National Legal Aid

National Legal Aid submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

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Contents

Executive summary

I applied for the NDIS in around June 2017. When I applied, I had been living with debilitating back pain since 2012, which meant I had to stop working. As a result, I developed anxiety which led to severe depression.

Having worked throughout my life, I thought the Government would be there to support me to get things like a mobility scooter to help me get around and do the small and simple things in life. Instead, I have faced four years of delay after delay – every time I think I'm finally going to get the support I need, they just turn around and ask for more reports, more documents, new assessments. I feel invisible and abandoned. – Gary* (Vic)[1]

National Legal Aid (**NLA**) welcomes the opportunity to make a submission to the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (**Disability Royal Commission**).[2]

NLA brings together the practice experience of the eight Australian state and territory legal aid commissions. In the 2020-21 financial year, legal aid commissions provided over 1.9 million legal services to people across the country.[3] These services included services to people with disability through Your Story Disability Legal Support supporting the Disability Royal Commission, and services to assist people in relation to the National Disability Insurance Scheme, mental health advocacy and guardianship, disability discrimination, accessible community legal education, and services in the criminal, family, family violence and child protection justice systems.

NLA recognises that people with disability are from diverse cultural groups and backgrounds, and have needs, priorities and perspectives related to their age, sex, gender, sexual orientation, race, and cultural and linguistic backgrounds, among other factors. We acknowledge the diversity of disability and the diversity of experiences of people with disability. We also acknowledge the impact of structural racism and colonisation on First Nations peoples living with disability, and the importance of trauma-informed care, cultural strengthening, and self-determination.

This submission adopts a life course approach that highlights the impact multiple systems and barriers can have on people with disability, at different times of life, as well as the potential cumulative impact of such experiences over their lifetime.[4] The Disability Royal Commission recognised:

A life course approach recognises that all stages of a person's life are not only connected with one another, but also with other people in society, and with the lives of past and future generations. For example, a person's experience of inclusion during their early years may have lifelong positive effects throughout their life whereas early experiences of exclusion may have lifelong negative effects.[5]

Within this life course approach, our focus is on legal and related problems, drawing on our service experiences, client stories and lived experience expertise relevant to these areas. These issues are highlighted through the stories of 43 clients with disability who were assisted by legal aid commissions across Australia.

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[1] All case studies marked with an asterisk in this submission have been de-identified.
[2] Based on the Disability Royal Commission's Terms of Reference, the term 'people with disability' is defined as people with any kind of impairment, whether existing at birth or acquired through illness, accident or the ageing process, including cognitive impairment and physical, sensory, intellectual and psycho-social disability (including mental health issues): *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Interim Report, October 2020), 557.
[3] NLA, *National Legal Aid Statistics 2020-21* (Web Page, 2022) https://www.nationallegalaid.org/ See the NLA Booklet (**enclosed**), which provides some further background to NLA and legal aid commissions.
[4] NLA made a previous submission to the Disability Royal Commission dated 28 March 2020 on the draft Terms of Reference.
[5] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Promoting Inclusion* (Issues Paper, 4 December 2020) 2.

We frequently see that people with disability experience discrimination, exclusion, and structural, systemic and practical barriers to accessing supports and services in all settings and contexts – from school, tertiary education, the workplace and the community, to mental health facilities and custodial environments. Children with disability who do not receive reasonable supports to participate in education are more likely to be excluded or disengage from school. The chronic lack of accessible, appropriate and affordable housing also leaves many people with disability homeless or in unstable accommodation.

Structural and systemic barriers to accessing the National Disability Insurance Scheme (**NDIS**) and other disability supports, services and funding mean that people with disability frequently instruct legal aid commissions that they do not receive adequate support to live freely and safely. Ongoing discrimination and lack of support leave many people with disability out of work, at risk of having children removed, and at increased risk of exposure to violence, abuse, neglect and/or exploitation.

The COVID-19 pandemic has had profound impact on the health, safety and wellbeing of people with disability, and their access to legal assistance and other services and supports. Measures adopted to curtail the spread of COVID-19 in prison, detention centres and other facilities further restricted access to legal advice and representation, family contact, and appropriate health care. Remote communities have experienced difficulties accessing face-to-face services due to restrictions on travel. In some remote communities where people do not own a telephone and/or reception is limited, access to legal and other support services has been further reduced.

NLA also welcomes the recognition of the importance of inclusion, community participation, and equality of access to services and support, regardless of attributes and geographic location. Through our work assisting people with disability across their life course and in various systems, legal aid commissions across Australia agree with the Disability Royal Commission that promoting a more inclusive and equitable society supports the independence and social connectedness of people with disability, and their right to live free from violence, abuse, neglect and exploitation. We consider this will also reduce the frequency of families being broken up, reduce entry to the criminal justice system, and reduce the likelihood of compulsory treatment and other restrictive practices being applied to people with disability.

NLA makes a range of recommendations to facilitate the rights of people with disability to live free from violence, abuse, neglect, and exploitation. These include the need for:

- appropriate resourcing of the NDIS
- cross-disciplinary education and training
- the expansion and enhancement of the services which support case management and access to the civil[6] and criminal justice and health systems
- raising the age of criminal responsibility
- a national human rights charter
- and the extension of Your Story Disability Legal Support.

[6] Including family law, family violence, and child protection.

Summary of recommendations

Informed by client stories, lived experience expertise, and the service delivery experience of legal aid commissions, NLA has identified the following 20 high-level recommendations to prevent the violence, abuse, exploitation, and neglect of people with disability, and create a fairer, safer, and more inclusive community. We note that more detailed recommendations appear throughout this submission and are listed in the **Annexure** to this submission.

Supporting children and young people with disability and their families

I. Commonwealth, state and territory governments should support people with disability to **attend school and participate on an equal basis** with others, and to maximise their learning, social connection and life opportunities, by:

   a. strengthening and promoting understanding of, and compliance with, relevant laws, including anti-discrimination laws, and standards, and

   b. adopting measures to prevent discrimination, exclusion and the use of seclusion and restraint in schools, including relevant data reporting which allows for monitoring of trends related to students with disability.

   c. encouraging a comprehensive understanding of issues affecting the participation of students with disability to be informed by data which allows for monitoring of trends related to students with disability. (Recommendation 1)

II. The National Disability Insurance Agency (**NDIA**), and state and territory governments should ensure that children with disability have access to **adequate timely NDIS and other disability supports**, wherever they live (including regional, rural and remote areas), that NDIA communications with participants are clear and efficient and effective NDIS resolution pathways are available for participants. (Recommendation 2)

III. State and territory governments should adopt and implement disability informed, culturally safe, holistic, therapeutic approaches to support children and young people with disability who are at risk of being taken into care or are in **residential care**. Police should not arrest or pursue criminal charges against such children if there are viable alternatives. (Recommendations 4 - 7)

IV. State and territory governments should avoid the **criminalisation** of children and young people with disability, including by raising the minimum age of criminal responsibility to 14 years. (Recommendation 8)

NDIS, housing, income, and other safe and effective supports

V. Commonwealth, state and territory governments should ensure that services and systems, such as the NDIS, coordinate to provide timely access to **high quality, culturally safe, trauma-informed, individualised supports** and treatment for all people with disability. (Recommendation 15)

VI. The Commonwealth Government should ensure that legal aid commissions are funded to levels appropriate to provide legal advice to NDIS applicants and to support legal advice and representation for meritorious applications to the AAT for review of NDIA decisions. (Recommendation 17)

VII. The NDIA should improve oversight of the **NDIS market** and strengthen mechanisms to address gaps between the NDIS and mainstream services. This should include adopting a service safety net for cases where market failure places people with complex support needs at risk of detention or systemic or long-term harm. (Recommendation 19)

VIII. The NDIA, and state and territory governments should increase the availability of appropriate, affordable, accessible **housing**, and support people with disability and mental health issues to find and maintain housing, as well as strengthen protections against unfair and discriminatory evictions of people with disability. (Recommendations 23- 26)

IX. The Commonwealth Government should ensure adequate **income replacement supports** for people with disability, including by implementing changes to the eligibility criteria and impairment tables of the Disability Support Pension (**DSP**). (Recommendation 27)

Family law, family violence, elder abuse, and child protection systems that responds to the needs of people with disability

X. Commonwealth, state and territory governments should improve the **family law, family violence and child protection systems** for people with disability through:

a. investing in cross-disciplinary training and professional development of decision makers and health, welfare and legal professionals to:

i) strengthen their knowledge and understanding of the intersections between disability, mental health and the dynamics of family violence; and

ii) ensure they are equipped to apply holistic, trauma-informed and strengths-focussed responses to support people with disability, and ensure their rights are upheld.

b. ensuring sufficient resourcing of disability informed, culturally safe and accessible legal assistance and advocacy, including to address issues of legal professional conflict, to support people with disability to engage with the family law, family violence and child protection systems.

c. putting in place appropriate supports, including NDIS supports for parents with disability, to help families to remain together as a family unit. (Recommendation 38)

Improved regulation and oversight of restrictive practices and compulsory treatment

XI. **Mental health and disability services** should promote the human rights of people with disability, make compulsory treatment of mental health issues a true last resort, and move towards eliminating the use of restrictive practices, including seclusion and restraint. (Recommendation 39)

XII. Commonwealth, state and territory governments should adopt a robust national framework for the regulation and oversight of the use of **restrictive practices** on people with disability that applies to all settings. This framework should aim to eliminate the use of restrictive practices in all settings and contain effective enforcement mechanisms. (Recommendation 41)

Reducing contact with the criminal justice system

XIII. Practices relating to engagement by police with people with disability should be improved by:

a. adopting a disability informed culturally safe needs assessment framework and screening to identify and take into account the needs of all people with disability, whether witness, victim or accused.

b. reducing the frequency of arrest and detention of people with disability by ensuring that arrest is truly a last resort, and

c. increasing the use of discretion to grant cautions and other diversionary options when decisions are being made that impact on people with a disability. (Recommendation 42)

XIV. State and territory governments should increase **support for people with disability in the criminal justice system**, including through:

a. acknowledging the needs of children with disabilities in the criminal justice system and developing specialised supports and approaches

b. bail accommodation and support services and programs to assist people to understand and comply with their bail conditions

c. therapeutic, specialist and solution-focussed courts and programs that ensure that relevant and accurate diagnostic reports are provided and address the underlying causes of offending and the therapeutic needs of the individual

d. court liaison services that aim to identify people with mental health issues who have been charged, and intervene as early as possible

e. a more holistic approach to sentencing, including community-based sentencing options and support to comply with these sentences

f. approaches and services to assist people with drug or alcohol issues to avoid contact with, or be diverted from, the criminal justice system, and

g. funding legal aid commissions to provide people with disability legal advice and support to assist with parole applications**.** (Recommendation 49)

XV. State and territory governments should ensure that people with disability in youth and adult custody including people with mental health issues, First Nations peoples, and female prisoners, have access to culturally safe, trauma-informed **health care, treatment and disability supports**, including the NDIS. (Recommendation 57 and 58)

XVI. State and territory governments should ensure the forensic patient pathway is consistent with its therapeutic and non-punitive goals, including by:

a. ensuring that forensic orders for persons who are unfit to be tried have a fixed term and are subject to review at regular intervals

b. allocating sufficient resources to ensure forensic patients who are required to be detained are either detained in a forensic mental health facility or forensic disability facility that is commensurate with their support needs and level of risk, and not in prison, and

c. ensuring alternative pathways, including therapeutic pathways, are available for people who have charges before summary courts and experience a mental health issue or cognitive impairment. (Recommendation 60)

XVII. The NDIA, and state and territory governments should assist people with disability in custody to **transition to the community** by:

a. urgently identifying people with disability who remain in custodial, forensic or mental health settings due to a failure to secure disability services

b. allocate appropriate funding to ensure that people with disability are assisted with release planning and through care supports including to access NDIS supports prior to release

c. developing a nationally consistent policy of no exits from prisons or inpatient units into homelessness, and

d. ensure that people with disabilities have access to legal support for parole application in all Australian jurisdictions. (Recommendations 64 and 66)

A framework for promoting inclusion and human rights

XVIII. Commonwealth, state and territory governments should elevate and resource disability lived experience **leadership and self-advocacy**, and ensure people with lived experience lead or are

involved in co-designing all reforms and meaningfully involved in leadership, governance, oversight and training in disability services and settings. (Recommendation 69)

XIX. The Commonwealth Government should extend funding of the specialist national disability legal service (Your Story Disability Legal Support) to assist people with disability to understand and assert their rights and to link them with other appropriate services. (Recommendation 70)

XX. Commonwealth, state and territory governments should strengthen **legislative protections** for people with disability by adopting a federal Charter of Human Rights and streamlining discrimination laws. (Recommendation 71)

Introduction

Our work with people with disability

NLA represents the directors of the eight state and territory legal aid commissions in Australia.

Legal aid commissions are independent, statutory bodies established by respective state or territory enabling legislation and funded by Commonwealth and State or Territory governments to provide legal assistance to people.

NLA's purpose is to:

- lead and encourage a national system of legal aid that allows people experiencing disadvantage to access justice
- ensure the legal assistance sector is adequately funded
- provide a forum for collaboration at a national level between government, stakeholders, community and legal assistance providers, to develop best practice legal assistance.

NLA aims to ensure that people's legal rights and interests are not prejudiced because they cannot:

- obtain access to independent legal advice
- afford the appropriate cost of legal representation
- obtain access to the federal and state and territory legal systems, or
- obtain adequate information about access to the law and the legal system.

Legal help for people with disability, their carers and families

Legal aid commissions are the largest providers of legal services to people with disability across Australia. In the 2020-21 financial year, legal aid commissions provided over 1.9 million services, including grants of aid for ongoing legal representation, duty lawyer at courts and tribunals, legal advice, family dispute resolution conferences, community legal education, and information and referrals.[7] More than 161,000 of the legal services provided by legal aid commissions in 2020-21 were to people who identified as persons with disability.[8] Legal aid commissions provide services through our 78 offices and by outreach at many locations including in the community, at courts and tribunals, hospitals, prisons, and forensic facilities.

The Commonwealth Government funds legal aid commissions in each state and territory to provide specialist legal advice and representation for NDIS appeals to the Administrative Appeals Tribunal (**AAT**), and funds legal aid commissions and community-controlled Aboriginal and Torres Strait Islander legal services to provide legal support to people with disability, their carers, families, supporters and advocates to engage with the Disability Royal Commission. The 'Your Story Disability Legal Support' (**Your Story**) is a joint initiative of NLA and National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**).[9]

Legal aid commissions create resources, in consultation with clients with disability lived experience, which address specific legal issues that impact on people with disability in a range of formats that address different communication needs, including audio description, Auslan, easy read, videos with

[7] NLA, *National Legal Aid Statistics 2020-21* (Web Page 2022) <https://nla.legalaid.nsw.gov.au/nlareports/>. CLE and information/referral data are estimates - data obtained from legal aid commission annual reports where available. Where the data was not available in the 2020-21 annual report it is based on the 2019-20 data for those legal aid commissions.
[8] NLA, *Legal Aid Commissions' Disability Service Data* (15 October 2021). Data significantly understates the number of services to people with disability as not all service users identify disability, and demographic data is not available from all legal aid commissions for all service types.
[9] *Your Story Disability Legal Support* (Web Page) <https://yourstorydisabilitylegal.org.au>.

closed captions and website-based audio functions.[10] Legal aid commissions run legal education sessions for disability organisations and community members to help people identify, understand and access legal services.

Further information about legal aid commission services and NLA can be found here.

[10] E.g., See Legal Services Commission South Australia, 'Rights on Show' (Web Page, 2014-2017) <https://lsc.sa.gov.au/cb_pages/rights_on_show.php>

1. Supporting children and young people with disability and their families

Through our work, we are aware of direct violence against, and abuse, neglect and exploitation of, children and young people with disability and their families. We also see systemic discrimination, denial of opportunities and other breaches of the human rights of children and young people with disability.

Young clients of legal aid commissions who are living with disability have experienced:

- a lack of access to necessary adjustments and supports, and restraint, seclusion and exclusion, in school settings
- difficulties accessing the NDIS and necessary early intervention supports
- separation from family and entry into the child protection system, leading to placement in out-of-home care (**OOHC**)
- a lack of contact with family when parents are separated or when in care because of inadequate support to spend time with parents
- non-therapeutic responses to harmful behaviours in the home
- criminalisation of behaviours that arise from complex trauma, and
- a lack of access to necessary support and access to the NDIS when transitioning out of care and custody.

These early experiences decrease the opportunities for children and young people with disability to learn, and to participate and form protective connections in their community. We are concerned that as a consequence, children and young people with a disability may be more likely to enter the criminal justice system, and experience violence, abuse, neglect and exploitation throughout their life.

1.1 Education and schools

1.1.1 Need for reasonable adjustments for students

Legal aid commissions regularly assist clients with matters arising from the treatment of students with disability by schools, including schools not making reasonable adjustments to assist students with disability to fully participate in their education. We consider this is often due to factors including:

- a lack of consultation with parents and carers of children with disability in order to identify reasonable adjustments that could be made under the *Disability Discrimination Act 1992* (Cth) (**Disability Discrimination Act**) and the Disability Standards for Education 2005 (**Education Standards**) to assist children with disability to participate in education on the same basis as other students
- a lack of clarity in the Education Standards regarding what is required to identify and implement reasonable adjustments for students with disability
- need for improved understanding of specific disabilities, and obligations under discrimination law and the Education Standards
- inadequate resourcing to support schools to comply with obligations under discrimination law and the Education Standards
- a lack of clear guidance for schools, parents or students regarding when discrimination is lawful under exceptions in anti-discrimination laws and the Disability Discrimination Act, and

- assumptions that certain conduct is exempt under anti-discrimination laws such that further efforts are not made to explore reasonable adjustments.

The Commonwealth Government reviewed the Education Standards in 2020 to determine whether the Standards were effective in supporting students with disability to access and participate in education on the same basis as students without disability, and whether any improvements to the Standards should be made. We consider that implementing the Review's recommendations would assist in addressing some of the factors raised above, in particular the recommendations aimed at:

- empowering and supporting students and their families by:
    - working with them to develop information products on the Standards that explain the rights of students with disability, and providing this information to students and their families
    - including in the Standards clearer rules to education providers about consulting with students with disability and their families on required supports and adjustments, resolving issues and handling complaints
    - sharing information about a student's needs when changing schools or training
- strengthening educator's awareness of their responsibilities under the Standards by–
    - developing information on the Standards that explains responsibilities, including examples of good practice
    - providing training to all teachers on the Standards and on supporting students with disability
- improving accountability for ensuring the Standards are followed.

The Department of Education website states the Australian Government will work closely with state and territory governments and education authorities to implement the recommendations.

The impact of the COVID-19 pandemic has further amplified the barriers experienced by students with disability to access appropriate supports at school, as demonstrated in Anthony's story below.

Anthony:* lack of flexibility and support leading to exclusion from education **(NSW)**

Anthony is a 17-year-old Aboriginal boy with a significant cognitive disability. Prior to the COVID-19 pandemic, Anthony enjoyed school. However, his disabilities meant he was unable to participate in 'home learning' because he could not sit in front of a computer all day. The school remained open to children of essential workers but refused to accept Anthony back. Anthony's participation in online classes fell in 2021, and he was refused re-enrolment in 2022 based on poor attendance. No allowance was made for the difficulties of home learning with a disability during the pandemic.

We regularly assist clients with legal proceedings for non-compliance with the Disability Discrimination Act and the Education Standards. However, by the time instructions are received to commence legal proceedings, a student may have lost many months of education, and no legal remedy can replace or properly compensate for lost education and connection with peers. This can lead to social isolation and adversely impact the young person's ability to fully participate in social and economic opportunities as an adult. These issues were exacerbated for some children by home-schooling requirements during the COVID-19 pandemic.

Veronique's story below highlights the difference that individualised, reasonable adjustments can make to a student's experience at school and their educational and life outcomes.

Veronique's son:* Student cannot attend without adjustments (Vic)

Veronique's son has a learning disability and has suffered serious health problems. As he approached high school, he was told that his special aide funding would cease and that he'd be expected to go through year 7 without any learning assistance. Veronique said:

> *To put my son into high school without aide was a terrifying thought for my son and he told me how worried he was.*
>
> *Expectations of the school for him to perform at high school level e.g., assumptions that he understood what he was being taught, severe weaknesses in basic literacy and numeracy skills, and his lack of social skills particularly in the playground… was an unbearable thought for me as his mother.*

Veronique home-schooled her son for nine months but decided to investigate legal options. She said:

> *I didn't believe that a child with disabilities should have to be home-schooled and isolated from others. It was also my belief that parents should not have to bear another heavy burden on top of what is already a difficult job caring for a child with disabilities.*

Victoria Legal Aid worked with Veronique to bring a discrimination claim and attend a conciliation. Veronique says her son benefitted immensely from the legal advice and representation she received:

> *After the conciliation, my son was given an aide, personalised transition to a mainstream high school, additional support from the school welfare officer… and importantly teachers with knowledge of his difficulties because the school implemented professional development in this area.*
>
> *My son became a very happy young man. He had the knowledge that the school understood his difficulties and more importantly there would always be someone willing to listen to what he has to say. My son completed years 11 and 12 and graduated with the rest of his class. He is now studying a trade to set up a career for himself. Without a doubt the adjustments made in our case made such a big difference. I fear without Victoria Legal Aid's help to get these adjustments my son would have fallen through the cracks and not succeeded with his education.*

1.1.2 Restraint, seclusion, and exclusion of students

Failures to appropriately support students with disability may create or exacerbate challenging behaviours, and lead to students being restrained, secluded or excluded from school. For example, the behaviour of students with disabilities such as autism spectrum disorder (**ASD**) or attention deficit hyperactivity disorder (**ADHD**) can be framed as 'bad behaviour' with suspensions and exclusion often seen as the only option, even though more appropriate and less restrictive alternatives may be available. There is no clear legislative requirement for schools to consider whether less restrictive means are available when deciding whether to use restrictive practices. A national human rights charter would, in our view, provide a framework for adopting a human rights lens in approaching these issues, and help to ensure that all educators have thoroughly investigated and identified supports appropriate for the individual.

The story of Leila's son below illustrates how the use of harmful restrictive practices, as well as exclusion from the classroom and opportunities to socialise with peers, can have long-term consequences for students with disability.[11]

Leila's son:* Restrained and secluded at school without reasonable adjustments **(Vic)**

I knew that my son was a little different from other children very early on, he was an extremely active child. Due to our concerns about escalating behavioural difficulties at home we sought professional assessments, and he was diagnosed with ASD. His lack of social skills and heightened sensory sensitivities created numerous problems for him. We tried our best to be guided by experts and get him the support he needed.

When he started in prep, all the supports he'd had in place in kindergarten stopped. He didn't receive dedicated one-to-one support, he stopped receiving speech pathology and occupational therapy support, no detailed individual learning plan was developed, and there was no funding in place to support him at school. We had provided reports from experts recommending a full-time aide, a program to help regulate activity levels, consistent behaviour strategies and more, but these were not put in place.

As he deteriorated at school, his "access" to the curriculum deteriorated at the same rate. He could not access the curriculum in the same way others could because he was often literally not in the room due to his behaviours, and often when he was in the room, he was misbehaving and therefore not paying attention to his teacher.

It was clear as soon as staff began having problems with him that they were not effectively addressing his disabilities. His behaviour was deteriorating at school, he was being bullied by other students, and it would get to the point where he would have a "meltdown" and lash out. For a long time there was no formal attempt by anyone to try and find out what was causing his behaviours.

My son was often placed in a timeout, or I was asked to come and pick him up early. He missed a lot of schooling because of this. Staff resorted to restraint and seclusion to manage his behaviour. At times he was physically restrained for up to 40 minutes while he was struggling violently to get away. We were told that a storeroom was being converted into a sensory calming room but the room was used while it was still full of supplies. It had heavy objects, objects with sharp and hard edges, and was completely unsafe to place an autistic child who was having a meltdown. Every week I would be called to the school to pick him up due to him having a meltdown. When I arrived, I would be often led to the storeroom, which was where he had been placed. Most of the time he was in there, he was on his own, with the door shut. Sometimes when I picked him up he had urinated or defecated and wiped himself up. This was due to the fact that he needed to go to the toilet but could not get out.

His behaviours continued, and any strategies that were being used were clearly ineffective. We had a meeting with the school where they said an aide would be provided and eventually funding was put in place, but this was 18 months too late. In the meantime, my son continued to have meltdowns and be secluded and restrained. We knew the situation was terribly wrong but did not know what to do. The school continued not to understand that what we wanted were preventative strategies put in place so that there was the lowest possibility that my son became agitated in the first place. I requested a written assurance that methods of restraint employed by the school would cease immediately, but we received no assurance it would stop. We ended the year being fairly traumatised as a family. We decided to investigate other schools in the hope of a fresh start.

[11] Australian Coalition for Inclusive Education, *Driving Change: A Roadmap for Achieving Inclusive Education in Australia* (Report, February 2021).

We strongly support efforts to reduce and eliminate the use of restrictive practices on children. A child's behaviour support plan should travel with them, and schools should ensure that all relevant staff have read and acknowledged its contents before having contact with the child. Continuity of restrictions and protections around the use of restrictive practices should apply, regardless of what setting a child is in at a particular time.

Recommendation:

1. **Commonwealth, state and territory governments should support people with disability to attend school and participate on an equal basis with others, and to maximise their learning, social connection and life opportunities, by:**
    a. **strengthening and promoting understanding of, and compliance with, relevant laws, including anti-discrimination laws, and standards**
    b. **adopting measures to prevent discrimination in schools**
    c. **ensuring that restraint, seclusion and exclusion of a child or young person in any form are measures of last resort, and only the least restrictive means available are used.**
    d. **encouraging a comprehensive understanding of issues affecting the participation of students with disability, informed by data and monitoring of trends related to students with disability.**

1.2 NDIS and early intervention supports

The NDIS and concerns related to its implementation are discussed more generally in Part 2 of this submission.

The introduction of the NDIS has transformed the potential for children and young people with disability to grow up with the supports they need to develop, build relationships, and participate in the community, and to ensure their families are able to support them appropriately.

However, legal aid commissions routinely witness failures of the NDIA to provide these necessary supports to children and young people with disability. For families trying to obtain appropriate supports for their children, the review process can be experienced as complex, elongated, and burdensome. Families are forced to live with the reduced support level until the supports are successfully reinstated. Families often witness significant deterioration of the NDIS participant when supports are removed, and can struggle to regain the level of function the person had prior to the loss of support. For child participants, this can result in developmental delays, decreased social skills and increased behavioural challenges. We consider that the NDIA could better support people with disability to communicate with it.

Families may receive well-funded plans only to find they are unable to implement the plan and purchase the intended supports, due to a lack of suitable, specialist disability support providers. This is particularly the case in rural, regional and remote areas, where people with disability continue to be disadvantaged in the rollout of the NDIS. The impact of 'thin markets' is particularly significant for families with children with complex disability and support needs.

In Samantha's case below, her parents were forced to fill the gaps when carers with specialist training were unable to attend rostered shifts. Inconsistent care arrangements had a devastating impact on Samantha and her family, putting their physical, financial and emotional wellbeing at risk.

Samantha:* Overcoming 'thin markets' for a child with complex support needs and her family (Vic)

Samantha has multiple, complex disabilities. She is seven years old. She loves Peppa Pig, playing with playdough, cars, baby dolls, bubbles and listening to stories. She lives in a regional centre with her family. Samantha's disabilities can result in multiple seizures each day, low muscle tone and serious respiratory vulnerability. Samantha's disabilities mean that she can't mobilise without assistance and she needs to be constantly watched to determine if she is having a seizure, how severe the seizure is and the appropriate medical response. Samantha's treatment and the medical responses to her disabilities have been determined by a major teaching hospital.

During her first four NDIS plans, Samantha had access to a small number of carers who received the specialist training required to safely care for her. Her care agency often cancelled shifts because no trained carers were available, or because carers were unwell. Samantha is at risk of hospitalisation if she gets an infection. In their place, Samantha's family attempted to fill the gaps.

This market failure resulted from an inadequate pool of trained carers and a lack of a back-up mechanisms for Samantha in her regional area. The personal and financial impact on Samantha's family was extreme. On several occasions, her father cared for her for 36 hours without sleep. When Samantha's family members got sick, they faced a choice between trying to care for her with the risk of infection and failing to care for her.

At times her father was only able to work one day per fortnight because he was caring for Samantha during gaps in the roster and responding to emergencies when existing staff quit or called in sick for shifts. Samantha's family had to rely on another family member for financial support as they couldn't work full-time.

The failure to provide children and young people with disability the supports to which they are entitled, at the time they need them, may significantly limit their opportunities to develop skills and participate in the community as they grow. It also places undue stress on families. A lack of adequate supports may also lead to challenging behaviours in the home and community, which increases the risk of children and young people with disability being placed in OOHC and/or entering the criminal justice system and can lead to parents relinquishing care of their children. In no circumstances should a parent be advised or compelled to relinquish their child because of delays in accessing NDIS supports.

Where support needs are not addressed promptly, as indicated above, ongoing behaviours may lead to criminal charges and the child or young person being remanded in custody or sentenced to imprisonment. This is demonstrated below in the case of Brian who, if the Victorian Department of Health and Human Services' Intensive Support Team had not intervened, likely would have been held in custody unnecessarily for even longer, due to delays in having his NDIS plan reviewed.

Brian:* Magistrate recommends increased NDIS supports so Brian can live in the community (Vic)

Brian is 19 years old. He is friendly and sociable, and loves being around people, especially people his age. He has an intellectual disability, autism, and anxiety. Like many teenagers, he likes swimming at the pool, and going to the movies.

Due to his complex disability, Brian has trouble managing his impulses, and he needs ongoing support to work on regulating emotions like frustration and anger. When Victoria Legal Aid first met Brian, in mid-2018, he was referred by the Children's Court to a program where he could access a range of local health, education, employment and recreational supports. Brian was

progressing well and his behaviours of concern had lessened, but the funding for that program stopped once Brian's court case finished.

When the NDIS was rolled out to where he lived, Brian received a NDIS plan. Despite his complex needs, previous behaviours and the clear success of more structured supports, Brian's NDIS plan only provided modest supports with no significant outreach or specialist support coordination. Within six months, Brian was spending much of his time at home, away from peers and disengaged from positive community supports. Earlier this year Brian seriously injured his younger sibling and he was arrested and remanded in adult custody.

Brian was seriously distressed in prison and told his lawyer repeatedly that he wanted to go home. Given the change in circumstances, an urgent review of his NDIS plan was needed. He needed to access alternative supported accommodation and an increase in the level of funded supports. Victoria Legal Aid immediately requested that his Disability Justice worker facilitate a NDIS plan review. The NDIA responded that it would take several months, and nothing could be done to expedite the review.

Victoria Legal Aid continued to advocate to Brian's Disability Justice worker for urgent assistance and escalated the case to the Department of Health and Human Services' Intensive Support Team. An application for bail was made for Brian to be released from custody. At his bail hearing, the Magistrate insisted that more be done to increase funding to allow for greater outreach support for Brian in the community.

Brian spent nearly three months in prison on remand before he had access to the disability supports he needed to be released on bail. The delay in reviewing his plan was the difference between being held in custody and being supported to live in the community. In terms of its impact, the prolonged time he spent in custody took a significant toll on Brian's health, wellbeing, and sense of safety. Brian is now receiving the levels of NDIS support he needs to achieve his goals. He has access to specialist support coordination and a skilled outreach worker who helps him with his behaviour and takes him to participate in recreational activities. Brian's specialist support coordinator plays a crucial role in bringing together the various agencies and workers involved in supporting him to live well and safely.

Recommendation:

2. **The NDIA and state and territory governments should ensure that children with disability have access to adequate timely NDIS and other disability supports, wherever they live (including regional, rural and remote areas), that NDIA communications with participants are clear and that efficient and effective NDIS resolution pathways are available for participants.**

1.3 Children with disability in out-of-home care

Children with disability are disproportionately represented in OOHC, particularly residential care settings.[12] In 2020, 15 per cent of children in OOHC were reported as having a disability.[13] Children placed in OOHC have often been exposed to multiple traumas from a young age, for instance due to family violence, substance abuse, neglect, abandonment, and/or sexual or physical abuse.

[12] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Violence and Abuse of People with Disability at Home* (Issues Paper, 2 December 2020) 5, citing Royal Commission into Institutional Responses to Child Sexual Abuse, *Contemporary Out-of-home Care* (Final Report Vol 12, 2017) 59, 123, 217.
[13] Australian Institute of Health and Welfare ('AIHW'), *Child Protection Australia 2019–20* (Report, Child Welfare Series No. 74, Cat. no. CWS 78, 2021).

In our experience, access to appropriate supports to achieve the best possible future is often not available to children and young people in OOHC. The factors contributing to this are multi-dimensional and require collaboration across human services agencies. These factors include limitations to:

- screening and assessment to identify, monitor and review children and young people for indicators of disability or developmental delay
- workforce specialisation, skills and resources, including among non-governmental agencies contracted to provide OOHC services, to identify and provide support services to children and young people in care with disability
- support for young people transitioning out of care with an approved NDIS plan, including to navigate the various systems to access disability support[14]
- consideration of culturally safe and trauma-informed means of supporting First Nations children and their families to access disability support via the NDIS, and
- mental health supports, such as counselling for children exposed to trauma/FV are particularly lacking in some locations. For example, Tasmania Legal Aid is aware of children in OOHC waiting for counselling for more than a year. For many of these children, the trauma of their experience impacts their day-to-day life, and they are not provided with the opportunity to address issues and develop copying skills through counselling. The issue of thin markets is further addressed below.

Even where children have diagnoses, have reports from highly experienced treating practitioners, and have been in secure accommodation due to concerns about safety and risk to themselves, legal aid commissions have observed that there are still significant delays in obtaining an approved NDIS plan. In NSW, the Supreme Court has urged the NDIA to expedite applications of children with disability, particularly where the absence of a plan has led to 18-year-olds remaining in secure accommodation because they are unable to access the care they need.[15]

Max's story below demonstrates the barriers experienced by a young person in OOHC in accessing adequate disability support.

Max:* Inadequate disability support to young person in OOHC **(NSW)**

Max, aged 16, was living in an OOHC placement which broke down after he was charged for some minor property offences resulting from the placement. Max was unhappy living at the placement and with his case manager so went to live with his girlfriend's family. The family were shocked that Max was not already receiving NDIS support. Max had been diagnosed with autism, ADHD, oppositional defiance disorder (**ODD**), receptive and expressive language disorder, and a mild development delay, and he also suffered from a weak muscular system.

