecution must proceed without additional and crucial sources of information. OPA appreciates that some magistrates refuse to hear a matter unless an ITP was present during the police interview, but this is not consistent practice.[33]

Neither OPA nor the ITP Program have access to Victoria Police data and, therefore, it is impossible to determine the actual demand for the program. OPA, however, is encouraged by the significant increase in the number of ITPs requested to attend police interviews; it indicates growing disability-awareness in the police force. Thus far, into the 2019-2020 financial year, the program notes a 30 per cent increase in demand over last year.

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[30] Victoria Police, *Victoria Police Manual – Interviews and statements*, 12.
[31] Ibid.
[32] Additional data on the ITP Program can be provided to the Royal Commission on request.
[33] OPA's 2012 report*Breaking the Cycle: Using Advocacy-Based Referrals to Assist People with Disabilities in the Criminal Justice System* articulates the importance of ITPs in further detail: Not involving an ITP could compromise the integrity of the evidence raised in the interview. 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 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 whom they believe may have a cognitive impairment or mental illness.

OPA has long-advocated for the ITP Program to be legislated to give full effect to Australia's obligations under the CRPD and to increase consistency in the use of ITPs across Victoria. Legislating the program would ensure it is adequately resourced. As it stands, despite the steady and increasing demand for the ITP Program, funding has not kept pace, hampering the ability of the program to ensure trained ITPs are available when required. The strain on both ITP Program staff and volunteers is at times so great that the provision of ITPs in some regions is not sufficient. Current estimates show that about 10 per cent of requests for an ITP are not responded to. On average, this represents 42 interviews per month where a person with disability misses out on this important safeguard due to volunteer unavailability, remote location of police stations, or gaps in the roster. Simply put, the program is not sufficiently resourced to respond to the demand.

Finally, OPA notes that Victoria is the only Australian jurisdiction that has an ITP or similar program; ITPs are a safeguard that could benefit all Australians with disability and, therefore, OPA extends the recommendation below to all Australian jurisdictions.

Recommendation 7

Australian jurisdictions should legislate and establish Independent Third Persons (ITP) Programs. 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 penalty to be imposed when the requirement for an ITP is not complied with – e.g. evidence from an interview may be inadmissible if the procedure was not compliant with the ITP requirement**
- **a requirement for the ITP program to be adequately resourced to meet its legislated functions, based on modelling of demand.**

Recommendation 8

The Victorian Government should adequately resource the Independent Third Person Program to respond to demand.

OPA repeats a recommendation made in *I'm too scared to come out of my room*.

Recommendation 9

The Victorian Government should expand the role of the Independent Third Person Program to:

- **provide support in hearings in courts and tribunals**
- **provide referrals to service and support agencies.**

5.2. Corrections Independent Support Officers

Corrections Independent Support Officers (CISO) are experienced ITPs who provide assistance and support to prisoners with a diagnosed intellectual disability during Governor's disciplinary hearings at prisons across Victoria. CISOs explain to prisoners their rights, check that they understand them, and are freely able to exercise them throughout the process. A CISO volunteer acts in a similar manner to an ITP, that is, ensuring the person understands the charges, process, and any hearing outcomes.

In 2018-19, CISOs attended 299 hearings, assisting 164 clients. CISOs are available within all 13 Victorian adult prisons, however, utilisation of the program varies widely across all sites. In most prisons, the service was only used once or twice during the year, whereas, two prisons utilised a CISO more than 100 times.

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

CISOs observe the frequency at which prisoners with disability are charged with prison offences that occur as a direct result of their disability. The most common contraventions relate to offences of aggression and property damage. CISO volunteers support prisoners who have been charged with these types of offences despite having little understanding of the impact of their behaviours. For example, one of the most common charges for which CISOs attend hearings relate to prisoners having contraband cigarettes. CISOs comment on the difficulty for some prisoners with cognitive impairment to comprehend that cigarettes are not permitted in prison, although they are entirely legal in community settings.

CISO data demonstrates that prisoners with disability are more often charged than not. Charges include monetary fines, loss of privileges or increases in time served. In nearly half (or 47 per cent) of the hearings attended by CISO in the last four years, the hearing outcome was a fine to the prisoner. Fines range between $10 to $1000 and, in some rare cases like in the case story above, can quickly reach hefty sums.

One important limitation of the CISO Program is that it can only be accessed by prisoners with a diagnosed intellectual disability, unlike the ITP Program which applies broader inclusion criteria. In practice, this means individuals with cognitive impairment caused by other conditions, such as mental illness or ABI, are excluded but could greatly benefit from the program. Because it is only for people with a *diagnosed* intellectual disability, many prisoners miss out, that is, those who do not self-disclose their disability or who have not been assessed by Corrections Victoria for intellectual disability. OPA knows this represents

a substantial cohort of prisoners, which points to the need for proper screening of disability within the prison system, an issue discussed in section 7.

OPA is collaborating with Corrections Victoria to review the Memorandum of Understanding (MoU) between the two organisations. One of the planned activities is an evaluation of the CISO Program, which will seek to understand and remedy disparities in utilisation across sites. It is hoped that the results will lead to overall improvements in the operations of the CISO Program. Importantly, OPA knows more can be done to promote the program within prisons and to facilitate access to a CISO when needed and welcomes Corrections Victoria's willingness to work towards these objectives.

Recommendation 10

Australian jurisdictions should consider implementing programs similar to Victoria's Corrections Independent Support Officers (CISO) Program to support prisoners with a cognitive impairment in disciplinary hearings.

5.3. Court Intermediaries

OPA brings the Royal Commission's attention to Victoria's Communication Intermediaries Pilot Program. The program commenced in July 2018 and stems from a recommendation made by the Victorian Law Reform Commission in its report on *The Role of Victims of Crime in the Criminal Trial Process*.

Intermediaries are communications professionals who assess a witness' communication needs and advises the court on strategies to help the witness give their best evidence.[34]The program is limited to victims in sexual offences and witnesses in homicide matters,[35] and is only available in some court jurisdictions in Melbourne and selected rural areas.

In OPA's view, the Communication Intermediaries Program is a welcome and useful support for people with disability. It is consistent with the CRPD, specifically Articles 12 and 13, that state that all people with cognitive impairment, whether they are victims or perpetrators of violence, have the right to access a communication intermediary.

The program is funded until June 2020 and is currently being evaluated; a review of the process implementing the project was positive, but the project has not yet run sufficiently long for there to be a meaningful outcomes review. OPA recommends it should be continued for at least another year to enable an outcomes review to be undertaken, noting that timelines will be affected by the COVID-19 pandemic. OPA expects the outcomes will be positive and, if so, the program should be expanded to cover all Victorian courts. OPA updates a recommendation made in *I'm too scared to come out of my room.*

[34] https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/victorian-intermediaries-pilot-program
[35] Department of Justice and Regulation (Vic) *Intermediaries Pilot Scheme*.

