



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

Criminal justice and people with disability



Final Report
Volume 8

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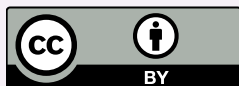
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with disability

Acknowledgement of Country

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission) acknowledges Australia's First Nations peoples as the Traditional Custodians of the lands, seas and waters of Australia, and pays respect to all First Nations Elders past, present and emerging.

We recognise their care for people and country. In particular, we acknowledge the Traditional Custodians of the lands on which our offices are based: the Gadigal people of the Eora Nation where our Sydney office stands, the Jagera and Turrbal people as Traditional Owners and Custodians of the lands on which the city of Brisbane is located and the Ngunnawal and Ngambri peoples upon whose land the city of Canberra is located.

We pay our respects to all First Nations people with disability and recognise the distinct contributions they make to Australian life and to the outcome of this inquiry.

Acknowledgement of people with disability

The Royal Commission acknowledges people with disability who fought and campaigned long and hard for the establishment of this Royal Commission.

We acknowledge the courage and generosity of people with lived experience of disability who shared their knowledge and experiences of violence, abuse, neglect and exploitation with the Royal Commission. Their contributions to the Royal Commission have been indispensable in framing recommendations designed to achieve a more inclusive society that supports the independence of people with disability and their right to live free from violence, abuse, neglect and exploitation.

Content warnings

This report contains information about violence, abuse, neglect and exploitation that may be distressing to readers.

The report contains first-hand accounts of violence, abuse, neglect and exploitation. As a result, some direct quotes in the report may contain language that may be offensive to some people.

First Nations readers should be aware that some information in this report may have been provided by or refer to First Nations people who have passed away.

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Key terms

children

In this volume, we generally refer to children and young people in detention under the age of 18 years as ‘children’.

In youth justice systems, the terms ‘youth’ and ‘young people’ are often used to distinguish people aged 14 to 17 from younger ‘children’. Unless we cite research that explicitly refers to ‘young people’, we use the term ‘children’ to simplify language and to acknowledge the vulnerability of all people under 18 years held in detention.

This is consistent with international conventions. The *Convention on the Rights of the Child*¹ defines a child as any person under 18 years, recognising that all people aged under 18 years need special safeguards and care because of their physical and mental immaturity. The United Nations Committee on the Rights of the Child has recognised the evolving capacities of adolescents in the context of States Parties’ implementation of rights.² However, it has also highlighted that adolescents, including those with disability and those detained in the criminal justice system, are entitled to continuing protection from all forms of exploitation and abuse.³ Youth justice agencies should not forget that older adolescents are still in their childhood and have specific developmental needs and rights.

corrective service and youth justice agencies

We refer to the state and territory government agencies responsible for administering prisons and juvenile detention centres as ‘corrective service and youth justice agencies’. Only in Western Australia is the corrective services agency responsible for both adult prisons and youth detention. In other jurisdictions, youth justice and detention centres are administered by a government department responsible for community services, human services, children or youth justice.

criminal justice system

In Australia, there are nine separate sources of criminal law: Commonwealth legislation and the legislation of six states and two territories. Each jurisdiction has its own courts. For ease of reference in this volume, we use ‘the criminal justice system’ to refer collectively to the criminal justice systems of the Commonwealth, the states and the territories.

offender

We use the term 'offender' to refer to a person who is found by a court to have done something prohibited by law and has been convicted of a criminal offence by a court. A person who has been charged with an offence, but not convicted, will usually be referred to in court as the 'defendant' or the 'accused'. Police may refer to a person who they consider may have committed a crime but who has not been charged, a 'suspect', or a 'person of interest'.

prisoners and detainees

We refer to adult prisons as 'prisons' and the people incarcerated in adult prisons as 'prisoners'. 'Detention centre' is used to describe juvenile detention centres and 'detainee' refers to the children detained in them. People may be detained in other settings, such as police custody.

prisons, youth detention centres and custody

We use the terms 'prison' and 'detention' to distinguish between adults and children in custody. The detention of children is generally regarded as a measure of last resort and is intended to focus on reintegration of the detainee into the community.

We use the term 'custody' when referring to both adults and children who are confined in a prison or detention centre.

remand

'Remand' is the status of a person who is in custody who has not yet been convicted or sentenced by a court, for example, someone charged with an offence but denied bail.

Summary

This volume describes what we have learnt about the treatment of people with disability in the criminal justice system in Australia. In particular, we have found people with disability are significantly over-represented at all stages of the criminal justice system.

We held a number of public hearings on the experiences of people with disability in the criminal justice system in Australia. These included:

- Public hearing 11, 'The experiences of people with cognitive disability in the criminal justice system'
- Public hearing 15, 'People with cognitive disability and the criminal justice system: NDIS interface'
- Public hearing 17, 'The experience of women and girls with disability with a particular focus on family, domestic and sexual violence'
- Public hearing 27, 'Conditions in detention in the criminal justice system'
- Public hearing 28, 'Violence against and abuse of people with disability in public places'

People with disability in the criminal justice system

Chapter 1 gives a snapshot of the available data about people with disability in the criminal justice system, common types of disability, and factors contributing to people with disability having high rates of contact with the criminal justice system. Particular groups of alleged offenders with disability are far more likely to have contact with the criminal justice system (including with police, courts and corrections) than other groups. These include First Nations people with cognitive disability, women with disability experiencing violence, and people with co-occurring cognitive disability, psychosocial disability and other disabilities.

The statistics are stark. For example, a 2015 report on adult prisoners in New South Wales found that 43 per cent of First Nations women who participated in the study had a disability,⁴ and between 40 to 90 per cent of adult prisoners may have an acquired brain injury.⁵ Because of limitations in the available data, the true number of people with disability in the criminal justice system in Australia is unknown. Nonetheless, it is clear people with disability – particularly those with cognitive disability – are disproportionately represented in criminal justice settings, across all stages, from police contact and arrest, through to court processes and correctional settings.

The disproportionate rate of imprisonment of people with disability is not the result of any inherent relationship between disability and crime. Rather, it reflects the disadvantages experienced by many people with disability, such as poverty, disrupted family backgrounds, family violence and other forms of abuse, misuse of drugs and alcohol, unstable housing and homelessness.

People with disability, particularly cognitive disability, are also exposed to frequent and intense policing.⁶ People with cognitive and mental health impairments experience multiple forms of disadvantage, making them more likely to be criminalised and caught up in a cycle of reoffending and incarceration.

Relatively little attention has been paid by governments to the disproportionate number of people with cognitive disability who are in custody. The data we received about the proportion of First Nations people with cognitive disability in custody, particularly in youth detention, exposes a largely hidden national crisis. For example, as of 2015, almost one in four First Nations young people aged 14 to 21 in detention were estimated to have an intellectual disability, compared with one in 12 non-Indigenous young people.

Despite this strong evidence, with the possible exception of New South Wales Corrective Services, corrective service and youth justice agencies do not collect or record adequate data about disability in their prison and youth detention populations. They also use widely different methods to identify prisoners with disability. No corrective service or youth justice agencies use a culturally validated screening tool to identify disability in First Nations people in custody.

This means custodial agencies cannot identify the prevalence and types of disability within incarcerated populations, or adequately understand their support needs. This lack of data also limits the development, implementation and evaluation of criminal justice disability policies and programs, and the monitoring of health and disability support needs of people with disability in custody.

We heard that prisoners with disability are:

- more likely to have difficulty coping with the prison environment
- more likely to experience a higher rate of comorbid mental health disorders and physical conditions than prisoners without disability
- at increased risk of being disadvantaged and socially isolated
- at higher risk of returning to custody.

Interactions with the criminal justice system come at great social and economic cost to the community. It benefits the entire community if people with disability do not enter the criminal justice system in the first place, and if treatment and supports are improved within the criminal justice system and continue after any term of imprisonment. Further research is required on the social and economic benefits of early support to prevent people with cognitive disability and complex support needs from coming into contact with the criminal justice system.

Improved screening and identification practices, complemented by further research, are needed to understand the true extent of disability of people in criminal justice settings. This would also improve understanding of Australia's compliance with its obligations to ensure the rights of people with disability are upheld in the criminal justice system.

The right to humane treatment in criminal justice settings

Chapter 2 examines evidence we received about the treatment of people with disability in criminal justice settings. It focuses on the experience of people with disability in custodial settings and sets out the obligations of Australian governments for people with disability who are in contact with the criminal justice system.

In our public hearings, witnesses gave evidence about poor conditions of detention for people with disability in adult prisons and youth detention centres in Australia. We heard evidence about accessibility and communication issues, untreated medical and psychological conditions, a lack of appropriate mental health care, a lack of social workers, and negative staff attitudes towards people with disability. We heard about the lack of accessible showers. We heard about excessive lockdowns of detention centres, and isolation practices, resulting in solitary confinement of prisoners and detainees. We heard that prisoners with cognitive disability are susceptible to exploitation by other prisoners, including sexual exploitation. We also heard about the humiliation experienced by people with disability in custody.

We were told the focus on security in custodial settings means the experience of custody can be significantly more severe for people with disability than for those without disability. In some circumstances, so called ‘challenging behaviour’ is perceived as resistance, which custodial staff meet with a punitive response.

Witnesses told us staff in custodial settings need more disability awareness training so they take a trauma-informed approach to people with disability in custody and deal with them humanely.

Australia has international obligations to take appropriate legislative, administrative and other systemic measures to promote the human rights of people with disability. Under the *Convention on the Rights of Persons with Disabilities (CRPD)* Australia is obligated to protect people with disability, including those in the criminal justice system, from all forms of exploitation, violence and abuse.

Article 13 of the *CRPD* requires States Parties to ensure effective access to justice for people with disability, on an equal basis with others. Article 14(2) of the *CRPD* requires States Parties to ensure, where people with disability are deprived of their liberty, they are to be treated in compliance with the objectives and principles of the *CRPD*, including through the provision of reasonable accommodations.

Additional international obligations apply to children in detention, including under the *Convention on the Rights of the Child*, which we outline in Chapter 3, ‘Youth detention’. Those rights are relevant to most people with disability who are in contact with the criminal justice system, as many people with disability in adult prisons were first criminalised as children.

Prisoners with disability have additional protections under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

(*OPCAT*) (ratified by Australia in December 2017) and the United Nations *Standard Minimum Rules for the Treatment of Prisoners*, also known as the *Nelson Mandela Rules*. Of particular relevance to our inquiry, the *Nelson Mandela Rules* define ‘solitary confinement’ as the confinement of prisoners for 22 hours or more per day without meaningful human contact.

Governments need to ensure the bodies nominated as National Preventive Mechanisms (NPMs) for the purpose of complying with *OPCAT* are designed and operate in a way that reflect the particular needs of people with disability. For example, NPMs should make efforts to employ First Nations staff and people with lived experience of disability, in particular psychosocial and intellectual or cognitive disability. NPMs should also engage people with expertise in children’s rights and how detention can affect children. We make recommendations in this volume to support implementation of *OPCAT* and protect the rights of people with disability in places of detention.

We also heard evidence in our public hearings about independent non-government organisations, some of which are permitted to enter prisons to provide support to people with disability including cultural safety for First Nations people. We heard how their work has improved the conditions for people with disability in custody, and strengthened their prospects of reintegrating into the community upon release.

Youth detention

Chapter 3 focuses on the treatment of children and young people in youth detention in the states and territories. As we have explained, we use the term ‘children’ in this volume to refer to people under the age of 18.

Children with disability are significantly over-represented in youth detention across Australia. The chapter focuses on the Banksia Hill Detention Centre in Western Australia (Banksia Hill), in which a high proportion of the children detained have cognitive disability. Banksia Hill houses remand and sentenced detainees, male and female, aged from 10 to 18.⁷

Children in youth detention have complex needs and are likely to have suffered multiple traumas, such as childhood abuse and neglect, socioeconomic disadvantage, family violence, and poor educational opportunities. While in detention, children with disability are exposed to an increased risk of violence, abuse, neglect and exploitation.

Under state and territory legislation and international law young people should be detained only as a last resort and for the shortest appropriate period.

In Western Australia since at least 2013, the Inspector of Custodial Services of Western Australia has drawn attention to the use of inappropriate confinement practices at Banksia Hill. The Inspector has repeatedly recommended that the Department of Justice introduce an operational philosophy based on rehabilitation and a trauma-informed approach to the treatment of children in detention.

In March 2022, the Inspector published a report to the Western Australian Parliament in which he stated that Banksia Hill is no longer fit for purpose as a youth detention centre. He described the treatment of detainees in solitary confinement as cruel, inhuman or degrading. He also drew attention to the fact a high proportion of the children detained at Banksia Hill have disability. Several court judgments in 2022, including of the Supreme Court of Western Australia, reflect the Inspector's concerns.

In 2022, each night about 709 children aged 10 to 17 were in juvenile detention in Australia. Across Australia, First Nations children made up 61 per cent of all those aged 10 to 17 in detention on an average night in the 2022 June quarter.⁸ Yet First Nations children make up only around 6 per cent of the Australian population aged 10 to 17 years. In Western Australia, in the 2022 June quarter, on an average night around 80 per cent of detainees aged 10 to 17 years were First Nations children.

We heard that many children who are remanded or sentenced to a period in detention cycle in and out of detention and contact with the criminal justice system.

While the number of children in youth detention has decreased in recent years, the rate of children with cognitive disability in detention remains high. In New South Wales, the most recent survey of young people in custody found that almost 24 per cent of First Nations young people in custody have an intellectual disability.⁹ In contrast, 9.8 per cent of First Nations young people aged 14 to 21 have an intellectual disability.¹⁰ One quarter (25 per cent) of participants in that survey reported having had a head injury with loss of consciousness. Notably, the survey showed the level of disability and its impact on young people in custody was significantly higher than the level and impact indicated by self-reporting. This suggests young people in custody were under-reporting the level and impact of their disability.

Empirical research also supports the likelihood of high levels of cognitive impairment among children in youth detention. The first study to investigate the prevalence of fetal alcohol spectrum disorder (FASD) within an Australian juvenile detention centre found that 89 per cent of children who were in youth detention in Western Australia between May 2015 and December 2016 had at least one domain of severe neurodevelopmental impairment and 36 per cent had FASD.¹¹

The Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory collected data on the prevalence of a range of health conditions in youth detention. The data indicated high levels of FASD, brain injury and psychosocial disability among detainees. It found that a lack of screening of, and information about, young people entering detention meant that custodial staff often misinterpreted features of disability as bad behaviour.

We heard from people with disability who had lived experience of detention at Banksia Hill and legal practitioners whose clients were detained in the centre. They spoke of solitary confinement practices and degrading conditions for detainees. We were also provided with sentencing remarks from the Children's Court of Western Australia delivered in 2022 relating to children held at Banksia Hill with disability and complex needs, including FASD, intellectual disability and

language disorders. They reveal that children with disability are locked in their cells, regularly in excess of 22 and 23 hours per day, and over consecutive days and weeks.

The Children's Court judgments also record details such as detainees:

- being deprived of sunlight, some for several weeks
- being given no education due to 'operational matters' (with the court finding this was not due to detainees' behaviour)
- having no interaction with other detainees, and little interaction with staff
- being isolated all day in their cells without any current orders authorising such confinement being in force, which the Children's Court said amounted to 'deliberately flouting the law'.

It is necessary to make clear that despite the evidence as to the conditions in Banksia Hill, we have not made any findings about the conduct of the Department of Justice of Western Australia in relation to Banksia Hill. We have, however, considered whether solitary confinement in youth detention should be banned. Our response to that issue, raised squarely in the evidence presented to us, is in the affirmative.

The evidence indicates too often decisions that lead to the isolation of children are not made lawfully. The evidence, and the consensus expressed in human rights instruments, suggests solitary confinement is not an appropriate response to children with disability displaying behaviours of concern. Solitary confinement can have severe, long-term and irreversible effects on a child's health and wellbeing, including their physical and psychological health and social and educational development.

No jurisdiction currently prohibits isolation amounting to solitary confinement. Past reports and inquiries show the practice of locking children in their cells for 22 or more hours a day has been used in most state and territory juvenile detention centres.

Isolation amounting to solitary confinement is often imposed on children as a consequence of operational decisions to 'lockdown' a detention centre because of a lack of staff. This is unacceptable. It is the duty of state and territory governments to properly staff their youth detention facilities so the rights of children deprived of their liberty are upheld.

We recommend state and territory youth justice legislation should be amended to prohibit the use or practice of solitary confinement and to clearly define safeguards applying to isolation or seclusion of children with disability. In this chapter we also make recommendations to improve practices for screening and assessing children with disability, the provision of therapeutic support for those children and disability awareness training for staff in youth detention generally.

The rights of people found unfit to be tried and indefinite detention

Chapter 4 examines indefinite detention of people with disability and their fitness to stand trial. Some people with cognitive disability who face serious criminal charges may be found either ‘unfit to be tried’ or ‘not guilty on the basis of mental impairment’. Each state and territory in Australia has developed its own laws to determine the issue of ‘fitness’ and its consequences.

Because of the laws in this area, people with disability can be at risk of indefinite detention, meaning no date is fixed for their release. This means their period of detention can be longer than if they had been convicted and sentenced in an ordinary criminal trial.

In Public hearing 11 we heard deeply troubling evidence about the treatment of ‘Winmartie’ and ‘Melanie’, who were found unfit to stand trial.¹² They were detained in forensic facilities in the Northern Territory and New South Wales, respectively. They were subject to restrictive practices, including long-term seclusion and, in Winmartie’s case, chemical restraint. Both were in detention well beyond any period that would have been set had they been convicted and sentenced. We discuss Winmartie’s and Melanie’s experiences in this chapter and in Volume 9, *First Nations people with disability*.

There is no data on how many people deemed unfit for trial are held in custody around Australia. Collection of this data is an essential step in analysing how forensic systems are working and what effect they are having on people with disability, in accordance with Australia’s human rights obligations.

We make recommendations to end regimes allowing for the indefinite detention of people with disability in Australia. Those recommendations are aimed at:

- supporting people with disability to participate in legal proceedings to maximise the prospect they are fit to stand trial
- improving the fitness inquiry undertaken by courts
- educating court practitioners about the needs of people with cognitive impairment in their dealings with the court system
- requiring governments to review and implement the *National Statement of Principles relating to persons unfit to plead or not guilty by reason of cognitive or mental health impairment* prepared in 2019 by a working group established by the former Council of Attorneys-General
- collecting and publishing data about the number of people found unfit to stand trial around Australia.

Screening, assessing and identifying disability in custody

In Chapter 5 we examine current practices for screening and identifying people with disability at various stages of the criminal justice system, with a focus on custodial settings.

‘Screening’ usually involves a series of questions or tests administered when a person is first admitted to an agency, such as during ‘intake’ to prison, to identify the possibility of having a disability.

‘Assessment’ generally involves a more detailed process for determining disability, involving appropriate professionals and in-depth testing.

Witnesses told us about the importance of justice agencies being able to identify that a person has a disability. They expressed concerns that disability screening and identification processes are inadequate and information sharing practices between justice and other agencies for identifying a person’s disability needs are poor. The inadequacy of screening and identification processes in justice settings has also been the subject of past government reports and research studies.

Screening for and identification of disability are important for all people with disability who come into contact with the criminal justice system but they have particular significance for people with cognitive or psychosocial disability. We heard that many people with disability enter the criminal justice system without having been previously identified as having cognitive disability.¹³ This is especially the case for First Nations people with disability, as people in Aboriginal and Torres Strait Islanders communities are less likely to be captured in statistics about the prevalence of disability than non-Indigenous people with disability.¹⁴ People may also be reluctant to disclose their disability in custody for a number of reasons, including fear of victimisation or past trauma.

Public hearing 27 included an examination of the screening practices used by corrections and youth justice agencies in all Australian states and territories. There are no national standards or minimum requirements for screening for disability in custodial settings. We found the methods used for identifying disability vary between the states and territories. The type of information sought and the methods used to collect it, the timing of its collection and the way it is recorded and used, also vary significantly. Some states and territories have specific screening tools for gathering information about disability, which we examine in this chapter.

Most jurisdictions acknowledged there is room for improvement in their disability screening processes in custodial settings, including at admission and induction.

We make recommendations to improve current screening processes in correctional settings.

One recommendation is that state and territory corrective service and youth justice agencies develop national practice guidelines and policies relating to screening for disability in custody. National practice guidelines or standards would promote consistent approaches among jurisdictions. They would provide a benchmark for corrective and justice health agencies to

evaluate their own disability screening and identification policies and procedures against the national practice standards. A collaborative approach among all Australian justice and justice health agencies for identifying disability in custodial settings is needed given the very high number of people in the criminal justice system with disability.

The development of national practice guidelines would also encourage the use of consistent definitions and disability indicators for screening and assessing people with disability in custody. Implementing the guidelines would increase the prospect that appropriate supports are made available to people with disability in custody and when leaving custody.

The National Disability Insurance Scheme and criminal justice interface

In Chapter 6 we address the division of government responsibilities for funding and providing supports to people with cognitive disability and/or complex needs in the criminal justice system.

The introduction of the National Disability Insurance Scheme (NDIS) in 2013 did not shift all the responsibility for supporting people with disability in the criminal justice system to the Australian Government and the National Disability Insurance Agency (NDIA). Rather, the Australian Government and state and territory governments now share that responsibility. In particular, state and territory governments are responsible for funding and providing supports to people with disability through their criminal justice systems, which include corrective services, juvenile justice and justice health agencies.

The NDIS and justice systems are meant to work closely together at the local level. This is to enable planning and coordinating streamlined services for individuals requiring both justice and disability services, and to achieve a smooth transition from one to the other. The Applied Principles and Tables of Support (APTOS) is an agreed set of principles developed by the Australian Government and state and territory governments to further define the funding and delivery responsibilities of the NDIS and other service systems, including justice.

In Public hearing 15, witnesses from government agencies in New South Wales, Victoria, Queensland and Tasmania raised concerns that the distinction between disability and criminogenic-related supports referred to in the APTOS contributes to uncertainty and confusion about NDIS funding.

While the Australian Government and the NDIA have taken some steps to clarify respective responsibilities of the NDIS and the justice system, the evidence suggests the confusion around responsibilities to provide support has not been adequately resolved. This is particularly the case, insofar as people with disability with complex needs are concerned, where the delineation between disability and criminogenic needs may be difficult to determine.

We also heard that the NDIA has adopted a restrictive approach towards its responsibility to provide transition supports for people being released from prison. Transition supports are supports to facilitate the person's transition from the custodial setting to the community. The evidence we heard in Public hearings 11 and 15 shows the importance of well-timed and adequate transition planning and supports for people in custody and detention settings. These supports mitigate against the risks of people with disability being drawn back into the criminal justice system due to a lack of support.

Greater flexibility is required to support transition planning for people in custodial settings, given evidence that it is often a protracted process and supports can be difficult to obtain after release. The timing of planning for transition supports should not risk a person having to stay in custody longer than necessary while those supports are arranged or not having appropriate supports available after their release from prison. We make recommendations to improve transition planning by the NDIS and the interface between justice systems and the NDIS.

Data collection by criminal justice systems on people with disability

Chapter 7 considers data collection by the criminal justice system about people with disability. No jurisdiction in Australia, except to an extent New South Wales, collects or publishes data recording the number of people with disability in the criminal justice system or the types and prevalence of disability within custodial settings. Inconsistent and incomplete disability screening processes, a lack of data collection and poor data linkage all contribute to the poor understanding of the prevalence and types of disability in the criminal justice system. All governments have acknowledged the requirement to implement evidence-based policy in service settings, for this reason the underinvestment in data collections in the criminal justice system in states and territories cannot continue. Data linkage under the National Disability Data Asset provides an opportunity to vastly improve the understanding of the experiences of people with disability in the criminal justice system, both as offenders and as victims of crime.

Police responses to people with disability

In Chapter 8 we focus on police responses to people with disability. While we did not conduct a public hearing into the effectiveness of police responses to people with disability, we received evidence in a number of public hearings about this topic. We also commissioned a research report, *Police responses to people with disability*, from researchers at the University of New South Wales. The report found police responses to people with disability are inadequate. While some individual police demonstrate good practice, the researchers concluded there is a systemic lack of effective response by police to people with disability as victims, witnesses and offenders.

Public hearing 17 focused on the experiences of women and girls with disability of domestic, family and sexual violence. Despite the prevalence of crimes involving violence of this type,

we were told women and girls with disability often had negative experiences of making reports to police.

That public hearing was held in Hobart. We examine the evidence we heard about the effectiveness of Tasmania Police in responding to domestic, family and sexual violence towards women and girls with disability.

A 2022 report drew on 'linked data' from state and national data to examine factors associated with the victimisation of people with disability in New South Wales. It found:¹⁵

- People with psychosocial or cognitive disability, and First Nations people with disability, are the most likely to be victims of violent crime.
- Young, female, and First Nations people with disability were at greater risk of being victims of violent and domestic violence-related crimes.
- People with disability were more likely to experience revictimisation than people with no disability.