Max's case manager was responsible for applying for the NDIS but there was little expertise in navigating the NDIS. The case manager's first attempt at applying for the NDIS was not approved. The case manager made a second attempt at a NDIS application but told Max that the application process would take over six months.

As Max was approaching 18 years, instead of pursuing a NDIS application, the case manager applied for a guardianship and financial management order for Max. A guardianship and financial management order was made by the Tribunal due to inadequate support provided to Max for his complex disabilities and the difficulties in accessing the NDIS.

[14] CREATE Foundation, *Supporting Children and Young People with a Disability Living in Out-of-home Care in Australia* (Literature Review, August 2012).
[15] There is a series of reported decisions that deal with this issue in the matter of *Re Millie*. See, eg, *Re Millie*; *Secretary Department, Family & Community Services & Minister for FACS* [2019] NSWSC 1110.

In the year after Max left care, his supports struggled to contact him and get the required information and evidence to prepare the application, delaying his access to essential support.

Recommendations:

3. **Commonwealth and state and territory governments should ensure that departments are appropriately resourced and that:**
   a. **the OOHC sector has the specialist skills and training required to identify and appropriately support young people with disability, including how to access the NDIS. This should include greater training and support for child protection workers to identify and assist children and young people to access NDIS supports, which could reduce the need for further child protection intervention**
   b. **every child entering OOHC is screened and assessed for indicators of disability and provided appropriate timely supports**
   c. **every young person with a disability leaving care has an approved NDIS plan or access to disability services once they have left care.**

1.4 Criminalisation of children and young people

Legal aid commissions are concerned that children and young people with disability are at increased risk of entering and/or remaining in the criminal justice system due to:

- some experiences in out-of-home care
- the minimum age of criminal responsibility being set too low[16]
- unmet disability support needs, and
- non-therapeutic justice or punitive responses to adolescent violence in the home when a therapeutic response is needed.

Entering the criminal justice system at a young age, particularly entering custody, has the real potential to be harmful and traumatising, and to have a serious adverse impact on the opportunities and prospects of young people for the rest of their lives.

1.4.1 Out-of-home care and the criminal justice system

Legal aid commissions see children and young people in residential OOHC, who have had limited or no previous involvement in the criminal justice system, start accumulating criminal charges once placed in care.[17]

If disability support and other needs are not being appropriately addressed in the care setting, children and young people with disability may be at increased risk of engaging in behaviours that might attract criminal charges. This risk can be heightened by disconnection from culture and community and a lack of positive community, cultural peer or multidisciplinary engagement to build resilience and self-worth, or where English is not their first language. A lack of access to appropriate therapeutic and mental health services in regional and rural areas often compounds these issues.

Legal aid commissions see an increase in engagement with the criminal justice system where:

- police are asked to respond to minor incidents in OOHC. In some instances, this appears to be driven by a requirement to make a police report for the purposes of an insurance claim (for example

[16] NLA submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group Review, 28 February 2020 and see also 1.4.2 Low minimum age of criminal responsibility.
[17] https://www.legalaid.vic.gov.au/care-not-custody-keeping-kids-residential-care-out-courts

related to minor damage) which conflicts with the objective to minimise the contact of these children and young people with the criminal justice system

- police charge children and young people in OOHC or lay additional charges rather than adopting alternative measures
- carers respond to young people with challenging behaviours by using police as a behaviour management tool
- curfews and non-association conditions are imposed on children and young people in OOHC as part of their bail conditions, and
- intervention orders are taken out against children and young people in OOHC to protect staff.

Legal aid commissions see a high number of cases where police have been called to a residential care unit to deal with behaviour by a child that would unlikely come to police attention had it occurred in a family home.[18] Victoria Legal Aid and Legal Aid NSW have represented children from residential care who have faced criminal charges for behaviours such as smashing a cup, throwing a sink plug, or spreading food around a unit's kitchen. In many instances, the attendance of the police further escalates the situation.

In response to concerns about the use of police as a behaviour management tool for young people in out-of-home care, legal aid commissions in NSW, Victoria, the Northern Territory and Queensland collaborated with others in the sector to bring about an agreed framework or protocols that acknowledge the need for therapeutic approaches when supporting young people in residential care, and place these responsibilities on carers and police.[19] These also state that criminal charges should not be pursued if there are viable alternatives. Other states and territories should be encouraged to develop similar frameworks or protocols. All should consider how to foster awareness among key stakeholders to ensure the frameworks or protocols are applied consistently, as well as develop an implementation plan that outlines concrete commitments, with measures and an agreed timeframe within which they should be evaluated.

Katie's story below describes the experience of a young person with significant complex needs and the criminalisation of her disability while in residential care. It demonstrates how the existence of state-wide protocols can assist with facilitating better outcomes.

Katie:* criminalisation of behaviour **(NSW)**

Katie is a 13-year-old child who resides in a residential care placement operated by a non-governmental organisation. She has diagnoses of Reactive Attachment Disorder and ADHD and has experienced significant and complex trauma.

Until living in the placement, Katie had no criminal history or interactions with police. While she was living there, ongoing care and protection proceedings were creating significant anxiety for her. This anxiety was exacerbated by increased interactions with police. Katie was charged with a range of minor offences all related to the residential care setting. At one point, Katie accumulated six charges in a two-week period, with multiple intervention orders where carers are listed as the protected person. One example occurred when a carer cancelled a contact visit between Katie and a family member. Katie pulled the carer's hair and was subsequently charged with common assault.

[18] Victoria Legal Aid, *Care Not Custody: A New Approach to Keep Kids in Residential Care Out of the Criminal Justice System* (Report, 2016); Erin Gough, *The Drift from Care to Crime: A Legal Aid NSW Issues Paper* (Issues Paper, October 2011).
[19] NSW Ombudsman, *Joint Protocol to reduce the contact of young people in residential care with the criminal justice system* (Report, 2 July 2019); Victorian Department of Health and Human Services, *Framework to reduce criminalisation of young people in residential care* (Report, February 2020); The State of Queensland (Queensland Family and Child Commission), *Joint Agency Protocol to Reduce Preventable Police Call-outs to Residential Care Services* (2018).

The escalation of incidents and frequency of appearances before the Children's Court raised concerns with Katie's criminal lawyer that the *Joint Protocol to reduce the contact of young people in residential care with the criminal justice system* (2019) had not been considered. A referral was made to have Katie's matter discussed in a multi-agency group set up to review incidents where the protocol was not adhered to. As a result, the residential care facility reviewed the incidents leading to the police being called and identified opportunities where alternative actions could have been taken. Katie's functional assessment was reviewed, and new strategies implemented in her behaviour support plan, developed in collaboration with Katie. Additional support was provided to Katie's care team including referrals to specialist adolescent psychological and mental health services, and agreements reached with police to provide a consistent and therapeutic response. Increased knowledge and awareness of legal rights was developed by the care facility. Katie's criminal charges were ultimately diverted under the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (NSW) in recognition of her diagnoses.

Recommendations:

4. **State and territory governments should adopt and implement culturally safe, holistic, therapeutic approaches to support children and young people with disability who are at risk of being taken into care or are in residential care and prevent their engagement with the criminal justice system. This should include implementation of existing frameworks and protocols to respond to children and young people in out-of-home care, and development of new frameworks and protocols across all states and territories.**
5. **State and territory governments should prohibit professional carers from taking out apprehended violence or intervention orders against children in out-of-home care.**
6. **Police should not pursue criminal charges against children and young people with disability in out-of-home care if there are viable alternatives.**
7. **State and territory governments should improve support and training for care providers regarding therapeutic ways to address disability and trauma-related challenging behaviour, to minimise the need for police involvement in cases where there is no immediate danger to staff or other children or young people.**

1.4.2 Raise the age of criminal responsibility

Across Australia, the minimum age of criminal responsibility is set at 10 years.[20] NLA strongly supports raising the minimum age of criminal responsibility to 14 years old.[21] One of the compelling reasons for this is the overrepresentation of children and young people with disability in the criminal justice system:

- A significant proportion of young people in custody have a neurodevelopmental disorder, including intellectual disability.[22]

[20] *Crimes Act 1914* (Cth) s 4M; *Criminal Code Act 1995* (Cth) s 7.1; *Criminal Code Act 2002* (ACT) s 25; *Criminal Code* (NT) ss 38(1), 42AP; *Children (Criminal Proceedings) Act 1987* (NSW) s 5; *Children, Youth and Families Act 2005* (Vic) s 344; *Young Offenders Act 1993* (SA) s 5; *Criminal Code Act Compilation Act 1913* (WA) s 29; *Criminal Code Act 1899* (Qld) s 29(1); *Criminal Code 1924* (Tas) s 18(1).

[21] NLA submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group Review, 28 February 2020 and see also 1.4 Criminalisation of children and young people.

[22] Victorian Youth Parole Board, *Annual Report 2019-20* (Report, September 2020) 29.
E.g., in 2018 it was reported that in Western Australia 89 per cent of young people in youth detention have at least one form of severe neurodevelopmental impairment: Law Council of Australia, *The Justice Project, Final Report, Part 1 – People with Disability* (Report, August 2018) 4. Various studies have shown that between 39 and 46 per cent of young people in custody in NSW fall into the 'borderline' range of cognitive functioning (IQ 70 to 79): Chris Cunneen, *Arguments for Raising the Minimum Age of Criminal Responsibility* (Research Report, 2017) 8.

- There is a high prevalence of mental health disorders among children and young people in the youth justice system.[23]
- Young people with foetal alcohol syndrome disorder (**FASD**) are significantly overrepresented in the Australian justice system.[24] FASD gives rise to cognitive impairments in processing and retaining information, and expressive and reception language difficulties. Relevantly, this can include complying with court orders and complex instructions or directions from authorities.

Children who have contact with the criminal justice system at a young age are less likely to complete their education or find employment and are more likely to die at an early age.[25] Legal aid commissions often see "cross-over" between the child protection and youth justice systems, and cycles of disadvantage that are intergenerational and result in untold financial and social costs.

Children with cognitive disability are at greater risk of criminalisation and extended and repeated incarceration. They are also more likely to be refused bail and held on remand due to an inability to understand or comprehend bail conditions, or a lack of support to comply with conditions.[26] Of particular concern, research shows that Indigenous people with cognitive disability have contact with police over two years earlier than non-Indigenous people with a cognitive disability.[27] Research also suggests that many children, especially Indigenous children, have hearing and language impairments that may not be diagnosed.[28] Such disabilities can compound the impact of mental health issues and cognitive disabilities.

Through our work, legal aid commissions see that periods on remand are particularly detrimental for young children: they disrupt continuity of mental health treatment, disability supports, peer and family relationships, education, training and employment opportunities, and community housing and supports, and are therefore a barrier to rehabilitation. Children end up disconnected from culture, language, and community, which can be further isolating and traumatic. This can entrench criminogenic patterns.

Raising the minimum age of criminal responsibility to 14 would place focus on the welfare needs of children under 14 rather than on alleged offending behaviour. It would also significantly reduce the overrepresentation of young children with disability in the justice system and ensure that they receive health system responses rather than law enforcement responses.

Recommendation:

8. State and territory governments should raise the minimum age of criminal responsibility to 14 years.

[23] In NSW, approximately 83 per cent of those in youth custody have mental health issues: Justice Health and Forensic Mental Health Network, *Annual Report: Our Network – 2020* (2020) 13.
[24] George Woods, Stephen Greenspan and Bhushan Agharkar, 'Ethnic and Cultural Factors in Identifying Foetal Alcohol Spectrum Disorder' (2011) 39(1) *The Journal of Psychiatry and Law* 9, 37; In the Banksia Hill Detention Centre study in Western Australia, 39 per cent of the young people in the study identified as having a FASD diagnosis: Angela Dudley, Tracey Reibel, Carol Bower and James Fitzpatrick, 'NDIA Planning Project: Critical Review of the Literature – Foetal Alcohol Spectrum Disorders' (2015) *Telethon Kids Institute*.
[25] Australian Medical Association, 'AMA Calls for Age of Criminal Responsibility to be raised to 14 years of age' (Media Release, 25 March 2019).
[26] E.g., the *Youth Justice Legislation Amendment Act 2021* (NT), which included amendments to bail laws that caused youth detention numbers in the Northern Territory to double within six months, disproportionately affects young people living with a disability.
[27] Chris Cunneen, *Arguments for Raising the Minimum Age of Criminal Responsibility* (Research Report, 2017) 11, citing 'Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System Project', UNSW School of Social Sciences.
[28] Ibid, 10.

1.4.3 Adolescent violence in the home

Adolescent violence in the home (**AVITH**) is a particular area of concern, which requires a tailored and therapeutic response. AVITH is a complex issue, distinct from intimate partner violence or other forms of family and domestic violence. Many children who use violence are also victims of family violence themselves, have a history of trauma, and/or have a disability, such as a cognitive impairment or mental health issue that may not have been previously identified, diagnosed, or addressed. A significant proportion of these young people also use drugs or alcohol and/or are disengaged from school.[29]

In our experience, families in these situations seek help and support.[30] A therapeutic response is much more likely to effectively address other risk factors, such as previous exposure to family violence, trauma, experience of mental health issues and unmet disability support needs.

However, legal aid commissions see that when families experiencing AVITH contact authorities (e.g., police or child protection) for help, it can lead to a non-therapeutic justice response. Young people have intervention orders made against them that do not address their underlying behaviour and include conditions that exclude them from their home.

We see a disproportionate number of young people with disability or mental health issues charged with breaching intervention orders, as they may not have fully understood, appreciated or been able to remember the terms of their intervention order, or had limited ability to manage their behaviour that led to the breach.

In South Australia, police have committed to establishing specialist disability engagement officer roles within each district and local service area to cultivate relationships and networks between local police and people with disability, disability service providers and disability service sites (accommodation, employment, recreation), improve understanding and awareness, and establish information flow that safeguards people with disability.[31] In Victoria the VICPOL Police and Emergency Response (PACER) model involves mental health clinicians travelling with police so that they can work together to respond to people in crisis. In Western Australia the police (WAPOL) are piloting a similar approach.

Recommendations:

9. **State and territory legislation should require courts to take into account a child's age and disability in the context of capacity to comply with potential intervention orders, interim or final.**
10. **Commonwealth, state and territory governments should invest in evidence-based holistic therapeutic and family-focused responses to AVITH, including outside of business hours, to address the diverse and complex needs of families. These should draw on evidence from research, such as the Centre for Innovative Justice's WRAP Around project.**
11. **Police workforces should have embedded disability and youth specialist officers to support families with children and adolescents with disability who act with violence in the home.**

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[29] Karla Elliott et al, *Investigating Adolescent Family Violence: Background, Research and Directions, Context Report, Focus Program on Gender and Family Violence: New Frameworks in Prevention* (Report, December 2017).
[30] This reflects the findings of Victoria's Royal Commission into Family Violence, that adopting a therapeutic response to adolescent violence and providing supports around the family are likely to better align with what affected family members want, as well as improve safety: Royal Commission into Family Violence, *Summary and Recommendations* (Paper No 132 Session 2014–16, March 2016).
[31] South Australia Police, 'Disability Access and Inclusion Plan 2020 – 2024' (Web Page) <https://www.police.sa.gov.au/__data/assets/pdf_file/0009/934758/Disability-Access-and-Inclusion-Plan-2020.pdf>.

1.5 Access to, and coordination of, disability support for young people in the criminal justice system

The period of time in custody presents an opportunity for coordinated service delivery to screen and assess for indicators of disability. However, data available on the rates of disability of young people in custody suggest that there is significant under-reporting of disability.[32] There remain gaps in service coordination for young people in youth justice custody to access adequate disability support. For young people transitioning out of custody, adequate post-release support specific to disability is difficult to obtain. These issues are exacerbated in rural and remote areas where supply of services is limited or non-existent. Young people who are in custody on long periods of remand without the continuity of relevant disability supports in custody face significant challenges.

There are barriers for young people in custody to accessing appropriate services to assist with diagnosis and ongoing support. The lack of assessment and reports mean that young people do not have access to the relevant evidence required to apply for and access the NDIS. E.g., early diagnosis and interventions for FASD are linked with better long-term outcomes for the young person. Limited access to assessments for FASD means that opportunities are missed to provide timely, specialised support for the young person. This is demonstrated below in Dan's story.

Dan:* limited access to FASD assessment while in custody **(NSW)**

Dan is a 16-year-old Aboriginal man with a mild cognitive disability who has had frequent interactions with the criminal justice system which has seen him in and out of custody.

Dan's support workers suspected that he has FASD. During the brief periods where Dan was out of custody, his supports were unable to contact him to arrange the FASD assessment. With Dan spending significant periods of time in custody, the support workers attempted to make use of the opportunity to arrange a FASD assessment to take place in juvenile detention. However, the assessment was unable to be facilitated.

Without the assessment, Dan is unable to access NDIS supports necessary to break the cycle of further detention. An assessment and diagnosis would assist caregivers, educators and authorities better understand and respond to Dan's behaviour and assist to provide better supports for Dan as he transitions to adulthood.

There has been some positive feedback about the NDIA's Justice Liaison Officer roles specifically assigned to youth justice, particularly with regard to the provision of additional resources, connection and facilitation of access to the NDIS that would otherwise be difficult to navigate. Noting that thin market issues must be addressed, additional resources to promote, enhance, and expand Justice Liaison Officer roles in youth justice settings could better support young people to access the NDIS and disability supports.

Funding multi-disciplinary partnerships can also facilitate access to screening, assessment and supports, such as the DARDY project (Disability Advocacy Referral Diversion for Young People), which Legal Aid Western Australia is co-ordinating and working with a range of agencies on.

Recommendations:

12. **Commonwealth, state and territory governments should inquire into the disproportionate rates of children with neurodevelopmental and cognitive impairment in criminal justice system settings, the potential for universal screening for neurodevelopmental and cognitive impairment, and the establishment of pathways to the NDIS.**

[32] Justice Health and Forensic Mental Health Network, *2015 Young People in Custody Health Survey* (Report, 2015).

13. **State and territory governments should establish multi-agency partnerships to improve service coordination across agencies to provide holistic wraparound support for a young person with a disability and complex support needs in the criminal justice system including young people in custody.**
14. **The NDIA should increase resources for Justice Liaison Officers for young people in custody and youth justice supervision, to facilitate access to the NDIS and disability support.**

2. NDIS, housing, income, and other safe and effective supports

2.1 NDIS

The NDIS is intended to support the independence and social and economic participation of people with disability and promote the provision of high quality and innovative supports that enable people with disability to maximise their independence and be fully included in the community.[33] However, the NDIS has proven to be a complex system to navigate. People with disability face significant barriers to accessing the NDIS. These include unclear communication from the NDIS communications, thin service provider markets, costly reports, limited support co-ordination and poor linkages across services and system, and delays in resolving applications and appeals. The move to NDIS also adversely impacted on funded programs which had previously supported people to access the services they need.[34]

We refer the Disability Royal Commission to the NLA submission to the Review of the NDIS Act and the new NDIS Participant Service Guarantee (**Tune Review**).[35] We recognise the adoption of the *NDIS Amendment (Participant Service Guarantee and Other Matters) Bill 2021* in March 2022, which implements a number of the Tune Review recommendations, and note it will be important to monitor their implementation. Outlined below are a number of current access issues; assessing whether positive changes have been attained through the Act's implementation will provide an important measure of success.

2.1.1 General barriers to access

Barriers to accessing the NDIS include:

- limited support to make the request, and obtain supporting evidence from treating doctors, therapists and support people
- lack of accessible, non-digital information for people who do not use the internet
- inadequate information from the NDIA about what is required for access and the evidence the NDIA typically requires to make an assessment
- inadequate information for treating health practitioners and support people about the level and type of detail the NDIA typically requires, and
- thin markets (addressed below).

These barriers highlight the need for the NDIA to review and adjust its communications to people with disability, their families and support people.

[33] *National Disability Insurance Scheme Act 2013* (Cth) s 3.
[34] E.g., Victoria Legal Aid's Aboriginal Community Engagement Officers report that fuel costs were previously funded through co-op packages, enabling people to drive to access services, but these are not funded through the NDIS.
[35] NLA, *Putting People First: Removing Barriers for People with Disability to Access NDIS Supports* (Submission to the Review of the NDIS Act and the new NDIS Participant Service Guarantee, 4 November 2019). This submission includes 28 client stories and sets out 46 detailed recommendations for reform to ensure the NDIS meets the needs of people with disability.

2.1.2 Culturally Safe Supports for First Nations peoples

First Nations peoples face barriers to accessing culturally safe supports. Access to the NDIS is a particularly acute issue for young First Nations peoples in detention in the Northern Territory. Young people accepted on to the NDIS, but who are not legally represented, have been told by the NDIA that their NDIS plans cannot commence until they are released from detention. In matters where young people have been represented and plans have commenced when a young person is in detention, the NDIA has been slow to respond to changing circumstances (e.g., on the transfer to another detention centre thousands of kilometres away or on the release of that young person from custody). Such delay leaves the young person without the reasonable and necessary supports that should be available to them in detention and on release.

Bob's story* **(NT)**

Bob is a young First Nations person diagnosed with moderate to severe intellectual disability. He has been repeatedly in and out of youth detention.

When Bob was accepted on to the NDIS, he waited nearly two months after his planning meeting for his NDIS plan to be developed. When he returned to custody, the NDIA advised that they were "unable to commence a plan build until a release date is finalised and set in stone". With legal assistance, a plan was finally prepared, but provided no funding for the 50 hours per week of core supports recommended for Bob by allied health professionals. Bob was released from custody and his coordinator of supports made a change of circumstances application.

Approximately one and half months later, Bob's review is yet to be determined and he remains without core supports. As a result, Bob has not attended school and infrequently comes home, leaving him at risk of reoffending and child protection authorities taking him into care.

The NDIS Act creates a broad obligation on the NDIA to communicate in language and terms that are appropriate for the people receiving the information.[36] NLA supports the initiatives of the NDIA to improve its engagement with First Nations peoples and become more flexible, accessible, and culturally safe. NLA in this regard refers to the NDIA's Aboriginal and Torres Strait Islander Engagement Strategy progress update issued in July 2021 and looks forward to the issuing of the refreshed Strategy in 2022.

2.1.3 Lack of access to necessary reports and supporting evidence

The NDIA typically requires people with disability to provide specialist practitioner reports and supporting evidence in order to approve access for a particular support need. Many people cannot afford to pay for these reports, and they can face long delays in gaining access, significant stress, and financial hardship. There is also a shortage of specialists in some areas, and reluctance among some specialists to provide reports for matters before the AAT due to the potential to be called as a witness in proceedings.

Medical practitioners often complete the access request form with sufficient information to satisfy the criteria under the NDIS Act for the NDIA to determine whether the person should access specific supports. However, the NDIA commonly requests further, more detailed reports from the same medical practitioners (often at the person's own cost) or requires specific language to be used by clinicians. Often the highly detailed information requested about disability is not required under the NDIS Act.

[36] *National Disability Insurance Scheme Act 2013* (Cth) s 7. This is consistent with articles 9 and 21 of the *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 14.

Where a person does not respond within the required timeframe,[37] the NDIS Act enables the NDIA to treat their access request as withdrawn.

Legal aid commissions have often found the NDIA unwilling to consider requests to fund medical reports for people who are unable to pay for reports themselves, notwithstanding legislative power for the NDIA to do so.[38] This imposes an increased burden, including an administrative burden, on the resources of other agencies, such as state health services, therapists, disability advocates, the AAT, and the legal aid commissions.

Gary's story below demonstrates the adverse effects that can occur when multiple, staggered requests for new and different assessments are made by NDIA.

Gary's story* (Vic)

I applied for the NDIS in around June 2017. When I applied, I had been living with debilitating back pain since 2012, which meant I had to stop working. As a result, I developed anxiety which led to severe depression.

Having worked throughout my life, I thought the Government would be there to support me to get things like a mobility scooter to help me get around and do the small and simple things in life. Instead, I have faced four years of delay after delay – every time I think I'm finally going to get the support I need, they just turn around and ask for more reports, more documents, new assessments. I feel invisible and abandoned.

Sometimes, it has all become too much to cope with. As well as the NDIS, it took years and going to the AAT before I finally got access to the DSP in 2019. About six months ago, I was so distraught because of the delays by the Government, feeling like I was not believed, and would never get any help. I felt worthless. I overdosed on my prescription medication, recorded a video saying goodbye to my kids. I woke up to the ambulance people in my house taking me to hospital. They said I was lucky to be alive.

But still the Government did not hear me or see me. I have jumped through every hoop – I just had a new occupational therapy assessment and the report said I should have access to the NDIS. Now, they want three more new assessments. Even the thought of getting to the assessments which are one-and-a-half hours away in a Maxi Taxi exhausts me, and I know I will be in pain getting there and back.

When I think about the money that has been spent by the Government, I am horrified because it's more than what I'm asking for to get the help I desperately need.

People who have never met me, who have never laid eyes on me have spent four years fighting to prevent me from getting the basic help I need to live a decent life.

During COVID-19, the Northern Territory Legal Aid Commission has seen delays in accessing interstate medical specialists and experts, which is necessary for gaining access to the NDIS, as well as during AAT proceedings. The pandemic has also delayed, and in some circumstances halted, NDIS planning meetings for clients. While some planning meetings were conducted by phone or video, which can be challenging for some people with a disability, others did not proceed.

[37] Section 26 of the *National Disability Insurance Scheme Act* (Cth) provides a minimum timeframe of 28 days or a longer period if specified in request.
[38] *National Disability Insurance Scheme Act* (Cth) s 6.

Will's story (NT)

Will is a young man with complex needs at a correctional centre in the Northern Territory. He had been waiting over 5 months from October 2021 until March 2022 for NDIS planners to attend an in-person plan review. We understand that no alternative form of meeting was arranged, and as a consequence, Will's access to a NDIS plan to receive much needed disability supports was delayed.

2.1.4 AAT review

Legal aid commissions receive funding to provide legal assistance to applicants seeking review by the AAT of decisions made by the NDIA, either where a person has been refused access to the NDIS or where the supports funded by the NDIS are inadequate. The number of people seeking assistance is increasing, and we are also concerned about the cost and complexity associated with the matters for which assistance is sought. This is a relatively new and changing jurisdiction, which requires a forward-looking process, based on a thorough understanding of past data and trends, as well as accurate projecting for the future, to achieve better and more sustainable outcomes for people with disability, as well as systems efficiencies.

The AAT merits review is intended to be "fair, just, economical, informal and quick", with the NDIA required to conduct itself as a model litigant. Many of the model litigant obligations have the potential to ensure that proceedings are conducted in a timely way, and thus avoid unnecessary delay. Legal aid commissions also play an important role in supporting fair and just outcomes and the efficient and effective functioning of the AAT.

The NDIA is represented in every matter before the AAT by experienced solicitors, and in many cases barristers. The environment is generally adversarial, and the requirements can be technical. It can be intimidating for unrepresented applicants and non-legally trained advocates. A fair process requires balanced representation for both applicants and respondents. The funding provided to each of the NDIA and the legal aid commissions should be more proportionate and appropriate for the legal aid commissions to advise people about the merits of their matter and to represent them in appealing NDIA decisions accordingly.

Proceedings are often long and complex and can require multiple expert reports, briefing counsel for hearings, numerous witnesses, witness expenses, costs of transcripts and written submissions. In our experience, the NDIA sometimes takes an adversarial approach that increases cost and complexity:

- **Assisting the AAT:** The NDIA has an obligation to avoid, prevent, and limit the scope of, litigation. However, in some cases, the NDIA has expanded the scope of issues in dispute by raising matters at hearing which were not previously raised during alternative dispute resolution. The NDIA has caused participants to have to prove issues that are not in dispute. In addition, there is experience of the NDIA challenging the AAT's jurisdiction, e.g., incorrectly characterising the decision under review, impeding rights to review by attempting to undertake unscheduled reviews, and/or issuing new plans arising from the unscheduled review without the consent/involvement of the participant or the AAT, rather than an internal review of the statement of participant supports.
- **Summonsing practice:** The NDIA has an obligation to make information easily available to the AAT and to present new material that is relevant and may assist the AAT. The NDIA's ongoing practice of seeking an excessive number of summonses that are unlimited in scope often results in participants being required to provide a large volume of irrelevant material. This practice also requires our solicitors to review copious records, thereby limiting the number of clients we can assist. Further, the summonses have often been to medical professionals who have not treated the client for a number of years, and to government organisations such as Medicare and Centrelink,

where obtaining documents can be a lengthy process. In addition, if the recipient does not respond to the summons, the NDIA re-issues the summons, which further delays the review.

- **Obligation to act fairly and promptly:** Meaningful engagement in pre-hearing processes, less adversarial behaviours, and timely preparation/intervention are all critical to improve the conduct of matters.

NLA welcomes the new Government's commitment to addressing the backlog of NDIS cases awaiting finalisation at the AAT and acknowledges the proposal to introduce an alternative dispute resolution expert review pathway to help address the backlog. However, reform is still required to minimise the adversarial approach taken in these reviews, and to limit the risk of delays in resolving disputes.

Rohan's story* (Qld)

Rohan was a NDIS participant who was not satisfied with the supports in his plan. He sought internal review, and then, when not satisfied with the internal review decision, filed an external review decision in the AAT. Although the primary focus of his external review was in relation to a wheelchair, the occupational therapist who prepared a report for the AAT proceedings also recommended a number of other supports that would benefit Rohan. Following these recommendations, the NDIA's lawyer requested that Rohan withdraw his Tribunal proceedings and lodge a "change of circumstances" request, so that these additional supports could be considered.

The NDIA lawyer's request was made after the Federal Court of Australia handed down a decision (by consent of the parties) overturning the AAT's decision in the case of *QDKH*.[39] In the original hearing of *QDKH*, the applicant sought approval of certain supports which were not requested before the internal reviewer. The Tribunal determined that it did not have jurisdiction to consider supports that were not 'put before' an internal reviewer. The Federal Court's decision subsequently determined that the Tribunal's decision was an error of law – there is no such requirement.

In light of this, there is no reason that Rohan should have been requested to withdraw his AAT proceedings in order for the additional supports to be considered by the Tribunal. Additionally, no information was provided to Rohan as to the Federal Court decision, the implications of withdrawing, and the possible outcomes of a "change of circumstances" request.

There was no benefit in Rohan making a "change of circumstances" request. Doing so could have further delayed the resolution of his situation by introducing unnecessary procedures.

Recommendations:

15. Commonwealth, state and territory governments should ensure that services and systems, such as the NDIS, coordinate to provide timely access to high quality, culturally safe, trauma-informed, individualised supports and treatment for all people with disability, including in rural, regional and remote locations, forensic mental health wards and units, and correctional centres.

16. To reduce barriers to accessing the NDIS and supports, the NDIA should:

a. use its power to enable participants and prospective participants to obtain the reports necessary and relevant for their application to the NDIA or AAT

b. only make requests for further information where strictly necessary and which are consistent with the eligibility criteria under the NDIS Act, and

c. not impose a higher bar or request more information than is required by law, particularly where these types of requests are unduly barring access to the NDIS.

[39] *QDKH v National Disability Insurance Agency* [2021] AATA 922.

17. The Commonwealth Government should ensure that legal aid commissions are funded to levels appropriate to provide legal advice to NDIS applicants and to support legal advice and representation for meritorious applications to the AAT for review of NDIA decisions.

18. The Commonwealth Government should amend the NDIA Act to clarify the difference between a scheduled plan reassessment, an unscheduled plan reassessment, and internal review of a statement of participant supports.

2.1.5 Accessible and affordable dispute resolution 'Market failure' or 'thin NDIS markets'

'Market failure' or 'thin markets' is a key reason that the NDIS is not yet living up to its purpose of giving choice and control to Australians with disability.

Legal aid commissions have seen service providers withdraw services from, or decline to consider providing services to, people with complex support needs and challenging behaviours, especially those involved in the criminal justice system. Where a person with complex support needs is currently in custody, it can be even more difficult for them to purchase the supports they need in a thin market. Some legal aid commissions have assisted clients with disability, who remain in custody because they have not been able to initiate assistance through the NDIS or access the support covered by their NDIS plans.[40]

People in regional, rural and remote areas experience significant market failures due to the limited availability of local services, particularly where specialist support is required. The Northern Territory Legal Aid Commission has assisted young people detained in the Alice Springs Youth Detention Centre and Don Dale Youth Detention Centre with their NDIS claims. Significant difficulties in gaining access to the necessary specialist assessment services while in custody caused lengthy delays in progressing their applications. The lack of available specialised support providers in the area made implementing plans practically impossible. As Joseph's story shows, these issues often mean that young people exit detention without necessary supports in place in the community.

Joseph:* Young person from remote Northern Territory community in and out of detention without NDIS supports (NT)

Joseph is a young person detained at a Youth Detention Centre who has been diagnosed with FASD and intellectual disability. As Joseph lives in a remote area of the Northern Territory, he was not diagnosed or formally assessed prior to entering detention, despite a number of interactions with the justice system.

When Joseph entered detention, NT Legal Aid arranged for him to undergo diagnostic assessment from a service provider in Alice Springs, which is the only provider of assessments in the area. As a result, Joseph was granted access to the NDIS. Joseph's diagnostic assessment recommended a number of specialised supports, but these do not exist in Alice Springs. This has caused significant delays in establishing his NDIS plan, as any supports provided to Joseph in detention will need to be delivered by visiting interstate service providers.

Since this time, Joseph has been released and subsequently detained again due to re-offending resulting from a lack of necessary supports.

[40] In a submission to the NDIS Thin Markets Project in June 2019, Victoria Legal Aid, Northern Territory Legal Aid and Legal Aid Queensland shared the stories of clients who spent protracted periods in jail or a mental health unit: 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).

Jade's story below also highlights that market deficiency is even more acute for remote communities. A concerning cycle of service reduction has been identified whereby a person is unable to access funded supports due to a lack of available or culturally sensitive services. As a result, funding included in the NDIS plan is underspent, then funding in subsequent NDIS plans is reduced. The absence or lack of supports is further considered to be an issue which contributes to people intersecting with the criminal justice system.

Jade:* Absence of NDIS service providers contributes to entry to the justice system (NT)

Jade is a young child who was assisted by NT Legal Aid in proceedings before the AAT. Jade lives in an extremely remote area in the Northern Territory and has significant disability support needs.

Due to there being limited service providers in the region, the allocated funding in Jade's first NDIS plan was not fully utilised. On this basis, the funding approved in Jade's subsequent plans was reduced significantly, leading to the cessation of necessary behavioural supports. Without these supports, Jade had encounters with the criminal justice system.