Recommendation 11

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.**

6. Providing specialist supports and accommodation for people with disability

One of the factors leading 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. In this section, OPA describes some of the challenges faced by people with disability in accessing supports that could potentially divert them from the justice system.

6.1. Pre-release planning

Providing continued care in the transition from prison to the community is known as 'through care'; it involves pre-release planning that, ideally, is initiated in the weeks before a prisoner's release. Through care and pre-release planning are critical in the rehabilitation of prisoners. It can prevent future custody by supporting individuals throughout a momentous life transition. 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 (as discussed further below), as well as growth in the prevalence and severity of mental illness and disability among prisoners.

Case story: Mark

OPA received a letter from Mark, 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 requested a prison support worker to establish a transition support plan where he requested 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 never received 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 how to access it. He remained optimistic and sought assistance from OPA in the absence of any pre-release planning.

The Victorian Ombudsman's 2015 report into the rehabilitation and reintegration of prisoners identifies the many risks faced by individuals upon prison release. 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 predicting 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 comprehensive for 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 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.[36]

There is a need for systems to be integrated to better support individuals 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 often made aware of prisoners presenting obvious signs of mental illness who, following assessment by forensic mental health staff in preparation for release/bail, are placed on a compulsory assessment order under the Mental Health Act. In effect, they are transported directly from the prison to a mental health hospital service where they are generally admitted.

Anecdotally, OPA notices a contrast in pre-release planning between prisoners who have a network of informal supports and those that do not. Unfortunately, those without natural supports are disadvantaged in that they are less likely to be released and, therefore, remain in restrictive environments because they lack the community supports.

Mark's story illustrates how the release from prison can be distressing when there are limited dedicated support programs. Some individuals, like Alex, would rather remain in custody, than face homelessness or returning to an unsafe home. Better integration of services and coordination between the justice, disability, and mental health systems is needed to ensure a person is fully supported while in detention and on release.

[36] Forensicare, *Formal submission: Royal Commission into Victoria's Mental Health System* (July 2019) 15.

It is the justice system's responsibility to regulate correctional services, but 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 met with rigorous and best-practice treatment approaches, adequately priced services offered by skilled workers, and perhaps, most importantly, secure community accommodation options. OPA repeats a recommendation made in its submission to the Royal Commission into Victoria's mental health system, noting that it was first made by the Victorian Ombudsman in 2016, but has not been implemented, despite Government accepting the recommendation.

Recommendation 12

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

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 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 above, the release date is often unknown for prisoners on remand, causing resistance from the NDIA and providers to engage in the planning process, as was illustrated in Andy's case below. Some prisoners may find it difficult to provide therapeutic input 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. Recommendations are made in section 7.

6.2. Community-based supports

The criminalisation of people with disability is, in part, linked to the lack of appropriate community-based supports. It has been said that prisons are the new disability institutions. Sadly, OPA is aware that the dearth of specialist accommodation and supports can cause some people to be held in restrictive environments, whether that be in custody or under conditions of strict supervision.

Rebecca is one example wherein a person with disability was made subject to unnecessary detention for over 18 months for the 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 of varying intensity with the criminal justice system.

In the absence of specialist supports and/or accommodation, and in combination with the perception that some people with disability are a risk to their communities, a person may face a sentence that is disproportionate to their offence. Section 6.3 of this submission goes into further detail on the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA), but OPA provides an example here. When a person is sentenced on a custodial supervision order under the CMIA, 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, effectively maintaining someone in an environment that is overly restrictive.

OPA has grave concerns about the right and ability of NDIS participants with complex needs and a history of offending behaviours to access specialist supports. Previously, this area of the sector was managed, in Victoria, by the Department of Health and Human Services (DHHS) which coordinates Disability Justice services, but the DHHS is incrementally retreating from the provision of disability services and the market is thin and failing. There is a need for a provider of last resort, as recommended below.

6.2.1. NDIS supports

Applied Principles

The first roadblock is the difficulty in reaching a consensus about the source of funding. In the NDIS context, the *Applied Principles to Determine the Responsibilities of the NDIS and Other Service Systems* (Applied Principles) determine the responsibilities of each systemin providing supports at key interfaces. In Victoria, funding for services at the disability justice interface is split between the NDIA and DHHS justice service, but 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 Applied Principles identify the following as being within the purview 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[37]

OPA suggests that much, if not all, of the content of the clinical services provided to people under a civil detention regime (such as the one described in section 6.2.2) clearly falls into the category of reasonable and necessary NDIS supports. However, the following example shows the arduousness of applying the principles to concrete funding decisions:

> 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.

Accordingly, clinical supports provided to people who present with offending behaviours simultaneously with 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

[37] Council of Australian Governments (COAG) *Principles to determine the responsibilities of the NDIS and other service systems* (November 2015) 23.

accordance with the Applied Principles) be funded by the NDIA. Yet, the NDIA has on multiple occasions refused to fund those types of supports.

The Applied 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 a recommendation made in several of its submissions on the NDIS.

Recommendation 13

The Council of Australian Governments (COAG) Disability Reform Council should review the *Principles to Determine the Responsibilities of the NDIS and Other Service Systems* to ensure they provide clear guidance to resolve interface questions.

Provider choice and control

Sourcing a willing provider, whether for SDA or other supports, now requires an increasing amount of work involving multiple parties advocating for NDIS participants in this cohort. Before the NDIS, the courts could exercise pressure on DHHS to find a suitable disability residential service to enable prison release, as DHHS held a central vacancy management role and also operated and/or funded services in the sector. Now, DHHS has relinquished its vacancy management functions and is one of many market players with access to legacy SDA stock. This means there is no single entity that can be compelled or held to account to provide accommodation or, indeed, any other services. The implementation of a person's plan, no matter the amount of funding or approved line items it contains, is halted if there are no providers to deliver the supports identified in the plan.

An emerging issue is the retraction and refusal of specialist providers to take in clients with complex behaviours of concern. Until recently, OPA could be confident that a handful of providers would be skilled, resourced, available, and willing (for the most part) to support clients with offending behaviours. Their high levels of expertise and skills are still in need, but increasingly, providers advise OPA that some clients are "too difficult" and/or pose too great a risk to the occupational health and safety of their staff. Agencies also sometimes fear that they may be held responsible for the actions of the participant if they cause harm to others in the community. This is a rhetoric that is becoming familiar to OPA.

This is one of the greatest downfalls to the NDIS' marketised approach: that choice and control is granted to both participants *and* providers. While there are often financial incentives for providers to take on participants with substantial NDIS funding, OPA concludes that, for many providers, the perceived risks outweigh the monetary benefits.