A research report prepared for the Royal Commission, *Police responses to disability*, describes the barriers victims and witnesses with disability face in coming forward to police and being believed.¹⁶ Police responses were often compromised because when people did make reports, they were unable to provide a clear account of what occurred, were not believed, or were dismissed as substance affected or as simply wasting police time. This response was widely identified as corrosive of trust in police on the part of victims with disability, who were then more reluctant to report their further victimisation to police.

In this chapter, we also discuss evidence from Public hearing 28 about the feasibility and availability of alternative reporting pathways for people with disability to report incidents or crimes to police. We make recommendations to improve police responses to people with disability.

Diversion from the criminal justice system

Chapter 9 examines the availability of diversionary pathways for people with cognitive disability who come into contact with the criminal justice system. Diversion is the process of keeping people at risk of contact with the criminal justice system away from it.

Diversion is one of the key mechanisms police have at their disposal in responding to people with disability who are alleged offenders. Court-based diversion programs provide an opportunity to respond to the underlying causes of offending by linking participants to support services, rather than proceeding straight to conviction.

We heard that participants in diversion programs are less likely to appear before the courts and more likely to access NDIS supports.

However, the available evidence indicates that diversionary orders available to the courts are generally underused, especially for First Nations defendants, due to systemic issues.¹⁷ These include difficulties linking defendants to available supports because of a lack of viable diversion options in the community, and delays in obtaining formal reports needed to justify diversion options to the court. We were told that people in rural, regional and remote areas in particular may not have access to sufficient services and programs in their communities.

For diversion programs to be effective, they must be accessible, responsive to the needs of people with disability and equipped to provide culturally appropriate support. In Public hearing 11, we received evidence that programs with these features – such as the Cognitive Impairment Diversion Program formerly run in New South Wales but terminated in 2020 – can effect lasting change for both the person with cognitive disability and the broader community.

We make a recommendation to improve the availability of diversionary mechanisms for people with cognitive disability in court proceedings.

Acknowledging disability and family and domestic violence in law and policy

In Chapter 10 we examine policies and laws aimed at addressing family and domestic violence and whether these adequately address violence against people with disability.

People with disability, especially women with disability, experience more family and domestic violence than people without disability. The Australian Bureau of Statistics' *Personal Safety Survey* shows that women with disability aged 18 to 64 are more likely to experience sexual assault or threat, intimate partner violence, emotional abuse, and stalking, than men with disability or women without disability.¹⁸ During our inquiry we received submissions and evidence suggesting women with disability experience violence from a wider range of perpetrators than people without disability and in a wider range of settings, such as violence and abuse from intimate partners who are also carers, co-residents and support workers. Witnesses in Public hearing 17 told us how abusers targeted their disability-related needs or adjustments, such as controlling access to mobility or communication aids or medication.

The National Plan to End Violence Against Women and Children 2022–2032 (National Plan) sets Australia's policy framework and guides future action on prevention of and response to violence against women across Australia. The National Plan recognises that violence against women and girls with disability occurs more frequently and across a wider range of settings and there is a need to build capacity in response services to understand and identify violence against women with disability.

The National Plan lacks specific actions to address violence against women and girls with disability. We identify gaps that need to be addressed and recommend the Australian Government and state and territory governments develop a five-year Action Plan for Women and Children with Disability, developed by and for women with disability.

Legal definitions of family and domestic violence differ in each state and territory. Some of these laws do not recognise the violence and abuse people with disability are subjected to or the contexts in which that violence occurs. The National Plan includes actions to address the inconsistency in laws across Australia. As part of that work, we recommend states and territories amend their legislation to include the relationships and settings where people with disability experience family and domestic violence and to include disability-based violence and abuse.

Recommendations

Recommendation 8.1 Conditions in custody for people with disability

State and territory governments should uphold the rights of people with disability who are in custody. Consistent with article 14 of the *Convention on the Rights of Persons with Disabilities*, all corrective service and youth justice agencies should provide people with disability with the disability supports they require to place them in the same position, so far as feasible, as other people in custody.

Recommendation 8.2 Disability awareness in *OPCAT* monitoring

In implementing the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the Australian Government, in consultation with the state and territory governments, should support the development of a human rights education and training strategy that includes disability awareness training for National Preventive Mechanisms (NPMs), detention authorities and their staff. NPMs should:

- engage with disability organisations about the needs of people with disability in places of detention
- obtain training and education for their staff on the types of disability and needs of people with disability in places of detention, including the impact of intersectional disadvantage
- obtain the views of people with disability in places of detention by directly engaging with them about their experiences in places of detention
- have effective mechanisms for obtaining the views of people with disability in places of detention.

Recommendation 8.3 Prohibiting solitary confinement in youth detention

States and territories should:

- a. introduce legislation to prohibit solitary confinement in youth justice settings (being the enforced isolation or segregation for any purpose of a child or young person for 22 or more hours in any day)
- b. introduce legislation to prohibit the use of isolation (however described) in youth detention centres as punishment in any circumstance
- c. review legislation, policy and procedures to ensure children with disability are not subjected to isolation practices amounting to solitary confinement
- d. ensure legislation authorising isolation (including lockdowns) in youth detention centres provides for its use:
 - as a temporary response to behaviour that poses a serious and immediate risk of harm to an individual
 - as a last resort after all other measures to address risk have been exhausted
 - for a period that must not exceed a specified number of hours in any day
- e. ensure legislation authorising isolation (including lockdowns) in youth detention centres provides at a minimum the following protections for children with disability:
 - a requirement to take into account the child's disability needs before any isolation period is authorised
 - meaningful human contact during the period of isolation
 - access to the community equivalent standard of health care, including mental health services during the period of isolation
 - regular review of the order and circumstances authorising isolation
 - the creation and keeping of detailed records relevant to the period of isolation and the provision of a copy of such records to the relevant body with independent oversight of places of detention (such as the Inspector of Custodial Services).

Recommendation 8.4 Screening and assessment for disability in youth detention

State and territory governments should ensure timely screening and expert assessment are available for individual children with cognitive disability involved in the criminal justice system (including, but not limited to, detention settings) and that they receive appropriate responses, including therapeutic and other interventions.

Recommendation 8.5 Disability training for staff in youth detention

State and territory governments should ensure staff and officials in youth detention centres at all levels receive appropriate initial and ongoing training and support in relation to the needs and experiences of children with disability. This includes training and support on trauma-informed care and culturally appropriate and gender responsive approaches to children with disability in detention.

Recommendation 8.6 Western Australia youth detention staff retention

The Department of Justice of Western Australia should immediately review its youth justice staffing and recruitment model to ensure sufficient, suitably trained staff are available to supervise children and young people to minimise lockdowns and prevent the solitary confinement of detainees. This should include developing and implementing a recruitment and retention strategy that:

- addresses high staff attrition rates in youth detention
- promotes representation at senior management level of staff with disability and First Nations backgrounds
- includes measures to help staff access mental health support.

Recommendation 8.7 Western Australia youth detention operating philosophy

The Department of Justice of Western Australia (through the Corrective Services Division) should:

- immediately cease confinement practices at youth detention centres amounting to solitary confinement of children with disability
- ensure decisions leading to the isolation of children with disability are made in conformity with legal requirements
- implement a new operating philosophy and service model to manage detainees with disability in a therapeutic, non-punitive, non-adversarial, trauma-informed and culturally competent way
- ensure the operating philosophy and implementation plan are developed in conjunction with people with disability and First Nations people
- release a clear timeline for publication of its new operating philosophy and service model for youth detention in Western Australia and the associated implementation plan
- raise awareness at every level of staff in the youth detention centres concerning the support needs of people with cognitive disability and foster respect for the rights of people with disability
- ensure lawyers representing detained clients are allowed adequate time and assured of confidentiality at youth detention centres to take instructions, especially where their clients have cognitive disability.

Recommendation 8.8 *Inspector of Custodial Services Act 2003 (WA)*

The Western Australian Government should introduce and support legislation amending the *Inspector of Custodial Services Act 2003 (WA)* to provide the Inspector with a discretion to demand a response from the department or other relevant agency, within a specified time, to recommendations of the Inspector included in a report to Parliament. This should include the steps (if any) taken by the agency in response to the recommendations and an explanation of why steps have not been taken (if that be the case).

Recommendation 8.9 Use of seclusion in New South Wales Justice Health and Forensic Mental Health Network

The New South Wales Government should review existing policy regarding the use of seclusion for adults in the Justice Health and Forensic Mental Health Network, including the use of clearly designated authorisation and mandatory clinical and administrative review.

Recommendation 8.10 Transition from custodial supervision in the Northern Territory

The Northern Territory Government should provide supported step-down accommodation in community-based settings for people with disability subject to custodial supervision orders.

Recommendation 8.11 Information for courts and legal practitioners

The Commonwealth, state and territory criminal justice systems should provide information about seeking or making adjustments and supports and services for people with disability, and the circumstances in which they may be required. This information should be made available to judicial officers, legal practitioners and court staff, including through practice notes or bench books.

Recommendation 8.12 Implementation of the *National Principles*

The Australian Government, together with state and territory governments, should review the *National Statement of Principles Relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment (National Principles)* through the Standing Council of Attorneys-General.

The *National Principles* should be revised to include the following:

- Indefinite detention is unacceptable and laws providing for it should be repealed.
- Where an order for detention is made, there should be a maximum term of detention nominated beyond which the person cannot be detained (a 'limiting term').
- The limiting term should not exceed the court's assessment of the sentence it would have imposed on the defendant had the person been found guilty of the offence in an ordinary trial of criminal proceedings.
- In hearings conducted to determine a person's fitness to stand trial or to plead, the court must consider whether it can modify the trial process or ensure assistance is provided to facilitate the defendant's understanding and effective participation in the proceedings. This includes any cultural or other trauma-informed supports a First Nations defendant may need to ensure the defendant can participate in a fair trial and understand the proceedings.

The Standing Council of Attorneys-General should agree to a timetable for implementation of reforms identified in the review of the *National Principles*.

The Commonwealth, states and territories should amend their legislation on fitness to stand trial to align with the revised *National Principles*.

The Australian Government, and state and territory governments, should build their capacity to provide step-down options, including medium and low secure and community-based accommodation options, for the placement of people in the forensic system to facilitate their progressive transition to less restrictive environments.

Recommendation 8.13 Data about people detained in forensic systems

The Australian Government and state and territory governments should support legislation requiring the annual collection and publication of data relating to people found unfit to plead or not guilty by reason of cognitive or mental health impairment. The data collected should include:

- the number of people under forensic orders in their jurisdiction
- the number of people under orders for detention and the numbers subject to:
 - indefinite periods of detention
 - limiting terms (or equivalent)
 - orders extending their order for detention
- the number of people under orders for detention by sex, disability, disability type and First Nations status
- the number of such people detained in:
 - an adult correctional facility
 - a youth detention facility
 - a forensic mental health or forensic disability facility
 - a general psychiatric unit.

Recommendation 8.14 National practice guidelines for screening in custody

State and territory corrective services, youth justice agencies and justice health agencies, through the Corrective Services Administration Council and equivalent youth justice bodies, should develop national practice guidelines and policies relating to screening for disability and identification of support needs in custody. People with disability, including with lived experience of the criminal justice system, and people with expertise in cognitive disability should be involved in the design of the guidelines and contribute to the approaches to implementation. The guidelines and policies should:

- explain the essential elements of screening and assessment for people with disability, including a trauma-informed approach to identifying disability and the person's needs
- reduce reliance upon self-disclosure as the primary means of disability identification following admission of a person with disability to custody
- require screening upon reception into custody or shortly thereafter both for prisoners and detainees who have been sentenced and for those on remand
- promote the consistent collection of data and its use to inform system-wide responses
- encourage the development and use of culturally safe disability screening tools that address the particular needs of First Nations people with disability
- encourage the development and use of disability screening tools that are culturally appropriate for people with disability from culturally and linguistically diverse communities
- encourage investment in initial and ongoing training, education and support of staff about disability identification and awareness
- encourage collaborative practices including the engagement of clinicians to conduct assessments to identify the support needs of a person with disability in custody
- require the identification of a disability or impairment to be matched with appropriate support while in custody
- promote the use of screening outcomes to develop plans for prisoners and detainees transitioning to the community
- contribute to appropriate information sharing among agencies including court-based assessments and reports.

Recommendation 8.15 Policies and practices on screening, identifying and diagnosing disability in custody

State and territory governments should ensure that policies and practices concerning screening, identification and diagnosis of disability in respect of people with disability in custody are consistent with the national practice guidelines.

Recommendation 8.16 Support by First Nations organisations to people in custody

State and territory corrective service and youth justice agencies and justice health agencies should engage First Nations organisations, including Aboriginal Community Controlled Health Organisations, to provide culturally safe disability screening and assessment services for First Nations prisoners and detainees.

Recommendation 8.17 NDIS Applied Principles and Tables of Support concerning the justice system

Through the Disability Reform Ministerial Council, the Australian Government and state and territory governments should:

- review the *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) and the Applied Principles and Tables of Support (APTOS) and operational guidelines to align and provide clear parameters in determining which supports will be funded by the National Disability Insurance Scheme (NDIS) for participants involved in the criminal justice system
- resolve issues related to the interface between the NDIS and the criminal justice system, particularly the distinction between ‘criminogenic-related supports’ and ‘disability-related supports’
- where such issues cannot be resolved, agree on a mechanism for joint-funding of individual supports.

Proposed amendments to the *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) and the APTOS should be agreed by National Cabinet.

Recommendation 8.18 Timing of NDIA-funded transition supports

The National Disability Insurance Agency (NDIA) should issue guidelines stating expressly that a release date is not a precondition for approving funding for transitional supports for participants in custody. The NDIA's Justice Operational Guidelines and internal practice guides should be amended to make this clear.

Recommendation 8.19 Amendment of the *Disability Discrimination Act 1992* (Cth) to cover police provision of 'services'

The *Disability Discrimination Act 1992* (Cth) should be amended to expressly include 'services provided by police officers in the course of performing policing duties and powers' in the definition of 'services' in section 4.

Recommendation 8.20 Improving police responses to people with disability

The Australian Government and state and territory governments and police services should collaborate with people with disability in the co-design, implementation and evaluation of strategies to improve police responses to people with disability.

All police services should introduce adequate numbers of dedicated disability liaison officers.

The Australian Government and state and territory governments should introduce an alternative reporting pathway for people with disability to report crimes to police.

Recommendation 8.21 Diversion of people with cognitive disability from criminal proceedings

The New South Wales, South Australian, Victorian and Western Australian governments should review and fund their existing court-based diversion programs for people with cognitive disability charged with offences that can be heard in local or magistrates' courts to ensure the programs:

- are accessible and culturally appropriate, particularly in regional and remote areas
- provide support for defendants to access the National Disability Insurance Scheme (NDIS)
- satisfy service needs, including connecting defendants to appropriate education, housing, employment and other services.

The Australian Capital Territory, Northern Territory, Queensland and Tasmanian governments should develop and fund court-based diversion programs for people with disability charged with summary offences in local or magistrates' courts which:

- are accessible and culturally appropriate, particularly in regional and remote areas
- provide support for defendants to access the NDIS
- satisfy service needs, including connecting defendants to appropriate education, housing, employment and other services.

All states and territories should commission independent evaluations of their diversion programs. Any evaluation should assess and, where feasible, quantify economic and social benefits for both individual defendants and the community as a whole.

Recommendation 8.22 Age of criminal responsibility

States and territories that have not already done so should introduce legislation to raise the minimum age of criminal responsibility to 14.

Recommendation 8.23 Action plan to end violence against women and children with disability

The Australian Government and state and territory governments should develop a five-year Action Plan for Women and Children with Disability to accompany the National Plan to End Violence against Women and Children 2022–2032. The Action Plan should:

- be developed by and for women with disability
- prioritise cohorts at greatest risk of violence
- coordinate with other relevant plans and strategies, in particular the forthcoming Aboriginal and Torres Strait Islander Action Plan and Australia’s Disability Strategy 2021–2031.

The Action Plan should include comprehensive actions and investment to address violence experienced by women and children with disability across the focus areas of:

- prevention
- early intervention
- response
- recovery and healing.

Recommendation 8.24 Disability-inclusive definition of family and domestic violence

In working towards nationally consistent, inclusive definitions of gender-based violence under the National Plan to End Violence against Women and Children 2022–2032, states and territories should amend their legislative definitions of family and domestic violence to include:

- all relationships in which people with disability experience family and domestic violence, including but not limited to carer and support worker relationships
- disability-based violence and abuse
- all domestic settings, including but not limited to supported accommodation such as group homes, respite centres and boarding houses.

The *Family Law Act 1975* (Cth) and any relevant state and territory laws should also be amended consistently with this recommendation.

Endnotes

- 1 *Convention on the Rights of the Child*, opened for signature 20 November 1987, 1577 UNTS 3 (entered into force 2 September 1990).
- 2 Committee on the Rights of the Child, *General comment no. 20 (2016) on the implementation of the rights of the child during adolescence*, UN Doc CRC/C/GC/20, (6 December 2016), [18–20], [22], [40], [42–43], [46], [50].
- 3 Committee on the Rights of the Child, *General comment no. 20 (2016) on the implementation of the rights of the child during adolescence*, UN Doc CRC/C/GC/20, (6 December 2016), [31–32], [40], [87–88].
- 4 NSW State Government Justice Health and Forensic Mental Health Network, *2015 network patient health survey: Aboriginal people's health report*, 2017, p 20.
- 5 Australian Institute of Health and Welfare, *The health of Australia's prisoners 2018*, Report, 2019, p 106.
- 6 Exhibit 11-012.01, 'Statement of Professor Eileen Baldry AO', 22 October 2020, at [16], [50], [54], [66–69], [76], [83]; Shasta Holland & Peter Persson, 'Intellectual disability in the Victorian prison system: Characteristics of prisoners with an intellectual disability released from prison in 2003–2006', vol 17 (1), *Psychology, Crime & Law*, 2011, pp 25–41, 27.
- 7 Transcript, Eamon Ryan, Public hearing 27, 6 October 2022, P-282 [41–44].
- 8 Australian Institute of Health and Welfare, *Youth detention population in Australia 2022: Supplementary tables*, Catalogue number JUV 139, 2022, Tables S4, S14.
- 9 Exhibit 4-9, 'Statement of Professor Julian Trollor', 11 February 2020, at [21].
- 10 Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Health Survey, 2018-19*, Results accessed using TableBuilder, by disability type; by age.
- 11 Carol Bower, Rochelle Watkins & Raewyn Mutch, 'Fetal alcohol spectrum disorder and youth justice: A prevalence study among young people sentenced to detention in Western Australia' (2018), vol 8 (2), *BMJ Open*, p 7.
- 12 Names changed to protect identity.
- 13 Eileen Baldry, Leanne Dowse, Ruth McCausland & Melissa Clarence, *Lifecourse institutional costs of homelessness for vulnerable groups*, Report to the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, May 2012, p 109.
- 14 Law Council of Australia, *Justice Project: People with disability*, Final report, part 1, August 2018, p 8.
- 15 Clare Ringland, Stewart Boiteaux & Suzanne Poynton for NSW Bureau of Crime Statistics and Research, *The victimisation of people with disability in NSW: Results from the National Disability Data Asset pilot*, Crime and Justice Bulletin no. 252, September 2022, p 1.
- 16 Leanne Dowse, Simone Rowe, Eileen Baldry & Michael Baker, *Police responses to people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021, p 336.
- 17 Exhibit 11-012.01, 'Statement of Professor Eileen Baldry AO', 22 October 2020, at [151–155].
- 18 Australian Bureau of Statistics, *Microdata: Personal Safety Survey, 2016*, Results accessed using Australian Bureau of Statistics DataLab, by whether experienced any physical assault since age 15; by whether experienced any physical threat since age 15; by whether experienced any sexual assault since age 15; by whether experienced any sexual threat since age 15; by whether experienced any current/previous partner violence since age 15; by whether experienced emotional abuse by current and/or previous partner since age 15; by whether experienced stalking since age 15; by whether has a disability; by sex; by age (18–64).

1. People with disability in the criminal justice system

Key points

- People with disability are significantly over-represented at all stages in the criminal justice system in Australia.
- First Nations people are over-represented in both adult prisons and youth detention centres.
- The rates of cognitive and psychosocial disability, including intellectual disability and acquired brain injury, among First Nations people who are in contact with the criminal justice system are particularly high.
- People with disability also have disproportionately high levels of contact at earlier stages of the criminal justice process.
- Governments must do more to address the over-representation of people with disability, especially First Nations people with cognitive disability and people with complex needs, in the criminal justice system. People with complex needs may have multiple concurrent disabilities or forms of disadvantage, or both.
- We need to understand why people with disability are so over-represented in the criminal justice system if we are to establish early intervention measures, reduce their number, protect their rights and identify their disability support needs.
- Improved screening and identification, and better data collection practices are needed to understand the true extent of the disability needs of people in criminal justice settings and to establish a better foundation for developing disability policies.

1.1. Introduction

This volume describes what the Royal Commission learnt about the treatment of people with disability in the criminal justice system in Australia.

The Royal Commission held a number of public hearings on the experiences of people with disability in the criminal justice system in Australia.

Public hearing 11, 'The experiences of people with cognitive disability in the criminal justice system', examined:

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- the factors that contribute to people with cognitive disability first coming into contact with the system
 - the over-representation of First Nations people with cognitive impairment within the criminal justice system
 - how and why people with cognitive disability cycle in and out of the criminal justice system.

In Public hearing 15, 'People with cognitive disability and the criminal justice system: NDIS interface', we examined the division of responsibility between the Australian Government and state and territory governments for providing supports and services to people with cognitive impairment or disability who are enmeshed in the criminal justice system. We considered the role of the National Disability Insurance Scheme (NDIS) in assisting people with cognitive disability to transition from prison or custody into the community.

Issues considered in Public hearing 16, 'First Nations children with disability in out-of-home care', included:

- the lack of culturally appropriate assessments and services for these children
- under-diagnosis of particular conditions, including fetal alcohol spectrum disorder (FASD)
- the consequences of failing to identify disability.

We heard that a disproportionate number of children in out-of-home care end up in contact with the criminal justice system.¹

Public hearing 27, 'Conditions in detention in the criminal justice system', built upon the areas examined in the previous public hearings. However, it had a particular focus on Western Australia, including the experiences of First Nations children with disability in detention. Considerable attention was given to issues arising at Banksia Hill Detention Centre (Banksia Hill), given the very significant problems currently affecting that facility. However, the issues examined were of relevance to prisons and youth detention centres more broadly. We heard from witnesses with lived experience of disability who have been imprisoned or detained or are close family members of people in prisons or detention centres around Australia.

In Public hearing 28, 'Violence against and abuse of people with disability in public places', we examined the violence and abuse experienced by people with disability when in public spaces, including how people with disability experience police responses.

The evidence at these hearings and other data compiled by the Royal Commission demonstrate people with disability are significantly over-represented at all stages of the criminal justice system in Australia.²

This chapter provides a snapshot of the available data about the involvement of people with disability in the criminal justice system; the types of disability prevalent among these people; and the factors contributing to their high rates of contact with the criminal justice system.

Particular groups of people with disability – for example, First Nations people with cognitive disability; women with disability experiencing violence; and people with co-occurring cognitive disability, psychosocial disability and other disabilities such as hearing impairment – are far more likely to have contact with the criminal justice system (including police, courts and corrections) than other groups.³

Approximately 40 per cent of people entering prison in Australia have a mental health condition.⁴ It appears that people with cognitive disability who have more than one disability have the highest rates of contact with the criminal justice system.⁵ These rates are even higher for First Nations people and First Nations people with cognitive disability.⁶

The statistics set out in this chapter are stark. For example, a 2015 report on adult prisoners in New South Wales found that 43 per cent of First Nations women had a disability, and that between 40 to 90 per cent of adult prisoners may have an acquired brain injury.⁷

It is clear from the evidence that the disproportionate rate of imprisonment of people with disability is not the result of any inherent causal relationship between disability and crime. Rather it reflects the disadvantages experienced by many people with disability, such as poverty, disrupted family backgrounds, family violence and other forms of abuse, misuse of drugs and alcohol, unstable housing and homelessness.

People with disability, particularly those with cognitive disability, are also exposed to frequent and intense policing.⁸ People with cognitive and mental health impairments experience multiple forms of disadvantage, making them more likely to be criminalised, and caught up in a cycle of reoffending and incarceration.⁹

Governments must do more to lower the rates at which people with disability enter the criminal justice system. State and territory governments have implemented measures to protect and enforce the rights of people with disability in their criminal justice systems. An example is legislation empowering courts to divert people with cognitive disability from court processes. However, these measures appear to have done little to reduce the number of people with cognitive and psychosocial disabilities enmeshed in the criminal justice system.