While NT Legal Aid's advocacy led to an overall increase in funding for Jade, it was not to the level provided in Jade's first plan, or to the level arguably required to provide adequate support. A thin (or in this case, absent) market had already led to poor legal outcomes for a child.

Thin markets can directly impact upon funding decisions made by the NDIA. This is seen in the Northern Territory, where it is not uncommon for support coordinators to work within the same organisation as support services. Where support coordinators advocate for services provided by the organisation they work within, Northern Territory Legal Aid has observed a refusal of funding by the NDIA on the basis that the request is acquisitive.

Urgent work is required to address the gaps between the NDIS and mainstream services. There is a need for a service safety net in urgent cases where market failure leads to people with complex needs entering the criminal justice system. There is also a need to ensure appropriate therapeutic disability supports are available while in custody and reduce delays in providing pathways out of custody for people with disability. Furthermore, there is a clear need for stronger NDIS market oversight, including by monitoring changes in the NDIS market which may indicate emerging risk, and monitoring and mitigating the risk of unplanned service withdrawal. We encourage the examination of all potential issues including, and beyond, geography and pricing in identifying why the market is not stepping in to meet the needs of all people with disability.

Recommendation:

19. The NDIA should improve oversight of the NDIS market and strengthen mechanisms to address gaps between the NDIS and mainstream services, in accordance with the introduced principle related to market access as outlined in subsection 4(15) as inserted by item 5 of Schedule 2 of the amendments to the NDIS Act, and effective from 01/07/22. These should include:

- **a. <u>a service safety net that is responsive, accessible and has clear accountability:</u> If a person has been found eligible for the NDIS and has a funded plan but cannot secure supports due to the unwillingness or unavailability of market providers, the NDIA or other government agencies must intervene to ensure that the person with disability is not left without needed supports.**
- **b. <u>planning that sets people up well from the outset</u>: Equipping, resourcing and overseeing skilled planning that facilitates supports that are appropriate to the particular person and their needs, is critical to the effectiveness of the NDIS**

c. **<u>a workforce and system that can engage with complexity</u>: Innovative, skilled and experienced support coordinators must be a systematised and ongoing part of the scheme for people with complex needs and behaviours of concern (not just as an introductory requirement) to problem-solve issues, navigate systems and think creatively about supports. This is a key foundation for keeping other supports in place.**

d. **<u>choice and control for people in rural and regional communities, and access to culturally safe services</u>: Training, engagement and capacity-building for local services, changes to pricing and guidelines in relation to travel for providers and participants, and, if needed, directly purchasing services on behalf of participants, should be implemented as a priority to make sure that realisation of the promise of the NDIS is not confined to our cities.**

e. **<u>using pricing as a lever</u>: While pricing is not the only driver of thin markets, it is a relevant factor in the difficulties our clients have securing the supports funded in their plans. Pricing should contemplate the costs of delivering supports to people with high and complex needs, as well as the costs of delivering supports in regional, rural and remote areas.**[41]

2.1.6 A complex landscape: accessing integrated and coordinated service responses and supports

In a complex landscape that now spans across NDIS and state-funded service providers, as well as disability and mainstream services such as housing, justice and education, the lack of a coordinated multi-agency response to provide wraparound support for people with disability and complex support needs is a significant concern. E.g., there was previously a NSW government initiative, hosted by NSW Health, called the Integrated Service Response (**ISR**). This initiative assisted services to coordinate wraparound support for people with disability and complex support needs. The multi-agency and coordinated response provided a critical role in consistent service delivery and a forum to access that collaborative response. The ISR was disbanded without any replacement or access to referral contact points.

Legal aid commissions also see a trend wherein the NDIA has been unwilling to provide adequate funding for support coordination. Oftentimes the NDIA recommends that participants engage with their Local Area Coordinator for this help rather than providing appropriate funding. Alternatively, where support coordination is provided, the NDIA fails to provide funding in sufficient amounts to enable this support to be effective and beneficial.

More approaches to establish coordinated and multi-agency responses should be prioritised to ensure that people with disability and complex needs, like Amy below, are appropriately and adequately supported.

[41] National Legal Aid, Submission No 10477 to Commonwealth Department of Social Services, *Overview of the 2019 Review of the NDIS Act and NDIS Participant Service Guarantee* (4 November 2019) 20-21.For further recommendations for improvements to support the operation of the NDIS and its intersection with other service systems, see – Victoria Legal Aid, Submission to Commonwealth Department of Social Services and National Disability Insurance Agency, *NDIS Thin Markets Project* (June 2019) https://library.vla.vic.gov.au/firstvlaRMSPublic/docs/Corporate/VLA%20Submissions/NDIS%20Thin%20Markets%20Project.pdf.

Amy's story* (NSW)

Amy is an Aboriginal teenager assessed as having the intellectual capacity of a five-year-old and requires assistance with housing. She currently has access to an NDIS plan, but it only covers a limited number of days in respite care. Family and Community Services has paid at times for hotel accommodation, but as there are no formal statutory orders placing Amy in their care, they are reluctant to continue supporting Amy's housing needs. Although numerous stakeholders are involved, including the NDIS, Family and Community Services, a community support organisation and a clinical specialist, there is disagreement as to what housing support should be provided to Amy and how this should be resourced. In the meantime, Amy's family placements are unsuitable as they do not provide the stability or support required for her complex needs. This has resulted in her continued contact with the criminal justice system through multiple offences. While Amy was granted bail by the Children's Court, she was unable to return to the family home and remained in custody until alternative accommodation could be sourced.

Amy's case would have been an ideal referral to the ISR, as it required high level coordination of services where existing options had been exhausted and where service providers were in conflict around addressing Amy's needs. In the absence of the ISR, Amy spent further time in youth custody given the lack of appropriate housing options available to her.

In addition, NDIA coordinators of supports are often unable or unwilling to advocate for our client's best interests where conflict arises with the service provider. The NDIS funds coordinators of supports for people with disability. However, in many cases people with a cognitive impairment and with complex needs, there is an inherent conflict of interest when the coordinator of supports and/or the service provider is the source of conflict or the very issue with which the client needs assistance (e.g., where the provider's property has been damaged by conduct of the cognitively impaired client, leading to criminal charges).

The consequences of this gap are most acute when a person with disability is evicted from their accommodation by a service provider, and where that service provider is their only 'support'. Such clients are faced with a situation where they can only receive support coordinator services once they have entered other accommodation, but their critical and most pressing need is for someone to advocate for, and facilitate their entry to, other accommodation. In other cases, no NDIS funding has been provided for a support coordinator for the most disadvantaged clients. Matthew's story below is a stark example of this and the consequences related to the risk of re-offending.

Matthew's story* (NSW)

Matthew is a middle-aged man with a mild intellectual disability who has also been diagnosed with post-traumatic stress disorder (PTSD) as a result of childhood trauma and sexual abuse.

Matthew has been in and out of out-of-home care since he was very young. As a young boy he was removed from the family home after he was sexually abused by a close family member. When he was 10, Matthew and his two younger siblings were sexually assaulted by a man who falsely presented himself to the family as a social worker. The children were subsequently kidnapped and taken interstate by two men who intended to make them available to an active paedophile group.

Matthew's mother also has an intellectual disability and was unable to explain the situation to the police. It was only after FACS intervened that police became aware of the situation. The children

were then located with the men and taken into state care. Matthew engaged in counselling following the abuse and gained further counselling as an adolescent. However, despite wanting to engage in counselling as an adult to assist in the management of his PTSD, he has been unable to do so.

Matthew was referred to an NGO service provider in 2016 after being charged with assault occasioning actual bodily harm the preceding year. The charge concerned his uncle who had been living with Matthew and his family at the time. One of the causes of Matthew's offending was his belief that his uncle was a paedophile. The charge was dealt with under section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW). As part of his treatment plan, Legal Aid NSW's Client Assessment and Referrals Unit applied on Matthew's behalf for NDIS funding and referred him to an NGO service provider under a block funding arrangement which included a case worker.

NDIS funding was granted. His package did not include a support coordinator. Matthew was not involved in a pre-plan meeting with NDIS, does not understand his NDIS plan, and does not know how to access NDIS money. Further, the plan does not take into account his accommodation or employment needs. He participates in a supported work program, but this is not linked to his NDIS plan. Matthew does not have the ability to coordinate his NDIS plan, is unable to source supports for himself and requires assistance to follow through and engage with supports. Accordingly, Matthew's NDIS plan requires urgent review to develop more appropriate and effective supports to meet his therapeutic, accommodation, social and employment needs.

Matthew has recently been charged with intimidation and common assault. The matter is proceeding under section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW). In that context, his lawyer reviewed the approved NDIS plan that Matthew provided. The plan directs him to access his NDIS funding by using an online portal and contact the NDIS if he has any further enquiries. Matthew has limited literacy skills and no access or understanding of how to access this assistance online. Matthew has recently been referred to the Cognitive Impairment Diversion Pilot.

Recommendation:

20. State and territory governments should establish multi-agency integrated service response partnerships to provide coordinated support to people with disability and complex support needs.

2.1.7 Debt recovery against participants by service/product providers

An issue related to access is the rising number of NDIS service providers suing NDIS participants and their carers in their personal capacity. Plan managers, allied health professionals, and support coordinators may provide advice or recommendations to NDIS participants about engaging services, for which it turns out funding is not included in the NDIS plan. As only the service/product provider and the NDIS participant are parties to the contract, debt recovery processes are carried out against the participant personally.

NDIS participants receive letters from debt collectors acting on behalf of service providers and/or face civil litigation before consumer tribunals and courts. These tribunals and courts determine debt issues under service/product contracts and do not have jurisdiction to consider 'top ups' to the statement of participant supports in an NDIS plan to provide funding for outstanding fees under a contract.

There are issues generally regarding participants understanding obligations in relation to:

- service and product contracts and their obligations under such contracts, and

- engaging workers (whether employees or independent contractors) to provide support work services.

Margaret's story* (NSW)

Margaret is a carer for her adult child, who is a NDIS participant. Her son does not have capacity, and Margaret is his financial manager, guardian and NDIS nominee.

Margaret engaged a NDIS provider, who was a sole trader providing essential services like dressing and showering her son. All agreements were oral. There was a dispute about payment rates, and the NDIS money ran out early. Margaret believes this happened because the provider over-charged. Margaret and the NDIS provider tried to get help from the plan manager, the NDIA and the NDIS but were not successful.

Soon after, Margaret discovered that over $15,000 had been removed from her bank account under a garnishee order. The provider had served a statement of claim but had an incorrect address, so the provider was able to obtain a default judgment and garnishee order without Margaret knowing anything about the matter until her bank account was garnished. Margaret lives in social housing. The money was her life savings and she needed it for another child with a disability.

Legal Aid NSW successfully advocated for a NDIS 'top up' under the client's plan. A pro bono solicitor assisted with having the default judgment set aside.

Recommendation:

21. The NDIA could better support participants, providers and NDIS partners, to avoid debt recovery by service/product providers by providing clearer messaging to participants and training to plan managers, allied health professionals, and support coordinators about how plan funds have been calculated and how they can be used, including guidance around flexible use.

2.2 Accessible, affordable housing

Legal aid commissions see how a lack of accessible, affordable housing and supports for people with disability, and the discrimination sometimes experienced in accessing and sustaining housing:[42]

- undermines social inclusion, wellbeing, independence and safety
- reduces ability to participate in education and employment
- reduces ability to keep their family together
- increases their risk of interacting with the criminal justice system, and entering or remaining in detention, including indefinite detention in prison, mental health units and forensic settings
- increases their risk of homelessness and avoidable evictions for reasons directly related to their disability, and
- increases risk of violence, neglect, abuse and exploitation in other systems and settings.

Specialist disability accommodation funded through the NDIS is available only to those NDIS participants with "extreme functional impairment" or "very high support needs" who meet specific

[42] 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). Members of Victoria Legal Aid's mental health lived experience advisory group also spoke about experiencing discrimination from landlords after disclosing they received the DSP.

eligibility criteria.[43] This means that most other low-income people with disability rely upon access to social housing. There are also problems of feasibility for eligible participants who wish to reside in specialist disability accommodation whilst still being able to live with their families. This is due to inadequate/insufficient specialist disability accommodation for participants and families or flexibility in funding arrangements within plans.

The gaps in specialist disability support and services, including as a result of NDIS 'market failure', together with the difficult interface between the NDIS and state and territory funded services, make it difficult for people with disability to navigate systems to secure appropriate accommodation and to sustain that accommodation.[44] Additionally, a lack of appropriate housing can lead to a refusal of live-in support services for NDIS participants.

Philippa's story below demonstrates how a lack of appropriate accommodation and inadequate support from the NDIS are mutually compounding and lead to a risk of homelessness and family separation.

Philippa:* I just want my son to come home (Vic)

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 have caused the housing provider to try to evict us in the Victorian Civil and Administrative Tribunal (**VCAT**). VCAT hasn't made a decision yet, but has said that Ryan can't attend the property in the meantime.

As a result, Ryan has been shifted between different short-term accommodation facilities. Ryan has and will continue to require urgent new NDIS plans to fund this.

It was Ryan's birthday last week and he wasn't allowed to spend any of it at his home. I visit him every night. He asks me to stay with him until he goes 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 me. This plan won't be possible if I don't have a place to live. I would jump at the chance to secure a housing option that could accommodate Ryan and me and keep us together. The option doesn't seem to exist. I don't know what it will mean for our future if eviction happens. I just want my son to come home.

The Australian Government has an international legal obligation to ensure the progressive realisation of the right to adequate housing for all, which includes a right to live somewhere in security, peace and dignity.[45] It also has obligations under the Convention on the Rights of Persons with Disabilities (**CRPD**) to realise the rights of all people with disability to live in the community, to be free from interference with their privacy or home, and to an adequate standard of living.[46]

There are differing protections for the right to housing across the states and territories. In NSW, the legal framework does not sufficiently protect the right to access safe, secure and affordable housing. Nor does it require public housing providers and publicly funded housing services to consider the impact of decisions on tenants' human rights, such as is required in human rights legislation in the

[43] *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020* (Cth) rr 11–14.
[44] NLA, *Putting People First: Removing Barriers for People with Disability to Access NDIS Supports* (Submission to the Review of the NDIS Act and the new NDIS Participant Service Guarantee, 4 November 2019) 4.
[45] *International Convention on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11.
[46] CRPD arts 19, 22 and 28.

ACT, Victoria and Queensland. This can result in unacceptable accommodation conditions and unfair evictions into homelessness.[47]

NDIS services are regulated by the NDIS Quality and Safeguards Commission, which aims to uphold the rights of people with disability, including the right to dignity and respect, and the right to live free from abuse, exploitation and violence. Workers and providers who deliver NDIS supports must comply with the requirements of the NDIS Quality and Safeguards Commission, which include acting with respect for individual rights in the NDIS Code of Conduct.

Despite this, some legal aid commissions have assisted a number of clients who are NDIS participants with complex support needs, who have faced unreasonable evictions from specialist disability accommodation, group homes and other supported living arrangements. We see accommodation providers terminate clients' services at short notice in response to challenging behaviour, with no account for whether less restrictive alternatives were possible that would not have resulted in potential homelessness.

Joan:* A lack of housing security for NDIS participant (NSW)

Joan is an Aboriginal woman with multiple disabilities, resulting in a life-threatening condition which requires 24/7 monitoring. Joan is under the NDIS and has a plan manager, a support co-ordinator and a NDIA complex case planner. Joan's father Simon is her informal guardian, and neither he nor Joan has access to Joan's NDIS funding.

Joan lived in share-house accommodation managed by a disability service provider which provided most of Joan's services. There was no official NDIS funding for that accommodation, or formal written occupancy agreement in place apart from a short letter drafted by the provider and signed by Simon.

Simon believed that the accommodation was a long-term arrangement and that Joan's plan manager was working with the disability service provider to secure the required NDIS funding. In the following months, staff members and other residents found Joan's behaviour to be challenging. The disability service provider claimed the accommodation was only a short-term solution and offered Joan an alternative location in which she would need 1:1 care. Simon understood that the NDIS would not fund that level of service and deemed the alternative as unsuitable.

The provider asked Joan to vacate the accommodation, explaining that they already offered it to an alternative occupant. The provider's legal representatives sent Simon a termination letter, alleging breaches of a service agreement that was unrelated to the accommodation, and failure to pay for services. The provider threatened to remove Joan and cease her services on a specific date.

Simon made a complaint to the NDIS Quality and Safeguards Commission. The Commission agreed to investigate the quality and safety of the services provided by the provider to Joan, and the eviction notice. However, the Commission could not order the provider to provide a transition plan or impose a penalty if they chose to remove Joan without a plan.

Following a Legal Aid NSW meeting with the provider, their legal representatives and Commission members, the provider agreed to extend Joan's stay while Legal Aid NSW negotiated an appropriate occupancy agreement at an alternative location (managed by the provider as short-term accommodation). However, in practice, the provider could have chosen to remove her without facing any formal penalty. Had she been removed; she would have been at an imminent risk of homelessness. No transition plan was put in place.

[47] E.g., Legal Aid NSW sees social and community housing providers rely on 'no grounds' termination notices to evict clients, with no legal requirements preventing unfair and discriminatory evictions.

Recommendations:

22. **The NDIA should support people with disability in all dealings and communications with the NDIA (including assistance to obtain necessary allied professional health reports) so that the NDIA is appropriately enabled to fund accessible housing including individualised living options, supported independent living, and specialist disability accommodation.**
23. **Commonwealth, state and territory governments should implement a service safety net to minimise the impact of market failure in the housing context on clients with complex support needs.**
24. **State and territory governments should increase availability of appropriate, affordable, accessible housing, and strengthen protections against unfair and discriminatory evictions of people with disability.**
25. **The NDIA should reduce the administrative barriers faced by people with disability when trying to access NDIS housing supports, including individualised living options, supported independent living, and specialist disability accommodation.**
26. **The NDIA and state and territory governments should support people with severe mental illness to find and maintain housing, including through the following measures:**
    a. **The NDIA should continue to amend its specialist disability accommodation strategy and policies to encourage the development of long-term supported accommodation for NDIS recipients with severe and persistent mental illness.[48]**
    b. **State and territory governments, with support from the Commonwealth Government, should address the shortfall in the number of supported housing places and the gap in homelessness services for people with severe mental illness.[49]**

2.3 Disability Support Pension (DSP)

The DSP is intended to provide access to social security to people with disability or chronic conditions who cannot realise economic security through paid work participation. However, legal aid commissions have seen how successive legislative and policy changes have made it increasingly difficult for people with disability to access this important safety net, forcing many people with disability onto lower forms of payment. These systemic failures harm people with disability, which the sector indicates constitutes institutional neglect and abuse.[50]

Recent years have seen a widening gap between DSP and Jobseeker Allowance payment rates, while hurdles to qualification for the DSP have increased over the last two decades.[51] This began with changes requiring that applicants be unable to work 15 hours per week within 2 years to qualify for the DSP (where the requirement was previously that people must be unable to undertake 30 hours of work per week), followed by changes to the impairment tables setting out DSP qualification criteria, and later the introduction of a 'program of support' requirements and has accelerated with changes to the way DSP is assessed.

[48] Productivity Commission, *Mental Health* (Inquiry Report, 2020) Recommendation 20, Action 20.3.
[49] Ibid.
[50] Australian Federation of Disability Organisations, 'Disabled Australians harmed and neglected by Centrelink' (Media Release, 14 October 2021).
[51] Over several years, governments have tightened DSP eligibility requirements. Successful DSP claims have dropped from 63 per cent in 2010 to just 25 per cent in 2015: Australian Council of Social Service, 'Disability Support Pension cuts bad news for people affected' (Media Release, 21 February 2018).

In May 2021, the Senate referred an inquiry into the purpose, intent and adequacy of the Disability Support Pension[52] and released a report in February 2022.[53] This inquiry, together with the review of the *Social Security (Tables for the Assessment of work-related Impairment for Disability Support Pension) Determination 2011* (**Impairment Tables**), have provided crucial opportunities to identify and address key systemic barriers that are preventing people with disability accessing the income they need to live a dignified, healthy and safe life.

We strongly support the recommendations of that comprehensive inquiry. In our view, the changes that would result from implementing those recommendations would significantly improve the health, wellbeing, social and economic participation and opportunities for those who cannot work due to disability.

2.3.1 Requirement to have a condition that is fully diagnosed, treated and stabilised

To qualify for the DSP, a person must have an impairment, and the impairment must be caused by a permanent condition, which is defined as a condition that has been fully diagnosed, treated, and stabilised. It is only impairments resulting from permanent conditions that will then be assessed under the Impairment Tables to see if a person meets the eligibility requirements for DSP.[54]

In our experience, the current framework for assessing permanence is blunt and does not reflect the lived experience or complex circumstances of those unable to work due to disability, including the following:

- Where diagnosis has evolved or changed over time or has been referred to in different ways in a client's medical history, this can result in a decision that a condition is not fully diagnosed.
- The term 'fully treated' has been interpreted as requiring specialist intervention, which can be prohibitively expensive, particularly if reports are required, and delays can be very long.
- Changes in medication, which are common for some conditions such as mental health conditions or chronic pain conditions, are considered by decision makers as meaning the condition is not fully treated and stabilised.
- People with terminal conditions may not meet the narrow and specific requirements to be granted DSP on the basis of Centrelink's definition which requires evidence that the person's condition is debilitating with a prognosis of 24 months or less, and there is a significant reduction in work capacity within this period.
- People living in regional, rural or remote locations have limited access to specialists, and the cost and difficulty of travelling to a major city to access treatment are often prohibitive. While Centrelink policy allows for consideration of these issues, in our experience these factors are not adequately taken into account by decision makers in determining what constitutes 'reasonable treatment'.
- People with long-term episodic or fluctuating conditions, particularly people with psychosocial disability, struggle to provide evidence that their condition is fully stabilised.

People who have a permanent incapacity to work should not be excluded from the DSP due to an overly technical and proscriptive definition of permanence.

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[52] The Senate Community Affairs References Committee is to conduct an inquiry and provide a report by the first sitting week of February 2022.
[53] Commonwealth of Australia, *Purpose, Intent and Adequacy of the Disability Support Pension* (Report, 2022).
[54] The relevant provisions are contained in section 94 of the *Social Security Act 1991* and the *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011*.

Recommendations:

27. **Consistent with the recommendations of the Senate inquiry into the purpose, intent and adequacy of the Disability Support Pension, the Commonwealth Government should investigate how the requirement that a condition be 'fully diagnosed, treated and stabilised' is preventing people with conditions that are complex, fluctuating, or deteriorate over time, from accessing the Disability Support Pension, and could be modified to ensure people get the support they need.[55]**
28. **The Commonwealth Government should ensure adequate income replacement supports for people with disability, including by implementing changes to the eligibility criteria and impairment tables of the Disability Support Pension.[56]**

2.3.2 Requirement to participate in a program of support

In order to qualify for the DSP, a person must have "actively participated in a Program of Support" (**PoS**) for 18 months in the three years prior to lodging their claim. Alternatively, a person can meet the requirement to have actively participated in a PoS if they were engaged with a PoS at the time of their claim AND they provide evidence (from their PoS or from their doctor etc.) that their impairments on their own prevent them from obtaining a vocational benefit from ongoing engagement with a PoS. A person does not have to comply with these requirements if they are assessed as having a severe impairment, which is defined as 20 points under a single Impairment table (as opposed to 5 or 10 points).

The definition of severe impairment does not take into account the compounding impact of multiple moderate or mild impairments. Currently, people who have multiple disabilities that prevent them from working (as compared with a single severe disability) face the additional hurdle of completing a PoS. For example, a person who has a total of 40 points under four or five of the Impairment Tables will be required to satisfy the PoS requirement, whereas a person with 20 points under a single table does not need to meet the requirement.

In practice, applicants for DSP are not advised of the important role that PoS plays and many are exempted by Centrelink from doing PoS because of the impact of their disability, but are still required to complete it to be eligible for DSP. They are often not informed of the requirement to have participated in a PoS until they apply for review at the AAT. There is a lack of clarity both within Centrelink and across the legal and community sectors about precisely what a PoS is.

Peter's story below illustrates the unfair delay to accessing the DSP, and the lack of actual support as a result of the PoS requirement.

Peter:* Unfair delays in accessing the Disability Support Pension (Vic)

I'm 51 years old. I was a panel beater my whole adult life, and I loved it. I worked with my dad, and that was great, because he's probably my best friend.

In 2014, after years of issues with my body, I was diagnosed with multiple sclerosis. I kept on working for as long as I could, but in 2017 it started to get impossible. I couldn't handle the tools anymore without shaking or dropping them. I was getting very weak. I have also suffered from progressive deafness, and I have to use a hearing aid, which I have on loan because I can't afford to buy one.

I finally had to accept that I wasn't able to continue with my career in panel beating.

[55] The Department of Social Services is currently undertaking consultation regarding proposed changes to the Disability Support Pension (DSP) Impairment Tables and NLA will be contributing a submission.
[56] Ibid.

I thought about trying to retrain and do something different, but the problems with my body were just getting worse all the time. I had to learn to live with pain and fatigue. I've also had increasing issues with incontinence in recent years, which is extremely embarrassing, and which makes working in general difficult to contemplate. My body just doesn't work properly.

In April 2019, I made an application for the Disability Support Pension. Centrelink rejected my application. I asked them to review that decision because I believed it was wrong, and then I just didn't hear anything from them for months and months. I called them many times and had argument after argument with them over the phone. I felt it quite disgraceful, to be honest.

At one point, someone said to me, "Do you have arms and legs?" I said yes, and they said, "Well you can work then." I couldn't believe it. I felt so degraded and unheard. I have been treated with suspicion and contempt throughout the two years I've been trying to get the DSP.

When they did finally look at my application, Centrelink said that there was something called a 'program of support' – they said I had to do this program for 18 months before I applied for DSP to help me get back to work. But I can't work and no program would make that possible. And no one ever told me about the program. I had never even heard about it before.

Eventually, in 2020, I was referred to a Disability Employment Services provider and this was the first time I was referred to a program of support – a whole year after I made my application for DSP. But then, that service told me that they had taken me off the system because I can't work. They said I should be on DSP. I asked them for some kind of letter to show to Centrelink, but they refused, insisting that it's up to Centrelink to officially exit me from the program.

So you can see the complete bind I am in. I don't understand why I'm apparently not entitled to the DSP. It's confusing. I've been over it with my mum and my sister, who are more educated than I am, and even they can't understand. My doctors said that I couldn't work and they still say I can't work. The thought of starting this whole process all over again is overwhelming, because what if they still say no? What then? I don't think I can go through all of this all over again.

I'm lucky enough to live with my parents - I don't know how I would've survived without them. But they're getting older and shouldn't have to look after me so much.

I thought that we lived in a society where, if you become disabled and can't work anymore, you can get the Disability Support Pension. I happily paid my taxes all my working life because I believe that we should support the more vulnerable members of our community. Believe you me, if I could work I'd be out there working. I used to work seven days a week, and I loved it. All of my doctors have told Centrelink that I can't work and that I deserve the DSP. I really don't understand why my doctors' opinions and my experience of living in my body aren't enough.

Recommendation:

29. Consistent with the recommendation of the Senate inquiry, the Department of Social Services should conduct a consumer-focused and public review of all aspects of the program of support requirements and consider making participation in an employment services program voluntary for all Disability Support Pension claimants.

2.4 Further education

Access to tertiary and/or vocational education is a potential pathway to future employment and social and financial independence.

However, the rules and policies in tertiary education that apply to all students may unfairly impact on students living with disability. For instance, Victoria Legal Aid's mental health lived experience advisors

report resistance of educational providers to provide reasonable adjustments and flexible approaches, making it difficult for some people to attend important educational events or complete their study.

This includes:

- refusal to record lectures
- insistence on heavy study loads
- lack of help to find suitable or part-time placements, and
- unwillingness to negotiate adjustments to placement hours or requirements.

In addition, some LACs see discrimination cases related to vocational placements that must be completed to attain a degree. In the experience of some LACs, placement providers fail to make reasonable adjustments for the student or terminate their placement because of characteristics or symptoms of the student's disability.

However, it is not clear that unfair treatment by placement providers occurs within an area of life protected under discrimination laws, since placement providers are generally independent of the tertiary education institution, and it is not clear that they are providing the student a "service". This creates difficulties in resolving the situation through legal avenues. Further, when a student has had a placement terminated because of their disability, tertiary institutions have asserted that the responsibility for reasonable adjustments lies with the placement provider and they are unable to assist. As the placement providers have already indicated their inability to make adjustments, and may fall outside the protection of discrimination laws, students are effectively locked out of completing the requirements of their studies.

This can have a consequential effect for people with disability in accessing pathways to future employment or additional study. For example, students who experience lower grades related to a lack of adjustments made have also found it difficult to be accepted into future courses. This in turn reduces opportunities for future meaningful employment, and the ability to achieve economic and financial independence.

Recommendation:

30. Commonwealth, state and territory governments should clarify the application of anti-discrimination laws to placement providers and strengthen obligations on tertiary educational and placement providers to provide students with disability reasonable adjustments and flexible approaches.

2.5 Employment

Removing barriers to people with disability accessing employment and thriving at work is essential to promoting a more inclusive community that supports the independence of individuals with disability.

Over the past five years, Victoria Legal Aid's Equality Law Program has provided over 6,200 legal advice sessions regarding discrimination matters, including over 1,600 legal advices about disability discrimination in employment. The majority of these cases relates to a lack of reasonable adjustment provisions, and difficulties for people with disability who have experienced discrimination to enforce their rights.

2.5.1 Obtaining employment

Issues can arise when people are asked to disclose any pre-existing medical conditions or disabilities in job application forms.

The Fair Work Act, Disability Discrimination Act, and state and territory laws protect against discrimination in determining who should be offered employment. However, it is typically very difficult to prove that a person was unsuccessful in applying for a position for a discriminatory reason. For the most part, this discrimination remains hidden behind explanations relating to expertise, experience and suitability for the role. This means that most employers are not challenged to demonstrate their compliance with discrimination law and the impetus for compliance may be reduced.

2.5.2 Maintaining employment

Legal aid commissions advise people with disability who have been placed in a difficult position when their employer requests their medical history or asks that they attend a medical assessment. An employee risks disciplinary action or dismissal in refusing a request to provide medical history or to attend a medical assessment because they have an obligation to obey their employer's lawful and reasonable directions. However, there is a high degree of uncertainty about what is lawful and reasonable:

- Section 30 of the Disability Discrimination Act makes it unlawful for employers to request information for the purpose of discriminating against an employee. However, this protection does not apply if the information is required to assess whether the person can perform the inherent requirements of the job or for assessing what "reasonable adjustments" may be required.
- An example of a request that might be unlawful is given in the section, but it does not provide guidance on when a request for information might go too far.[57]

Tom's story below highlights the negative impact of requests for medical information that are not limited to the minimum medical information required to assess whether the employee can perform the inherent requirements of the job, or to identify reasonable adjustments.

Tom:* Unnecessary requests for medical information (Vic)

I've been trying to go back to work for a few months now. They've got a report saying I'm fit to start back but it's not enough. I just feel like they don't understand. They see me as a liability if I go back. They've asked for more reports about my physical injury, which is why I've been off work, but then they wanted me to do an independent psychiatric assessment too. It's been a tough time for me, but my doctors all say my mental health has no impact on my ability to work and it never has, so it makes no sense to insist on that. I asked them why all the reports they've already got aren't sufficient and they said no, they need to have me independently assessed. I've already been through that and it's tiring telling the same story all the time. I feel like they just want to get rid of me and they're making me jump through all these hoops to force me to leave.

I feel humiliated and embarrassed actually, having to go to the doctors, having to go the psych, having to report back. Having to go to the psych made me feel very apprehensive and insecure. They wanted to know about my background, my history. There was a fair bit of personal detail that was documented. I haven't got the report so I don't know what's in it, so I'm a bit unsure of what was actually documented. I don't know if everything I told the psychiatrist has been put into writing or whether he edited it for the purpose of what my employer wants. They don't need to know some of the stuff that I said to him. The psych said the sooner I get back to work the better, but I'm very concerned about the outcome. It's detrimental on my health and mental state because I sit there

[57] *Disability Discrimination Act 1992* (Cth) s 30(3)(b) provides an example of lawful and unlawful requests under the section. Example: An employer may not require a prospective employee to provide genetic information if the employer intends to use that information to unlawfully discriminate against the employee on the ground of a disability of the employee. However, the employer may require such information in order to determine if the prospective employee would be able to carry out the inherent requirements of the employment or to determine what reasonable adjustments to make for the employee.

and I wonder, and maybe I wonder too much because it's out of my control. I'm passionate about what I do and I want to return back to work.

Greater clarity is needed on the scope of the protection, to ensure that a request for medical information is limited to the minimum medical information required to assess whether the employee can perform the inherent requirements of the job, or to identify reasonable adjustments.

2.5.3 Strengthening reasonable adjustments

The obligations and entitlements for "reasonable adjustments" under section 5 of the Disability Discrimination Act can be unclear because no examples are provided. For some people with disability, adjustments are key to securing quality employment.

A significant issue people with disability face in employment is when employers insist that they be fully fit to work their full hours and duties, with no adjustments required, before they are allowed to return to work from a period of illness or injury. Greater guidance for employers as to what adjustments might be reasonable would assist in return-to-work negotiation and avoid the need for litigation.

Sarah:* Back full time or not at all (Vic)

Prior to my heart operation, my boss told me that I was not to worry about my job – it would always be there for me. Then after the operation when I dropped off my medical certificates, the same boss said to me, no matter how long it took, my job was safe, and that when I was ready to go back, I could work half a day a week if that suited me, and then after that I could work up to my full-time hours. I was on leave for a few months recovering and then my doctor said that I could gradually return to work.

After much communication (backwards and forwards) and many delays on my boss's behalf, I was then able to start back at work. I came back the first week for a half day, which I found exhausting, and then I came in the following week for two-and-a-half days. I was then told I could no longer do my old job and was given other jobs to do (which I had never done before). There was a lot of work involved and new skills to learn, which, on top of trying to get my confidence back whilst dealing with the fatigue, was extremely stressful. I was continually berated by a younger worker who said that I was slow and wasn't including all the details required. I felt useless and very upset as I wasn't given much training in the new role; I was just thrown the work and told to do it.

A few weeks into my return to work my boss took me outside the office door where there were no witnesses and asked me how I was. I said not too bad. My boss then said "will you be back to work full time in three weeks?" I said no, as discussed previously I was working on increasing my hours each week and in a couple of months I would be back full time. She then stated, "well then I don't have a job for you and you can go now."