No provider of last resort

In the absence of willing providers in a marketised sector, no entity holds the duty of care, once squarely owed by governments, to provide services to people with disability. In the NDIS market, no one provider can be called on to step in in the event of market failure.

In addition to the issue noted above, some specialist providers are leaving the market altogether as they claim the individualised funding model does not lend itself to funding services at the intersection of justice and disability. OPA holds grave concerns about the growth stunt in the forensic disability sector, especially in community settings. An important gap is created in the absence of DHHS and the dearth of specialist providers in the market. Moreover, further market issues are expected as providers struggle to survive in the sector during the COVID-19 crisis. There is urgent need for government intervention to ensure a provider of last resort can fill gaps in the market.

Recommendation 14

The National Disability Insurance Agency should publish, consult on, 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:

- **provider of last resort mechanisms are established as an ongoing component of the NDIS market**
- **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 (as recommended earlier)**
- **as soon as possible and where necessary, participants are transitioned back to support outside provider of last resort arrangements.**

6.2.2. Compulsory treatment under the *Disability Act2006* (Vic)

One form of specialist supports that is available to some people with disability who have a history of offending behaviours is through compulsory treatment under the *Disability Act 2006* (Vic). The Supervised Treatment Order (STO) regime set out in the Act aims to bring greater fairness and scrutiny to decisions affecting the personal liberties of people with intellectual disability.

In Victoria, the Act sets out a legal framework for the civil detention and compulsory treatment of people with intellectual disability who are found to pose a significant risk of serious harm to others. The legislation requires that the person with an intellectual disability derives a 'benefit' from being placed on a STO, and that the levels of restrictions on the person's life be incrementally reduced over time.

VCAT can make a STO for no longer than 12 months, at which point a new application has to be made and again tested against the legislative criteria, but there is no limit in the number of applications that can be made. A key element to the test is that the proposed treatment plan benefits the person as well as manages any risk they pose to others.

VCAT plays an important monitoring and safeguarding role in the application of STOs. Firstly, VCAT can only make a STO if it is satisfied that the person with an intellectual disability meets certain criteria.[38] It also has a periodic review role in approving any material changes to the person's treatment plan that result in increased levels of supervision or restriction.

The Act provides a range of provisions in relation to supervised treatment, which are aimed at protecting the rights of people subject to STOs. OPA believes that STOs bring a significant level of transparency and fairness to the detention and compulsory treatment of people with intellectual disability in Victoria. STOs, as a civil regime, also have the advantage of intervention at an earlier point than the criminal justice system; in this way, they can divert persons away from the criminal justice system into the community, albeit with augmented supports and supervision.

In OPA's view, the effectiveness of the STO regime is largely due to its matrix of elements:[39]

- The process that leads to the development of a treatment plan includes the engagement of skilled professionals, the scrutiny of the Senior Practitioner who must approve the plan, and VCAT which must make the STO having regard to the plan.
- The external bodies involved in regulating and scrutinising the use of STOs (VCAT, the Senior Practitioner, and OPA) are obliged to ensure that the rights, dignity and interests of the person with the intellectual disability are protected.
- Victoria Legal Aid's specialist advocacy for persons proposed for or subject to detention.

Despite these important safeguards, STOs can lead to severe deprivations of liberties being imposed on people with disability, as in Ryan's story below.

Case Story: Ryan

OPA's 2018 report, *The Illusion of Choice and Control*, presented the story of Ryan[40] who, at that time, had just recently been made subject to an STO. OPA provides an update on Ryan's story to demonstrate the extent of restrictions that can be imposed for individuals on STOs.

> Progress has been extremely slow for Ryan, as to be expected given the disruptive and traumatic circumstances Ryan has endured over the last few years.
>
> After being placed on an STO, and with much advocacy effort, he was provided an NDIS-funded SDA. The property underwent substantial modification and is extremely restrictive: Ryan is unable to leave the house and there are physical barriers that completely separate him from his workers. There are high fences in the yard, CCTV striker locks on all doors and gates, a separating wall between Ryan and his workers, tables bolted to the floor. It is a low stimulus environment.

[38] Set out in s191 of the *Disability Act 2006* (Vic).
[39] Office of the Public Advocate (Vic), *Submission to Senate Community Affairs References Committee on the indefinite detention of people with cognitive and psychiatric impairment in Australia* (April 2016), 15.
[40] Office of the Public Advocate (Vic) *The Illusion of Choice and Control* (2018) 64.

Ryan is on a significant NDIS plan, which amounts to over $1 million, through which he receives Supported Independent Living (SIL) and specialist support coordination (which is being undertaken by two support coordinators given the complexities of Ryan's care). A disability service agency provides 24/7 supports, on a 2:1 staffing basis (down from 3:1 supports). This is in addition to the Senior Practitioner providing clinical oversight to the implementation of his compulsory treatment and behaviour support plan.

OPA and the Senior Practitioner have concerns about the lack of progress, hampered by building and security issues to do with the fabric of the unit, unauthorised access to the community, resulting in further harm to, and increased levels of restrictions on Ryan.

Ryan's family has questioned the lack of progress made as a result of his detention and treatment over the last 12 months, and is critical of both DHHS and the agencies providing supports. OPA shares these concerns and has challenged DHHS on its resistance to be involved in Ryan's care.

Notwithstanding the value of Ryan's NDIS plan, OPA has found that he is receiving minimal therapeutic benefits from his supports. For instance, while staff do attend his home, they mostly observe him through a security camera as they are fearful to enter his area and, consequently, do not engage with him in a therapeutic way. Ryan cannot access the outdoor yard for fear that he will escape onto the streets again, despite the yard having high walls. More recently, there are indicators of positive change due to engagement of different support providers.

The NDIS market is simply not equipped to manage someone like Ryan. And while according to Victorian law, he is being kept in a community setting, he is effectively held in a purpose-built prison where he is subject to layers of containment, isolation, and restrictive interventions.

The last available data on STOs dates from 2017-18 when 26 people were subject to STOs in Victoria.[41]Since 2008, only four women have been subject to an STO, hence, the majority of STO clients are men.[42]A significant number of STO clients have concurrent disabilities, such as ABI and mental illness and most of the clients on STOs were NDIS participants,[43] the implications of which are discussed below.

One of OPA's concerns in relation to STOs is that a person could become subject to de facto continuous detention by reason of consecutive renewal of applications. OPA stresses the importance of the careful application of safeguarding processes and bodies to prevent this. The emphasis of STO is on reducing levels of supervision and increasing independent freedom of movement where risks can be managed; in this sense, STOs offer greater flexibility to risk manage individuals with cognitive impairment than usual mainstream correctional arrangements.

