


Protecting people with disability in the forensic and criminal justice systems

Submission to the Inquiry into the National Disability Insurance Scheme Quality and Safeguards Commission (June 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 who today are still arrested and imprisoned at rates far higher than other Australians.

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

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Executive summary

Victoria Legal Aid (VLA) is the largest provider of legal services to people with disability in Victoria. In 2017, VLA's client who was unfit to stand trial because of his disability spent 180 days in jail after his NDIS funded supports withdrew meaning he could no longer live in his house. In reviewing Francis's situation, Justice Lasry said:

*'He's in 23-hour lockdown at Melbourne Assessment Prison. I can't imagine a worse place for him. The longer he is there the more he will be damaged. Who knows what damage has been done already?'*¹

Four years on and VLA continues to see:

1. People with disability, including people on forensic orders, ending up in prison rather than appropriate accommodation, and without access to appropriate disability supports.
2. 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.
3. 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.
4. People with disability, including those on forensic orders, spending disproportionately extensive 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.

We welcome the invitation of the NDIS Joint Standing Committee to provide written evidence focussed on people on forensic orders as part of its Inquiry into the National Disability Insurance Scheme Quality and Safeguards Commission.²

This submission contains the stories of four VLA clients with disability, Peter, Alex, John and Jim,³ who ended up in prison. Peter and Alex were on forensic orders after being found unfit to stand trial, so should have been diverted from prison to supported accommodation appropriate to their needs. Because this was not available, they were in prison for a combined total of over five years.

Despite having complex disabilities, John and Jim were in the mainstream justice system, and both were unable to get out of custody because of the absence of housing and services.

Each of these people was damaged by the prison environment, including through restrictive practices, such as chemical restraint, handcuffing and long periods of isolation in their cell to manage behaviour related to their disability and their inability to cope in the prison environment.

¹ Emma Younger, 'Man with intellectual disability released from Melbourne prison after judge 'horrified' by conditions' (24 November 2017) (available at: <https://www.abc.net.au/news/2017-11-24/judge-releases-man-with-autism-from-melbourne-jail/9186352>); 'Emergency intervention removes disabled young man from prison' 7.30 (9 November 2017) (available at: <https://www.abc.net.au/7.30/emergency-intervention-removes-disabled-young-man/9135942>).

² We note that the May 2021 hearings of the NDIS Joint Standing Committee in its Inquiry into the National Disability Insurance Scheme Quality and Safeguards Commission were focussed on people on forensic orders (despite this not being within the original terms of reference). VLA was invited to appear at these hearings or, in the alternative, to provide a written submission based on our experience working with people in the forensic system.

³ Names and some identifying details of clients have been changed throughout this submission.

Their time in prison was prolonged by the lack of clear processes in place to access the NDIS while they were in prison or to support their transition out.

The current discussion regarding the jurisdiction of the NDIS Commission in relation to people on forensic orders and in the justice system is symptomatic of the broader debate about responsibilities between the NDIA and mainstream service systems since transition to the NDIS. It also highlights the vacuum of accountability this confusion creates. 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 NDIS funded 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.

In this context, the health and wellbeing of people on forensic orders could benefit significantly from some of the key roles the NDIS Quality and Safeguards Commission (**NDIS Commission**) plays, including regulating NDIS service providers, promoting safety and quality of services, providing national consistency, resolving problems and identifying areas for improvement.⁴

Even where the NDIS Commission may not be the right body to directly undertake the roles required, we draw the issues we see through our work to the attention of the Joint Standing Committee to inform your inquiry and recommendations, so that these issues can be addressed.

⁴ NDIS Quality and Safeguards Commission <<https://www.ndiscommission.gov.au/>>.

Recommendations

Informed by our work, we set out the following opportunities for improved leadership, coordination, oversight and regulation in relation to people on forensic orders.

1. Support and regulate a system that can engage with complexity and prevent offending

We see people who become the subject of forensic orders, or otherwise enter the criminal justice system, because their disability support needs have not been met. 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;⁵ or due to responsibility shifting between the NDIA and State- and Territory-funded services.

