



LEGISLATIVE COUNCIL
LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry: Inquiry into Victoria's criminal justice system

Hearing Date: 21 October 2021

Question[s] taken on notice

Directed to: Mr Nicholson – Victoria Legal Aid

1. The Chair Page no. 24-25

Question asked.

Is there any analysis or evaluation? I just wonder if there are any references that you might be able to send to us around any evaluation of the Scottish—what has happened since that presumption - against short sentencing?

Response:

In Scotland, a presumption against short sentences of **three months** or less commenced in early 2011.¹ The presumption against short sentences was extended to **twelve months or less** in 2019.² The presumption against short sentences placed a legislative onus on sentencers to *avoid* the use of short prison sentences (of less than twelve months) in all but exceptional cases and, if imprisonment is imposed, to formally record the reasons.

To date there has only been one formal assessment of the Scottish legislation which created a presumption against short sentences of 3 months or less.³ The assessment found there was a decrease in the use of very short sentences and an increase in the use of sentences of 3 months or more. However both trends followed pre-existing trajectories. The most common reason a short sentence was imposed was repeat non-compliance with community orders. The review suggested providing sentencers with regular briefings about local and national use of sentencing orders, and easy access to research and statistical evidence about outcomes and effectiveness.

A 2015 Scottish review of reoffending research concluded: “The evidence is still developing, but a number of studies have found that those serving short prison sentences have higher rates of

¹ Three related reforms in the *Criminal Justice and Licensing Act 2010*: Community Payback Orders, the Presumption Against Short Sentences and Criminal Justice Social Work Reports. Together, these were intended to contribute to a more effective and publicly acceptable system of community disposals, to provide a credible alternative to short sentences and, in turn, to contribute to a reduction in 'churn' in the prison population.

² Presumption against Short Periods of Imprisonment (Scotland) Order 2019; the presumption applies to all offences committed on or after 4 July 2019.

³ Scotcen Social Research, *Evaluation of Community Payback Orders, Criminal Justice Social Work Reports and the Presumption Against Short Sentences* (Report, 2015); <https://www.gov.scot/publications/evaluation-community-payback-orders-criminal-justice-social-work-reports-presumption-against-short-sentences/>.



reoffending than those serving community sentences.”⁴ The review noted: “Short prison sentences can be perceived as meaningless, putting people's lives on hold but not helping them overcome their problems. Imprisonment can also entail losing employment, housing or contact with family.”

Scottish National Statistics show that those released from a short prison sentence of 12 months or less are reconvicted nearly twice as often than those sentenced to serve community payback orders (noting that those offenders assessed as suitable for community payback orders may be less likely to reoffend as a result of other factors).⁵

⁴ *What Works to Reduce Reoffending: A Summary of the Evidence* (Report, May 2015)

<https://www.gov.scot/publications/works-reduce-reoffending-summary-evidence/>.

⁵ [Reconviction rates - offender cohort: 2017 to 2018 - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/reconviction-rates-offender-cohort-2017-to-2018/).



Lead the Way: A Victorian Disability Act that promotes inclusion and equality

Submission to the Victorian Disability Act Review (October 2021)



Acknowledgement of Country

This submission was written on the land of the Wurundjeri and Boon Wurrung people of the Kulin Nation.

We acknowledge and pay our respects to Aboriginal and Torres Strait Islander peoples and Traditional Custodians throughout Victoria, including Elders past and present.

We also acknowledge the strength and resilience of all First Nations people whose social and emotional wellbeing continues to be negatively affected by discrimination, racism, child removal and other devastating ongoing effects of colonisation.

© 2021 Victoria Legal Aid. Reproduction without express written permission is prohibited.

Written requests should be directed to Victoria Legal Aid, Strategic Communications, 570 Bourke St, Melbourne Vic 3000.

www.legalaid.vic.gov.au

Connect with Victoria Legal Aid  

Contents

Executive summary	1
22 recommendations for a Disability Act that promotes rights, accountability and inclusion	3
1. Victoria Legal Aid and our work with Victorians with disability	9
1.1 Specialist work with Victorians with disability	9
1.2 Lived experience advice and leadership	10
2. Objectives, principles and definitions that drive reform and inclusion	11
2.1 Embedding lived experience leadership	11
2.2 Cultural safety, self-determination and cultural wellbeing	12
2.3 Acknowledging and addressing intersectionality	13
2.4 A clear commitment to human rights – and the tangible benefits of this	14
2.5 Expand the scope, ambition and potential of the Disability Act	16
2.6 Getting the definitions right	17
3. Mechanisms that will drive cultural change and accountability	17
3.1 A legislative framework and oversight to support cultural change and accountability	17
3.2 Promoting supported decision-making	18
3.3 An enforceable positive duty	21
3.4 A service safety net	23
3.5 Access to independent advocacy and legal assistance	24
4. Strengthening our existing accountability mechanisms	26
4.1 State disability plan	26
4.2 Disability action plans	28
5. Safeguards and rights protection	29
5.1 Compulsory treatment	29
5.2 Restrictive practices	32
5.3 People’s homes and residential rights	33
5.4 Community visitors	36
6. Forensic disability services and sentencing	39
6.1 People with disability in Victoria’s criminal justice and forensic systems	39
6.2 Prolonged detention in prison because of lack of planning, coordination and exit pathways	40
6.3 Expanding access to specialist therapeutic intervention through the Courts	44
Annexure 1: Snapshot of VLA clients	45

Executive summary

There is more to do to promote disability equality and pursue disability inclusion. This is particularly the case in helping to create enabling environments and to change negative attitudes. Breaking down barriers and ensuring people with disability can take part and be included in all aspects of our community requires a concerted effort from us all.¹

Victoria Legal Aid (VLA) welcomes this quote in the *Review of the Disability Act 2006: Consultation Paper (consultation paper)* and the recognition, commitment and direction it demonstrates. We welcome the opportunity to inform this important re-set of expectations and standards for inclusion and equality for Victorians with disability and for the Victorian community.

VLA is the largest provider of legal services to people with disability in Victoria. In 2019–20, we provided assistance to over 88,000 clients and 25% – over 22,000 people – disclosed having a disability or experiencing a mental health issue.²

Through our staff, our clients and our lived experience experts with disability, we see the power, expertise and diversity of Victorians with disability. Through our work, we also see the way in which our laws, services and systems continue to fall short for people with disability and for the community. We see Victorians with disability:

- Subject to discrimination in employment, education and access to services and spaces³
- Detained for prolonged periods in restrictive environments, including prison, because of a lack of housing and support options in the community⁴
- Evicted or living in insecure or unsafe housing
- Separated from families and children through the child protection system⁵
- Experiencing abuse and violence
- Subject to compulsory treatment, seclusion and restraint when there should be less restrictive options available

¹ Department of Families, Fairness and Housing, *Review of the Disability Act 2006 (2021)*, Minister's Foreword, 3 (**consultation paper**).

² See Victoria Legal Aid, *Annual Report 2019–20 (2020)* (available at: <<https://www.legalaid.vic.gov.au/about-us/our-organisation/annual-report/>>) (**VLA Annual Report**). This includes clients seen by a private practitioner duty lawyer. Unique clients are individual clients who accessed one or more of Victoria Legal Aid's legal services. This does not include people for whom a client-lawyer relationship was not formed, who received telephone, website or in-person information at court or at public counters or participated in community legal education—we do not create an individual client record for these people. This client count also does not include people assisted by our Independent Mental Health Advocacy or Independent Family Advocacy and Support services. We note that, because this figure relies on clients disclosing their disability or mental health issue at the time of receiving legal assistance, the actual number of clients with disability is likely to be significantly higher. We also note that, because of the way our data is collected and recorded, we are not able to accurately separate out mental health from other disability.

³ See, eg, Victoria Legal Aid, *Addressing discrimination to prevent violence, abuse, neglect and exploitation – Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (30 April 2020).

⁴ Including under custodial supervision orders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* and under supervised treatment orders. See, eg, Victoria Legal Aid, *People falling through the cracks between the NDIS and mainstream services*, (20 July 2021) <<https://www.legalaid.vic.gov.au/about-us/news/people-falling-through-cracks-between-ndis-and-mainstream-services>>.

⁵ See, eg, Victoria Legal Aid, *Achieving safe and certain homes for children* (2020) (available at: <https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla_report_child_protection_permanency_report_pdf.pdf>); also Office of the Public Advocate, *Rebuilding the village: Supporting families where a parent has a disability* (Report 2, 2015) (available at: <<https://www.publicadvocate.vic.gov.au/our-services/publications-forms/241-rebuilding-the-village-supporting-families-where-a-parent-has-a-disability-report-2-child-protection-2015?path=>>) (**OPA Rebuilding the Village**)).

- Unable to get adequate supports through the National Disability Insurance Scheme (**NDIS**), including because of inadequate plans, services that are not equipped to deal with the complexity of a person's needs or unplanned service withdrawal
- Experiencing inappropriate responses in the family violence system, including misidentification as primary aggressors and a punitive response to adolescent violence in the home.

Through this work we see that obligations to protect the rights and promote the inclusion of Victorians with disability need to extend across sectors and services. In addition to disability services, the lives and wellbeing of people with disability are affected by our housing, health, education, employment, justice and child protection systems. The vision and obligations in Victoria's new Disability Act must therefore extend beyond the disability services system and into these intersecting services.

In addition to ambitious new legislation, there must be a sustained commitment to effective implementation, which includes investing in the systems and changes that will make inclusion and equality possible, including embedding and resourcing lived experience leadership, funding education, providing resourcing, and ensuring accountability.

This is a chance for Victoria to continue its leading role in promoting the rights and inclusion of people with disability. This work must be led by people with disability, including co-production and co-design of the reforms, implementation and oversight. This must include the voices and leadership of people with disability who identify as First Nations people, people from culturally and linguistically diverse backgrounds, LGBTQI+ community members, people with different socioeconomic backgrounds, young people and older people.

The new Disability Act and the reforms it introduces must prioritise Aboriginal self-determination and work to address the systemic racism experienced by First Nations people with disability and its consequences, including over-representation in our criminal justice and child protection systems.

This legislation is not a 'gap filler' in a post-NDIS-transition landscape. It is a chance to re-set our expectations as a state and together, led by people with disability, to create and implement legislation that recognises, promotes and protects the rights of people with disability and holds agencies accountable when they fall short.

22 recommendations for a Disability Act that promotes rights, accountability and inclusion

Informed by our work with people with disability, our lived experience experts and our partners in the legal and disability sectors, we make the following 22 recommendations for a new Disability Act, and framework for implementation, that promote rights, accountability and inclusion.

Objectives, principles and definitions that drive reform and inclusion

- 1. Embed lived experience leadership and engagement.** Consistent with the principle of protecting and promoting the rights, dignity and autonomy of people with disability, embed lived experience leadership and engagement in designing the reforms and in the re-designed system.
- 2. Recognise and promote cultural safety, cultural wellbeing and self-determination for First Nations people with disability.** Informed by Aboriginal Community Controlled Organisations and First Nations communities, the new Disability Act must include a clear commitment to self-determination and to the provision of culturally safe services to First Nations people with disability. This should include making sure self-determination is a priority in the state disability plan; recognising Aboriginal Community Controlled Health Organisations as priority service providers for Aboriginal people with disability; and recognising the importance of culture for social and emotional wellbeing (including in disability action plans).
- 3. Diverse voices and intersectionality.** The new Disability Act should expressly recognise and seek to address intersectionality and the way different aspects of a person's identity can subject them to overlapping forms of discrimination.⁶ Co-production, co-design and engagement processes should ensure the active involvement of people with disability from diverse communities, including First Nations people, people from culturally and linguistically diverse backgrounds, LGBTQI+ community members, people with different socioeconomic backgrounds, young people and older people. An intersectional approach may create some overlap between obligations under the *Gender Equality Act 2020* (Vic) (**Gender Equality Act**) and the new Disability Act and this should be addressed in implementation (for example, through aligning disability impact assessments and gender impact assessments).
- 4. Embed human rights.** The new Disability Act should refer to, incorporate and implement the obligations in key human rights instruments, including the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**), the *UN Convention on the Rights of Persons with Disabilities*, *UN Declaration on the Rights of Indigenous Peoples* and the *UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* and the accompanying Optional Protocol (**OPCAT**).
- 5. Expand the scope, ambition and potential of the Disability Act.** Expand the coverage of the new Disability Act beyond disability services to the broader public sector, so that obligations to address discrimination and promote inclusion for people with disability extend across vital services of housing, health, education, child protection, family violence and justice

⁶ See, eg, *Gender Equality Act 2020* (Vic) s 9(1)(c), which provides that a gender impact assessment must: 'if practicable, take into account that gender inequality may be compounded by disadvantage or discrimination that a person may experience on the basis of any of the following—(i) Aboriginality; (ii) age; (iii) disability; (iv) ethnicity; (v) gender identity; (vi) race; (vii) religion; (viii) sexual orientation.

(including police, courts and prisons).⁷ We see this as a starting point. Recognising the crucial role of the private sector in providing services and promoting inclusion for people with disability, these obligations should ultimately be extended more broadly.

6. **Modernise definitions.** Update the definitions in the Disability Act, informed by people with lived experience and with reference to the Convention on the Rights of Persons with Disabilities and the social model of disability. See also recommendations 15 and 22 regarding definitions for the purpose of access to therapeutic supports in the justice and forensic systems.