At the time this whole experience of returning to work in an unknown job, the constant degrading by younger co-workers and the constant chopping and changing of my days of work was horrible. And then to be told there was no job for me was the ultimate rejection, which made me feel useless and depressed. I cried for days because I wasn't given a chance to recover – ask anyone who has had heart surgery how tired the operation leaves you, let alone how painful it is for months.

I feel there were completely unrealistic expectations and pressure placed on my return to work. There should've been a clear and realistic return to work procedure. My mind was perfect, my body just needed to adjust to working again. I have long since recovered physically, and if I had been given the opportunity, I would've been back to full-time work as I had originally agreed upon. It took a very long time to gain even an inch of my confidence back after this experience, and as a result of this, I have never returned to the workforce, as who is going to employ an elderly lady

that has had heart surgery? I have found this terribly sad as I have worked my entire life, and to be treated with absolutely no dignity or compassion was appalling.

The *Equal Opportunity Act 2010* (Vic) (**Victorian Equal Opportunity Act**) is unique in providing examples of adjustments that may be reasonable, such as allowing the person to be absent during work hours for rehabilitation, or allowing the person to take breaks more frequently.[58] A similar list of examples should be inserted into the Disability Discrimination Act and other state and territory legislation as relevant, including the example of a gradual return to full hours and duties.

Recommendation:

31. Commonwealth, state and territory governments should strengthen the reasonable adjustments provision in the Disability Discrimination Act and respective legislation by clarifying what adjustments may be reasonable, with clear examples, including a gradual return to full hours and duties.

32. Commonwealth, state and territory governments should strengthen the Disability Discrimination Act and state and territory discrimination law prohibitions on requesting discriminatory information by limiting a reasonable request for medical information to:

a) the minimum medical information required in order to assess whether the employee can perform the inherent requirements of the job or to identify reasonable adjustments, and

b) circumstances where there is evidence that the medical information requested is required.

2.6 Accessing community services, places and other services

Legal aid commissions assist people with disability who encounter attitudinal and environmental barriers when attempting to access services, community infrastructure and public spaces, which can significantly decrease their community and economic participation, social connectedness, and life opportunities.

2.6.1 Attitudinal barriers affecting access to services

Attitudes towards disability can create barriers for people with disability when attempting to access services in the community, such as health care. These barriers may prevent people with disability from being able to access the services they are entitled to or result in a lower standard of care. Fear of encountering negative attitudes and previous bad experiences can also deter people from attempting to access services at all.

People with multiple and intersecting identities are more likely to encounter attitudinal barriers in accessing services. First Nations clients with disability have told Victoria Legal Aid staff that they fear disclosing mental health issues when accessing services and worry about these issues being disclosed when referred between services, because they fear discrimination as a result. This compounds the lack of cultural safety they report frequently experiencing when accessing mainstream services, and contributes to them not attending services and, as a result, sometimes losing access to the service altogether.

Some clients with disability report that they experience discrimination when reporting criminal activity and making complaints, such as not being given the same credibility because of a diagnosis, labelled “passive aggressive”, and dismissed as a chronic complainer. In the experience of Victoria Legal Aid’s consumer advisors, a number of people with disability have reported being assaulted while admitted to

[58] *Equal Opportunity Act 2010* (Vic) s 20.

a psychiatric inpatient unit in a public or private hospital, and that police refuse to investigate the allegation in those circumstances. Some people were told by police that they had to make a complaint directly with the hospital first, even though past complaints had been ineffective and taken too long to resolve. When another person reported an assault in an inpatient unit, police interviewed health staff at the service but did not take a victim statement from the person allegedly assaulted. Another person reported having to obtain their own intervention order without police assistance.

All complaints should be investigated appropriately and pursued accordingly.

2.6.2 Equal access to public spaces

People with disability, especially those with mobility or vision impairments, may experience a lack of physical inclusion in the built environment when attempting to access buildings or parts of buildings open to the public. Lack of ramps, suitable entry points or other facilities may constitute indirect discrimination.,

Environmental barriers are particularly common in buildings built prior to the Disability Discrimination Act or the *Disability (Access to Premises - Buildings) Standards 2010* (**Premises Standards**). Often respondents to a discrimination complaint will claim that the building complied with the relevant building standards in place at the time of construction and defend the complaint on the basis that having to make the building accessible would cause them 'unjustifiable hardship'[59] due to the cost, technical barriers, and/or impact on heritage features of a building.

The introduction of the Premises Standards seeks to put universal design[60] at the forefront of plans for new buildings or upgrades of buildings. The application of universal design principles is an important part of ensuring that people with disability can access basic services and participate fully in society, thereby ensuring social and legal inclusion.

However, recent examples of matters brought to the Queensland Human Rights Commission relating to upgrade works[61] demonstrate that the implementation of the Premises Standards is not always reflected in the design stage, e.g.:

- during a station upgrade, the escalators were removed and replaced by steep stairs, which impacted on an older person with back problems accessing a train station. This was resolved with an agreement that escalators be installed as part of the station upgrade, and
- wheelchair access parking spaces were unavailable at a ferry terminal during construction works, which impacted on a wheelchair user being able to use the ferry.

Recommendation:

33. Private and public entities should consistently comply with the Premises Standards, to enable all people with disability to access and participate in the community on an equal basis with others.

[59] Unjustifiable hardship is a defence to a discrimination claim under federal discrimination laws if able to be proven by a respondent in a matter.
[60] Universal design principles provide a framework for the design of equipment and environments to be inclusive and accessible for all people. Universal design principles have been implemented in the design of buildings, open spaces, products, technology, and documents. For more information, see '7 Principles of Universal Design', *Centre for Universal Design Australia* (Web Page) <https://universaldesignaustralia.net.au/7-principles-of-universal-design/>.
[61] 'Human Rights Case Studies', *Queensland Human Rights Committee* (Web Page) <https://www.qhrc.qld.gov.au/resources/case-studies/human-rights-case-studies>.

2.7 Asylum seekers

Some legal aid commissions provide advice, and representation, to asylum seekers and other disadvantaged non-citizens and through this work see the treatment of people with disability in Australia's immigration detention centres. People in immigration detention are from culturally and linguistically diverse backgrounds,[62] and many, especially those who have experienced or fled persecution and violence, experience significant disability and/or mental health issues including PTSD. People are frequently subjected to long periods of detention while awaiting an outcome of their case, with risk to physical and mental health.

The experience of immigration detention is likely to be particularly severe for people with intellectual, psychosocial and neurological disabilities. As well as exacerbating existing mental health issues, immigration detention can cause severe mental health issues in detainees. Multiple reviews have concluded that health care services at regional immigration detention centres are limited, mental health issues are the most common reason for presentation to the hospital, and mental distress and despair are clinically correlated with being held in detention.[63]

In addition, structures for supporting people with disability in immigration detention are underdeveloped and inadequate. This, combined with the conditions in immigration detention, leads to a range of issues for people with disability, including the following:

- Inadequate supports for people whose decision-making capacity is in doubt, to help them regain capacity, leading to their cases stalling and thus prolonging their detention
- Exposure to violence within detention, including serious assaults. The unsafe environment causes fear that leads people to isolate themselves
- Alarming rates of self-harm and other injury
- Reluctance to make a complaint due to a sense that there is 'no point' and/or fear of repercussions
- Neglect and exacerbation of health issues due to barriers to obtaining medical treatment, including:
    - excessive formal requirements to obtain care, including written requests
    - significant delay in requests being actioned
    - lack of access to specialist or high-level care for significant health issues
    - concerning psychiatric assessments by International Health and Medical Services (**IHMS**) staff suggesting that people with well-documented diagnosed disability are anti-authority or uncooperative, and
    - a lack of clear pathways to raise health concerns on behalf of clients.
- Diminished autonomy and rights through:
    - the inability to choose or obtain preferred or established medical treatment
    - a lack of privacy, including inappropriate sharing arrangements and excessive supervision, even when in hospital, and
    - clients not requesting necessary medical support or raising other health issues due to a fear of repercussions, quarantine and exposure to harsh hospitalisation processes.

[62] *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, The experiences of culturally and linguistically diverse people with disability (Issues Paper, March 2021).
[63] Gillian Triggs, 'Mental health and immigration detention' (2013) 199(11) *Medical Journal of* Australia 721, 722.

- The use, and threat, of solitary confinement and restraints, including handcuffs and body belts. One of Victoria Legal Aid's clients with disability described being forcibly injected with medication by staff in personal protective equipment (**PPE**) during COVID-19 and fed through a small window over a quarantine period, which they found traumatising. Others report being told they would be secluded if they act a certain way or complain.
- Withholding of 'points' used for canteen purchases when a person is unable to complete activities due to their health.

The story below shows the impact of conditions in immigration detention and the lack of access to treatment and support.

"I feel like I'm screaming for help but when people hear me, they turn away" (Vic)

When I was a child in Somalia, rebel forces tortured and murdered my father, raped my mother, and severed my brother's hand before my eyes. I fled for my life and lived for years in great hardship in a Kenyan refugee camp, where I suffered repeated rape, before coming to safety in Australia in 2003. My experiences have led me to suffer severe PTSD. I also suffer from depression, bipolar disorder and schizophrenia, including episodes of psychosis. Because of my mental health, I received a disability pension in the community in Australia.

After arriving in Australia, when I was very young, I started to abuse substances to cope with the trauma, and got into trouble with the law. While in custody, I was brutally assaulted, leaving me in a coma and with an acquired brain injury that meant I had to learn to walk again. I need assistance with daily tasks like showering, cooking and cleaning, and I have serious reading and cognition difficulties.

After my visa was cancelled, I was put into immigration detention, where I have been for over two years. In here, I experienced extreme distress, including hearing my father's voice begging for mercy, and having flashbacks and nightmares. My memory is affected and I feel very unsafe and afraid.

I came into detention with medication that I had taken in the community and in jail. In the first week, I didn't get any medication at all, despite bringing it with me. It took about a week to see a doctor. When I told them I needed medicine, they wouldn't believe me. Eventually, they gave me medication that they chose, and I had no choice. They say, "you take what we give you". It's not helping me. I want the ones I used to have but they won't give them to me. What I'm being given isn't working but no one will listen.

If you want to see a doctor, you have to put a form in and wait two or three days. When you do see the doctors, it does not seem like they are listening to you. They just think about medication and no other treatment.

I used to have counselling in prison. I told them there that I need to see a counsellor. I'm still asking two years later. They tell me that they will book me in and that I have to wait. I need someone to speak to.

In prison, I was in a disability unit and in a cell by myself, but in immigration detention I share a cell in the general area. I asked to be by myself. I can't sleep and I feel afraid because anybody can come in at any time. If you get sick at night, there is no intercom. It's really far to get to the office from the cell. I feel afraid that something really bad might happen in the night and that I couldn't do anything.

I also feel very unsafe and insecure in detention. I was assaulted here and my arm was broken and I was vomiting with the pain. They told me to wait in my room, handcuffed, including my broken arm. It was over five hours before they agreed to call an ambulance, and another two

hours waiting. In the ambulance, I was handcuffed and in a body belt. In hospital, I slept in the room handcuffed with five officers around me. I couldn't move. They refused to take the handcuffs or belt off. I felt traumatised. I felt like I was nothing. I was shackled like an animal, with everyone looking at me.

The officers here are like soldiers. It makes me re-traumatised. I was five years old when I first saw the bullets, spray, handcuffs and guns of soldiers. When I look at these officers that is what I see.

I can't understand what is happening to me. I love this country but I can't understand this cruelty. This is not the Australia I know.

There is nobody here who will help me. I need proper treatment, counselling and support. I want to be in the community and rebuilding my life and getting the help I need.

Immigration detention is horrible. I can't describe it. I feel like giving up. Before detention, I never would give up, but I am a human being and I can only hold so much.

As a general principle, a person should not be placed in a closed immigration detention facility unless they pose an unacceptable risk to the Australian community that cannot be managed in a less restrictive way.[64] The Department of Home Affairs uses a risk assessment matrix to determine whether a person presents a 'risk' to the community, and therefore whether they should be detained in closed detention and how they should be managed within detention. This matrix includes considerations such as past self-harm, disagreeable behaviour, and whether the person has protested their conditions.

We consider that this tool is not appropriate for determining risk to others or the community and ought to be revised. It disproportionately affects people with disability, who are more likely to have a history of self-harm and increases the likelihood that they will be kept in closed detention and treated in a more restrictive way. In closed detention, people will have less access to the supports they need to live with dignity, and to address any issues underpinning their behaviour that could have contributed to them being perceived as a risk to the Australian community. We note that people on temporary visas do not meet the residency requirements for the NDIS, and even those who are potentially eligible may face many barriers obtaining supports (see 2.1 above).

If no alternatives to closed immigration detention can be identified, reasonable adjustments for the individual's particular disability need to be made. Regular access to an independent review body, to scrutinise that detention, should be available to ensure that detention remains necessary and proportionate.

Recommendation:

34. The Commonwealth Government should protect, respect and fulfil the rights of refugees and asylum seekers with disability, including by:

- **a. revising the risk assessment matrix tool to be appropriate for determining risk to others or to the community**
- **b. ensuring people with disability are not subjected to immigration detention except as a last resort, where no alternatives exist. If no alternatives exist, people with disability should have access to better conditions of detention in light of their particular disability, and regular access to an independent review body scrutinising that detention to ensure it does not continue any longer than strictly necessary.**

[64] This could be release into the community, or community detention (permitting a person to live at a specified residence in the community with certain conditions attached): *Migration Act 1958* (Cth) s 197AB.

2.8 Barriers to bringing a discrimination claim

Access to services, places, and support may be improved by reducing the barriers to bringing a claim for discrimination. An ongoing concern in relation to disability discrimination law is the need for individuals who experience discrimination to bring discriminators to account. If people do not feel able to raise their complaints, there is likely to be less general awareness of issues, less accountability and less action to create positive change. Barriers include:

- power imbalance
- financial dependence on the discriminator
- a fear of reputational damage
- retaliation or being punished at work
- difficulties proving the conduct, and
- the disparate cost/benefit of litigation.

Furthermore, barriers to bringing a claim under discrimination law are embedded in the legislative framework of both disability discrimination laws and interpretation by the courts. The overlapping nature of the federal and state/territory-based laws also creates complexity. These barriers include:

- the risk of a substantial adverse costs order under the Disability Discrimination Act, even with a potentially meritorious claim
- that the applicant bears the sole burden of proving discrimination, often against a well-resourced employer or educational institution that holds key documents and exercises a high degree of control over witnesses
- narrowly applied and highly technical legal tests, such as the requirement to identify a comparator in order to establish direct discrimination under the Disability Discrimination Act, and
- confusion about what constitutes a reasonable adjustment in certain circumstances, and an onerous approach to causation under sections 5(2) and 6(2) of the Disability Discrimination Act as a result of the case of *Sklavos*.[65]

These factors prevent people who have experienced harm and discrimination from pursuing a legal claim, and thereby prevent discrimination laws from fulfilling the objectives of eliminating disability discrimination and promoting recognition and acceptance within the community of the principle that people with disability have the same fundamental rights as the rest of the community.

Recommendations:

35. Commonwealth, state and territory governments should strengthen legislative protections for people with disability by:

a. reforming federal, state and territory anti-discrimination laws as appropriate to provide a modern, robust legal framework for preventing and addressing disability discrimination, including the following:

i) Limit costs orders against unsuccessful applicants to instances where the application is frivolous, vexatious or without foundation.

ii) Shift the burden of proof to the respondent (e.g. employer) once the complainant (e.g. employee) has established a *prima facie* case.

[65] *Sklavos v Australian College of Dermatologists* [2017] FCAFC 128.

iii) **The definitions of discrimination in the Disability Discrimination Act should be simplified by removing the comparator test.**

iv) **The Disability Discrimination Act should be amended to provide a standalone reasonable adjustments protection following the model adopted in Victoria.**

2.9 Empowering regulators to enforce discrimination laws

The burden of enforcing disability discrimination laws should not be the sole responsibility of individuals. Regulators, including the Fair Work Ombudsman, the Australian Human Rights Commission, and state and territory human rights and anti-discrimination commissions, should be empowered and properly resourced to investigate and act on breaches of discrimination law in their respective jurisdictions. Empowering human rights commissions to enforce compliance with discrimination laws would recognise disability discrimination as unlawful behaviour that can result in substantial harm to a person's health, safety, and future successes, as well as to the broader community.

Recommendation:

36. Commonwealth, state and territory governments should grant national, state and territory human rights commissions increased powers and resources to effectively address disability discrimination, including:

a. greater investigation powers

b. powers to enter into enforceable undertakings, issue compliance notices, and conduct own motion investigations and enforcement actions, and

c. the power to seek sanctions against those who breach discrimination laws in order to enforce compliance with those laws.

3. Family law, family violence, elder abuse, and child protection systems that respond to the needs of people with disability

Legal aid commissions work extensively in responding to family violence, child protection, and family law. Some legal aid commissions also have specialist units which respond to elder abuse. Where parties to the same matter both approach a legal aid commission for assistance, legal aid commissions' grants of aid programs ensure that i) matters are referred appropriately so there is no conflict of interest, and ii) that both parties will still be funded to receive the assistance that they need.

Through our work, legal aid commissions see that the family Law, family violence, elder abuse and child protection systems are not set up to understand and respond to the needs of people with disability. We see the impact of stigma and negative assumptions regarding disability, which can lead to people with disability not being believed, or having their capacity and decisions questioned or undermined by these systems.

Lack of access to appropriate supports and services, compounded by broader issues with NDIS supports (see section 2.1 above), can make it more difficult for people with disability to break free of coercive or violent situations, putting them at further risk of violence. For parents with disability, these factors can cause or prolong separation from their children.

The police, courts, legal and non-legal practitioners within family violence and child protection systems need to be better equipped to have a comprehensive understanding of the nature and dynamics of family violence, and its intersection between mental health and disability, to protect people from systemic harm.[66]

3.1 Improving understanding of, and responses to, disability and mental health in the family violence system

Family violence data and research show that women[67] with disability face a heightened risk of experiencing intimate partner violence[68]. They may face additional challenges in leaving a violent relationship,[69] as they are likely to be more dependent on a partner for support and parenting, and already socially isolated. These risks are magnified for First Nations women, women from culturally and linguistically diverse backgrounds, and women who live in a regional, rural or remote area, who face other barriers to accessing appropriate supports when experiencing family violence. Victoria Legal Aid's Independent Mental Health Advocacy and Independent Family Advocacy Support non-legal advocates regularly see clients facing these challenges.

[66] NLA acknowledges the significant recent work of the Australian Law Reform Commission (ALRC) in reviewing the family law and related systems, and the recommendations arising from the report of that review which include recommendations about making decisions for people with disability. Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family La System*, ALRC Report 135 (2019). We understand that the Commonwealth Attorney-General's Department is considering the ALRC's recommendations. NLA further notes that Family Law Council has been reconvened and is considering terms of reference which include "options and avenues for making the family law system more accessible and equitable for separating families". (Family Law Council, Terms of Reference, 13 September 2022). NLA also gratefully acknowledges the recent Commonwealth Government funding for a national mental health training package for the legal assistance sector, 2022.

[67] Victoria Legal Aid notes that men also experience family violence and require safe and responsive services but acknowledges that family violence overwhelmingly impacts on women and children.

[68] Women with Disabilities Victoria, *Submission to the Royal Commission into Family Violence* (June 2015) 4.

[69] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Violence and Abuse of People with Disability at Home* (Issues Paper, 2 December 2020) 3-5.

Responses to family violence can be affected by assumptions about mental ill health.[70] There is a risk of people with mental health issues being misidentified as family violence offenders or the primary aggressor.[71]

Access to legal services and an appropriate legal systems response to support justice outcomes are continuing issues. NLA gratefully acknowledges Government funding received to support national initiatives by legal aid commissions to respond to family violence, such as the Family Advocacy and Support Service, a holistic wrap around service providing legal and social support to people experiencing family violence.[72]

3.1.1 Family Court litigation guardians

In our experience there continue to be great difficulties for people with disability who require assistance to initiate or respond to family law applications in circumstances where they require a litigation guardian. Rules 3.12 to 3.16 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) provide that a party to a family law matter may have a litigation guardian appointed for them where they do not understand the nature and possible consequences of the proceeding or they are not capable of adequately conducting, or giving instruction for the conduct of the proceedings. Rule 3.16 states that where a litigation guardian cannot be identified, the court may request the Commonwealth Attorney General to appoint one. Along with other bodies such as state and territory offices of the public guardian/public advocate, legal aid commissions sometimes receive requests to act as litigation guardian for parties.

Legal aid commissions can give only limited assistance in response to these requests as the role of the litigation guardian does not involve the provision of legal assistance; rather, the litigation guardian stands in the shoes of the party, and this will necessitate the guardian engaging in activities outside those usually undertaken by a lawyer. While LACs may endeavour to identify a suitable guardian in individual matters, the current role of LACs in relation to ligation guardians has largely been to provide a grant of aid for legal representation to a person eligible for legal assistance and in whose shoes the litigation guardian stands. The limited availability of persons to act as litigation guardian is a significant issue.

Recommendations 46, 47, and 48 of the Australian Law Reform Commission's review into the Family Law System,[73] relate to supported and substituted decision making. Recommendation 48 is "The Australian Government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation representatives in family law proceedings."[74] NLA understands that the Commonwealth Attorney-General's Department is currently undertaking work in relation to these recommendations.

Recommendation:

37. Commonwealth, state and territory governments should continue to investigate and respond to the recommendations of the Australian Law Reform Commission's *Family Law for the Future – An Inquiry into the Family Law System Final Report 135*, and the challenges in

[70] E.g. ANROWS women, disability and violence: barriers to accessing justice: final report https://apo.org.au/sites/default/files/resource-files/2018-04/apo-nid173826.pdf
[71] Women's legal service Victoria, policy paper 1 https://womenslegal.org.au/files/file/WLSV%20Policy%20Brief%201%20MisID%20July%202018.pdf
[72] Inside Policy, *An Evaluation of the Family Advocacy and Support Services Final Report* (2018).
[73] Australian Law Reform Commission, *Family Law for the future – An Inquiry into the Family Law System*, ALRC Report No 135 (2019).
[74] Australian Law Reform Commission, *Family Law for the future – An Inquiry into the Family Law System*, ALRC Report No 135 (2019).

relation to the appointment of litigation guardians in the family law system, including to identify, train, and accredit litigation guardians, and to provide all related funding support.

3.2 Need for improved response to family violence in the mental health system

Legal aid commissions see situations where people, especially women, experiencing family violence receive a mental health response that does not address the co-occurring family violence issue. A holistic response to the multiple factors which victim survivors of family violence may experience is necessary to address trauma and reduce the risk family violence continuing.

Legal aid commissions assist people detained as compulsory patients based on reports about the person's mental health from someone who is alleged to be using family violence against them. Disclosures of family violence can be disbelieved by people including members of treating teams and/or seen as evidence of mental health issues. Without adequate consideration of the basis of such claims, there is a risk that the mental health system inadvertently perpetuates a cycle of control or abuse against a victim survivor of family violence. For example, by involving an alleged perpetrator in a victim's mental health care plan despite the victim having disclosed family violence.

3.3 Allegations by a former partner or family member regarding parenting capacity and mental health

We see people with disability who experience bad faith allegations by a former partner or family member regarding their parenting capacity or the stability of their mental health. Negative assumptions regarding mental health and disability decrease the likelihood of the person with disability being believed that the allegations against them are unfounded. Such allegations may lead to the commencement of child protection proceedings and the temporary or protracted removal of children from their care.

Adele's story below demonstrates how it can be difficult and time-consuming to disprove such allegations. Furthermore, the stress and protracted nature of child protection proceedings and the ongoing impacts of family violence and trauma may exacerbate the person's mental health issues, creating a further barrier to reunification. Adele's story shows the need for the child protection system to be better equipped to understand and respond to family violence in the context of disability and mental health issues.

Adele:* Role of family violence in mental health decline not considered in child protection process (Vic)

As a baby, Mia was taken from her mother, Adele, through the intervention of the Department of Health and Human Services. Adele had been juggling parenting and a successful career when she began to experience serious family violence, including threats to kill, perpetrated by her partner. After some time, she was diagnosed with PTSD and separated from her partner.

However, the continuation of family violence after separation, including physical assault, threats to take her children away, and false claims to Department of Health and Human Services Child Protection, combined with single parenting and PTSD saw Adele's life spiral into a mix of problematic alcohol and drug use, further mental health issues, and homelessness.

After Mia was removed from her care, Adele actively engaged in a plan to have Mia returned to her care. She engaged with her psychologist and undertook drug treatment, despite continuing to experience family violence by Mia's father. Despite the claims of family violence, the Department

of Health and Human Services shared information about Adele with the father, which further antagonised him. When the matter went to court, Adele had demonstrated that she was no longer using drugs but that, without support to address the family violence, she was struggling to stabilise her mental health.

Without identifying the family violence as an ongoing issue, the Department argued in Court that Adele's mental health continued to pose a risk to Mia. The Department then made an application for Mia to be placed with a family member, on an order that only allowed Adele four contact visits a year with her daughter.

Adele has since commenced a new relationship and has had another baby that the Department has assessed is safe in her care.

3.4 Parents with disability and child protection

3.4.1 Negative assumptions made about parenting capacity because of disability

Legal aid commissions assist parents with disability in child protection proceedings that may result in temporary or permanent removal of children from their care or restricted contact with them. Legal aid commission lawyers see parents with disability, particularly a cognitive disability or mental health issue, have children removed at a higher rate than parents who do not have a disability,[75] often because parents with disability face disproportionate scrutiny of their parenting ability.[76] Victoria Legal Aid, in both its legal representation and non-legal advocacy work with parents in child protection, is concerned by a number of reports by child protection identifying parental disability as the basis for concerns about parental capacity.[77]

Parental mental health concerns are one of the key risk factors for children entering OOHC, particularly when co-occurring with family violence or substance abuse.[78] Where a mental health issue is present, it is essential to understand the basis on which it may present a current or future risk of abuse or neglect.

It is important that the child protection system avoids a deficit-focused view of parents with disability, instead shifting attention to what supports could be put in place to assist with parenting and help keep the family together. Wherever possible, parenting capacity should not be determined until this has been done. If supports are already in place, assessments of parenting capacity, where required, should be made based on parenting capacity with supports.

Barriers to participation in legal proceedings

Parents with disability may experience barriers attempting to participate in child protection proceedings, which may be compounded by living in remote areas, limited access to interpreters, and the significant time and at times prohibitive costs involved in attending court. Parents in inpatient mental health

[75] Victoria Legal Aid, *Achieving Safe and Certain Homes for Children: Recommendations to Improve the Permanency Amendments to the Children, Youth and Families Act 2005 based on the experience of our clients* (Report, November 2020); Office of the Public Advocate, *Rebuilding the Village: Supporting Families where a Parent has a Disability* (Report 2: Child Protection, 24 September 2015*).*

[76] Office of the Public Advocate, *Rebuilding the Village: Supporting Families where a Parent has a Disability* (Report 2: Child Protection, 24 September 2015*).*

[77] Reported by staff in Victoria Legal Aid's Independent Family Advocacy Support team.

[78] As a signatory to the United Nations *Convention on the Rights of the Child* and CRPD, children should not be separated from their parents against their will unless this is in the best interests of the child as determined by a Court and subject to judicial review. Under these conventions, the disability of a parent is not justification for the separation of children from parents and the State is committed to providing the supports necessary for parents with disability to meet their parenting responsibilities. These rights are reflected in the *Children, Youth and Families Act 2005* (Vic).

facilities can be effectively excluded from participating in such proceedings.[79] This can be because they are assessed or assumed to lack capacity, have not been notified, do not have phone access, are not supported by appropriate services, or have not been granted leave. In addition, inpatients may not have legal representation if a litigation guardian has not been appointed due to a lack of capacity to instruct a lawyer.[80]

Without parental participation, there is a risk that a court may not have all the information necessary to make a determination in the best interests of the child, and that the parent's presence in a mental health unit will be considered adverse to them. The lack of substituted decision makers to act for parents with disability in Children's Court proceedings adversely impacts on their prospects of reunification with their children.

3.4.2 Difficulties accessing disability supports and strict statutory timeframes create barriers to reunification

Delays in accessing necessary supports, combined with strict statutory timeframes for the resolution of child protection proceedings, create significant barriers to reunification for parents with disability. In Victoria family reunification orders provide a 12-month timeframe for a family to achieve reunification.[81] An additional 12 months may be provided if reunification is likely to be achieved or a permanent alternative sought. This approach assumes that all families experience problems that can be addressed within one or two years. Parents with disability are particularly affected because the supports they need may not be readily available, due to access barriers, long wait times, costs, or limited services near a parent's home, particularly in rural, regional or remote areas. A lack of other services, such as public housing, can also delay parents addressing protective concerns within the timeframe.

The Children's Court is therefore prevented from reunifying the child with the parent when the time limit expires, even if the child does not have an alternative stable placement and the parent is making some progress towards addressing the protective concerns. As Rhiannon's story shows, parents with disability who do not receive timely, tailored or appropriate supports face greater challenges in achieving reunification with their child.

Rhiannon:* Without intensive supports and reasonable adjustments, reunification was made more challenging to achieve (Vic)

Rhiannon has three children and was diagnosed with several disabilities that impact on her ability to address concerns that have been raised by child protection. Rhiannon also has an intellectual disability and a history of exposure to family violence.

At the time, Rhiannon's eldest two children were removed from her care. At the time, Rhiannon felt that the Department of Health and Human Services did not make reasonable adjustments during the reunification period to account for Rhiannon's disabilities. For example, the Department did not provide assistance to Rhiannon for her to obtain a NDIS plan with a view to providing her additional help that could have allowed for her two eldest children to safely return to her care. Despite requesting assistance to attend a parenting program for parents with disabilities, a referral was not provided by the Department. At that point, Rhiannon felt that a pre-assessment had been made that her intellectual disability would prevent her from successfully engaging in the program.

[79] Legal aid commissions may assist people in such circumstances, e.g. Victoria Legal Aid's Duty Lawyer Guidelines state that people are eligible for services even if they do not physically attend court, and Victoria Legal Aid is committed to improving lawyers' access to parties in mental health facilities.
[80] In Victoria, under the *Children, Youth and Families Act 2005* (Vic), where a parent who is a party to proceedings is deemed not to have capacity to instruct a lawyer, they currently go unrepresented.
[81] *Children, Youth and Families (Permanent Care and Other Matters) Act 2014* (Vic).

When the reunification timeframe was almost concluding, the Department advised Rhiannon that it had no other option but to change the case plan for her two children from a reunification to a non-reunification objective. Upon making this decision, the Department significantly and immediately reduced Rhiannon's contact arrangement with her two eldest children. This has left Rhiannon feeling powerless about her situation, and without any other choice but to accept that her children will not be returning to her care despite her willingness and capacity to do so.

Recommendation:

38. Commonwealth, state and territory governments should improve the family law, family violence and child protection systems for people with disability through:

- **a. investing in cross-disciplinary training and professional development of decision makers and health, welfare and legal professionals to:**
  - **i) strengthen their knowledge and understanding of the intersections between disability, mental health and the dynamics of family violence; and**
  - **ii) ensure they are equipped to apply holistic, trauma-informed and strengths-focussed responses to support people with disability, ensure rights are upheld.**
- **b. ensuring sufficient resourcing of disability informed, culturally safe and accessible legal assistance and advocacy, including to address issues of legal professional conflict, to support people with disability to engage with the family law, family violence and child protection systems.**
- **c. putting in place appropriate supports, including NDIS supports for parents with disability, to help families to remain together as a family unit.**

4. Improved regulation and oversight of restrictive practices and compulsory treatment

NLA strongly supports efforts to reduce the use of compulsory treatment and restrictive practices. Legal aid commissions work with people with disability who are subjected to a range of compulsory treatment orders and restrictive practices in mental health or disability-specific services and settings.

Many of our clients have complex needs and have experienced significant trauma and abuse as children. In our view better support should be provided to people experiencing deterioration of their mental health, and their support people, at the earliest stage/s and/or on initial presentation in order to reduce the need for restrictive practices or compulsory treatment.

4.1 Restrictive practices in disability-specific environments

While there is some evidence of improvement in service provider accountability and scrutiny of restrictive practices,[82] some legal aid commissions continue to see the use of restrictive practices not in accordance with the National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018. including[83]

- detention of people with disability in residential services and group homes, substantially limiting every aspect of their daily life, such as access to visitors and phone calls, whether and what they can watch on television, and when and in what circumstances they may access the community under staff supervision[84]
- the use of environmental restriction to protect from risk, due to a lack of staff and other resources to monitor risk or support meaningful occupation. This can occur in community-based settings such as group homes; and
- regular restriction of residents' freedom of movement. For example., services may prevent residents from leaving their rooms or the premises by various means, such as locked doors, refusing to provide the support the person requires to exercise their freedom of movement, encouraging the person to believe they are not permitted to leave, or threatening consequences for leaving. Restrictive practices imposed on one resident may also impact on other or all residents, as Tim's story demonstrates.

Tim's story* (NSW)

Tim is a forensic patient who has polydipsia – a serious condition that may lead to serious injury and death involving thirst despite drinking plenty of fluids. Tim's access to taps would need to be restricted at any supported accommodation, including potential removal of taps. This would impact on other residents, and it is unlikely that other residents would require the same restrictive practice.

[82] See, eg, NDIS Quality and Safeguards Commission, Regulated Restrictive Practices Guide (October 2020), and state-based regimes such as Part 8 of the *Disability Act 2006* (Vic), which includes requirements for creation of treatment plans, senior practitioner oversight of restrictive interventions and treatment plan creation, and tribunal review of supervised treatment orders and treatment plans.

[83] See for example, https://www.theguardian.com/australia-news/2021/nov/10/ndis-providers-used-unauthorised-restraints-on-clients-over-a-million-times-in-12-months

[84] In Victoria, the *Disability Act 2006* (Vic) permits the detention of people with an intellectual disability, who pose a significant risk of serious harm to others, for the purposes of compulsory treatment, pursuant to a Supervised Treatment Order.

It is highly likely that cases of restrictive practices are underreported. These practices are largely hidden from external sight, and some people subjected to restrictive practices in disability-specific settings may be unable to seek the advice and assistance that they need.

There is a lack of consistency and robustness in federal, state and territory legislation regarding a formal authorisation process for the use of restrictive practices including by NDIS providers on NDIS participants.