To play a role in preventing the criminalisation of people with disability, the NDIS Commission should:

- Provide effective oversight of the quality of support to ensure that behaviours related to a person's disability are effectively supported to prevent NDIS participants ending up in the criminal justice system.
- Provide NDIS market oversight, including by monitoring changes in the NDIS market which may indicate emerging risk, and by monitoring and mitigating the risk of unplanned service withdrawal.
- Promote and inform urgent work to address the gaps between the NDIS and mainstream services, including the need for a service safety net in urgent cases where market failure leads to people with complex needs engaging with the criminal justice system, ensuring appropriate therapeutic disability supports are available while in custody, and reducing delays in providing pathways out of custody for people with disability.⁶

2. Provide leadership on the use of restrictive practices to manage behaviours related to disability for people in custody

The experiences of both Peter and Alex (set out below) highlight the particular harm done to people with cognitive disability by the use of restrictive practices in the prison system, such as the chemical restraint that Peter was subjected to.

⁵ Victoria Legal Aid, [Ten Stories of NDIS 'Thin Markets': Reforming the NDIS to meet people's needs](#), submission to the Department of Social Services and the National Disability Insurance Agency's NDIS 'Thin Markets' Project (June 2019) (**Thin Markets Submission**).

⁶ As the Joint Standing Committee knows, the '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. We understand this is the third time that Committee has highlighted that the publication and implementation of a PLR arrangement (or similar framework) is necessary and that it remains unactioned. See also 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).

Informed by its work providing practice advice on the use of restrictive practices, including consultation with State and Territory governments,⁷ the NDIS Commission should:

- Provide leadership on the use of restrictive practices to manage behaviour related to disability for people in prisons.
- Consider setting national standards for the use of restrictive practices to manage behaviour related to disability for people in prisons.
- Promote consistent regulatory standards for restrictive practices in prisons to align with regulatory standards elsewhere.

3. Improve access to disability services in custody and make sure that people with disability do not remain in prison simply because of a lack of appropriate support

People's need for disability services does not end when they enter custodial environments. To support access to disability services and supports for people in custody, and to minimise the negative impact and harm of imprisonment for people with disability, the NDIS Commission should:

- Accept and promote the role it can play when a person enters the justice system, including supporting access to the NDIS and NDIS funded services for people in prison and forensic facilities.
- Support or coordinate the identification by the National Disability Insurance Agency (NDIA) and State and Territory governments, as well as ongoing monitoring and reporting, of all people who remain in custody or forensic facilities because of a failure to secure disability services.
- Be more assertive in its complaints outreach and monitoring of issues for people on forensic orders and criminal orders who may be eligible for NDIS support, and proactively engage with those people as they face many barriers to making complaints and navigating the system.

4. Address barriers to transitioning out of custody

In the absence of proactive discharge and pre-release planning, people's exit from prison or forensic facilities can be delayed, causing people to be stuck in prison or forensic facilities. Ineffective discharge and transition planning or subsequent market failure means a person exits with inadequate supports and is more vulnerable to re-offending or readmission.

The NDIS Commission should:

- Consider setting national standards for transition planning and supports for people with disability who are detained, including maintaining an appropriate intensity of support to prevent people re-entering the criminal justice system.
- Make sure it is clear, including to people with disability, their families and carers trying to navigate the system, 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.

⁷ See NDIS Quality and Safeguards Commission, *Regulated Restrictive Practices Guide* (October 2020) (NDIS Commission Restrictive Practices Guide).

Victoria Legal Aid, our work and Victoria's forensic system

VLA is a statutory agency responsible for providing information, advice and assistance in response to a broad range of legal problems. Working alongside our partners in the private profession, community legal centres, and Aboriginal legal services, VLA assists people with legal problems such as family separation, child protection, family violence, discrimination, criminal matters, fines, social security, mental health and tenancy.

VLA is the largest provider of legal services to people with 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; and 14% were in custody, detention or psychiatric care.⁸

Relevantly to this inquiry, VLA's specialist services for people with disability and experiencing mental health issues, including people subject to forensic orders, include:

- **Specialist mental health legal practice.** Our Mental Health and Disability Law program provides 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. In 2017–18, we appeared for clients in 93 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (**Crimes Mental Impairment Act**) hearings in the County Court and Supreme Court, as well as at the Forensic Leave Panel for clients on supervision orders seeking access to leave.
- **Criminal legal practice.** Our Criminal Law program provides support for people involved in the criminal justice system. This includes our specialist Therapeutic Courts and Programs team, comprising lawyers working in the Assessment and Referral Court List in the Magistrates' Court, our specialist practice with clients who fall under the Crimes Mental Impairment Act, as well as duty lawyers assisting people with mental health issues and disability whose matters are dealt with through mainstream criminal justice processes.
- **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.
- **Non-legal advocates and consumer experts.** 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's *Speaking from Experience* advisory group is made up of people who have lived experience of mental health issues and the public mental health system.