While people who are on STOs gain access to high quality services and clinical oversight from the Senior Practitioner, those not on STOs are denied access to the same level of funded treatment, services and safeguards. Essentially, this means that a person's access

[41] Department of Health and Human Services (Vic) *Senior Practitioner report 2017-18* (June 2019), 19.
[42] Ibid.
[43] Ibid 22.

to the benefits and safeguards associated with supervised treatment is made conditional on their detention.

Moreover, the STO regime is only available to individuals with intellectual disability, at the exclusion of other forms of cognitive impairment. The *Mental Health Act 2014* (Vic) provides a framework for the compulsory treatment of people with mental illness, but there is a gap in relation to individuals with Autism Spectrum Disorders or ABI who may be detained in a custodial environment because they are not eligible for an STO.

STOs come with a number of protections, but they do not and cannot protect from the challenges inherent to the NDIS market; that is, participant choice and control is just as compromised by providers accepting particular clients and leaving others to the market. As in Ryan's case, advocacy by multiple parties is often required to source and put the required supports in place. It remains unclear to OPA how the Victorian Senior Practitioner can direct that treatments are carried out in the context of an STO if they are being funded by the NDIA.OPA fears the intersection of Commonwealth and State-based legislation may hinder the clinical oversight provided by the Senior Practitioner in this regard.

OPA considers the Victorian STO process could be a model for other jurisdictions to consider.

Recommendation 15

Australian jurisdictions should consider whether legislation enabling treatment-based detention should be enacted. This could be based on the model contained in Victoria's *Disability Act 2006* (Vic).

6.2.3. Civil detention outside of the STO legal framework

OPA is aware of a small, but non-negligible, number of individuals who are effectively made subject to significant deprivations of liberties and indefinite detention, outside of any legal framework. To be clear, these individuals are not necessarily in contact with the criminal justice system, neither are they on an STO, but are effectively detained and escape the safeguards available under the Disability Act. The following relates anecdotal concerns about the growth in 'restrictive SIL houses'[44] under the NDIS.

It should be specified that these types of deprivations of liberty predate the NDIS, however, the scheme has exacerbated OPA's concerns and introduced additional complexities. The individuals who are known to OPA and live in these arrangements at the moment are NDIS participants, with plans of substantial funding, who receive supported accommodation (SDA or otherwise) and/or SIL/core supports within a community setting. Their homes have been modified to incorporate high degrees of restrictions, not unlike Ryan's, and because these participants are seen as posing a risk to others, they often live on their own. Behaviour support plans are in place, which allow for environmental restraints such as seclusion (this is problematic and described below). If a participant in this setting has limited informal

[44] In its submission to the Joint Standing Committee on the NDIS' inquiry into Supported Independent Living, OPA describes three new models of supported accommodation that are emerging in the NDIS market where SIL-like (shared core) supports are provided to a group of NDIS participants without key safeguards being in place (namely, the safeguards of independent oversight of closed-environments, tenancy rights related to a person's disability, and protection from service provider conflicts of interest). The example provided in this submission is another type of SIL-house which contravenes principles for good practice.

supports, human contact can, alarmingly, limit itself to NDIS-funded workers. Thin NDIS markets often result in supports being provided by poorly trained staff.

Certainly, there are some safeguards to avoid deprivations of liberty of this nature occurring, however, OPA identifies emerging safeguarding gaps, made all the more complex in the transition to the NDIS.

OPA's first concern is that the true extent of the issue remains unknown and can be hidden from OPA. By way of its guardianship and advocacy functions, OPA may be made aware of individuals in these situations. Another pathway is through Community Visitors, however, in the transition to the NDIS Quality and Safeguarding Framework, Community Visitors will not have authority to visit residences without an SDA agreement, which will limit the extent of their visits. For instance, OPA knows of at least one case through its guardianship program where the participant is not in an SDA and, therefore, would not have otherwise come to the attention of Community Visitors.

Another concern relates to the complexity of the NDIS safeguarding environment caused by the overlay of Victorian and Commonwealth legislation. Under the NDIS Quality and Safeguards Framework and related legislation and rules at the Commonwealth level[45], to simplify very complex processes and issues, all regulated restrictive practices must be approved in a behaviour support plan by an authorised officer. This includes environmental restraints and seclusion.

The Victorian Disability Act provides additional (and necessary) safeguards against deprivation of liberties by making it clear that a disability service provider must not detain a person with an intellectual disability unless the person is under a STO. This is a crucial provision but it is not always complied with, the reason being that NDIS providers, including behaviour support specialists, may not always appreciate the obligations that exist under State legislation. This is all the more real with the diversification of the market where DHHS previously held a level of overarching, whole-of-sector oversight. OPA is unaware of any equivalent provisions being articulated in NDIS regulations, which is a worrying reduction in safeguards that can lead to civil detention, as described above, going unnamed or unnoticed.

As mentioned, OPA may become aware of individuals living in detention-like settings and the Disability Act accounts for this by conferring powers onto the Public Advocate to apply to VCAT for an order directing an authorised program officer to make an application for a STO, which is a crucial safeguard.[46] This occurs where the Public Advocate believes that a person is being detained to prevent a significant risk of serious harm to others and an application for a STO has not been made. A further complexity may arise in some cases, as STOs are only available for individuals who fulfil a set of legislated criteria that can be hard to meet. For example, the person must have an intellectual disability, thereby excluding other types of cognitive impairment such as ABI or autism. The Victorian Law Reform Commission, in its review of the *Guardianship and Administration Act 1986* (Vic), when considering its interaction with the Disability Act, found no reason to exclude people with an ABI from the Disability Act's STO provisions. OPA believes the provisions should be further extended to include all forms of cognitive impairment.

[45] *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth)
[46] *Disability Act 2006* (Vic) s 191.

Recommendation 16

The *Disability Act 2006* (Vic) should be amended to extend compulsory detention provisions to include all forms of cognitive impairment.

In its submission responding to the Issues Paper on *Health care for people with cognitive disability*, OPA referred the Royal Commission to *Designing a deprivation of liberty authorisation and regulation framework*, an OPA publication laying out preliminary thinking and design of such a framework. This submission reiterates the need for a sector-wide approach to the regulation and monitoring of deprivations of liberty to enhance and promote the human rights of people with disability. OPA refers the Royal Commission to the paper once more, in the context of civil and criminal detention, as a guide for the development of a deprivation of liberty framework.

Recommendation 17

The Victorian Government should coordinate the design and implementation of a deprivation of liberty authorisation and regulation framework.

