



# Submission

Cultural review of the adult custodial corrections system

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December 2021

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## Abbreviations

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

## Recommendations

This submission responds to Terms of Reference stream 1(2) and stream 2(2) of the Cultural Review of the Adult Custodial Corrections System. The Office of the Public Advocate makes the following recommendations:

### **Recommendation 1**

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

### **Recommendation 2**

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

### **Recommendation 3**

The Victorian Government should develop 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 4**

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

### **Recommendation 5**

The Victorian Government should, in its implementation of the Optional Protocol to the United Nations Convention Against Torture, in consultation with people with disability through their representative organisations, designate the Victorian National Preventative Mechanism to conduct inspections of all places of detention and closed environments as a matter of urgency.

### **Recommendation 6**

The Victorian Government should ensure that the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2020 is prioritised on the 2022 legislative agenda.

### **Recommendation 7**

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

### **Recommendation 8**

The Victorian Government should ensure Corrections Victoria received adequate funding to screen for disability and support prisoners to lodge National Disability Insurance Scheme access requests to enable prisoners to receive appropriate disability supports whilst in prison.

### **Recommendation 9**

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

### **Recommendation 10**

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

### **Recommendation 11**

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

**Recommendation 12**

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

**Recommendation 13**

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

**Recommendation 14**

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

- development of plain English materials explaining the disciplinary hearing process and available supports;
- expansion of the Corrections Independent Support Officer program to provide assistance to prisoners with other forms of cognitive impairment;
- improved integration of the Corrections Independent Support Officer program into pre-hearing processes, including during the notification of charge; and
- identification of further opportunities to promote the Corrections Independent Support Officer program within prisons and relevant specialist units.

**Recommendation 15**

The Victorian Government should, in consultation with the Office of the Public Advocate, expand the Corrections Independent Support Officer program to enable prisoners to speak with a Corrections Independent Support Officer upon receiving notice that a hearing will occur, so that the person is able to consider what rights they have prior to the day of the scheduled hearing.

**Recommendation 16**

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

**Recommendation 17**

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

**Recommendation 18**

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

**Recommendation 19**

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

**Recommendation 20**

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

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

To this end, OPA provides a range of critical services for people with cognitive impairment or mental illness, including guardianship, advocacy, and investigation services. In 2020-21, OPA was involved in 1941 guardianship matters (964 which were new), 425 investigations, and 352 cases requiring advocacy.

OPA's 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, and the civil detention and compulsory treatment provisions in the *Disability Act 2006* (Vic). The officers' interventions remain the largest single contributor to OPA's individual advocacy.

A key function of the Public Advocate is to promote and facilitate public awareness and understanding about the *Guardianship and Administration Act 2019* (Vic), and any other legislation affecting persons with disability or persons who may not have decision-making capacity. To do so, OPA maintains a full-service communications function including media outreach, and runs an Advice Service which provided 11,619 instances of advice or information during the 2019-20 financial year. OPA also coordinates a community education program for professional and community audiences across Victoria on a range of topics such as the role of OPA, guardianship and administration, and enduring powers of attorney. In 2020-21, OPA delivered 73 education sessions for an audience of 2273 people.

OPA is supported by more than 600 volunteers across four volunteer programs: the Community Visitors Program, the Independent Third Person Program (ITP Program) and the Corrections Independent Support Officer (CISO) Program. The ITP Program is a 24/7, state-wide volunteer service operating in all police stations in Victoria. ITPs assist persons with cognitive impairment when giving interviews and making formal statements to Victoria Police. In 2020-21, ITPs attended a total of 3631 interviews and statements. CISOs are experienced ITPs who support prisoners who have an intellectual disability at General Manager's Disciplinary Hearings at Victorian prisons and/or remand centres. In 2020-21, CISOs were invited to attend 74 hearings for 106 charges supporting 63 clients at four prisons in Victoria - the lowest number of hearings attended since 2009 when the program started. COVID-19 was a contributing factor as Corrections Victoria needed to develop an IT system that allowed remote prison attendance for anyone requiring it, including CISOs.<sup>1</sup>

## 1.2 About this submission

OPA welcomes the Victorian Government's commission of the independent review into the culture of Victoria's adult custodial corrections system to help drive a safer, more inclusive environment for all staff, and ensure Victoria's prison system continues promoting rehabilitation, reducing recidivism, and catering to the needs of all prisoners to ensure the system improves community safety.

This submission will adopt as its scope issues related to disability with a focus on cognitive impairment, intellectual disability, and mental illness. This submission responds to Terms of

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<sup>1</sup> Office of the Public Advocate, *Annual Report* (Report, 2021) 45  
<<https://www.publicadvocate.vic.gov.au/opa-s-work/our-organisation/annual-reports/opa-annual-reports/359-opa-annual-report-2020-2021>> ('OPA 2020-21 *Annual Report*').

Reference stream 1(2) and stream 2(2) and is based on examples gathered across OPA's program areas, particularly from the Advocate Guardian and CISO programs. This submission will make recommendations relevant to OPA's functions and statutory obligations, namely protecting and safeguarding the rights and interests of Victorians with disability. OPA notes that there are many significant aspects of Victoria's criminal justice system that need to be resourced adequately and operate well to enable full realisation of the insights of this review. Furthermore, there are many issues at the interface of the criminal justice system and other service systems, particularly the National Disability Insurance Scheme (NDIS).

OPA understands that the panel of independent expert witnesses and Review Lead are seeking, amongst other areas of interest, reflections on the effectiveness and appropriateness of the Department of Justice and Community Safety (DJCS) systems and processes to support the safety of people in custody. As part of the review, consideration will be given to issues experienced by particular cohort groups such as women, Aboriginal people, LGBTI people, people with disability, elderly individuals and people from a Culturally and Linguistically Diverse (CALD) background. In this submission, OPA will identify systemic problems that: disadvantage people with disability; contribute to a person engaging with the justice system and recidivism; and reduce safety and the realisation of rehabilitative outcomes.