4.2 Compulsory treatment and restrictive practices in mental health units and hospitals

4.2.1 Compulsory mental health treatment

All states and territories have legislation that permits compulsory or involuntary treatment of people with mental health issues. The treatment can be provided under a treatment order without the person's consent in hospital, residential care or the community.[85] Compulsory treatment of mental health issues is intended to be a last resort (and voluntary treatment is preferred).[86]

However, there is concern amongst legal aid commissions that there is heavy reliance on compulsory treatment in a way that undermines people's autonomy, dignity, recovery and self-determination,[87] e.g. compulsory treatment orders made for the maximum length of time possible,[88] and there seems to be limited offering of voluntary treatment, and over-reliance on coercive practices.[89]Clinicians often fail to presume capacity of people to provide informed consent or support people to make informed decisions, and there is limited regard for a person's views and preference.[90]

As demonstrated by the story below, the misapplication of the capacity test can have profound and negative impacts on the individual who then receives compulsory treatment.

PBU and NJE:[91] Capacity to consent to or refuse treatment

Victoria Legal Aid appealed to the Supreme Court of Victoria on behalf of clients 'PBU' and 'NJE' to clarify when electroconvulsive therapy (**ECT**) can be performed without a person's consent. Both had ECT ordered against their will by the Mental Health Tribunal. The Victorian Civil and Administrative Appeals Tribunal (**VCAT**) affirmed those decisions.

Describing the impact of compulsory ECT for him, PBU said:

[85] AIHW, 'Mental health services in Australia' (Web Page) <https://www.aihw.gov.au/reports-data/health-welfare-services/mental-health-services/overview>

[86] E.g., the *Mental Health Act 2014* (Vic) promotes least restrictive treatment, supported decision-making, rights-based practice and recovery focused treatment.

[87] See Edwina Light et al, 'Community Treatment Orders in Australia: Rates and Patterns of Use' (2012) 20(6) *Australasian Psychiatry* 478, 480. Victoria has the highest rate of people subject to Community Treatment Orders (98.8 per 100,000). This is compared with 61.3 per 100,000 in QLD, 48.6 per 100,000 in WA, 46.4 per 100,000 in NSW, and 30.2 per 100,000 in Tasmania. There was no data available for SA or NT. See also Piers Gooding and Yvette Maker, 'Why are the Rates of Restrictive Practices in Victoria's Mental Health Services so high?' *Pursuit*, (Web Page, 19 January 2019) <https://pursuit.unimelb.edu.au/articles/why-are-the-rates-of-restrictive-practices-in-victoria-s-mental-health-services-so-high>. Victoria is higher than the national average for people admitted involuntarily to inpatient units (the percentage of people admitted to an inpatient unit involuntarily [as opposed to voluntarily] is 52% in Victoria, compared to a national average of 45.4%).

[88] See, eg, Mental Health Tribunal, *2017-2018 Annual Report* (Report, July 2018).

[89] See, eg, *Royal Commission into Victoria's Mental Health System, Final Report, Volume 4: The Fundamentals for Enduring Reform* (Final Report, February 2021) 387.

[90] Ibid 393-394.

[91] *PBU & NJE v Mental Health Tribunal* [2018] VSC 564 (1 November 2018) 103 (citations omitted).

"It was one of the most traumatic days of my life, when I was taken into the ECT room and held down on the bed. I didn't know I was going to have ECT … The most terrifying aspect of having ECT is that I didn't know what state I would be in after."

This case is the first time the court considered laws that govern the use of compulsory ECT in Victoria. The court was asked to consider important criteria governing the administration of compulsory ECT, including a person's capacity to consent to or refuse treatment.

In his judgment, Supreme Court Justice Kevin Bell found that VCAT had misapplied the law in relation to whether PBU and NJE had the capacity to decide if they wanted ECT and had breached their human rights.

Justice Bell ruled that people experiencing mental health issues should face the same standard as all other people when their capacity to consent is assessed and said:

"The issue is closely connected with the need to respect the human rights of persons with mental disability by avoiding discriminatory application of the capacity test. More should not be expected of them, explicitly or implicitly, than ordinary patients. …

When respect is afforded to the choice of the person to consent to or refuse medical treatment, the person is recognised for who they are."[92]

Further, people with psychosocial disability who voluntarily receive mental health treatment commonly report that they are often subjected to coercion to agree to the treatment. For example, we see services requiring people with psychosocial disability to comply with the service's treatment plan despite the person's own views and preferences, or else risk compulsory treatment involving an inpatient stay or delay of discharge.[93]

There is a need for increased access to legal assistance for people facing compulsory treatment across Australian states and territories. Legal assistance is a crucial mechanism for rights protection where significant decisions affecting rights are being made in circumstances of considerable power imbalance.[94]

Non-legal advocacy also provides important support to promote the rights of consumers, in particular those subject to or at risk of compulsory treatment. However, these services are not consistently available across all states and territories, and not all consumers are aware of how to access them.

Legislative provisions that enable an opt-out model of access to non-legal advocacy services for consumers subject to or at risk of compulsory treatment should be provided across Australia. This would enable the provision of information on rights and the mental health system, coaching for self-advocacy, referrals, and non-legal advocacy to all consumers who want it. These changes would remove the onus on the consumer to find out about and contact such services and would ensure greater access to non-legal advocacy services for consumers.

4.2.2 Seclusion and restraint in mental health settings

Legal aid commissions see that people with dual disabilities or complex needs are particularly susceptible to coercive or restrictive practices in inpatient units. These include:

- detention in high dependency or intensive care areas of the unit, which is often done to ensure safety from co-patients, but results in restricting or preventing the person's access to leave, and

[92] Ibid [173], [179].
[93] Victoria Legal Aid, *Paving the Roads to Recovery: Building a Better System for People Experiencing Mental Health Issues in Victoria* (Submission, May 2020) 14.
[94] E.g., the Royal Commission into Victoria's Mental Health System (2020) recommended an increase in legal representation for people facing compulsory treatment (recommendation 56).

- restraint and seclusion, which are often used to address behaviours that do not arise from the person's mental health, by staff who lack training to respond appropriately in other ways.

Vanessa:* Strict conditions and leave cancellation (Vic)

Vanessa is a woman in her early 30s, currently living in a Secure Extended Care Unit in an outer suburban hospital in Victoria. The service has noted that they feel there is no therapeutic benefit to Vanessa remaining at the Secure Extended Care Unit, but they have not developed a discharge plan for her due to perceived risk involved in her diagnosis of a severe eating disorder, and lack of a NDIS plan in place.

Vanessa frequently has her leave cancelled at the Secure Extended Care Unit, sometimes due to concerns about risk, but other times for 'behavioural modification'. Vanessa states that if she is rude to a nurse and raises her voice, then her leave is cancelled. This can be for a period of a few days, or sometimes for a period of a fortnight. Vanessa feels that when her leave is taken away, it is a form of punishment.

As a young woman with limited freedom, detained without an immediate prospect of discharge, Vanessa explains:

They do not allow me chewing gum on the ward and when I can't go out and have a cigarette, that's one of my main comforts.

They are reducing all my pro re nata ("as needed") medications which actually help me, and they are not allowing me, when I have low blood sugar, to have the treatment I prefer. They force me to have a glucose injection which I hate, instead of glucose gel."

People with disability being held in seclusion at inpatient mental health units are at risk of continued arbitrary seclusion as a means of control, enforcing discipline, or because there is no alternative place available. In NSW, the Mental Health Review Tribunal has no explicit power to oversee the seclusion of patients within a mental health facility or direct that seclusion be undertaken in a particular manner, and the person subject to seclusion cannot seek review of a decision to keep them in seclusion.

Lizzie's story* (NSW)

Lizzie is an involuntary patient in a secure mental health facility. In 2012 Lizzie assaulted a nurse and was placed in seclusion. Lizzie was then transferred to another secure mental health facility where she was placed in seclusion intermittently, then detained in seclusion permanently from 2014 until 2020.

Since June 2020 Lizzie has only returned to seclusion on an infrequent and very short-term basis. Lizzie remains in the secure mental health facility and requires extensive rehabilitation after being kept in seclusion for six years.

Nationally, there is growing recognition of the negative impact of seclusion and restraint on people experiencing mental health issues. In recent years, there have been significant government efforts at both the state and federal levels to reduce the use of restrictive practices, such as patient seclusion, in mental health services.[95] E.g., the Royal Commission into Victoria's Mental Health System recommended that the Victorian Government act immediately to reduce the use of seclusion and restraint in mental health and wellbeing service delivery, with the aim to eliminate these practices within

[95] See, eg, standards established by the Australian Commission on Safety and Quality in Health Care. See also AIHW, 'Mental Health Services in Australia' (Web Page) <https://www.aihw.gov.au/reports/mental-health-services/mental-health-services-in-australia/report-contents/restrictive-practices)>. Data on the use of seclusion, mechanical and physical restraint by hospital were reported for the first time in 2018. This reporting enables comparison of individual services against other states and territories, national rates and similar services, which can support service reform and quality improvement agendas.

10 years.[96] Through our work, we see the impact of seclusion and restraint on people with disability and reiterate the need for prompt national action toward its elimination.

4.3 Inadequate supports prolonging detention in restrictive environments

People with psychosocial disability are frequently detained in inpatient settings despite being clinically ready for discharge into the community. This is due to:

- lack of access to, or delays in accessing, the NDIS or other community supports to enable discharge from forensic services
- lack of access to appropriate accommodation, including limited crisis accommodation and very few long-term stable housing options available
- lack of expertise or rehabilitation supports to support people with dual disability
- reduction in support services for people without NDIS packages, and market failure or thin markets for those with NDIS packages, resulting in lack of access to services and supports that people are funded to receive (see section 2 above)
- poor discharge planning, and
- lack of clarity regarding the responsibilities of different systems of support, especially where the person has a dual disability.

Recommendations:

39. Mental health and disability services should promote the human rights of people with disability, make compulsory treatment of mental health issues a true last resort, and move towards eliminating the use of restrictive practices, including seclusion and restraint.

40. State and territory governments should amend existing mental health laws to at a minimum:

a. allow mental health review tribunals to review a decision to hold a person in seclusion after a period of seven continuous days, or more than 14 cumulative days within a 28-day period

b. allow a person held in seclusion to ask to be removed from seclusion, and if the request is denied, to seek a review of the decision by a mental health review tribunal

c. empower mental health review tribunals to make orders to release a person from seclusion, or order that seclusion be undertaken in a particular manner

d. state in what circumstances seclusion should not be used (e.g., to punish a person or due to lack of alternative placement), and

e. implement an 'opt-out' system for referrals to independent mental health advocates for any person subject to compulsory treatment, along with providing adequate resourcing for independent advocates to meet demand.

41. Commonwealth, state and territory governments should adopt a robust national framework for the regulation and oversight of the use of restrictive practices on people with disability that applies to all settings. This framework should aim to eliminate the use of restrictive practices in all settings, and include effective mechanisms to ensure compliance.

[96] *Royal Commission into Victoria's Mental Health System, Final Report, Volume 4: The Fundamentals for Enduring Reform* (Final Report, February 2021) Recommendation 54.

5. Reducing contact with the criminal justice system

NLA refers to the submission made by Legal Aid Queensland to the Disability Royal Commission *Criminal Justice System Issues Paper*.

People living with disability are more likely to have contact with the criminal justice system than people who do not have a disability,[97] and are overrepresented in the prison population.[98] Results from various studies globally estimate that between 25 and 30 per cent of people in prison have borderline intellectual functioning, while 10 per cent have a mild intellectual disability.[99] The overwhelming majority also experience a range of psychosocial disabilities related to mental health issues.[100] The Productivity Commission Report on Mental Health acknowledges that among those who formally enter the justice system, people experiencing mental health issues are overrepresented at every stage.[101]

A range of factors contribute to the significant number of people with disability engaged with the criminal justice system, including:

- inadequate disability support in the community
- gaps in support due to transition to the NDIS
- inadequate supports under the NDIS
- housing instability
- substance use and addiction
- involvement in multiple layered and disjointed service responses
- barriers to accessing the DSP and the widening gap with other social security payments
- non-payment of fines
- enforcement of public space and transport offences
- mandatory sentencing, and
- breaches of intervention orders.

Paul's story* (SA)

Paul, aged 42, lives with an intellectual disability, uses a wheelchair and has limited verbal communication.

Paul had been residing in a group home because his elderly mother was no longer able to care for him. Paul found it very difficult to adjust to many people being near him, and when trying to get the attention of others would often throw his hands around. As a result, on one occasion, he accidentally hit another resident and an interim intervention order was put in place. The conditions of the intervention order

[97] Eileen Baldry, 'Disability at the Margins: Limits of the Law' (2014) 23(3) *Griffith Law Review* 370, 377; *Law Council of Australia*, *People with Disability, The Justice Project Final Report – Part 1* (Final Report, August 2018) 18.
[98] Almost 1 in 3 (29%) prison entrants aged 18 and over reported living with a disability (that is, any restriction on activity, employment or education), compared with 1 in 5 (22%) people aged 18 and over in the general community- Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2018* (Report, 2019) 82. In Victorian prisons, 33 per cent of adult women and 42 per cent of adult men have an acquired brain injury, compared with 2 per cent in the general Australian community- Victorian Department of Justice, *Acquired Brain Injury in the Victorian Prison System* (Corrections Research Paper Series, No 4, 4 April 2011) 19.
[99] Mike Hellenbach, Thanos Karatzias and Michael Brown, 'Intellectual Disabilities among Prisoners: Prevalence and mental physical comorbidities' (2017) 30(2) *Journal of Applied Research in Intellectual Disabilities* 230.
[100] Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2018* (Report, 2019) 27.
[101] Productivity Commission, *Mental Health* (Final Report, 30 June 2020) 46.

meant that he could not return to the group home. He returned to live with his mother until suitable accommodation could be found for him.

Paul does not understand what has happened and is not aware of the intervention order or what it means. There is a high risk that the intervention order could be breached because Paul does not understand its terms or purpose. A breach is a serious offence and Paul could face jail time.

The overrepresentation of people with disability in the criminal justice system carries a significant personal and community cost to health and wellbeing, and places significant demands on limited public resources through the direct cost of imprisonment[102] and the indirect consequences of imprisonment on the person, their family and the community.

Preventing people from entering the criminal justice system, particularly where the offending is low level, is the best way to limit ongoing and entrenched involvement in criminal justice processes. It is widely accepted that a holistic approach to intervention is beneficial.[103] NLA strongly supports the use of non-legal approaches, such as support services, to assist people to deal with the underlying causes of their behaviour and to change behaviours.

Reforms are needed to reduce the significant number of people with disability engaged with the criminal justice system, including:

- improved police responses, including increased use of diversion and reduced use of arrest and detention
- changes to bail laws
- expansion of therapeutic courts and services
- increased use of community-based sentencing
- community-based support for treatment of alcohol and substance use as a health issue, rather than a criminal justice issue, and
- improved mental impairment legislation
- Abolition of mandatory sentencing laws or at a minimum amendment of mandatory sentencing laws to include exceptions for people with disability.

5.1 First responses

5.1.1 Police as first responders

Legal aid commissions hold concerns about the frequency with which police are called to respond to people with disability, and particularly those experiencing mental health crises, in situations that could be assisted by health professionals better placed to assist the individual and de-escalate an incident.[104]

[102] Productivity Commission, *Report on Government Services* (Report, January 2019) Table 8A.17. The Council of Australian Governments reports that real net operating expenditure per prisoner per day in Victoria in 2017–18 was $323.82 while net operating expenditure per Community Corrections offender per day in 2017–18 was $32.40. In 2015-2016, the average cost of keeping just one young person in custody at Banksia Hill Detention Centre was close to $1,000 per day, or $360,000 per year for each young person: Neil Morgan, Office of the Inspector of Custodial Services, *Behaviour Management Practices at Banksia Hill Detention Centre* (Report, June 2017) 1.
[103] Liz Curran, 'Ensuring Justice and Enhancing Human Rights: A Report on Improving Legal Aid Service Delivery to Reach Vulnerable and Disadvantaged People' (2007) *La Trobe University and Victoria Law Foundation*.
[104] Victoria Legal Aid's submission to the Royal Commission into the Victorian Mental Health System and associated evidence https://www.legalaid.vic.gov.au/sites/default/files/vla/vla-rcvmhs-paving-the-roads-summary-2020.pdf; http://rcvmhs.archive.royalcommission.vic.gov.au/Nicholson_Dan.pdf

In Western Australia there is a Mental Health Co-Response program whereby mental health practitioners and WA Police co-respond to calls seeking assistance where mental illness is identified as a likely factor. By providing specialist intervention and support, the initiative aims to provide a coordinated response for people experiencing mental health crisis, including self-harm, alcohol and other drug-related issues. The program is designed to divert people experiencing mental health distress away from the criminal justice system and connect them with the mental health support services they require.

NLA would support a consistent co-response approach throughout Australia. Response teams should be supported by First Nations mental health workers, to ensure First Nations communities have access to culturally informed support.

Alice's story* (NSW)

Alice is an Aboriginal woman in her 60s who suffers from multiple health issues, including depression, cataracts in both eyes, and knee problems that require her to use a walking frame.

One evening, Alice's daughter, Jennifer* phoned NSW Ambulance for assistance after Alice attempted to stab herself in the stomach with a fork. Two male police officers attended the home after being notified by NSW Ambulance that Alice was threatening self-harm. Upon entering Alice's bedroom, they saw Jennifer trying to take the fork from her. Without warning or any attempt to verbally deescalate the situation, one of the officers deployed capsicum spray into Alice's eyes at close range. The officers then forced Jennifer and Alice's niece out of the bedroom, refusing to let them attend to her. The officers were alone with Alice in her bedroom for several minutes before she emerged handcuffed. Neither of the officers assisted Alice in walking. She was blinded by the capsicum spray and did not have her walking frame, causing her to fall to the ground and injure her knees.

It wasn't until two ambulance officers arrived at the scene that police finally removed the handcuffs from Alice. Jennifer and one of the ambulance officers helped her to sit down on a chair outside. The same police officer who had sprayed Alice with capsicum spray then proceeded to hose her down with a forceful stream directed into her face. One of the ambulance officers had to direct him that it was enough. Alice was taken to hospital by ambulance, her dress soaking wet, her eyes, wrists and knees in a great deal of pain.

As a result of the incident, Alice suffered bruising and loss of function to her wrists for several days. Consequently, she required additional help from her daughter in completing everyday tasks such as bathing. Alice's interaction with police has exacerbated her mental condition, provoking ongoing feelings of anxiety, fear and humiliation.

A comprehensive needs assessment framework should be used throughout Australia as a tool to assist police officers identify a range of disabilities, and related needs of community members with whom they engage. In the United Kingdom there has been structured partnering with health professionals in police responses to a person in crisis. This has been co-ordinated under a Vulnerability Assessment Framework model. The methodology provides guidance to officers to consider observable characteristics of the person they are engaging with to tailor an appropriate response. The development of the comprehensive needs assessment framework should be subject to wide consultation with peak organisations that provide services for people with disability.

5.1.2 Diversion

We are concerned about the high number of people with disability entering the criminal justice system for low level or trivial offending. Issues can include:

- persons are charged for minor offending where the circumstances warrant a caution or a health-based response and linking to support services[105]
- persons are arrested and bailed, where they could appropriately be brought before the court on summons or via notice to appear, and
- police keep persons in custody bringing them before a court to determine bail when police bail should have been an alternative.

We support increased and consistent use of diversion, including cautions, for people with disability, particularly for people with intersecting issues such as mental health, cognitive impairment, substance abuse and/or family violence. Social, health and legal services should be better integrated to ensure successful diversionary responses. Cautions and other diversionary options reduce recidivism,[106] engage people with supports to address the underlying causes of the offending behaviour,[107] reduce distress associated with criminal proceedings and enable people to remain in the community to receive treatment and maintain employment, housing, and social connections.

5.1.3 Arrest and detention of people with disability

We are concerned about the frequency with which people with disability are subjected to unnecessary arrest and detention, without proper regard for the person's disability, including any mental health condition.

Carter's story* (SA)

Carter is 20 years old and his minor summary offence has now been finalised in the courts. Just prior to his arrest, Carter was diagnosed with autism and anxiety, and was processing this diagnosis and learning to function more independently in society.

Carter was at a train station and had forgotten his disability pass. He had always remembered to carry it in the past, but on this occasion he was rushing to an appointment and left it behind. He boarded the train, and while waiting for it to leave the station he was approached by transit police and asked for his ticket or pass. As a result of being challenged, the way in which he was spoken to, and the number of questions being asked, Carter became more and more stressed. Carter found the questioning difficult to process and was not sure what was happening as the situation escalated. The police later alleged that Carter assaulted the transit police. Carter was arrested and charged with resisting arrest and assault.

[105] E.g., data show that police in Victoria are increasingly likely to commence court proceedings rather than utilise non-court action, including referrals, diversions and cautions: Australian Bureau of Statistics, *4519.0 Recorded Crime – Offenders, 2018-19*, (Catalogue No 4519.0, 6 February 2020) Police proceedings, selected states and territories - Table 27 Victoria. The use of diversions in Victoria has steadily decreased, from 25.6 per cent of matters receiving diversion in 2008–09 to 12.5 per cent of matters in 2016–17. This is a drop in real numbers from 22,098 to 18,165 diversions: D Cowan et al, 'Reducing Repeat Offending Through Less Prosecution in Victoria, Australia: Opportunities for Increased Diversion of Offenders' (2019) 3 *Cambridge Journal of Evidence Based Policing* 109. There is evidence that cautioning rates in rural and regional Victoria are below that of metropolitan Melbourne and the state average: Kimberley Shirley 'The cautious approach: Police cautions and the impact on youth reoffending' (2017) 9 *Crime Statistics Agency* 3.

[106] Victorian studies indicate that a young offender who participates in a diversion program is far less likely to reoffend than a young person whose case is determined in court and is subsequently incarcerated, even where the seriousness of the offending is taken into account: Caitlin Grover, 'Youth Justice in Victoria' (Research Paper, Victorian Parliamentary Library & Information Service, April 2017) 7.

[107] E.g., in Victoria, police officers have discretion to give a formal warning, an official caution, or to charge and recommend for diversion. Each of these options may be accompanied with direct referral to a service or support, voluntary in the case of a warning and caution, or obligatory (though consent-based) in the context of diversion.

When the matter went to court, the evidence was insufficient to show that the alleged assault had taken place, and that charge was dropped. Carter pled guilty to the resisting arrest charge without a conviction being recorded.

Many of our clients with disability have experienced discrimination, abuse and mistreatment by police, including excessive use of force resulting in injury, during the arrest process. Frequently, police treat the characteristics of a disability as suspect behaviour grounding a reasonable suspicion for search and police interaction. In many cases, these interactions with police have exacerbated existing trauma, and led to a deterioration of our clients' mental health.

The use of a comprehensive needs assessment framework by police as discussed above would assist police to recognise when a person may have a disability. We consider that comprehensive training for police on differing forms of disability would be useful, in addition to de-escalation training to equip police with strategies to respond to incidents involving a person with a disability such as ASD.

Belle's story* (NSW)

Belle is a woman in her 30s who suffers from post-traumatic stress disorder, anxiety and panic attacks. Belle has a very serious fear of police and finds it difficult to be near or talk to police. She says that "this has been the way things are for me for many years now". She has done a lot of work on herself to try to overcome this fear but even a single incident with police can still be debilitating.

Police records confirm that she has had more than 60 encounters with police over approximately 15 years, many of which she has found terrifying and traumatising. Merely seeing police nearby can cause her to hyperventilate. As a result, whenever Belle sees or is approached by police officers, her usual response is to hide, run away, change direction or crouch down into a ball on the ground.

On several occasions, police officers have pursued Belle in order to stop and search her, use force to detain her (e.g. grabbing her arm, holding her down on the ground, or handcuffing her), or conduct purported welfare checks. During some contacts, police transported Belle to hospital or a refuge because she refused to speak or engage with them. Sometimes, they stopped her to conduct an 'ID check', but after they discovered notes on their system about her behaviour, they left her alone. These types of contact have continued to happen despite Belle not having anything illegal in her possession or being involved in any criminal activity. Some police records mistakenly assert that she takes illicit drugs.

Belle asserts that these interactions with police have exacerbated her anxiety and left her even more fearful of police. She cannot work full-time, she is afraid to go out in public, her self-esteem is affected, and from time to time she has thoughts of self-harm and suicide. Over the years, she has attempted to communicate her condition to particular area commands to make local arrangements that make officers aware of who she is and direct them to avoid unnecessary contact. Despite her efforts, she has continued to be the target of persistent police contact.

On some occasions charges, proceed by arrest including against children, in circumstances where a more appropriate course would have been to proceed by way of summons..[108]

Where a caution or diversion is not appropriate and charges are required, police should wherever possible proceed with the least restrictive measure, including proceeding by summons rather than arrest. Measures to increase the routine use of summons or notice to appear may include increasing the seniority of authorisation for issuing a charge sheet, or requiring the arresting officer to state on the

[108] In Victoria, this is despite a presumption to proceed by summons in the *Children Youth and Families Act 2005* (Vic) s 345(1).

charge sheet why proceeding by summons or notice to appear was not appropriate. Benefits of reducing the arrest of people with disability would include:

- reducing any potential for harmful experiences or injury in custody
- keeping people connected to treatment, the NDIS and other support in the community
- reducing the volume of matters in the Magistrates' Court and high levels of demand for court-based support services (e.g., Court Integrated Services Program (**CISP**) in Victoria)
- reducing the number of people being held for minor offending that may not attract a term of imprisonment
- averting breaches of bail conditions, which result in further charges and remand, and
- Ensuring justice system resources (police, courts, legal assistance) are most effectively targeted to where they are needed.

In our experience, the right to silence is often not fully appreciated or understood. Often, the person being interviewed does not know, nor is it explained to them, how they can exercise their right to silence. People with cognitive or intellectual disability may be less likely to understand and exercise their rights or may need their rights explained to them in ways that are appropriate to their disability.

Materials should be developed to assist people with intellectual and cognitive disability to understand their criminal process rights. Bail papers should also be available in alternative formats such as an easy read version. In Western Australia Blurred Borders resources have been developed by Legal Aid WA to assist in explaining criminal process rights and obligations.

Legislation should ensure that people living with cognitive or intellectual disability and/or with mental health issues are entitled to legal advice and a support person prior to and during police questioning and investigation. Police policies and training should ensure that police can identify a person with disability and take steps to facilitate their rights to a lawyer and a support person.

Intermediaries

Intermediaries are experts in communication and assist people with communication difficulties at health care or justice access points. The failure to properly communicate with people in contact with these systems, especially those with multiple and complex health, welfare and cultural needs, can have critical and long-lasting implications.

The system for using intermediaries is well developed in the United Kingdom through the work of The Advocates Gateway.[109] While most Australian jurisdictions have implemented their own formal schemes, intermediaries are yet to be utilised uniformly in Australia. In the Northern Territory, 95% of the adult prison population has a hearing impairment which can affect cognitive function, there is no formalised system for using intermediaries, and only one Auslan interpreter available.[110] Formal Auslan may not be the first sign language of First Nations Peoples and there is a prevalence of use of Indigenous deaf sign language among First Nations peoples[111]. In the Northern Territory there have been times when it has been impossible to obtain an interpreter for a client who is facing the criminal justice system to the extent that is needed for legal representation.[112]

[109] *The Advocates Gateway* (Web Page) http://www.theadvocatesgateway.org/
[110] Criminal Lawyers Association of the Northern Territory, Submission to the Senate Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia (7 April 2016) 9.
[111] https://pursuit.unimelb.edu.au/articles/speaking-my-language-indigenous-deaf-sign
[112] https://supremecourt.nt.gov.au/__data/assets/pdf_file/0009/778554/NTSC-41-R-v-Ebatarinja-22-Apr-1999-Mildren-J.pdf

5.1.4 Disability discrimination by police

Disability discrimination protections do not currently apply to police on the basis that they are not providing a 'service' when they are performing a number of their duties. The courts have taken a relatively narrow approach to determining what constitutes a service under anti-discrimination laws. The Disability Discrimination Act also prohibits discrimination on the ground of disability in the course of administrating a Commonwealth law. This applies to public officers, such as police, judicial officers, magistrates and registrars. However, the majority of police powers are tied to state laws, which ultimately means most police statutory powers are not captured by the Disability Discrimination Act.

There are types of police work that could be considered a service, including providing protective assistance to a person, detecting and preventing crime against a person,[113] or stopping and questioning a person.[114] However, courts and tribunals have consistently excluded many other activities, including investigating an alleged offence, questioning or arresting an alleged offender, dealing with a bail application, deciding whether to lay charges or to apply for an AVO, deciding whether to prosecute charges,[115] serving summonses, executing search warrants and taking other steps in respect of the laying of charges and their prosecution, and considering bail under bail legislation. These exclusions grant police considerable impunity when dealing with people with disability. Rather than encouraging best practice, police can invariably rely on the narrow judicial construction of 'service' when exercising their powers. Consequently, police who respond to a person in crisis who is a suspect or person of interest, may assert that they have limited positive obligations to make reasonable adjustments for them.

5.1.5 Complaints about service providers

Legal aid commission clients with disability report that they experience discrimination and stigma when reporting criminal activity and making complaints about service providers. Some clients report that they are not given the same credibility because of their diagnosis, are labelled "passive aggressive", and may be dismissed as a chronic complainer. In the experience of Victoria Legal Aid's consumer advisors, a number of people with disability have reported being assaulted while admitted to a psychiatric inpatient unit in a public or private hospital, and that police refuse to investigate the allegation in those circumstances. Some people were told by police that they had to make a complaint directly with the hospital first, even though past complaints had been ineffective and taken too long to resolve. When another person reported an assault in an inpatient unit, police interviewed health staff at the service but did not take a victim statement from the person allegedly assaulted. Another person reported having to obtain their own intervention order without police assistance.

In our view, everyone should have equal rights to pursue police complaints and criminal charges, free from discrimination and stigma.

Recommendations:

42. State and territory governments should adopt greater safeguards in police powers and accountability legislation, and reorientate police enforcement practices to be culturally safe, take into account the particular needs of people with disability, and reduce the frequency of their arrest and detention, particularly where a welfare response would be more appropriate and effective.

[113] *Commissioner of Police (NSW) v Mohamed* (2009) 262 ALR 519, [27]-[48] (Spigelman CJ and Basten JA).
[114] *Russell v Commr of Police (NSW)* [2001] NSWADT 32.
[115] *Ella and Ors v State of New South Wales (NSW Police)* [2005] NSWADT 145, [21].

a. **Police should increase their use of discretion to issue cautions and pursue other diversionary options to minimise the intensity of a criminal justice response towards people with disability.**

b. **Police should consult widely on, develop and implement a comprehensive needs assessment framework to assist police officers and staff to identify the needs of people with disability they encounter, especially in the field or other non-custodial settings. Police should undertake preliminary screening to determine whether a person has a disability before bringing them into police custody.**

c. **At a minimum, police should be trained to recognise when intervention by a partner agency or health professional is necessary. Consideration should be given to mental health clinicians attending incidents alongside police, to improve interactions between police officers and people with mental health issues.**

43. **State and territory governments should adopt a legislative requirement that people with disability be given access to an independent support person, and a lawyer who would provide advice and explain the person's rights, at investigation stage and prior to any police questioning and/or interview and be available during any questioning/interview as appropriate. Police should have a positive duty to facilitate a person's access to these rights. There should be a dedicated appropriately resourced service including a hotline (similar to the Aboriginal Legal Service Custody Notification Scheme) which is staffed with a lawyer 24 hours a day, 7 days a week, to facilitate this duty.**

44. **The Commonwealth, state and territory governments should develop a uniform, national, mandatory statutory code of practice on the detention, treatment and questioning of people with disability, such as those with cognitive and psychiatric impairment, to be applied at all stages of the criminal justice system.**

45. **Legal information should be available in additional formats for people with disabilities (such as easy-read and Auslan).**

46. **State and territory governments should amend the governing legislation for police in each state and territory (e.g. the *Police Act 1990* (NSW)) and the Disability Discrimination Act to impose a duty on police to exercise their powers and functions without discrimination, regardless of a person's alleged criminal status or other circumstances.**

5.2 Bail laws

In legal aid commission our experience, arrest and bail are routinely can be used for minor, non-violent, low-level offending, including possession or use of drugs and minor thefts (such as food). As a result, people are increasingly spending time in custody for relatively minor offences that would not usually attract a custodial sentence. As a result of bail laws, we are finding more and more people are in custody because of the issues in their lives rather than the seriousness of the offences committed. The growing remand population across Australia[116] indicates that bail reform is necessary to reduce the over criminalisation and incarceration of people with disability.

Some people with disability may find it difficult to be released on bail, because of issues including lack of housing (if the person is homeless or if there has been an incident at the family home) or the person

[116] See for eg, ABS data from 2019 (pre-Covid) demonstrates that the number of unsentenced prisoners in Australia more than doubled in the previous 10 years, from 6391 in 2009 to 14,210 in 2019: ABS, *Prisoners in Australia*, 2019: https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2019

may need other social support like assistance with getting identification so that they can obtain social security.

We observe that bail conditions can be imposed that do not mitigate a bail risk, are excessively onerous and not reasonably possible to comply with, and do not take into account the individual's circumstances. We regularly see a large number of conditions being imposed on our clients, which often leads to a greater volume of minor or technical breaches. Our clients are then at times arrested for such breaches of bail (with no new offence committed), in circumstances where there are more appropriate alternatives to arrest, which in turn leads to a significant and unnecessary increase in the remand population.

In some locations we also see courts frequently impose conditions, such as curfews, place restrictions and daily reporting requirements, in circumstances where the conditions do not appear to address specific bail concerns, can be an issue in some locations. These and other onerous conditions, such as non-association orders and bail compliance checks, can particularly impact on First Nations people with disability.

In our experience, courts and police sometimes do not take into account factors associated with a defendant's Aboriginality when imposing bail conditions, despite the current requirement in bail laws such as the NSW Bail Act for bail authorities to consider "any special vulnerability or needs the person has including being an Aboriginal or Torres Strait Islander person".[117] This can mean that a First Nations person with disability is unable to comply with both the bail conditions and their cultural obligations. For example, imposing non association conditions or place restrictions which restrict the person's access to family or Country.