6.2.4. Compulsory treatment under the *Mental Health Act 2014* (Vic)

The *Mental Health Act 2014* (Vic)prescribes a regime for compulsory mental health assessment and treatment for people where they present a danger to themselves or others. Compulsory treatment can also take the form of Community Treatment Orders, subject to certain conditions. The Act is clear that compulsory treatment should only be when "there is no less restrictive means reasonably available to enable the person to receive the immediate treatment."[47]

The Mental Health Act in Victoria provides a model for consideration in the way clinical oversight and review mechanisms are provided, with access to a second opinion, legal aid assistance, the opportunity to appoint a nominated person and provisions for a consumer's advance statement to be considered by the authorised psychiatrist. In this way, there are a number of accountability measures and safeguards contained in the Mental Health Act.

Despite them, some people subject to detention and treatment under the Mental Health Act continue to be detained in clinical mental health services beyond the time needed for treatment. OPA's *Long Stay Patient Project* maintains a register on the number of people who are affected and the latest data from the project was provided to the Royal Commission in response to the Issues Paper on *Health care for people with cognitive disability.*

6.3. *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)

In Victoria, the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA) is the legislation that "creates a specialised pathway for people charged with an offence and who have a mental impairment that affects their capacity to participate in the normal

[47] *Mental Health Act 2014* (Vic) s 5 (d).

criminal process."[48] The Victorian Law Reform Commission (VLRC), in its review of the CMIA, described it as follows:

> The CMIA enshrines long-standing legal principles, fundamental to Victorian law, that all people are entitled to a fair hearing and that people should only be punished for behaviour for which they are criminally responsible. The CMIA sets out the law and process for determining whether a person is mentally unfit to stand trial for a criminal charge and whether a person, because of a mental impairment, is not criminally responsible for offending. It also sets out a system for managing people who have been found unfit to stand trial or not criminally responsible because of mental impairment.[49]

The CMIA is far-reaching in that it operates across government departments, criminal courts, and both the mental health and disability service sectors, and in some cases, the aged care sector. It can apply to different types of mental impairments such as mental illness, intellectual disability, autism spectrum disorder or dementia. The 'typical' CMIA cases tend to involve an accused with significant mental illness and comprise the most serious offences of violence.[50] Supervision orders under the CMIA operate outside the criminal justice system and are not a sentence. They may, nevertheless, be custodial, involving detention in a mental health facility or a disability service or can also be non-custodial, involving supervision and treatment in a community setting.

It is also important to note that supervision orders are of indefinite duration and only come to an end when a court is satisfied the person's risk is appropriately reduced. In practice, it can lead to prolonged supervision of individuals who are subject to this Act. There are instances where, if a person was provided with appropriate supports, they could successfully exercise legal capacity and progress through the criminal trial and potentially be sentenced for a lesser duration. To illustrate the impact of being placed under the CMIA, OPA is involved in a matter where two individuals were brought to court having jointly committed an offence. The first offender, who was fit to stand trial, pleaded guilty and sentenced to six months in prison, whereas the second offender was made subject to a custodial supervision order under the CMIA and now faces much longer and stricter restrictions. As cited in the ALRC's report, *Equality, Capacity and Disability in Commonwealth Laws*, "decision-making capacity should be assessed with a view to ascertaining whether a defendant could stand trial with the assistance of special measures and where any other reasonable adjustments have been made."[51]

The VLRC reviewed the CMIA in 2014, and, at that time,146 participants were detained under the Act. The majority (65 per cent) had a primary diagnosis of schizophrenia, whereas the proportion of people with intellectual disability under the CMIA was much lower (an estimated 10 of the 146 or 6.8 per cent of detained participants). The VLRC suggests that this is likely because it is more common for intellectual disability to underlie unfitness to stand trial than a defence of mental impairment.[52]

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[48] https://www.lawreform.vic.gov.au/content/3-overview-cmia
[49] Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), (2014), 49.
[50] Ibid 48.
[51] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (2014) 199-200.
[52] Ibid 22.

The Victorian Ombudsman's investigation into the imprisonment of a woman found unfit to stand trial (i.e. Rebecca) estimated that between 30 to 35 CMIA orders were made in 2016-17, including both custodial and non-custodial supervision orders.[53]

The data that the Sentencing Advisory Council could provide to the Victorian Ombudsman was limited in its detail and comprehensiveness. For instance, the council could not establish the exact number of orders made per year and could not generate data on the number of people on CMIA who are in remand. When questioned by the Victorian Ombudsman, Forensicare suggested:

> It would appear that there is no single point of oversight of the operation and administration of the CMIA within Government. For example, there is no single point in Government that would have details of the number of people declared liable to supervision under the Act, what happens to each of these people whilst liable to supervision and how the CMIA is operating more generally.[54]

The court makes the decision about where to detain adults under the CMIA. The legislation states that for individuals sentenced to a custodial supervision order, one of the following three options applies:

- Thomas Embling Hospital (Victoria's forensic mental health hospital, operated by Forensicare),
- the Disability Forensic Assessment and Treatment Service (DFATS, a DHHS-operated service for people with intellectual disability)
- the Long Term Rehabilitation Program (also DHHS operated, with a five-bed capacity).

Concerningly, the Victorian Ombudsman concluded that it was impossible to determine how many people are in prison (i.e. on custodial supervision orders) under the CMIA. It can be estimated that because the CMIA predominantly applies to individuals with mental illness, the majority of CMIA participants on custodial orders are detained at Thomas Embling Hospital. While OPA finds Thomas Embling to generally be more accessible than other facilities, bed shortages, nonetheless, mean that some CMIA clients who would be best placed at Thomas Embling are kept in general prisons where they are not receiving appropriate mental health supports and fall through the cracks of oversight.

The CMIA is clear that, outside of the designated facilities, 'the court must not make a supervision order committing a person to custody in a prison unless it is satisfied that there is no practicable alternative in the circumstances',[55] however, OPA knows of individuals under the CMIA who are detained in prison due to lack of available beds in either of the designated facilities. In reality, the effectiveness of the legislated pathway is being reshaped to align with bed availability, rather than to prioritise individual well-being. To this point, the VLRC found that non-custodial orders could often be a successful alternative to more severe forms of detention.

Over the years OPA has, in various capacities, supported a number of individuals on the CMIA and has repeated its concerns about the limited safeguards relating to treatment planning and review contained in the CMIA. By way of comparison, treatment provided to

[53] Victoria Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (October 2018), 48.
[54] Ibid 48.
[55] *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 26 (4).

persons with mental illness who are on compulsory orders under the *Mental Health Act 2014* (Vic) are relatively well-established based on the evidence that the illness may respond to treatment and psychosocial supports over time. The same does not clearly exist in the CMIA.