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

OPA has written about many of these issues previously. For the benefit of the inquiry, OPA highlights in this submission matters raised in previous OPA submissions and reports that are relevant to the terms of reference for this inquiry.<sup>2</sup>

### **1.2.1 A human rights approach**

This submission applies a human rights approach that:

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

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<sup>2</sup> See in particular, I'm too scared to come out of my room (2019); Submission to the Royal Commission into Victoria's mental health system (2019); Submission in response to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Criminal Justice System Issues Paper (2020); Submission to Victorian Parliamentary Inquiry into Homelessness in Victoria (2020); and Victorian Law Reform Commission in response to its Inquiry into Improving the Response of the Justice System to Sexual Offences (2021). The submissions are located on OPA's website: <https://www.publicadvocate.vic.gov.au/>

- seeks for people with disability to be supported and resourced to have the capabilities to lead a dignifying and flourishing life.

This submission is founded on the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

In 2014, the Australian Law Reform Commission (ALRC) undertook a review of existing laws and legal frameworks to establish the extent to which people with disability have an equal right to make decisions for themselves, including in the administration of justice. OPA commends the ALRC's final report, *Equality, capacity, and disability in Commonwealth laws* and refers the inquiry 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.<sup>3</sup>

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

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

- the right to recognition and equality before the law<sup>4</sup>
- the right to liberty and security of person<sup>5</sup>
- the right to humane treatment when deprived of liberty<sup>6</sup>

<sup>3</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (2014) 11 ('ALRC Equality Report').

<sup>4</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 8.

<sup>5</sup> *Ibid* s 21.

<sup>6</sup> *Ibid* s 22.

- the right to a fair hearing<sup>7</sup>
- various rights in criminal proceedings.<sup>8</sup>

In preparing this submission, OPA also takes into account the Optional Protocol to the Convention against Torture (2006) (OPCAT) and the *Mental Health Act 2014* (Vic).

## 2. The criminalisation of disability

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

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

### 2.1 Context

The following discussion originally appeared in OPA's recent submission to the Victorian Parliament's Legal and Social Issues Committee's enquiry into Victoria's criminal justice system published by the Parliament on its website: [Submission to Inquiry into Victoria's Criminal Justice System - Office of the Public Advocate](#)<sup>9</sup>

The Burdekin report of 1993<sup>10</sup> provides important historical context by identifying de-institutionalisation as a major turning point in the trajectory of the human rights of people with disability. De-institutionalisation resulted in a significant and essential shift in the delivery of supports and services to people with disability and mental illness, representing a momentous advancement of the rights of people with disability.

However, governments did not anticipate or provide the necessary resources for the community sector to take on its new mandate, the impact of which has been disproportionately felt by individuals with dual or multiple diagnoses (now often referred to as 'individuals with complex needs'). The systematic criminalisation of some disadvantaged people with mental and cognitive disability, in particular First Nations People, has been a devastating consequence of the absence of early and appropriate diagnosis, intervention and support in the community.<sup>11</sup>

OPA understands that behaviours of concern exhibited by individuals with complex needs are very often linked to the inequities they have endured throughout their lives. OPA understands that behaviours of concern may be linked to childhood experiences of institutionalisation or trauma that have not been addressed. Children with disability are at greater risk of coming in contact with the child protection system and being

<sup>7</sup> Ibid s 24.

<sup>8</sup> Ibid s 25.

<sup>9</sup> Office of the Public Advocate, *Submission to Inquiry into Victoria's Criminal Justice System* (September 2021).

<sup>10</sup> Human Rights and Equal Opportunity Commission (Cth), *Human Rights and Mental Illness: report of the national inquiry into the human rights of people with mental illness* (Canberra, 1993). ('Burdekin report')

<sup>11</sup> Ruth McCausland and Eileen Baldry, 'I feel like I failed him by ringing the police': Criminalising disability in Australia' (2017) 19 (3) *Punishment & Society*, 290.

placed in out-of-home care than children without disability, even though this is a highly inappropriate setting to support a child with high needs.

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

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

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

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. The over-representation of people with a disability in Victorian Correctional Facilities in many cases, represents a failure of adjacent systems and inequalities experienced by people with disability. It is not the role of prison officers to provide disability supports, particularly personal care and yet, particularly since the introduction of the NDIS, that is what is increasingly required of them.

## 2.2 Cultural representations of disability

The Victorian Ombudsman reported in 2015 on the lack of through-care and access to disability-specific supports, particularly in the context of pre-release planning, noting these absences do little to help reduce rates of reoffending for prisoners with disability.<sup>12</sup> Corrections Victoria’s most recent disability framework lists addressing recidivism among vulnerable cohorts and providing responsive intervention strategies for prisoners with disability as primary objectives.<sup>13</sup> However, prisoners with disability remain over-represented in Victorian prisons<sup>14</sup> and the stories in this submission show they do not receive appropriate support and care.

One approach to explain the inconsistency between the policy goals of Corrections Victoria and what the evidence shows, is to consider the experience of incarceration for prisoners with disability. This requires questioning the cultural meanings attached to our

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<sup>12</sup> Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, 87. (*‘Rehabilitation and reintegration of prisoners report’*).

<sup>13</sup> Corrections Victoria, *Corrections Victoria Disability Framework 2016-2019: Expanding the opportunities*, 6. Note that work on development of a new Corrections and Justice Services Disability Framework 2020-2022 is underway, see Department of Justice and Community Safety, *Disability action plan Framework 2019-2021 Implementation plan*, Action 2.3

<sup>14</sup> *Rehabilitation and reintegration of prisoners report* (n 20) 7.

understanding of prisoners with disability. The work of Dowse, Baldry and Snoyman,<sup>15</sup> and critical disability studies more broadly, is particularly helpful in explaining how peoples' understandings of disability are conceptualised. By thinking culturally, it is clear how understandings of disability are informed by many things: personal stories, popular culture, news media and peoples' own experiences are some examples. All these create cultural references and representations of disability. Some may be accurate, some less so. Likewise, some might be more believable, but others not so much. Ultimately, this means that dominant and marginalised representations of disability exist in culture.<sup>16</sup>

Turning to the criminal justice system, there is a similar process at work, but one that significantly disadvantages prisoners with disability. Looking at how 'disability related behaviours of concern' are conflated with 'criminogenic behaviours' within the system is a useful starting point. This submission's focus on 'disability related behaviours of concern' is deliberate because these behaviours are considered to pose a significant risk to the prisoner with disability, other people and the community at large.<sup>17</sup> The idea of prisoners with disability as 'risky' also contributes to broader cultural meanings of this vulnerable cohort as pathological. Put differently, the criminal wrongdoing of prisoners with disability ends up becoming confused with disability-specific behaviours such that *the behaviour itself is seen to be criminal*. In a criminal justice context, this means these behaviours are taken to be a criminogenic trait that needs to be 'managed' rather than recognised as a characteristic of a cognitive impairment that might require therapeutic support.