Mechanisms that promote rights, inclusion and accountability

7. **A regulatory model geared to drive cultural change.** Adopt a robust model of accountability based on the Gender Equality Act to embed cultural change and drive compliance with the new Disability Act. This should include obligations on public sector services to prepare action plans that comply with the principles, undertake disability impact assessments, implement strategies that include measurements, targets and timelines, and publicly report on work and progress.⁸ It should include both educative and enforcement roles for a new Disability Inclusion Commissioner. Organisations and agencies should also be provided with education, support, resources and adequate time to support compliance.
8. **Embed supported decision-making and implement it in practice.** Name and explain supported decision-making in the new Disability Act. Create a specific principle focused on supported decision-making, require disability support providers to support people to make their own decisions and clearly limit the circumstances in which substituted decision-making can occur. Require anyone exercising powers under the new Disability Act to undertake ongoing mandatory, co-produced training on the new Disability Act, including supported decision-making and the application of the Victorian Charter. Services should develop resources and tools to embed supported decision-making in their day-to-day work and should report on compliance with the training requirements.
9. **A new enforceable positive duty to consider, promote and take action to achieve inclusion for people with disability in Victoria.**
 - a. Create an enforceable positive duty in the new Disability Act to consider, promote and take action to achieve inclusion for people with disability in Victoria, including in the development of policies and programs and the delivery of services, supplemented by guidelines for compliance.
 - b. Give the Victorian Equal Opportunity and Human Rights Commission and a new Disability Inclusion Commissioner powers and resources to undertake systemic investigation, enter into enforceable undertakings, issue compliance notices, and seek sanctions against those who breach the existing positive duty under the *Equal*

⁷ We recommend the definition of 'defined entities' in the *Gender Equality Act 2020* (Vic) s 5 is adapted for the new Disability Act: '(1) For the purposes of this Act, an entity is a defined entity on a particular day if it is, on the most recent 30 June before that day— (a) a public service body; or (b) a public entity; or (c) a special body; or (d) a Council; or (e) Court Services Victoria; or (f) a university within the meaning of the Education and Training Reform Act 2006; or (g) the Office of Public Prosecutions; or (h) a prescribed entity— that has 50 or more employees. (2) The regulations may prescribe a defined entity to be exempt from the application of this Act'.

⁸ See above, n 7, we recommend the definition of 'defined entities' is adapted for the new Disability Act, including the public sector, universities, local councils and some organisations with more than 50 employees.

Opportunity Act 2010 (Vic) (**Equal Opportunity Act**) or the new positive duty under the Disability Act (respectively).

- 10. A service safety net.** Victoria should commit to addressing the gaps between the NDIS and mainstream services by introducing a service safety net. In urgent cases, where market failure leads to people with complex needs experiencing a crisis (including in the justice or child protection systems), there should be a clear system for making sure people receive the supports they need, and clear responsibility for coordinating, funding and providing services in these situations.
- 11. Independent non-legal advocacy and legal assistance.** Recognise, and invest in, access to independent non-legal advocacy and legal assistance as key mechanisms for promoting equality through supporting people to understand and exercise their rights, as well as preventing legal issues arising or escalating.⁹ This should include a legislated right to an advocate and investment in Aboriginal Community Controlled Organisations to provide these services to their communities.

Strengthening our existing accountability mechanisms

- 12. State disability plan: co-design and accountability.** To improve the effectiveness and impact of the state disability plan, the new Disability Act should require:
 - a. Co-design of state disability plan with people with lived experience.
 - b. Bi-annual public reporting of progress against measurable goals co-designed with people with disability and based on reliable data and qualitative data from people directly affected.
- 13. State disability plan: a focus on legal and justice systems.** The state disability plan should commit to:
 - a. **Accessible legal systems.** People with disability should be supported to understand and fully participate in legal proceedings affecting them, including through better referral pathways, legal sector training on accessibility, trauma-informed and inclusive services, and client-centred service design.
 - b. **Disability supports in the criminal justice system.** A whole-of-government commitment to addressing the over-representation of people with disability in the criminal justice system should include: access to specialist courts and services; human rights protections for people with disability in the system; and targets for legal sector staff training.
- 14. Disability action plans.** Improve the impact and effectiveness of disability action plans, including requiring that disability action plans: are informed – in development, implementation, evaluation and oversight – by people with disability, including staff or clients; reflect the updated principles and objectives of the new Disability Act; further the goals of the state disability plan; and are publicly available.

Safeguards and rights protection

- 15. Eligibility for residential treatment facilities.** Where custodial supervision is the least restrictive option available, a person found unfit to plead or who meets other criteria for

⁹ See: Social and Global Studies Centre, RMIT University, *Final Evaluation of Independent Family Advocacy and Support (IFAS) Pilot* (September 2021) (**IFAS Report**) which found that IFAS had successfully reached priority clients – 20% identifying as having an intellectual disability; had supported families to stay together, where possible; and had reduced the need for complex legal proceedings by diverting approximately 20% of clients from court.

supervised treatment under the Disability Act should be eligible for admission to a residential treatment facility rather than detained in prison (i.e., this should not be limited to people with intellectual disability).¹⁰

16. Safeguards against prolonged or unnecessary compulsory treatment. The new Disability Act should:

- a. Require the transition process to consider the will and preference of the person affected and identify the goals they are expected to achieve, as well as the types of discharge supports that are required and will be provided to support this process.
- b. Require the will and preference of the person affected to be considered in the development of treatment plans.
- c. Require that proposed treatment plans be provided to the person affected in a timely manner and in an accessible way, including an additional form, if necessary, that is appropriate to the person's circumstances (for example, whether by using modified language, visual aids or other means).
- d. Include forensic residents under the Disability Act for the purposes of a treatment plan when they are admitted to a residential treatment facility.
- e. Require that to make an order, the Victorian Civil and Administrative Tribunal (**VCAT**) must be satisfied that the service provider can implement the treatment plan, including that necessary resources are available and that VCAT relies only what is available and able to be implemented in assessing the expected benefit to the person of the plan.
- f. Require that to make any subsequent orders, VCAT must be satisfied that the order has met the expected benefit to the person who is the subject of the plan as required by the legislation. If this cannot be demonstrated, a further order should not be made unless changes are made to the treatment plan to satisfy VCAT that this criterion can be met.

17. Effective safeguards regarding restrictive practices. To make sure restrictive practices are only used when they are the least restrictive option available, the new Disability Act should require:

- a. The will and preference of the person affected to be considered in the development of behaviour support plans.
- b. Behaviour support plans to be provided to the person affected in a timely manner and in an accessible way, including an additional form, if necessary, that is appropriate to the person's circumstances (for example, whether by using modified language, visual aids or other means).
- c. Authorised program officers to be provided with training to ensure that they understand the legislative requirements for the development and provision of behaviour support plans.
- d. Regular audits of the compliance of disability support providers with requirements for behaviour support plans.

18. Safe and secure housing and accommodation. To protect and promote the rights of people with disability in housing and accommodation, we recommend that:

¹⁰ Section 152 (1)(a) of the Disability Act should be amended to include people with cognitive impairment as eligible for admission to a residential treatment facility for compulsory treatment.

- a. A policy and engagement process is commenced right away to identify and recommend the best option for regulating accommodation provided by Supported Independent Living providers.
- b. Social housing providers have clear obligations to prioritise sustaining tenancies and avoiding evictions for people with disability. This includes facilitating early access to supports and applying a human rights framework to ensure alternatives to eviction are properly explored.¹¹ This should form part of the state disability plan.
- c. The protections of the 'reasonable and proportionate' test be included in the Disability Act for group home residents.

19. Supporting the oversight role of community visitors. To clarify and strengthen the role and powers of community visitors in a post-NDIS environment, the new Disability Act should provide that:

- a. Specialist Disability Accommodation providers are required to take steps to make sure that residents are informed of the more limited oversight role of community visitors where a standard rental agreement is in place and of their ability to request community visitor involvement. Compliance with this requirement to be subject to external reporting and auditing.
- b. Community visitors are able to enter Specialist Disability Accommodation where a person has entered a rental agreement under the *Residential Tenancies Act 1997* (Vic) (**Residential Tenancies Act**) without consent where they have formed a reasonable belief that a resident may be at risk of abuse or neglect and they have not been able to obtain the residents' consent despite reasonable steps being taken.
- c. All Specialist Disability Accommodation, short-term accommodation and assistance and disability residential services providers are reported to Consumer Affairs Victoria, so that the various places community visitors can visit can be consolidated into a single register.

Forensic disability services and sentencing

20. Forensic programs, treatments and therapies for people with intellectual disability. We endorse VALID's recommendation (informed by people with intellectual disability with past or current involvement in the criminal justice system) that 'the Victorian Government reconceptualize and redevelop all forensic programs, treatments, and therapies for people with intellectual disabilities. Forensic programs should be well funded and codesigned with people with lived experience. Programs should be grounded in human rights principles and should be trauma-informed and person-centred'.¹²

21. Service coordination for people in the forensic system. To prevent people with disability coming into contact with the criminal justice system and to minimise the length and harmful effects of this contact when it does occur, the Victorian Government should take responsibility for service coordination for people in the forensic system (a person on an order or in custody), including:

- a. Providing information about a person's treatment or services to courts to enable informed decisions regarding sentencing or bail.

¹¹ See, eg, Victoria Legal Aid, *It starts with a home: Making evictions the option of last resort in Victoria* (Submission to the Social Housing Regulation Review) (September 2021) (VLA Social Housing Review Submission) 12.

¹² VALID, *Justice for All* (September 2021) 9 (recommendation 17).

- b. Ensuring continuity of services between the justice or forensic systems and the community.
- c. Transition planning.
- d. Recording and reporting on all people who remain in custody or forensic facilities because of a failure to secure disability services.
- e. Clarifying and promoting, including for people with disability, their families and carers, who is responsible for arranging, funding and providing services to people with a disability in the justice system (noting the particular challenges of system navigation for those with cognitive disability).
- f. Embedding a service safety net where market failure leads to people with complex needs becoming engaged with the criminal justice system, to ensure appropriate therapeutic disability supports are available while in custody, and reduce delays in providing pathways out of custody for people with disability (see also recommendation 10 above).

22. Access to therapeutic services and supports for people with cognitive disability. The provisions in the *Sentencing Act 1991* (Vic) (**Sentencing Act**) and the *Children, Youth and Families Act 2005* (Vic) (**Children, Youth and Families Act**) in relation to pre-sentence reports, and the ability to order that a person participate in disability services, should be extended to people with cognitive disability.

1. Victoria Legal Aid and our work with Victorians with disability

VLA's vision is a fair and just society where rights and responsibilities are upheld. VLA is a statutory agency responsible for providing information, advice, and assistance in response to a broad range of legal problems through 15 offices across Melbourne and regional Victoria. Working alongside our partners in the private profession, community legal centres, and Aboriginal legal services, VLA assists people with legal problems related to family separation, child protection, family violence, discrimination, criminal matters, fines, social security, mental health and tenancy. More information about our clients and our work is set out in **Annexure 1**.

1.1 Specialist work with Victorians with disability

VLA is the largest provider of legal services to people with mental health issues and disability in Victoria. In 2019–20, VLA provided assistance to over 88,000 clients: 25% – over 22,000 people – disclosed having a disability or experiencing a mental health issue; 14% were in custody, detention or psychiatric care.¹³

VLA's work with Victorians with disability includes:

- **Specialist mental health and disability work, including under the Disability Act.** Our specialist mental health and disability lawyers provide advice and representation to people with a mental health diagnosis or cognitive disability. We work to realise people's rights and autonomy, and to help make sure the justice and health systems operate fairly. Lawyers provide legal advice and representation for people for Mental Health Tribunal hearings across Victoria and work with people facing or subject to residential treatment and supervised treatment orders under the Disability Act. **In the last five years, VLA lawyers have provided 293 advice services to people under the Disability Act and appeared in VCAT in approximately 65 hearings. This includes providing advice and representation regarding a change to a person's treatment plan, a residential treatment order or supervised treatment orders.**
- **Criminal legal practice.** VLA represents people with mental health issues and disability in the criminal justice system. This includes representation for people who are accused of committing a criminal offence whose matters are dealt with through mainstream criminal justice processes, our specialist Therapeutic Courts and Programs team, comprising lawyers working in the Assessment and Referral Court List in the Magistrates' Court, and our specialist practice with clients who fall under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* (**Crimes Mental Impairment Act**).
- **Non-legal advocates.** The Independent Mental Health Advocacy (**IMHA**) service, a non-legal advocacy service, supports people who are receiving compulsory mental health treatment to have as much say as possible about their assessment, treatment, and recovery. IMHA advocates work in every designated mental health service in Victoria,¹⁴ as well as at Thomas Embling Hospital. Our Independent Family Advocacy and Support (**IFAS**) service, provides non-

¹³ VLA Annual Report, above n 2.

¹⁴ A designated mental health service is a health service that may provide compulsory assessment and treatment to people in accordance with the *Mental Health Act 2014 (Vic)*.

legal advocacy and support to parents and primary carers in the early stages of child protection involvement, with a focus on Aboriginal families and parents with an intellectual disability.

- **NDIS appeals.** Like all Legal Aid Commissions across Australia, VLA receives funding from the Department of Social Services to provide legal representation in NDIS matters on review at the Administrative Appeals Tribunal.
- **Discrimination law practice.** VLA has a specialist discrimination law service, the Equality Law Program, which represents people with complaints of discrimination, including employment-related disability discrimination. Our legal advice and representation helps people to obtain and retain employment, receive fair compensation, and achieve systemic outcomes that stop discrimination occurring again in the future. Over the past five years we have provided over 6,280 legal advice sessions regarding discrimination matters, including 1,614 legal advices about disability discrimination in employment.
- **Family law, family violence and child protection.** Our work in family, youth and children's law aims to help people resolve family disputes and achieve safe, workable and child-focused parenting and care arrangements. We represent parents with disability who are involved in the child protection system, children with disability who enter out-of-home care and children with disability who use violence and are at risk of entering the criminal justice system. We also see through our practice that women with a disability are more likely to experience family violence and, as a result may have contact with the family law, family violence and child protection systems.

It is this work that has informed our submission and recommendations for a new Disability Act for Victoria.

1.2 Lived experience advice and leadership

In 2016, VLA's IMHA service set up Speaking from Experience, an advisory group made up of people who have lived experience of mental health issues and the public mental health system. IMHA's Senior Consumer Consultant supports Speaking from Experience to inform service design, delivery and evaluation across VLA. The Senior Consumer Consultant and Speaking from Experience have also contributed to policy development, been on staff recruitment panels, and developed accessible resources for clients across our legal and non-legal advocacy services.¹⁵

VLA is working toward embedding lived experience leadership in its organisational culture, including the establishment of an advisory group for VLA's Independent Family Advocacy Support (**IFAS**) service, which began in January 2019 and consists of people with lived experience of the child protection system. The IFAS Lived Experience Consultant guides the work of the lived experience advisory group in advising VLA on its work with people who have contact with the child protection system.

Through this work, VLA sees the value of lived experience leadership and the depth and diversity of expertise it provides in shaping services and reform.