Bail-related secondary offences, such as the offence of breaching a condition of bail, are particularly problematic. The increase in bail-related secondary offences represents a growing proportion of all charges sentenced in Victoria,[118] and "these offences have increased the burden on police, prosecutors, defence lawyers, correctional staff, courts and court administrative staff."[119] The Victorian Law Reform Commission recommended against a bail-related secondary offence in its *Review of the Bail Act*, noting that this might have a disproportionate effect on vulnerable people.[120]

Periods on remand, including short periods, are highly detrimental, particularly for people with disability. They disrupt continuity of treatment, supports, training and employment opportunities, and family relationships, and increase the likelihood of reoffending.[121] Time spent on remand also increases the likelihood of a sentence of imprisonment,[122] as remand rates increase the risk of accused people pleading guilty to offences where the evidence may not have sustained a finding of guilt, because this is the fastest way to be released from custody.[123]

If electronic monitoring is used this may have a particularly adverse impact on the mental health of a person with disability.

There is also a strong need for improved bail support services to address a range of health and social needs at all stages of the bail and remand process, including support to be granted police or court bail, support to comply with bail, and greater supports for those who are bail refused. As recommended in the 2021 Northern Territory Children's Commissioner's report, an evidence-based therapeutic

[117] *Bail Act 2013* (NSW) s 18(1)(k).
[118] Sentencing Advisory Council, *Secondary Offences in Victoria* (Report, September 2017) 87.
[119] Ibid.
[120] Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Report, 2007) 128.
[121] Dr M McMahon, 'No bail, more jail? Breaking the nexus between community protection and escalating pre-trial detention' (Research Paper, Parliament of Victoria, August 2019) 22; citing P Heaton, S Mayson & M Stevenson 'The downstream consequences of misdemeanour pretrial detention' (2017) 69(3) Stanford Law Review 714.
[122] Sentencing Advisory Council, Time Served Prison Sentences (Report, January 2020).
[123] Ibid.

framework of care should be developed and implemented at supported bail facilities.[124] Bail support services, such as the Court Integrated Services Program run by the Magistrates' Court of Victoria, seek to address the underlying factors that contribute to a person's offending (such as substance abuse, mental health issues and/or disability) and assist them to access treatment and services, as needed, to reduce their risk of reoffending. In Western Australia there is a Reducing Avoidable Remand program whereby lawyers and social support workers support people to avoid remand custody or be released from remand custody through linkages to social supports. This type of support should be available throughout Australia.

Recommendations:

47. State and territory governments should review and reform their respective bail legislation and police operating procedures to improve bail decisions of police and courts, to address the number of people with disability in police custody and on remand.

48. State and territory governments should increase the availability of, and access to, bail support services and programs to assist people to comply with their bail conditions and address any underlying causes of offending. This should include culturally appropriate bail support services and programs based on consultation with communities.

5.3 Therapeutic courts and programs

Most people entering the criminal justice system do not receive a therapeutic court response that addresses their individual needs and circumstances. Many people who access legal aid commission services are marginalised and experience acute disadvantage, and may have a range of disability, mental health, social and legal needs, making it difficult for them to engage with mainstream services. When people are sentenced in the community, there is an opportunity to support engagement in programs for positive change, rehabilitation and recovery. However, the capacity to pursue more therapeutic pathways is constrained by the architecture of the summary jurisdiction, and related resourcing.

Improving criminal justice processes for people with disability involves adopting a therapeutic justice system that responds to individual needs. The criminal justice system is currently insufficiently resourced to assess and respond to each individuals' circumstances and to deliver all individuals the outcomes that support recovery and rehabilitation.[125]

A relatively small number of people with disability have access to an alternative therapeutic court pathway. These specialist therapeutic courts work to identify, respond to and address the underlying circumstances of offending to support rehabilitation and recovery. For instance, specialist and problem-solving courts such as Victoria's Assessment and Referral Court (**ARC**), and Queensland's Court Link program, focus on addressing the underlying causes of offending and the therapeutic needs of the individual. In Perth Magistrates Court Western Australia therapeutic intervention can be accessed through the specialist mental health court, known as the Start Court, and the Intellectual Disability Diversion Court. These resources are not available regionally, and to access them people must travel from outer-suburban areas to the courts in Perth.

[124] Office of the Children's Commissioner Northern Territory, *Saltbush Social Enterprises: Monitoring Visits* (Final Report, 4 March 2021) 9.
[125] Opportunities to improve the operation of the summary jurisdiction have been identified by the Law and Justice Foundation, which made a number of recommendations for procedural reforms to the Victorian summary crime jurisdiction that will help to facilitate better outcomes though reducing congestion in the summary jurisdiction. See generally, Hugh McDonald et al, *In Summary: Evaluation of the appropriateness and sustainability of Victoria Legal Aid's Summary Crime Program* (Report, June 2017).

Therapeutic courts have the common benefit of more time and stronger relationships between the participant, the prosecution, support workers and the legal team. This can have strong therapeutic benefits for participants. The Royal Commission into Victoria's Mental Health System recommended state-wide access to ARC courts (which are currently available in only four Victorian locations).[126]

Evaluations demonstrate that therapeutic courts are effective in achieving their aims.[127] Therapeutic courts can also assist in resolving other intersecting legal and social issues. This is demonstrated by Cathy's experience.

Cathy's story* (Vic)

Cathy was remanded in April 2019 on charges of assault and breaching a Family Violence Intervention Order (IVO), and assaulting police officers and medical personnel. She had eight pages of prior charges, including previous time in custody on assault and breach of IVO charges.

Child Protection became involved and Cathy was excluded from contact with her daughter and from her home under a final IVO.

Cathy had been diagnosed with significant mental health issues, including bipolar disorder, adjustment disorder and post-traumatic stress disorder. She had substantial reduced capacity in the areas of social and occupational functioning. She self-treated her symptoms with cannabis and alcohol. She also experiences severe epilepsy. Her doctor noted that while in custody, the severity of her epilepsy (she can experience up to 12 fits in a month) presented a very real risk to her health, safety and even her life.

Despite the risks of custody on her health and safety due to her significant mental health issues, Cathy was initially refused bail due to the severity of the charges. Cathy's Victoria Legal Aid lawyer carried out intensive background work and advocacy, and Cathy was eventually granted bail after 69 days on remand. Due to her lawyer's advocacy she was also accepted into the ARC program.

Cathy spent a total of 10 months on the ARC program. Due to her time on ARC, Cathy now has a NDIS plan with attached funding, has developed the strength and skills to navigate and self-advocate within the health system for better treatment for her epilepsy (something which even her ARC clinicians were unable to do) and undertakes a range of mindfulness and creative pursuits including adopting and caring for a number of pets. She has also abstained from drug and alcohol use.

Cathy now has regular contact with her daughter and is on amicable terms with her ex-partner. Child Protection have withdrawn from the family due to the positive progress they have seen in Cathy. The intervention order expired and no extension was sought.

At Cathy's finalisation hearing, she thanked the Magistrate for her time and patience, saying that she'd spent her entire life in and out of courts and, for the first time, felt like she wouldn't return.

The use of specialised court lists for people with mental health and cognitive impairment was also recommended by the NSW Law Reform Commission and the Northern Territory Law Reform

[126] Royal Commission into Victoria's Mental Health System, (Final Report, February 2021) Summary and Recommendations, 73.

[127] KPMG, *Evaluation of the Drug Court of Victoria* (Final Report, Magistrates' Court of Victoria, 18 December 2014); Department of Justice, *The Drug Court: An Evaluation of the Victorian Pilot Program* (Report, 2005); Zoe Dawkins et al, *County Koori Court* (Final Evaluation Report, County Court of Victoria and the Department of Justice, 27 September 2011); Mark Harris, Department of Justice Victoria, *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program, October 2002–October 2004* (Report, 2006); Stuart Ross, 'Evaluating neighbourhood justice: Measuring and attributing outcomes for a community justice program', *Trends and Issues in Crime and Criminal Justice*, No 499, Australian Institute of Criminology (2015); Anthony Morgan and Rick Brown, 'Estimating the costs associated with community justice', *Trends and Issues in Crime and Criminal Justice*, 507, Australian Institute of Criminology (2015). See also Victorian Ombudsman, *Investigation into the reintegration and rehabilitation of prisoners in Victoria* (Report, September 2015).

Committee, which noted reductions in re-arrest rates, incarceration rates, and associated costs to the criminal justice system.[128]

Court liaison services are also a useful mechanism to increase access to justice for people with disability. These services aim to identify people experiencing mental health issues who have been charged, and intervene as early as possible, often pre-trial or during the trial process.[129] In NSW, courts where court liaison services operate achieve a 1.5 times higher rate of diversion than ordinary courts, and the rates of diversion for Aboriginal defendants at courts with court liaison services is more than double than courts without the service.[130] The Productivity Commission's report for the Inquiry on Mental Health found that more can be done to improve the accessibility and operation of court liaison programs.[131]

Recommendations:

49. State and territory governments should increase support for people with disability in the criminal justice system by:

- **a. acknowledging the needs of children with disabilities in the criminal justice system and developing specialised supports and approaches**
- **b. funding bail accommodation and support services and programs to assist people to understand and comply with their bail conditions**
- **c. adopting therapeutic, specialist and solution-focussed courts and programs that ensure that relevant and accurate diagnostic reports are provided, and address the underlying causes of offending and the therapeutic needs of the individual**
- **d. expanding court liaison services that aim to identify people with mental health issues who have been charged, and intervene as early as possible**
- **e. adopting a more holistic approach to sentencing, including community-based sentencing options and support to comply with these sentences**
- **f. adequality funding services to assist people with drug or alcohol issues to avoid contact with, or be diverted from, the criminal justice system, and**
- **g. funding legal aid commissions to provide people with disability legal advice and social support to assist with parole applications.**

5.4 Sentencing

Legal aid commission clients experience a range of complex and compounding issues, such as cognitive impairment, mental health issues, health, drug and alcohol issues, housing, literacy, family, financial/debt, and employment issues.

Where possible, people with disability should be supported to remain in the community, to reduce trauma and the risk of recidivism. Disability informed, culturally safe support services and related

[128] NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice system, Diversion* (Report No. 135, June 2012) 333-348; Northern Territory Law Reform Committee, *Report on the Interaction between people with Mental Health Issues and the Criminal Justice System* (Report, 2016). The Northern Territory Law Reform Commission recommended the establishment of a specialist mental health court or mental health diversion list constituted by an appropriately qualified magistrate: see from p 26.
[129] Productivity Commission, *Mental Health* (Final Report, 30 June 2020) 1033.
[130] NSW Bureau of Crime Statistics and Research, *Mental Health Diversions for Statewide Community and Court Liaison Service (SCCLS) Courts and Non-SCCLS Courts 2016-2021*, data provided to Legal Aid NSW, 8 December 2021.
[131] Productivity Commission, *Mental Health* (Final Report, 30 June 2020) 1037.

sentencing options are crucial to minimising the risk of First Nations young people unnecessarily entering the criminal justice system.

Ideally, diversion would occur through the exercise of police discretion, by agreement/arrangement, or access to a therapeutic court. There is evidence that people who are sentenced to, and complete a community-based order, such as a community correction order, are less likely to reoffend than those on custodial orders.[132] Community correction orders also help people to avoid short terms of imprisonment, which are highly detrimental. Community Corrections orders tailored to the individual's needs, require the offices of community corrections to be appropriately resourced including by ensuring the appropriate training and other supports of officers involved.

Mandatory sentencing can disproportionately impact on people with disability. For example, in Western Australia, a first offence of assault public officer (where bodily harm is caused) carries a minimum of six months immediate imprisonment. These offences vary in their level of seriousness. The result of the mandatory imprisonment requirement is that Courts cannot take into account the basic principles relevant to sentencing people living with disability, such as the causal connection between the persons disability and the offending, the potential vulnerability of the person living with the disability in a prison environment, whether they are an appropriate vehicle for general deterrence, and whether steps have been taken to reduce the risk of reoffending. E.g., it is common to see offences against public officers that occur in circumstances where people are in the midst of a mental health crises. Where a person's mental health situation does not give rise to a defence, the Courts have no option but to sentence the person to a minimum of six months imprisonment even if the treatment need has been addressed or where there is a clear casual connection between the persons mental illness and their offending.

NLA endorses the position of the Law Council of Australia that Mandatory sentencing disproportionately impacts upon persons with a mental illness or cognitive impairment[133] and that of the Danila Dilba Medical Service that mandatory sentencing results in responses that are not tailored to meet the complex and individual needs of people coming into the justice system.[134]

Legal aid commissions support the repeal of mandatory sentencing and a focus on alternative approaches to imprisonment, including community-based sentencing options.

Recommendations:

50. Respective governments should abolish mandatory sentencing laws or at a minimum amend mandatory sentencing laws to include exceptions for people with disability where provision is not already made.

51. Commonwealth and State and Territory governments should fund/provide:

- **a. training for legal practitioners, community corrections and youth justice staff, and all decision makers regarding disability informed approaches,[135] Including the benefits of remaining in the community through the use of diversion, therapeutic courts or community corrections orders, and cultural considerations**
- **b. expert reports to inform sentencing dispositions.**

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[132] Research in Victoria found that 26.7 per cent of offenders who were discharged from community correction orders had returned with a new community correctional sanction within two years. In comparison, 43.6 per cent of the prisoners who were released from prison had returned to prison under sentence within two years of release: Corrections Victoria, 'Corrections Statistics: Quick Reference' (2019).

[133] https://www.lawcouncil.asn.au/publicassets/f370dcfc-bdd6-e611-80d2-005056be66b1/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf, 5.

[134] https://justice.nt.gov.au/__data/assets/pdf_file/0009/1069569/Danila-Dilba-Health-Service.pdf, 3.

[135] NLA gratefully acknowledges Commonwealth Government funding for a national mental health training package for the legal assistance sector, 2022.

5.5 Drugs and alcohol

Drug and alcohol use is a significant underlying issue for a large proportion of people who access legal aid commission services, including clients with disability.[136] Drug misuse often co-exists with mental and physical health problems and early experience of trauma (including witnessing domestic violence and being homeless), and can lead to contact with the criminal justice system, as illustrated in Dominik's story below.

Dominik's story* (NSW)

Dominik is a young man aged 20 years old. Dominik had his first contact with Legal Aid NSW when he was 12 and is a high user of legal aid services with 96 service contacts over a five-year period.

As a child, Dominik suffered from chronic ear infections, his speech was slow to develop and he had periodic bouts of asthma. He had early corrective surgery for a congenital abnormality.

Dominik's mother suffered from obsessive-compulsive disorder and other anxiety problems. Dominik's father was violent to his mother. At age two, Dominik's parents separated and he lived with his mother in refuges for a period of time. He has subsequently had periods of living with his mother, his father, his grandparents and in various foster placements.

At age four, Dominik was diagnosed with ADHD, and has since been diagnosed with conduct disorder, ODD, and various other psychiatric conditions. He has had episodes where he has self-harmed and attempted suicide. On intelligence tests, Dominik returned scores in the range of moderate intellectual disability.

The NSW Department of Family and Community Services became involved with Dominik when he was seven years old. Over subsequent years Dominik had many short and difficult out-of-home-care placements as well as numerous periods where he lived with friends or on the street.

Dominik attended four primary schools and his early learning difficulties were initially addressed by teachers' aides. As Dominik transitioned to high school he was frequently excluded and expelled. Placements in special schools were unsuccessful and he stopped attending school in Year 9.

Dominik started smoking cannabis and drinking alcohol when he was about 13 years old. By age 15, he was using amphetamines. Dominik's criminal justice offending profile involved offences such as stalk/intimidate, breach of bail, assault, and theft offences. Often his offences involve family members as victims. Dominik had periods of residential drug and alcohol treatment and was recommended for the Youth Drug and Alcohol Court but did not proceed with an application. The Youth Drug and Alcohol Court ceased operating in 2012.

Many clients urgently need assistance to overcome their drug and alcohol problems, but face barriers accessing the services and treatment they need. These barriers include:

- a significant lack of appropriately resourced or any rehabilitation services, particularly in regional, rural and remote areas
- costs to patients, including for a criminal record check before entering rehabilitation and travel costs

[136] An examination of Legal Aid NSW's 50 most frequent users of legal aid services found that three quarters had used drugs and/or alcohol, and 20 per cent had accessed treatment for drug and alcohol addiction. Most of the frequent users had complex needs – nearly half had received a mental health diagnosis – and about half had a primary carer who had experienced drug and/or alcohol issues: Legal Aid NSW, *High Service Users at Legal Aid NSW* (Report, 2013) 3-4.

- long waitlists and waiting times for entry into drug rehabilitation programs
- pre-entry conditions, such as a requirement that a person on a waitlist for a residential rehabilitation facility call the facility three times per week to remain on the waitlist
- mandatory detoxification before entering a rehabilitation facility, and
- a lack of culturally appropriate services for First Nations peoples.

Graeme's story* (NSW)

Legal Aid NSW acted for Graeme, an Aboriginal man with long-term drug and alcohol dependence. He was charged with offences related to domestic violence in August 2016. He was bail refused and pleaded guilty to the charges at his first appearance in the Local Court. A court-ordered drug and alcohol assessment identified Graeme as suitable for a long-term residential rehabilitation program. He was accepted into a facility, but with an expected wait time of approximately six weeks. Graeme was told he must call the facility three times a week between 10am and 4pm to maintain his position on the waiting list.

By November 2016, Graeme had run out of jail money and was unable to keep calling the facility three times a week. During that time, his brother died by suicide, and Graeme was refused leave by Corrective Services NSW to go to the funeral. He only called the facility once a week, and so lost his place on the program. At his solicitor's request he was placed back on the waiting list, but at the bottom of the list and with an expected wait time of more than three months. A further bail application was refused. By December 2016, Graeme had progressed to the top half of the list. By the end of January 2017, however, he gave up trying to get into the program and proceeded to be sentenced. While the sentence he received was backdated, he had spent five months on remand with no access to a rehabilitation program.

Recommendation:

52. State and territory governments should further invest in diversionary approaches and programs for people with disability, including by:

a. expanding drug courts[137] to regional, rural and remote areas, reviewing eligibility criteria and ensuring cultural appropriateness, and including discretion to admit offenders convicted of strictly indictable and/or violent offences

b. expanding associated drug rehabilitation services (such as the Magistrates Early Referral Into Treatment (MERIT) program and the Compulsory Drug Treatment Program in NSW)

c. expanding drug and alcohol detoxification and rehabilitation facilities, including residential facilities, that are able to appropriately provide for the needs of people with disabilities.

53. State and territory governments should provide alcohol addiction treatment services at all stages of the criminal justice system, and demand and supply reduction measures where they are evidence-based and supported by communities.

[137] Evaluations have found that participants in the NSW Drug Court are less likely to be reconvicted than offenders given conventional sanctions (mostly imprisonment), and the Drug Court costs less than conventional sanctions: Don Weatherburn et al, NSW Bureau of Crime Statistics and Research, *The NSW Drug Court: A Re-evaluation of its Effectiveness* (Crime and Justice Bulletin No 121, September 2008) 1; Stephen Goodall, Richard Norman and Marion Haas, NSW Bureau of Crime Statistics and Research, *The Costs of NSW Drug Court* (Crime and Justice Bulletin No 122, September 2008).

5.6 Health care and disability supports in custody

Legal aid commissions are concerned that people with disability face significant barriers to accessing health care and disability supports while in custody, in particular:

- the lack of timely, adequate and equivalent mental health care and treatment
- the lack of culturally appropriate health care for First Nations peoples with disability
- the lack of trauma-informed care for women with disability
- being subjected to restrictive practices, including seclusion, often due to needs and behaviours arising from their disability, and
- the lack of access to multidisciplinary intervention and assistive technology to improve functionality.

5.6.1 Access to disability supports and the NDIS in custody

There is a high level of unmet need for disability support in prison. Legal aid commission clients with disability who are in custody often have limited or no access to disability supports and face significant barriers to accessing the NDIS while in custody. (See Part 2 re the NDIS.)

It is often difficult for a person in custody to access a disability support advocate, communicate with the NDIS or receive communication (which is often electronic). Without the help of a disability advocate or lawyer, some prisoners are not aware of how to access support. Providers may be unwilling or unable to assess a person in custody, and corrective services may not be able to facilitate virtual or in-person assessments. Difficulty and delays in attempting to access the NDIS while in custody can impede transition planning and unnecessarily prolong the detention of people with disability.

Many of our clients have a disability which does not fall within a specified category in order to qualify for the support they need, or their disability is considered insufficiently serious to justify formal support. In such cases, they must liaise directly with local correctional staff if they need facilities or adjustments, or they rely on other prisoners for help. Clients have reported feeling stressed and anxious when requesting support from officers who may lack the training necessary to recognise legitimate needs, have limited capacity and time to help, or perceive requests as forms of prevarication.

Even when a prisoner's disability is visible, needs may not be consistently met. For example, legal aid commissions are aware of cases in which prisoners in wheelchairs or with limited mobility received no disability support. Prisoners with longstanding hip, leg and spinal injuries were allocated top bunks despite mobility issues. In one case, a prisoner with diabetes had to have toe amputation due to delay in meeting his repeated requests for wide trainers to avoid lesions on his feet.

Fred's story* (NSW)

Fred is a man in his 50s. He is a bilateral amputee and wheelchair user. One of his legs is amputated above the knee. He has prostheses but requires the use of two poles to walk, and walking can be difficult and painful in them, so he is heavily reliant on a wheelchair.

Fred was charged, bail refused and placed in a privately-operated prison. On his third day in prison, he was assaulted by another prisoner. He became very concerned for his safety.

Fred was moved to another cell in the clinic at the prison. During the approximately three-month period that he was held there, he was not able to go outside, or access the offender telephone system or AVL suites, as there were stairs between his cell and the location of the yard, AVL suites and phones. Fred had his prostheses with him, but was told he could not have his poles as they may be used as weapons. No assistance was provided by staff at the centre to enable Fred to access the yard or AVL

suites. He was not able to attend his first court appearance by AVL. Fred was able to use a phone in the clinic to contact his family and lawyer, but only at the discretion of the clinic staff. Fred first spoke to his lawyer approximately five weeks after he entered custody, and after his first court appearance.

There was no shower bench or chair in his cell. The prison gave him an office chair to use in the shower instead. The wheels on the office chair made it unsafe for Fred to transfer to and from the wheelchair, so Fred did not shower very often. There were also no railings around the toilet to allow for a safe transfer to and from the wheelchair. Fred fell a few times transferring between the wheelchair and the toilet. This was Fred's first time in custody, and the experience left him feeling very distressed and confused.

After three months, Fred was transferred to another prison, where he was kept for six months. There, he was moved in and out of the 'disability cells', but again, the toileting and showering facilities in these cells were not appropriate for a wheelchair user.

Fred was then moved to another prison where he stayed for nine months. This centre also did not have railings around the toilet. He did, however, have access to an occupational therapist and physiotherapist.

Fred was recently released from prison. Legal Aid NSW assisted him to make a disability discrimination complaint to Anti-Discrimination NSW against the privately-operated prison.

Recommendations:

54. The NDIA, and state and territory governments should ensure that all people with disability have access to the NDIS and other disability supports while in custody, including by:

- **a. Supporting prisoners to access the NDIS, and community supports prior to a determination about parole or release, to address the disability needs of the individual and support rehabilitation.**
- **b. Providing additional psychiatric hospital beds for prisoners with psychiatric illness and psychosocial disability to improve access to psychiatric treatment.**
- **c. Providing access to treatment, education, employment, and other programs regardless of a prisoner's disability.**
- **d. Undertaking comprehensive assessment of disability needs at intake with disability supports or adjustments then provided where required.**

55. State and territory governments should ensure comprehensive training of prison officers about disabilities and associated behaviour management and de-escalation strategies.

5.6.2 Access to health care and treatment in custody

People in custody have a much poorer health profile than the general population.[138] Legal aid commission lawyers see difficulties with access to health care, treatment and support for clients with disability in custody. In our experience, correctional centres generally fail to provide timely or adequate updates or feedback about our clients' health. These barriers can have significant consequences for our client's health, cause instability, impact their recovery, lead to longer periods of imprisonment, and increase the chance of reoffending.

[138] See Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2018* (Report, 2019); Anne Grunseit et al, Law and Justice Foundation of New South Wales, *Taking Justice into Custody: The Legal Needs of Prisoners* (Report, 2008) 279; Maria Borzycki, Australian Institute of Criminology, *Interventions for Prisoners Returning to the Community* (Report, 2005) 34.

The high rate of movement of prisoners between custodial centres, the lack of communication between private and public correctional centres, and the lack of continuity of care between the community and custodial settings mean that prisoners can be denied the opportunity to develop an ongoing relationship with service providers, and required to repeat their story multiple times, potentially exacerbating their trauma.

Access to medical care and treatment for people with mental health issues

Procedures used to manage and reduce a risk of self-harm, such as placing a prisoner in a dry and/or observation cell if they have raised concerns about their mental health state, often do not take into consideration the risk of further trauma to the prisoner. Prisoners frequently avoid disclosing suicidal thoughts to avoid being placed in a dry isolation cell, as the experience of isolation can exacerbate their mental health issues.[139]

Prisoners who require ongoing medication and/or treatment for mental health issues experience significant delays in accessing appropriate health care once they enter custody.

Clients report the following:

- Medication is often interrupted when entering custody. People entering custody are unable to access medication until they have been clinically assessed. There are long wait times for appointments with clinicians, and even longer delays when the services are provided by non-corrections staff. As a result, prisoners can suffer serious negative consequences of sudden medication withdrawal, and their mental health condition may remain untreated for substantial periods of time.
- It is difficult to obtain a review of mental health medication when suffering from side effects. Often, prisoners do not hear back in response to a request for review. Many times, they report having decisions about medication type and dose made without any consultation.
- Mental health care being interrupted by movement between prisons, which occurs at times without much notice. Following a move, prisoners often have to submit new requests to see a specialist and begin waiting all over again.
- Being taken off mental health medication without explanation, causing significant side-effects from withdrawal, only for a different dose of the medication to be reintroduced at a later date.
- Lack of access to specific drugs, such as Quetiapine (an antipsychotic drug commonly prescribed for sleep disorders and generalised anxiety disorder), without a transition plan for transitioning onto a new drug.
- Withholding information about suicidal ideation because of fears that disclosure will result in measures such as placement in solitary confinement which can involve placing greater strain on mental health.
- Concerns about over-crowding and assault particularly where they have been victims of sexual assault.

Deteriorating mental health due to a lack of access to medication upon entering custody can result in a person with disability being subjected to restrictive practices and is typical of some of the issues observed by the Victorian Ombudsman when she conducted a pilot inspection under the Optional

[139] *Inquest into the death of Bailey Mackander* (Coroner Truscott, 15 December 2021).

Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**).[140]

Mental health services for children and young people in detention also appear to be under-resourced, resulting in them transitioning out of acute settings without the support they need. Jim's story highlights the lack of resources for children with complex needs in detention.

Jim's story* (NT)

The Northern Territory Legal Aid Commission represented Jim, a young Aboriginal male who was detained at the Alice Springs Youth Detention Centre. Soon after his incarceration, he expressed suicidal ideation to detention centre staff, and was subsequently transferred to Alice Springs Hospital for a mental health assessment. The assessing psychiatrists determined that Jim's acute suicidal ideation was situational (due to being incarcerated) and discharged him back to the detention centre.

Shortly after returning to detention, Jim again expressed suicidal ideation and was returned to Alice Springs Hospital, only to be again discharged to the detention centre. This pattern repeated on a number of occasions over the following week.

Legal Aid's conversations with Jim's mental health treating team at the hospital revealed that they had not been provided information about Jim's multidisciplinary assessment or his FASD diagnosis, which meant his mental health treatment plan did not appropriately factor in his disability.

Poor mental health care frequently arises in coronial inquest matters. Coronial findings have repeatedly highlighted the need for better resourcing of prison mental health care, and more timely mental health assessments and treatment.

Inquest into the death of Jonathon Hogan (NSW)

Jonathon was a 23-year-old Wiradjuri, Ngiyampaa and Murrawarri man who died by suicide at Junee Correctional Centre in February 2018. He had been in and out of correctional facilities since he was 14 and had a diagnosis of schizophrenia. Legal Aid NSW granted aid to his father Matt Hogan.

The Coroner delivered very strong findings on the failure of the State to provide adequate mental health care and apologised to Jonathon's family. Three of the six recommendations directly relate to mental health treatment in custody, including the need to:

- review intake procedures to ensure timely reviews of inmates with serious mental health issues by mental health clinicians
- examine staffing ratios and resources to determine whether they are sufficient to ensure intake and ongoing reviews in a timely manner, and
- review notification process where inmate not compliant with anti-psychotic medication.[141]

[140] The Victorian Ombudsman made a number of recommendations to improve the support for women at Dame Phyllis Frost Centre and prisoner rehabilitation and support more generally: Victorian Ombudsman, *Investigation into the reintegration and rehabilitation of prisoners in Victoria* (Report, September 2015).
[141] *Inquest into the Death of Jonathon Hogan*, Deputy State Coroner Grahame (6 May 2020).

Recommendation:

56. State and territory governments should ensure that there is mental health screening and assessment of all individuals (whether sentenced or not) by a mental health professional on admission to correctional facilities, and on an ongoing basis where appropriate, and that mental health information obtained from screening and assessment is used to inform resourcing and transition planning for the individual upon release.[142]

Access to health care for First Nations peoples with disability

First Nations peoples are significantly overrepresented amongst those in prison with disability and complex disability support needs, including access to health care for chronic health conditions and mental health issues:

- Cognitive impairment has been identified as a factor contributing to the disproportionately high rate of imprisonment of Aboriginal and Torres Strait Islander peoples, along with other forms of disability.[143]
- Chronic health conditions are more prevalent among First Nations peoples, who experience comorbidities that commonly include diabetes, cardiovascular disease and chronic kidney disease.[144]
- A 2019 Australian Institute of Health and Welfare (**AIHW**) report on the health of Australia's prisoners provides that, while there was little difference in the proportions of Indigenous and non-Indigenous prison entrants reporting restrictions to an activity (20 per cent and 22 per cent, respectively), almost half (48 per cent) of the Indigenous entrants rated the extent of their limitation or restriction as profound/severe,[145] compared with one in three non-Indigenous entrants.[146]
- First Nations peoples are recognised as at-risk populations for a range of mental health issues.

We have seen deficiencies in the way that diabetes is managed and treated in short-term custody, including failure to promptly obtain the medical information necessary to provide appropriate and timely health care and failure to act on information contained in medical records. This particularly impacts on Aboriginal and Torres Strait Islander people in custody.

Koa's story* (NSW)

Koa, an Aboriginal man with Type 1 diabetes who was insulin dependent, was arrested and detained at a police station just after midnight. Three hours later he was transferred to custody at the Surry Hills Police Centre. After 14 hours in custody, he was released from custody on bail later that day at 4pm.

Despite his medical condition and insulin dependence being recorded on information and lodgement documents, and despite being seen by a nurse and asking different officers for insulin on multiple occasions, Koa was unable to access insulin and he did not receive sufficient blood

[142] Productivity Commission, *Mental Health* (Final Report, 30 June 2020) Action 21.4.
[143] Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Discussion Paper 84, 19 July 2017) [1.12].
[144] In particular, Aboriginal and Torres Strait Islander people are four times more likely to develop Type 2 diabetes than non-Indigenous people and typically onset occurs much earlier in their lifetime. The death rate is also four times that of non-Indigenous people when diabetes is an underlying or associated cause of death- Australian Institute of Health and Welfare, *Cardiovascular Disease, Diabetes and Chronic Kidney Disease: Aboriginal and Torres Strait Islander People* (Report, 2015) ix, 64.
[145] Profound/severe means that the person always or sometimes needs help or supervision for at least 1 activity. Activity participation restrictions or limitations include limitations in self-care, mobility, communication, learning or applying knowledge, managing activities around the home, managing situations, or personal relationships: Ibid 80-81.
[146] Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2018* (Report, 2019) 79-80.

glucose testing during his time in custody. He became unwell, had difficulty moving and talking, and struggled to participate in his court appearance by AVL.

On his release, he struggled to walk to his brother's home nearby where he always keeps a blood glucose testing kit and insulin. On arrival, he immediately self-administered an appropriate insulin dose.

Koa came to Legal Aid NSW for assistance to make a health care complaint. In response to his complaint, Justice Health apologised that he did not receive adequate care and acknowledged the potential for poor health consequences which he could have experienced as a result of not receiving insulin. Koa describes those consequences more bluntly: "I didn't want to become just another black death in custody."

The Royal Commission into Aboriginal Deaths in Custody recommended that Corrective Services, in conjunction with Aboriginal Health Services and other appropriate bodies, have regard to the standard of physical and mental health care available to Aboriginal prisoners in each prison, and the involvement of Aboriginal Health Services in the provision of such care.[147] Notwithstanding this recommendation, a 2019 AIHW report on the health of Australia's prisoners provides that only nine per cent of Aboriginal people discharged from prison reported receiving treatment or consultation from an Aboriginal Community Controlled Health Organisation or Service or an Aboriginal Medical Service while in prison.[148]

More recently, a NSW Parliament inquiry into the *High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody* found that "the delivery of health and mental health care services within custodial settings is under-resourced and not fit for First Nations people in custody." Specifically, the inquiry report acknowledged the "importance of having culturally competent health services in custody for Aboriginal people, and the need to embed Aboriginal health workers or registered Aboriginal and Torres Strait Islander Health Practitioners in New South Wales correctional health centres."[149]

The high level of Aboriginal and Torres Strait Islander people with disability in custody, coupled with poor health outcomes of Aboriginal and Torres Strait Islander people generally and amongst Aboriginal and Torres Strait Islander prisoners, justifies the need for more culturally safe health care services in prison for this cohort.

Recommendations:

57. State and territory governments should review and increase the availability of culturally safe, trauma informed health care, treatment and disability supports, including the NDIS, for imprisoned First Nations peoples with disability by:

- **a. improving the number, capacity and retention of First Nations health workers**
- **b. improving health programs and services tailored to First Nations peoples with disability, and**
- **c. partnering with First Nations health justice organisations in the community.**

[147] *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991), vol 1, recommendation 152.
[148] Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2018* (Report, 2019) 142.
[149] Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody, Parliament of New South Wales, *The high level of First Nations people in custody and oversight and review of deaths in custody* (April 2021) 121-122.

Access to trauma-informed care for female prisoners

Research in Australia indicates that between 57 and 90 per cent of women in prison have experienced child sexual abuse or trauma of some kind, including domestic and family violence.[150] A recent ANROWS Report acknowledges that trauma, mental illness and substance use have complex impacts on the nature of both women's victimisation and pathways to contact with the legal system. It also cites research that two in three women in prison have a history of a mental health condition, and around 86 per cent of Aboriginal and Torres Strait Islander women in prison have a diagnosed mental health condition.[151]

In our experience, the ability of prisons to provide trauma-informed care to women in custody (including those on remand) with mental health issues and other disabilities is limited. We are particularly concerned about the lack of trauma-informed health care services for female prisoners with reproductive and mental health care needs,[152] as well as the lack of culturally appropriate care for First Nations women in custody. The importance of trauma-informed care for women is highlighted in Lexi's story below.