A recent Ombudsman investigation contains multiple examples of prisoners with disability not receiving adequate institutional support in disciplinary hearings because their conduct was taken to be either: (1) an intentional breach of prison rules or (2) unrelated to their disability.<sup>18</sup> In these case stories, the sanctions levied against the prisoner with disability are typically harsh because the behaviour is interpreted as an offence against the prison system, rather than symptomatic of a cognitive impairment. As such, the action taken by the justice system is punitive instead of therapeutic. These responses underscore how the criminal justice system continues to misidentify disability-specific behaviours because they are considered entirely criminogenic.

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

### 3. Bail laws and remand

#### 3.1 Reducing the number of people with disability in prisons

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

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

<sup>16</sup> Simi Linton, 'Disability Studies/Not Disability Studies' (1998) 13 (4) *Disability & Society*, 533.

<sup>17</sup> Kim Chandler, Ben White & Lindy Willmott, 'What role for adult guardianship in authorising restrictive practices' (2017) 43 (2) *Monash University Law Review*, 494.

<sup>18</sup> *Ombudsman's Disciplinary hearing report* (n 17), 54-68.

The above-mentioned issues are explored in greater detail in OPA's recent submission to the Victorian Parliament's Legal and Social Issues Committee's enquiry into Victoria's criminal justice system published by the Parliament on its website: [Submission to Inquiry into Victoria's Criminal Justice System - Office of the Public Advocate](#). OPA refers this inquiry to the submission in full.

In the above-mentioned submission, OPA discussed people with cognitive impairments who are respondents to family violence and personal safety intervention orders not understanding the conditions of their order, or in the case of people with cognitive impairments released on bail, not understanding the conditions of bail. In both circumstances, OPA has found that people with cognitive impairments commonly breach conditions because of their disability. Anecdotally, OPA is aware that this issue disproportionately impacts on First Nations people.

In addition to the issues raised in the above-mentioned submission, OPA notes that in varied engagements with police, it is essential that people understand their obligations in relation to orders, registry conditions, or relevant bail conditions. The implications of breaching bail conditions for example, can lead to new criminal offences and an increased likelihood of returning to prison. OPA is aware that people with cognitive impairments, including ABIs, often do not comprehend the conditions of their orders and consequently breach conditions.

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

The [Submission to Inquiry into Victoria's Criminal Justice System - Office of the Public Advocate](#) includes detailed discussion of the changes made to bail laws made in 2013 and 2018, which made accessing bail more difficult, giving rise to increasing numbers of people on remand. Given the overrepresentation of people with cognitive impairments in the criminal justice system generally, it is likely that people with cognitive disability and mental illness are also overrepresented in the remand population.

In *A Pathway to decarceration: A Justice system response to COVID-19*, the Law Institute of Victoria (LIV) and the Federation of Community Legal Centre (FCLC) argued for urgent bail reform to reduce the number of vulnerable people on remand and who are a low risk to the community including by abandoning the reverse onus categories in the *Bail Act 1977* and replacing this with a single test of unacceptable risk.

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

### **3.3 Remand hearings with a Bail Justice**

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

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

## 4. Identifying people with disability and their support needs

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

In Victoria, there is no systematic assessment of an adult's disability, outside of a mental health screening, as they enter prison. (In Victoria, this usually takes place at the Melbourne Assessment Prison). The mental health assessment, to OPA's knowledge, is exceedingly focused on risk (for example, assessing a person's suicidality) and will not always trigger service delivery. There is no assessment of other forms of cognitive impairment and, therefore, Corrections Victoria generally relies on piecemeal sources of information, such as information from the courts, obvious signs of impairment, and/or individuals disclosing their disability status.<sup>19</sup>

A person may not want to identify as having a disability for fear of discrimination or retribution, or it may be that a person has a contested or an undiagnosed disability, which is often the case with ABIs. It is, therefore, near impossible to establish the real prevalence of disability in prisons, and, consequently, to ascertain the level of need for disability supports.<sup>20</sup>

Identifying a person's disability is, of course, a prerequisite to accessing their eligibility for the NDIS. Corrections Victoria should facilitate NDIS participation at all stages – at the point of entering the prison system, during the prisoner's sentence and most crucially before the prisoner is released to ensure continuity of disability support between prison and living in the community. This will be discussed in detail below under heading 'Supporting people with disability in prison.'

Identifying a person's disability is also an obligation of Article 31 of the CRPD that requires State Parties to:

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

This obligation remains unfulfilled by the justice system as a whole, but, in this instance, OPA builds on a recommendation made by the Victorian Ombudsman's report on the *Investigation into the rehabilitation and reintegration of prisoners in Victoria*<sup>21</sup> which was also made in OPA's submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper (recommendation 23).<sup>22</sup>

### Recommendation 1

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

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

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<sup>19</sup> DRC criminal justice submission (n 9) 47.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

OPA also notes the work that has recently commenced in line with Victoria's Youth Justice Strategic Plan 2020-2030 to support young people with disability involved in Youth Justice. This work includes, amongst other things, implementing a Child and Adolescent Intellectual Disability Screening Questionnaire to allow Youth Justice staff to identify young people with intellectual disability and refer them for clinical assessment and further support and referring young people with disability to the NDIS Complex Support Needs pathway. This work also involves piloting a specialist service response to facilitate access to the NDIS and to maximise supports.<sup>23</sup> OPA commends the Department on this work and supports similar actions being rolled out to adults within the Victorian custodial system.