¹⁵ See also: Roper, Cath; Grey, Flick, and Cagodan, Emma. (5 April 2018) Co-Production: Putting principles into practice in mental health contexts (5 April 2018) <https://healthsciences.unimelb.edu.au/_data/assets/pdf_file/0007/3392215/Coproduction_putting-principles-into-practice.pdf>; Bennetts, Wanda; Cross, Wendy, and Bloomer, Melissa, 'Understanding consumer participation in mental health: Issues of power and change' (2011) 20(3) International Journal of Mental Health Nursing, 155–64, 2.

2. Objectives, principles and definitions that drive reform and inclusion

Getting the objectives, principles and definitions right is a crucial part of creating legislation that meaningfully protects and promotes the rights of people with disability in Victoria.

In addition to these legislative foundations, it is crucial that there is a regulatory model geared to drive cultural change, which is discussed in part 3 below.

2.1 Embedding lived experience leadership

It is vital that the reforms are led and genuinely informed by people with disability. Principles and objectives should specifically acknowledge the commitment to, and crucial role of, lived experience leadership and participation. This should be embedded throughout the new Disability Act and its implementation.

Lived experience leadership adds value to services and communities by changing cultures, informing practice, designing services that are tailored to people's needs, and redressing traditional power imbalances.¹⁶ Through diverse perspectives of people with disability, including First Nations people, people from culturally and linguistically diverse backgrounds, LGBTQI+ community members, people with different socioeconomic backgrounds, young people and older people, lived experience leadership can also recognise intersectionality and the way different aspects of a person's identity can subject them to overlapping forms of discrimination. In this way, lived experience leadership can also play a role in identifying and addressing systemic racism and discrimination.

We reiterate the importance of lived experience leadership in the design, implementation and evaluation of the reforms to the justice and forensic systems discussed in part 6 below,¹⁷ recognising that too often the justice system is designed by and for the institutions in it – the courts, lawyers and police – not by the people who directly experience the system and need it to be responsive and effective.

Lessons can be taken from the recommendations of the Royal Commission into Victoria's Mental Health System, which seek to embed lived experience leadership in design, delivery, evaluation, governance and oversight of the reformed mental health system.

Informed by the expertise of VLA's mental health lived experience advisory group, Speaking from Experience, we caution against single lived experience roles on oversight and governance bodies and encourage transparency in the appointment of key positions to strengthen the reforms and build trust in the reform process.

We also have experience in co-production and co-design, including the design, operation and evaluation of our IMHA service and of NDIS self-advocacy resources, training modules and self-help tools, which we would welcome the opportunity to share with the Department.

¹⁶ B Scholz, S Gordon and B Happell, 'Consumers in mental health service leadership: a systematic review' *International journal of mental health nursing* (2017), 26(1), 20-31; B Scholz, J Bocking and B Happell, 'How do consumer leaders co-create value in mental health organisations?' *Australian Health Review* (2017), 41(5), 505-510; B Happell, W Bennetts, J Tohotoa, D Wynaden and C Platania-Phung, 'Promoting recovery-oriented mental health nursing practice through consumer participation in mental health nursing education' *Journal of Mental Health* (2017) 1-7.

¹⁷ See, eg, Centre for Innovative Justice and Jesuit Social Services, *Recognition, Respect and Support: Enabling Justice for People with an Acquired Brain Injury* (2018) (available at: <<https://cij.org.au/cms/wp-content/uploads/2018/08/enabling-justice-full-report.pdf>>).

Recommendation 1: Embed lived experience leadership and engagement.

Consistent with the principle of protecting and promoting the rights, dignity and autonomy of people with disability, embed lived experience leadership and engagement in designing the reforms and in the re-designed system.

2.2 Cultural safety, self-determination and cultural wellbeing

The new Disability Act must include a clear commitment to self-determination and to the provision of culturally safe services to First Nations people with disability.¹⁸ It should explicitly name cultural wellbeing as an outcome and standard for services for First Nations people with disability.

It is important for the new Disability Act to acknowledge the intersectional impact of systemic racism for First Nations people with disability. For example, Victoria's First Nations communities continue to be disproportionately and unfairly impacted by the criminal justice system and this is compounded for First Nations people with disability. In relation to Aboriginal children and young people, the Commission for Children and Young People wrote in the *Our Youth, Our Way* report:

*Over-representation does not reflect the criminality of Aboriginal children and young people in the youth justice system. Rather, it is the result of structural racism produced by the structures, policies and practices that underpin our social institutions and determine how they operate. This applies not only to the youth justice system, but also to its interrelationship with other systems, including the child protection, health, housing and education systems.*¹⁹

The new Disability Act's whole of government approach focussed on inclusion and equality for people with disability must address systemic racism experienced by First Nations people with disability, and the flow-on consequences of this, including over-representation in the criminal justice and child protection systems.

Our recommendations specifically in relation to the criminal and forensic systems are discussed in part 6 below.

We reiterate the importance of partnerships with Aboriginal Community Controlled Organisations to design reforms and deliver services. These expert, culturally safe organisations should be resourced to do this work. Working with these organisations and co-designing and co-producing services, reforms and resources with First Nations people with disability is crucial for building cultural competency across service providers and for making services accessible and culturally safe.

Recommendation 2: Recognise and promote cultural safety, cultural wellbeing and self-determination for First Nations people with disability

Informed by Aboriginal Community Controlled Organisations and First Nations communities, the new Disability Act must include a clear commitment to self-determination and to the provision of culturally safe services to First Nations people with disability.

¹⁸ See eleven self-determination guiding principles developed following extensive community engagement with Aboriginal Victorians: human rights, cultural integrity, commitment, Aboriginal expertise, partnership, decision-making, empowerment, cultural safety, investment, equity and accountability. Victorian Government, *Self-Determination Reform Framework (Report, July 2019)* 7.

¹⁹ Commission for Children and Young People, *Our Youth, Our Way – Summary and Recommendations* (2021) 2.

This should include making sure self-determination is a priority in the state disability plan; recognising Aboriginal Community Controlled Health Organisations as priority service providers for Aboriginal people with disability; and recognising the importance of culture for social and emotional wellbeing (including in disability action plans).

2.3 Acknowledging and addressing intersectionality

The obligations in the new Disability Act should seek to address the ways in which different aspects of a person's identity can subject them to overlapping forms of discrimination.

We support the express recognition of intersectionality in the new Disability Act to help address the discrimination and inequality experienced by people with disability who identify as First Nations people, people from culturally and linguistically diverse backgrounds, LGBTQI+ community members, people with different socioeconomic backgrounds, young people and older people.

Gloria's story highlights the way in which a person's experience of disability discrimination can be compounded by their age and cultural background.

Gloria:²⁰ Intersectional discrimination in employment

Gloria was experiencing stress at work, which culminated in her being performance managed for alleged underperformance. This included imposing new morning shifts on her, which she felt she could not do. Gloria – an older woman – contacted us with concerns that the performance management was unlawful discrimination based on her age, as her colleagues had allegedly made comments about her age.

Once Gloria started talking with our lawyer, with the assistance of an interpreter, she shared that the issues at work had caused her to suffer serious anxiety and she had been hospitalised as a result. She also clarified that the reason she felt unable to work the new morning shifts was because she was currently experiencing insomnia due to workplace stress, which meant the early morning roster was unsuitable.

Once the lawyer assisting Gloria knew this, they were able to negotiate an outcome with the employer that responded to her needs, referring to Gloria's rights to reasonable adjustments and accommodation due to her disabilities (anxiety and insomnia), as well as her claims of age discrimination. Gloria's complaint was resolved successfully, with the employer apologising for the impact of their treatment on her and agreeing to a more suitable roster.

Gloria said that her cultural background affected her experience because she had been educated that she should follow the instructions of her employer. Gloria said "even when I face this issue, I do not know how and what can I do until my previous colleague told me, maybe I can get help from Legal Aid".

Gloria also thinks that the language barrier meant that it was harder for her to get help from others.

²⁰ Name has been changed.

Recommendation 3: Diverse voices and intersectionality

The new Disability Act should expressly recognise and seek to address intersectionality and the way different aspects of a person's identity can subject them to overlapping forms of discrimination.²¹

Co-production, co-design and engagement processes should ensure the active involvement of people with disability from diverse communities, including First Nations people, people from culturally and linguistically diverse backgrounds, LGBTQI+ community members, people with different socioeconomic backgrounds, young people and older people.

An intersectional approach may create some overlap between obligations under the Gender Equality Act and the new Disability Act and this should be addressed in implementation (for example, through aligning disability impact assessments and gender impact assessments).

2.4 A clear commitment to human rights – and the tangible benefits of this

We support the consultation paper's recognition of the need to ensure 'a strong human rights approach in the Disability Act, informed by the rights and principles in the UN Convention'.²²

It is crucial that Victoria's new Disability Act embeds human rights in both its drafting and its implementation. The Act should refer to, incorporate and implement:

- The Victorian Charter
- UN Convention on the Rights of Persons with Disabilities
- UN Declaration on the Rights of Indigenous Peoples
- OPCAT.

The Victorian Charter has played a crucial role in making sure that the impact of decisions on people's everyday lives is at the centre of government decision-making. It plays an important role in building a more rights-respecting culture within the Victorian Government, including the public service, through embedding consideration of human rights during the development of new laws, policies and guidelines, and as part of government decision-making.

Through our casework, VLA sees the benefits of the Victorian Charter for Parliament, government, the public service, individuals whose human rights have been breached, and our community as a whole. Since its introduction, the Victorian Charter has improved public service standards, consideration of human rights in drafting new legislation and been used to secure positive outcomes for our clients.

The case of our client, Paul, in *Slattery v Manningham City Council*²³ demonstrates the important role of the Victorian Charter in allowing people with disability to have their human rights taken into

²¹ See, eg, *Gender Equality Act 2020* (Vic) s 9(1)(c), which provides that a gender impact assessment must: 'if practicable, take into account that gender inequality may be compounded by disadvantage or discrimination that a person may experience on the basis of any of the following—(i) Aboriginality; (ii) age; (iii) disability; (iv) ethnicity; (v) gender identity; (vi) race; (vii) religion; (viii) sexual orientation.

²² Consultation paper, above n 1, 15.

²³ [2013] VCAT 1869 (30 October 2013).

account in decisions affecting them, and for systems change to improve human rights training for public authorities.

Victorian Charter upholds Paul's access to local council facilities

The Manningham City Council banned Paul – who was 67 years old at the time – from all buildings that it owned, operated, or managed, in part because it alleged he was disruptive at local council meetings and abusive towards staff. Paul has bipolar disorder, post-traumatic stress disorder, compulsive disorder, an acquired brain injury and a hearing impairment.

Although the Council had concerns about Paul's behaviour, it had options other than simply banning him from more than 200 council-owned, operated, or managed buildings in the City of Manningham. Paul couldn't even take his grandchildren to the local swimming pool.

VLA assisted Paul to lodge a disability discrimination complaint under the Equal Opportunity Act in VCAT, highlighting our client's rights to freedom of expression, participate in public life and equality before the law under the Victorian Charter.

VLA submitted that Paul's case demonstrated a lack of compliance with section 38 of the Victorian Charter as the local council minutes revealed that no consideration was given to our client's human rights when deciding to exclude him from a range of public facilities. At the hearing, the Chief Executive Officer at the Council gave evidence that he had never received training on the Council's rights and responsibilities under the Victorian Charter and was not aware of anyone else at the Council receiving Victorian Charter training.

VCAT found that the Council had discriminated against Paul and ordered the Council to pay him \$14,000 in compensation. VCAT also ordered compulsory training on the Victorian Charter for Manningham City councillors, chief executive and directors (this was the first known remedy of this kind). A further declaration was made that the Council breached Mr Slattery's human rights to take part in public life (section 18), freedom of expression (section 15) and the right to equality (section 8). Following the decision, Mr Slattery was able to participate more fully in public life through accessing council facilities in his local area.

Paul said that the decision helped him move on with his life:

“I felt demeaned and embarrassed by the ban, and I wanted to fight it to highlight discrimination and help other people in similar situations. I'm really proud that this decision is a landmark in establishing the rights of other people like myself who have a disability”.

This example highlights the role of the Victorian Charter in improving decisions, realising rights and promoting inclusion and wellbeing for people with disability in Victoria. The preventative role of a human rights framework, and the direct impact for people with disability, could be stronger if core human rights instruments were embedded in the new Disability Act and its implementation (including through training and resources).

The implementation of the OPCAT is also an important opportunity to improve monitoring, oversight and accountability measures to prevent and address human rights abuses in closed environments,

including Victoria's disability services.²⁴ Improvements to the monitoring and oversight system in the new Disability Act should complement the forthcoming appointment of the National Preventive Mechanism (**NPM**) in Victoria. This NPM must be established in line with international law and best practice, including embedding lived experience leadership.²⁵

Recommendation 4: Embed human rights

The new Disability Act should refer to, incorporate and implement the obligations in key human rights instruments, including the Victorian Charter, the UN Convention on the Rights of Persons with Disabilities, UN Declaration on the Rights of Indigenous Peoples, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and OPCAT.

2.5 Expand the scope, ambition and potential of the Disability Act

Through our work, we see the interactions people with disability have with different services and systems and the impact these services and systems have on their lives and wellbeing. Throughout a person's life, the engagement with education, housing, employment and disability services are crucial. Where these systems and services are not meeting people's needs, they are more likely to have engagement with other systems, including child protection or justice.

Putting the person at the centre, it makes sense that the new aspects of Victoria's Disability Act, focussed on promoting inclusion and tackling inequality, will apply across the public sector. It will no longer frame people with disability solely as recipients of disability services, but will re-shape a rights-based system with accountability for promoting inclusion across the public sector.

As a starting point, we recommend that the new obligations focussed on inclusion and equality (including regarding disability action plans, disability impact assessments, reporting and compliance with the positive duty) apply for the same 'defined entities' as the Gender Equality Act, including the public sector, universities and local councils.²⁶ Ultimately, however, promoting inclusion and tackling inequality requires commitment from across sectors, particularly in an environment when access to supports and services for people with disability increasingly occurs in the private market. Similar to the intention for the Gender Equality Act, Victoria should work toward obligations that can cover a broader range of service providers in the private and not for profit sectors.