This submission is informed by our work for accused persons in the Magistrates' Court and in indictable crime trials in the higher courts, as well as our representation of people subject to supervision orders under the Crimes Mental Impairment Act who are detained in prisons and forensic

⁸ See Victoria Legal Aid, *Annual Report 2019–20 (2020)* <<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.

facilities and subject to supervision in the community. Such orders are commonly in place for many years and we work with clients throughout the life of the order.

In Victoria, following a finding of not guilty by reason of mental impairment or unfitness to be tried under the Crimes Mental Impairment Act, the court must either declare that a person is liable for supervision or order their unconditional release. The most common order under the Crimes Mental Impairment Act is for a court to declare a person is liable for supervision.⁹ The court must then make a custodial or non-custodial supervision order. Supervision orders under the Crimes Mental Impairment Act are indefinite orders and can only be brought to an end by a court determining that to do so would not present a risk of harm to the person on the order or anyone else.

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. 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.¹⁰ 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.

People whose criminal cases proceed under the Crimes Mental Impairment Act are initially assisted through VLA's Criminal Law program and, once a supervision order is made, the Mental Health and Disability Law team within the Civil Justice program is responsible for this work.

People with disability, including on forensic orders, in prisons

Through our work, we see that clients with cognitive disability and mental health issues are ending up in prison when services, including NDIS funded services, do not adequately ensure that behaviours related to a person's disability are effectively supported to prevent offending. This can be because the services are not suitably qualified to deal with the complexity of a person's needs, the person's NDIS plan does not provide for adequate supports or there has been unplanned service withdrawal.¹¹

In addition, we see clients with cognitive disability ending up in prison despite being on a forensic order because of a lack of appropriate non-custodial housing and support options. Once in prison, there is significant confusion about when a person can receive funding for NDIS supports, and barriers to accessing those supports both in prison and as part of planning for release. Prison is not an environment equipped to meet the needs and people with disability and, as Peter and Alex's stories below show, the harm they experience affects people's ability to exit and jeopardises their release.

The transition to the NDIS has complicated the service landscape for people with disability, particularly those in contact with the justice system. It has multiplied the number of organisations that may need to be involved, leading to increased confusion and reduced accountability and resulting in

⁹ 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.

¹⁰ Forensicare Annual Report 2019-2020, 46.

¹¹ See John's story below. See also Thin Markets Submission, above n 5.

those who are intended to be diverted from sentence to disability accommodation and support as a result of their significant cognitive impairment, spending prolonged periods in prison before commencing the process of treatment and rehabilitation that has been determined necessary to manage their risk of reoffending and as required by their order.¹²

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

Peter: 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 and Unfitness to be Tried) Act 1997*. 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. In such cases, the intention of the legislation is that those found unfit to stand trial should not be held criminally responsible, but diverted to treatment and support. 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.

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 sister became very concerned when she was later informed that his sedation was due to a very high dose of medication that she 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-

¹² Under the Victorian *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* people found unfit to stand trial or not guilty by reason of mental impairment are made subject to supervision orders to manage future risk through access to treatment and support, recognising long standing principles that they should not be held criminally responsible. Under the Act, a person can only be made subject to custody in a prison where there is 'no practicable alternative'.

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 sister 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 have ended up in prison when they are placed on a forensic order because of a lack of appropriate non-custodial housing and support options. As Peter's case shows, 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 and their inability to cope in the prison environment. This can undermine rehabilitation and the development of living skills needed to support successful and sustainable transition out of custody.

Similarly to Peter, the court was reluctant to send Alex to prison, but said there were no alternatives. As a young person with a disability, he became acutely distressed in prison. When he eventually was released the sustainability of his transition was jeopardised by inadequate supports.

Alex: 6.5 months in prison, distressed, barely eating and self-harming

Alex is a young person with a number of complex cognitive and developmental disorders. He was living with his parents and on a NDIS plan which provided staff to support his disability needs on a daily basis.