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

### 5.1 Disability Justice Strategy

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

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

- Negative attitudes and assumptions about people with disabilities often resulting in people with disabilities being viewed as unreliable, not credible or not capable of giving evidence, making legal decisions or participating in legal proceedings.
- 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.
- 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.
- 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').
- Support, adjustments and aids may not be provided to prisoners with disabilities so that they can meet basic human needs and participate in prison life.<sup>24</sup>

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

OPA endorses the AHRC's recommendation and encourages the inquiry to consider the *Equal before the law* report. OPA refers to and repeats an amended version of recommendation 1 in its submission to the Royal Commission into Violence, Abuse, Neglect

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<sup>23</sup> Department of Justice and Community Safety, *Disability action plan – Implementation plan 2020-21* (2020) 17, Action 4.3 <<https://www.justice.vic.gov.au/about-the-department/disability-action-plan-implementation-plan-2020-21>>.

<sup>24</sup> Australian Human Rights Commission, *Equal before the law* (2012) 8 ('*Equal before the law*').

and Exploitation of People with Disability: The Criminal Justice System Issues Paper (DRC criminal justice submission)<sup>25</sup>:

## Recommendation 2

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

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

- Undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.
- The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.

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

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

OPA refers to and repeats an amended version of recommendation 2 in its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper<sup>26</sup>:

## Recommendation 3

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

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.<sup>27</sup> It is estimated that approximately 40 per cent of prisoners are on remand.

Being subject to criminal detention does not strip a person of their human rights. Some of these rights are captured in the United Nations Convention against Torture (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.”<sup>28</sup> The title indicates the framework expired recently and OPA is not aware of it being renewed.

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<sup>25</sup> Office of the Public Advocate (Vic), *Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper* (March 2020) 12 ('DRC criminal justice submission').

<sup>26</sup> Ibid, 13.

<sup>27</sup> Corrections, Prisons & Parole, *Corrections statistics: quick reference* (Website) <<https://www.corrections.vic.gov.au/prisons/corrections-statistics-quick-reference>>.

<sup>28</sup> Department of Justice and Regulation (Vic) *Corrections Victoria Disability Framework 2016-2019* (2015) 3. OPA submission to cultural review of adult custodial corrections system CD/21/887730

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 2 of this submission calling for a disability justice strategy could provide 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 habitation and rehabilitation, as per Article 26 of the CRPD.

## 5.2 Human rights framework for Corrections Services

In addition to the Disability Justice Strategy, OPA brings the inquiry's attention to the Human Rights Principles for ACT Correctional Centres, published in January 2019.<sup>29</sup> The principles align with Australia's obligations under international human rights commitments and give effect to obligations articulated under the Territory's *Human Rights Act 2004* (ACT).

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

Reasonable adjustments should be made to ensure persons with a disability can enjoy and exercise their human rights on an equal basis with others, including appropriate measures to support persons with a disability in exercising their legal decision-making capacity.<sup>30</sup>

OPA considers that there is a need for similar human rights principles in Victoria's correctional centres. While Victorian correctional facilities are bound by the Victorian Charter, the Victorian Ombudsman's report of the *Investigation into the imprisonment of a woman found unfit to stand trial*<sup>31</sup> demonstrates that the State does not always act in a manner that is compatible with the rights articulated in the Charter. The Victorian Ombudsman recommended that the Department of Justice and Community Safety provide, or commission, guidance about acting in compatibility with the Victorian Charter for all public authorities providing mental health and disability services.<sup>32</sup> OPA sees value in guidance similar to the Human Rights Principles for ACT Correctional Centres for the corrections systems in Victoria that builds on the Victorian Charter.

OPA refers to and repeats an amended version of recommendation 19 from its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper<sup>33</sup>:

### Recommendation 4

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

## 5.3 OPCAT

OPA encourages the inquiry to have regard to 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

<sup>29</sup> ACT Government, *Human Rights Principles of ACT Correctional Centres* (2019).

<sup>30</sup> ACT Government, *Human Rights Principles of ACT Correctional Centres* (2019) 9, Principle 5. Respect and dignity.

<sup>31</sup> Victorian Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (2018) ('*Imprisonment of a woman report*').

<sup>32</sup> *Ibid* 67 rec 8.

<sup>33</sup> *DRC criminal justice submission* (n 9) 42.

punishment.”<sup>34</sup> 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. The Commonwealth Ombudsman, as NPM, holds the responsibility to establish a network of NPMs across States and Territories.<sup>35</sup>

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,<sup>36</sup> 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.<sup>37</sup> 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.”<sup>38</sup> 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.<sup>39</sup>

In November this year, at the Meeting of Attorneys-General, participants agreed that “officials would continue to discuss the intergovernmental agreement and funding.”<sup>40</sup> This makes it likely that Australian governments will not meet their international obligation to

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<sup>34</sup> OPCAT Article 1.

<sup>35</sup> 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.

<sup>36</sup> *Ibid* 43.

<sup>37</sup> United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on national preventive mechanisms*, (2010) Principle 16.

<sup>38</sup> 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).

<sup>39</sup>The University of Western Australia, ‘OPCAT series: The need for formal partnerships between civil society and the National Preventative Mechanism’, *University of Western Australia Impact* (Website) <<http://www.news.uwa.edu.au/2019121611777/uwa-public-policy-institute/opcat-series-need-formal-partnerships-between-civil-societ?page=1>>.

<sup>40</sup> Australian Government Attorney-General’s Department, ‘Meeting of Attorneys-General (MAG) Communique -12 November 2021’ *Publications* (Website) <<https://www.ag.gov.au/about-us/publications/meeting-attorneys-general-mag-communique-november-2021>>.

implement OPCAT within the agreed timeframe. OPA urges the Victorian Government to, in consultation with civil society organisations, designate the Victorian NPM as matter of urgency.

#### **Recommendation 5**

**The Victorian Government should, in its implementation of the *Optional Protocol to the United Nations Convention against Torture*, in consultation with people with disability through their representative organisations, designate the Victorian National Preventative Mechanism to conduct inspections of all places of detention and closed environments as a matter of urgency.**

### **5.4 Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**

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 criminal process.”<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup> 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 was 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

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<sup>41</sup> Victorian Law Reform Commission (Website) <<https://www.lawreform.vic.gov.au/content/3-overview-cmia>>.

<sup>42</sup> Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), (2014), 49.