OPA has outstanding concerns around the operation of the CMIA, particularly its lack of clarity around responsibility for people on custodial and non-custodial orders. When combined with low availability of appropriate supported accommodation for persons on CMIA dispositions, they represent a real failure to the rehabilitation of people subject to supervision under this Act. The Victorian Ombudsman raised the urgent need for progress, as there is an ongoing risk in using overly punitive approaches in supporting people on the CMIA.[56]

The VLRC made important recommendations in its review of the CMIA, as did the Victorian Ombudsman in the aforementioned report on a woman found unfit to stand trial. OPA notes that, until very recently, the Bill had lapsed on the Victorian Parliament's legislative agenda but OPA welcomes the improved amendment Bill introduced into Parliament on 17 March 2020 and second read on18 March 2020.[57] The Bill's assent is likely to be delayed due to the parliamentary recess in response to the COVID-19 pandemic, but reform seems near and the recommended amendments are aligned with OPA's advocacy in this sector.

It is worth noting that the proposed Bill implements many, though not all, of the VLRC's recommendations. It brings home the point made above regarding treatment plans and introduces a novel oversight role for the Senior Practitioner in relation to CMIA participants. This will bring an important increase in the level of scrutiny to a person's treatment and discharge, rather than solely focusing on sentencing. OPA also welcomes the Bill's provision for less-restrictive arrangements to be available under the Mental Health or Disability Act as an alternative to CMIA orders.

OPA also repeats a recommendation in relation to amendments for the CMIA and other equivalent legislation in other jurisdictions, noting that some aspects are included in the Bill sitting before the Victorian Parliament.

Recommendation 18

Australian jurisdictions should consider enacting (or amending) legislation based on Victoria's *Crimes (Mental Impairment and Unfitness to be Tried) Bill 2020* and ensure adequate resourcing of government departments responsible for clients under that Act to meet their legislated functions.

7. Meeting the basic human rights of people with disability who are in prisons

At 30 June 2019, there were 8101 prisoners in the Victorian prison system. This represents an 82.6 per cent increase in the span of ten years.[58]It is estimated that approximately 40 per cent of prisoners are on remand.

[56] Victoria Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (October 2018),
[57] https://www.legislation.vic.gov.au/bills/crimes-mental-impairment-and-unfitness-be-tried-amendment-bill-2020
[58] https://www.corrections.vic.gov.au/prisons/corrections-statistics-quick-reference

Being subject to criminal detention does not strip a person of their human rights. Some of these rights are captured in UNCAT, and OPA highlights the rights of prisoners to be treated with humanity and respect for their dignity and to achieve the highest attainable standard of physical and mental health.

In the absence of a human rights framework to guide the criminal justice system, the Department of Justice does have a *Corrections Victoria Disability Framework 2016-2019* that aims to "protect the rights of all prisoners and offenders with a disability."[59]The title indicates the framework expired recently and OPA is not aware of it being renewed.

In Victoria, forensic disability services fall within the shared remit of the Department of Justice and Community Safety and the DHHS.OPA is aware that the DHHS has its own framework, the *Forensic Disability Program Framework*, which provides direction to specialist services (such as DFATS, described further below) for people with cognitive impairment interacting with the criminal justice system.

That the frameworks do not reference each other, despite significant overlap, is a missed opportunity. Both are dated and OPA hopes the departments will work together and incorporate emerging NDIS interface issues in future service planning. Indeed, in light of the NDIS reform, the justice system will have to adjust the ways in which it supports people with disability, although there is little to be found in terms of policy guidance or direction to facilitate this. Recommendation 1 of this submission calling for a disability justice strategy could provide a solution to duplication or overlapping frameworks and to ensure clarity in attributing roles and responsibilities to different entities in affording people with disability who come into contact with the justice system their right to habilitation and rehabilitation, as per Article 26 of the CRPD.

7.1. A human rights framework for Corrections

OPA brings the Royal Commission's attention to Human Rights Principles for ACT Correctional Centres, published in January 2019. The principles are articulated in line with Australia's obligations under international human rights commitments and give effect to obligations articulated under the territory's *Human Rights Act 2004* (ACT).

In its entirety, the document is commendable and highlights the many ways that persons with disability and/or mental illness can be afforded their human rights 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.

Evidence provided in this section of the submission demonstrates the need for similar human rights principles in Victoria's correctional centres. While it is true that Victorian correctional facilities are bound by the Victorian Charter, the Victorian Ombudsman's report 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

[59] Department of Justice and Regulation (Vic) *Corrections Victoria Disability Framework 2016*-2019 (2015) 3.

Department of Justice and Community Safety provide, or commission, guidance about acting in compatibility with the Victorian Charter for all public authorities providing mental health and disability services.[60] OPA sees value in similar guidance for the corrections systems in all Australian jurisdictions, noting that most jurisdictions do not have a human rights charter in place. The human rights principles could be explicitly incorporated into existing frameworks, where available.

Recommendation 19

Australian jurisdictions should publish human rights principles and guidelines for Corrections services. In Victoria, this should build on the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

7.2. Specialist disability units

In Victoria, there exists a select number of correctional facilities designated for people with disability and/or mental illness. This submission has previously mentioned Thomas Embling Hospital – the forensic mental health facility – and DFATS. There are some prisons with specialist units for people with cognitive impairment, such as the Marlborough Unit in Port Philip Prison for prisoners with intellectual disability. This is by no way an exhaustive list but simply identifies that specialist correctional services do form part of the landscape.

There is considerable variability in the models of care, the quality and comprehensiveness of disability supports, and the level of staff skill and experience. Even in some facilities based on therapeutic or rehabilitation models, corrections staff demonstrate limited skills specific to cognitive disability and, therefore, usually respond to disability-related behaviour in overly punitive ways. There are some experienced staff but, unfortunately, many leave the sector, as it can be demanding.

As in the community sector, staff in the justice sector are increasingly claiming that behaviours of concern pose a threat to occupational safety. In one example, an OPA client was transferred from a forensic disability service where they had made improvements to a general population prison because their behaviours of concern had led to a work safe claim and staff simply could not cope. It is concerning that a facility/unit that should be skilled to support a person with disability refuses to maintain therapeutic supports.

Forensic disability settings also vary in terms of access. For instance, individuals with Autism Spectrum Disorder or ABI are seldom admitted to DFATS or Thomas Embling because they do not neatly meet the admission criteria for these facilities. Prisoners are not assessed for cognitive or neurological impairment on admission to prison, so only those who self-disclose or present obvious signs of disability will be identified as requiring specialised support. In some cases, assessments can be requested, but it is not uncommon for diagnoses to be disputed. For instance, one OPA client had received discordant diagnoses – ABI in one assessment, schizophrenia in another – which compromised their ability to access Thomas Embling Hospital.

[60] Victoria Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (October 2018),

Access is not determined solely on the basis of diagnosis but rather is contingent on a combination of factors, such as a person's sentence, bed availability and mix of residents/prisoners Availability is limited and, as a consequence, many, if not most, prisoners with disability are held within the general prison population, where prison staff typically exhibit a very limited understanding of disability. Prisoners with disability within general prisons are also prone to bullying by other prisoners and, indeed, CISOs regularly observe other prisoners taking advantage of people with disability who may not understand the prison rules or grasp social cues.