Lexi's story* (NSW)

Lexi is an Aboriginal woman. At the time she breached parole, she was seven weeks' pregnant. She called the police station to tell them that she would come in the next day with a solicitor, and that she was pregnant and intended to get an abortion.

The following day, the police forcefully entered her property with police dogs. She heard the police burst through the door and was frightened and hid in a cupboard. She was bitten by one of the dogs, and the police were rough with her during the arrest. She told the police officers that she was pregnant, but they did not believe her.

Lexi saw a Justice Health nurse the day after she was admitted into custody and told them she wanted an abortion. She was questioned repeatedly about whether she wanted to go through with the pregnancy.

When she was 18 weeks pregnant, an ultrasound was organised during which she advised the health professionals that she did not want to know the sex of the baby but was told anyway. The abortion was not organised until she was 22 weeks pregnant, by which point she had become visibly pregnant and was being labelled a "baby killer" by other inmates and correctional centre staff. She was placed into segregation at one point because she felt unsafe.

She was placed in a mental health screening unit following signs of suicidal ideation but did not receive any counselling or mental health services. Lexi suffered from depression, anxiety and PTSD.

The provision of trauma informed care in custody may significantly assist women to progress legal and non-legal issues and improve their well-being ahead of release from custody.

[150] Mary Stathopoulos, *Addressing Women's Victimisation Histories in Custodial Settings* (Report No 13, 2012) 8.
[151] Australia's National Research Organisation for Women's Safety, *Women's Imprisonment and Domestic, Family and Sexual Violence* (Report, 2020) 4.
[152] According to a 2019 AIHW report, almost 1 in 50 women entering custody was pregnant: Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2018* (Report, 2019) 72. When compared with pregnant women in the community, pregnant women in prison have more mental health issues: Dowell et al 2018; Dowell et al 2019; Knight & Plugge 2005; Mukherjee et al 2014) in AIHW, *The Health of Australia's Prisoners 2018* (Report, 2019) 73.

Recommendation:

58. State and territory governments should ensure that the health care needs of women in custody with disability are met with female-specific, trauma-informed care, including mental health support. Trauma-informed care should recognise the impact of trauma on the person, minimise further trauma, embody the principle of 'do no harm', and be aware of the inadvertent way that institutions may re-enact traumatic interactions.[153]

5.7 Restrictive practices, including seclusion, in custody

The use of restrictive practices that are inherently degrading or painful is prohibited under rule 47 of the United Nations *Standard Minimum Rules for the Treatment of Prisoners* (**Mandela Rules**). Further, the use of any restrictive practice must be "the least intrusive method that is necessary and reasonably available to control the prisoner's movement, based on the level and nature of the risks posed". Article 14 of the CRPD states that the existence of a disability in no case justifies a deprivation of liberty.[154] The Australian Government guidelines on best practice for corrections require restrictions to be "the minimum required to maintain safety, security and good order, alongside their human rights".

Despite these standards, restrictive practices continue to be used on our clients with disability in police custody and in prison. One of the consequences of the growing prison population across Australia is the impact of overcrowding on the management of people in custody. Some of the custodial management practices, such as lockdowns and rotations, the use of solitary confinement, and irregular access to programs and support, can, in our view, have a direct and harmful impact on people with cognitive and/or psychosocial disability.

We also see people with disability being placed in more restrictive settings or subjected to highly restrictive management conditions due to their needs and behaviour. This includes extended solitary confinement, 23-hour lockdown, restraint and deprivation of movement, and strip searches. This is closely linked to the lack of appropriate resourcing of supports and facilities in the forensic disability and mental health systems, the use of inappropriate facilities within prison to manage disability, and issues associated with staffing numbers, training and capability to manage the complex needs and behaviours of people in custody, especially those with disability. These issues are especially acute for those with coexisting issues, including acquired brain injuries, autism, intellectual disability and mental health conditions.

During the COVID-19 pandemic, the use of restrictive practices on prisoners exponentially increased, and long periods of isolation with limited access to legal and family visits exacerbated mental health issues, interrupted health services, and delayed people's release from custody.

Recommendation:

59. Corrective services should ensure that custodial management practices involving restrictive practices (such as solitary confinement, lockdown, restraint, deprivation of movement, quarantine and other forms isolation) are carefully balanced with measures adopted to safeguard prisoners' mental health and the need for rehabilitation.

[153] Niki Miller and Lisa Najavitas, 'Creating trauma-informed correctional care: a balance of goals and environment' (2012) 3(10) *European Journal of Psychotraumatology* 1.
[154] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 14.

5.8 Forensic patients

Each jurisdiction has specific legislation to provide for hearing a charge where an accused person is not fit to be tried, and dispositions where a person is found not guilty on the basis of experiencing a mental health or cognitive impairment – this submission refers to these cohorts as 'forensic patients', to the exclusion of other cohorts.[155] The purpose of these legislative regimes is to provide a therapeutic framework for the care, treatment and supervision of forensic patients. It is designed to divert the small number of people who come within these legislative regimes from punishment to treatment, in recognition that they have not been convicted of a crime and to support their rehabilitation and address their future risk.

Legal aid commissions have concerns around the extent to which these therapeutic goals are met and the legal processes that apply to forensic patients and see failures to adequately support forensic patients. In particular, we are concerned about:

- **Testing of the allegations:** There is some divergence between the jurisdictions in relation to the court process following a person being found unfit to be tried. In NSW, Victoria, the Northern Territory, Tasmania and the ACT, a special hearing must be held, and must as closely as possible resemble an ordinary criminal trial and the standard of proof is beyond a reasonable doubt.[156] In South Australia, a modified trial is held where the physical elements of the offence must be proven beyond a reasonable doubt, however the mental elements of the offence are not required to be proven and the accused is unable to rely on a defence.[157] In contrast, in Queensland and Western Australia, special hearings are not available and therefore the accused is not provided with a proper opportunity to test the evidence against them, despite the fact they can be subjected to an indefinite detention order.[158] It is vital that accused persons have the right to test the allegations against them, in a manner that as closely as possible resembles the opportunity provided to other accused persons.
- **Indefinite/Indeterminate orders for persons unfit to be tried:** In Queensland, Tasmania, Western Australia, the Northern Territory and Victoria, a person who is found unfit is made the subject of an indefinite forensic order requiring them to be detained or under supervision in the community.[159] However, the Northern Territory and Victoria have additional safeguards to assist in preventing prolonged detention.[160] In NSW, South Australia and the ACT, the length of the term is a reference to the best estimate of a sentence a person would have received had they been

[155] Each jurisdiction uses different terminology to refer to forensic patients. See 'Forensic Patient - mental health legislation', *Royal Australian and New Zealand College of Psychiatrists* (Web Page, 30 June 2017) <https://www.ranzcp.org/Files/Resources/Mental-health-legislation-tables/8-Definitions-of-forensic-patient-Australian-and-N.aspx>.

[156] *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) ss 54, 56(1) ; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 16(1), 17, 38V; *Criminal Code Act 1983* (NT) ss 43V, 43W ; *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 15-17; *Crimes Act 1900* (ACT) ss 316-317.

[157] *Criminal Law Consolidation Act 1935* (SA) ss 269M-269N.

[158] *Mental Health Act 2016* (Qld) ss 134(3)(b), 137; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 19(5), 24, 35.

[159] *Mental Health Act 2016* (Qld) s 137; *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 18(a)-(b), 24, 29A; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 24, 35; *Criminal Code Act 1983* (NT) s 43ZC; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 27(1).

[160] In the Northern Territory, a court sets an initial length to the order and the length is equivalent to the length of imprisonment the person would have received if they were convicted- *Criminal Code Act 1983* (NT) s 43ZG(2). In Victoria, a 'nominal term' is given, which is a statutory fixed period of time based solely on the specific offence(s) they have been found to have committed and there is no opportunity for judicial discretion in relation to the length of the term: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 28. In both jurisdictions, at the end of the period set, a 'major review' occurs. In the Northern Territory, there is a presumption in favour of a forensic patient order coming to an end unconditionally: *Criminal Code Act 1983* (NT) s 43ZH(2)(a). While in Victoria, there is a presumption in favour of the order changing to a non-custodial order: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s35(3)(a)(i). However, each presumption will be rebutted where the statutory community safety test is met.

convicted of the offence(s).[161] While in each jurisdiction a patient cannot be released unless they satisfy the statutory community safety test,[162] in NSW they must also satisfy the Tribunal that they have spent 'sufficient time in custody',[163] which brings the concept of punishment into the equation. In NSW the State can also apply to the Supreme Court to extend the forensic patient status of a person who is the subject of a limiting term.[164]

We submit that all jurisdictions should adopt a legislative model, similar to that in South Australia and the ACT,[165] where there is a limit to the length of any order, the length of the order is consistent with any sentence of imprisonment the person would have received had they been convicted of offending, the forensic patient is only detained in circumstances where their release is considered to place members of the public at risk of serious harm, and they are subject to reviews at regular intervals by an independent decision-making body.

- **Shortage of forensic mental health beds:** There are serious shortages of inpatient forensic mental health facilities in all states and territories, especially for young people and women.[166] This means that forensic patients who experience a mental illness often receive sub-therapeutic care in prison, rather than appropriate care in a specialist forensic mental health facility with multi-disciplinary staff, such as psychiatrists, psychologists, occupational therapists, social workers and nurses. In NSW, e.g., forensic patients who have received a finding of 'act proven but not criminally responsible' will often have been in prison for over four years before they are transferred to the state's only high security forensic mental health facility, the Forensic Hospital.[167] While waiting for a bed, they do not have access to the care, treatment and rehabilitation they require, and are regularly in their cells for more than 18 hours per day. In the Northern Territory, forensic patients who are the subject of 'custodial supervision orders' are detained in prison due to the Northern Territory not having a high security forensic mental health facility.[168]

  Our concerns in relation to the provision of mental health care in prisons are addressed at section 6.6.2. We are concerned that prisoners who experience disability are not receiving care equivalent to that which they would receive in the community, as is required by the Mandela Rules.

Dale's story* – waiting years for a forensic bed (NSW)

Dale entered custody on remand with an established diagnosis of schizophrenia. Just before his reception, he had spent a few weeks as an involuntary patient in a psychiatric hospital because he was hearing voices. At first, Dale was placed in a mental health screening unit at a mainstream prison. Sometimes he was around people with similar symptoms, even though he had asked staff to separate him for his own well-being. He stayed there for about three weeks until he was transferred to a different correctional complex and placed in the general population. He was still hearing voices, but because it was his first time in prison, he "went along with things". Dale was unable to see a psychiatrist about his medications and the voices. Sometimes he saw a psychologist because they were on site more regularly; but if he needed help with his dosage, the

[161] *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 63(2); *Criminal Law Consolidation Act 1935* (SA) s 269O(2); *Crimes Act 1900* (ACT) s 301(2).
[162] *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 84(2); *Criminal Law Consolidation Act 1935* (SA) s 292T(2)(ba); *Mental Health Act 2015* (ACT) s 180(3)(c).
[163] *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 84(1)(c).
[164] Ibid s 103.
[165] We note, however, that neither of these jurisdictions has established a specialist disability forensic facility to provide an alternative to prison, in circumstances when detention is considered appropriate.
[166] Productivity Commission, *Mental Health* (Final Report, 30 June 2020) 1049.
[167] *Mental Health Review Tribunal, Annual Report 2021* (Report, 28 October 2021) 10.
[168] David McGrath et al, *Report on the Review of Forensic Mental Health and Disability Services in Northern Territory* (Final Report, January 2019).

psychologist had to forward his requests to the psychiatrist and Dale had to wait for an appointment. The wait was much longer than the previous prison placement.

Eventually, Dale was moved to the general population at another correctional centre. Dale was placed on a waitlist for a bed at the Forensic Hospital. He asked staff to hurry his place in 'the queue'. Dale was still hearing voices, but he felt a bit more stable. He was unable trial a medication to treat persistent residual symptoms like 'voices'. Dale found his time in the general population incredibly stressful and was worried that if he asked for treatment he would me marked as a 'trouble maker'. Dale reported he was afraid and worried if he displayed symptoms he would be locked in by guards or targeted by inmates. As his stress increased, so did his symptoms.

Dale waited a total of three-and-a-half years for a forensic mental health bed from the time he arrived in custody to the time of his placement. This was due to delays at different stages:

- 17 months on remand to receive a finding of not guilty by reason of mental health
- four-and-a-half months to receive a court order that the Mental Health Review Tribunal should determine his placement
- six weeks for the Mental Health Review Tribunal to order his transfer to a forensic bed, and
- 19 months to be transferred to a forensic bed.

When Dale was finally transferred, he immediately had access to a multidisciplinary team of occupational therapists, psychiatrists, and other health professionals. If he got symptoms or sick, his needs were attended to within 10 minutes rather than days. Eventually, Dale was able to access specialised courses on managing mental health to learn insight into his symptoms, triggers and early warnings to prevent relapse. The staff were trained to recognise his behaviours and respond in a therapeutic way. Dale progressed successfully to escorted leave[169] and is grateful for the care provided.

- **Lack of forensic disability facilities:** In a number of jurisdictions, no specialist forensic disability facility has been established for forensic patients who experience a cognitive impairment such as an intellectual disability, an acquired brain injury or dementia, but who do not experience a mental illness. Forensic patients with these characteristics who are required to be in a place of detention will invariably be detained in prison due to the lack of an alternative. This is unsatisfactory given the vulnerabilities experienced by this cohort, the fact that they have not been convicted of a crime, and that prisons are ill-equipped to provide for the specific and substantial support needs of such individuals. There is a need for funding to be provided for the development and implementation of additional therapeutic secure facilities for children and adults with complex needs including cognitive and mental impairments. We support the submission that these should be developed in partnership with local Aboriginal Community Controlled Health Services.[170]

  The use of prison in such circumstances has attracted criticism from a range of bodies,[171] including the United Nations which has called for Australia to '[e]nd the unwarranted use of prisons for the management of unconvicted persons with disabilities….'.[172] Some jurisdictions, such as

[169] Dale had also experienced financial difficulties while he was in prison but once inside the Forensic Hospital he could access the Disability Support Pension.
[170] Danila Dilba Health Service submission to the Northern Territory Law Reform Committee, *Mandatory Sentencing and Community-Based Sentencing Options* (November 2020) https://justice.nt.gov.au/__data/assets/pdf_file/0009/1069569/Danila-Dilba-Health-Service.pdf, p 4.
[171] NSW Law Reform Commission, *Criminal Responsibility and Consequences,* (Report 138, May 2013) 314; Mental Health Review Tribunal, *Annual Report 2019-20* (Report, 19 October 2020) 9; *National Statement of Principles Relating to Persons Unfit to Plead or found Not Guilty by Reason of Cognitive or Mental Health Impairment* (9 August 2019).
[172] UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013)*, UN Doc CRPD/C/AUS/CO/1 (2013) [32].

Queensland,[173] Western Australia[174] and Victoria,[175] have established specialist forensic disability facilities. Resourcing can however be an issue. In Queensland, there is one facility which is in Brisbane and there are limited bed numbers. Patients who are from remote areas, including First Nations peoples, are therefore effectively away from family and community for significant periods of time.

- **Challenges accessing the NDIS:** Forensic patients who are detained, particularly in prison, experience difficulties in obtaining access to the NDIS while they are in detention and for their transition into the community. There are strict rules around what types of supports the NDIA will fund. For example, the NDIA is not responsible for funding day-to-day supports while a person is detained in prison or a mental health facility, and is only responsible for other supports "to the extent appropriate in the circumstances of the person's custody".[176] There is a lack of clarity and coordination around who is, or should be, responsible for providing disability supports to forensic patients where the provision of those supports will result in a reduction in the patient's risk to self or others (see 5.9.1 below). Furthermore, it can be difficult to assess a person's level of functioning while they are detained in prison, which can lead to the NDIA not being provided with sufficient evidence to support the funding of the supports sought by the forensic patient.

  Without funding for disability supports, the decision-maker may be less likely to approve the forensic patient's release, due to concerns about the level of support the patient will have in the community and how this may relate to the patient's risk of harm to self and others.

- **Magistrates / Local Court:** While there is an alternative pathway in the superior courts, and the potential therapeutic benefits of such pathways for offenders with disability, such pathways are not available in all jurisdictions for matters that are dealt with summarily. This has resulted in a range of consequences for clients with disability, including:

  - people entering the system who would likely be found unfit to be tried, plead guilty to charges, resulting in convictions which may not be appropriate and time in custody where they may experience harm and struggle to access appropriate support, and
  - people who are unfit to be tried returning to the Magistrates or Local Court on a series of low-level matters but not being able to have these matters dealt with by the court in a timely manner, due to the fact that fitness to be tried can only be raised before superior courts.

    NSW and Queensland both provide for diversionary options at the summary level.[177] NSW's approach is particularly unique because the threshold for an accused to be diverted from the criminal justice system is not reliant on a person necessarily reaching the threshold required in the superior courts for a person to be unfit to be tried or of unsound mind. This allows for people with mental health and cognitive impairments to have their charges dismissed on the basis they are diverted for treatment and/or support in the community, which can include being placed on a community treatment order or being taken to, and detained in, a mental health facility.[178]

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[173] The Forensic Disability Service, a medium security facility, has been established under the *Forensic Disability Act 2011* (Qld).
[174] The Bennett Brook Disability Justice Centre has been established under the *Declared Places (Mentally Impaired Accused) Act 2015* (WA). This facility has to date supported very limited numbers of people, which is understood to be due to strict eligibility criteria.
[175] Places that are designated as 'residential treatment facilities' under the *Disability Act 2006* (Vic) can be used as places of detention for the purpose of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).
[176] *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) r 7.24.
[177] For an overview of each jurisdiction's diversionary pathways at the summary court level, see Fiona Davidson et al, 'Mental Health and Criminal Charges: Variation in diversion pathways in Australia (2017) *Psychiatry, Psychology and Law* 1, 5. Queensland has similar provisions in place (see Mental Health QLD 2016 Chapter 6, Part 2).
[178] *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) ss 12-23.

- **Non-identification of disability:** LACs observe that cognitive disability and mental health issues are often not identified or identified in a timely way, as the system to some extent depends on self-identification. Where a legal aid commission lawyer is involved, they may discern issues but be limited in the ability to obtain an appropriate and/or timely report from relevant medical professionals because of lack of resources, including waiting times to see medical experts and the significant cost of expert reports. There is a risk, particularly for unrepresented people of being punished for offences for which they could have been found unfit for trial, and not being referred to appropriate services and supports as a result, with potentially dire consequences.[179]

Due to the very onerous and restrictive nature of the forensic mental health and cognitive impairment regimes, the lack of appropriate facilities, and the waiting periods for beds at existing specialist facilities, accused persons may make a strategic decision not to rely on a mental or cognitive impairment defence even when it is available, as becoming a forensic patient may be considered worse than receiving a finite sentence of imprisonment. Such a strategic decision may also occur in relation to the issue of fitness to be tried.

In 2015, the Law, Crime and Community Safety Council (now known as the Meeting of Attorneys-General) established a cross-jurisdictional working group, which developed the National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty by Reason of Cognitive or Mental Health Impairment (**National Principles**).[180] Although the National Principles have been endorsed by all jurisdictions except South Australia, many of the principles are not adhered to in each jurisdiction. Legal aid commissions submit that if each jurisdiction's laws and policies were consistent with the principles, many of the issues raised above would be addressed.

Recommendations:

60. State and territory governments should implement the National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty by Reason of Cognitive or Mental Health Impairment, including through the following:

a. Persons who are unfit to be tried should only be subject to a forensic order if the allegations are proven beyond a reasonable doubt following a special hearing.

b. Persons who are unfit to be tried should only be subjected to forensic orders that are fixed in length and are an estimate of the sentence of imprisonment they would have received if they were convicted. They should only be held in a place of detention during their order if their level of risk necessitates it, and should be subject to regular reviews by an independent decision-making body.

c. Forensic patients should have a personalised, recovery-oriented care plan which focuses on the least restrictive options.

d. Detention should occur in facilities adequately resourced and appropriately reviewed/oversighted appropriate to the forensic patient's needs and in the least restrictive environment to protect against risk of significant harm.

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[179] See, e.g., the case studies of "James" and "Charlie" by Legal Aid Queensland, *Submission to the Royal Commission into violence, abuse, neglect and exploitation of people with disability - criminal justice systems issue paper* (6 July 2020). The Victorian Law Reform Commission identified a number of these, and other, shortcomings in its major review of the Victorian mental impairment legislation and made some recommendations to improve the operation of the scheme as well as the services provided to people under supervision. The implementation of many of these recommendations will improve the outcomes of people with disability who come into contact with the criminal justice system: Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Report, 2014) Chapter 5. A number of these changes were supported in Victoria Legal Aid, 'Submission to the VLRC Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997' (2013).

[180] *National Statement of Principles Relating to Persons Unfit to Plead or found Not Guilty by Reason of Cognitive or Mental Health Impairment* (9 August 2019).

e. **Step-down accommodation should be available to ensure that forensic patients can recover and transition to life in the community.**

61. State and territory governments should:

a. **fund additional beds in specialist high, medium and low secure forensic mental health facilities, as a matter of urgency, and a low secure mental health facility suitable for forensic patients of all genders**

b. **fund additional intensive mental health supports in the community, including appropriately supported, stable accommodation, and**

c. **fund and implement further trauma-informed facilities, pathways and options in medium and high secure units, as well as in the community, for forensic patients, especially women, who have experienced trauma.**

62. Commonwealth, state and territory governments should resource and support a regular multi-agency forum between the NDIA and relevant state and territory agencies (responsible for matters such as the provision of health and disability services in prisons, forensic disability facilities and the community, and the provision of public housing) to provide support for forensic patients with disability but no mental health issues, underpinned by a memorandum of understanding with clear roles and responsibilities.

63. State and territory governments should review their respective mental health and cognitive impairment legislation in relation to its application in summary jurisdictions, and increase the range of orders available, including the option to have the charges dismissed on the basis that the accused will receive care and/or support either informally or through a community or inpatient order under relevant mental health legislation, as per the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).

5.9 Transition to the community post-release

A range of issues make it difficult for people with disability to have appropriate supports in place post-release from custody, including:

- inadequate transition planning, especially for people on short or fixed term sentences
- limited coordination and planning between systems (e.g., fragmented health information systems inhibit information-sharing between custodial and community health providers,[181] creating gaps in service provision when people leave custody)[182]
- difficulties arranging NDIS plans, and a lack of clear processes, accountability and responsibility for NDIS plans, and
- lack of stable and secure housing and accommodation.
- lack of support for people making applications for parole.

These issues can delay discharge or release from prison or inpatient units. They also increase the risk of a person being released into homelessness or inappropriate accommodation without appropriate supports, putting them at risk of breaching any conditions of their release, further offending, and readmission to some form of custody.

[181] Audit Office of New South Wales, *Access to health services in custody* (Report, September 2021) 6.
[182] Ibid 11.

5.9.1 NDIS

The introduction of the NDIS has further complicated the service landscape. There is no longer one agency or worker (such as the former state and territory-based case managers) responsible for the person's matter, and for commencing and coordinating transition and disability support planning necessary for release from custody. In the absence of clear responsibility and coordination between the NDIS and the criminal justice, health and disability systems, people with disability in custody face enormous barriers in attempting to navigate and coordinate these systems themselves, especially if they have complex support needs and/or limited access to external supports.

Although the NDIA is responsible for funding a participant's disability supports when they transition from custody, the delimitations of service responsibility are not clearly defined. Sometimes neither state, territory or federal governments, nor the NDIA, accepts responsibility for service provision, resulting in the services needed for the person to transition and live safely in the community simply not being available. People with disability who are not yet NDIS participants or whose plans are inadequate to purchase the supports necessary for safe reintegration to the community are at particular risk of remaining in custody, as there remains no clear processes and lines of responsibility in place to initiate and pursue a NDIS application and/or plan review to support their transition out of custody.

For forensic patients without a fixed or clear release date, it can be particularly difficult to arrange a NDIS plan to support transition to the community. In particular, the NDIS disability/justice support gaps have significantly restricted forensic patients with cognitive disability only, from accessing less restrictive care in the community.

Due to the NDIS revising its risk matrix, we also see the NDIS refuse supports or give less priority to cases where the individual is already "supported" in custody or detention. This has resulted in delayed release into the community of NDIS participants in long-term detention (as forensic patients or prisoners).

Our solicitors report that the NDIA Justice Liaison Officer roles have not resolved these issues. The NDIA Justice Liaison Officer roles are intended to provide a single point of contact for workers within each state and territory justice system, to coordinate support for NDIS participants in youth and adult justice systems. Ideally, Justice Liaison Officers would take responsibility for managing urgent cases or cases where there have been substantial delays due to interface issues between government agencies.

5.9.2 Housing

The lack of housing pathways out of both prison and forensic services into stable, supported accommodation is one of the key blockages in the system. While this issue affects all people leaving custody, it disproportionately impacts on people with disability, who face additional barriers finding stable accommodation that suits their needs, and whose disability supports are at real risk of breaking down without it. The Productivity Commission's Inquiry into Mental Health found that the current capacity of housing and homelessness services to support people with serious mental health issues to find and maintain housing "falls well short of need".[183]

Without stable and secure housing, it is far more difficult for a person leaving custody to reintegrate back into the community – to engage with and maintain their disability and other supports, physical and mental health services, employment, vocational training and education, to address substance dependence, to access clean, healthy and safe living conditions, to remain safe and not become

[183] Productivity Commission, *Mental Health* (Inquiry Report, 30 June 2020) Recommendation 20 — supportive housing and homelessness services.

victims of crime themselves, and to comply with any supervision requirements or other orders. This places them at greater risk of breaching the conditions of their release, reoffending, and returning to custody.[184] On the contrary, transitional and housing support services have the potential to reduce recidivism, thereby bringing direct benefits to clients, increasing community safety, and reducing criminal justice system costs.[185]

Jackie's experience in custody shows the dangers facing people with disability who have no supports in custody or the community, and the difference that a targeted service like the Extended Reintegration Service can make.

Jackie's story* (NSW)

Jackie is an Aboriginal woman. She has an acquired brain injury and has poor reading and writing skills as a result.

Jackie was due to be assessed for parole in mid-2018 but was refused. As her next parole hearing approached the following month, her community corrections officer decided not to recommend parole because she had no supports or accommodation in place. Following a three-year sentence, Jackie was very distressed because her release was being delayed.

Corrective Services attempted to avoid releasing Jackie to homelessness, however the outcome of longer incarceration was almost equally unsatisfactory. Housing Jackie was proving difficult as she had a negative former tenancy classification with the Department of Housing. This was due to a repair debt, which came about after creating a memorial on her wall using photos and pins following the death of her sister.

Jackie needed a service that could assist her with housing and other supports. Legal Aid NSW referred her to the Community Restorative Centre and connected the caseworker with Jackie's parole officer. With constant follow up, Legal Aid NSW was able to get her referred to the Extended Reintegration Service, which is a partnership between Corrective Services, NSW Health and NSW Housing, funded by Corrective Services. Community Restorative Centre transitional workers offer pre-release support and planning, and intensive holistic case management for up to nine months post-release. To be eligible, Jackie had to have a severe mental health issue or intellectual disability, a high to medium-high risk of recidivism and would need to live within southwest Sydney. Jackie was approved for this program and received housing and casework support. She was eventually released into a property in February 2019.

[184] E.g., a Victorian study found that people with intellectual disability return to prison at more than twice the rate of people without such disability: Corrections Victoria, *Intellectual Disability in the Victorian Prison System: Characteristics of Prisoners with Intellectual Disability Released from Prison in 2003-2006* (Report, 2007). Similarly, NSW research found that the rate of recidivism for prisoners with intellectual disability is 2.4 times higher for prisoners without prior convictions and 1.48 times higher for those with prior convictions: see Vivienne Riches, Trevor Parmenter, Michele Wiese and Roger Stancliffe, 'Intellectual disability and mental illness in the NSW criminal justice system' (2006) 29(5) *International Journal of Law and Psychiatry* 386, 389. The Australian Institute of Criminology found that almost three quarters of cognitively impaired First Nations participants reoffended during the two-year follow-up period, and were 2.8 times more likely to reoffend than non-cognitively impaired First Nations participants: see Australian Institute of Criminology, *Aboriginal Prisoners with Cognitive Impairment* (Report, 2017) 7.

[185] Australian Institute of Criminology, *Supported Housing for Prisoners Returning to the Community: A Review of the Literature* (Research Report, No 7, 3 May 2018) v.

Recommendations:

64. The NDIA and state and territory governments should assist people with disability in custody to transition to the community, by:

- **a. urgently identifying people with disability who remain in custodial, forensic or mental health settings due to a failure to secure disability services**
- **b. developing integrated teams with specialised, trained planners to assist people with disability to access NDIS supports**
- **c. adopting clear processes for obtaining access to NDIS supports and planning for a person's release before their sentence is complete or discharge is imminent, and**
- **d. funding supports for transition prior to release, so that supports are in place to facilitate successful discharge or release and reduce their risk of reoffending or readmission.**

65. The NDIA should ensure that its Justice Liaison Officers:

- **a. are empowered to respond in urgent, critical or complex cases where a person with disability faces a risk of serious harm, injustice or adverse impacts on their health and wellbeing, and**
- **b. understand the NDIS justice/disability barriers faced by forensic clients with cognitive disability but no mental health issues, and are supported to work with corrective services and justice health agencies to assist individuals with release planning and accessing the NDIS.**

66. State and territory governments should support people with disability leaving custody to secure stable, supported accommodation, by:

- **a. developing a nationally consistent policy of no exits from prisons or inpatient units into homelessness**
- **b. increasing funding for housing and homelessness services, and**
- **c. amending their policies to require that, in addition to any current allocation, transitional housing be provided for a consecutive period of three to six months upon release, in order to increase the likelihood of successful transition to the community.**

67. The NDIA should amend its policies to encourage the development of long-term supported accommodation for NDIS recipients with severe and persistent mental health issues.[186]

5.10 Post-sentence detention and supervision

Legal aid commissions are concerned about the impact of post-sentence detention and supervision regimes on people with disability. Legal aid commissions appear in applications made by the state against clients for continuing detention and extended supervision orders (**ESO**) under high risk offenders (**HRO**) legislation.[187] Data suggests that people with disability – and in particular, Aboriginal people with disability – are disproportionally represented in HRO schemes.[188] Most HROs have

[186] Productivity Commission, *Mental Health (*Inquiry Report, 30 June 2020), Recommendations 20.1 (housing security for people with mental health issues); 20.2 (no discharge into homelessness); 20.3 (support people to find and maintain housing); and 20.3 (the National Housing and Homelessness Agreement).
[187] See, eg, *Crimes (High Risk Offenders) Act 2006* (NSW) ('CHRO Act') and the *Terrorism (High Risk Offenders) Act 2017* (NSW) ('THRO Act').
[188] In NSW, from February 2019 to August 2020, 78% of persons subject to CHRO Act applications decided by the court had mental health issues, and 31% had an intellectual disability. From July 2018 to July 2020, 59% of persons subject to THRO

complex needs, including psychosocial disability, intellectual disability, cognitive impairment, and/or mental health issues, which may be closely related to their risk of offending. They are often themselves the victims of violence, abuse and neglect, and the relationship between their trauma and behaviour can be poorly understood including by authorities.

We are concerned that, under existing state and territory HRO regimes, and the recently introduced Commonwealth ESO scheme, people with disability may become caught in a system that does not address their needs, sets them up to fail by imposing conditions they cannot meet, and ultimately undermines their rehabilitation. In NSW, orders for continued detention or extended supervision can be made for up to five years at a time, and there is no limit on the number of consecutive applications that can be made by the State. The large number of conditions attached to such orders (up to or exceeding 50 conditions) are onerous and usually include electronic monitoring, scheduling and restrictions on behaviour including where a person lives, interpersonal contact restrictions, restrictions on specific behaviour such as consumption of drugs or alcohol and access to the internet, and personal and property searches. The restrictiveness of orders can prevent our clients from accessing family and supports. For NDIS recipients, the cost of appointments and obligations related to the conditions imposed is often deducted from their NDIS funding, causing further disadvantage. Breach of an ESO condition – even by way of otherwise non-criminal conduct – can result in up to five years' imprisonment.

Young people with disability in custody may become subject to HRO orders after making misguided statements or associating with more serious offenders. In NSW, on several occasions the State has applied for orders against young Aboriginal men with low cognitive functioning in custody for unrelated minor offences. In one case involving a young person who purportedly converted to Islam and made comments supporting ISIS, the Supreme Court of NSW said the statements were made "by an immature young man confined in a correctional environment where it is necessary to affect a persona of toughness so as to avoid being the victim of other inmates."[189] In another case, the Supreme Court of NSW said "it is of significant concern… that orders seeking to criminalise and curtail the movements and rights of an 18-year-old man, in custody for offending as a minor, who has significant mental illness and cognitive impairments, are sought on such a last minute basis."[190]

We are also concerned about the increasing prevalence of child protection offender prohibition orders sought by police to restrict a person's movements and associations, as well as applications made by police to include a person on the Child Protection Register, despite that person having no criminal convictions for offending against children.[191] In our experience, police proceed with applications despite a person's capacity to understand potential court orders being impaired by their disability, and NDIS-appointed carers are used to assist with managing that person's risk to ensure they do not breach the order. In NSW, offences arise from failure to comply with these regimes, which carry a maximum penalty of five years' imprisonment, and frequently result in the accused being remanded or sentenced to imprisonment.

Post-conviction orders – which once comprised a handful of matters before courts – now represent a significant proportion of quasi-criminal proceedings. Despite this, there has been little attention given to the impact of the various post-conviction order schemes in Australia and how they interrelate, or to

matters decided by the court had mental health issues, and 12% had an intellectual disability. All Aboriginal and Torres Strait Islander people subject to an application under the CHRO or THRO Act during these periods had a disability: Legal Aid NSW's analysis of published decisions under the CHRO Act and the THRO Act.

[189] *State of NSW v RC (No 2)* [2019] NSWSC 845 [112].

[190] *State of NSW v GB by his Tutor* [2020] NSWSC 913 [77].