<sup>43</sup> Ibid 48.

ascertaining whether a defendant could stand trial with the assistance of special measures and where any other reasonable adjustments have been made.”<sup>44</sup>

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.<sup>45</sup>

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.<sup>46</sup>

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.<sup>47</sup>

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 Department of Families, Fairness and Housing (DFFH), formerly Department of Health and Human Services (DHHS), operated service for people with intellectual disability)
- the Long Term Rehabilitation Program (also a DFFH operated, formerly DHHS, 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’,<sup>48</sup> 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

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<sup>44</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (2014) 199-200.

<sup>45</sup> Ibid 22.

<sup>46</sup> Victoria Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (October 2018), 48.

<sup>47</sup> Ibid.

<sup>48</sup> *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 26(4).

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 under 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 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.<sup>49</sup>

OPA also wishes to draw the inquiry's attention to the way in which the pathway out of a custodial setting is dependent on community-based supports and appropriate accommodation, which often do not exist, resulting in continued incarceration, as was the case for 'Rebecca' (a pseudonym):

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

In 2018, the Victorian Ombudsman reported on the 'saddest case' she had investigated during her time as Ombudsman. The case concerned 'Rebecca', a 39-year-old woman who enjoys listening to music, going on drives and swimming at the beach. She has 'pervasive developmental disorder' and 'borderline intellectual function'.<sup>50</sup>

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

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.

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 welcomed the introduction of the *Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2020* into Parliament on 17 March 2020. The Bill was second read on 18 March 2020.<sup>51</sup>

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<sup>49</sup> Victoria Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (October 2018).

<sup>50</sup> Victorian Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (2018) 6. ('*Ombudsman's Unfit to stand trial report*').

<sup>51</sup> State Government of Victoria, *Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2020* (Website) <<https://www.legislation.vic.gov.au/bills/crimes-mental-impairment-and-unfitness-be-tried-amendment-bill-2020>>.

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.

However, the Bill has languished since its introduction to Parliament in early 2020. The Victorian Government should ensure that the Bill is prioritised on the 2022 legislative agenda.

### **Recommendation 6**

**The Victorian Government should ensure that the *Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2020* is prioritised on the 2022 legislative agenda.**

## **5.5 Aboriginal prisoners and staff: the importance of self-determination**

OPA welcomes the inquiry's focus on First Nations staff and First Nations people who are incarcerated. OPA notes the over-representation of First Nations people in Victoria's prison system and the importance of the right to access and continue to practice Culture, are free from discrimination, consistent with Aboriginal self-determination for staff and prisoners alike.

OPA supports the self-determination of First Nations people and urges the inquiry to engage with Aboriginal-controlled organisations, First Nations staff and First Nations people in custody regarding Terms of Reference stream 1(4) and stream 2(1).

## **6. Supporting people with disability in prison**

### **6.1 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 –DFATS and the Long Term Rehabilitation Program. 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.

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.

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.

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 be commended, 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."

OPA refers the inquiry to section 7.7 of this submission for detailed discussion of staff training.

## 6.2 NDIS eligibility

One of the primary aims of screening prisoners for disability should be to trigger service provision. In the context of the NDIS, any identification of disability should result in the lodging of an NDIS access request, where the person is not yet a participant in the scheme. The correctional facility should facilitate the completion of an Access Request Form (ARF). In the event that a potential participant is required to undertake additional assessments for the completion of the ARF, Corrections Victoria should provide support to this effect. Connecting eligible prisoners with NDIS supports will address disability needs including behaviours of concern. Therapeutic services accessed via the NDIS will support the prisoner and, in turn, is likely to contribute to reduced rates of recidivism.<sup>52</sup>

If OPA is involved with a person with a cognitive impairment in custody, the person's disability has been identified and an application for the appointment of a guardian has been made. In most of these cases, the guardian's role is to get the NDIS involved, including the support of a specialist support coordinator. This only occurs if the NDIS accepts that the

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<sup>52</sup> *DRC criminal justice submission* (n 9) 47.

person needs disability support while in prison, and the need for discharge planning for discharge into the community.

In some of these cases, the person has been supported by the State funded Multiple and Complex Needs Initiative (MACNI) which has provided support to bring together services to support clients with multiple and complex needs. The Victorian Department of Families, Fairness and Housing Intensive Support Team also supports people with complex needs to get the best possible package. These State funded services are critical to support people with complex needs to access the supports that they need whilst in custody, and to transition successfully into the community.

OPA draws the inquiry's attention to the support that Queensland Corrective Services provides prisoners in that jurisdiction to access the NDIS. In 2018-19, Queensland Corrective Services implemented its Service Reform Project valued at \$2.86 million. The project was designed to improve services for people with disability and mental illness in contact with the corrective services system. Queensland Corrective Services outlines in its 2018-19 Annual Report:

The project identified over 1,000 prisoners and offenders who may be eligible for the NDIS and supported over 170 to gain access to the scheme, including by helping prisoners to gather evidence of their disability by commissioning specialist assessments. Three research projects were commissioned to build an evidence base to determine the prevalence of certain forms of disability among the Queensland prison population and to identify screening and assessment tools to assist the further identification of prisoners with disability.

This evidence base will be used to inform future policy and practice in this area. Internal NDIS transition governance was refreshed and elevated, including the development of a Project Implementation Plan, Communications and Engagement Strategy and new reporting arrangements to address Recommendation 7 of the Queensland Audit Office's Report 14: 2017-18 – The National Disability Insurance Scheme.<sup>53</sup>

OPA draws the attention of the inquiry to Queensland's efforts in this space and considers a similar approach to supporting prisoners to access the NDIS would be of benefit in Victoria. In addition to prompting service delivery, effective data collection can inform future policy and programs. In its 2019-2020 Annual Report, Queensland Corrective Services approach is further detailed as follows:

Upon admission to a correctional centre, all prisoners are assessed in terms of their risks and needs. Correctional centre staff use the Immediate Risk Needs Assessment and the Hayes Ability Screening Index for all new admissions to identify whether a prisoner may have an intellectual disability. In 2019 20, QCS updated the Immediate Risk Needs Assessment to include specific questions to determine if prisoners are current or potential NDIS participants.