Alex was charged with non-violent offending and found unfit to plead. He was placed on a non-custodial supervision order and continued to live at home with his family.

Over the next few months, there were some incidents in which Alex put himself in danger and the police were called. Alex was brought before a judge who reluctantly decided there was an unacceptable risk that Alex might reoffend, or hurt a family member or himself. Consequently, he was placed on a custodial supervision order. At the time, the court acknowledged that it was a difficult decision to have to send such a young person with Alex's disabilities to prison. However, there were no other options open for Alex.

There were no available placements in treatment facilities which could support Alex and his disability. Because there was nowhere for Alex to go, he was sent to prison. For almost a month he was held in 23-hour isolation, locked in a tiny cell in conditions which had a significant detrimental impact on his health and wellbeing.

Alex was in prison for 6.5 months. He was acutely distressed and barely eating. His ability to communicate was affected and he routinely engaged in self-harming behaviour. The

situation was very distressing for his parents who are his strongest personal support but were unable to visit him.

Alex's doctors said his time in prison would harm him further and hinder any progress he had made from treatment.

While he was in prison, disability advocates and his NDIS Support Coordinator tried to find suitable accommodation for Alex in the community. There were delays caused because of the lack of available specialist disability accommodation for young adults like Alex as well as misunderstandings about Alex's eligibility for this accommodation under the NDIS. Although Alex is still young, he no longer qualifies for specialist accommodation services which supported him when he was a child and no suitable specialist disability accommodation could be found for him to live in.

Alex stayed in prison until a placement in disability accommodation became available for him.

When Alex was released in early 2020, he was placed as the only resident in a house with 24 hour NDIS funded support staff. This housing was funded by the Victorian Department of Families, Fairness and Housing for six-months. Unfortunately, the NDIS support staff provider lacked the appropriate expertise to properly support Alex, especially in the context of COVID restrictions. Appropriately engaging activities were limited and he spent increased time sleeping, absconded frequently, caused property damage and injured himself.

There was a risk that Alex would be returned to prison. This was a distressing time for Alex's family knowing the risk to their son's wellbeing if he returned to prison.

In early 2021, accommodation funding was secured as part of Alex's NDIS package to pay for medium term accommodation pending building of a robust specialist disability accommodation property. That is expected to be available early in 2022. His service provider changed with the move to the medium term accommodation, with the hope and expectation that more tailored and engaging services will be provided.

Both Peter and Alex's cases highlight that there are no clear processes in place to follow up access to the NDIS for people whilst they are in prison or to support their transition out, despite the significant access barriers that result from cognitive disability, compounded by the prison environment and the disproportionate impact of the imprisonment on this group of people.

The gaps in access, accountability and oversight have significant and long-term impacts for the health and wellbeing of people with disability in prison, create anxiety and distress for families and carers, and should be addressed as a priority.

Refer to recommendations 1 – 4 above.

Indefinite detention in prison or forensic facilities because of lack of planning, coordination and exit pathways

Limited transition support out of prison or the forensic system

In a submission to the NDIS Thin Markets Project in June 2019,¹³ Victoria Legal Aid, Northern Territory Legal Aid and Legal Aid Queensland identified clients who remain in prison, inpatient units or forensic facilities because of a failure to secure disability services. These stories highlighted the significant harm experienced by people in restrictive environments, which was caused by delays and system failure at each stage of the NDIS planning process.

We continue to see the barriers for clients with disability to access appropriate NDIS supports to facilitate their integration into the community and gradual exit from the system. This can have significant consequences for a person's rehabilitation and recovery.

For people in forensic facilities, this often leads to longer and at times clinically unnecessary periods of detention and we frequently see people remaining under custodial supervision under the Crimes Mental Impairment Act for longer than any term of imprisonment they would have received through ordinary criminal justice processes or than is necessary to manage their risk of reoffending.

This disproportionately impacts Aboriginal and Torres Strait Islander people, who are significantly over-represented in prisons and among those with disability in Australian prisons and forensic detention facilities.¹⁴

For people in the mainstream justice system, as John's story shows, the lack of adequate NDIS funded services and stable housing can contribute to people with disability spending prolonged periods in prison because they are unable to secure bail.