Recommendation 5: Expand the scope, ambition and potential of the Disability Act

Expand the coverage of the new Disability Act beyond disability services to the broader public sector, so that obligations to address discrimination and promote inclusion for people

²⁴ See, eg, Lea, Met al, 'A disability aware approach to torture prevention? Australian OPCAT ratification and improved protections for people with disability', *Australian Journal of Human Rights* (2018) 24(1) 70.

²⁵ See, eg, Caruana, Stephen, *Enhancing best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention Against Torture focus* (Report to the Winston Churchill Memorial Trust, 2017) 50 (available at: https://www.churchilltrust.com.au/media/fellows/Caruana_S_2017_inspection_methodologies_for_oversight_bodies_with_an_OPCAT_focus.pdf).

²⁶ *Gender Equality Act 2020* (Vic) s 5.

with disability extend across vital services of housing, health, education, child protection, family violence and justice (including police, courts and prisons).²⁷

We see this as a starting point. Recognising the crucial role of the private sector in providing services and promoting inclusion for people with disability, these obligations should ultimately be extended more broadly.

2.6 Getting the definitions right

Recognising the proposed role of the new Disability Act in promoting inclusion and equality for people with disability, we support the inclusion of definitions of ‘ableism’, ‘barriers’ and ‘inclusion’, as well as the movement away from a framework that only defines disability only for the purpose of specifying who can access services.

We also support the inclusion of definitions of ‘cognitive impairment’ and ‘psychosocial disability’.

These definitions should be informed by the expertise of people with lived experience, and with reference to the Convention on the Rights of Persons with Disabilities and the social model of disability.

We discuss the impact of the current definitions on people’s access to therapeutic services in parts 5.1. and 6.3.

Recommendation 6: Modernise definitions

Update the definitions in the Disability Act, informed by people with lived experience and with reference to the Convention on the Rights of Persons with Disabilities and the social model of disability.

3. Mechanisms that will drive cultural change and accountability

3.1 A legislative framework and oversight to support cultural change and accountability

To make sure the new Disability Act has a real impact for people with disability in Victoria, we recommend that a similar framework to the Gender Equality Act, carefully designed to lead and embed cultural change, is included in the new Act.

We support the creation of a Disability Inclusion Commissioner, a role specifically dedicated to leading cultural and practical change toward inclusion and equality.

We recommend that the accountability framework includes both educative and enforcement roles for the Disability Inclusion Commissioner through performance targets, timelines and public reporting, with an obligation on public sector services to develop action plans for how they will comply with the

²⁷ We recommend the definition of ‘defined entities’ in the *Gender Equality Act 2020* (Vic) s 5 is adapted in the new Disability Act: ‘(1) For the purposes of this Act, an entity is a defined entity on a particular day if it is, on the most recent 30 June before that day— (a) a public service body; or (b) a public entity; or (c) a special body; or (d) a Council; or (e) Court Services Victoria; or (f) a university within the meaning of the Education and Training Reform Act 2006; or (g) the Office of Public Prosecutions; or (h) a prescribed entity— that has 50 or more employees. (2) The regulations may prescribe a defined entity to be exempt from the application of this Act’.

new Disability Act and to undertake disability impact assessments.²⁸ This robust accountability framework should include reporting against targets, which could include compliance with the requirements and principles of the new Act, strategies to embed supported decision-making and reduce the number of people with disability in the Victorian justice system, the use and duration of compulsory treatment and adherence to the authorisation requirements for restrictive practices.

Informed by our experience as a public sector employer under the Gender Equality Act, we make the following practical points about implementation:

- A decent lead in time is needed to have all tools and resources available before obligations commence
- Education, training and resources for organisations should be provided and conducted by the Department (similar to the approach initially taken when the Victorian Charter was introduced)
- Thoughtful disability impact assessments and gender impact assessments are resource intensive and there should be synergy between them, for example one gender impact assessment and one disability impact assessment could be done at the same time, which would also promote an intersectional approach
- Recognising the resourcing that goes into reporting, we recommend it occurs every two years, rather than annually, to allow adequate time and resourcing for implementation work.²⁹

Recommendation 7: A regulatory model geared to drive cultural change

Adopt a robust model of accountability based on the Gender Equality Act to embed cultural change and drive compliance with the new Disability Act.

This should include obligations on public sector services to prepare action plans that comply with the principles, undertake disability impact assessments, implement strategies that include measurements, targets and timelines, and publicly report on work and progress.³⁰

It should include both educative and enforcement roles for a new Disability Inclusion Commissioner.

Organisations and agencies should also be provided with education, support, resources and adequate time to support compliance.

3.2 Promoting supported decision-making

Supported decision-making places the person at the front of the decision-making process; they are the primary decision-maker. There is an emphasis on the ability of the person to make their own decisions, when supported appropriately to do so. There is a focus on what assistance the person

²⁸ See, eg, the Gender Equality Commissioner has a range of enforcement options available under the Gender Equality Act. They include: working directly with an organisation to achieve an informal resolution (section 22(3)); issuing a compliance notice (section 22(1)); recommending that the Minister takes action against the organisation (section 26(b)); naming the organisation and their failure to comply on the Commission's website (section 26(c)); as a last resort, making an application to the Victorian Civil and Administrative Tribunal for an order directing the organisation to comply (section 26(d)).

²⁹ We note that certain obligations, for example in relation to compulsory treatment, restraint, imprisonment of people with disability have an immediate impact on people's lives and require closer oversight and more regular reporting.

³⁰ See above, n 7, we recommend the definition of 'defined entities' is adapted for the new Disability Act, including certain organisations that have 50 or more employees, including the public sector, universities and local councils.

needs or wants, rather than on deficits in decision-making. There is an emphasis on what the person decides for themselves, rather than what others determine is in their best interests.³¹

Supported decision-making should be named and explained in the new Disability Act. The obligations of decision-makers and service providers should be clear and widely understood: to support people to make their own decisions.

There should be a standalone principle on supported decision-making, to ensure people with disability who require support to make decisions are provided with appropriate support to enable the person, as far as practicable in the circumstances, to make and participate in all decisions that affect them; to have their views and preferences respected; and to develop a person's decision-making capacity. People with disability who can make autonomous decisions should be respected to do this.

An example of supported decision-making in practice

VLA's IMHA non-legal advocates assist people receiving or at risk of compulsory mental health treatment to make decisions and have as much say as possible about their assessment, treatment, and recovery. IMHA was set up as an integral part of realising the reforms and vision of the Victorian Mental Health Act, in particular those related to supported decision-making.

IMHA provides services over the phone through an intake line and advocates attend every public mental health service in Victoria to advocate, promote human rights and supported decision-making and support self-advocacy. In 2019–20, IMHA delivered 12,623 advocacy and self-advocacy services and 22,338 information and referral services.

IMHA has embedded lived experience into its model by employing a Senior Consumer Consultant who is part of the leadership team, creating the Speaking from Experience consumer advisory group and recently employing an NDIS Lived Experience Consultant. These roles and mechanisms ensure that IMHA service provision is informed by lived experience.

IMHA delivers representational advocacy using a supported decision-making paradigm, which takes the form of information provision, discussion of pros and cons of options available, individual advocacy, coaching to self-advocate, referrals, and community education. The model applies a personal recovery approach and incorporates empowerment principles to support people's ability to self-advocate.

In addition to promoting supported decision-making through its service provision, IMHA has:

- Developed a **supported decision-making training package**, which has been rolled out across all designated mental health services in Victoria. This training was co-designed with people with a lived experience of mental health issues, to address the low levels of understanding of supported decision-making amongst mental health clinicians.

³¹ Adapted from Australian Law Reform Commission, *Equality, Capacity, and Disability in Commonwealth Laws (ALRC Report 124) – Supported and Substitute decision-making* (18 September 2014) (available at: <<https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-alrc-report-124/2-conceptual-landscape-the-context-for-reform-2/supported-and-substitute-decision-making/>>).

- Co-produced a suite of resources about **rights, supported decision-making, and self-advocacy** for people that are subject to compulsory treatment.³²
- Co-designed a '**Self-advocacy for the NDIS**' training program and resources for NDIS service providers and other mental health professionals to build the capacity of people to self-advocate at any stage of the NDIS process, under the psychosocial disability stream.³³

It is through this work, and this lived experience expertise, that we see:

- The benefits of supported decision-making for people's rights, recovery, autonomy and wellbeing.
- What works well when designing and implementing a service model and training modules that promote supported decision-making.
- How crucial it is that services, training, resources and evaluation are co-designed and co-produced with people with lived experience of disability, including people who experience mental health issues or identify as having a disability, First Nations people, people from culturally and linguistically diverse backgrounds, members of the LGBTQI+ community, young people, and older people.
- The role for access to independent non-legal advocacy and to legal assistance in embedding supported decision-making because these services help people to understand and exercise their rights.
- The challenges converting a policy or legislation that introduces supported decision-making into real changes for people on the ground. In particular, we have seen that the *Mental Health Act 2014 (Vic)* (**Victorian Mental Health Act**) has not effectively embedded supported decision-making as intended because of the absence of mechanisms to drive cultural change, including education, resourcing, lived experience leadership and oversight and accountability.³⁴

We would welcome the opportunity to share the experiences and expertise we have gained through this work with the Department.

Recommendation 8: Embed supported decision-making and implement it in practice

Name and explain supported decision-making in the new Disability Act.

Create a specific principle focused on supported decision-making, require disability support providers to support people to make their own decisions and clearly limit the circumstances in which substituted decision-making can occur.

³² See, eg, Independent Mental Health Advocacy, *Speaking Up For Your Rights*, self-advocacy video and resources (available at: <<https://www.imha.vic.gov.au/know-your-rights/speaking-up-for-your-rights>>).

³³ See, eg, Independent Mental Health Advocacy, *Self-advocacy for the NDIS*, workbook (available at: <<https://www.imha.vic.gov.au/know-your-rights/self-advocacy-for-ndis>>). Other materials and resources are available via an online Training Hub and we could arrange for these to be shared if that would be of interest.

³⁴ See, Victoria Legal Aid, *Act for Change: A Mental Health and Wellbeing Act that realises the vision for change* (August 2021) (available at: <<https://www.legalaid.vic.gov.au/about-us/news/new-mental-health-and-wellbeing-act-must-bring-about-cultural-change>>) (**Act for Change**).

Require anyone exercising powers under the new Disability Act to undertake ongoing mandatory, co-produced training on the new Disability Act, including supported decision-making and the application of the Victorian Charter.

Services should develop resources and tools to embed supported decision-making in their day-to-day work and should report on compliance with the training requirements.

3.3 An enforceable positive duty

As the consultation paper notes: 'Victorians value fairness, respect and safety. We are one of Australia's few states with human rights legislation as well as positive duties within our anti-discrimination legislation'.³⁵

Through our specialist discrimination law practice, we see the potential for a positive duty to eliminate discrimination and promote equality. Such a duty can lift the enforcement burden from individual victims of discrimination, and play a preventative role with duty holders being required to take steps to prevent discrimination and promote inclusion.³⁶

We also see, however, that in the absence of adequate enforcement provisions, the existing positive duty in Victoria's Equal Opportunity Act does not live up to its full potential. For example, we are not aware of employees using, or seeking to use, the existence of the positive duty as a mechanism to address discrimination in the workplace. In our view, this is primarily because there are significant limitations on enforcing this duty.³⁷

In designing the positive duties in the new Disability Act (and in contemplated accompanying reforms to the Equal Opportunity Act), we encourage the Department to consider the role of visible enforcement and meaningful sanctions for breaches in encouraging preventative action and deterring non-compliance. Efforts to persuade compliance with the law are more effective if they are backed by the risk of consequences for non-compliance.³⁸ The "enforcement pyramid" for regulating discrimination laws developed by British academics Hepple, Coussey and Choudhury illustrates the actions that a regulator should be empowered to undertake in order to meaningfully enforce these laws:

- At the base of the pyramid is persuasion, including education and training, followed by voluntary action plans.

³⁵ Consultation paper, above n 1, 3 (Minister's foreword). See *Equal Opportunity Act 2010* (Vic) s 15.

³⁶ See, eg, Victorian Equal Opportunity and Human Rights Commission references to the positive duty under the Victorian Equal Opportunity Act in educational and guidance materials, as well as research reviews and investigations: [Supporting workers with a disability: Lessons for the post-COVID workplace \(2021\)](https://www.humanrights.vic.gov.au/resources/snapshot-supporting-workers-with-disability-lessons-for-the-post-covid-workplace/) <<https://www.humanrights.vic.gov.au/resources/snapshot-supporting-workers-with-disability-lessons-for-the-post-covid-workplace/>>; Victorian Equal Opportunity and Human Rights Commission, 'Retailers' Guide: Face masks, vaccination and discrimination' (August 2021) <<https://www.humanrights.vic.gov.au/resources/retailers-guide-face-masks-and-discrimination/>>; Victorian Equal Opportunity and Human Rights Commission, *Fair-minded cover: investigation into discrimination in the travel insurance industry* (2019), 8; Victorian Equal Opportunity and Human Rights Commission, *Independent review into sexual discrimination and sexual harassment, including predatory behaviour in Victoria Police* (2015), 45; Victorian Equal Opportunity and Human Rights Commission, *Held Back: The experience of students with disabilities in Victorian schools* (Final Report, September 2012); Victorian Equal Opportunity and Human Rights Commission, *Locked out: Discrimination in Victoria's private rental market* (2012), 3.

³⁷ The Victorian Civil and Administrative Tribunal does not have jurisdiction to hear claims from individuals about a breach of the positive duty. The *Equal Opportunity Act 2010* (Vic) s 15(2) provides that s 122, which gives VCAT jurisdiction to hear and determine applications for alleged contraventions of Parts 4, 6 or 7 of the Victorian Equal Opportunity Act, does not apply to s 15. See *Collins v Smith* (Human Rights) [2015] VCAT 1029 at [44]-[46]. VCAT can conduct an inquiry about a breach of the duty and make orders if the Victorian Equal Opportunity and Human Rights Commission refers a matter to it following a Victorian Equal Opportunity and Human Rights Commission investigation (s 139(2)(c)). We are not aware of this ever having occurred, and Victorian Equal Opportunity and Human Rights Commission investigations are rare.