In addition to developing operational guidelines and handbooks for working with prisoners with a disability, in 2019 20, QCS developed a guide to working with cognitive impairment to provide further support to operational staff and to enhance outcomes for prisoners.<sup>54</sup>

### **Recommendation 7**

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

### **Recommendation 8**

**The Victorian Government should ensure Corrections Victoria received adequate**

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<sup>53</sup> Queensland Corrective Services, *Annual Report* (Report, 2019) 36.

<sup>54</sup> Queensland Corrective Services, *Annual Report* (Report, 2002) 32.

**funding to screen for disability and lodge National Disability Insurance Scheme access requests on behalf of prisoners to enable prisoners to receive appropriate disability supports whilst in prison.**

### **6.3 Interface issues with the NDIS**

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

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

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

supports that address behaviours of concern and reduce the risk of offending and re-offending such as social, communication and self-regulation skills, where these are additional to the needs of the general population and are required due to the impact of the person's impairment/s on their functional capacity and are additional to reasonable adjustment.<sup>55</sup>

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

OPA repeats the following recommendation, amended from recommendation its submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation<sup>56</sup> to improve coordination issues at the interface between the NDIS and Corrections Victoria.

#### **Recommendation 9**

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

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<sup>55</sup> Council of Australian Governments (COAG) *Principles to determine the responsibilities of the NDIS and other service systems* (November 2015) 23.

<sup>56</sup> *DRC criminal justice submission* (n 9) 7.

## 6.4 NDIS services in prisons

As outlined in OPA's submission to the Disability Royal Commission in response to its Criminal Justice Issues Paper available on OPA's website – [OPA submission in response to Criminal Justice System Issues Paper - Office of the Public Advocate](#) – the provision of NDIS-funded supports in prisons is guided by the APTOS principles in relation to supports for participants subject to custodial sentences. The APTOS principles determine that the NDIS is responsible for:

- the coordination of NDIS supports with the supports offered by the justice and other service systems
- For people in a custodial setting (including remand) the only supports funded by the NDIS are those required due to the impact of the person's impairment/s on their functional capacity and additional to reasonable adjustment, and are limited to:
  - aids and equipment
  - allied health and other therapy directly related to a person's disability, including for people with disability who have complex challenging behaviours
  - disability-specific capacity and skills-building supports which relate to a person's ability to live in the community post-release
  - supports to enable people to successfully re-enter the community
  - training for staff in custodial settings where this relates to an individual participant's needs.<sup>57</sup>

According to OPA's interpretation of the APTOS 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, the APTOS 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. OPA has observed an attitude that commencing behaviour support interventions is not seen as valuable until the prisoner has a release date, as illustrated by Andy's story.<sup>58</sup>

### **Case Story: Andy**

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

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

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

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.

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<sup>57</sup> Ibid 45.

<sup>58</sup> Ibid 46.

The resistance comes from an alleged view that, once Andy receives his sentence or release date, there will be a significant change in his circumstances and, therefore, it is “useless” to begin service delivery beforehand.<sup>59</sup>

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

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

OPA notes that the 2016-2019 *Corrections Victoria Disability Framework* lists as actions to “deliver the necessary and relevant support to meet the needs of prisoners and offenders with a disability” as well as “improve system and processes, including enhanced assessment processes, refinement of program and service pathways for persons with a disability, and improving data collection and reporting.”<sup>60</sup> Work has commenced on the development of a new *Corrections and Justice Services Disability Framework 2019-2022* that articulates an integrated approach to supporting offenders and prisoners with disability.<sup>61</sup>

While these actions are not specific to the NDIS, OPA, nonetheless argues that the outcome of being “responsive to the diverse needs” of prisoners with disability remains unfulfilled until NDIS supports can be provided in all Victorian prisons.

OPA has observed that implementation of NDIS-funded supports to prisoners are slow, and that there are limited providers who are prepared to work with prisoners. Finding an agency that is prepared to be a coordinator, and that provider then finding adequate staff who are appropriately trained are challenges. Increased delivery of therapeutic supports in prison will render prisoners better-skilled and prepared for their re-entry into the community, creating the conditions to reduce rates of recidivism.

### **Recommendation 10**

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

## **6.5 Planning**

### **6.5.1 Participants to take part in planning meetings**

If and once accepted into the NDIS, Corrections Victoria should facilitate communication between a participant and a planner. If a prisoner has an NDIS plan in place on 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.

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<sup>59</sup> Ibid.

<sup>60</sup> Department of Justice and Regulation (Vic) *Corrections Victoria Disability Framework 2016-2019* (2015)9.

<sup>61</sup> Department of Justice and Community Services, *Disability Action Plan* (2020) Initiative 2.3, 13.

- 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.

### **6.5.2 Participants' access to NDIS-funded supports whilst in custody**

Once an NDIS plan is in place, the support coordinator, in collaboration with the correctional facility, should support the participant to engage NDIS-funded services.

- Protocols should be 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 be in place and be triggered.

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.

### **6.5.3 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, such as providers refusing to enter prisons to support NDIS participants who are incarcerated.

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. An important gap is created in the absence of DFFH (formerly 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 on-going COVID-19 crisis. There is urgent need for government intervention to ensure a provider of last resort can fill gaps in the market.

## **6.6 Corrections Independent Support Officers Program**

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

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

OPA has held ongoing concerns about the number of prisoners taking up the opportunity for CISO support, including the alleged rate of prisoner refusal of a CISO. There has never

been any advice provided to OPA about what information prisoners receive about the program or what a CISO could do to support them in a disciplinary hearing.

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

In 2020-21, CISOs attended 74 hearings relating to 106 charges. Sixty-three clients at four prisons in Victoria accessed a CISO.<sup>62</sup> This is a significant reduction in hearings when compared with the past four years (2016/17 – 224 hearings, 2017/18 – 290 hearings, 2018/19 – 299 and 2019/20 - 170).