John: In custody for almost 10 months because of lack of housing and supports

John has an ABI and a diagnosis of schizophrenia, and his disabilities have contributed to past problematic substance use, lack of employment, and limited community engagement. He has a history of mostly low-level offending. His disabilities have a significant impact on his everyday functioning, and his behaviours of concern limit his housing options. When he has received consistent community supports, John has been most successful in retaining accommodation and avoiding reoffending.

When John transitioned to the NDIS, his plan was not sufficient to support him to live well in the community. Without the supports he needed, John committed further offences and was taken into custody. John could be placed on the waiting lists for community and public housing providers, but any housing option was unlikely to be sustainable for John without intensive daily support.

¹³ Think Markets Submission, above n 5.

¹⁴ See, eg, Eileen Baldry, "Over 1,000 Australians with cognitive disability are detained indefinitely each year. This shameful practice needs to stop", *The Conversation*, 17 February 2021; Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander Health Performance Framework - summary report 2020*. See National Aboriginal and Torres Strait Islander Legal Services, Submission to the Disability Royal Commission's Criminal Justice Issues Paper (May 2020) <<https://disability.royalcommission.gov.au/system/files/submission/ISS.001.00157.PDF>>. See also NDIS Commission Restrictive Practices Guide, above, n 7 regarding family-centred and culturally inclusive services that understand the role and importance of culture in a person's life.

After re-entering custody, John remained in custody on remand, and applications for bail for John were adjourned and then withdrawn because of the absence of suitable housing in the context of his minimal supports.

At John's hearing, the Magistrate indicated she would be satisfied that John had spent sufficient time in custody in relation to his offences but would only release him if appropriate supports were in place. A supported residential service said it could hold a room for him pending further planning, but it could not hold John's housing indefinitely if the support was not confirmed.

Eventually John's NDIS plan was reviewed and his supports were increased to provide 24/7 support for him in his home. These supports made living at the supported residential service feasible for John.

It took 10 months for an NDIS plan review, which led to a sustainable post-release package of supports. For the majority of this time, John was in custody.

Poor planning and coordination, service withdrawal and the risk of re-offending

Poor planning or subsequent 'market failure', including service withdrawal, can mean that a person exits with inadequate supports and is more vulnerable to re-offending or readmission.

People with intellectual disability, acquired brain injury, autism and personality disorders are more likely to be impacted by 'market failure' as few support services are designed to respond to these intersecting needs. This impact has been visible through over-representation in the criminal justice system for some time.

The lack of appropriate services is exacerbated by the limited coordination and communication between service providers, as well as structural complexity and difficulty in accessing information about eligibility and capacity.

Although the NDIS has responsibility to fund transition supports to facilitate someone's transition from the custodial setting,¹⁵ as discussed above, people experience significant difficulties accessing pre-release planning and transition support from NDIS service providers.¹⁶

Peter, Alex and John's stories above all show the importance of planning for a person's release before their sentence is complete or discharge is imminent so that supports are in place to facilitate successful discharge or release and reduce risk of reoffending or readmission.

Resolving these issues does not necessarily require a new policy or legislative response. It requires additional investment in transitional support and forensic mental health and disability services to match increased demand and overall population growth to ensure that the service response gives effect to the current legislation and clinical framework.

It also requires clear mechanisms for accountability and oversight.

Refer to recommendations 1 – 4 above.

¹⁵ National Disability Insurance Agency, 'Justice', (Web Page, 11 December 2018) <<https://www.ndis.gov.au/understanding/ndis-and-other-government-services/justice>>.

¹⁶ See Thin Markets Submission, above n 5; National Legal Aid, *Putting people first: Removing barriers for people with disability to access NDIS supports* (November 2019) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-putting-people-first-removing-barriers-for-people-with-disability-to-access-ndis-supports-11-2019.pdf>>.

Gaps in accountability and oversight for people with disability in the criminal justice system

In Victoria, we see through our work that a lack of clarity about responsibility within the criminal justice, health and disability systems contributes to the risk that people with disability will be drawn into the criminal justice system and get stuck in prison or other restrictive environments because of a lack of appropriate disability support.

Responsibility for the provision of disability support to people on custodial and non-custodial supervision orders in Victoria is divided between:

- Department of Justice and Community Safety – with responsibility for disability and mental health services in prisons and community corrections
- Department of Health – with responsibility for mental health services
- Department of Families, Fairness and Housing – with responsibility for disability services.