In particular, relatively little attention has been paid by governments to the disproportionate number of people with cognitive disability who are in custody. The data we received about the proportion of First Nations people with cognitive disability who are in custody, particularly in youth detention, reveals a largely hidden national crisis.

1.2. Over-representation of people with disability

As part of our inquiry, we have sought to understand how many people with disability are involved in the criminal justice system. In public hearings, we were presented with data and research about the number of people with disability in the criminal justice system compared with the number of people with disability in the broader Australian community.

The true number of people with disability in the criminal justice system is unknown.¹⁰ Methods of data collection make it difficult to obtain an accurate estimate. For example:

- Disability research about justice settings has been piecemeal, focusing on disparate cohorts and specific types of disability, with disability often defined differently across studies.¹¹
- Sampling methods have varied.¹²

Another barrier is that many people with disability in justice settings, especially those in custody, may be reluctant or unable to disclose their disability.¹³ States and territories use widely different methods for identifying disability in their prisoner populations, but they generally rely heavily on self-reporting during face-to-face interviews. Further, many First Nations people may have an undiagnosed or unidentified disability yet no corrective services or youth justice agency uses a culturally-validated screening tool to identify disability in First Nations people. We address screening in Chapter 5, 'Screening, assessing and identifying disability in custody'.

Available data

Many estimates of the prevalence of disability in the criminal justice system have been derived from custodial health surveys.¹⁴ The Australian Institute of Health and Welfare (AIHW) conducted an adult prisoner entrant survey incorporating information from all Australian states, except New South Wales. It recorded that almost one in three (29 per cent) prison entrants reported a chronic condition or disability that affected their participation in day-to-day activities, education or employment.¹⁵ This compares with one in five (22 per cent) people in the general community.

Similar results emerged from an adult prisoner survey undertaken in New South Wales. In this survey, 28 per cent of those in prison who were surveyed reported experiencing difficulties with everyday activities related to longterm health conditions or disability.¹⁶ Around one quarter of survey respondents who had received any social security benefit reported that they had received the Disability Support Pension.¹⁷ Rates of disability differed by gender and First Nations status, with the highest rates reported by First Nations women (43 per cent).¹⁸

Empirical research has often focussed on intellectual disability in the criminal justice system, but study findings are inconsistent. This is potentially because of variations in the way studies define intellectual disability and the methods used to identify it.¹⁹ We heard that studies consistently find higher rates of intellectual disability in custodial populations than in the community. An estimated 2.6 per cent of the general population in Australia has an intellectual disability.²⁰ Several studies found that 25 to 30 per cent of people in prison have borderline intellectual disability and 10 per cent have a mild intellectual disability.²¹ A 2021 New South Wales study using linked administrative data on disability, health and corrections found that 4.3 per cent of the adult population in custody in New South Wales has an identified intellectual disability.²²

Particularly high rates of cognitive disability have been reported for First Nations young people in detention. Based on a 2015 survey, almost one in four First Nations young people

(aged 14 to 21) are estimated to have an intellectual disability compared with one in 12 non-Indigenous young people (based on a Full Scale Intelligence Quotient score below 70).²³ FASD rates among First Nations children are as high as 120 per 1,000.²⁴

A study conducted at Banksia Hill between May 2015 and December 2016 found 36 per cent of young people assessed had FASD and 89 per cent had at least one domain of severe neurodevelopmental impairment.²⁵

Research also shows high rates of other cognitive disability among people in custodial settings. Acquired brain injury (ABI) is especially prevalent and numerous studies report high rates of ABI among adult prisoners – as high as 40 to 90 per cent.²⁶ A report from the AIHW noted, ‘ABI is a risk factor for criminal behaviour and for offending after prison release’.²⁷ In 2022, the Australian Institute of Criminology published research from Victoria showing that young people with ABI or associated cognitive impairments may be over-represented in the criminal justice system.²⁸ However, a lack of neurological assessment and a reluctance to diagnose young people with a stigmatising condition means that many young people with symptoms of ABI are entering the criminal justice system undiagnosed.²⁹

The proportion of people with psychosocial disability in custodial populations is also much higher than in the general population. In 2015, around 63 per cent of prisoners 18 years and over surveyed in New South Wales had previously received a diagnosis of mental illness and just over 49 per cent had received some form of psychiatric care in their lifetime. More than one third had been diagnosed with depression and around a quarter had been diagnosed with anxiety.³⁰ Studies report that people with intellectual disability and comorbid mental illness are around two to four times more likely than those with intellectual disability alone to have a history of criminal charges.³¹

Studies suggest that people with disability also have disproportionately high levels of contact with early stages of the criminal justice process.³² They indicate that large numbers of people going through the lower courts have mental or cognitive disability.³³ For example, over 50 per cent of a cohort going through the Local Court of New South Wales had a mental impairment and a quarter of those appearing before six local courts in New South Wales were assessed as potentially having intellectual disability.³⁴

Research also shows that the majority of people with disability who offend have been victims of frequent and recurring forms of violence.³⁵

National Disability Data Asset pilot

A recent study used New South Wales linked population-level data drawn from the Justice Test Case of the National Disability Data Asset pilot. It confirmed:³⁶

- A large proportion of young and adult offenders are people with disability.
- Rates of disability were higher among First Nations offenders than non-Indigenous offenders.

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- First Nations offenders were also more likely to have been victims of crime than non-Indigenous offenders.

The study shows that, of adults with custodial contact:³⁷

- close to half were identified as people with disability (48 per cent)
- 41 per cent had psychosocial disability
- more than one in 10 were identified as having a cognitive disability
- more than one in seven were identified as having a physical disability.

The authors of the study stated:

This is the first comprehensive study of the interaction of people with disability within the NSW criminal justice system. Until now, this group has been largely overlooked in criminology research, but this paper suggests that people with disability represent a significant proportion of both the offender and custodial populations, and an even larger proportion of those with histories of victimisation. This was particularly so for people with more complex needs, be it through multiple concurrent disability types, a higher prevalence of factors related to disadvantage, or both. The findings of our research point to a clear and immediate need for significant investment in further disability focused research to better understand the context and experience of people with disability who have contact with the criminal justice system and potentially identify policy opportunities for strengthening support and diversion options for this vulnerable group.³⁸

The evidence is overwhelming that people with disability, particularly those with cognitive disability, are disproportionately represented in criminal justice settings in Australia.

Despite this strong evidence, with the possible exception of New South Wales Corrective Services, we found that corrective service and youth justice agencies do not collect or record adequate data about disability among their prison and youth detention populations. This means they cannot identify the prevalence, types and degree of disability among these populations, nor their support needs. This lack of data also limits the ability of these agencies to develop, implement and evaluate criminal justice disability policies and programs, and to monitor the health and disability support needs of people with disability in custody.³⁹

1.3. First Nations people with disability in the criminal justice system

The 1991 Royal Commission into Aboriginal Deaths in Custody found that First Nations people are taken into custody at 'the grossly disproportionate rate' of more than 15 times the rate for non-Indigenous people.⁴⁰ It recommended measures to address the over-representation of First Nations people in custody, but most of these recommendations have either not been implemented or have only been partially acted upon.⁴¹

First Nations people continue to be grossly over-represented in the criminal justice system in Australia.⁴²

The 2022 *Prisoners in Australia* survey coordinated by the Australian Bureau of Statistics shows that at 30 June 2022, the adult prisoner population (aged 18 to 64) was around 39,200 people. Just under 13,000 of these prisoners, or 33 per cent, were First Nations people.⁴³ As of 2021, around 2.9 per cent of the Australian population aged 18 to 64 identify as First Nations people, meaning they are substantially over-represented in prisons.⁴⁴ The *Prisoners in Australia* survey also showed First Nations people were imprisoned at a rate 17 times higher than non-Indigenous people (2,330 compared to 140 prisoners per 100,000 adult population).⁴⁵

The Australian Government's Closing the Gap framework aims to reduce disadvantage among First Nations people. Three of the 19 national socio-economic targets identified in the National Agreement on Closing the Gap relate to crime and justice. By 2031, they are to:⁴⁶

- reduce the rate of First Nations adults held in incarceration by at least 15 per cent from the 2019 rate (Target 10)
- reduce the rate of First Nations children (aged 10 to 17 years) in detention by 30 per cent from the 2019 rate (Target 11)
- reduce the rate of all forms of family violence and abuse against First Nations women and children by at least 50 per cent from the 2019 rate, as progress towards zero (Target 13).

The Productivity Commission monitors Australia's progress against the National Agreement targets. In 2020–2021, based on progress from the baseline year of 2018–2019, the Productivity Commission reported:⁴⁷

- Target 10 is worsening.
- Target 11 is on track to be met.
- There is no new data to assess progress towards achieving Target 13.

The Productivity Commission has advised caution regarding these assessments as they are based on limited data.⁴⁸

All states and territories have a disproportionately high rate of First Nations incarceration.⁴⁹ Of the total 6,276 prisoners in Western Australia, as at 30 June 2022, 2,521 (40 per cent) were First Nations people.⁵⁰ This total includes 1,883 prisoners on remand.⁵¹ Around 3.3 per cent of the Western Australia population are First Nations people.⁵² In September 2021, First Nations people in New South Wales were nearly 15 times more likely to be on remand than non-Indigenous people and were twice as likely to have been refused bail by police before their first court appearance.⁵³

The data on First Nations children in youth detention is even more troubling. In the last quarter of 2021–2022, on an average day 709 children in Australia were in youth detention.⁵⁴ Of these children, 432 (61 per cent) were First Nations children.⁵⁵ Yet only around 6 per cent of children

aged 10 to 17 in Australia are First Nations.⁵⁶ On average, First Nations children enter youth justice supervision at a younger age than non-Indigenous children and make up a higher proportion of those on remand.⁵⁷

We have also explored the data about First Nations incarceration rates from the perspective of people with disability. The picture is stark. There are high rates of disability within this already over-represented group. First Nations people with disability have multiple forms of disadvantage compared with other people in the community.

The over-representation of First Nations Australians with cognitive impairment in the criminal justice system is a national crisis. For example, research indicates that:

- First Nations people aged 17 to 75 with mental health disorders and cognitive disability experience more and earlier contact with the criminal justice system than non-Indigenous people.⁵⁸
- Almost one in four First Nations young people in detention are likely to have an intellectual disability, compared with one in 12 non-Indigenous young people.⁵⁹
- Rates of disability are also higher among adult First Nations offenders than among adult non-Indigenous offenders.⁶⁰ The results of a recent study based on data drawn from the New South Wales Justice Test Case of the National Disability Data Asset pilot show that the rate of cognitive disability in males was higher in the First Nations offending population (13 per cent) than in the non-Indigenous offending population (5.4 per cent). Compared to non-Indigenous male offenders, First Nations male offenders had higher rates of physical disability (16 per cent compared to 9.5 per cent, respectively) and psychosocial disability (33 per cent compared with 17 per cent respectively).⁶¹
- First Nations female offenders have higher rates of cognitive, physical and psychosocial disability than non-Indigenous female offenders.⁶²

There are also high rates of hearing impairment among First Nations people in custody in the Northern Territory.⁶³

We commissioned researchers from the University of New South Wales to review the available data on police processes, interactions and responses to people with disability. The research indicates First Nations people with cognitive disability who come to police attention are more likely to be investigated, charged and remanded in custody than First Nations people without cognitive disability.⁶⁴ Similarly, First Nations young people with cognitive disability are more likely to be charged with a first offence at a younger age than young people without cognitive disability.⁶⁵

The researchers drew our attention to studies suggesting that, when a person is identified as First Nations in criminal justice settings, any support needs associated with disability tend to become less of a priority.⁶⁶ This 'may be exacerbated by limited access to advocacy and legal services with disability expertise'. For many criminalised First Nations people with disability, diagnosis of their disability occurs for the first time upon entry to prison, although this does not mean that disability is identified or diagnosed in all or even most cases.⁶⁷

Measures to reduce the over-representation of First Nations people in the criminal justice system are crucial. But it is also vitally important to invest in specific, disability-related measures to prevent First Nations people with disability from entering the criminal justice system, and to address their disability support needs once they are in the criminal justice system. A person's status as First Nations should not result in their disability needs becoming less of a priority.

1.4. Criminalisation of disability

To make recommendations about what governments should do to reduce the number of people with disability in the criminal justice system, we needed to understand why and how people with disability are drawn into the criminal justice system.

In our public hearings we heard evidence that people with disability are 'criminalised' for a number of reasons.

In a formal sense, to criminalise a behaviour or act is to make it a criminal offence.⁶⁸ However, criminalisation is not only a function of applying a law to a particular behaviour or act. It also comes from a multitude of practices by workers inside and outside criminal justice agencies and across criminal, civil and administrative law systems.⁶⁹ Further, people who experience multiple forms of disadvantage – often described as intersectionality – are much more likely to be charged with and convicted of criminal offences.

Cumulative disadvantage

At Public hearing 11, we heard evidence that cumulative disadvantages means that people with cognitive and psychosocial disabilities become more visible to workers in the criminal justice system.⁷⁰ Those working in the criminal justice system, such as police, may focus on certain attributes or behaviours of people with disability, that draw them into the criminal justice system.⁷¹ For example, police may be called to manage behaviours by a person with cognitive disability, such as someone speaking loudly or yelling in a public place or exhibiting marked physical or verbal tics.⁷² In this example, if the behaviour is drawn to the attention of the police, they may interpret it as deliberately disruptive or non-compliant, leading them to treat the person as having committed a criminal offence.⁷³

Professor Eileen Baldry AO gave another example in her evidence:

[the way people] who have very poor impulse control behave, when perhaps confronted by someone, they may lash out, they may run away, that behaviour can easily be criminalised by the police because the police then arrest that person. That person hasn't necessarily done anything wrong or they may not at that point have done anything wrong.⁷⁴

At an early stage of police contact, police interactions with people with cognitive disability can quickly escalate. We were given examples of police using their authority inappropriately when dealing with people with disability. We heard accounts of unnecessary physical force and the use of threats and verbal put-downs. We were told children with cognitive disability, particularly First Nations children, may take responsibility for offences they did not commit because they are suggestible and tend to acquiesce to, or be intimidated by, authority figures. Police often do not have the training, knowledge or resources to respond sympathetically and appropriately to people with disability displaying what may seem unusual or possibly escalating behaviour.⁷⁵ Some police also have negative attitudes towards, or make assumptions about, people with disability who report or witness crime or are accused of crime.⁷⁶

Professor Eileen Baldry AO described these compounding factors of disadvantage using a spider web analogy. She explained the spider's web works to draw people with cognitive disability into the criminal justice system and then enmesh them:

It becomes stickier and stickier the more of these things that accumulate in your life. And eventually it is almost impossible to get out of that web. Because you do not have the leverages, you do not have the capacities, you don't have a community, you don't have the resilience, you don't have what other people who might have had supports throughout their lives do have.⁷⁷

Professor Baldry has conducted numerous empirical studies on the relationship between people with psychosocial and cognitive disabilities and the criminal justice system. Her research projects, combining quantitative and qualitative analysis, have sought to understand the life pathways of people with disability who interact with the criminal justice system. She has also conducted studies examining the interaction between First Nations people and the criminal justice system, mostly in New South Wales.⁷⁸

We do not describe the detail of that research in this volume. However, the *People with mental health disorders and cognitive disability in the criminal justice system in NSW* study shows that most people with multiple and complex needs who have been imprisoned had previously been recognised by education and welfare workers and police as children at risk of very poor outcomes.⁷⁹ Children with disability who live in poverty, have a limited education and lack access to support services are often identified as likely to be enmeshed in the criminal justice system. Yet, as Professor Baldry and her co-researchers observed, time and again the child or young person was left to the police to manage. As they moved into their early and mid-teens, the child or young person 'went from being at risk to being a risk and to being targeted by police, arrested and charged'.⁸⁰

The research showed that people with disability can be 'funnelled' into police management and the criminal justice system in their adult years.⁸¹ This typically happens when the person with disability has experienced serious mental ill-health or a breakdown in social connections, compounded by other impairments.⁸²

The research revealed that a large majority of people with disability who received custodial sentences received them from local courts.⁸³ Legislation establishes diversion schemes for

people with cognitive disability charged with criminal offences, but one study showed very few were afforded these options (only 12 per cent of those eligible applied for a diversion order) in New South Wales. Those with complex needs were 'captured' early by the criminal justice system.⁸⁴

One of the consequences of this use of the criminal law for children with disability was that their disability-related behaviours and responses to life circumstances were criminalised. This was particularly the case for First Nations children. First Nations people in the cohort experienced greater levels of disadvantage than non-Indigenous people.⁸⁵ They were more likely to have:

- experienced out-of-home care
- come into contact with police at a younger age and more frequently (as victims and offenders)
- higher rates of convictions and episodes of remand
- experienced homelessness.⁸⁶

First Nations women had the highest support needs.⁸⁷

From speaking with First Nations people with disability, their families and people who supported them, researchers sensed there is still an assimilation approach perceived as pervasive among many people working within criminal justice and human service agencies, with little recognition of the ongoing impact of colonisation, intergenerational trauma and grief and loss for First Nations people.⁸⁸ The researchers concluded the over-representation of First Nations people with mental and cognitive disabilities in the criminal justice system became 'normalised' in every community and context investigated.⁸⁹

Put briefly, the research shows that poverty and other forms of disadvantage are crucial factors in the criminalisation of people with disability.⁹⁰ It points to the need for education, disability, health and child protection services to provide support to those people and their families early, intensively and effectively.

Professor Baldry observed that, despite claims of integrated and whole-of-government approaches, funding is provided to an agency to deliver only its part of a service rather than funding provided for a service to be delivered by a group of agencies working together. This results in co-ordinated support not being provided to people with disability, which can propel them into offending pathways and homelessness.⁹¹

We also heard that offending behaviour may be a consequence of poor living circumstances. A person with disability may feel unsafe in institutional environments such as hostels and boarding houses or they become homeless. In these circumstances, the person may actually believe prison offers them greater security.⁹²

These observations are not intended to ignore or minimise behaviour that is clearly harmful to others or threatens the safety or security of members of the community. Our intention is to insist on the need for appropriately designed and implemented services to support people with disability and their families from an early age.

The criminal justice system is not a cure all for inadequate understanding of behaviour associated with disability and should not be expected to play an ‘ostensibly therapeutic role’.⁹³ As Professor Baldry contends, such an approach may serve to entrench people with mental and cognitive disability in, rather than divert them from, the system.⁹⁴ Criminal justice agencies must not be the default management option for people with disability. First and foremost, the factors contributing to the criminalisation of people with disability must be addressed.

Cost of criminalisation

Professor Baldry presented us with compelling evidence of the economic impact of failing to provide support to people with disability early in life, particularly interventions that could divert them from entering the criminal justice system.⁹⁵ Her research developed estimates of past and current institutional costs associated with people with mental health disorders, cognitive disability and complex needs cycling in and out of the criminal justice system and homelessness.

The research looked at the cumulative costs, across numerous agencies, of a series of events typically leading to a young person with cognitive disability coming into contact with the criminal justice system. This is an example of such a series of events:⁹⁶

- A young person with cognitive disability may behave in a challenging way because they are homeless or in out-of-home care – for example, they may become agitated and frightened then try to run away.
- The police, rather than a disability support service, are called to deal with the situation.
- The police arrest the young person, charge them and hold them in a cell overnight.
- The person with disability then appears before the Children’s Court.

The methodology to cost these events is set out in detail in the *Lifecourse institutional costs of homelessness for vulnerable groups* report.⁹⁷ The criminal justice system and emergency services appeared to bear the majority of the costs associated with a lack of adequate services to support people with mental health disorders, cognitive disability and complex needs early in their lives. A lack of adequate services is associated with economic and social costs in the forms of homelessness and interactions with the health and criminal justice systems later in the lives of people with disability.⁹⁸

It would clearly be preferable for people with disability to receive earlier, targeted support (such as childhood disability support at the first point of any cognitive or mental health diagnosis or recognition), rather than being dealt with by a costly criminal justice response later in life.

1.5. Why people with disability are over-represented in the criminal justice system

To ensure early intervention and reduce the number of people with disability in contact with the criminal justice system, it is vital we understand why people with disability are so over-represented in it. This involves gaining a better understanding of the types of support that can prevent people with disability, particularly those with complex needs, from being criminalised, particularly because of behaviour associated with their disability.

People with disability imprisoned after being convicted of criminal offences are:⁹⁹

- more likely to have difficulty coping with the prison environment
- more likely to experience a higher rate of comorbid mental health disorders and physical conditions than prisoners without disability
- at higher risk of reoffending.

The lack of a uniform approach to identifying people with disability in the criminal justice system contributes to the lack of reliable information about their experiences and the factors leading to their involvement in the criminal justice system.

We need reliable data and research about the prevalence of disability and the needs of people with disability in the criminal justice system. This is so we can monitor the needs of people with disability once they are in the criminal justice system and to inform policy development and disability-related service planning and delivery. We address data collection further in Chapter 7 'Data collection by criminal justice systems on people with disability'.

Endnotes

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2. The right to humane treatment in criminal justice settings

Key points

- People with disability are at heightened risk of violence, abuse, neglect and exploitation within prison environments.
- People with disability in custody often lack adequate access to medical attention and medication, mental health care, and supports, including for people who are d/Deaf or hard of hearing.
- Isolation practices are extensively used, particularly in youth detention.
- Prisoners and detainees with disability are vulnerable to exploitation and violence by other people in custody.
- Australia has obligations to protect people with disability in the criminal justice system under a number of international human rights treaties and instruments.
- These include the *International Covenant on Civil and Political Rights*; the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; the *Convention on the Rights of Persons with Disabilities*; the *Convention on the Rights of the Child*; and the United Nations *Standard Minimum Rules for the Treatment of Prisoners*, known as the *Nelson Mandela Rules*, which establish minimum standards of conditions and treatment of all prisoners, including those with disability.
- The *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* also imposes obligations on Australia to monitor places where people are, or may be, deprived of their liberty. We need each National Preventive Mechanism body charged with monitoring such places to have expertise to identify the needs of people with disability in places of detention.

2.1. Introduction

This chapter examines evidence the Royal Commission has received about the treatment of people with disability in criminal justice settings. It particularly focuses on the experience of people with disability in custodial settings. It also sets out the obligations of state and territory governments to people with disability who are in contact with the criminal justice system.

We were told that people with disability are at heightened risk of violence, abuse, neglect and exploitation within prison environments. Witnesses gave evidence about poor conditions for people with disability in adult prisons and youth detention centres in Australia. For example, we heard about a lack of accessible toilets and showers, and excessive lockdowns of detention centres resulting in solitary confinement. Witnesses gave evidence about difficulties in communicating, untreated medical and psychological conditions, not having medication dispensed needed for their disability, and humiliation experienced by people with disability because of negative staff attitudes.

2.2. Australia's human rights obligations

Australia's international human rights obligations under the *Convention on the Rights of Persons with Disabilities (CRPD)*,¹ the *Convention on the Rights of the Child (CRC)*,² the *International Covenant on Civil and Political Rights (ICCPR)*³ and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*⁴ are directly relevant to the treatment of people with disability in all forms of custody and detention. We address the *CRC* in more detail in Chapter 3, 'Youth detention'.

The *CRPD* includes rights of people with disability involved or at risk of becoming involved in the criminal justice system, including:

- the right to equal recognition before the law (article 12)
- the right to equal and effective access to justice (article 13)
- the right to liberty and security of the person (article 14(1))
- if persons with disability are deprived of their liberty, they are entitled on an equal basis with others to guarantees in accordance with international human right law and to be treated in compliance with the objectives and principles of the *CRPD*, including by the provision of reasonable accommodation (article 14(2))
- the right to freedom from torture or cruel, inhuman or degrading treatment or punishment (article 15).

In a report prepared for the Royal Commission, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*,⁵ Emeritus Professor Ron McCallum AO considered Australia's compliance with certain articles of the *CRPD*, including article 14, the right to liberty and security of the person; article 15, the right to freedom from torture, or cruel, inhuman or degrading treatment or punishment; and article 17, the right to integrity of the person.⁶

Access to justice

Article 13 of the *CRPD* states:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.⁷

In December 2017, the Office of the United Nations High Commissioner for Human Rights presented its report on *Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities*.⁸ The report described the *CRPD* as introducing innovations that expanded the classical notion of access to justice. It underscores the fact that access to justice for people with disability entails not only the removal of barriers to ensure access to legal proceedings to seek and obtain appropriate remedies on an equal basis with others, but also the promotion of the active involvement and participation of people with disability in the administration of justice.⁹ The report makes a number of recommendations for States Parties to consider to give effect to article 13 and take positive and proactive action to eliminate the barriers to justice.