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

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

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

This section of the submission has been adapted from OPA's recent submission to the Victorian Parliament's Legal and Social Issues Committee's enquiry into Victoria's criminal justice system published by the Parliament on its website: [Submission to Inquiry into Victoria's Criminal Justice System - Office of the Public Advocate](#).<sup>63</sup>

### 6.6.1 Prison disciplinary hearings

A prison disciplinary hearing occurs when a prisoner commits, or attempts to commit, an offence set out in regulation 65(1)(a)–(zh) 'Prison offences' of the *Corrections Regulations 2019* (Vic). The list of offending behaviour is extensive and includes actions such as assault or threaten any person, possess an article or substance that is not permitted, access the internet and disobey a lawful instruction from an officer. Before charging a prisoner with an offence, the disciplinary officer investigating the alleged offence is required to 'consider whether the prisoner has any special needs of special circumstances' per regulation 66(f) *Corrections Regulations 2019* (Vic). A registered intellectual disability or indeed a suspected intellectual disability, cognitive impairment, ABI or mental illness are special needs or circumstances and must be considered.

If the prisoner pleads or is found guilty, possible penalties are a reprimand, a fine not exceeding one penalty unit and loss of privileges per s 53(4)(a)-(c) 'Governor's hearing' of the *Corrections Act 1986* (Vic). While a reprimand has no immediate tangible effect, it may

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<sup>62</sup> Office of the Public Advocate, *Annual Report* (Report, 2021) 45  
<<https://www.publicadvocate.vic.gov.au/opa-s-work/our-organisation/annual-reports/opa-annual-reports/359-opa-annual-report-2020-2021>> ('OPA 2020-21 Annual Report').

<sup>63</sup> Office of the Public Advocate, *Submission to Inquiry into Victoria's Criminal Justice System* (September 2021).

have ramifications when a prisoner applies for parole. As one prisoner noted, '[I]t doesn't seem fair to me. I've been pinning my hope on getting parole.'<sup>64</sup>

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

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

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

### **Case story: Will**

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

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

The fire brigade was called and the 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.

## **6.6.2 Ombudsman's report**

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

The Ombudsman's investigation found a multitude of issues 'with the treatment of prisoners with a cognitive impairment or mental illness during the disciplinary process,'<sup>65</sup> namely:

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<sup>64</sup> Prisoner, complaint to the Ombudsman, cited in Victorian Ombudsman, *Investigation into good practice when conducting prison disciplinary hearings* (2021) 8.

<sup>65</sup> *Ombudsman's Disciplinary hearings report* (n 17) 61.

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

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

- a screening tool be implemented at prison admission to identify prisoners eligible to receive support under the CISO program
- hearing files in each case identify the steps taken to assist eligible prisoners to access the CISO program
- eligible prisoners be provided with an Easy Read CISO guide at admission and thereafter annually or following transfer to a new prison
- similar posters be displayed at all prisons
- information sessions about the CISO program be conducted at least annually for all staff
- clear protocols be developed in the case of eligible prisoners who are transferred to another prison prior to their hearing.<sup>66</sup>

### 6.6.3 Central coordination and oversight of disciplinary hearings

The Ombudsman's report sets out the laws and policies that 'establish the legislative and operational requirements for the prison disciplinary process.'<sup>67</sup> These consist of: the *Corrections Act 1986 (Vic)*; *Corrections Regulations 2019 (Vic)*; Commissioner's Requirements; Deputy Commissioner's Instructions and Operating Instructions; and other policy documents including the Prison Disciplinary Handbook which provides guidance concerning the conduct of the hearings.<sup>68</sup>

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

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

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

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<sup>66</sup> Ibid 63.

<sup>67</sup> Ibid 20.

<sup>68</sup> Ibid.

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

### **Recommendation 11**

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

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

### **Recommendation 12**

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

The Government's response to this and the previous recommendation was to note that they will be considered as part of this review into the culture of Victoria's prison system.<sup>69</sup> OPA notes the importance of this review and hopes that changes will result from it.

### **Recommendation 13**

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

The Victorian Government supported this recommendation in principle subject to budget deliberations.<sup>70</sup>

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

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

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

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<sup>69</sup> *Ombudsman's Disciplinary hearings report* (n 17) 78.

<sup>70</sup> *Ibid.*

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

- registered intellectual disabilities
- undiagnosed intellectual disabilities
- acquired brain injuries
- autism spectrum disorder
- dementia.<sup>71</sup>

In its submission to the Ombudsman, OPA<sup>72</sup> reported that mental illness was only excluded from the above criteria 'because of the number prisoners likely to be involved and the fact it would expand the Program beyond OPA's current capacity to manage'.

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

#### **Recommendation 14**

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

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

The Victorian Government supported this recommendation in principle subject to budget deliberations.<sup>73</sup>

OPA goes further and makes the following additional recommendations. The first builds on recommendation 14(c) above:

#### **Recommendation 15**

**In consultation with the Office of the Public Advocate, the Victorian Government expand the Corrections Independent Support Officer program to enable prisoners to speak with a Corrections Independent Support Officer upon receiving notice that a hearing will occur, so that the person is able to consider what rights they have prior to the day of the scheduled hearing.**

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<sup>71</sup> *Ombudsman's Disciplinary hearings report* (n 17) 61.

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

<sup>73</sup> Victoria Ombudsman, *Investigation into good practice when conducting prison disciplinary hearings* (Melbourne, 2021) 79.

The above recommendation may increase the opportunity for prisoners with intellectual disability to call witnesses if they wish to plead not guilty, and to make an informed decision about the presence of a Corrections Independent Support Officer at the hearing.

OPA makes the following further recommendations in relation to the CISO program and prison disciplinary hearings respectively.

#### **Recommendation 16**

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

#### **Recommendation 17**

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

## **6.7 Supports and adjustments for people with disability**

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. The CISO program, amongst others, is one such program that gives effect to Article 13 of the CRPD.