³⁸ Ayres, I., and Braithwaite, J. (1992) *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press.

- Next is an investigation by a Commission which can enter into enforceable undertakings or issue compliance notices.
- At the top of the pyramid is prosecution and sanctions.³⁹

Currently the Victorian Equal Opportunity and Human Rights Commission lacks the full suite of powers that form the regulatory pyramid outlined above, particularly at the pointy end. While they have education and dispute resolution functions, and limited investigation powers, they do not have robust powers to compel compliance with discrimination laws or to seek penalties for contraventions.⁴⁰

Reforms in the original Equal Opportunity Act would have enabled the Victorian Equal Opportunity and Human Rights Commission to enter into enforceable undertakings and issue compliance notices, however these reforms were repealed in 2011 before coming into force.

While pursuing sanctions should not be the primary activity of a regulator, the prospect of consequences for non-compliance can help efforts to persuade compliance with the law. As a result, it is important to have a positive duty to eliminate discrimination that can be enforced, with meaningful sanctions for non-compliance.⁴¹

It is our view that the Victorian Equal Opportunity and Human Rights Commission should be given greater investigation powers, the power to enter into enforceable undertakings and issue compliance notices, and the power to seek sanctions against those who breach discrimination laws in order to enforce compliance with those laws.

We encourage the Department to consider similar powers for the entity responsible for oversight of compliance with the new Disability Act, such as a potential Disability Inclusion Commissioner.

These powers should be accompanied by the resourcing necessary to undertake these important functions, including template documents, guidance materials and other supports similar to that provided by the Commission for Gender Equality in the Public Sector with respect to the Gender Equality Act.⁴²

Such education and enforcement are likely to lead to more services making greater efforts to prevent discrimination and promote inclusion. Without these powers, the legal, social and financial consequences for contravening protections are minimal, as legal action is rarely pursued by victims.

³⁹ Hepple, B., Coussey, M. and Choudhury, T. (2000) *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Hart Publishing, pp 58-59.

⁴⁰ See: *Equal Opportunity Act 2010* (Vic) part 8 (disputes) and part 9 (investigations).

⁴¹ For further discussion, see also Dominique Allen, 'Mechanisms Promoting Equality in the *Equal Opportunity Act*', *Melbourne University Law Review* 44(2) [2020] 459, 495.

⁴² Commission for Gender Equality in the Public Sector, *Support for defined entities to comply with the Gender Equality Act* (web page, reviewed 10 June 2021) <[Support for defined entities to comply with the Gender Equality Act | Commission for Gender Equality in the Public Sector \(genderequalitycommission.vic.gov.au\)](https://www.genderequalitycommission.vic.gov.au/support-for-defined-entities-to-comply-with-the-gender-equality-act)>.

Recommendation 9: A new enforceable positive duty to consider, promote and take action to achieve inclusion for people with disability in Victoria

- a. Create an enforceable positive duty in the new Disability Act to consider, promote and take action to achieve inclusion for people with disability in Victoria, including in the development of policies and programs and the delivery of services, supplemented by guidelines for compliance.
- b. Give the Victorian Equal Opportunity and Human Rights Commission and a new Disability Inclusion Commissioner powers and resources to undertake systemic investigation, enter into enforceable undertakings, issue compliance notices, and seek sanctions against those who breach the existing positive duty under the Equal Opportunity Act or the new positive duty under the Disability Act (respectively).

3.4 A service safety net

While the NDIS is working well for many people with disability, its reliance on market-based support provision and coordination with mainstream services can result in its failure to work effectively for participants with more complex needs, putting them at risk of significant harm.

Although the inevitability of thin markets and market failure was anticipated in planning for the NDIS, and there have been a series of calls for urgent measures to address thin markets and market failure,⁴³ there is still no enforceable obligation on any government body to ensure that an NDIS participant receives their funded support and no clear, consistent way of avoiding and addressing thin markets and their consequences.

People with disability need a reliable and systematised framework of accountability, coordination and response for supports provided under the NDIS and through Victorian mainstream services.

Through our work, we have seen the important role of Victoria's Intensive Support Team in service coordination and problem-solving. The Intensive Support Team model provides a single point of contact and accountability for whole-of-government (Victorian and Commonwealth) coordination in the system and enhances the skills of the multiple bodies engaging with the person. Prior to the creation of this team, clients and their lawyers or advocates were unsure what to do or where to go to resolve cases of crisis.

The Intensive Support Team demonstrates the Victorian Government's commitment to Victorians with disability receiving the services and supports they need to live well in the community. We understand that the existence of the Intensive Support Team is still intended to be time-limited, but

⁴³ The Joint Standing Committee's 'Market Readiness Report' recommended that 'the NDIA publicly release the outcomes of the Maintaining Critical Supports project and its policy on provider of last resort (PLR) arrangements as a matter of urgency' (recommendation 24) in September 2018. This was the third time that Committee highlighted that the publication and implementation of a PLR arrangement (or similar framework) is necessary. These remarks have been echoed by the Productivity Commission, the Australian National Audit Office and in the McKinsey & Company Independent Pricing Review. See Joint Standing Committee on the NDIS, *Report on Transition Arrangements for the NDIS* (2018) and *Report on Provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition* (2017); Productivity Commission, *National Disability Insurance Scheme – Costs* (2017) 36; Australian National Audit Office, *National Disability Insurance Scheme—Management of the Transition of the Disability Services Market* (2016–2017) 27; McKinsey & Company, *Independent Pricing Review, Final Report* (2018) (see especially 59 onwards). More recently, the COAG Disability Reform Council has acknowledged this need for "an integrated and holistic framework for maintaining critical supports for participants" and requested that "implementation be expedited and that further refinement and consultation be undertaken": COAG Disability Reform Council, Meeting of the COAG Disability Reform Council (Communiqué, 9 October 2019) 1.

reiterate that it is the kind of model needed to entrench and promote a systematic and efficient approach for people with complex needs at the interface NDIS and mainstream systems.

If a person has been found eligible for the NDIS and has a funded plan but cannot secure supports for reasons related to the market or the support provider withdrawing, the Victorian Government must intervene to ensure that the person with disability does not bear the burden of this system failure. It must be clear, including to the public, who is responsible for arranging, funding and providing services in these situations.⁴⁴ This is essential to making sure people do not slip through the cracks and end up in prison, in the mental health system or separated from their families.

We welcome the ongoing work of the Disability Reform Council and the recognition of the need for intergovernmental cooperation to ensure that nobody is left to navigate the complexities of gaps in federal and state responsibility and the failures of the market on their own.

The new Disability Act provides an opportunity to address the interface issues between the NDIS and mainstream services. The new Act should implement a service safety net for people with disability in Victoria that catches people with complex needs when the market fails.

Recommendation 10: A service safety net

Victoria should commit to addressing the gaps between the NDIS and mainstream services by introducing a service safety net.

In urgent cases, where market failure leads to people with complex needs experiencing a crisis (including in the justice or child protection systems), there should be a clear system for making sure people receive the supports they need, and clear responsibility for coordinating, funding and providing services in these situations

3.5 Access to independent advocacy and legal assistance

The Royal Commission into Victoria's Mental Health System found that non-legal advocacy is highly valued by mental health consumers, providing important support to promote the rights of consumers and the principles of the Victorian Mental Health Act.⁴⁵ Through our work with Victorians with disability, we also see the expert role played by disability advocates.

The work of our IMHA service in relation to supported decision-making is discussed above in part 3.2.

A recent independent evaluation of our IFAS service,⁴⁶ discussed in part 1 above, found that IFAS had successfully reached priority clients (20% identifying as having an intellectual disability); had supported families to stay together, where possible; and had reduced the need for complex legal proceedings by diverting approximately 20% of clients from court.

⁴⁴ We recognise that the NDIA and DFFH are not service providers and that the appropriate model requires further consultation in terms of accountability for funding, overall responsibility and service delivery. Such models could also include collaboration between government and non-government organisations.

⁴⁵ Royal Commission into Victoria's Mental Health System Final Report, Volume 4, 'The fundamentals for Enduring Reform' (February 2021) 396 (available at: <https://finalreport.rcvmhs.vic.gov.au/wp-content/uploads/2021/03/RCVMHS_FinalReport_Vol4_Accessible.pdf>) (Royal Commission Final Report volume 4).

⁴⁶ IFAS Report, above in Error! Bookmark not defined..

In addition to non-legal advocacy, together with community legal centres and Aboriginal Community Controlled legal services, VLA provides specialist legal assistance to people with disability in Victoria. The types of legal problems we assist with are discussed in part 1. Examples of this work include:

- Assisting people to understand their legal problem
- Making people aware of their rights in relation to appeal options
- Liaising with the other parties
- Referring people so their needs can be holistically met
- Accessing information in a way people can understand, for example, using interpreters and explanations of reports with people who cannot read
- Exploring options based on a person's preferences
- In some matters, providing representation at a court or tribunal to put forward the person's case.

Through this work we see that:

- Non-legal advocacy plays a critical role in realising a rights-focussed system in which people with disability understand and can exercise their rights and are supported to make decisions about their lives.
- Legal assistance allows people with disability to access information about their rights and better understand their options in order to make decisions. In this way, access to legal assistance is a key mechanism for promoting inclusion and embedding supported decision-making as it supports people to understand and exercise their rights.

Both non-legal advocacy and legal assistance are particularly important for people who are less able to navigate the complex service landscape independently, otherwise resulting in significant inequity. In addition to improving individual outcomes for people and increasing their ability to engage with decisions and processes that affect them, lawyers and advocates have a role to play in identifying and addressing systemic issues that are apparent through high volume work with clients and consumers. In this way, these services play a crucial part in oversight, including as part of introducing changes to systems, practices and culture.

Recommendation 11: Independent non-legal advocacy and legal assistance

Recognise, and invest in, access to independent non-legal advocacy and legal assistance as key mechanisms for promoting equality through supporting people to understand and exercise their rights, as well as preventing legal issues arising or escalating.⁴⁷

This should include a legislated right to an advocate and investment in Aboriginal Community Controlled Organisations to provide these services to their communities.

⁴⁷ See: Social and Global Studies Centre, RMIT University, *Final Evaluation of Independent Family Advocacy and Support (IFAS) Pilot* (September 2021) (**IFAS Report**) which found that IFAS had successfully reached priority clients – 20% identifying as having an intellectual disability; had supported families to stay together, where possible; and had reduced the need for complex legal proceedings by diverting approximately 20% of clients from court.

4. Strengthening our existing accountability mechanisms

As discussed above in part 3, there are a number of additional mechanisms that should be introduced, which would strengthen whole of government accountability for promoting inclusion and equality for people with disability.

In addition, this part discusses how to improve the operation of two existing inclusion mechanisms under the Disability Act: the state disability plan and disability action plans.

4.1 State disability plan

The state disability plan should play a key role in driving inclusion and equality. It should recognise the rights of people with disability as equal members of the community and seek to achieve substantive equality for all people with disability. The state disability plan provides an opportunity to promote the genuine whole of government response required to create social change on this scale.

Co-designed and accountable

The new Disability Act should require the state disability plan to be co-designed with people with disability. Lived experience of disability should inform the goals of the plan, the actions to achieve them, accountability mechanisms and reporting on progress.⁴⁸ The current Act only states that ‘regard must be had to the different needs of persons with different types of disabilities which may require different strategies’.⁴⁹ This should be broadened and a legislative requirement be introduced that people with disability are engaged and play a leadership role in the preparation of the state disability plan, as well as during the review and reporting phases.⁵⁰

We have seen through our work in the disability and mental health systems that without effective accountability, legislation is an essential but insufficient tool to create the kind of social and cultural change that is needed to make people with disability equal citizens. We see every day the difference between this intention and the ability of people with disability to access systems fairly and enjoy or uphold their legal rights. For the state disability plan to have real impact and benefit for people with disability, it needs to be supported by legislation, regulation and systems to measure compliance and progress with clearly defined goals. As discussed in part 3.1, the Gender Equality Act provides a model for the role education, regulation, reporting, data and enforcement can play to bring about cultural change.

Informed by our practice experience, we recommend the inclusion of the following elements to ensure that the state disability plan achieves its goals:

- Clear measurable goals co-designed with people with disability.
- Bi-annual public reporting based on the direct experience of people with disability who are impacted, as well as reliable data.

⁴⁸ See parts 1 and 2 for more detailed discussion regarding consumer leadership and intersectionality.

⁴⁹ *Disability Act 2006* (Vic) s 37(5).

⁵⁰ In New South Wales, in the preparation of their State Disability Inclusion Plan the Department “must consult with people with disability” (see: *Disability Inclusion Act 2014* (NSW) s 10(2)). Additionally, in South Australia, in their State Disability Inclusion Plan, the Minister must consult with people with disability and persons or bodies representing the interests of people with disability, and must also call for submissions from members of the public, including having regard to these submissions (see: *Disability Inclusion Act 2018* (SA) s 13(4)).

- Regular auditing and evaluation for compliance with legislation and regulatory requirements that includes people with disability in the identification of what should be audited and their direct experience in determining whether requirements have been met.

Recommendation 12: State disability plan – co-design and accountability

To improve the effectiveness and impact of the state disability plan, the new Disability Act should require:

- a. Co-design of state disability plan with people with lived experience.
- b. Bi-annual public reporting of progress against measurable goals co-designed with people with disability and based on reliable data and qualitative data from people directly affected.

A focus on legal and justice systems

Through VLA's work in the legal and social service systems, VLA sees the need for legal and system change to ensure that people do not experience inequality and unfair treatment or abuse as a result of their disability. Through our work in courts and tribunals across Victoria, we see too many cases where people with disability are not able to understand and participate in legal decisions and processes affecting them.

Across our family violence practice, the criminal justice and child protection system, and in civil and administrative law matters, VLA lawyers take steps to explain legal matters to our clients with disability, but the effectiveness of this is limited by inaccessible systems and processes, including the existing format of many court forms and documents, the limited opportunity in some contexts (such as a busy summary crime duty lawyer service) for us to provide lengthy and tailored explanations, and the type of language used in most court hearings across a range of jurisdictions.

The state disability plan should be required to address the key intersections between the disability and legal sectors to ensure that all Victorians have their disability appropriately taken into account at every stage of justice processes, are able to understand their treatment, and have the opportunity to full and equal participation in our legal system.