All of these factors combined can lead to significant measures being taken to separate and/or protect, although not necessarily support, prisoners with disability. Rebecca, for example, was left in isolation for 23 hours a day because corrections staff considered it was not safe for her to mix with other prisoners. This caused her serious distress that she would express with nearly constant screaming. Staff went to great lengths to support Rebecca as best they could, but simply were not equipped with the required skills or resources. Furthermore, OPA observes that prison management is consistently favoured over therapeutic rehabilitation.

There is an urgent need to reconsider how people with disability can best be supported in the corrections systems. OPA identifies that one of the most pressing needs relates to comprehensive training of staff in these facilities. Given the high prevalence of people with disability who are in prison, OPA suggests that all prison staff should receive some level of training to respond to disability and mental illness, as it has seen the noticeable improvements of training in the police force.

OPA notes that the *Corrections Victoria Disability Framework* does list workforce development as one of its main objectives. However, to OPA's knowledge specialist training for correctional staff is offered on a limited basis and only to staff in select roles (e.g. disability portfolio holders). These efforts should not be ignored, but OPA makes a recommendation for a more comprehensive approach to enliven 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."

Recommendation 20

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

7.3. DFATS

In Victoria, people with an intellectual disability who come before the criminal justice system may be detained in DFATS, a "state-wide disability forensic service, which provides assessment, treatment, support and residential services for people with cognitive impairment who display high-risk behaviours of concern and are involved (or at risk of being involved) in the criminal justice system."[61] DFATS provides a range of treatment to offenders with an intellectual disability in a residential setting.

[61] https://services.dhhs.vic.gov.au/forensic-disability-program

The pathway into DFATS is outlined in the Disability Act[62] and, over time, the makeup of residents has considerably been altered depending on the application of the admission criteria. At its inception, the focus was on sexual offenders, whereas now there is a predominance of residents on custodial supervision orders under the CMIA. Admission is determined by the Secretary of the DHHS, in line with the legislative criteria, but there is room for interpretation, evidenced by the recent shift towards prioritising CMIA admissions and the reduction in utilisation of the pathway for people on RTOs. Admission decisions are not without consequence, as individuals who could have access to DFATS instead remain in the general prison system where their rehabilitation is compromised.

In recent years, the impact of limited access to DFATS has perhaps been most felt by women who, technically, are eligible for admission but face restricted access due to the current residents being men who have committed serious violent offences. The constraints are of course motivated by safety concerns, but have important implications. OPA knows of a recent case whereby a woman with intellectual disability was found unfit to stand trial and placed under the CMIA. While the court initially sentenced her to a custodial supervision order under the CMIA, with DFATS being unavailable as a placement, the decision was made to change the order to a non-custodial one. In other cases, persons may be placed, to their detriment, within the general prison system.

The definition of 'treatment' at DFATS is not articulated in the Disability Act, and, therefore, is a broad and dynamic notion embracing services, psychosocial interventions such as modified use of mainstream offender treatment programs and programs that have been developed specifically and individually for persons with intellectual disability. As human rights restrictions, it is required that restrictive interventions be specified in the context of a treatment plan, but this should not be taken to mean that restrictive interventions are within the conceptualisation of treatment.

In the past ten years, there has been development of rehabilitative, habilitative practices and treatment programs for offenders with cognitive impairment. DFATS is at the forefront in implementing these new treatments. It is understood that the DFATS programs are designed in accordance with current best practice.

In the past, OPA expressed concerns for the operation and effectiveness of the DFATS model in that the service had moved towards a containment and corrections-orientated paradigm. OPA had become aware, through Community Visitors and reports from other OPA staff, of the inappropriate and excessive use of restraints to manage residents' violent behaviours. OPA commends the notable improvements made to the model of care in recent years and continues to monitor developments in this vein.

While OPA is aware of several evaluations of the DFATS model, there are queries relating to validity, transparency (none have been made public) and whether they have resulted in substantial changes in the level of care. OPA is of the view that longitudinal evaluation of the accessibility and efficacy of the DFATS programs should be undertaken. This would include demographics of the cohort, disability characteristics, assessment and treatment models, staff skill levels, and options for discharge planning. It would also be important to analyse the application of admission criteria, including the identification of individuals who were refused admission by the Secretary. The aim of the evaluation would be to improve

[62] Section 152 (6) of the *Disability Act 2006* (Vic) sets out the sentencing orders that qualify an individual for admission to DFATS.

programs in a way that is consistent with best practice in both design and implementation, and establish a clear progression for prisoners towards rehabilitation in terms of supports, supervision and accommodation.

OPA is not aware of whether facilities similar to DFATS exist in other States and Territories in Australia, but an evaluation of the DFATS model could, nonetheless, inform work done in other Australian jurisdictions.

Recommendation 21

The Victorian Government should commission an independent longitudinal evaluation of treatment provided at Victoria's Disability Forensic Assessment and Treatment Service (DFATS) to ensure programs are consistent with best practice. Any evaluation should be examined with a view of potential application to other Australian jurisdictions.

7.4. NDIS supports in prison

As discussed, the number of people with disability in prisons outnumbers the available beds in specialist units or facilities, leaving many individuals without any disability supports. OPA is aware that, previous to the NDIS, disability support workers could, on occasions, enter prisons. The NDIS reform has tempered this type of collaboration.

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.

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 offense-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.
>
> 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.

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, but a consensus is yet to be reached between the NDIA and other parties. As discussed in section 6.2.1, the Applied Principles continue to be inconsistently applied by parties on either end, leaving OPA and others uncertain as to which NDIS supports can be provided in prisons, and under which circumstances.

The NDIA has, thus far, denied responsibility and refrained from publishing a definitive position on this. The Victorian Government advises that the decision to determine whether NDIS supports can enter its premises sits with the direction of each individual custodial facility. For Andy, and in many cases where advocacy can be provided, NDIS-funded supports ultimately come to be provided in prisons. In other cases, the request is altogether denied.

OPA notes that the *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."[63] 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.

[63] Department of Justice and Regulation (Vic) *Corrections Victoria Disability Framework 2016*-2019 (2015)9.

Recommendation 22

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

The successful provision of NDIS-funded supports in prison unfortunately will require more than the implementation of the above recommendations, which illustrates the complexities emerging at this particular interface. There are a number of precursors to the successful provision of disability supports in prisons and, while these conditions, outlined below, may seem administrative or operational, it is difficult to provide supports in a custodial setting without them being fulfilled.

OPA proposes a 'participant pathway' specific to people with disability who seek to access NDIS-funded supports from within a custodial setting.