The introduction of the NDIS has further complicated this, as the delivery of support to a person with disability on a forensic order will now also require the person to go through NDIS application processes and coordinate NDIS provision along with State funded services.

The delimitations of service responsibility for people in the forensic disability system are not clearly defined and can be the subject of disagreement between the NDIA and State funded services. As the client stories in this submission have shown, this can create a significant administrative and resource burden on those involved in service planning and coordination and result in significant delay in securing appropriate services. Sometimes, neither State or Federal governments, nor the NDIA, accept responsibility for service provision, resulting in the services needed for a person to live safely in the community simply not being available.

The Royal Commission into Victoria's Mental Health System called attention to this gap in regard to prison-based mental health services. The Royal Commission highlighted that "multiple bodies have oversight roles over such services, but the service provision in correctional settings is not subject to the Chief Psychiatrist's standards, guidelines, monitoring, data analysis or public reporting."¹⁷ The same gap exists for people with a disability.

As this submission has discussed, this can ultimately result in people remaining in custody for longer than they should, and not getting the services and support they need to stay out of the criminal justice system. As Jim's case below shows, a common theme that arises across VLA's work with people who are – or should be – engaged with the NDIS is the lack of systemic coordination. That is, no one agency or worker is responsible for a person's matter and for navigating the system, particularly for people in prisons or other restrictive environments or who face other additional barriers to doing that themselves.

¹⁷ Royal Commission into Victoria's Mental Health System, *Final Report: Volume 4 – The Fundamentals for Enduring Reform*, 257. See also generally the discussion in Chapter 30.5 *Current regulatory and independent oversight arrangements*, 251ff.

Jim: 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.

He also has many challenges. He has a moderate intellectual disability stemming from a brain injury at birth. He has an extremely low range IQ in the low fifties, his diagnoses include severe psychiatric conditions, behavioural disorders and physical disabilities.

Jim has a significant history of physical and emotional trauma as well as sexual assault as a child. Child Protection was involved from when he was aged 8, he was removed from his parent's care a few years later and placed into state care, where he developed chronic polysubstance misuse at age 10 and left school aged 11. He has been homeless since aged 17 and for more than a decade he has slept on the streets in a sleeping bag. He has difficulties in emotional regulation, a long history of self-harm behaviour and suicidal ideation.

Jim has been on the Disability Support Pension for as long as he can remember. His goals are to find stable accommodation with appropriate supports including assistance with his finances and to be out of the criminal justice system.

Jim met his VLA lawyer when facing criminal charges that occurred in the context of trying to get money to buy drugs. He was located by the police and arrested, observed to be significantly impaired, unable to stay awake or answer questions in a coherent manner. 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." The NDIA said they would provide supported medium term accommodation for a maximum of six weeks – but only if he has alternative accommodation to go to after that time. Therefore, Jim's NDIS Senior Support Coordinator could not place Jim on a waitlist until he had accommodation in the community, but he could not get a place with specialist disability accommodation.

Jim has a current NDIS worker as well as a Disability Justice Advocate, however neither were able to secure accommodation for him. From the NDIS Senior Support Coordinator's perspective, a key difficulty was that the state funded accommodation organisations were not taking responsibility. His recent NDIS plan review resulted in an inadequate 16 hours per week of support, even though he requires extensive daily care. Both the Disability Justice Advocate and the Senior Support Coordinator escalated the situation internally, however, attempts to secure housing through all kinds of housing support and alternative providers were rejected, as well as specialist disability accommodation, on the basis that the current assessments were inadequate.

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.”**

These issues are not new. In 2018 the Victorian Ombudsman’s *Investigation into the imprisonment of a woman found unfit to stand trial* described the imprisonment of VLA’s client Rebecca, a 39-year-old woman with a significant developmental disorder, as ‘the saddest case I have investigated in my time as Ombudsman’.¹⁸ Rebecca’s case illustrates how blurred lines of government responsibility are having severe consequences for people with cognitive disability.