Recommendation 13: State disability plan – a focus on legal and justice systems

The state disability plan should commit to:

- a. Accessible legal systems. People with disability should be supported to understand and fully participate in legal proceedings affecting them, including through better referral pathways, legal sector training on accessibility, trauma-informed and inclusive services, and client-centred service design.
- b. Disability supports in the criminal justice system. A whole-of-government commitment to addressing the over-representation of people with disability in the criminal justice system should include: access to specialist courts and services; human rights protections for people with disability in the system; and targets for legal sector staff training.

4.2 Disability action plans

Disability action plans are an important tool in protecting human rights and promoting equality for people with disability. The Disability Act provides that the purpose of a disability action plan is to reduce barriers to accessing goods, services and facilities; reduce barriers to employment; promote inclusion and participation in the community; and achieve tangible changes in discriminatory attitudes and practices.⁵¹

The role for disability action plans

Currently, the Disability Act requires a 'public sector body' to prepare a disability action plan, and there are also expectations for local councils and health services.⁵²

As discussed above, the obligations in the Gender Equality Act, including regarding action plans, impact assessments and reporting, apply to 'defined entities', which include public sector bodies, local councils, Court Services Victoria, universities, the Office of Public Prosecutions and prescribed entities with 50 or more employees.⁵³

In the immediate term, we support the adoption of this definition in relation to the inclusion and equality requirements under the Disability Act.

We note, however, that people with disability engage with all kinds of organisations and should be able to expect inclusion in all aspects of their lives. This means that for disability action plans to drive inclusion they should not be limited to only public sector bodies. Larger service providers, whether they are for profit or for purpose, should ultimately be required to produce disability action plans. Expertise and support to develop, implement and monitor disability action plans should be available to these organisations to prevent them becoming tokenistic and 'tick a box' and instead drive meaningful change. This could include best practice examples of measures to guide organisations.

Consumer engagement and accountability

The Disability Act should contain minimum standards for plans that entities must meet, including:

- To be developed, implemented and evaluated in consultation with people with disability⁵⁴
- To align with the principles in the new Disability Act and comply with the state disability plan
- That plans and their reviews are publicly available and accessible.

A more robust accountability framework that includes reporting against targets and compliance with the requirements and principles of the Disability Act would help to make plans more effective in achieving inclusion and equality. Currently, the Disability Act provides that a public sector body must report on the implementation of its disability action plan in its annual reports and – if a council

⁵¹ *Disability Act 2006* (Vic) s 38(1).

⁵² *Disability Act 2006* (Vic) s 38, which includes state government departments, statutory authorities and statutory corporations. See also, Department of Families, Fairness and Housing, *Disability Action Plans* (available at: <https://providers.dffh.vic.gov.au/disability-action-plans>); 'The 2018-19 Statement of Priorities requires Victorian health services to submit a draft disability action plan to the department by 30 June 2019'.

⁵³ *Gender Equality Act 2020* (Vic) s 5.

⁵⁴ There are legislative requirements for some consultation in NSW and SA. In New South Wales, in the preparation of a Disability Inclusion Action Plan, a public authority 'must consult with people with disability' (*Disability Inclusion Act 2014* (NSW) s 12(2)) and in South Australia, in their Disability Access and Inclusion Plans, a State authority 'must consult with people with disability and persons or bodies representing the interests of people with disability' and 'must call for submissions from members of the public', including having regard to these submissions (*Disability Inclusion Act 2018* (SA) s 16(4)).

determines to prepare a disability action plan – then it must also report on its implementation in its annual report. Currently, the Disability Act contains no requirements for consultation in the development of plans. A legislative requirement to consult with people with disability in the setting of targets and measures and the review of these plans, and expertise and resources to support organisations to do this would improve accountability. Such a legislative requirement is already in place in New South Wales, where during the review, a public authority ‘must consult with people with disability’.⁵⁵

Parts 2.1 and 3.1 above discuss lived experience leadership and the accountability framework in the Gender Equality Act in more detail.

Recommendation 14: Disability action plans

Improve the impact and effectiveness of disability action plans, including requiring that disability action plans: are informed – in development, implementation, evaluation and oversight – by people with disability, including staff or clients; reflect the updated principles and objectives of the new Disability Act; further the goals of the state disability plan; and are publicly available.

5. Safeguards and rights protection Compulsory treatment

This part is informed by VLA’s work with people facing or subject to residential treatment and supervised treatment orders. In 2020–21, VLA’s mental health and disability lawyers provided over 40 advice services and appeared in approximately 10 VCAT hearings for people in relation to supervised treatment orders under the Disability Act.

Through VLA’s work, we see that compulsory treatment of people with intellectual disability creates profound limitations on the human rights of our clients, restricting their liberty and freedom of movement. VLA considers that supervised treatment orders should only be used where they are the least restrictive intervention required to manage peoples’ risk to others. This should be subject to stringent criteria and appropriate oversight and scrutiny and is currently regulated by Part 8 of the Disability Act. However, through our practice we also see that, because the current criteria require a person to have an intellectual disability to be eligible for admission to a residential treatment facility, people with other cognitive disability are unable to access treatment in a residential treatment facility, and are instead caught in the criminal justice system with a lack of access to appropriate treatment.⁵⁶

This part considers:

- The consequences for people with cognitive disability who currently fall outside the criteria for admission to a residential treatment facility
- The safeguards and accountability mechanisms that are needed to make sure that compulsory treatment is only ever used where it is the least restrictive intervention required to manage peoples’ risk to others.

⁵⁵ *Disability Inclusion Act 2014* (NSW) s 14(3).

⁵⁶ See, eg, Victoria Legal Aid, ‘*The saddest case*’ – we support Ombudsman’s findings (29 October 2018) <[The saddest case](https://www.vla.vic.gov.au/support-ombudsman-s-findings) – we support Ombudsman’s findings | Victoria Legal Aid (vla.vic.gov.au)>. See also Victorian Ombudsman, *Investigation into the Imprisonment of a Woman Found Unfit to Stand Trial* <<https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/investigation-into-the-imprisonment-of-a-woman-found-unfit-to-stand-trial/>> (Ombudsman’s report on a woman found unfit to stand trial).

While we are supportive of slightly broader eligibility for residential treatment facilities, we are cautious about the risk of ‘net widening’ and over-reliance on compulsory treatment.

People with cognitive disability in prison because of restrictive definitions and service and accountability gaps

People who are found unfit to plead as a result of cognitive impairment other than intellectual disability should not be in prison simply because this is the only option legally available. Where custodial supervision is the least restrictive option available, a person found unfit to plead or who meets other criteria for supervised treatment under the Disability Act should be eligible for admission to a residential treatment facility rather than detained in prison.

In some cases, better community-based facilities will prevent the need for compulsory treatment under the Disability Act and investing in these options should be a priority for reform. Where compulsory treatment is used, it must meet the diverse needs of people with intellectual disability, noting the particular need to provide appropriate treatment for women, gender diverse people, Aboriginal and Torres Strait Island people and those from culturally and linguistically diverse backgrounds. Such programs and facilities should be grounded in human rights principles, trauma informed and codesigned with people with diverse lived experience.

The gaps in services and accountability that contribute to people spending prolonged periods in restrictive environments are discussed further in part 6 below.

Stronger safeguards and better transition planning

In our practice, VLA also sees people who no longer require compulsory treatment under a supervised treatment order still being detained due to a lack of available services.

Transition planning

Detailed transition planning for discharge and transition from compulsory treatment is frequently complex and requires consideration of many and at times competing factors. These factors are often dependent on the decisions (both funding and service) from external organisations and can involve significant coordination and time. The earlier these matters can be planned, the more successfully they are likely to be in supporting a person with a disability to transition out of a facility into the Victorian community.⁵⁷

The Disability Act already includes a process for transition to be included in a treatment plan.⁵⁸ Unfortunately, the current proposed process is unclear. Transition planning frequently occurs as a parallel process to the treatment plan and is therefore not subject to external scrutiny, with less accountability, and doesn’t always directly involve the person affected. In addition, current transition planning documents are primarily focused on the external supports for the person affected, including accommodation, service provision, supervision and funding. These external supports are often vital for transition, but they are unable to provide a clear outline to the person affected of what they need to do to be able to transition from compulsory treatment.

⁵⁷ See Victoria Legal Aid, *Inclusion and accessibility for all Victorians: Submission on the Victorian Government’s Consultation paper for state disability plan 2021-2024* (April 2020).

⁵⁸ Section 153(2)(e) of the Disability Act applies to residents of a residential treatment facility and requires the Treatment Plan to “set out a proposed process for the transition from being a resident in a residential treatment facility to living in the community”; and s 191(7)(e) applies to STOs and requires the Treatment Plan to “set out a proposed process for transition of the person to lower levels of supervision and, if appropriate, to living in the community without a supervised treatment order being required”.

The effectiveness of these processes could be improved by earlier identification of factors that require problem-solving, creating clear points of accountability and providing the person affected with greater opportunities to pursue a transition that better accords with their will and preferences.

In addition, the Disability Act should be stronger in enforcing the transition planning requirements and holding services accountable by requiring that to make an order, VCAT must be satisfied that the service provider can implement the treatment plan, including that necessary resources are available and that VCAT relies only what is available and able to be implemented in assessing the expected benefit to the person of the plan.⁵⁹

Accessibility of treatment plans

Treatment plans are complex and long documents that can be difficult to understand and comprehend. We see through our daily casework that people with intellectual disability commonly require significant time to consider the information to understand the proposed effects, and additional time to consider their response. In addition, the language and length of the treatment plan can be difficult for some people with disability to meaningfully engage with without modifications of the content to make it more accessible. Treatment plans have significant impacts on the everyday lives of people with disability. It is vital that a person has sufficient time and supports to review and engage with the plan so that they can more meaningfully participate in the creation of its conditions.

Treatment plans for forensic residents

Forensic residents should also be provided with treatment plans. The Disability Act currently excludes forensic residents from receiving a treatment plan when they are admitted to a residential treatment facility.⁶⁰ In practice, this means that forensic residents must rely on the provisions of the Crimes Mental Impairment Act in relation to most aspects of their compulsory treatment. This exclusion creates a higher barrier for forensic residents to be involved in decisions about their compulsory treatment. Presently, the only formal avenue available to a forensic resident to discuss their compulsory treatment is in a court at a review of their custodial supervision order. This is not usually an appropriate forum as it is not the primary purpose for the hearing, and the court is often reluctant to involve itself in these questions.

The inclusion of forensic residents in the treatment plan process would overcome this difficulty and is consistent with the current operation of the Disability Act. The Disability Act already requires the authorised program officer to prepare treatment plans to be consistent with the order under which a person is admitted to the residential treatment facility,⁶¹ and operates for residents subject to different orders subject to court review.⁶²

Housing is crucial for effective transition planning

VLA also sees access to safe, stable, affordable housing as part of any effective response to the needs of people with disability. This includes improved coordination between state-based services

⁵⁹ See, eg, *Disability Act 2006* (Vic) ss 153(2) (preparing a treatment plan); 154(2) (annual review of the treatment plan).

⁶⁰ Section 153(1) of the Disability Act excludes forensic residents from requiring the preparation of a Treatment Plan by the Authorised Program Officer.

⁶¹ *Disability Act 2006* (Vic) s 153(2A).

⁶² This includes Supervision Orders and Interim Supervision Orders made under the *Serious Offenders Act 2018* (Vic).

and agencies and the National Disability Insurance Agency (**NDIA**), an increase in the supply of Specialist Disability Accommodation, and targeted programs aimed at reducing the risk of eviction.⁶³

Recommendation 15: Eligibility for residential treatment facilities

Where custodial supervision is the least restrictive option available, a person found unfit to plead or who meets other criteria for supervised treatment under the Disability Act should be eligible for admission to a residential treatment facility rather than detained in prison (i.e., this should not be limited to people with intellectual disability).⁶⁴

Recommendation 16: Safeguards against prolonged or unnecessary compulsory treatment

The new Disability Act should:

- a. Require the transition process to consider the will and preference of the person affected and identify the goals they are expected to achieve, as well as the types of discharge supports that are required and will be provided to support this process.
- b. Require the will and preference of the person affected to be considered in the development of treatment plans.
- c. Require that proposed treatment plans be provided to the person affected in a timely manner and in an accessible way, including an additional form, if necessary, that is appropriate to the person's circumstances (for example, whether by using modified language, visual aids or other means).
- d. Include forensic residents under the Disability Act for the purposes of a treatment plan when they are admitted to a residential treatment facility.
- e. Require that to make an order, VCAT must be satisfied that the service provider can implement the treatment plan, including that necessary resources are available and that VCAT relies only what is available and able to be implemented in assessing the expected benefit to the person of the plan.
- f. Require that to make any subsequent orders, VCAT must be satisfied that the order has met the expected benefit to the person who is the subject of the plan as required by the legislation. If this cannot be demonstrated, a further order should not be made unless changes are made to the treatment plan to satisfy VCAT that this criterion can be met.

5.2 Restrictive practices

Restrictive practice is defined in the Disability Act to mean 'any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with a disability or of an NDIS participant'.⁶⁵ The Disability Act seeks to regulate what are significant restrictions on the rights of people with disability to ensure that these practices are only used where they are the least restrictive option available and are of demonstrated benefit to the person.

⁶³ Productivity Commission, *Mental Health: Productivity Commission Inquiry Report* (30 June 2020), recommendation 20 (supportive housing and homelessness services), specifically action 20.1 (better consideration of the needs of people with mental health issues in housing policies); 20.3 (housing security for people with mental health issues and the National Housing and Homelessness Agreement).

⁶⁴ Section 152 (1)(a) of the Disability Act should be amended to include people with cognitive impairment as eligible for admission to a residential treatment facility for compulsory treatment.

⁶⁵ *Disability Act 2006* (Vic) s 3.

The Disability Act requires that any restrictive practices are documented in a behaviour support plan, however, behaviour support plans do not always adequately demonstrate that all less restrictive options have been explored before proceeding with restrictive practices to manage behaviour.

Plans are often developed with limited consultation with people with disability, their families and informal supports.

It is essential that authorised program officers are adequately trained and supported to carry out their role in developing plans and supporting people with disability to understand them.