1. Identification: Individuals who may have a disability are identified as they enter prison

In Victoria, there is no systematic assessments 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 (e.g. 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.

A person may not want to identify as having a disability for fear of discrimination or retribution and it can also 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.

Identifying a person's disability is, of course, a prerequisite to accessing the NDIS. It is also an obligation of Article 31 of the CRPD for 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.*

Recommendation 23

Australian jurisdictions 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.

2. Access: Individuals with disability who are in prison can access the NDIS

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. It is worth mentioning that, as of 1 July 2020, the NDIA is set to implement independent functional assessments, fully paid by the NDIA, which could relieve Corrections Victoria of the financial burden to undertake these assessments.

Recommendation 24

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.

3. Planning: Participants can take part in planning meetings

If and once accepted into the scheme, Corrections Victoria should facilitate communication between a participant and a planner. If a prisoner has an NDIS plan in place un entering custody, a plan review is triggered on intake and arranged accordingly. The following should be considered at this stage:

- A planner is assigned to the participant by the NDIA – this is likely to be through the Complex Support Needs Pathway.
- Planners can easily speak and/or meet with participants to develop or review their plans.
- The plan is appropriate and adjusted to the participant's circumstances, for instance, it takes into account the length of their sentence.
- The plan includes (specialist) support coordination.
- A plan review is scheduled for (or easily triggered) when pre-release planning begins.

4. Plan implementation: Participants can access NDIS-funded supports while in custody

Once an NDIS plan is in place, the support coordinator, in collaboration with the correctional facility, supports the participant to engage NDIS-funded services. Again, this is contingent on the implementation of recommendations made above.

- Protocols are in place for NDIS-funded providers to enter the custodial setting to provide supports.
- If no existing providers exist to meet the demand, a provider of last resort arrangement is in place and triggered.

As discussed in section 6.2 of this submission, the NDIS market is thin for services for participants with complex needs and offending behaviours. OPA identifies the following contributing factors: shortage in supply, variability in skill and expertise, unwillingness of providers to engage with this cohort because of perceived risk, and inadequate pricing. There is a pressing need for market intervention, and the roles and responsibilities of the market stewards (namely, the NDIA, the Australian and State and Territory Governments) in stimulating the market need to be urgently clarified, as recommended earlier in this submission.

OPA welcomes the recent appointment of NDIA Justice Liaison Officers (JLOs) whose role "will be to provide a single point of contact for workers within state and territory justice systems to coordinate support for NDIS participants in youth and adult justice systems."[64] OPA's understanding is that, similar to the NDIA's Health Liaison Officers, JLOs will not provide direct support to prisoners. Nonetheless, there is scope for JLOs to advance the above recommendations and clarify the pathway into the scheme for people with disability who are in custody.

7.5. OPCAT

The Issues Paper refers to Article 15 of the CRPD – freedom from torture or cruel, inhuman or degrading treatment or punishment – and makes further reference to UNCAT.OPA encourages the Royal Commission to have further regard to the Optional Protocol to the Convention Against Torture (OPCAT), which was ratified by Australia in December 2017.

The purpose of OPCAT is to "establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman, or degrading treatment or punishment."[65] To achieve this objective, OPCAT requires the establishment of a system of independent monitoring of places of detention through an independent body, known as the National Preventive Mechanism (NPM). The NPM's mandate is to conduct preventive visits to monitor against the convention's requirements and, in order to do so, OPCAT grants the NPM powers and functions such as unrestricted access to information, persons, and places of detention. Each jurisdiction is given the liberty to choose how it operationalises the NPM, and, indeed, there are a variety of approaches in countries around the world.

The Australian Government has designated the Office of the Commonwealth Ombudsman as the NPM for Commonwealth places of detention (e.g. immigration detention facilities). The Commonwealth Ombudsman will also be the NPM Coordinator for Australia, thereby holding the responsibility to establish a network of NPMs across States and Territories.[66]

[64] https://www.ndis.gov.au/news/3781-disability-reform-council-update
[65] OPCAT Article 1.
[66] Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT): Baseline assessment of Australia's OPCAT readiness* (September 2019) 6.

In 2019, the Commonwealth Ombudsman assessed the readiness of Australian jurisdictions to implement OPCAT by identifying the various entities in each State or Territory that could act as NPMs, of which OPA was one in Victoria. While the assessment found that one or more existing bodies in each jurisdiction were likely ready to meet the NPM obligations,[67] it was inconclusive in determining the preferred methodology going forward. It should be noted that the NPM for Victoria has not yet been designated, a decision that is pressing as Australia reaches three years since its ratification of OPCAT.

In line with guidelines, the NPM should be identified by an open, transparent and inclusive process involving a wide range of stakeholders, including civil society organisations.[68] Civil society organisations played an important role in Australia's ratification of OPCAT and, yet, the United Nations Committee, in its recent report on Australia's implementation of the CRPD, recognised Australia's "lack of engagement with persons with disabilities through their representative organisations regarding the designation and establishment of a disability inclusive National Preventive Mechanism."[69] OPA hopes this will be remedied and that the irreplaceable role of civil society organisations will be recognised in the designation of an NPM.

> While formal partnerships can take several forms, the two most common have been direct involvement in the monitoring of places of detention and participation in a broader advisory capacity. The Australian NPM will of course need to ensure there is clear division and definition of roles and responsibilities, and special procedures regarding confidentiality and information sharing should it establish any such formal arrangements.[70]

In closing, this submission has highlighted the unexpected ways in which people with disability may be deprived of their liberties. Many people with cognitive disability, mental illness and/or age-related disability are admitted to and reside in places like group homes, hospitals, and aged care facilities where they are subject to very high levels of supervision and restrictions on their liberty, including complete and continuous deprivations of liberty.

OPA refers the Royal Commission to its 2017 submission to the Australian Human Rights Commission inquiry on Australia's implementation of OPCAT,[71] as it explores the benefit of extending the responsibility of NPMs to have oversight of all places where deprivations of liberty occur, including settings of social care and of civil detention.

Recommendation 25

The Australian Government should, in its implementation of the Optional Protocol to the UN *Convention Against Torture* (OPCAT), ensure that deprivations of liberty and places of detention are understood to include informally imposed detention and restrictive practices in social care and residential settings.

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[67] Ibid 43.
[68] United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive* mechanisms, (2010) Principle 16.
[69] United Nations Committee on the Rights of Persons with Disabilities, Concluding Observations: UN Report on Australia's Review of the Convention on the Rights of Persons with Disability (CRPD) (24 September 2019)
[70] http://www.news.uwa.edu.au/2019121611777/uwa-public-policy-institute/opcat-series-need-formal-partnerships-between-civil-societ?page=1
[71] Office of the Public Advocate (Vic), *Submission to the Australian Human Rights Commission on the implementation of OPCAT in Australia* (2017).