The Australian Human Rights Commission (AHRC) has pointed out all people with disability, irrespective of the level of complexity and intensity of the supports they may require, are entitled to effective access to justice, stating:

access to justice for people with a disability ... is more than simply providing a wheelchair ramp into a courtroom. It is about fully supporting a person with a disability to appropriately intersect with all aspects of criminal justice systems, including identifying disability, provision of supported decision making and providing appropriate exit mechanisms.¹⁰

Liberty and security of the person

Article 9 of the *ICCPR* recognises and protects both liberty of person and security of person. Article 9 protects the rights of people from arbitrary arrest and detention, as well as setting out procedural rights to challenge the detention.

The Human Rights Committee that monitors the *ICCPR* issued *General comment no. 35 (Liberty and security of person)* in 2014.¹¹ The Committee explained 'liberty of person' concerns freedom from confinement of the body, not a general freedom of action. 'Security of person' concerns freedom from injury to the body and the mind, or bodily and mental integrity.¹² The Committee confirmed the rights in article 9 apply to everyone, including children and people with disability.¹³

The right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or not detained. This is a positive duty and States Parties must respond appropriately to patterns of violence against categories of victims, including violence against people with disability.¹⁴

The Human Rights Committee addressed the procedural requirements in relation to engagement with police. It said when children are arrested, notice of the arrest and the reasons for it should also be provided directly to their parents, guardians or legal representatives. For certain people with psychosocial disability, notice of the arrest and the reasons should also be provided directly to persons they have designated or appropriate family members. Additional time may be required to identify and contact the relevant third persons, but notice should be given as soon as possible.¹⁵

Article 14 of the *CRPD* is concerned with ensuring persons with disabilities enjoy the right to liberty and security of person on an equal basis with others.¹⁶ Professor McCallum said article 14(1)(b) 'is the linchpin of the article because it makes it clear that persons with disabilities cannot be deprived of their liberty arbitrarily' and 'the existence of a disability shall in no case justify a deprivation of liberty'.¹⁷

Conditions and treatment in detention

Article 14(2) of the *CRPD* states:

States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.¹⁸

The *CRPD* Committee, the independent committee that monitors the implementation of the *CRPD* by States Parties, has adopted *Guidelines on the right to liberty and security of persons with disability*. These guidelines state that people in detention have the right to conditions of accessibility and the provision of reasonable adjustments, ensuring 'access, on an equal basis with others, to the various areas and services, such as bathrooms, yards, libraries, study areas, workshops and medical, psychological, social, and legal services'.¹⁹

The reference to 'international human rights law' in article 14(2) is to a number of treaties and standards developed by the United Nations.²⁰

The starting point is article 10(1) of the *ICCPR*. Article 10(1) recognises the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person. Article 10(1) imposes on States Parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty.²¹

Article 10 is supplemented by the United Nations *Standard Minimum Rules for the Treatment of Prisoners*.²² These standards were first developed in 1955. They ‘set out what is generally accepted as good principle and practice in the treatment of prisoners’ and the management of institutions.²³ The standards represent the minimum conditions the United Nations accepts as suitable.

The standards were revised when in 1988 the United Nations adopted the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*. These principles addressed the rights of persons under arrest and detention to legal assistance, medical care and access to records of their detention, arrest, interrogation and medical treatment.²⁴ In 1990, the United Nations *Basic Principles for the Treatment of Prisoners* affirmed that prisoners should be treated with respect for their inherent dignity as human beings.²⁵

In 2015, the United Nations General Assembly expanded the standards, which are now known as the *Nelson Mandela Rules*.²⁶ There are now 122 rules addressing a wide range of standards for the treatment of people in detention, including people with disability.²⁷

Rule 5.2 states:

Prison administrations shall make all reasonable accommodation and adjustments to ensure that prisoners with physical, mental or other disabilities have full and effective access to prison life on an equitable basis.²⁸

Rule 45.2 states:

The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures.²⁹

The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice,³⁰ continues to apply.

Torture, cruel, inhuman and degrading treatment

The right to be free from torture, cruel, inhuman and degrading treatment also applies to detention and custodial settings.

Article 7 of the *ICCPR* is a prohibition on torture, cruel, inhuman and degrading treatment. Article 15 prohibits torture and other cruel, inhuman, or degrading treatment or punishments.³¹

Torture is a crime under international law. It is absolutely prohibited and cannot be justified under any circumstances.

Article 1(1) of *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* defines ‘torture’ to mean:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.³²

In its *General comment no. 20: Article 7 (Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment or Punishment)*, the Human Rights Committee said it is the duty of States Parties to afford everyone protection through legislative and other measures against the acts prohibited by article 7, 'whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity'.³³ The prohibition extends to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.³⁴

Torture is also a criminal offence in Australia.³⁵

There is no precise line between acts that constitute torture and acts that constitute cruel, inhuman, or degrading treatment or punishment. It is beyond the scope of this chapter to address the way international human rights have addressed when and how cruel, inhuman, or degrading treatment or punishment may breach international standards. In the Australian context, it is important to note the AHRC may inquire into an act or practice by the Commonwealth that may be inconsistent with or contrary to human rights, and conciliate complaints.³⁶ We address this in Chapter 2 of Volume 4, *Realising the human rights of people with disability*.

Human rights for the purpose of the AHRC's functions include the *ICCPR* and the *CRPD*.³⁷ In 2014, the then President of the AHRC exercised its powers under section 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaints made by four Aboriginal men with disability, including intellectual disability, against the Australian Government (Department of Prime Minister and Cabinet, Department of Social Services, Attorney-General's Department).³⁸ The President found the Australian Government failed to take measures to work with the Northern Territory to provide accommodation and other support services, other than accommodation in a maximum security prison, for people with intellectual disability who have been found unfit to plead to criminal charges.

The President considered the failure to take these measures was inconsistent with or contrary to the complainants' rights under articles 9(1) and 10(1) of the *ICCPR* and articles 14(1), 19, 25, 26(1) and 28(1) of the *CRPD*. The AHRC concluded that in the cases of Mr KA and Mr KD, the failure to act was inconsistent with article 7 of the *ICCPR* and article 15 of the *CRPD*. The President made the following finding:

The impact on Mr KD of custody in a maximum security prison was severe. Chief Justice Martin found that Mr KD was unable to live under conditions in a prison where he can associate with other prisoners even subject to usual management and discipline. The result was that he was isolated in a small single cell and the opportunities for him to be permitted outside this cell were restricted to two or three hours per day. Prolonged solitary confinement of a detained or imprisoned person may amount to a breach of article 7 of the ICCPR. Despite these severe conditions, the custodial order was confirmed because there were no adequate resources available for his treatment and support in the community outside of prison.

It appears that Mr KA has been subject to the most severe treatment while in prison, including frequent use of physical, mechanical and chemical restraints, seclusion, and shackles when outside his cell. ASCC [Alice Springs Correctional Centre] appears to have acknowledged that it is not equipped with alternative measures to lessen the risk to Mr KA and others as a result of his behaviour.

In November 2013, Mr KA's guardian wrote to responsible officials at ASCC and noted that there had been three incidents in the previous week of behaviour which caused harm to Mr KA and distress to those working around him, and which resulted in him being belted into a restraint chair and chemically restrained.

Mr KA's guardian said that this was the sixteenth time that Mr KA had engaged in behaviour of a nature which injured him, caused prison officials to belt him into a restraint chair and inject him with tranquilizers, and resulted in him spending at least one hour and sometimes two hours in this kind of restraint. Mr KA's guardian recognised that the Disability Team and the Corrections Team at ASCC were 'doing as much as they can', but that the environment at ASCC was clearly inappropriate. He asked why Mr KA had not been prioritised for transfer to a secure care facility and was instead still detained in a maximum security prison.

I find that the conditions of detention faced by Mr KD and Mr KA amounted to cruel, inhuman or degrading treatment contrary to article 7 of the ICCPR and article 15 of the CRPD.³⁹

In Professor McCallum's report, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*,⁴⁰ he referred to the finding of the CRPD Committee in *Noble v Australia*,⁴¹ a case concerning a First Nations person with cognitive disability who was imprisoned without trial. The CRPD Committee found that his detention and the violent assaults were inhuman and degrading treatment contrary to article 15. The CRPD Committee said:

[T]he Committee emphasizes that States parties are in a special position to safeguard the rights of persons deprived of their liberty owing to the extent of the control that they exercise over those persons ... In this context, State party authorities must pay special attention to the particular needs and possible vulnerability of the person concerned, including because of his or her disability. In the present case, the Committee notes

the author's allegations that he was subjected to frequent acts of violence and abuse, that his disability prevented him from protecting himself against such acts, and that the State party authorities did not take any measures to sanction or prevent them or to protect the author therefrom ... Taking into account the irreparable psychological effects that indefinite detention may have on the detained person, the Committee considers that the indefinite detention to which he was subjected amounts to inhuman and degrading treatment.⁴² The Committee therefore considers that the indefinite character of the author's detention and the repeated acts of violence to which he was subjected during his detention amount to a violation of article 15 of the Convention by the State party.⁴³

Professor McCallum also referred to the CRPD Committee's findings in 2019 in *Leo v Australia*⁴⁴ and *Doolan v Australia*⁴⁵ that both complainants had been subjected to degrading treatment contrary to article 15 of the *CRPD*.

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

In 2002, the United Nations General Assembly adopted the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*.⁴⁶ *OPCAT* came into force in 2006.⁴⁷

Article 1 of *OPCAT* sets out its purpose of establishing a system of regular visits by independent international and national bodies to places where people are deprived of their liberty, to prevent torture and other cruel, inhuman or degrading treatment or punishment. *OPCAT* broadly defines deprivation of liberty to cover prisons, immigration detention centres and psychiatric hospitals.⁴⁸

Australia acceded to *OPCAT* on 21 December 2017. Australia established a National Preventive Mechanism (NPM), consisting of visiting bodies with power to enter prisons, immigration detention centres and psychiatric hospitals for the purpose of strengthening the protection of persons who are deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment. Australia designated the Commonwealth Ombudsman as Australia's NPM together with similar state and territory bodies.⁴⁹

Article 4 of *OPCAT* imposes obligations on Australia to allow NPMs to visit any place under its jurisdiction and control where persons are, or may be, deprived of their liberty.

The Australian Government has opted for a 'progressive realisation' of *OPCAT*, whereby NPMs will prioritise activities in 'primary' places of detention, over all places where people may be deprived of their liberties.⁵⁰ The Australian Government defines 'primary places of detention' as including:⁵¹

- adult prisons
- juvenile detention facilities
- police lock-up or police station cells

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- closed facilities or units where people may be involuntarily detained by law for mental health assessment or treatment
 - closed forensic disability facilities or units where people may be involuntarily detained by law for care
 - immigration detention centres
 - military detention centres.

Governments in four jurisdictions, in addition to the Australian Government, have nominated NPMs. Western Australia has established its Inspector of Custodial Services as the body to perform the role of NPM. New South Wales, Queensland and Victoria have yet to designate their NPMs.

The AHRC has recommended:⁵²

- governments ensure NPMs are designed and operate in a way that reflects the particular needs, and are inclusive of, vulnerable cohorts disproportionately represented in places of detention, including First Nations people, children and young people, and people with disability
- specific efforts, including special measures, be made to employ First Nations staff and people with a lived experience of disability
- NPMs develop technical expertise about child development, children's rights, trauma and how detention can affect children, particularly when visiting institutions where children and young people are detained.

We endorse these recommendations. Their importance is reinforced by the vital role the Inspector of Custodial Services of Western Australia has played in bringing to light breaches of human rights in youth detention in that state, which we address in Chapter 3.

Redress

Both the *CAT* and the *ICCPR* impose an obligation on States Parties to grant redress and provide adequate compensation to victims of torture or ill treatment. Article 14 of the *CAT* provides:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.⁵³

There are limited avenues for prisoners to seek remedies under Australian law in circumstances where their human rights under the international human rights treaties and standards have been breached.

State governments' obligations to prisoners and detainees

At Public hearing 18, 'The human rights of people with disability and making the *Convention on the Rights of Persons with Disabilities* in Australian law, policies and practices', Counsel Assisting addressed the responsibilities of the states and territories in implementing the *CRPD*.

Counsel Assisting identified how *CRPD* rights and obligations, if they are to be implemented in Australia, call for action by states and territories, but noted Public hearing 18 did not address how the states and territories engaged with the *CRPD* or its relevance to their laws, practices and policies.⁵⁴ An important consequence of the allocation of power under the federal system is deficiencies in implementation of the *CRPD* by the states and territories can mean the Australian Government has failed to comply with its obligations under the *CRPD*.⁵⁵ These deficiencies can be just as significant as failures by the Australian Government itself to implement the *CRPD*.

As Counsel Assisting noted, the importance of state and territory implementation is evident from the number of state and territory issues raised by the *CRPD* Committee. For example, the laws and practices in issue in *Noble v Australia*, *Leo v Australia* and *Doolan v Australia* (fitness to plead, the role of 'mental capacity' in criminal justice, detention of persons unfit to plead) were the responsibility of Western Australia and Northern Territory.⁵⁶ It follows that, if the *CRPD* is to be fully implemented in Australia, it is necessary for the states and territories to be 'on board'.

The Australian Government's view is that state and territory governments have 'primary responsibility' for 'a number of roles and responsibilities relevant to the implementation of the *CRPD*', including jurisdictional court systems, correctional centres, and state and territory police.⁵⁷

As addressed in Chapter 3 of Volume 4, Australia does not have a national human rights act that implements the *ICCPR* and other international instruments into Australian law. However, the rights in relation to arbitrary detention; to be free from torture, cruel, inhuman and degrading treatment and punishment; and humane treatment in detention are recognised in the three jurisdictions that have human rights acts.

State and territory human rights laws

In the Australian Capital Territory, the *Human Rights Act 2004* (ACT) protects civil and political rights, including the rights discussed above.⁵⁸ Likewise, in Victoria, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*Victorian Charter*) protects civil and political rights⁵⁹ and in Queensland, the *Human Rights Act 2019* (Qld) protects civil and political rights.⁶⁰

Each of those laws makes it unlawful for public authorities/entities (which include police and prison authorities) to:⁶¹

- act in a way that is incompatible with human rights
- fail to give proper consideration to a relevant human right in making a decision.

The Supreme Court of Victoria has considered section 10(b) (the right not to be treated or punished in a cruel, inhuman or degrading way) and section 22(1), the right to humane treatment when deprived of liberty on a number of occasions.⁶² In *Certain Children by Their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children*,⁶³ the Supreme Court considered international treaties and case law when interpreting sections 10(b) and 22 of the *Victorian Charter*. The Supreme Court (Garde J) found as follows:⁶⁴

There is evidence that one or more young persons have, or may have, been subject to a breach of s 10(b) by reason of the harsh conditions at the Grevillea unit of the Barwon Prison at least in the first two weeks of its occupancy as a remand centre including:

- (a) very long periods of solitary and prolonged confinement of young people in cells formerly used for high security adult prisoners;
- (b) uncertainty as to the length and occurrence of lockdowns;
- (c) fear and threats by staff against young persons;
- (d) the use of SESG [Security and emergency Services Group] inside the Grevillea unit, including German Shepherd dogs;
- (e) the use of handcuffs on young people when moving to outdoor areas;
- (f) the noise of loud banging on the doors or screaming;
- (g) the failure to advise young people of their rights or the rules of the centre;
- (h) the general lack of space and amenities for young persons and the limited opportunity to use the space and amenities available;
- (i) the absence or very limited opportunity for education or other pursuits; and
- (j) the absence of family visits or access to religious services or advisers.

Justice Garde found that the treatment accorded to children also constituted inhuman treatment, contrary to section 22 of the *Victorian Charter*.

Discrimination law

The *Disability Discrimination Act 1992 (Cth) (DDA)* applies nationally and operates concurrently with state and territory anti-discrimination laws. The Australian Government considers the *DDA* gives effect to its obligations to respect, protect and fulfil the rights of people with disability.⁶⁵ We have addressed the operation of the *DDA* in more detail in Volume 4.

In summary, the *DDA* prohibits unlawful discrimination in certain areas, including employment, education, access to premises and provision of goods, services and facilities.⁶⁶ Discrimination may be direct discrimination⁶⁷ and indirect discrimination.⁶⁸ Discrimination can be found to have occurred when the alleged discriminator refuses or fails to make reasonable adjustments for a person with disability.⁶⁹

The concept of 'services' is broad and wide ranging in the *DDA* and arguably applies to service provided to prisoners with disability. However, numerous decisions of courts and tribunals have found that police do not provide 'services' for the purpose of discrimination law when interacting with a person suspected of committing an offence.⁷⁰ On the other hand, police provide 'services' to witnesses, victims of crime and members of the public.⁷¹

When in detention, prisoners continue to have rights under discrimination laws, including the *DDA*. The Australian Government's submission in response to our *Criminal justice system issues paper* adopted the general position that:

The [*DDA*] operates to protect people with disability who are incarcerated, meaning that correctional facilities may need to make reasonable accommodations and supports (i.e. reasonable adjustments) ... the issue of whether correctional facilities and prisons are services or facilities for the purpose of the [*DDA*] was considered in *Rainsford v Victoria*, where the Full Court of the Federal Court of Australia found that there was some strength in the view that the provision of transport and accommodation in a prison may amount to a service or facility. For the purposes of the [*DDA*], a failure to make a reasonable adjustment for a person with disability who is incarcerated may amount to direct or indirect discrimination.⁷²

In *Rainsford v State of Victoria*, a prisoner in Victoria argued that he had been discriminated against by reason of a back condition. The prisoner claimed he was transported without the opportunity to stretch and exercise his back and was confined in a cell for 23 hours a day without the ability to exercise. The prisoner's argument was that he was subjected to indirect disability discrimination in the provision of services and facilities relating to his prison accommodation and transportation.

The Full Federal Court said the provision of transport and accommodation to a prisoner would ordinarily constitute the 'provision of services' for the purposes of the *DDA*, but each case depended on its particular facts.⁷³ Consistent with High Court authority, the court said that in exercising statutory powers in the public interest, a body (including, implicitly, a corrective services agency) may also be engaged in the provision of services to particular individuals.⁷⁴

In a further appeal about the same prisoner's complaint, the Full Federal Court held there was no unlawful indirect discrimination. This was because there were systems in place for the prisoner to seek a medical certificate supporting a request for alternative transport or accommodation arrangements. This had not been sought. However, the court commented:

although the meaning of ‘service’ is not simple to resolve, and the matter was not argued in depth, we see some strength in the view that the provision of transport and accommodation, even in a prison, may amount to a service or facility.⁷⁵

The *DDA* should be amended to clarify that custodial authorities have a duty to make reasonable adjustments for prisoners and detainees. It should be uncontroversial that the provision of reasonable adjustments is necessary to avoid unlawful discrimination against prisoners and detainees. In any event, corrective service and youth justice agencies should provide people with disability in custody with the supports they require to place them in the same position, so far as feasible, as other people in custody.

State and territory anti-discrimination laws

All states and territories have enacted anti-discrimination legislation making discrimination on the ground of ‘disability’⁷⁶ or ‘impairment’⁷⁷ unlawful. As we have noted, state and territory laws operate concurrently with the *DDA*.⁷⁸ State and territory laws generally also make discrimination on the ground of disability in the provision of services unlawful. These laws may apply to the provision of services to prisoners, although limitations are placed on the remedies available under some laws.⁷⁹

The Victorian Civil and Administrative Tribunal (VCAT), for example, appears to distinguish between activities that provide a benefit for the welfare of the prisoner and other activities that are ‘an inherent part of incarceration’. VCAT does not consider the latter to be ‘services’ within Victoria’s anti-discrimination legislation. VCAT has said that decisions about ‘services’ include decisions to refuse a prisoner access to work in the prison, to medical treatment or to telephones,⁸⁰ but decisions about the management, security and good order of the prison, the discipline and security classification of prisoners, and the conduct of prison officers towards prisoners are not ‘services’.⁸¹

To make out a case of disability discrimination against the operator of a prison or detention centre, a prisoner (or detainee) must demonstrate that the operator has contravened one of the prohibitions against discrimination contained in Part 2 of the *DDA*. In practice, the prisoner would be likely to rely on s 24, the terms of which have been explained above.

If the prisoner’s case is based on a refusal by the operator of the prison to provide ‘services’, the prisoner will need to demonstrate that the refusal concerned ‘services’ as defined in the *DDA*. As the caselaw suggests, whether the operator can be shown to have refused to provide a ‘service’ is likely to depend on the particular circumstances.

2.3. Treatment of people with disability in custody

Lived experience examples of inhumane treatment

Lack of reasonable supports

Limited information is available about prisoners with physical disabilities in Australia.⁸² Witnesses raised concerns that prisoners with physical disability do not receive the practical supports they need to maintain their health and safety. For example, in Public hearing 27, 'Conditions in detention in the criminal justice system', Ms Di Lyons, who uses a wheelchair, said she was initially placed in an observation cell because there were no accessible custodial facilities in which to place her.⁸³ The bathroom was not accessible and there were no handrails.⁸⁴ Ms Lyons requested handrails in the bathrooms and cells, but they were never provided.⁸⁵

'Alen', who is Deaf and relies on Auslan to communicate, gave evidence about not being given adequate support to communicate in prison.⁸⁶ For the first four weeks of his imprisonment in New South Wales, he was unable to talk to anyone because he was not provided with an interpreter.⁸⁷ He was unable to participate in activities and programs because interpreters were not available⁸⁸ and he felt bored and lonely.⁸⁹ Moreover, emergency alarms in the prisons operated only on an audio system. In the absence of visual warnings, Alen had to rely on others or his own observations to alert him to an emergency.⁹⁰

Mr Trevor Barker from Gallawah, who works in Victorian prisons, reported there can be long delays in accessing Auslan interpreters, with some prisoners having to wait for eight to ten weeks.⁹¹ North Australian Aboriginal Justice Agency solicitor Megan Donahoe told us that, in her experience, First Nations clients with disability in prison frequently have to rely on family members who are also incarcerated for interpreting services, which leaves them vulnerable.⁹²

Research studies involving interviews with people who work in the criminal justice system report that people with disability are not provided with enough assistance to navigate the prison environment. For example, they frequently have to rely on other inmates for daily living support, such as showering.⁹³

Access to medication and medical attention

A common theme in our public hearings was that people with disability lack adequate access to medical attention and medication.

Mr Tyrone Justin is a Yorta Aslan and Barapa Baraga man who lives with autism spectrum disorder, an acquired brain injury and attention deficit hyperactivity disorder (ADHD). At the time of Public hearing 27, Mr Justin was 22 years old and had served four gaol sentences.⁹⁴ In Public hearing 27, Mr Justin told us he experienced isolation many times in custody. He said the longest period of isolation was 56 days (with a break after 28 days).⁹⁵ He said he lost 18 kilograms during that long period of isolation because of the small amount of food provided.⁹⁶

Mr Justin gave evidence that he had difficulties receiving his medication and did not receive the mental health care he needed. Whether he received his medication for depression during his period of isolation depended on the nurse on duty. He recalled being told 'You're making my job hard, I will make your life hard. You are not getting the anti-depressants'.⁹⁷ To get the attention of mental health professionals, he said 'you would have to yell in the door'.⁹⁸ Mr Justin explained that if he did not receive his medication he would vomit, experience headaches and his mental health worsened.⁹⁹

In 2022, Mr Justin was escorted to his grandmother's funeral. He said that upon return to prison he was in quarantine for 18 days. For 14 days, he was not given his anti-depressants. Mr Justin said if you 'heighten' you risk a 30-day 'slot', which he described as a loss of privileges (for example, no television or kettle, no sheets and only a blanket on a scratchy mattress) and an empty cell.¹⁰⁰

Mr Justin's access to family was also very limited. He said in custody it cost him \$8.90 for 12 minutes on the phone and he said that he only got \$13 a week for food and phone calls.¹⁰¹

Limited access to family via phone calls can clearly impact the mental health and wellbeing of a prisoner or detainee. It also deprives them of a means of complaining about mistreatment or being denied supports in custody.

At the time of Public hearing 27, Mr Justin was serving a community-based order at Wulgunggo Ngalu Learning Place, a Cultural Healing facility for First Nations men on corrections orders. He spoke positively about Wulgunggo Ngalu and his mother told us he is on the road to recovery and healing.¹⁰²

In the same public hearing, Ms Tina Powney gave evidence about her difficulties supporting her son in custody. She referred to problems in making contact with him and her distress about her son not being given the medication he needed.¹⁰³ As a result of her experience of supporting her son in custody, Ms Powney established Gallawah. Gallawah is a First Nations run, NDIS Support Coordination provider which supports clients in prison and youth detention.¹⁰⁴

Ms Powney and Mr Trevor Barker gave evidence that First Nations people with disability in prison experienced insufficient cultural safety, disability screening and assessment processes, medical and disability supports, programs and education opportunities.¹⁰⁵

Access to mental health treatment

Another theme arising from the evidence was the lack of appropriate mental health care for detainees and prisoners.