Plans are often difficult to understand, and insufficient time and effort is invested in supporting the person to understand them. Whilst an independent person must be available to explain to a person with disability any restrictive practices in the person's behaviour support plan and their review options, it is common that people are not adequately informed about this and are unsure about their review options and appropriate avenues of complaint. Given the significant barriers that people with disability can face, particularly those subject to restrictive practices, VLA recommends that there is proactive monitoring and auditing against statutory requirements in this area.

Recommendation 17: Effective safeguards regarding restrictive practices

To make sure restrictive practices are only used when they are the least restrictive option available, the new Disability Act should require:

- a. The will and preference of the person affected to be considered in the development of behaviour support plans.
- b. Behaviour support plans to be provided to the person affected in a timely manner and in an accessible way, including an additional form, if necessary, that is appropriate to the person's circumstances (for example, whether by using modified language, visual aids or other means).
- c. Authorised program officers to be provided with training to ensure that they understand the legislative requirements for the development and provision of behaviour support plans.
- d. Regular audits of the compliance of disability support providers with requirements for behaviour support plans.

5.3 People's homes and residential rights

Accommodation provided by Supported Independent Living providers

Together with the Commissioner for Residential Tenancies and the Office of the Public Advocate, we are concerned about the regulatory gaps for housing for people with disability provided by Supported Independent Living providers.

For people with disability who do not qualify for Specialist Disability Accommodation, Supported Independent Living providers – who provide supports to people with activities of daily living such as cooking, cleaning and personal care – are increasingly providing accommodation. Residents usually pay rent as well as contribute funds allocated in their NDIS plan for Supported Independent Living services.

There may be some Supported Independent Living accommodation covered by the *Supported Residential Services (Private Proprietors) Act 2010* (Vic), but the position is not clear and this accommodation does not appear to be covered by either part 5, division 2 of the Disability Act (which covers group homes) or part 12A of the Residential Tenancies Act (which covers Specialist Disability Accommodation).⁶⁶ This means residents are not adequately protected from insecurity and poor tenancy practices. It makes it difficult for residents to understand their rights and options and to know where to turn to seek advice or advocacy.

A further key problem created by the gap in resident protections is uncertainty about the role and responsibilities of community visitors in relation to Supported Independent Living-provided accommodation (discussed further in part 5.4 below).

A separate but related issue is the way in which the choice and control of people with disability are undermined where a single provider provides both a person's accommodation and their support services. For example, in one case VLA was involved in, our client made a complaint of abuse by their support provider, which was also their accommodation provider. The provider responded by giving our client 48 hours to leave the property. Our client wanted to stay in the accommodation but receive supports from a different provider, but the provider was not open to this.

There is a need for careful consideration of how Supported Independent Living accommodation is best regulated.⁶⁷

Lack of housing and the risk of eviction for people with disability and their families

Through our work, see the impact of a lack of accessible, affordable housing and supports for people with disability. We also see avoidable evictions of people for reasons directly related to their disability, and the discrimination faced by people with disability in accessing and sustaining housing.⁶⁸

As discussed in part 5.1, the shortage of accessible, affordable housing with supports can contribute to people being indefinitely detained in restrictive environments, including prison, mental health units and forensic settings.

In terms of the housing landscape for people with disability, Specialist Disability Accommodation funded through the NDIS is only available for a small proportion of people with disability,⁶⁹ which means that most people with disability rely upon access to other forms of housing.

Bianca's story shows how a lack of appropriate accommodation, inadequate support from the NDIS and decision-making by social landlords that does not prioritise eviction prevention, can together lead to a risk of homelessness and separation for people with disability and their families.

⁶⁶ As the consultation paper recognises (at 31): 'Most NDIS participants who live in group homes have their residential rights protected by new rules for Specialist Disability Accommodation in the Residential Tenancies Act. Some residents in group homes have not been able to move to the new protections due to NDIS transition issues. Until all people in group homes can transition to the new protections, these residents continue to have residential rights under the Disability Act'.

⁶⁷ We refer to the submission of the Commission for Residential Tenancies, which sets out options for addressing the current regulatory gap in resident protections: Extending the protection of Part 5 of the Disability Act to Supported Independent Living provided accommodation; extending the protection of the Residential Tenancies Act to Supported Independent Living provided accommodation as tenancy agreements not subject to the health and residential services exemption; extending the protection of the Residential Tenancies Act to Supported Independent Living provided accommodation through incorporation into the definition of Specialist Disability Accommodation or similar.

⁶⁸ See, eg, Victoria Legal Aid, *It starts with a home: Ten legal issues that cause – or are caused by – homelessness in Victoria submission to the Victorian Homelessness Inquiry* (March 2020) (available at: <<https://www.legalaid.vic.gov.au/about-us/news/urgent-changes-needed-to-break-cycle-of-homelessness-in-victoria>>).

⁶⁹ *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020* (Cth) rr 11–14. Specialist Disability Accommodation is available only to those NDIS participants with "extreme functional impairment" or "very high support needs" who meet specific eligibility criteria.

Bianca and Ryan:⁷⁰ Appropriate supports to sustain tenancies and keep people in their homes

I am a single mum to Ryan, my 16-year-old son, who lives with lifelong complex disabilities and medical conditions. This includes an intellectual disability and more recently severe behavioural disturbance. Ryan and I have been through periods of homelessness together and were fortunate to find transitional housing in 2019.

Over the past year Ryan's behavioural issues started to worsen. He wasn't the little boy I used to know. There were a series of incidents at the property early this year that caused the housing provider to try to evict us in VCAT. VCAT said that Ryan couldn't attend the property while it was considering my case.

As a result Ryan was shifted between different short-term accommodation facilities and required urgent new NDIS plans to fund this. Ryan couldn't spend his birthday at home. I visited him every night. He would ask me to stay with him until he went to sleep.

Ryan now has a lot more support behind him, including from the NDIS and the Department of Fairness, Families and Housing. A plan is being developed for Ryan to return home safely, so that he can split time between his father and I. The housing provider had agreed to resolve the VCAT case by consent after they became aware of the increased support for Ryan.

The housing provider is now trying to evict me again, even though there haven't been any further issues with Ryan at the property. They have told me I will receive a notice to vacate due to the owner wanting to sell the property. I can't help but think this has something to do with the owner not wanting Ryan at the property.

I would jump at the chance to secure a housing option that could accommodate Ryan and I and keep us together. The option doesn't seem to exist. I don't know what it will mean for our future if Ryan and I are evicted.

We refer the Department to our recent submission to the Social Housing Regulation Review, *It starts with a home: Making evictions the option of last resort in Victoria*, for a more detailed discussion of the reforms that would help make evictions, including of people with disability, a true option of last resort in Victoria.

A whole of government approach to promoting inclusion and equality for people with disability should extend to social housing providers. Their tenancy management decisions and practices, including regarding evictions, alternatives to eviction and referrals for support, should be guided by these obligations.

For people who are still in group homes regulated under the Disability Act, we note the absence of a 'reasonable and proportionate' test, which is a key protection that was introduced to prevent avoidable evictions under the updated Residential Tenancies Act. The 'reasonable and proportionate' test has an important role to play in weighing up the risks of eviction, as well as less restrictive options. A person's disability, access to support to address the landlord's concerns and their limited

⁷⁰ Names have been changed.

ability to find alternative housing are relevant factors that can be brought to VCAT's attention under this mechanism, and it should be included in part 5 of the Disability Act.

Recommendation 18: Safe and secure housing and accommodation

To protect and promote the rights of people with disability in housing and accommodation, we recommend that:

- a. A policy and engagement process is commenced right away to identify and recommend the best option for regulating accommodation provided by Supported Independent Living providers.
- b. Social housing providers have clear obligations to prioritise sustaining tenancies and avoiding evictions for people with disability. This includes facilitating early access to supports and applying a human rights framework to ensure alternatives to eviction are properly explored. This should form part of the state disability plan.
- c. The protections of the 'reasonable and proportionate' test be included in the Disability Act for group home residents.

5.4 Community visitors

Community visitors play an important role in safeguarding the rights of people living in disability accommodation.⁷¹ The overarching purpose is to visit people with disability and independently determine whether their human rights are being upheld by the accommodation services they rely on.⁷²

Community visitors monitor and report on these services, with an aim of ensuring that residents' rights are being upheld and that they are not being subjected to abuse, neglect or exploitation.⁷³

In recent years we have seen changes to the context in which the community visitors program operates, largely due to changes to the NDIS service environment, the development of a more diverse disability housing market and limitations on authority to visit certain types of accommodation.

Community visitors' role and powers in the post-NDIS environment

The NDIS funding model separates participants' funding for accommodation from funding for personal care required for everyday living (Supported Independent Living). We understand that the intention of this separation is to increase the choice and control of participants, by allowing them to more readily change either their accommodation or Supported Independent Living provider without having to change the other. Changes to NDIS funding have led to new models of accommodation evolving – and the creation of an increasingly complex service landscape.

The NDIS rollout in Victoria has also led to amendments to the Disability Act, such that community visitors now have a legislative right to visit:

- Disability 'residential services'⁷⁴

⁷¹ Office of the Public Advocate (2020), *Community Visitors Annual Report 2019-20*, 38.

⁷² Department of Social Services for the Disability Reform Council, Council of Australian Governments 2018, *Community Visitor Schemes Review – Final Report*, 8.

⁷³ Office of the Public Advocate (2021), *Safeguarding the rights and interests of people with disability – Submission to Department of Health*, 7.

⁷⁴ *Disability Act 2006* (Vic) s 30.

- Specialist Disability Accommodation-enrolled dwellings where individuals have entered Specialist Disability Accommodation residency agreements⁷⁵
- Short-term accommodation and assistance dwellings.⁷⁶

Community visitors do *not* have a legislative right to visit Specialist Disability Accommodation-enrolled dwellings where residents have chosen to enter into residential rental agreements under the Residential Tenancies Act. Community visitors can only visit if invited. This means that individuals whose residence is covered by a standard rental agreement will not have access to community visitors unless they request them to visit.

The particular situation that arises for people living in accommodation provided by Supported Independent Living providers is discussed above in part 5.3.

We have seen that the value of the community visitor's role comes from their ability to visit services without advance notice and enquire into the conditions of residents. Unannounced visits play a preventative role which cannot be replicated in contexts where community visitors must wait for their assistance to be requested; they also provide an opportunity for early intervention, so that concerns can be addressed immediately rather than escalating to abuse or neglect.

This oversight function needs to be balanced against the rights of people living in Specialist Disability Accommodation-enrolled dwellings to privacy and autonomy, including the right to choose who accesses your house. It is reasonable to draw this distinction on the basis that a person who has capacity to enter into a residential tenancy agreement would also be able to understand their rights under that agreement and to invite community visitors to their house to enforce their rights.

We note, however, that the community visitor program has indicated it is unsure whether individuals are made fully aware of the safeguarding implications flowing from their choice of agreement, or of the existence of community visitors.⁷⁷ Disability advocacy services have also voiced concerns that people with disability are not always made aware of all the housing options or funding provided by the NDIS before selecting an accommodation service, meaning that they may not be given true choice and control over their decision-making.⁷⁸

Accordingly, we recommend that Specialist Disability Accommodation providers be required to take steps to make sure that residents are informed of the different oversight role of community visitors where standard rental agreements are in place and their ability to request community visitor involvement. These requirements should be subject to external reporting and auditing to ensure compliance. In addition, the Disability Act should provide the ability for community visitors to enter such premises without consent where they have formed a reasonable belief that a resident in Specialist Disability Accommodation may be at risk of abuse or neglect and they have not been able to obtain the residents' consent despite reasonable steps being taken.

Supporting community visitors' role in different kinds of accommodation

The increasing complexity of the service landscape has made it more difficult for community visitors to know about the places they can visit. Previously, the community visitors program could obtain a

⁷⁵ *Disability Act 2006* (Vic) s 30A(1).

⁷⁶ *Disability Act 2006* (Vic) s 30A(2).

⁷⁷ Office of the Public Advocate (2020), *Community Visitors Annual Report 2019-20*, 47.

⁷⁸ Action for More Independence and Dignity in Accommodation (AMIDA) (2021), NDIS Home and Living Consultation – An Ordinary Life at Home, 2.

register from the Department of Health and Human Services⁷⁹ of all gazetted services which they were permitted to visit, however this is no longer the case.

Under section 498F(5) of the Residential Tenancies Act, a Specialist Disability Accommodation provider must give written notice to the Director of Consumer Affairs Victoria of any Specialist Disability Accommodation residency agreement entered into or established. The Director of Consumer Affairs Victoria is required to maintain a list of Specialist Disability Accommodation residency agreements and provide this to the Office of the Public Advocate for the purposes of arranging visits by community visitors.

We understand that Specialist Disability Accommodation and short-term accommodation and assistance providers must complete enrolment or registration with the NDIA,⁸⁰ while a residential service must receive approval from Department of Fairness, Families and Housing.⁸¹ There is a need for clearer communication and information-gathering processes surrounding service identification between the Department of Fairness, Families and Housing, Consumer Affairs Victoria and the NDIA.⁸² In our view, the new Disability Act could assist by requiring Specialist Disability Accommodation, short-term accommodation and assistance, and disability residential service providers to be reported to Consumer Affairs Victoria,⁸³ so that the various places community visitors can visit are consolidated into a single register. We note that similar registers exist in Victoria for other classes of accommodation, such as rooming houses.⁸⁴

Recommendation 19: Supporting the oversight role of community visitors

To clarify and strengthen the role and powers of community visitors in a post-NDIS environment, the new Disability Act should provide that:

- a. Specialist Disability Accommodation providers are required to take steps to make sure that residents are informed of the more limited oversight role of community visitors where a standard rental agreement is in place and of their ability to request community visitor involvement. Compliance with this requirement to be subject to external reporting and auditing.
- b. Community visitors are able to enter Specialist Disability Accommodation where a person has entered a rental agreement under the Residential Tenancies Act without consent where they have formed a reasonable belief that a resident may be at risk of abuse or neglect and they have not been able to obtain the residents' consent despite reasonable steps being taken.
- c. All Specialist Disability Accommodation, short-term accommodation and assistance and disability residential services providers are reported to Consumer Affairs Victoria, so that the various places community visitors can visit can be consolidated into a single register.