Rebecca¹⁹ loves listening to music and enjoys magazines, being taken for drives and swimming at the beach. From a young age she had difficulties with socialising, relationships, and dealing with change and stress. She was diagnosed with borderline intellectual function and pervasive developmental disorder (now classified as autism-spectrum disorder). Rebecca had lived at home her whole life until there was an incident in the home and the police applied for a limited intervention order. Rebecca struggled to understand the conditions of the intervention order; she would return home and arguments would ensue and police were called.

The situation went from bad to worse very quickly. Her limited verbal skills, difficulty controlling her emotional arousal and inability to cope with being touched or held by police made these incidents increasingly volatile. She was in and out of remand and every time things would escalate. Rebecca was charged with assault police on a number of occasions. These were quite minor assaults but bail was refused as she was said to be an unacceptable risk and she was remanded.

Over the next year and a half her lawyers tried to engage services to support Rebecca. During this time her stability and mental health continued to decrease. She had a care team which included Forensicare, Disability Client Services (**DCS**), local area mental health and the Multiple and Complex Needs Initiative (**MACNI**). However, she did not fall squarely into one service’s responsibilities and so was left languishing:

- Forensicare were unable to assist because she wasn’t diagnosed with a mental illness. She had received mental health system services from her teens until her 30s, at which time her diagnoses meant she was no longer eligible for those services.
- DCS had assessed Rebecca as not eligible for disability services. Though the reasons are not precisely recorded, it is clear that a narrow application of criteria to Rebecca’s assessments resulted in a decision that was not eligible.

¹⁸ Victorian Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (October 2018) (available at: <https://www.ombudsman.vic.gov.au/News/Media-Releases/imprisonment-of-woman-found-unfit-to-stand-trial>).

¹⁹ Rebecca is a pseudonym. The details about Rebecca’s background and criminal justice system interactions are from the Victorian Ombudsman’s report, *ibid*.

- Her local area mental health service discharged her just before she turned 35, because her behaviours were too challenging and it “had become clear that Rebecca required disability support and not medical treatment”.
- MACNI was willing to assist Rebecca even though she did not meet the criteria in its legislation, however there were delays with their assistance for various reasons outlined in the Ombudsman’s report.

Rebecca’s legal team was able to work with her guardian from the Office of the Public Advocate and her legal matter was finally able to be heard. Rebecca was approved for NDIS funding and a service provider was found. This set the ground work for the County Court to make a forensic supervision order releasing Rebecca from prison to her 24 hours a day supported accommodation.

The judge in Rebecca’s case stated that the time that she had to spend in custody awaiting support in the community which was safe and appropriate for her to live in was ‘unconscionable’, and said she might have been sentenced to a month in prison if she had been able to plead guilty and been sentenced for the charges. Instead, she was in prison for 18 months. Rebecca would have been released if she had housing and supports in the community. As the Ombudsman said, ‘[s]he remained in prison simply because there was nowhere else for her to go’.²⁰

With Rebecca we see the potential for tailored services for clients with complex needs who otherwise fall through the cracks, but also the inertia in the system as solutions are fashioned from scratch each time. For people like Rebecca, this means unimaginably long periods of time in custody.

The Victorian Ombudsman’s report clearly identifies the need for therapeutic responses and increased community support, to stop people with disability who do not belong in prison spending significant time there because of system and service failures.²¹ The Ombudsman considered the potential for the NDIS to fill some of the gaps in disability accommodation and services. Unfortunately, what we see through our work is that, for people in circumstances like Rebecca and Jim, the NDIS is creating more gaps than it is filling.

It is people like Jim and Rebecca, with complex cognitive impairments and mental health issues, who are most in need of services, and yet they fall through the cracks of responsibility. Clear mechanisms are needed for accountability and oversight of people eligible for the NDIS who are in the criminal justice system.

Refer to recommendations 1 – 4 above.

²⁰ Ibid.

²¹ The Ombudsman recommended that a senior officer be designated to centrally coordinate and oversee service responses to people subject to Crimes Mental Impairment Act proceedings and act as a contact point regarding service responses and advice for agencies and people involved in Crimes Mental Impairment Act proceedings; these should include people subject to the proceedings, their families and/or guardians, the courts, the Office of Public Prosecutions, defence lawyers and other advocates (recommendation 7). The Ombudsman also recommended that the government should coordinate regular, whole-of-government reporting on the management of people subject to custodial and non-custodial supervision orders under the Crimes Mental Impairment Act.

Annexure: Our clients