In Public hearing 27, Cheryl Ellis gave evidence about her son Gavin who lived with ADHD, Tourette's syndrome, obsessive compulsive disorder, and later schizophrenia.¹⁰⁶ Gavin tragically died at the Metropolitan Remand and Reception Centre at Silverwater by taking his own life. The coroner who conducted the inquest into Gavin's death found the mental health treatment he received before his death was inadequate.¹⁰⁷

The Coroner recommended to the NSW Commissioner of Corrective Services and the CEO of Justice Health and Forensic Mental Health Network that:

consideration [should] be given to what steps could be made to deliver better support and care to inmates placed in the safe cells, and to inmates who have recently been released from safe cells, including the provision of multidisciplinary services such as occupational therapists, social workers and psychologists, in order to minimise the likelihood of deterioration of their mental health.¹⁰⁸

We also heard about JC, a Yamatji woman, who was tragically shot by police and died at the age of 29, leaving behind her six-year-old son.¹⁰⁹ JC had a background of extreme disadvantage. She experienced serious, longstanding mental health issues and received a late diagnosis of fetal alcohol spectrum disorder (FASD).

At Public hearing 27, JC's mother gave evidence that the criminal justice system failed 'over and over' to give JC appropriate care.¹¹⁰ She said JC did not receive culturally appropriate care in prison from Aboriginal health workers or other cultural support. JC's mother believes that earlier screening for FASD would have made a difference as JC would have received support at an earlier stage.¹¹¹ She said that when JC left prison, there was no follow up mental health support.¹¹²

'Jasmin', the mother of 'Maison' gave evidence in Public hearing 27 that her son first went to youth detention when he was 15 years old.¹¹³ Maison experienced extended periods of isolation.¹¹⁴ He told his mother that in isolation he received no medical attention and rarely showered.¹¹⁵ He complained to his mother of being strip searched and having insufficient access to mental health care.¹¹⁶

'Nathan' is a Noongar man from Western Australia who was diagnosed with ADHD in primary school. He had a background of significant disadvantage.¹¹⁷ He first went into youth detention when he was 11 years old and cycled in and out of detention during his teenage years.¹¹⁸ He is now 24 years old and in prison in Western Australia. He told us in a written statement that he was not given mental health care and made his first self-harm attempt while in youth detention. Following a later self-harm attempt, he was left naked on the floor of his cell. He felt that his cries for help were not taken seriously.¹¹⁹

Violence from other prisoners or detainees

People with cognitive disability are vulnerable to exploitation by and violence from other prisoners.

In Public hearing 11, 'The experiences of people with cognitive disability in the criminal justice system', Dr Kathy Ellem gave evidence about her PhD research, *Life stories of ex-prisoners with intellectual disability in Queensland*, including their experiences and views about the criminal justice system. They reported having experienced gang rape, physical assault, bullying and intimidation from other prisoners.¹²⁰ Several reported being placed in isolation for considerable periods as a way of protecting them from potential harm by other prisoners. Not surprisingly, this resulted in psychological harm.¹²¹

In Public hearing 27, 'Terry' gave evidence about the abuse his son 'Aaron' experienced in youth detention in Western Australia.¹²² Aaron started having contact with the police from about the age of 12 as a result of behaviour related to his ADHD. Terry said when Aaron was admitted to detention, he and his wife told staff about Aaron's diagnosis of ADHD and autism and his medication needs, but were informed that some of the medication could not be given in prison, and Aaron would only be given his night medication.¹²³

Two weeks after Aaron entered detention he was sexually assaulted by another detainee. According to Terry, the aftermath of the assault was handled very poorly. No-one from the detention centre called Terry or his wife to tell them what had happened. It was Aaron who called and told Terry.¹²⁴ Terry was told he could visit the following day but had to wait hours before seeing Aaron.¹²⁵ Aaron told his parents he had been instructed to strip the bedding in the cell where the sexual assault took place and to wash everything.¹²⁶ He was told to shower and change his clothes.¹²⁷

Terry said autism makes a person in Aaron's situation vulnerable.¹²⁸ He feels his attempts to explain Aaron's disability and vulnerabilities to detention staff were not heeded. Terry said there is a need for special training for staff and for hiring staff that specialise in dealing with children with disability so they receive the support they require.¹²⁹

Mr Andrew Robson, Managing Solicitor of the Criminal Law Division, Legal Aid Western Australia, told us in Public hearing 27 he considers prisoners with an intellectual disability more susceptible to exploitation by other prisoners, including sexual exploitation or being asked to hand over prescription medication.¹³⁰ He suggested there should be more dedicated prison units for people with disability which would operate on therapeutic principles, employ trained staff and would ensure the safety of such prisoners and detainees.¹³¹

Restrictive practices and seclusion

We address the use of restrictive practices in Volume 6, *Enabling autonomy and access*. Restrictive practices are used against people with disability in response to 'behaviours of concern' in a range of general settings including education, health and justice settings, and disability-specific settings such as group homes. Publicly available data on the use of restrictive practices is unavailable for justice settings. In Volume 6, we make recommendations to address this data gap as an immediate priority.

Past investigations and inquiries have commented on the need for correctional authorities to keep adequate records on their use of restrictive practices in custodial settings, including periods of isolation.¹³² There is an urgent need to better understand the extent to which restrictive practices are being used in prison and places of detention.

Chapter 3 of this volume outlines the extensive use of solitary confinement and seclusion, which is a form of restrictive practice, in youth detention in the states and territories.

Nathan told us in a written statement that in youth detention he experienced strip-searching, the use of mechanical restraints, isolation and extended lockdowns.¹³³ He reported suffering

physical abuse at the hands of youth detention centre staff, including while handcuffed, resulting in injuries.¹³⁴ We refer to Nathan further in Chapter 3 concerning youth detention.

Jasmin told us on one occasion Maison suffered grazes to his face after staff handcuffed his hands behind his back and then used a third set of handcuffs to join his hands and feet.¹³⁵ Jasmin explained how the measures applied to Maison before family visits, including strip searching, having to wear handcuffs and being patted down in front of other families, were degrading and influenced her son's decision to cease family visits.¹³⁶ Maison spent 406 consecutive days in the isolation unit while in youth detention.¹³⁷ Maison elected to be transferred to a maximum security prison to avoid being put into isolation.¹³⁸

Dr Ellem gave examples from her empirical research of research participants with disability spending considerable time in isolation while in prison.¹³⁹ Dr Ellem referred to the psychological harm that may be done to people with cognitive disability from long-term isolation practices in prison, including:

the desperation people with intellectual disability feel in solitary confinement, which can be expressed through head banging and self-harming behaviour.¹⁴⁰

In Public hearing 11, we heard deeply troubling evidence about the treatment of two First Nations people, 'Winmartie' and 'Melanie'.¹⁴¹ They were detained in forensic facilities in the Northern Territory and New South Wales, respectively. They were subject to restrictive practices, including long-term seclusion and, in Winmartie's case, chemical restraint. We discuss Winmartie's and Melanie's cases further in Chapter 4, 'The rights of people found unfit to be tried and indefinite detention' and in detail in Volume 9, *First Nations people with disability*.

The experiences of d/Deaf people

We have referred to Alen's experiences in prison. Alen, who is Deaf, told us that he was not given adequate support to communicate in prison.¹⁴²

Ms Jody Barney, a Biri-Gubba Uragan and a South Sea Islander woman, gave pre-recorded evidence in Public hearing 27 about her work with d/Deaf and hard of hearing First Nations people in prisons and youth detention centres across Australia.¹⁴³

Ms Barney said First Nations people often have difficulties in communicating because their language system developed from a variety of languages.¹⁴⁴ Ms Barney said Western hearing assessments are culturally unsafe for First Nations people.¹⁴⁵ She also observed that some First Nations people may be reluctant to be tested for hearing loss because it has been normalised in their family and is not seen as something to be addressed.¹⁴⁶

Ms Barney explained some of the dangers she observes for people who are d/Deaf or hard of hearing in detention environments. In prison, there is a lack of visual information. Consistent with Alen's evidence, she said prisons tend not to convey information visually, which means d/Deaf prisoners often do not know what is happening. This can be a frightening experience.¹⁴⁷

Ms Barney also said people who cannot hear well may be bullied by other inmates or blamed for problems that occur.¹⁴⁸ They may be labelled as ‘stupid’ or ‘mischievous’ and targeted for that reason.¹⁴⁹ She said that d/Deaf and hard of hearing women in detention may be more ‘visually reactive’. For example, they may have strong verbal outbursts which may be interpreted as aggressive and result in punishment.¹⁵⁰

Quantitative and qualitative evidence suggests that hearing impairment among First Nations people is associated with a higher likelihood of contact with the criminal justice system. For example, a 2012 study found that 94 per cent of a sample of 134 Aboriginal inmates in Northern Territory correctional centres suffered from significant hearing loss.¹⁵¹ In 2015, the Law Council of Australia reported there may be a link between the prevalence of hearing impairment in particular remote First Nations communities and an increased likelihood of contact with the criminal justice system.¹⁵² In 2010, the Senate Community Affairs References Committee was satisfied that the case had been made that there is ‘likely to be a link between hearing impairment [in First Nations people] and higher levels of engagement with the criminal justice system’.¹⁵³ The factors linking hearing impairment with increased likelihood of contact with the criminal justice system were identified as poor educational outcomes, impaired language development and the stigmatising effects of hearing impairment on social skills.¹⁵⁴

In 2022, the State Coroner of New South Wales identified systemic failures within the New South Wales custodial health system to recognise and provide appropriate care for the ear and hearing issues experienced by First Nations man, Mootijah Shillingsworth.¹⁵⁵

Mootijah was in custody awaiting sentence when he died from complications stemming from inadequate treatment of otitis media (middle ear infection). He had been in custody on 13 occasions between 1997 and 2017. The State Coroner received expert evidence about the association between hearing loss and frequent contact with the justice system by First Nations people.¹⁵⁶ The Coroner adopted the observation of counsel assisting that:

It is reasonable to assume the costs of medical treatment of this condition in later life, by which time the physical and psychological damage caused has become entrenched, along with the costs associated with persons coming into increasing contact with police, courts and custodial environments, would outstrip that required to fund appropriate early intervention.¹⁵⁷

These reports reinforce Ms Barney’s evidence about the importance of meeting the needs of First Nations people who are d/Deaf and hard of hearing. Non-Indigenous prisoners who are d/Deaf or hard of hearing face similar issues requiring remedial actions.

Security and lack of disability knowledge

The focus on security in custodial settings means the experience of custody can be significantly more severe for people with disability than for prisoners who do not have a disability. One obvious issue is that people with disability do not understand, or appear to respond inappropriately, to custodial staff by reason of their disability, whether it be a cognitive disability, hearing impairment or other disability.

In some circumstances, challenging behaviour is perceived as resistance and is met with a punitive response to maintain order within the correctional environment – for example, prolonged isolation and being denied access to basic activities.¹⁵⁸

Witnesses gave evidence at Public hearing 27 that the training custodial staff do receive about disability is inadequate.¹⁵⁹ In Western Australia, correctional staff generally receive a small component of disability and mental health training, with ad hoc refresher courses. Witnesses said custodial staff fail to recognise behaviour associated with disability and may misinterpret it as defiance, disobedience, or acting out. As a result, their responses can be punitive instead of supportive of the person with disability. These responses can reinforce behaviour that staff interpret as non-compliant.¹⁶⁰

A critical question is whether corrective services and youth justice agencies have the time, training and tools to effectively identify people with disability and their support needs when they enter prison. It is apparent, as outlined in Chapter 5 ‘Screening, assessing and identifying disability in custody’, that prisons and detention centres around Australia are not consistently assessing prisoners or detainees to determine whether they have a disability and, if so, the nature of that disability. The absence of an assessment makes it impossible for custodial staff to identify the people in custody who require support. This has serious repercussions because staff fail to appreciate that certain behaviour a person with disability exhibits may be a function of their disability.

We heard evidence in Public hearing 27 that some gaps in support are being met by non-government organisations which provide support to people with disability in prison or detention. For example, Gallawah is a First Nations run, disability service provider based in Victoria. At the time of Public hearing 27, it had 60 staff and provided services to 200 clients, 40 of whom were in prison, 20 were on community corrections orders and 4 were in juvenile detention. Approximately 90 per cent of Gallawah’s clients were First Nations people.¹⁶¹ Through its support coordination, Gallawah seeks to address gaps in a range of areas in custody, including cultural safety for First Nations people, inadequate disability screening and assessment, medical and disability supports, programs and education opportunities. It arranges for Elders and First Nations community members to go into prisons to assist and support participants with the transition from custody to the community upon release.¹⁶²

We also heard evidence from Ms Megan Krakouer, Director of the National Suicide Prevention and Trauma Project, about the support provided to prisoners at Acacia Prison and children at Banksia Hill Detention Centre in Western Australia as part of the project.¹⁶³ Following the death of three First Nations men in Acacia Prison, Ms Krakouer and her colleague Mr Gerry Georgatos were contracted to provide services to male prisoners with the aim of reducing the rates of self-harm between October 2020 and June 2021.¹⁶⁴ Working on a full-time basis at that facility for eight months, they assisted hundreds of men by providing a range of services embedded in culturally safe practices including one-on-one counselling. They also helped create post-release safety plans for the men to aid their transition to the community.¹⁶⁵

In February 2020, the National Suicide Prevention and Trauma Project was granted one-off funding to deliver an eight-week support program to girls at Banksia Hill Detention Centre.¹⁶⁶

The majority of the girls in the program were living with FASD, or cognitive impairment and had experienced trauma.¹⁶⁷ Ms Krakouer gave evidence that the work of the program included writing background reports to the Children’s Court about individual detainees to support release applications. In addition, the project connected girls to housing options and developed safety plans for their release from detention.¹⁶⁸

We also heard evidence from Ms Debbie Kilroy OAM, Chief Executive Officer of Sisters Inside Inc about its culturally-informed bail program for girls, the Yangah Program.¹⁶⁹ The Yangah Program seeks to improve the likelihood of a successful bail application by ensuring the girls have access to safe, secure accommodation, community-based services, legal representation and individual and family support. Ms Kilroy said the girls who have participated in that program have not been re-criminalised nor re-entered the youth detention centre. Sisters Inside also provides counselling and support in women’s prisons in Queensland and offers support after release.¹⁷⁰

2.4. Conclusion and recommendations

State and territory governments should uphold the rights of people with disability who are in custody. Consistent with article 14 of the *CRPD*, all corrective service and youth justice agencies should provide people with disability the disability supports they need while in custody.

The Australian Government’s implementation of *OPCAT* heightens the obligation to ensure that people with disability deprived of their liberty are protected from cruel, inhuman or degrading treatment or punishment, and from torture.

Each jurisdiction will nominate its own body to monitor compliance with *OPCAT* in places of detention. This may include bodies such as the Ombudsman or the Inspector of Custodial Services in each particular state or territory.

The standards set by *OPCAT* are not merely aspirational goals. They set out obligations that have practical implications for the way government agencies treat people in custody. It is clearly important that each NPM has the requisite expertise to identify the needs of vulnerable cohorts of prisoners and detainees, particularly people with disability, and to adopt processes for preventing ill treatment of people with disability. To gain this expertise, it is essential that each NPM body engages with disability organisations to obtain disability awareness training and education for their staff, and that this training and education, rather than being a one off, is an ongoing investment by the NPM body.

In undertaking their functions, it will also be important for NPMs to have effective mechanisms to seek the views of prisoners and detainees with disability themselves. They should do so by directly engaging with prisoners and detainees with disability about their experience of custody.

Accordingly, we recommend the Australian Government, in consultation with state and territory governments, should support the development of a human rights education and training strategy including disability awareness training for NPMs, detention authorities and their staff.

Recommendation 8.1 Conditions in custody for people with disability

State and territory governments should uphold the rights of people with disability who are in custody. Consistent with article 14 of the *Convention on the Rights of Persons with Disabilities*, all corrective service and youth justice agencies should provide people with disability with the disability supports they require to place them in the same position, so far as feasible, as other people in custody.

Recommendation 8.2 Disability awareness in *OPCAT* monitoring

In implementing the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the Australian Government, in consultation with the state and territory governments, should support the development of a human rights education and training strategy that includes disability awareness training for National Preventive Mechanisms (NPMs), detention authorities and their staff. NPMs should:

- engage with disability organisations about the needs of people with disability in places of detention
- obtain training and education for their staff on the types of disability and needs of people with disability in places of detention, including the impact of intersectional disadvantage
- obtain the views of people with disability in places of detention by directly engaging with them about their experiences in places of detention
- have effective mechanisms for obtaining the views of people with disability in places of detention.

Endnotes

- 1 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).
- 2 *Convention on the Rights of the Child*, opened for signature 20 November 1987, 1577 UNTS 3 (entered into force 2 September 1990).
- 3 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- 4 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
- 5 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020.
- 6 Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: An assessment of Australia's level of compliance*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2020, pp 65–82.
- 7 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 13.
- 8 Office of the United Nations High Commissioner for Human Rights, *Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities*, 37th sess, A/HRC/37/25, Agenda items 2, 3, (7 March 2018); United Nations General Assembly, *Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, 44th sess, A/HRC/44/1 3 (27 December 2017).
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3. Youth detention

Key points

- Children with disability are over-represented in youth detention. While in youth detention, they are exposed to substantial risks of violence, abuse and neglect.
- Detention settings are characterised by strict discipline and rules. This exacerbates the vulnerabilities of children with disability who often lack access to therapeutic support and trauma-informed care.
- There is no comprehensive national source of data about the number of children with disability in youth detention. However, the available data indicates that a significant majority of children in youth detention have one or more disability.
- Isolation amounting to solitary confinement is over-used in youth detention centres. It has not been used only as a last resort.
- State and territory youth justice legislation should be amended to prohibit the use or practice of solitary confinement (defined as isolation for a period of 22 hours or more per day) and to define the safeguards governing isolation or seclusion of children with disability.
- Youth justice agencies and their staff need to be better informed about the impact of detention and isolation on children with disability and the needs of children with disabilities who are placed in isolation.

3.1. Introduction

This chapter focuses on youth detention and our inquiry into the Banksia Hill Detention Centre in Western Australia (Banksia Hill) where a high proportion of detainees have intellectual disability or cognitive impairment.¹ Banksia Hill houses remand and sentenced detainees, male and female, aged from 10 to 18.²

Children with disability are over-represented in youth detention.³ While in youth detention, they are exposed to substantial risks of violence, abuse and neglect.⁴ Children who offend are themselves significantly more likely to have experienced previous trauma and adversity compared to children who do not offend.⁵ Detention settings are characterised by strict discipline and rules. This exacerbates the vulnerabilities of children with disability who often lack access to therapeutic support and trauma-informed care. The children necessarily rely on custodial staff to satisfy their needs, including those associated with any impairments they may have.

We inquired into the treatment of children in detention at Banksia Hill. For many years Banksia Hill has faced allegations of frequent lockdowns and solitary confinement of detainees. Several periods of unrest involving property damage, self-harm and staff assaults have been reported in the media. In 2022, multiple voices familiar with the criminal justice system strongly criticised the conditions of detention at Banksia Hill for children with disability. However, the problems are longstanding.

Inspector of Custodial Services

Since at least 2013, in reports to the Western Australian Parliament, the Inspector of Custodial Services of Western Australia, Mr Eamon Ryan, and his predecessor, have drawn attention to the use of inappropriate confinement practices at Banksia Hill.⁶ The Inspector has repeatedly recommended that the Department of Justice introduce an operational philosophy based on rehabilitation and a trauma-informed approach to the treatment of children in detention. In March 2022, the Inspector published a report in which he stated that Banksia Hill is no longer fit for purpose as a youth detention centre.⁷

In the March 2022 report, Mr Ryan described the treatment of detainees in solitary confinement and as cruel, inhuman or degrading. Detainees were often locked in their cells for most of the day, preventing meaningful social interaction with peers and staff. Due to staff shortages, detainees faced long periods of time alone in cells that were often in a poor state. This typically led detainees to act out and, increasingly, they were self-harming.⁸ Mr Ryan concluded that the human rights of detainees were being breached by not providing them with the minimum time out of their cell, as required by legislation. The Inspector noted that many of the young people had significant impairments, traumatic backgrounds and diagnosed complex neurological disorders.

Court judgments

Several court judgments in 2022 reflected these concerns about detainees held at Banksia Hill. On 10 February 2022, when sentencing a young person, the President of the Children's Court of Western Australia commented that Banksia Hill was 'dehumanising'.⁹ For 33 days, including five over Christmas 2021, the 15-year-old boy who was being sentenced had been given no time out of his cell. Judge Quail described this as solitary confinement. He said the boy's experience of detention had been one of prolonged systematic dehumanisation and deprivation with no rehabilitative element or effect.¹⁰ The conditions of his detention had not met the bare minimum standards that the law required. As the judgment records, the child has fetal alcohol spectrum disorder (FASD), anxiety disorder, post-traumatic stress disorder (PTSD), attention deficit hyperactivity disorder (ADHD), and a history of childhood trauma.

On 25 August 2022 the Supreme Court of Western Australia made a declaration that the confinement of a 14 to 15-year-old boy, VYZ, on 27 separate days between 20 January and 19 July 2022 while he was on remand at Banksia Hill, was unlawful.¹¹ VYZ had been locked in his cell for periods of more than 20 hours and, on some days, for 23 to 24 hours. He was not detained for any disciplinary reason and the lockdowns amounted to solitary confinement.

Justice Tottle found the repeated use of lockdowns was primarily because of chronic staff shortages and that the potential harm to detainees was considerable and may affect their lives for years to come.¹²

The defendants in the case were the Superintendent of Banksia Hill and the Chief Executive Officer of the Department of Justice. They strongly resisted the making of the declaration of unlawfulness. The judgment stated that the defendants' arguments were 'to be deprecated in the strongest terms' if they suggested that the lockdowns would continue.¹³

Past reports, inquiries and court judgments show that the practice of locking children in their cells for 22 or more hours a day has been used in most state and territory youth detention centres. We address this in Section 3.5 below.

Issues to be addressed

Witnesses in Public hearing 27, 'Conditions in detention in the criminal justice system', identified issues needing to be addressed, primarily with reference to Banksia Hill:

- Children admitted to custody are not routinely assessed for cognitive disability. The screening for disability relies too heavily on children reporting their own disability and disability needs.
- Isolation is used excessively as a mechanism for behavioural management.
- Lockdowns of the detention centre are imposed excessively because of staff shortages, leading to the isolation and solitary confinement of children.
- Children do not receive adequate or consistent access to education or mental health care in detention.
- Custodial staff need more training to enable them to respond appropriately to the behaviours and needs of children with disability.
- There is a need for trauma-informed practices and more cultural support for First Nations children in detention, many of whom have cognitive disabilities.

We make recommendations in this volume to address these issues.

3.2. Children with disability in youth detention

Youth detention is intended to provide a secure environment for the detention and rehabilitation of children accused or convicted of criminal offending. State and territory governments owe children in youth detention a duty of care that includes protecting them against violence, abuse, neglect and exploitation.¹⁴

Children in youth detention have complex needs and are likely to have suffered multiple traumas, such as childhood abuse and neglect, socioeconomic disadvantage, family violence, and educational exclusion.¹⁵

The *Convention on the Rights of the Child (CRC)* states that detention of children should be a last resort.¹⁶ State and territory legislation also states that young people should be detained only as a last resort and for the shortest appropriate period.¹⁷ For example, section 120(1) of the *Young Offenders Act 1994 (WA)* provides that '[t]he court cannot impose any custodial sentence unless it is satisfied that there is no other appropriate way for it to dispose of the matter'.

Children aged 10 to 17 years can be legally detained, but some states and territories are moving to raise the minimum age of criminal responsibility. The Northern Territory has passed legislation to raise the minimum age to 12 years. The Australian Capital Territory and Victoria have committed to raising the age to 14 years, while Tasmania has committed to raising the age of criminal detention from 10 to 14 years.¹⁸ On an average night in the 2022 June quarter, there were 709 children aged 10 to 17 in juvenile detention in Australia.¹⁹

As we noted in Chapter 1, 'People with disability in the criminal justice system', First Nations children made up 61 per cent of all those aged 10 to 17 in detention on an average night in the 2022 June quarter.²⁰ In Western Australia, on an average night in the 2022 June quarter, around 80 per cent of detainees aged 10 to 17 years were First Nations children.²¹

While the proportion of all children in youth detention has decreased in recent years, there is no evidence that the proportion of children with cognitive disability in detention has decreased.²² This is of particular significance to our inquiry.

We heard many children who are on remand or sentenced to a period in detention cycle in and out of contact with the criminal justice system.²³ We heard about the importance of specific prevention measures, including early intervention, supportive programs and diversionary justice programs to ensure that children with cognitive disability are not involved with the criminal justice system in the first place.²⁴ We deal with these issues in other chapters in this volume and in Volume 9, *First Nations people with disability*.