[191] Both types of applications are made within the 'Special Jurisdiction' of the *Local Court: Local Court Act 2007* (NSW) Pt 4. *O'Neill v Commissioner of Police* [2020] NSWSC 1805.

monitoring the impact and effectiveness of these schemes, under which significant injustices can arise.[192]

Recommendation:

68. Commonwealth, state and territory governments should undertake a comprehensive, independent review of their respective post-sentence detention and supervision schemes – including HRO schemes – with appropriate targeted consultation which includes legal assistance service providers. Any review should prioritise consideration of measures to reduce the disproportionate representation of people with disability captured by such schemes.

[192] There have been significant administrative errors made by the NSW Police Force affecting registrable persons: Law Enforcement Conduct Commission, *The New South Wales Child Protection Register: Operation Tusket* (Final Report 2019). These errors have had dire consequences for some offenders. In the absence of court proceedings following post-conviction outcomes, this type of mismanagement may continue to go unnoticed by legal representatives, government agencies and courts.

6. A framework for promoting inclusion and human rights

The following legal and systemic changes are suggested as essential for protecting and promoting the rights of people with disability:

- embedding lived experience, expertise and leadership
- access to specialist legal assistance and independent advocacy, and
- federal legislative protection of human rights and structural and systemic reform to Commonwealth, state and territory discrimination laws.

6.1 Embedding lived experience leadership

Lived experience leadership and self-advocacy are critical components to promoting inclusion and respecting, protecting and upholding the rights of people with disability. People with lived experience should lead, or be involved in, the co-design of all reforms, and be meaningfully involved in leadership, governance, oversight and training in disability services and settings.

Lived experience leadership adds value to services and communities by changing cultures, informing practice and redressing traditional power imbalances.[193] This leadership is provided at a systemic level, which privileges the voices of lived experience experts so that they shape professional and organisational practice. It is based on emerging evidence that services designed, delivered and evaluated by the people who use them are more likely to achieve better outcomes and improve satisfaction.[194]

As such, recognition of the importance of lived experience leadership, co-design and co-production is anticipated to be reflected in the Commission's final report. The system changes that flow from this Royal Commission should be shaped, and led, by people with lived experience of disability.

Recommendation:

69. Commonwealth, state and territory governments should elevate and resource disability lived experience leadership and self-advocacy, and ensure people with lived experience lead or are involved in co-designing all reforms and meaningfully involved in leadership, governance, oversight and training in disability services and settings.

6.2 Specialist legal support for people with disability by extending Your Story Disability Legal Support

Disability advocacy and legal assistance are essential to the realisation and protection of human rights, and to redress breaches of rights. The provision of specialist, trauma-informed, holistic legal services that address a range of legal and non-legal problems can ensure that people with disability have the support they need to overcome barriers to participating fully and equally in society. Legal assistance is vital for people at risk of being subjected to compulsory treatment, seclusion or restraint.

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[193] B Scholz, S Gordon and B Happell, 'Consumers in mental health service leadership: a systematic review' (2017) 26(1) *International Journal of Mental Health Nursing* 20-31; B Scholz, J Bocking and B Happell, 'How do consumer leaders co-create value in mental health organisations?' (2017) 41(5) *Australian Health Review* 505-510; B Happell et al, 'Promoting recovery-oriented mental health nursing practice through consumer participation in mental health nursing education' (2017) *Journal of Mental Health* 1-7.

[194] For an example of this in practice, including an evaluation evidence base, see Victoria Legal Aid's Independent Mental Health Advocacy Service and lived experience staff and advisory group, in Victoria Legal Aid, *Paving the Roads to Recovery: Building a Better System for People Experiencing Mental Health Issues in Victoria* (Submission, May 2020) 25-7.

Issues raised during the Disability Royal Commission's inquiries demonstrate the need for:

- accessible legal advocacy and advice for people with disability, especially First Nations peoples, people from culturally and linguistically diverse backgrounds, women and children
- accessible legal education and rights awareness for the community, and
- education for legal professionals about working with people with disability.

The Australian Government currently funds Your Story[195] to provide legal support to people with disability, their carers, families, supporters and advocates to engage with the Disability Royal Commission. Since its establishment in September 2019, Your Story has:

- received over 8,000 calls, webchat, email and website enquiries from people with disability, their carers, families, supporters and advocates
- provided over 4,343 information and referral services through our call centre
- provided over 10,044 legal and social work services including legal advice, support with submissions and private sessions, social work support and referrals
- provided over 801 accessible community legal education events and activities across Australia
- developed over 171 accessible community legal education resources including easy read guides and videos in Auslan
- provided over 5716 services connecting clients with specialist legal support for issues separate to their engagement with the Disability Royal Commission, counselling, disability advocacy and other supports across Australia.[196]

NLA proposes that Your Story, a specialist national disability legal service, should continue to be funded beyond the life of the Disability Royal Commission. The service would:

- specialise in providing accessible legal support to people with disability, as well as their carers and families, with a focus on assisting people from culturally and linguistically diverse backgrounds, women and children
- provide culturally safe legal services and support to First Nations peoples with disability
- specialise in providing accessible community legal education and information to people with disability, as well as their carers and families
- specialise in legal issues that commonly affect people with disability such as NDIS, DSP, housing, employment, discrimination (including exclusion from education), guardianship, advocacy and complaints against service providers and agencies (for example, police complaints), child protection and criminal justice issues (for example, issues experienced in custody)
- provide holistic legal and social work support to people with disability experiencing interconnected and complex legal and social issues, including by working closely with disability advocates
- connect clients with specialist legal support, disability advocacy and other services across Australia
- provide disability aware legal education to the legal community
- provide data to increase and promote understanding of the experiences of people with disability in the justice system, and

[195] *Your Story Disability Legal Support* (Web Page) <https://yourstorydisabilitylegal.org.au>
[196] Info Line calls September 2019 to March 2022. All other service data are from September 2019 to December 2021. Service data are for services provided by Your Story (NLA) and does not include a count of services provided by Your Story (NATSILS).

- provide input about key law and policy reform issues affecting people with disability in the justice system, particularly with respect to final recommendations made by the Disability Royal Commission.

Key benefits would include:

- leveraging:
    - the specialist expertise that has been developed by Your Story in providing accessible, flexible, trauma-informed, culturally safe, disability aware legal services
    - the existing referral pathways, trusted branding, and relationships with the disability sector and people with disability and their families, which have been established by Your Story. In particular, the service could act as a central referral point for people with disability and their families by providing referrals to legal and other service providers in each state and territory, including to disability advocates and specialist services delivering services to First Nations Peoples.
- supporting recommendations which may be made in the final report of the Disability Royal Commission about legal services and the justice sector and providing community legal education focused on changing attitudes towards disability and providing accessible legal information to people with disability and their families, needs which were flagged in the interim report of the Disability Royal Commission.
- Legal aid commissions are extremely well positioned to deliver accessible, co-designed and relevant legal education and publications about rights and laws.[197] Specialist disability legal education programs can work with the disability community (including disability advocates) to develop high quality community legal education. These programs have the support of practice lawyers when developing resources, and established distribution networks across the community. Materials are targeted at early intervention and at particular needs for people who are already engaged with the justice systems.

In the event that Your Story is extended to provide this national specialist disability legal service, we recommend that this transition start to occur from around January 2023 and before the end of the Disability Royal Commission.

Recommendation:

70. The Commonwealth Government should extend funding of the specialist national disability legal service (Your Story Disability Legal Support) to assist people with disability to understand and assert their rights and to link them with other appropriate services.

6.3 Protecting human rights

Australia is a state party to a number of international human rights instruments that set out the range of rights to be enjoyed by people with disability – namely the:

- *Convention on the Rights of Persons with Disabilities*
- *International Covenant on Civil and Political Rights*
- *International Covenant on Economic, Social and Cultural Rights*
- *Convention on the Rights of the Child*

[197] E.g., See Legal Services Commission South Australia, 'Rights on Show' (Web Page, 2014-2017) <https://lsc.sa.gov.au/cb_pages/rights_on_show.php>

- *Convention on the Elimination of Discrimination Against Women*
- *Convention on the Elimination of Racial Discrimination* and
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

As such, Australia has undertaken to ensure and promote the full realisation of all human rights and fundamental freedoms for all people with disability, and to end discrimination of any kind on the basis of disability.[198]

Australian governments must, among other things:

- prohibit all discrimination on the basis of disability[199]
- adopt all measures to implement the rights under the CRPD and other instruments, and to modify or abolish existing laws, regulations and practices that discriminate against people with disability[200]
- take into account the protection and promotion of the rights of people with disability in all policies and programs,[201] and
- with regard to economic, social and cultural rights, take measures to the maximum of its available resources, with a view to achieving progressively the full realisation of these rights.[202]

These commitments are translated into federal law through the Disability Discrimination Act and supported by s, other legislation such as the *Fair Work Act 2009* (Cth) (**Fair Work Act**), and state and territory anti-discrimination laws.

In addition, reform of federal anti-discrimination laws and the introduction of a federal Charter of Human Rights to provide for a more complete and streamlined equality framework is due.

Recommendations:

71. Commonwealth, state and territory governments should strengthen legislative protections for people with disability by adopting a federal Charter of Human Rights and streamlining discrimination laws. The Charter would ensure the consideration of these rights when new laws and policies are created, and when services are delivered, including disability services. Further, the Charter must be enforceable in order to protect those rights and provide avenues for people to take action if their rights are violated.

[198] CRPD art 4.
[199] Ibid art 5.
[200] Ibid art 4(1)(a)-(b).
[201] Ibid art 4(1)(c).
[202] Ibid.

Annexure – Full list of recommendations

1. **Commonwealth, state and territory governments should support people with disability to attend school and participate on an equal basis with others, and to maximise their learning, social connection and life opportunities, by:**
   a. **strengthening and promoting understanding of, and compliance with, relevant laws, including anti-discrimination laws, and standards**
   b. **adopting measures to prevent discrimination in schools**
   c. **ensuring that restraint, seclusion and exclusion of a child or young person in any form are measures of last resort, and only the least restrictive means available are used.**
   d. **encouraging a comprehensive understanding of issues affecting the participation of students with disability, informed by data and monitoring of trends related to students with disability**
2. **The NDIA and state and territory governments should ensure that children with disability have access to adequate timely NDIS and other disability supports, wherever they live (including regional, rural and remote areas), that NDIA communications with participants are clear and that efficient and effective NDIS resolution pathways are available for participants.**
3. **Commonwealth and state and territory governments should ensure that departments are appropriately resourced and that:**
   a. **the OOHC sector has the specialist skills and training required to identify and appropriately support young people with disability, including how to access the NDIS. This should include greater training and support for child protection workers to identify and assist children and young people to access NDIS supports, which could reduce the need for further child protection intervention**
   b. **every child entering OOHC is screened and assessed for indicators of disability and provided appropriate timely supports**
   c. **every young person with a disability leaving care has an approved NDIS plan or access to disability services once they have left care.**
4. **State and territory governments should adopt and implement culturally safe, holistic, therapeutic approaches to support children and young people with disability dwho are at risk of being taken into care or are in residential care in residential care and prevent their engagement with the criminal justice system. This should include implementation of existing frameworks and protocols to respond to children and young people in out-of-home care, and development of new frameworks and protocols across all states and territories.**
5. **State and territory governments should prohibit professional carers from taking out apprehended violence or intervention orders against children in out-of-home care.**
6. **Police should not pursue criminal charges against children and young people with disability in out-of-home care if there are viable alternatives.**
7. **State and territory governments should improve support and training for care providers regarding therapeutic ways to address disability and trauma-related challenging**

behaviour, to minimise the need for police involvement in cases where there is no immediate danger to staff or other children or young people.

8. **State and territory governments should raise the minimum age of criminal responsibility to 14 years.**
9. **State and territory legislation should require courts to take into account a child's age and disability in the context of capacity to comply with potential intervention orders, interim or final.**
10. **Commonwealth, state and territory governments should invest in evidence-based holistic therapeutic and family-focused responses to AVITH, including outside of business hours, to address the diverse and complex needs of families. These should draw on evidence from research, such as the Centre for Innovative Justice's WRAP Around project.**
11. **Police workforces should have embedded disability and youth specialist officers to support families with children and adolescents with disability who act with violence in the home.**
12. **Commonwealth, state and territory governments should inquire into the disproportionate rates of children with neurodevelopmental and cognitive impairment in criminal justice system settings, the potential for universal screening for neurodevelopmental and cognitive impairment, and the establishment of pathways to the NDIS.**
13. **State and territory governments should establish multi-agency partnerships to improve service coordination across agencies to provide holistic wraparound support for a young person with a disability and complex support needs in the criminal justice system including young people in custody.**
14. **The NDIA should increase resources for Justice Liaison Officers for young people in custody and youth justice supervision, to facilitate access to the NDIS and disability support.**
15. **Commonwealth, state and territory governments should ensure that services and systems, such as the NDIS, coordinate to provide timely access to high quality, culturally safe, trauma-informed, individualised supports and treatment for all people with disability, including in rural, regional and remote locations, forensic mental health wards and units, and correctional centres.**
16. **To reduce barriers to accessing the NDIS and supports, the NDIA should:**
    a. **use its power to enable participants and prospective participants to obtain the reports necessary and relevant for their application to the NDIA or AAT,**
    b. **only make requests for further information where strictly necessary and which are consistent with the eligibility criteria under the NDIS Act, and**
    c. **not impose a higher bar or request more information than is required by law, particularly where these types of requests are unduly barring access to the NDIS.**
17. **The Commonwealth Government should ensure that legal aid commissions are funded to levels appropriate to provide legal advice to NDIS applicants and to support legal advice and representation for meritorious applications to the AAT for review of NDIA decisions.**

18. **The Commonwealth Government should amend the NDIA Act to clarify the difference between a scheduled plan reassessment, an unscheduled plan reassessment, and internal review of a statement of participant supports.**
19. **The NDIA should improve oversight of the NDIS market and strengthen mechanisms to address gaps between the NDIS and mainstream services, in accordance with the introduced principle related to market access as outlined in subsection 4(15) as inserted by item 5 of Schedule 2 of the amendments to the NDIS Act, and effective from 01/07/22. These should include:**
    a. **a service safety net that is responsive, accessible and has clear accountability: If a person has been found eligible for the NDIS and has a funded plan but cannot secure supports due to the unwillingness or unavailability of market providers, the NDIA or other government agencies must intervene to ensure that the person with disability is not left without needed supports.**
    b. **planning that sets people up well from the outset: Equipping, resourcing and overseeing skilled planning that facilitates supports that are appropriate to the particular person and their needs, is critical to the effectiveness of the NDIS**
    c. **a workforce and system that can engage with complexity: Innovative, skilled and experienced support coordinators must be a systematised and ongoing part of the scheme for people with complex needs and behaviours of concern (not just as an introductory requirement) to problem-solve issues, navigate systems and think creatively about supports. This is a key foundation for keeping other supports in place.**
    d. **choice and control for people in rural and regional communities, and access to culturally safe services: Training, engagement and capacity-building for local services, changes to pricing and guidelines in relation to travel for providers and participants, and, if needed, directly purchasing services on behalf of participants, should be implemented as a priority to make sure that realisation of the promise of the NDIS is not confined to our cities.**
    e. **using pricing as a lever: While pricing is not the only driver of thin markets, it is a relevant factor in the difficulties our clients have securing the supports funded in their plans. Pricing should contemplate the costs of delivering supports to people with high and complex needs, as well as the costs of delivering supports in regional, rural and remote areas.**[203]
20. **State and territory governments should establish multi-agency integrated service response partnerships to provide coordinated support to people with disability and complex support needs.**
21. **The NDIA could better support participants, providers and NDIS partners, to avoid debt recovery by service/product providers by providing clearer messaging to participants and training to plan managers, allied health professionals, and support coordinators**

[203] National Legal Aid, Submission No 10477 to Commonwealth Department of Social Services, *Overview of the 2019 Review of the NDIS Act and NDIS Participant Service Guarantee* (4 November 2019) 20-21.For further recommendations for improvements to support the operation of the NDIS and its intersection with other service systems, see- Victoria Legal Aid, Submission to Commonwealth Department of Social Services and National Disability Insurance Agency, *NDIS Thin Markets Project* (June 2019) https://library.vla.vic.gov.au/firstvlaRMSPublic/docs/Corporate/VLA%20Submissions/NDIS%20Thin%20Markets%20Project.pdf

about how plan funds have been calculated and how they can be used, including guidance around flexible use.

22. **The NDIA should support people with disability in all dealings and communications with the NDIA (including assistance to obtain necessary allied professional health reports) so that the NDIA is appropriately enabled to fund accessible housing including individualised living options, supported independent living, and specialist disability accommodation.**
23. **Commonwealth, state and territory governments should implement a service safety net to minimise the impact of market failure in the housing context on clients with complex support needs.**
24. **State and territory governments should increase availability of appropriate, affordable, accessible housing, and strengthen protections against unfair and discriminatory evictions of people with disability.**
25. **The NDIA should reduce the administrative barriers faced by people with disability when trying to access NDIS housing supports, including individualised living options, supported independent living, and specialist disability accommodation.**
26. **The NDIA and state and territory governments should support people with severe mental illness to find and maintain housing, including through the following measures:**
    a. **The NDIA should continue to amend its specialist disability accommodation strategy and policies to encourage the development of long-term supported accommodation for NDIS recipients with severe and persistent mental illness.[204]**
    b. **State and territory governments, with support from the Commonwealth Government, should address the shortfall in the number of supported housing places and the gap in homelessness services for people with severe mental illness.[205]**
27. **Consistent with the recommendations of the Senate inquiry into the purpose, intent and adequacy of the Disability Support Pension, the Commonwealth Government should investigate how the requirement that a condition be 'fully diagnosed, treated and stabilised' is preventing people with conditions that are complex, fluctuating, or deteriorate over time, from accessing the Disability Support Pension, and could be modified to ensure people get the support they need.[206]**
28. **The Commonwealth Government should ensure adequate income replacement supports for people with disability, including by implementing changes to the eligibility criteria and impairment tables of the Disability Support Pension.[207]**
29. **Consistent with the recommendation of the Senate inquiry, the Department of Social Services should conduct a consumer-focused and public review of all aspects of the program of support requirements and consider making participation in an employment services program voluntary for all Disability Support Pension claimants.**
30. **Commonwealth, state and territory governments should clarify the application of anti-discrimination laws to placement providers and strengthen obligations on tertiary**

[204] Productivity Commission, *Mental Health* (Inquiry Report, 2020) Recommendation 20, Action 20.3.
[205] Ibid.
[206] The Department of Social Services is currently undertaking consultation regarding proposed changes to the Disability Support Pension (DSP) Impairment Tables and NLA will be contributing a submission.
[207] Ibid.

educational and placement providers to provide students with disability reasonable adjustments and flexible approaches.

31. Commonwealth, state and territory governments should strengthen the reasonable adjustments provision in the Disability Discrimination Act and respective legislation by clarifying what adjustments may be reasonable, with clear examples, including a gradual return to full hours and duties.

32. Commonwealth, state and territory governments should strengthen the Disability Discrimination Act and state and territory discrimination law prohibitions on requesting discriminatory information by limiting a reasonable request for medical information to:

a. the minimum medical information required in order to assess whether the employee can perform the inherent requirements of the job or to identify reasonable adjustments, and

b. circumstances where there is evidence that the medical information requested is required.

33. Private and public entities should consistently comply with the Premises Standards, to enable all people with disability to access and participate in the community on an equal basis with others.

34. The Commonwealth Government should protect, respect and fulfil the rights of refugees and asylum seekers with disability, including by:

a. revising the risk assessment matrix tool to be appropriate for determining risk to others or to the community

b. ensuring people with disability are not subjected to immigration detention except as a last resort, where no alternatives exist. If no alternatives exist, people with disability should have access to better conditions of detention in light of their particular disability, and regular access to an independent review body scrutinising that detention to ensure it does not continue any longer than strictly necessary.

35. Commonwealth, state and territory governments should strengthen legislative protections for people with disability by:

a. reforming federal, state and territory anti-discrimination laws as appropriate to provide a modern, robust legal framework for preventing and addressing disability discrimination, including the following:

ii) Limit costs orders against unsuccessful applicants to instances where the application is frivolous, vexatious or without foundation.

ii) Shift the burden of proof to the respondent (e.g. employer) once the complainant (e.g. employee) has established a *prima facie* case.

iii) The definitions of discrimination in the Disability Discrimination Act should be simplified by removing the comparator test.

v) The Disability Discrimination Act should be amended to provide a standalone reasonable adjustments protection following the model adopted in Victoria.

36. Commonwealth, state and territory governments should grant national, state and territory human rights commissions increased powers and resources to effectively address disability discrimination, including:

a. greater investigation powers

b. powers to enter into enforceable undertakings, issue compliance notices, and conduct own motion investigations and enforcement actions, and

c. the power to seek sanctions against those who breach discrimination laws in order to enforce compliance with those laws.

37. Commonwealth, state and territory governments should continue to investigate and respond to the recommendations of the Australian Law Reform Commission's *Family Law for the Future – An Inquiry into the Family Law System Final Report 135*, and the challenges in relation to the appointment of litigation guardians in the family law system, including to identify, train, and accredit litigation guardians, and to provide all related funding support.

38. Commonwealth, state and territory governments should improve the family law, family violence and child protection systems for people with disability through:

a. investing in cross-disciplinary training and professional development of decision makers and health, welfare and legal professionals to:

iii) strengthen their knowledge and understanding of the intersections between disability, mental health and the dynamics of family violence; and

iv) ensure they are equipped to apply holistic, trauma-informed and strengths-focussed responses to support people with disability, ensure rights are upheld.

b. ensuring sufficient resourcing of disability informed, culturally safe and accessible legal assistance and advocacy, including to address issues of legal professional conflict, to support people with disability to engage with the family law, family violence and child protection systems.

c. putting in place appropriate supports, including NDIS supports for parents with disability, to help families to remain together as a family unit.

39. Mental health and disability services should promote the human rights of people with disability, make compulsory treatment of mental health issues a true last resort, and move towards eliminating the use of restrictive practices, including seclusion and restraint.

40. State and territory governments should amend existing mental health laws to at a minimum:

a. allow mental health review tribunals to review a decision to hold a person in seclusion after a period of seven continuous days, or more than 14 cumulative days within a 28-day period

b. allow a person held in seclusion to ask to be removed from seclusion, and if the request is denied, to seek a review of the decision by a mental health review tribunal

c. empower mental health review tribunals to make orders to release a person from seclusion, or order that seclusion be undertaken in a particular manner

d. state in what circumstances seclusion should not be used (e.g., to punish a person or due to lack of alternative placement), and

e. implement an 'opt-out' system for referrals to independent mental health advocates for any person subject to compulsory treatment, along with providing adequate resourcing for independent advocates to meet demand.

41. **Commonwealth, state and territory governments should adopt a robust national framework for the regulation and oversight of the use of restrictive practices on people with disability that applies to all settings. This framework should aim to eliminate the use of restrictive practices in all settings, and include effective mechanisms to ensure compliance.**
42. **State and territory governments should adopt greater safeguards in police powers and accountability legislation, and reorientate police enforcement practices to be culturally safe, take into account the particular needs of people with disability, and reduce the frequency of their arrest and detention, particularly where a welfare response would be more appropriate and effective.**
    a. **Police should increase their use of discretion to issue cautions and pursue other diversionary options to minimise the intensity of a criminal justice response towards people with disability.**
    b. **Police should consult widely on, develop and implement a comprehensive needs assessment framework to assist police officers and staff to identify the needs of people with disability they encounter, especially in the field or other non-custodial settings. Police should undertake preliminary screening to determine whether a person has a disability before bringing them into police custody.**
    c. **At a minimum, police should be trained to recognise when intervention by a partner agency or health professional is necessary. Consideration should be given to mental health clinicians attending incidents alongside police, to improve interactions between police officers and people with mental health issues.**
43. **State and territory governments should adopt a legislative requirement that people with disability be given access to an independent support person, and a lawyer who would provide advice and explain the person's rights, at investigation stage and prior to any police questioning and/or interview and be available during any questioning/interview as appropriate. Police should have a positive duty to facilitate a person's access to these rights. There should be a dedicated appropriately resourced service including a hotline (similar to the Aboriginal Legal Service Custody Notification Scheme) which is staffed with a lawyer 24 hours a day, 7 days a week, to facilitate this duty.**
44. **The Commonwealth, state and territory governments should develop a uniform, national, mandatory statutory code of practice on the detention, treatment and questioning of people with disability, such as those with cognitive and psychiatric impairment, to be applied at all stages of the criminal justice system.**
45. **Legal information should be available in additional formats for people with disabilities (such as easy-read and Auslan).**
46. **State and territory governments should amend the governing legislation for police in each state and territory (e.g. the *Police Act 1990* (NSW)) and the Disability Discrimination Act to impose a duty on police to exercise their powers and functions without discrimination, regardless of a person's alleged criminal status or other circumstances.**
47. **State and territory governments should review and reform their respective bail legislation and police operating procedures to improve bail decisions of police and courts, to address the number of people with disability in police custody and on remand.**

48. State and territory governments should increase the availability of, and access to, bail support services and programs to assist people to comply with their bail conditions and address any underlying causes of offending. This should include culturally appropriate bail support services and programs based on consultation with communities.

49. State and territory governments should increase support for people with disability in the criminal justice system by:

- **a. acknowledging the needs of children with disabilities in the criminal justice system and developing specialised supports and approaches**
- **b. funding bail accommodation and support services and programs to assist people to understand and comply with their bail conditions**
- **c. adopting therapeutic, specialist and solution-focussed courts and programs that ensure that relevant and accurate diagnostic reports are provided, and address the underlying causes of offending and the therapeutic needs of the individual**
- **d. expanding court liaison services that aim to identify people with mental health issues who have been charged, and intervene as early as possible**
- **e. adopting a more holistic approach to sentencing, including community-based sentencing options and support to comply with these sentences**
- **f. adequality funding services to assist people with drug or alcohol issues to avoid contact with, or be diverted from, the criminal justice system, and**
- **g. funding legal aid commissions to provide people with disability legal advice and social support to assist with parole applications.**

50. Respective governments should abolish mandatory sentencing laws or at a minimum amend mandatory sentencing laws to include exceptions for people with disability where provision is not already made.

51. Commonwealth and State and Territory governments should fund/provide:

- **a. training for legal practitioners, community corrections and youth justice staff, and all decision makers regarding disability informed approaches,[208] Including the benefits of remaining in the community through the use of diversion, therapeutic courts or community corrections orders, and cultural considerations**
- **b. expert reports to inform sentencing dispositions.**

52. State and territory governments should further invest in diversionary approaches and programs for people with disability, including by:

- **a. expanding drug courts[209] to regional, rural and remote areas, reviewing eligibility criteria and ensuring cultural appropriateness, and including discretion to admit offenders convicted of strictly indictable and/or violent offences**

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[208] NLA gratefully acknowledges Commonwealth Government funding for a national mental health training package for the legal assistance sector, 2022.

[209] Evaluations have found that participants in the NSW Drug Court are less likely to be reconvicted than offenders given conventional sanctions (mostly imprisonment), and the Drug Court costs less than conventional sanctions: Don Weatherburn et al, NSW Bureau of Crime Statistics and Research, *The NSW Drug Court: A Re-evaluation of its Effectiveness* (Crime and Justice Bulletin No 121, September 2008) 1; Stephen Goodall, Richard Norman and Marion Haas, NSW Bureau of Crime Statistics and Research, *The Costs of NSW Drug Court* (Crime and Justice Bulletin No 122, September 2008).

b. expanding associated drug rehabilitation services (such as the Magistrates Early Referral Into Treatment (MERIT) program and the Compulsory Drug Treatment Program in NSW)

c. expanding drug and alcohol detoxification and rehabilitation facilities, including residential facilities, that are able to appropriately provide for the needs of people with disabilities.

53. State and territory governments should provide alcohol addiction treatment services at all stages of the criminal justice system, and demand and supply reduction measures where they are evidence-based and supported by communities.

54. The NDIA, and state and territory governments should ensure that all people with disability have access to the NDIS and other disability supports while in custody, including by:

a. Supporting prisoners to access the NDIS, and community supports prior to a determination about parole or release, to address the disability needs of the individual and support rehabilitation.

b. Providing additional psychiatric hospital beds for prisoners with psychiatric illness and psychosocial disability to improve access to psychiatric treatment.

c. Providing access to treatment, education, employment, and other programs regardless of a prisoner's disability.

d. Undertaking comprehensive assessment of disability needs at intake with disability supports or adjustments then provided where required.

55. State and territory governments should ensure comprehensive training of prison officers about disabilities and associated behaviour management and de-escalation strategies.

56. State and territory governments should ensure that there is mental health screening and assessment of all individuals (whether sentenced or not) by a mental health professional on admission to correctional facilities, and on an ongoing basis where appropriate, and that mental health information obtained from screening and assessment is used to inform resourcing and transition planning for the individual upon release.[210]

57. State and territory governments should review and increase the availability of culturally safe, trauma informed health care, treatment and disability supports, including the NDIS, for imprisoned First Nations peoples with disability by:

a. improving the number, capacity and retention of First Nations health workers

b. improving health programs and services tailored to First Nations peoples with disability, and

c. partnering with First Nations health justice organisations in the community.

58. State and territory governments should ensure that the health care needs of women in custody with disability are met with female-specific, trauma-informed care, including mental health support. Trauma-informed care should recognise the impact of trauma on the person, minimise further trauma, embody the principle of 'do no harm', and be aware

[210] Productivity Commission, *Mental Health* (Final Report, 30 June 2020) Action 21.4.

of the inadvertent way that institutions may re-enact traumatic interactions.[211]

59. Corrective services should ensure that custodial management practices involving restrictive practices (such as solitary confinement, lockdown, restraint, deprivation of movement, quarantine and other forms isolation) are carefully balanced with measures adopted to safeguard prisoners' mental health and the need for rehabilitation

60. State and territory governments should implement the National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty by Reason of Cognitive or Mental Health Impairment, including through the following:

- **a. Persons who are unfit to be tried should only be subject to a forensic order if the allegations are proven beyond a reasonable doubt following a special hearing.**
- **b. Persons who are unfit to be tried should only be subjected to forensic orders that are fixed in length and are an estimate of the sentence of imprisonment they would have received if they were convicted. They should only be held in a place of detention during their order if their level of risk necessitates it, and should be subject to regular reviews by an independent decision-making body.**
- **c. Forensic patients should have a personalised, recovery-oriented care plan which focuses on the least restrictive options.**
- **d. Detention should occur in facilities adequately resourced and appropriately reviewed/oversighted appropriate to the forensic patient's needs and in the least restrictive environment to protect against risk of significant harm.**
- **e. Step-down accommodation should be available to ensure that forensic patients can recover and transition to life in the community.**

61. State and territory governments should:

- **a. fund additional beds in specialist high, medium and low secure forensic mental health facilities, as a matter of urgency, and a low secure mental health facility suitable for forensic patients of all genders**
- **b. fund additional intensive mental health supports in the community, including appropriately supported, stable accommodation, and**
- **c. fund and implement further trauma-informed facilities, pathways and options in medium and high secure units, as well as in the community, for forensic patients, especially women, who have experienced trauma.**

62. Commonwealth, state and territory governments should resource and support a regular multi-agency forum between the NDIA and relevant state and territory agencies (responsible for matters such as the provision of health and disability services in prisons, forensic disability facilities and the community, and the provision of public housing) to provide support for forensic patients with disability but no mental health issues, underpinned by a memorandum of understanding with clear roles and responsibilities.

63. State and territory governments should review their respective mental health and cognitive impairment legislation in relation to its application in summary jurisdictions, and increase the range of orders available, including the option to have the charges

[211] Niki Miller and Lisa Najavitas, 'Creating trauma-informed correctional care: a balance of goals and environment' (2012) 3(10) *European Journal of Psychotraumatology* 1.

dismissed on the basis that the accused will receive care and/or support either informally or through a community or inpatient order under relevant mental health legislation, as per the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).

64. The NDIA and state and territory governments should assist people with disability in custody to transition to the community, by:

- **a. urgently identifying people with disability who remain in custodial, forensic or mental health settings due to a failure to secure disability services**
- **b. developing integrated teams with specialised, trained planners to assist people with disability to access NDIS supports**
- **c. adopting clear processes for obtaining access to NDIS supports and planning for a person's release before their sentence is complete or discharge is imminent, and**
- **d. funding supports for transition prior to release, so that supports are in place to facilitate successful discharge or release and reduce their risk of reoffending or readmission.**

65. The NDIA should ensure that its Justice Liaison Officers:

- **a. are empowered to respond in urgent, critical or complex cases where a person with disability faces a risk of serious harm, injustice or adverse impacts on their health and wellbeing, and**
- **b. understand the NDIS justice/disability barriers faced by forensic clients with cognitive disability but no mental health issues, and are supported to work with corrective services and justice health agencies to assist individuals with release planning and accessing the NDIS.**

66. State and territory governments should support people with disability leaving custody to secure stable, supported accommodation, by:

- **a. developing a nationally consistent policy of no exits from prisons or inpatient units into homelessness**
- **b. increasing funding for housing and homelessness services, and**
- **c. amending their policies to require that, in addition to any current allocation, transitional housing be provided for a consecutive period of three to six months upon release, in order to increase the likelihood of successful transition to the community.**

67. The NDIA should amend its policies to encourage the development of long-term supported accommodation for NDIS recipients with severe and persistent mental health issues.[212]

68. Commonwealth, state and territory governments should undertake a comprehensive, independent review of their respective post-sentence detention and supervision schemes – including HRO schemes – with appropriate targeted consultation which includes legal assistance service providers. Any review should prioritise consideration

[212] Productivity Commission, *Mental Health (*Inquiry Report, 30 June 2020), Recommendations 20.1 (housing security for people with mental health issues); 20.2 (no discharge into homelessness); 20.3 (support people to find and maintain housing); and 20.3 (the National Housing and Homelessness Agreement).

of measures to reduce the disproportionate representation of people with disability captured by such schemes.

69. **Commonwealth, state and territory governments should elevate and resource disability lived experience leadership and self-advocacy, and ensure people with lived experience lead or are involved in co-designing all reforms and meaningfully involved in leadership, governance, oversight and training in disability services and settings.**
70. **The Commonwealth Government should extend funding of the specialist national disability legal service (Your Story Disability Legal Support) to assist people with disability to understand and assert their rights and to link them with other appropriate services.**
71. **Commonwealth, state and territory governments should strengthen legislative protections for people with disability by adopting a federal Charter of Human Rights and streamlining discrimination laws. The Charter would ensure the consideration of these rights when new laws and policies are created, and when services are delivered, including disability services. Further, the Charter must be enforceable in order to protect those rights and provide avenues for people to take action if their rights are violated.**

End.