⁷⁹ Now the Department of Families, Fairness and Housing.

⁸⁰ *Disability Act 2006* (Vic) s 3.

⁸¹ *Disability Act 2006* (Vic) s 3.

⁸² Office of the Public Advocate (2020), *Community Visitors Annual Report 2019-20*, 38.

⁸³ By the NDIA, DFFH and Specialist Disability Accommodation-enrolled providers.

⁸⁴ See: [Consumer Affairs Victoria public register](#).

6. Forensic disability services and sentencing

6.1 People with disability in Victoria's criminal justice and forensic systems

VLA represents people with disability who are accused of criminal offending in all court jurisdictions of Victoria. Our clients are in custody and the community, and those in the community may be subject to court ordered obligations, such as bail conditions, or sentencing orders after being found guilty of a criminal offence.

We also represent people who are subject to supervision orders under the Crimes Mental Impairment Act who are either detained in prisons and forensic facilities or subject to supervision in the community. Such orders are commonly in place for many years and we represent clients when orders are reviewed by the Court, or a party makes an application to change the order.

Through this work, VLA sees:

- People entering the justice system because their disability-related needs are not being adequately met by accommodation, services and supports in the community.⁸⁵
- People with disability, including people on forensic orders, ending up in prison rather than appropriate accommodation, and without access to appropriate disability supports.
- People with cognitive disability subject to use of restrictive practices in the prison system, including chemical restraint, which is not subject to the same regulatory standards as outside custody.
- People being unable to maintain or obtain NDIS supports while in prison, which limits pathways for people to transition out of prison or the forensic system into the community.
- People with disability, including those on forensic orders, spending disproportionately long periods in custody (prison or restrictive forensic settings) because of lack of clear responsibility to provide necessary disability support in prisons and the criminal justice system.

In our practice experience, we also see that people with cognitive disabilities may have greater difficulty in modifying their behaviour and complying with police directions or court orders, increasing the risk of criminal charges, arrest and custody. Failures in access to appropriate supports can result in people entering the criminal justice system, at which time they are then unable to maintain or obtain NDIS supports while in prison, which limits pathways to transition out of prison or the forensic system into the community..

An overview of the forensic system – people subject to Crimes Mental Impairment Act orders

In Victoria, if an accused is either found to be not fit to be tried or not guilty by reason of mental impairment, the court must either declare that a person is liable for supervision or order their unconditional release. The most common order is for a court to declare a person

⁸⁵ This could be because plans and supports that do not adequately meet people's needs; a result of market failure or 'thin markets', whereby people are not able to access services and supports they are funded to receive; or due to responsibility shifting between the NDIA and State- and Territory-funded services.

is liable for supervision.⁸⁶ The court must then make a custodial or non-custodial supervision order for a nominal term, and orders are reviewed at regular intervals. Supervision orders under the Crimes Mental Impairment are indefinite orders, although have nominal terms with periodic court reviews. A court can revoke (end) an order after considering a number of factors, including the current nature of the person's disability, risk of harm to themselves and the community, and ongoing availability of community treatment and support.

Forensicare provides treatment and supervision of people on orders under the Crimes Mental Impairment Act because of mental health issues, including providing inpatient services at Thomas Embling Hospital for those on custodial orders. As at 30 June 2020, there were 171 people on Crimes Mental Impairment Act supervision orders because of mental health issues who were supervised by Forensicare.⁸⁷

The Disability Forensic Assessment and Treatment Service provides supervision and treatment for men who fall under the Crimes Mental Impairment Act because of disability, including in secure facilities for those on custodial orders. Data is not published in regard to the number of people on Crimes Mental Impairment Act orders because of disability or the number of people on supervision orders in prison.

There is no specialist forensic disability facility in Victoria for women with other disabilities such as cognitive impairment.

6.2 Prolonged detention in prison because of lack of planning, coordination and exit pathways

As Jim's and Peter's stories in this part show, we continue to see people falling between the responsibility of the NDIS and mainstream service systems since transition to the NDIS. For people with disability in the forensic or justice systems, including for NDIS participants, it is unclear which agencies are responsible for: identifying people with disability entering prison; overseeing what services can and should be provided to people who enter the forensic or justice system; facilitating access; and ensuring people get the services they are funded to receive, including where the supports are related to a person's disability and their offending.

A growing prison population in Victoria has resulted in delays to assessments for Crimes Mental Impairment Act fitness and impairment proceedings, sentencing and custodial intake assessments, and the lack of appropriate services is exacerbated by the limited coordination and communication between service providers. VLA's client Jim was held in custody for over 200 days mainly due to a vacuum of responsibility about which agency should provide his support services upon release.

Jim:⁸⁸ Unable to get out of custody due to falling through system responsibility gaps

Jim is an Aboriginal man in his 20s. Jim has a good sense of humour, enjoys music and is skilful in remembering lyrics and tunes, he likes to play football and is talented at woodwork.

⁸⁶ Unconditional release is very rare once a person is found unfit to plead or not guilty by reason of mental impairment under the Crimes Mental Impairment Act.

⁸⁷ Forensicare Annual Report 2019-2020, 46.

⁸⁸ Name has been changed.

He also has many challenges, including a moderate intellectual disability, psychiatric conditions, behavioural disorders and physical disabilities. Jim has a significant history of physical and emotional trauma.

Jim met his VLA lawyer when facing criminal charges that occurred in the context of trying to get money to buy drugs. Jim was remanded into custody and was unable to be released because he had no suitable supported accommodation and support services in the community, despite being extremely vulnerable in custody.

The NDIA refused to take full responsibility for Jim's needs, stating through the Disability Justice Advocate 'the difficulty with Jim is that he has issues in so many areas - mental health, substance dependence and homelessness, that it is not only his disability impacting his accommodation issues.' Jim has a current NDIS worker as well as a Disability Justice Advocate, however neither were able to secure accommodation for him.

Jim ultimately spent over 200 days in custody, in large part due to a lack of central responsibility for his circumstances. While individuals tried their best, as a whole, organisations were pushing away responsibility because his issues were 'too complex' and fell outside their jurisdiction. He spent far more time in custody than warranted, taking into consideration the severity of the allegations, viewed in the context of his complex disability and prospects for rehabilitation. Jim said to his VLA lawyer, **"if I had housing and support, none of this would have happened."**

Peter was in prison over four years despite being found unfit to stand trial.

Peter:⁸⁹ Found unfit to stand trial, but spent over four years in prison without appropriate therapy and subjected to chemical restraint

Peter has a significant acquired brain injury (**ABI**) and is currently on a non-custodial supervision order (**NCSO**) under Victoria's Crimes Mental Impairment Act. He is now living at a brain injury rehabilitation unit.

Peter was admitted to the unit in 2021, but before that he spent more than four and a half years in prison since being remanded at the time of his offence in late 2016.

In 2018 Peter was found unfit to stand trial and placed on a supervision order. The Crimes Mental Impairment Act allows a person on a supervision order to receive treatment and support, rather than a criminal sentence. As there was no suitable supported housing available, Peter was committed to custody in prison on a custodial supervision order with a nominal term of 20 years. In the court ruling, the judge recognised that this was a regrettable outcome but found there was no practicable alternative to prison for Peter at that time. The judge commented on the need for appropriate housing to be found and noted that "hope was expressed that the NDIS would be available to pay for 24 hour staffed accommodation" for Peter in the future.

⁸⁹ Name has been changed.

Despite the court's comments, options for Peter to be released from prison were not explored or progressed for some time.

Peter's ABI has significant impacts on his ability to concentrate and process information, and on his communication and memory. Peter was not able to recall what prison he was in, why he was in prison, the names of his parents, siblings, where his family lives or the names of his children.

Peter's family would visit him regularly in prison and were distressed by his situation. They felt powerless to do anything to change his situation. Peter was subject to high levels of medication, amounting to chemical restraint, resulting in him being severely sedated in his cell for most of the day. Neither his family nor his legal guardian were informed of this. His family became very concerned when they were later informed that his sedation was due to a very high dose of medication that they had not been aware of.

Peter also didn't receive the occupational therapy he was supposed to while in prison which impacted on his ability to develop skills for independent living.

In 2019, Peter was assessed to be eligible for the NDIS and a plan was developed that included funding for assessment and planning to assist with transition to a community-based setting. Further work was delayed however until suitable accommodation could be secured. Victoria Legal Aid became involved with Peter in mid-2019 and was able to assist in progressing his matter.

The chemical restraint that Peter was subject to delayed access to NDIS funded accommodation and support because of the need to find a provider who could manage the regulatory requirements for the use of restrictive practices. This meant that in order to be released, Peter had to go through the process of withdrawing from high doses of medication whilst in prison rather than a more therapeutic environment. It was in this context that Peter's family first became aware of the level of medication Peter had been prescribed.

The use of chemical restraint, combined with lack of appropriate therapy over an extended period, meant that Peter was largely unable to progress his rehabilitation and independent living skills whilst in prison which has made the transition to the rehabilitation unit challenging and may ultimately compromise his ability to remain there.

Peter is one of a number VLA clients with cognitive disability who remained in prison because of a lack of appropriate non-custodial housing and support options to facilitate his release. Peter's case shows that prison is a damaging environment for people with cognitive disability, as they are more likely to be subject to restrictive practices, such as chemical restraint, handcuffing and long periods of isolation in their cell to manage behaviour related to their disability. This can undermine rehabilitation and the development of living skills needed to support successful and sustainable transition out of custody.

These issues were highlighted by the Victorian Ombudsman's *Investigation into the Imprisonment of a Woman Found Unfit to Stand Trial*,⁹⁰ regarding our client Rebecca who spent almost two years in a damaging prison environment, without adequate treatment or support and subjected to restrictive practices such as 23-hour lockdown and solitary confinement. Rebecca's case highlighted the gaps

⁹⁰ See Ombudsman's report on a woman found unfit to stand trial, above n 56.

between the NDIS and mainstream services, which are especially acute for people with complex needs involved with the criminal justice system. In Rebecca's case, a lack of housing and services in the community to meet her disability related needs, as well as blurred lines of government responsibility, had severe consequences. Rebecca's case is one of many we see where the criminal justice system and prisons are being used to respond to mental health and disability. In the Ombudsman's report it was recognised that Rebecca remained in prison simply because there was nowhere else for her to go.⁹¹ Even fewer appropriate alternatives to prison are available for women than men.

The stories of Jim, Peter and Rebecca are powerful reminders of the need for a framework of service provision and accountability that makes sure people are getting the supports and services they need, and an established process when supports fail (see part 3.4 above).

Recommendation 20: Forensic programs, treatments and therapies for people with intellectual disability

We endorse VALID's recommendation (informed by people with intellectual disability with past or current involvement in the criminal justice system) that 'the Victorian Government reconceptualize and redevelop all forensic programs, treatments, and therapies for people with intellectual disabilities. Forensic programs should be well funded and codesigned with people with lived experience. Programs should be grounded in human rights principles and should be trauma-informed and person-centred'.⁹²

Recommendation 21: Service coordination for people in the forensic system

To prevent people with disability coming into contact with the criminal justice system and to minimise the length and harmful effects of this contact when it does occur, the Victorian Government should take responsibility for service coordination for people in the forensic system (a person on an order or in custody), including:

- a. Providing information about a person's treatment or services to courts to enable informed decisions regarding sentencing or bail.
- b. Ensuring continuity of services between the justice or forensic systems and the community.
- c. Transition planning.
- d. Recording and reporting on all people who remain in custody or forensic facilities because of a failure to secure disability services.
- e. Clarifying and promoting, including for people with disability, their families and carers, who is responsible for arranging, funding and providing services to people with a disability in the justice system (noting the particular challenges of system navigation for those with cognitive disability).
- f. Embedding a service safety net where market failure leads to people with complex needs becoming engaged with the criminal justice system, to ensure appropriate therapeutic disability supports are available while in custody, and reduce delays in providing pathways out of custody for people with disability (see also recommendation 10 above).

⁹¹ Ibid.

⁹² VALID, *Justice for All* (September 2021) 9 (recommendation 17).

6.3 Expanding access to specialist therapeutic intervention through the Courts

We see through our work that our clients sometimes find it challenging to comply with their orders due to insufficient access to services, and a supervision environment that is inherently compliance driven and not well equipped to manage and assist people experiencing complex issues.

Clients have found it difficult initiate or seek out contact with appropriate disability supports (such as a disability case-worker as could otherwise be offered as part of a Justice Plan) to comply with court-ordered obligations and goals for rehabilitation (for example, forgetting appointments or to notify any changes of address), and their consequential non-compliance with their obligations contributes to their behaviours becoming increasingly criminalised.

This carries the risk of a person moving deeper into the justice system for breaching the conditions of their order, rather than because of new offending. If a person is not supported to manage related issues, such as drug or alcohol dependence, there is also a risk of further offending.

Currently, section 80 of the Sentencing Act and provisions under the Children, Youth and Families Act in relation to pre-sentence reports and the ability to order that a person participate in disability services, are confined to people with intellectual disability within the meaning of the Disability Act.

Our lawyers regularly see clients who are assessed as an adult as having an intellectual disability, however do not meet the definition of intellectual disability in the Disability Act. This may be due to social and other circumstances that prevented them being assessed as a child, and therefore not meeting the requirement of being assessed before 18 years of age.

Our lawyers also see an over-representation of people with an acquired brain injury or other cognitive disability in the criminal justice system. Whilst other forms of cognitive disability such as acquired brain injury may arise differently from intellectual disability, they can result in similar levels of functioning and need for support. For this reason, people with significant support needs arising from cognitive disability other than intellectual disability should not be excluded from the kind of therapeutic specialist intervention and assistance provided to those who have an intellectual disability. Accordingly, VLA supports amendments to the Sentencing Act and the Children, Youth and Families Act to apply these provisions to cognitive disability rather than intellectual disability. Cognitive disability could then be defined in the Disability Act on the basis of functioning and support needs.

Recommendation 22: Access to therapeutic services and supports for people with cognitive disability

The provisions in the Sentencing Act and the Children, Youth and Families Act in relation to pre-sentence reports, and the ability to order that a person participate in disability services, should be extended to people with cognitive disability.

Annexure 1: Snapshot of VLA clients