Advocacy is another 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 18**

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

## **6.8 Staff training**

It is essential that all custodial corrections staff have an understanding of cognitive impairment including how it may present, and how people may be impacted in different ways by their disability. “All justice system personnel need comprehensive training so that

they know how to communicate with people with disability and can make appropriate adjustments.”<sup>74</sup>

Whilst the Corrections Victoria Disability Framework lists workforce development as one of its main objectives, so far as OPA is aware, specialist training for correctional staff is offered on a limited basis to staff in select roles, for example, disability portfolio holders. Whilst this work is to be commended, OPA recommends a more comprehensive approach to 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.”<sup>75</sup>

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

### **Recommendation 19**

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

OPA recently articulated in its submission to the Victorian Parliament's review of the criminal justice system that:

Education should consider the ways in which the criminal justice system discriminates on the basis of disability when disability is not actively taken into account within that system, or adjacent systems such as housing and supports for behaviours of concern, effectively criminalising disability including punishing it by incarceration. Any new training modules should be co-designed, delivered and evaluated by people with lived experience of the criminal justice system, including people with a cognitive impairment, ABI and mental illness. Co-design, delivery and evaluation, or at the very least, consultation with and contribution by those with lived experience, will ensure that educational materials are created with direct and full participation of the class of people who will be affected by judicial educative outcomes.

Education should include awareness training around system failure issues including that judges and magistrates do not have adequate alternatives to prison when dealing with offenders with disability. For example, when an offender with disability is not coping in the community and is demonstrating behaviours that are threatening or dangerous, judicial officers have little choice but to incarcerate the offender. The level of rehabilitation and support for behaviours of concern that is required to assist offenders with cognitive disability, ABI and mental illness does not occur to a satisfactory degree in prison.

Issues that contribute to this problem are that there are few NDIS staff who are willing to, and have the skills to work with, complex and violent offenders; often, NDIS supports do not follow a prisoner into custody; and the NDIS is reluctant to commence behavioural supports until the prisoner has a release date. This is of particular concern in instances where receiving a release date is dependent on the prisoner making progress addressing their behaviours of concern. OPA notes that there are only two purpose-built bail houses for people with intellectual disability. This is insufficient, particularly given that some OPA clients are unable to live with others and need stand-alone supported accommodation.

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<sup>74</sup> *I'm too scared to come out of my room* (n 47) 72.

<sup>75</sup> *DRC criminal justice submission* (n 9) 43.

Staff education about recidivism and the causes of crime, including in relation to people with cognitive impairment, ABI and mental illness cannot address the overrepresentation of people with a disability in the prison population, however it may go some way in improving culture and ameliorating misunderstandings around disability.

## 7 Pre-release planning

### 7.1 Lack of planning

As discussed in OPA's submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of people with Disability in response to its Criminal Justice System Issues Paper,<sup>76</sup> providing continued care in the transition from prison to the community, known as 'through care' and ideally initiated in the weeks before a prisoner's release, as well as pre-release planning are critical in the rehabilitation of prisoners. Appropriately supporting people through this significant transition helps to reduce the risk of re-offending and subsequent return to custody.<sup>77</sup>

In order to be successful, correctional staff must engage prisoners in the process and community-based specialised supports must be available post-release, but often they are hard to source. Shortages may be due to limited funding, an unwillingness of NDIS providers to take on clients with offending behaviours, and the significant proportion of people with mental illness and disability in Victorian prisons.<sup>78</sup>

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

As identified by Forensicare below, the release date is often unknown for prisoners on remand, causing resistance from the NDIA and providers to engage in the planning process prior to the person's release from prison. Some prisoners may find it difficult to provide therapeutic input to their therapy prior to their return to mainstream society, especially if they have been in custody for a long time; they may not know what supports they will need or even what is available through an NDIS plan. Specialist planning and advocacy can be useful to assist with this.<sup>79</sup>

#### 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

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<sup>76</sup> Office of the Public Advocate (Vic), *Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper* (March 2020).

<sup>77</sup> Ibid 27.

<sup>78</sup> Ibid.

<sup>79</sup> Office of the Public Advocate (Vic), *Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper* (March 2020) 29.

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.<sup>80</sup>

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

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<sup>80</sup> Forensicare, *Formal submission: Royal Commission into Victoria's Mental Health System* (July 2019) 15. OPA submission to cultural review of adult custodial corrections system CD/21/887730

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 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.

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.

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

## **Recommendation 20**

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

Pre-release planning, however, will be of little utility if there are no services to provide the necessary support. While it is the justice system's responsibility to regulate correctional services, governments more broadly have a duty of care to adequately fund and resource community-based services to prevent injustice and support all people to avoid unnecessary detention and deprivations of liberty. The need to protect the community is valid but it should be addressed by rigorous and best-practice treatment approaches, adequately priced services offered by skilled workers, and perhaps, most importantly, secure community accommodation options.<sup>81</sup>

Recent research from the Australian and Urban Research Institute (AHURI) entitled 'Exiting prison with complex support needs: the role of housing assistance' paints a picture of prisoners with cognitive disability and the barriers they experience while in prison and when accessing support services on release.<sup>82</sup> The AHURI report then argues for an increase in social housing for ex-prisoners with complex support needs alongside the specialised support services they need for a successful transition to the community. OPA's experience

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<sup>81</sup> *DRC criminal justice submission* (n 9) 29.

<sup>82</sup> Australian Housing and Urban Research Institute *Exiting prison with complex support needs: the role of housing assistance*. (Melbourne, 2021), 14-24 (chapter 2) and 25-33 (chapter 3).

would support AHURI's findings and it agrees that governments need to increase social housing and the support services available for ex-prisoners with complex needs.

## 7.2 Lack of available supports and housing

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

OPA draws the attention of this inquiry to the way in which the pathway out of a custodial setting is dependent on community-based supports, which often do not exist, resulting in continued incarceration, as was the case for 'Rebecca' whose story is included under the heading 'Meeting the basic human rights of people with disability who are in prisons' above.

Rebecca's situation is one example of a person with disability being subject to unnecessary detention for an extended period of time (in this case, for more than 18 months) for the devastatingly simple reason that no suitable accommodation was available. Sadly, Rebecca is not alone. OPA is aware of this happening to many people with disability who often have sizeable amounts of funding in their NDIS package, but are met with a market that is simply unable to respond to their needs. OPA's report, *The Illusion of Choice and Control*, presents 12 real case stories where NDIS participants experience challenges in obtaining adequate supports under the NDIS. In the majority of the stories, the person had contact with the criminal justice system.<sup>83</sup>

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

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

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

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<sup>83</sup> Office of the Public Advocate, *The illusion of 'Choice and Control'* (2018) ('*The Illusion of Choice and Control*').