Lack of data

There is no comprehensive national source of data about the number of children with disability in youth detention. In the next section we set out a snapshot of available data about youth detention, drawn from administrative datasets and research studies.

The Australian Institute for Health and Welfare (AIHW) annual reports on youth detention do not provide any information on the disability status of detainees.²⁵ The most recent report, *Youth detention population in Australia 2022*, draws together data supplied to the AIHW by all state and territory government departments responsible for youth justice. The information is extracted from their administrative systems and covers children supervised in the community or in detention. While the data includes detainees' sex, date of birth, postcode, Indigenous status and court orders, no disability indicators are collected.

In preparation for Public hearing 27, we asked state and territory youth justice agencies about the data they collect on children with disability who enter detention. Most jurisdictions do not

routinely collect data on the disability status of children in custody, as we discuss in Chapter 7, 'Data collection by criminal justice systems on people with disability'.²⁶ However, in all states and territories, if a child's disability is known at the time of admission or diagnosed during their time in custody, there is a system for recording information about the child's disability.

States and territories use different ways of categorising disability and have different information systems to record relevant data. In their responses to the Royal Commission, state and territory agencies acknowledged their information systems do not enable them to readily extract information about the types and prevalence of disability in their adult and youth prisoner populations.²⁷ Further, some detainees may have undiagnosed disabilities and, therefore, have no disability recorded.

This lack of data points to a limited systemic capacity to understand and provide for the needs of children in detention who have a diagnosed or undiagnosed disability. It limits governments' ability to respond appropriately to the disability needs of children in detention. We address data collection issues in more detail in Chapter 7.

Data on children with disability in youth detention

The available data indicates that a significant majority of children in youth detention have one or more disability.²⁸

We included and discussed relevant data in Chapter 1 of this volume. We referred to the study at Banksia Hill showing that 89 per cent of young people in youth detention between May 2015 and December 2016 had at least one domain of severe neurodevelopmental impairment and 36 per cent had FASD.²⁹ Severe impairment in memory, motor skills and cognition were commonly found in the young people with FASD and also seen among those without a FASD diagnosis, but at lower levels.³⁰ The study reveals that the majority of those with FASD had not been previously identified as having FASD.³¹ The authors said this demonstrated a significant need for improved diagnosis.

As at June 2022, First Nations young people represented over 51 per cent of the juvenile custodial population in New South Wales.³² The most recent survey of young people in custody in New South Wales found that around 24 per cent of First Nations young people in custody have an intellectual disability.³³ Notably, young people with severe cognitive impairment or severe intellectual disability were excluded from the survey due to lack of consent.³⁴

One quarter (25 per cent) of participants in that survey reported having had a head injury with loss of consciousness. Of these, almost 22 per cent reported that medical tests or scans had confirmed they had a resultant brain injury.³⁵ Notably, the survey showed that the level of disability and its impact on young people was significantly higher than indicated by self-report, suggesting that young people in custody were under-reporting the level and impact of their disability.³⁶

In Queensland, an annual *Youth Justice Census* records that, of the children in youth detention centres or police watch-houses in 2022:³⁷

- 12 per cent had diagnosed or suspected FASD
- 26 per cent had diagnosed or suspected cognitive or intellectual disability
- 27 per cent had at least one diagnosed or suspected mental health disorder
- 68 per cent of detainees were First Nations people.

Those figures are broadly consistent with the data in the *Independent Review of Youth Detention Report (Queensland)* published in 2016.³⁸

In Victoria, a survey of 167 males and nine females in youth detention in 2017 found that 24 per cent presented with issues concerning their intellectual functioning.³⁹

A South Australian sample of detainees found that nine out of 10 young people had disability-related needs.⁴⁰

The *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Northern Territory Royal Commission) *Interim Report* said:

many children and young people enter detention with serious cognitive disabilities, mental illness, addiction to nicotine, alcohol and other drugs as well as physical deficits such as poor hearing and sight, and, in some cases, also functional illiteracy.⁴¹

The Northern Territory Royal Commission collected data on the prevalence of a range of conditions in youth detention and commissioned multidisciplinary assessments of 16 children who gave evidence. It found:

- 56 per cent of those children had FASD
- 31 per cent had some form of brain injury
- 56 per cent had a history of self-harm/suicidal ideation.⁴²

The Northern Territory Royal Commission found that adequate health assessments and FASD screening were not undertaken and that custodial staff did not have adequate training to respond to detainees in a trauma-informed manner.⁴³

National Disability Data Asset pilot

The National Disability Data Asset pilot has resulted in more recent data about the disability status of children in detention.

A Justice Test Case used linked Australian Government and state government data collections to examine the proportion of people with disability in New South Wales who offend and the proportion of offenders who have disability.⁴⁴ Young offenders and adult offenders were reported on separately.

The Justice Test Case revealed that young people with disability were over-represented in the youth justice system. Between 1 January 2009 and 31 December 2018, more than two in five young people and around one in two adults with sentenced custodial episodes in New South Wales had disability.⁴⁵ Around half the young offenders with disability (just over 51 per cent) had cognitive disability. Almost 70 per cent of young offenders with disability had psychosocial disability. Particularly high rates of cognitive disability were reported among First Nations children in detention. Almost one in four First Nations children are likely to have an intellectual disability compared with one in 12 non-Indigenous children.⁴⁶

Factors such as a later age of initial engagement with disability-related services, greater remoteness of residence and frequency of contact with the child protection system were found to be strongly associated with the likelihood of a young person with disability having criminal justice contact before the age of 18.⁴⁷

3.3. Experience of children with disability at Banksia Hill Detention Centre

At Public hearing 27 we heard evidence from ‘Nathan’, a Noongar man from Western Australia.⁴⁸ Nathan told us he was first detained at Banksia Hill in 2012 at 12 years of age. He was detained over 10 times until late 2017. He described experiencing lockdowns ‘over and over’ and a lack of access to fresh air and sunlight. He said on some days he was let out of his cell for 20 minutes or not at all. He said officers told him, ‘you’re a bad kid’.⁴⁹

Lockdowns and isolation

On 4 May 2017, Nathan was involved in incidents which caused damage to D-wing in Urquhart Unit at Banksia Hill. Leading up to the incidents, there were lockdowns ‘all day over and over’. He was told this was because there was not enough staff. Nathan received no education during the rolling lockdowns. Nathan said he was not given any coping strategies. He was ‘just a kid locked in a cell on his own’ and stuck with his own thoughts. He said his time in Banksia Hill took him to a dark place and ruined his life and, for the first time in his life, he had wanted to kill himself.⁵⁰

After the May 2017 incidents, Nathan had no bedding and had to sleep on the floor naked, as his clothes were also taken from him. He was not able to shower for a week and the electricity and water were turned off for long periods.⁵¹

Nathan described an incident when an officer stood in front him when he was trying to get out of the shower. He hit the guard, who then hit him back, causing him to fall over. Other officers came and ‘folded him up’ and held a boot on his face for five minutes. He was handcuffed. He said officers hit and kicked him, causing black eyes and lumps on his back, ribs and head. He asked to have photographs taken of the injuries but his request was refused. He said he was strip searched every day after the incidents.⁵²

He does not remember having any assessments but was told by mental health staff that he had depression and anxiety. He already knew he had ADHD. He said First Nations officers were present but his culture was not acknowledged. The First Nations officers watched things happen, and this hurt him the most.⁵³

'Jasmin' gave evidence about her son 'Maison's' experience as a detainee at Banksia Hill.⁵⁴ Following riots at Banksia Hill on 4 May 2017, Maison was placed in the Harding Unit – an isolation unit that became the Intensive Support Unit (ISU). He spent 406 days in the ISU. Jasmin said this was highly distressing and 'ruined' Maison.⁵⁵

We did not investigate Nathan or Jasmin's accounts by interviewing other witnesses, but their evidence is consistent with the evidence about the lockdowns at Banksia Hill, including the Inspector of Custodial Services reports considered earlier.

Concerns raised

The Inspector's March 2022 report analysed individual detainees' out-of-cell time and found periods when detainees had less than two hours out-of-cell time per day. One example is a detainee who spent 15 out of 27 days in the ISU in November 2021 with fewer than two daytime hours out of their cell. This included one period of five continuous days and a second period of six continuous days in their cell.⁵⁶ The Inspector concluded there were numerous breaches of the United Nations *Standard Minimum Rules for the Treatment of Prisoners*, also known as the *Nelson Mandela Rules*.⁵⁷ The Rules stipulate that solitary confinement refers to confinement for 22 or more hours a day without meaningful human contact.

The findings were so concerning the Inspector issued a show cause notice to the Department of Justice. This was because he suspected there was a serious risk to the care or welfare of detainees in the ISU at Banksia Hill and that detainees were being subjected to cruel, inhuman or degrading treatment.⁵⁸ After that report, there was a further period of unrest at Banksia Hill when some detainees breached their cells and caused property damage.

In July 2022, the Department of Justice transferred 17 detainees to a unit on the grounds of the adult Casuarina Prison (Unit 18), which the Minister for Corrective Services declared a 'young offenders detention centre' by order made under the *Young Offenders Act 1994 (WA)*.⁵⁹ According to an announcement made at the time by the Director-General, Dr Adam Tomison, this action was taken because of 'destruction of living quarters and infrastructure and threats and attacks on staff' by 'disruptive detainees'.⁶⁰

We received evidence in Public hearing 27 that the detainees transferred to Unit 18 had high levels of trauma and that some had disability.⁶¹ The Deputy Superintendent, Dr Angela Cooney, gave evidence that recommendations were made to the staff on adjusting their approach to support detainees' needs. Dr Cooney agreed that the time detainees spent locked in their cells affected their behaviour.⁶² Dr Cooney said boredom and lack of engagement in activities was also a significant factor in the unrest which occurred.⁶³

Mr Peter Collins, Director of Legal Services of Aboriginal Legal Service Western Australia (ALSWA), Ms Alice Barter, Managing Lawyer of ALSWA's Civil Law and Human Rights Unit and Ms Sasha Greenoff, Diversion Officer in ALSWA's Youth Engagement Program gave evidence in Public hearing 27 about their clients in Banksia Hill and Unit 18.

Ms Barter said that, after the Supreme Court's decision in VYZ (and the Inspector's March 2022 report) rolling lockdowns continued at Banksia Hill and Unit 18 due to staff shortages.⁶⁴ Clients reported high rates of self-harm and distress about being locked in their cells for long periods.⁶⁵

The ALSWA witnesses said they were deeply concerned the trauma detainees have experienced during their lives is compounded, and their development and mental health are significantly impacted, by the excessive lockdowns. They said some young people who have spent time in the ISU reported seeing other people in their cells distressed or self-harming. The capacity of young people with disability to deal with lockdowns is limited given that many of them have FASD or other neurodevelopmental language disorders.⁶⁶

The ALSWA witnesses said the physical conditions in cells also has a detrimental impact on children with sensory sensitivities and cognitive impairments. Children become 'dysregulated' in their cells. We were told the cells can be dirty and damaged, lack fresh air and expose children to harsh light. We were also told that the cells are sometimes very cold or very hot and lack soft sensory furnishings to help children calm down.⁶⁷

Mr Collins gave evidence that he was unable to have confidential communications with his clients at Unit 18. Guards, other inmates and lawyers were present during legal visits in the same space at the same time.⁶⁸ A transcript of proceedings before the Children's Court in November 2022 shows legal representatives were not given access to their clients at Unit 18.⁶⁹ The Court issued a directive that detainees in Unit 18 be brought to court to facilitate access to their lawyers.⁷⁰

Mr Collins also told us of an ALSWA client in Unit 18 who had not been given any school education while in detention.⁷¹ This evidence about lack of education opportunities is reflected in the sentencing remarks of the Children's Court of Western Australia which were provided to us. The sentencing remarks record instances when detainees received no or very limited education over lengthy periods in detention.

Children's Court judgments

We were provided with numerous sentencing remarks of the Children's Court of Western Australia delivered between 10 February 2022 and 3 November 2022. These relate to children with disability and complex needs, including FASD, intellectual disability and language disorders, held at Banksia Hill. They demonstrate that lockdowns continued after the transfer of detainees to Unit 18, regularly exceeding 22 hours per day.

The Children's Court judgments record:⁷²

- detainees were deprived of sunlight, some for several weeks
- education was not provided due to 'operational matters', with the Court finding that it was not due to detainees' behaviour
- when brought out of their cells, detainees were escorted and some were shackled
- at Unit 18, there are no school facilities, no health or psychological support facilities, no program facilities and no ability to provide for a woodwork shop or any program which requires space or dedicated equipment
- there was no interaction between detainees, who even had meals in their cells
- no intensive support was offered, despite the department's statements to the court about the purpose of Unit 18
- in cases where no confinement orders or detention offence charges were in place for a detainee, the Department was 'deliberately flouting the law' in confining the detainee.

One detainee had no education or recreation activities during their 96 days in custody. Another detainee had a total of 30 hours of education over seven months.⁷³ He 'had exceedingly limited opportunities to engage in education due to ongoing operational matters that have precluded him from accessing school'.⁷⁴ This had 'nothing to do with his behaviour in the centre' and continued after he was placed in Unit 18. He had been locked in his cell for at least 30 days, and for more than 20 hours per day, since 21 July 2022. On one day the lockdown lasted the full 24 hours. Between 1 and 5 August 2022 he had five continuous days of being locked in his cell. He experienced an additional three consecutive days of lockdown in August 2022. The court said this was 'harsh and unusual punishment of a completely arbitrary nature' and '[h]is experience of detention continues to be traumatic, and is leading to episodes of self-harm'.⁷⁵

The circumstances of detention described in that court judgment were not exceptional in that similar descriptions were contained in other judgments. The extent of lockdowns experienced by detainees, as reported by the Children's Court, is also consistent with the individual cases reported by the Inspector in his reports.

The events described above are not new. For many years the Inspector and human rights bodies have expressed similar concerns in multiple reports.⁷⁶ ALSWA has made numerous complaints to the Western Australian Minister for Corrective Services, the Department of Justice and other relevant government agencies about the treatment of children in youth detention in Western Australia.

3.4. The use of isolation and seclusion

The power to confine children in their cells

The law in Western Australia does not empower custodial officers to keep detainees in their cells in a state of solitary confinement all day or almost all day.

The *Young Offenders Act 1994 (WA)*, specifies only two circumstances in which detainees can be confined. An order can be made under the Act for:

- confinement when ‘hearing and determining a charge that a detainee has committed a detention offence’⁷⁷ (detention offence confinement)
- confinement for the ‘good government, good order or security of the detention centre’.⁷⁸

Detention offence confinement

Detention offence confinement may be ordered by a superintendent or a visiting justice as a way of dealing with a detainee who has been found to have committed a ‘detention offence’.⁷⁹ The period of confinement must not exceed 24 hours if the order is made by the superintendent or 48 hours if the order is made by a visiting justice.⁸⁰

The *Young Offenders Act 1994 (WA)* provides that a detainee confined for a detention offence is entitled to fresh air, exercise and staff company for a period of at least 30 minutes every three hours during ‘unlock hours’.⁸¹ This expression refers to the period during which detainees who are not subject to confinement or restraint are able to leave their sleeping quarters.⁸²

The law of Western Australia contrasts with the law in Victoria which prohibits confinement or isolation as a form of punishment or discipline.⁸³

The state’s Department of Justice does not rely on detention offence confinement to justify lockdowns.⁸⁴ On 3 November 2022, the President of the Children’s Court said that the Court could find no record since November 2020 of any detainee having been charged with a detention offence, given that those charges are required to be referred to the Court.⁸⁵

Confinement to maintain good government, good order or security

The superintendent also has power to order that a detainee be confined to their sleeping quarters or to a designated room, for a period not exceeding 24 hours, to maintain good government, order or security of the detention centre.⁸⁶

A detainee whose confinement is for 12 hours or longer is entitled to at least one hour of exercise every six hours during unlock hours.⁸⁷

The department treats this as entitling detainees to one hour out-of-cell per day, as the normal ‘unlock hours’ are 11 hours and 15 minutes.⁸⁸ During those hours, detainees who are not subject to a confinement order should be engaged in activities such as education, training, programs, welfare support, socialisation, social and official visits, and recreation.⁸⁹ It follows that, even if the minimum limits under the law are met, detainees can still be held in their cell for 22 or 23 hours per day.

As the Inspector said in his March 2022 report, there can be no doubt that such conditions, especially if prolonged, would be damaging to the health and wellbeing of young people.⁹⁰

Detainees are likely to experience such a long period of isolation as punitive, even if punishment is not the stated purpose of that type of lockdown.

Human rights standards

Australia's international human obligations under the *Convention on the Rights of Persons with Disabilities (CRPD)*, *CRC*, *International Covenant on Civil and Political Rights (ICCPR)* and *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)* are directly relevant to the issues raised in relation to Banksia Hill Detention Centre for children with disability.

With respect to children, article 2 of the *CRC* requires States Parties to ensure that all children within their jurisdiction enjoy all the rights in the *CRC* without discrimination of any kind. This obligation requires States Parties to take appropriate measures to prevent all forms of discrimination, including on the ground of disability.

Further, article 3(1) recognises a child's right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern a child, both in the public and private sphere.⁹¹ The expression 'best interests' is not defined in the *CRC*. However, the Committee on the Rights of the Child (CRC Committee) considers article 3(1) to be one of the fundamental values of the *CRC*.⁹²

In 2013, the CRC Committee *General comment No. 14* on the meaning and application of the 'best interests of the child' principle⁹³ explained the three elements of the principle as follows:⁹⁴

- **A substantive right:** The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered.
- **A fundamental, interpretative legal principle:** If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.
- **A rule of procedure:** Whenever a decision is to be made that will affect a specific child ... the decision-making process must include an evaluation of the possible impact ... of the decision on the child.

The best interests principle is a flexible concept that takes account of the particular circumstances of the child and the context in which particular human rights may be in issue.

Article 37(c) of the *CRC* requires a State party to ensure 'every child deprived of liberty shall be treated with humanity and respect ... and in a manner which takes into account the needs of persons of his or her age'.

Article 40(1) of the *CRC* provides:

States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

For children with disability, article 23 of the *CRC* and *General comment No. 9 (2006) on the rights of children with disabilities*,⁹⁵ specifically sets out a State's obligations to provide assistance and support to children with disability, including the treatment of children who are in conflict with the law as described in article 40 of the *CRC*. The CRC Committee recommended the following elements of the treatment of children with disabilities in conflict with the law be taken into account:

(a) A child with disability who comes in conflict with the law should be interviewed using appropriate languages and otherwise dealt with by professionals such as police officers, attorneys/advocates/social workers, prosecutors and/or judges, who have received proper training in this regard;

(b) Governments should develop and implement alternative measures with a variety and a flexibility that allow for an adjustment of the measure to the individual capacities and abilities of the child in order to avoid the use of judicial proceedings. Children with disabilities in conflict with the law should be dealt with as much as possible without resorting to formal/legal procedures. Such procedures should only be considered when necessary in the interest of public order. In those cases special efforts have to be made to inform the child about the juvenile justice procedure and his or her rights therein;

(c) Children with disabilities in conflict with the law should not be placed in a regular juvenile detention centre by way of pre-trial detention nor by way of a punishment. Deprivation of liberty should only be applied if necessary with a view to providing the child with adequate treatment for addressing his or her problems which have resulted in the commission of a crime and the child should be placed in an institution that has the specially trained staff and other facilities to provide this specific treatment. In making such decisions the competent authority should make sure that the human rights and legal safeguards are fully respected.⁹⁶

The CRC Committee considers the *CRC* requires States Parties to develop and implement a comprehensive juvenile justice policy.⁹⁷ As addressed in Chapter 2, 'The right to humane treatment in criminal justice settings', the *ICCPR* sets out the right of persons deprived of their liberty to be treated with humanity and respect for their inherent dignity.⁹⁸

The CRC Committee has said a comprehensive juvenile justice policy take into account the rights in the *CRC* but promote the integration of other international standards including the United Nations *Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)*.⁹⁹

It is beyond the scope of this chapter to address all the relevant international standards in relation to the treatment of people in detention. However, the following are of particular relevance:

- The *Havana Rules* state that the solitary confinement of juveniles constitutes cruel, inhuman or degrading treatment and is strictly prohibited.¹⁰⁰
- The *United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)* apply to all prisoners (not only children) and define solitary confinement as the confinement of prisoners for 22 hours or more a day without meaningful human contact (Rule 44). ‘Prolonged solitary confinement’ refers to solitary confinement for a period in excess of 15 consecutive days (Rule 44).¹⁰¹
- The *Nelson Mandela Rules* prohibit the use of solitary confinement for any person with mental or physical disabilities if that confinement would exacerbate their conditions.¹⁰² They reiterate the strict prohibition on the use of solitary confinement for children.¹⁰³

On the available evidence, Western Australian law does not comply with the standards in the *Nelson Mandela Rules* because it allows for just one hour out-of-cell for detainees and does not prohibit the use of solitary confinement. As the Inspector said in his March 2022 report, the *Nelson Mandela Rules* provide clear moral guidelines for the treatment of prisoners and detainees in custodial settings.

The rights set out above are premised on a recognition that the prolonged confinement of children may be harmful.

Torture, cruel, inhuman and degrading treatment

In Chapter 2 we addressed the prohibition on torture or cruel, inhuman or degrading treatment or punishment. No child or young person should be subjected to torture or cruel, inhuman or degrading treatment or punishment.¹⁰⁴

In 2011, the United Nations *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* warned that even a few days of solitary confinement can induce harmful and abnormal neurological and emotional symptoms. It also said that the health risks rise each additional day.¹⁰⁵ The Special Rapporteur called for a complete ban on its use for juveniles and people with ‘mental disabilities’.

In 2015, the Special Rapporteur called upon States Parties to ‘prohibit solitary confinement of any duration and for any purpose’ of children deprived of their liberty.¹⁰⁶

In 2019, in its *Concluding Observations on the combined second and third periodic reports of Australia*, the Committee on the Rights of Persons with Disabilities (CRPD Committee) expressed concerns about:

1. the over-representation of convicted young persons with disability in the youth justice system, especially male youth from First Nations communities¹⁰⁷

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2. the lack of culturally suitable support for First Nations children with disability and their families¹⁰⁸
 3. a substantial number of persons with disability expressing suicidal ideation, particularly within First Nations communities, due to, among other things, lack of support, poverty and isolation¹⁰⁹
 4. the reported abuse of young First Nations persons with disability by fellow prisoners and prison staff, the use of prolonged solitary confinement, particularly of persons with intellectual or psychosocial disabilities, and the lack of safe and accessible channels for making complaints.¹¹⁰

In December 2022, the Committee against Torture, which monitors CAT, said it had serious concerns about the practice of keeping children in solitary confinement at Banksia Hill in Western Australia, the Ashley Youth Detention Centre in Tasmania and Don Dale Detention Centre in the Northern Territory.¹¹¹

It said the practice of keeping children in solitary confinement contravened the CAT and the *Nelson Mandela Rules*. It expressed serious concern about the persistent over-representation of First Nations children and children with disability in the juvenile justice system.¹¹²

Response of the Western Australian Government

In Public hearing 27 we sought the response of the Western Australian Government to the issues at Banksia Hill. The following government witnesses gave evidence:

- Dr Adam Tomison, Director-General, WA Department of Justice
- Mr Mike Reynolds, Commissioner for Corrective Services, WA Department of Justice
- Mr Wade Reid, Superintendent of Banksia Hill Detention Centre
- Dr Angela Cooney, Deputy Superintendent Rehabilitation and Reintegration, WA Department of Justice
- Dr Joy Rowland, Director Medical Services, Corrective Services.

Dr Tomison gave evidence that, between January and March 2022, Banksia Hill was in a state of emergency.¹¹³ He said critical incidents were occurring each day or every other day: detainees were self-harming, causing damage to cells, escaping from cells and assaulting staff.¹¹⁴ There was a significant increase in incidents from September 2021 and the state of emergency was 'sustained'.¹¹⁵ The period January to February 2022 resulted in the facility locking down detainees almost continually to allow staff to deal with the incidents and ensure safety.¹¹⁶

Dr Tomison acknowledged the child who was the subject of Judge Quail's remarks in February 2022, discussed earlier in this chapter, was locked down as a result of staff shortages, not to ensure safety or security or for disciplinary reasons. But Dr Tomison emphasised that the main reason for the lockdowns was that the centre could not function adequately because of the behaviour of detainees.¹¹⁷

We do not doubt incidents of the kind to which Dr Tomison referred increased the need for lockdowns. However, Banksia Hill has a consistent history of staff shortages leading to excessive cell lockdowns. In our view, the failure of the department and Corrective Services over many years to adequately staff the detention centre has been an important factor in the decisions to impose rolling lockdowns.

Staff shortages have been a consistent feature at Banksia Hill and a known cause of cell lockdowns over many years. This is recorded in the Inspector's findings since 2013. His reports show:

- The years 2010 to 2012 were marked by staff shortages and excessive lockdowns of children in their cells.¹¹⁸
- In 2013, high levels of staff absenteeism were said to be 'not a recent phenomenon'.¹¹⁹ The Inspector made detailed recommendations in the 2013 report to address staff shortages.¹²⁰
- Staff shortages led to regular rolling lockdowns in 2016.¹²¹ The Inspector's report said lockdowns due to staff shortages were avoidable with appropriate resourcing, planning, and management. The Inspector made recommendations about these issues.¹²²
- Staff shortages continued to cause rolling lockdowns in 2017.¹²³
- In 2018, a restrictive regime at Banksia Hill caused lockdowns due to staff shortages.¹²⁴ The Inspector recommended a regular program of recruitment that accounted for known staff attrition rates. He noted that staff felt unsupported by 'head office and their senior managers'.

In a report in April 2021, the new Inspector, Mr Eamon Ryan, said a regular program of recruitment had not been established. However, the department had run four entry level training programs for Youth Custodial Officers (YCOs) since 2018.¹²⁵ Workers compensation levels remained high, and over 25 per cent of active claims in 2020 were for psychological or stress-related injury.¹²⁶

The Inspector's report in March 2022 records that staffing shortages were again resulting in 'the lack of out of cell time detainees were receiving, which often resulted in legislative requirements not being met'.¹²⁷

In his evidence, Dr Tomison accepted that, in 2022, staffing levels were generally well below what they should have been and there had not been a full complement of staff at different points over previous years.¹²⁸ He did not know when Banksia Hill last had a full complement of staff or what the annual attrition rate was.¹²⁹ We think it is surprising Dr Tomison did not have that information.

Insufficient custodial staff at Banksia Hill

The Commissioner for Corrective Services is ultimately responsible for the management of Banksia Hill.¹³⁰ The Commissioner, Mr Mike Reynolds, said it has been a very difficult facility over the last two years, partly due to low staffing numbers. He said it also has ‘a very difficult cohort of young people’ who exhibit ‘very similar behaviours’ to their behaviours in the community, involving high levels of violence and destruction. He said the infrastructure at Banksia Hill was fit for purpose when built 25 years ago, but has sustained a lot of damage since then.¹³¹

At the time of Public hearing 27 (in September and October 2022), there were 93 children in detention in Western Australia. Ten of those children were in Unit 18. Nearly 80 per cent of Banksia Hill’s population were First Nations children. Superintendent Wade Reid gave evidence that the proportion is often 70 per cent or higher.¹³²

At the time of the hearing, an average of 30 to 35 YCOs were on duty each day.¹³³ A full staffing complement is 65 YCOs per day.¹³⁴ Mr Reid said that, between January and mid-October 2022, 61 new YCOs had been trained but 47 other YCOs had resigned or retired.¹³⁵ Mr Reid said the reason for the transfer of some detainees to Unit 18 was that ‘we could not contain people in their accommodation’.¹³⁶

We heard that the low staffing levels at Banksia Hill are forcing custodial staff to implement rolling lockdowns, resulting in the children being held for 23 hours a day in their cells.

Mr Reynolds gave evidence that, as Commissioner, he has no power to transfer officers from adult prison to Banksia Hill to deal with the low staff numbers.¹³⁷ Corrective Services invites prison officers to volunteer to help at the detention centre, but they cannot work as YCOs unless they have undertaken the training.¹³⁸ Mr Reynolds said that very few prison officers are prepared to do the 12-week training course needed to become a YCO. More YCOs choose to become prison officers due to the different pay and conditions.¹³⁹

Mr Reynolds said that he has made ‘very clear recommendations’ to both the government and the union that Corrective Services should be matching the conditions applicable to officers of adult prisons for YCOs. That discussion has been on foot since he has held the role of Commissioner (March 2022).¹⁴⁰

Mr Reynolds did not agree that children at Banksia Hill are continuing to suffer by not being able to access the entitlements they should receive. He said they are ‘getting out of their cells. They’re getting access to lots of support and programs and education, which has dramatically improved since the opening of Unit 18.’¹⁴¹ He supported the decision to move detainees to the adult prison, although he acknowledged it was an extraordinary measure. He described it as ‘a well-balanced and long thought-out decision of the Director-General’.¹⁴²

After Public hearing 27, the Inspector of Custodial Services carried out inspections of Banksia Hill and Unit 18. In his report dated May 2023, Mr Ryan records that by the time of his inspection in February 2023, there had already been 16 resignations of youth custodial officers in 2023.¹⁴³ The total number of resignations and retirements in 2022 was 50 ‘which undermined the impact of having 83 new recruits commence’. He said the ‘current staffing crisis is the immediate issue’ as it means there are insufficient staff available each day to safely operate Banksia Hill and Unit 18 on a normal routine. He said ‘this has led to increases in lockdowns, critical incidents, staff assaults, significant infrastructure damage and self-harm attempts’.¹⁴⁴

Lockdown not the only option

The history we have recounted shows that Banksia Hill has had low staffing levels at frequent intervals for over 10 years. The Department has known for a long time that staff shortages have been a cause of excessive lockdowns of detainees. Following Public hearing 27, the Western Australian Government did not contest a finding that staff shortages have been a consistent feature at Banksia Hill Detention Centre and a known cause of cell lockdowns since 2013.¹⁴⁵ Nor did it contest a finding that the Department of Justice failed to adequately staff Banksia Hill and that this had been a critical factor in the solitary confinement imposed on detainees during 2021 and 2022.¹⁴⁶

It is a fair inference that the department did not fully implement the Inspector’s recommendations to address staff shortages. Had they been implemented, there was a reasonable chance the lockdowns in 2021 and 2022 would not have been needed and the children would not have been subjected to solitary confinement.

Dr Tomison’s explanation was the excessive lockdowns in 2021 and 2022 happened because the department had ‘no other option’ and that ‘you have to put a young person somewhere safe in the facility you’ve got’.¹⁴⁷ However, this explanation does not give due weight to the history we have outlined.

The department cannot rely on the emergency that presented in 2022 to justify the excessive lockdowns it imposed. The department has known about and tolerated the conditions that led to this situation for many years. Of particular concern is that, if the state government allocated more resources for staffing, it would have had less restrictive options available to it than solitary confinement.

Repeated use of isolation reflects a failure of the Department of Justice and Corrective Service to adequately plan for and resource staffing at Banksia Hill and to effectively understand and address children’s behaviours. Lockdowns and isolation should not be used to overcome the facility’s staffing challenges. These issues are not within the control of the detainees.

We consider it likely that many of the incidents in early 2022, involving detainees damaging and escaping from their cells, were the result of excessive lockdowns in cells, not vice versa.¹⁴⁸ At the very least, excessive lockdowns are likely to have significantly contributed to the unrest that arose from late 2021. In submissions to the Royal Commission, the Western Australian

Government accepted lockdowns ‘were probably one factor that contributed to the conduct of damaging and escaping from cells’, but said the situation was a complex one involving a number of factors, including the staffing issues.¹⁴⁹ In our view, detainee ‘behaviour’ should not be blamed for the continuing lockdowns. The department had ample opportunity to address the problem of staff shortages over many years.

Dr Tomison accepted the Inspector’s show cause notice in December 2021 referred to possible ‘cruel, inhuman or degrading treatment’ in the ISU. But he did not accept that description, preferring to characterise it as ‘not best possible’ treatment and ‘not acceptable’ treatment.¹⁵⁰ His comment that ‘it’s not like we were sitting on our hands trying not to do anything’ did not address the critical questions.¹⁵¹

Dr Tomison did not accept that locking a 14-year-old child with FASD, PTSD and developmental disabilities in a cell for 23 hours a day is cruel and unusual punishment.¹⁵² His response focused on the motivations of the department. He said ‘we didn’t do it to punish the young person’ and it was ‘not great practice’ but he would ‘describe it as what I had to deal with at the time’.¹⁵³ Regarding VYZ, he said he had ‘no other option’.¹⁵⁴ We find that proposition difficult to accept.

Dr Tomison appeared not to accept the Inspector’s opinion, expressed over many years, that a suitable therapeutic environment did not exist at Banksia Hill. He said he did not think Banksia Hill was ‘perfect by any means’ but it was ‘generally okay’ before the troubles in early 2022.¹⁵⁵ He said that risk periods ‘come and go’.¹⁵⁶

Nowhere in Dr Tomison’s evidence did he deplore the treatment of the children at Banksia Hill, the conditions in which they found themselves or the unlawfulness of the practice of confining detainees for long periods. Rather, he preferred to use language such as ‘not ideal’ and ‘not perfect’ and insisted the long lockdowns were justifiable in the circumstances. Euphemistic language distracts attention from the serious harm caused to children, who are already extremely vulnerable, by confining them for prolonged periods. As Tottle J said in VYZ:

framing the practice of locking detainees, who are children, in the sleeping quarters for between 20 and 24 hours a day on a regular basis, by reference to an inability to provide ‘optimal services’, grossly distorts the perspective from which the practice should be assessed.¹⁵⁷

We also consider the experience and perspective of detainees, such as VYZ, who were not involved in any of the disturbances but were subjected to long periods of lockdown has to be acknowledged.¹⁵⁸ Those disturbances cannot conceivably justify the burden of excessive lockdowns placed on detainees who were not involved in the unrest.

The history of the court proceedings involving VYZ suggests that the department did not take the matter as seriously as it should have given the gravity of the situation. The department’s position was to defend the proceedings and argue in the Supreme Court that the solitary confinement of VYZ (over at least 27 days) was, in fact, lawful and, if it was not, the Court should not declare it to be unlawful.¹⁵⁹

Repeated lockdowns continued following the judgment in VYZ, as disclosed in the sentencing remarks of the Children’s Court we refer to earlier in this chapter. It is unsatisfactory the department continued to impose lockdowns and isolate detainees after the Supreme Court’s declaration. The Western Australian Government accepted a finding that ‘rolling lockdowns’ due to staff shortages have continued at Banksia Hill since the transfer of detainees from Banksia Hill to Unit 18.¹⁶⁰

As Counsel Assisting contended in their submissions following Public hearing 27, it is also unsatisfactory that the Department of Justice and Corrective Services has not done more to understand the reasons for the low staffing levels. Low staffing levels have been a persistent problem for more than 10 years and a direct cause of the isolation to which detainees have been subjected.

Conclusions on Banksia Hill

Our findings concerning Banksia Hill are below. Our recommendations are set out in Section 3.8.

Conclusions on Banksia Hill Detention Centre

These are our findings about Banksia Hill Detention Centre:

1. Children, including many with disability, have been subjected on a regular basis to confinement in their cells at Banksia Hill and in Unit 18 of Casuarina Prison, in contravention of their entitlements to out-of-cell time under the *Young Offenders Act 1994* (WA).
2. Children with disability in detention in Western Australia have been subjected to confinement for 22 hours or more a day without meaningful human contact. This amounts to solitary confinement. It has been continuing since at least late 2021 and was continuing at the date of Counsel Assisting's submissions (24 November 2022).
3. Lockdowns at both Banksia Hill and Unit 18 (Casuarina Prison) continued after the transfer of detainees from Banksia Hill to Unit 18 in July 2022. Lockdowns regularly exceeded 20 to 22 hours per day, including on successive days.
4. The treatment of children in detention in Western Australia, including those with disability, does not meet the standards set out in the *Convention on the Rights of Persons with Disabilities*, the *Convention on the Rights of the Child*, or the *International Convention on Civil and Political Rights*, including the standards which Australia supports for juvenile detention in the *Rules for the Protection of Juveniles Deprived of their Liberty*.
5. Based on records that the Children's Court provided to us, some children detained in Unit 18 have been provided with very limited education and therapeutic support.
6. The Department of Justice failed to adequately staff Banksia Hill over many years and this was a critical factor in the solitary confinement imposed on detainees during 2021 and 2022.

3.5. The use of solitary confinement in youth detention

While Public hearing 27 focused on Western Australia, there is evidence that isolation of detainees occurs in youth detention centres in other states and territories.

Isolation practices in other states and territories

Queensland

An independent review into the treatment of children in Queensland youth detention centres referred to a case of a young person being isolated in his cell for up to 23 hours a day for periods of up to seven days.¹⁶¹ The 2017 review found that this practice was not authorised.

More recently, on 21 February 2023, the Children's Court of Queensland sentenced a 14-year-old boy with FASD and ADHD who had spent 139 days in youth detention.¹⁶² The judgment records that, over 87 of the days for which records were made available to the Court, the boy was confined to his cell for 20 or more hours each day. For 10 of those 87 days, he was confined for 24 hours a day.¹⁶³

The judgment records that the child developed behavioural problems during his detention. The court said the circumstances of his detention were 'cruel, inappropriate and have served no rehabilitative effect'.¹⁶⁴ It said detaining a young person with these deficits and impairments for such a long period was completely contrary to the *Youth Justice Act 1992* (Qld) and the Charter of Youth Justice principles. In particular, it was contrary to principles regarding detention as 'a last resort' and 'for the least time that is justified'.

Northern Territory

In 2017, the Northern Territory Royal Commission found that the isolation of detainees at the Don Dale Youth Detention Centre met the definition of 'solitary confinement' used by the United Nations Special Rapporteur for torture and other cruel, inhuman or degrading treatment or punishment.¹⁶⁵ It 'possibly amounted to torture'. The Royal Commission recommended that the *Youth Justice Act 2005* (NT) be amended to prohibit extendable periods of isolation beyond 24 hours, to clearly define the circumstances in which a child may be isolated and provide stronger protections and safeguards.¹⁶⁶

Victoria

An inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system was conducted by the Commission for Children and Young People in 2017. The inquiry found 'widespread use of restrictive practices that led to the confinement and isolation' of children.¹⁶⁷ These included people with FASD, intellectual disability and psychosis.¹⁶⁸

The Commission's *Final inquiry report* records 4,829 separate episodes of isolation between February 2015 and July 2016.¹⁶⁹ The Commission found occasions where children were kept in conditions that met the United Nations' definition of 'solitary confinement'. The Commission reported that 73 per cent of confinement instances for periods of isolation between 13 and 24 hours were not authorised correctly.¹⁷⁰ It made recommendations to clarify the purpose and use of isolation.

Other reports in Victoria, particularly of the state Ombudsman, record the use of solitary confinement, prolonged solitary confinement, inadequate record-keeping and a lack of authorisation for isolation practices in youth detention centres.¹⁷¹ They refer to facility-wide lockdowns being used due to staff shortages or as a means of collective punishment when only a small number of detainees caused an incident.¹⁷²

New South Wales

The Inspector of Custodial Services in New South Wales reported 4,401 episodes of confinement during 2019 and 2020 across six New South Wales youth detention centres.¹⁷³ These episodes made up 70 per cent of all punishments administered during this time period.¹⁷⁴

In 2018, the Inspector reported that isolation (called confinement in New South Wales) was the most prevalent form of punishment used in juvenile justice centres in New South Wales. This was despite there being no evidence that it effects positive behavioural change.¹⁷⁵ In 2020, the Inspector found that, after a riot at Frank Baxter Juvenile Justice Centre in August 2019, children were kept in their rooms for 22 hours a day for an extended period. This continued for six weeks following the Inspector's inspection of the facility. The children had no access to school, programs or activities and there was no review by senior management.¹⁷⁶ The report noted evidence about the particular anxiety suffered by First Nations detainees and the harms associated with isolating young people, including emotional distress and the impact on brain development.

South Australia

In 2020, the South Australian Ombudsman conducted an investigation which identified that two children in the Adelaide Youth Training Centre were subjected to inhumane treatment, including extended periods of isolation and solitary confinement.¹⁷⁷

'Ben' was confined to his cell for more than 22 hours per day, which constitutes solitary confinement, on 25 days over a period of around four months. This included confinement for more than 22 hours on 5 consecutive days. 'Ryan' was confined to his cell for more than 22 hours per day, amounting to solitary confinement, on 18 days over a period of around two months. Thirteen of those days were consecutive.

The Ombudsman concluded that the then Department for Communities and Social Inclusion (now known as the Department of Human Services) acted in a manner that was unreasonable, wrong, oppressive, unjust and contrary to law. One of the Ombudsman's recommendations was that the department 'prohibit extended periods in isolation beyond 22 hours in any circumstances'. This recommendation has not been actioned.

Tasmania

In December 2022, the United Nations Committee against Torture said it had serious concerns about the practice of keeping children in solitary confinement at Tasmania's Ashley Youth Detention Centre.¹⁷⁸ Rolling lockdowns at the detention centre were widely reported, during which detainees were allowed one hour or less out of their cells each day. This was apparently due to staff shortages.¹⁷⁹

The current Commission of Inquiry into the Tasmanian Government's responses to Child Sexual Abuse in Institutional Settings has heard evidence about the improper use of isolation and segregation. This includes using those measures 'to punish or intimidate children', at Ashley Youth Detention Centre.¹⁸⁰ That Commission of Inquiry is due to report by 31 August 2023.

Solitary confinement should be prohibited

The reports, court decisions and inquiries discussed above indicate that isolation amounting to solitary confinement is over-used in youth detention centres. It has not been used only as a last resort. They also indicate that, often, decisions that lead to the isolation of children are not made lawfully.

We have considered whether state and territory legislation should prohibit the practice of solitary confinement, defined as isolation or confinement for 22 or more hours in a single day, in youth detention centres. We conclude that legislation should be amended to prohibit such solitary confinement.

Ms Kriti Sharma (Senior Disability Rights Researcher with Human Rights Watch), Adjunct Professor of Law George Newhouse (Macquarie University, University of Technology Sydney and Director of the National Justice Project) and Ms Deborah Kilroy OAM (CEO of Sisters Inside Inc) gave evidence that solitary confinement should be banned under Australian (state and territory) laws.¹⁸¹

Ms Sharma said legislation authorising corrective service and youth justice agencies to impose confinement or isolation for the good order of the institution is abused, resulting in conditions amounting to solitary confinement.¹⁸² Ms Sharma said solitary confinement should be illegal.¹⁸³ Both Mr Newhouse and Ms Kilroy also said the use of solitary confinement should be banned.¹⁸⁴ Mr Newhouse argued that cultural change in prison settings will not occur unless solitary confinement is made illegal and there is accountability for breaches of the law.¹⁸⁵

The Australasian Juvenile Justice Administrators' *Juvenile Justice Standards* (2009) state that separation or isolation of a child or young person is to be used 'for the minimum amount of time necessary' and 'only in response to an unacceptable risk of imminent harm, escape and or in accordance with legislation'.¹⁸⁶ However, its Principles of Youth Justice in Australia (April 2019) do not address the use of isolation in youth detention.¹⁸⁷

Multiple bodies, including the CRC Committee,¹⁸⁸ the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁸⁹ the Victorian Ombudsman¹⁹⁰ and the Royal Commission into the Protection and Detention of Children in the Northern Territory, have called for a prohibition on solitary confinement or extendable periods of isolation.¹⁹¹

The CRPD Committee has said solitary confinement should never be used for a person with disability, especially a person with psychosocial disability or if there is a danger to the person's health.¹⁹² The CRPD Committee has expressed serious concern about the use of prolonged solitary confinement, particularly for people with intellectual or psychosocial disability, in Australian prisons and the lack of safe channels for making complaints.¹⁹³ The CRPD Committee recommended the prohibition of solitary confinement for people with disability.¹⁹⁴

Legislation on isolation in each state and territory

The power to isolate a child in a youth detention centre is subject to statutory limitations in each jurisdiction. The legislation in each state and territory differs regarding the extent of the protections provided to detainees and the records required to be kept about periods of isolation. Time limits for isolation also vary, as does the terminology used in legislation (segregation, separation, seclusion, isolation and confinement are all used). No jurisdiction prohibits isolation amounting to solitary confinement. We outlined the legislation in Western Australia, the *Young Offenders Act 1994 (WA)*, earlier in this chapter.

In Victoria, under the *Children, Youth and Families Act 2005 (Vic)*, isolation may be used if all other reasonable steps have been taken to prevent harm or damage to property and the child's behaviour presents an immediate threat to safety or property.¹⁹⁵ The period of isolation must be approved by the Secretary. The law also allows isolation 'in the interests of the security of the centre',¹⁹⁶ often referred to as a 'lockdown'. Section 487 of the Act provides that 'the use of isolation ... as a punishment' is 'prohibited'.

The New South Wales *Children (Detention Centres) Act 1987 (NSW)* authorises the centre manager to direct the segregation of a detainee to protect the personal safety of that detainee or any other person, if satisfied there is no practicable alternative means to protect personal safety.¹⁹⁷ However, section 19(2) of the Act provides that '[a] detainee shall not be segregated [under that section] by way of punishment'. There is a separate power to 'separate' detainees for the purpose of ensuring the security, safety and good order of a detention centre.¹⁹⁸ Punishments for misbehaviour may also include confinement not exceeding 12 hours or, for a detainee over 16 years, not exceeding 24 hours.¹⁹⁹

Under the *Youth Justice Act 1997 (Tas)*, seclusion may only be used in Tasmanian detention centres in limited situations. It can be used if the detainee's behaviour presents an immediate threat to their own safety or that of another person or property, and all other reasonable steps have been taken to prevent harm but have been unsuccessful. It can also be used in the interests of security of the detention centre.²⁰⁰ A secluded detainee must be supervised and observed every 15 minutes.²⁰¹

The Australian Capital Territory's *Children and Young People Act 2009* (ACT), provides that a detainee may be segregated in a safe room if the Director-General believes on reasonable grounds that it is necessary to prevent an imminent risk of self-harm and less restrictive ways have been considered or tried.²⁰² It can also be used to ensure the safety of anyone else, or the security or good order of the detention centre.²⁰³

In Queensland, under the *Youth Justice Regulation 2016* (Qld), a detention centre employee may seclude a child in a locked room for the child's protection or to protect another person or property, or to restore order.²⁰⁴ An independent review of youth detention in 2016 recommended that these provisions be transferred to the *Youth Justice Act 1992* (Qld) to ensure Parliamentary oversight.²⁰⁵ If a child is secluded in a locked room, the executive director must approve any seclusion for more than two hours. If the seclusion is for more than 24 hours, additional approval is needed for each 24 hour period.²⁰⁶

The Northern Territory legislation – the *Youth Justice Act 2005* (NT) – provides that the superintendent may authorise the 'separation' of a detainee if it is reasonably necessary for the detainee's protection or the protection of another person or property. Authorisation may only be given if all reasonable behavioural or therapeutic measures to resolve the situation have been attempted and have failed, and no other course of action is reasonably practicable.²⁰⁷ The superintendent may not authorise the separation of a detainee for a period exceeding 12 hours without the CEO's approval. The CEO's approval must be given for each successive 12-hour period.²⁰⁸ A detainee may not be secluded for more than 72 consecutive hours.²⁰⁹ There is a separate provision allowing 'a reasonable and necessary lockdown period' of the detention centre.²¹⁰

In South Australia, the *Youth Justice Administration Act 2016* (SA) authorises isolation in a safe room to prevent harm to a person or property, to maintain order in the centre, or to preserve the security of the centre.²¹¹ The maximum period of isolation is 24 hours for detainees aged 12 to 14 years and 48 hours for those aged 15 years and over. Isolation is prohibited for those aged under 12 years. The legislation prohibits 'isolation or segregation' from other residents 'other than in a safe room or in prescribed circumstances'.²¹²

Using isolation as a penalty or punishment for misbehaviour is specifically authorised in Western Australia and New South Wales.²¹³ There is a real question as to whether use of isolation for punitive reasons complies with article 37(a) of the *CRC*, which states that no child should be subject to cruel, inhuman or degrading punishment.

As this discussion shows, most Australian states and territories allow detainees to be placed in isolation to maintain the 'good order' or security of a detention centre. A power expressed in these terms is not unlimited. The repository of the power must exercise it, as a matter of law, consistently with the purpose for which it was granted and not in a manner that can be characterised as 'unreasonable'.²¹⁴ But legal limitations on power tell us little about the exercise of such powers in practice.

The evidence we received about Banksia Hill, the past reports and court decisions referred to above indicate that, too often, decisions that lead to the isolation of children are not made lawfully. For example, no authorisation for the confinement of VYZ at Banksia Hill had been given.²¹⁵

3.6. Prohibiting solitary confinement

In our opinion, state and territory youth justice legislation should be amended to prohibit the use or practice of solitary confinement (defined as isolation for a period of 22 hours or more per day) and to define the safeguards governing isolation or seclusion of children with disability. Extended periods in isolation for 22 or more hours in any circumstance should be prohibited by law.

We emphasise children in detention should be spending far more than two hours per day outside their cells. Children in detention in Western Australia should spend hours out of their cell in accordance with the ‘normal’ daily routine.²¹⁶ At the time of the Inspector’s March 2022 report, that was 11.25 hours per day. However, what we have heard suggests the norm is rarely if ever achieved.

We acknowledge some children in detention settings engage in very challenging behaviour. The use of isolation may, at times, be necessary to prevent an imminent and serious threat to the child concerned or to others. All states and territories have to meet the challenge of managing children in detention in the least restrictive way without compromising the safety and security of staff and other children. As we have explained, many of these children have disability. There is no evidence that solitary confinement is an appropriate response to people with disability displaying behaviours of concern.

There is evidence, and a consensus in human rights instruments, that solitary confinement can have severe, long-term and irreversible effects on a child’s health and wellbeing.²¹⁷ The prolonged use of isolation can impact the physical and psychological health of the child, as well as their social and educational development.²¹⁸

In 2017, the Australian Children’s Commissioners and Guardians summarised the intensified risks of solitary confinement for children generally:

Children are particularly vulnerable because they are still in crucial stages of development –socially, psychologically, and neurologically. The experience of isolation can interfere with and damage these developmental processes. For children and young people with mental health problems or past experiences of trauma, isolation practices can have severely damaging psychological effects. Where children and young people are at risk of suicide or self-harm, isolation is likely to increase their distress and suicidal ideation and rumination.²¹⁹

We accept the evidence of witnesses that isolation and solitary confinement exacerbates the difficulties experienced by children in detention who have cognitive impairment and brain injuries.²²⁰

In 1991, the Royal Commission into Aboriginal Deaths in Custody *National Report* noted the ‘extreme anxiety suffered by Aboriginal prisoners committed to solitary confinement’.²²¹ It recommended corrective services recognise that ‘it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention’.²²² It said ‘the broad thrust of the recommendations which have been made relative to prisons ... have relevance for juvenile detention centres’.²²³

We recommend legislation be either amended or enacted to provide strict safeguards so isolation can only be used as an absolute last resort after all other measures to address risk have been exhausted. Before authorising any isolation period for a child with disability, there should be a requirement to take into account the individual circumstances of the child and regular review to ensure the period of isolation is no longer than strictly necessary.

Prohibition on isolation as a punishment

Isolation for the purposes of punishment should be prohibited. Legislation already provides alternative punishments for misbehaviour by detainees. Taking New South Wales as an example, those alternatives might include restricting participation in sport or leisure activities or imposing additional duties ‘of a constructive nature’. In the case of misbehaviour amounting to serious misbehaviour under the regulations, the non-parole period of any detention order may be extended by no more than seven days.²²⁴

Inadequate staffing of a detention centre is never a justification to impose solitary confinement on any child, particularly a child with disability. The state’s duty of care to children in detention entails adequately staffing its detention centres to discharge that duty.

A prohibition on the use of solitary confinement would not undermine the safe operation of youth detention facilities. It would not preclude the appropriate separation of a child in limited circumstances for a specified period to protect that child, another child, or property.

The overriding approach in youth detention should be person-centred and recovery-based rather than punitive. A rights-respecting approach is needed to provide humane conditions of detention. From a disability perspective, this should focus upon the individual characteristics and support needs of the detainee, particularly around reasonable accommodations. This is not possible if a child with disability is locked in a cell alone for 22 or more hours a day.

The issue brings into focus Australia’s commitments under the *ICCPR*, *CRPD*, *CRC* and *OPCAT*, which mandate better protections for the rights of children in detention. Australia’s ratification of *OPCAT* has introduced a requirement for independent monitoring in all places of detention, including in youth justice centres. This emphasises the importance of conditions in detention for children with disability.

Australia’s obligations under *OPCAT* require the prevention of torture, cruel, inhuman or degrading treatment or punishment. International law makes it clear that solitary confinement of children creates a significant risk of torture, cruel, inhuman or degrading treatment or punishment. The use of solitary confinement practices outlined in this chapter show that

breaches of Australia's obligations under *OPCAT* have taken place. A legislative prohibition of solitary confinement in youth detention would be consistent with the preventative aim of *OPCAT* and also with Australia's obligations under the *CRPD*.

In order for this prohibition to be effective, other changes are needed. These include significant improvements in disability screening processes, particularly for First Nations people; training custodial staff about disability; and the provision of behaviour supports for children and young people with disability, in detention settings.

Recommendation 8.3 Prohibiting solitary confinement in youth detention

States and territories should:

- a. introduce legislation to prohibit solitary confinement in youth justice settings (being the enforced isolation or segregation for any purpose of a child or young person for 22 or more hours in any day)
- b. introduce legislation to prohibit the use of isolation (however described) in youth detention centres as punishment in any circumstance
- c. review legislation, policy and procedures to ensure children with disability are not subjected to isolation practices amounting to solitary confinement
- d. ensure legislation authorising isolation (including lockdowns) in youth detention centres provides for its use:
 - as a temporary response to behaviour that poses a serious and immediate risk of harm to an individual
 - as a last resort after all other measures to address risk have been exhausted
 - for a period that must not exceed a specified number of hours in any day
- e. ensure legislation authorising isolation (including lockdowns) in youth detention centres provides at a minimum the following protections for children with disability:
 - a requirement to take into account the child's disability needs before any isolation period is authorised
 - meaningful human contact during the period of isolation
 - access to the community equivalent standard of health care, including mental health services during the period of isolation
 - regular review of the order and circumstances authorising isolation
 - the creation and keeping of detailed records relevant to the period of isolation and the provision of a copy of such records to the relevant body with independent oversight of places of detention (such as the Inspector of Custodial Services).

Recommendation 8.4 Screening and assessment for disability in youth detention

State and territory governments should ensure timely screening and expert assessment are available for individual children with cognitive disability involved in the criminal justice system (including, but not limited to, detention settings) and that they receive appropriate responses, including therapeutic and other interventions.

3.7. Improving conditions for children with disability in detention

Youth justice agencies and their staff need to be better informed about the impact of detention and isolation on children with disability and the needs of children with disabilities who are placed in isolation.

Training custodial and other staff

It is likely the high staff attrition rate at Banksia Hill was partly a result of inadequate training about the needs of children with cognitive disability and the supports that should be available to them. Witnesses raised concerns staff may be using restrictive practices, including isolation, because they are not adequately trained to respond to children with disability who they perceive as displaying non-compliant behaviour.²²⁵

We were told staff working at Banksia Hill receive three hours training on disability awareness at the Corrective Services Academy. The training is intended to assist staff identify a detainee with intellectual disability or cognitive impairment and includes modules on communication and trauma-informed care.²²⁶

Witnesses told us staff need proper training in cognitive impairment and brain injuries so they can demonstrate genuine empathy for detainees and respond appropriately to their behaviour.²²⁷ The training must include instruction on culturally appropriate responses to First Nations detainees.²²⁸

There has been limited research into the capacity of the custodial workforce to identify and manage people in detention centres with FASD or other neurodevelopmental impairments. One study surveyed 109 custodial officers working in Banksia Hill, before and after they completed an intervention aiming to train the custodial workforce in the management of youth with FASD and neurodevelopmental impairment.²²⁹ It concluded that a lack of specific knowledge, inadequate training and inconsistent information-sharing processes reduced the ability of the custodial workforce to care adequately for young people with FASD and other neurodevelopmental impairments. Almost all survey participants said additional knowledge would assist them with the daily management of detainees.

The study trialled training programs for the custodial staff. Improvements were recorded across almost all knowledge and attitude items on the management of FASD and other neurodevelopmental impairments.²³⁰

Dr Marshall Watson, Consultant Child and Adolescent Forensic Psychiatrist, said a trauma-informed philosophy needs to be embedded across all levels within detention centres, from reception staff through to senior management including staff conducting screening.²³¹ Dr Watson said staff need training in developmental trauma including its presentation and impacts, the effect of trauma on children and families and the disparities in health outcomes that occur if trauma is not properly considered.

Dr Watson is a descendant of the Noongar people of the south-west of Western Australia. He has particular expertise in youth justice. He said disability training in detention centres must teach that behaviour is a means of communication and a young person's inability to regulate emotions and communicate can lead to behavioural issues. Dr Watson said addressing the emotional needs of young people tailored to their level of understanding and abilities will lead to a significant improvement in outcomes.²³² Dr Watson believes training should be delivered to staff by clinicians with expertise in developmental trauma and education, and be facilitated by First Nations health professionals and community members so it is culturally safe.²³³

Other witnesses said staff training should be conducted with a First Nations led organisation that can explain cultural differences.²³⁴

Ms Barter gave evidence that Youth Custodial Officers (YCOs) in Western Australia have an important role to play in ensuring any new trauma-informed philosophy is implemented successfully.²³⁵ YCOs should provide culturally-informed and trauma-informed care and have training in disability awareness and de-escalation practices.²³⁶ Ms Barter believes YCOs should be youth workers who wear plain clothes.²³⁷ She suggested the current case planning staff should be integrated with the YCOs and there should be consistency in the staff dealing with children.²³⁸

Ms Sharma said the overriding philosophy in correctional centres is currently one of security and good order of the prison. A rights-respecting approach is needed that provides humane conditions of confinement. From a disability perspective, this should focus on the individual characteristics and support needs of the person with disability, particularly around reasonable accommodations.²³⁹ Ms Sharma said no state or territory in Australia currently operates a correctional system that reflects best practice for people with disability.

We recommend all youth justice agencies review the content and scope of the disability training given to custodial staff and all staff in detention centres. This training should aim to increase their ability to understand and manage children displaying challenging behaviours. It should include guidance and training for youth justice staff to ensure isolation is only used when necessary, is not used as punishment, and is always accompanied by other measures to address a child or young person's behaviour or risk.

Achieving this outcome will require strong leadership and significant cultural change. It will need the engagement of all staff, including senior management, so they have a clear understanding about the complex needs of children in custody, and effective ways of managing challenging behaviour. However, more training will not be sufficient if detention centres like Banksia Hill are not adequately staffed.

Recommendation 8.5 Disability training for staff in youth detention

State and territory governments should ensure staff and officials in youth detention centres at all levels receive appropriate initial and ongoing training and support in relation to the needs and experiences of children with disability. This includes training and support on trauma-informed care and culturally appropriate and gender responsive approaches to children with disability in detention.

Recommendation 8.6 Western Australia youth detention staff retention

The Department of Justice of Western Australia should immediately review its youth justice staffing and recruitment model to ensure sufficient, suitably trained staff are available to supervise children and young people to minimise lockdowns and prevent the solitary confinement of detainees. This should include developing and implementing a recruitment and retention strategy that:

- addresses high staff attrition rates in youth detention
- promotes representation at senior management level of staff with disability and First Nations backgrounds
- includes measures to help staff access mental health support.

New operating philosophy in Western Australia youth detention

We were told Banksia Hill is going through a transformational process and developing a new operating philosophy and service model.²⁴⁰

Since 2013, the Inspector has consistently recommended Banksia Hill implement a trauma-informed approach, which would represent a comprehensive change in operating philosophy (as set out in his reports). His reports outline a history of failed attempts by the department to implement such an approach.²⁴¹ The Northern Territory Royal Commission made similar recommendations.²⁴²

The Operating Philosophy and Service Model

The Director General told this Royal Commission the department's consultant Nous Consulting has developed a new model of care. He said the implementation plan is close to being finalised, subject to further stakeholder consultation.²⁴³

We were given the Operating Philosophy and Service Model (OPSM) developed by Nous Consulting for the Department of Justice (dated May 2022).²⁴⁴ Nous Consulting's report setting out the OPSM states it is based on national and international best practice and therapeutic models for managing young people across the justice system.²⁴⁵

The OPSM acknowledges that young people in detention have often experienced abuse, trauma, neglect, family and domestic violence, disrupted education and mental health issues.²⁴⁶ It recognises they present with neurological and cognitive impairments and alcohol and other drug issues.²⁴⁷ It states young people should 'fundamentally be treated differently to adult offenders due to distinct differences in their biological, psychological and social needs'.²⁴⁸ Banksia Hill's new 'approach will therefore be developmentally appropriate, rehabilitative and prioritise young people's rights, strengths, interests and needs'.²⁴⁹ The OPSM 'commits Banksia Hill to treat young people in its care as young people first and act in their best interests'.²⁵⁰

The OPSM also recognises 'the principle of Aboriginal self-representation is at the centre of Banksia Hill's efforts' to address the over-representation of First Nations children in youth detention.²⁵¹

The service model is based on eight service principles and outlines how the operating philosophy will be practically applied.²⁵² While these include 'embed[ding] developmentally appropriate and needs-informed approaches' and promoting 'support for staff', there is no reference to the need to accommodate the specific disability needs of children or to the need for increased disability awareness training for staff. It does not indicate or propose any plan to consult with people with disability on the design of the new operating philosophy and service model. Nor does it commit to engaging with a reference group of people with disability or people representing intersectional groups, such as First Nations people, to provide advice regarding implementation and improvement.

The OPSM section on intake and assessment processes includes disability among the items an assessment of needs 'may' include.²⁵³

However, the section on screening and assessment does not identify a need for neuropsychological assessment, FASD screening or disability screening that accommodate cultural needs.²⁵⁴ We consider these assessments should form a mandatory part of the future screening of new detainees admitted to custody.

In evidence at Public hearing 27, Dr Tomison said the department was still working on an implementation plan for the OPSM.²⁵⁵

Expert evidence about best practice

Witnesses expressed concern the new operating philosophy will unduly focus on infrastructure to the detriment of a rehabilitative approach and it will not be culturally informed.²⁵⁶ That caution may be justified based on the department's recent announcement of funds for new infrastructure and the Inspector of Custodial Services' past reports. For example, in 2018 the Inspector reported:

the Department has often responded to major incidents at Banksia Hill by strengthening custodial infrastructure. But this needs to be balanced with improvements to the daily routine and the range of activities and services available to young people ...²⁵⁷

Ms Sharma gave examples of 'pockets of good practice' in custodial settings, to make them more recovery-oriented and trauma-informed.²⁵⁸ They included community-based programs, specialist courts and services that support the needs of people with disability. She said most of these reforms were short lived because funding was withdrawn.²⁵⁹ She said practices vary widely and there is little sharing of models across Australia or even within one jurisdiction.²⁶⁰

Mr Collins said reform requires an entire re-imagining by the government and the community about the relationship with First Nations people in the state. It is not merely a matter of providing more funding or programs. Mr Collins said the government is repeating the failures of the past and First Nations people need to have the power to look after themselves to help reduce the high rate of recidivism.²⁶¹

Mr Collins pointed out there is no First Nations sentencing court in Western Australia, except for the Barndimalgu Domestic Violence Court in Geraldton. He said the court systems 'relentlessly' recycle First Nations adults and young people with disability, sending them to custody only to release them back into dysfunction to re-offend and land back in custody.²⁶² The ALSWA witnesses' joint statement included a number of practical recommendations, which they also made to the Western Australian Government.

Implementation of new operating philosophy

The evidence points to the key features for an effective operating philosophy or model of care in youth detention. It must:

1. be trauma-informed, an element of which is having a sufficient welfare-focused non-custodial workforce.
2. be culturally informed.
3. be developed in conjunction with people with disability and with detainees and their families.
4. prioritise wellbeing and through-care for children to return to the community.

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5. be well supported by training for all staff working at the detention centre (not only those interacting with detainees). Training should particularly focus on the impact of cognitive disability and the communication needs of children with disability.
 6. use developmentally appropriate approaches.

The Department of Justice should release a clear timeline for finalisation and publication of its plan for implementing the OPSM. These plans should be reviewed from a disability rights and needs perspective.

Single youth detention facility

The Commissioner of Corrective Services, Mr Reynolds, said his understanding was Banksia Hill did not experience the same disruptions before it was amalgamated with the former remand facility in 2012.²⁶³ The single facility Banksia Hill houses remand and sentenced detainees, male and female, aged from 10 to 18.²⁶⁴ He said combining remand and sentenced populations in a single facility created various issues because people on remand are generally less stable. Having only recently come in to custody, they may have acute drug, alcohol and family issues and not had time to adjust.²⁶⁵

Mr Reynolds said about 70 per cent of the 17 detainees transferred to Unit 18 were on remand.²⁶⁶

Mr Reynolds's observations are consistent with human rights instruments, which distinguish between sentenced and unsentenced prisoners. The *ICCPR* says that remand and sentenced prisoners should be held in separate facilities.²⁶⁷ Remand prisoners are entitled to the presumption of innocence.

Mr Reynold's evidence is also consistent with the former Inspector of Custodial Services Mr Neil Morgan's conclusion the 'one stop shop' model at Banksia Hill is 'a failure'.²⁶⁸ In June 2017 the then Inspector Mr Morgan recommended the government investigate opportunities for smaller residential facilities across the state to keep children close to their families and networks, and to increase the prospects of successful rehabilitation. He said Banksia Hill had been consistently unstable despite its high cost. In February 2018 he reported that 'for good reason, no other state or territory believe[d] it is appropriate to hold' all detainees, sentenced and on remand, 'in one place'.²⁶⁹

The current Inspector, Mr Ryan, agrees with his predecessor, Mr Morgan: having all people – aged from 10 to 17, male and female, on remand and sentenced – detained in one place has not been effective.²⁷⁰ He told us while having a 'critical mass' to operate two separate facilities is a potential issue, it would in his view operate better than a single facility.²⁷¹

Ms Krakouer, Director of the National Suicide Prevention and Trauma Project, said it is problematic having just one facility in the state when many children come from outside Noongar country, speak different languages and are removed from their country and culture when detained in Banksia Hill.²⁷²

The Western Australian Government's recent announcement of substantial funds to improve the infrastructure at Banksia Hill suggests a decentralised model for youth detention is not under consideration. In our view, there is a strong case for reconsidering the 'one stop shop' model for youth detention in Western Australia, given the documented problems besetting that detention centre since 2013.

The Department of Justice's new operating philosophy does not address the issue of whether having a single detention facility in the state is adequate. Also, it does not address whether there is a need to separate people on remand from those sentenced to increase stability, as suggested by the Commissioner for Corrective Services' evidence.

Recommendation 8.7 Western Australia youth detention operating philosophy

The Department of Justice of Western Australia (through the Corrective Services Division) should:

- immediately cease confinement practices at youth detention centres amounting to solitary confinement of children with disability
- ensure decisions leading to the isolation of children with disability are made in conformity with legal requirements
- implement a new operating philosophy and service model to manage detainees with disability in a therapeutic, non-punitive, non-adversarial, trauma-informed and culturally competent way
- ensure the operating philosophy and implementation plan are developed in conjunction with people with disability and First Nations people
- release a clear timeline for publication of its new operating philosophy and service model for youth detention in Western Australia and the associated implementation plan
- raise awareness at every level of staff in the youth detention centres concerning the support needs of people with cognitive disability and foster respect for the rights of people with disability
- ensure lawyers representing detained clients are allowed adequate time and assured of confidentiality at youth detention centres to take instructions, especially where their clients have cognitive disability.

Inspector of Custodial Services' powers

The Inspector has a vital role to provide independent oversight of adult and juvenile places of detention. The Inspector reports directly to parliament and is independent of the Western Australian agencies responsible for custodial services: Corrective Services and Department of Justice. The state has nominated the Inspector to perform the National Preventive Mechanism function for *OPCAT* purposes, in justice-related facilities.

Ms Krakouer said the department is not transparent with information. Information only becomes available when the Inspector releases reports. She said real-time data is needed about the occurrence of self-harm and the disabilities of detainees.²⁷³

The *Inspector of Custodial Services Act 2003 (WA)* requires the Inspector to prepare a report following each inspection, detailing findings and recommendations.²⁷⁴ The Inspector is to give an agency the opportunity to make submissions before expressing a critical opinion in a report. This means the Minister for Corrective Services and the department are aware of the likely contents of reports prior to their release. Section 35 of the Act imposes a minimum 30-day embargo after parliament receives a report.²⁷⁵ This effectively delays the public release of the Inspector's reports for at least a month after they are finalised.

The Act does not require the department to respond or make public its response to the Inspector's recommendations. We were told the government often does not adopt the Inspector's recommendations.²⁷⁶ Mr Collins said the Act should mandate a government response to any recommendations, and that the response should be tabled in parliament.²⁷⁷ We agree.

We believe the Inspector should have a statutory power to require a response from the department or other relevant agency, within a specified time period, outlining its response to recommendations in a report to parliament. This should include what steps (if any) have been taken and why steps have not or are not proposed to be taken in response to the recommendation.

Even if the department already voluntarily reports to the Inspector on its implementation of recommendations, the Act should contain a discretion for the Inspector to require a response or update from the department and a requirement to make public the response. This would provide greater transparency.

It is difficult not to conclude the Western Australian Government has been ignoring the highly significant recommendations the Inspector has made over years. These recommendations are about improving outcomes for children in detention and reminding the state to discharge its duty of care to those children, including by adequately staffing the detention centre.

The lack of transparency in the government's response to the Inspector's repeated and substantially similar findings and recommendations concerning Banksia Hill over many years underscores the importance of strengthening mechanisms for responding to the Inspector's recommendations.

Recommendation 8.8 *Inspector of Custodial Services Act 2003 (WA)*

The Western Australian Government should introduce and support legislation amending the *Inspector of Custodial Services Act 2003 (WA)* to provide the Inspector with a discretion to demand a response from the department or other relevant agency, within a specified time, to recommendations of the Inspector included in a report to Parliament. This should include the steps (if any) taken by the agency in response to the recommendations and an explanation of why steps have not been taken (if that be the case).

3.8. Conclusion

The evidence indicates that children are too often isolated unlawfully. There is no evidence solitary confinement is an appropriate response to people with disability displaying behaviours of concern. Isolation amounting to solitary confinement is often imposed on children as a consequence of operational decisions to 'lockdown' a detention centre because of a lack of staff. This is unacceptable. It is the duty of state and territory governments to properly staff their youth detention facilities so the rights of children deprived of their liberty are upheld.

Youth justice legislation should be amended to strictly prohibit the use or practice of solitary confinement and to clearly define safeguards applying to isolation or seclusion of children with disability.

Screening and assessment practices for children with disability require improvement. Staff and officials in youth detention centres at all levels should receive appropriate training and support in relation to the needs and experiences of children with disability.

Endnotes

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4. The rights of people found unfit to be tried and indefinite detention

Key points

- Some people with cognitive disability who face serious criminal charges may be found either ‘unfit to be tried’ or ‘not guilty on the basis of mental impairment’. Each state and territory in Australia has developed its own laws to determine the issue of ‘fitness’ and its consequences.
- People in this situation (whom we call ‘forensic patients’) can be at risk of indefinite detention, meaning no date is fixed for their release. This can lead to a period of detention longer than if they had been convicted and sentenced in an ordinary criminal trial, even though they have not been convicted of an offence.
- People with cognitive disability should be given appropriate assistance in court proceedings so they can be found fit to stand trial and receive a fair trial in ordinary criminal proceedings.
- Governments should repeal laws that allow for the indefinite detention of people with cognitive disability. The fitness to be tried laws should be reformed to provide for:
 - fixed limiting terms, determined by a court’s estimate of the sentence that would have been imposed if the person was convicted of the offence for which they were charged
 - regular independent reviews by a tribunal or court throughout the period of the person’s detention
 - detention in prison only as a last resort
 - legislation, policy and practices reflecting the *National Statement of Principles Relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment*.

4.1. Introduction

This chapter examines indefinite detention of people with disability and their fitness to stand trial. In Public hearing 11, ‘The experiences of people with cognitive disability in the criminal justice system’, we examined the treatment of people with cognitive disability who are detained in the forensic system.

Forensic patient systems in Australia

Some people with cognitive disability who face serious criminal charges may be found either 'unfit to be tried' or 'not guilty on the basis of mental impairment'. In some jurisdictions the equivalent of a finding of unfitness to be tried is a finding that the accused is 'unfit to plead'. We refer to people who are the subjects of such findings as 'forensic patients'.

For a person to be 'fit to be tried', they need to have the capacity to understand matters central to a fair trial. These include the charges against them, the nature of the proceedings and the 'substantial effect of any evidence' presented by the prosecution.¹ They should be able to explain their version of the facts to the court or their legal representative and decide what defence to offer.²

When a court finds a person 'unfit to be tried' it means the person lacks the capacity to understand these matters. In that case, a trial cannot proceed without unfairness or injustice to the accused.

A court may find a person 'not guilty on the basis of mental impairment'. This means the person, by reason of their impairment, did not know what they were doing was wrong or did not understand that the act was wrong.³ In these circumstances, the person cannot be held criminally responsible for their act. A range of terms are used to refer to this outcome. For example, in New South Wales it is a special verdict of 'act proven but not criminally responsible because of mental health or cognitive impairment'.⁴

A finding of this kind can have significant consequences for the accused person. In most states and territories, the person can be detained until a tribunal is satisfied they are no longer a serious risk to others or themselves. That is, no minimum or maximum detention period is prescribed.

Forensic patients have not been convicted of a criminal offence or sentenced to a term of imprisonment. Rather, after a person is found unfit to stand trial or not guilty by reason of mental impairment, the legislation authorises the court to make an order for the person's detention.

If a court makes orders for detention, forensic patients do not have to be detained in separate forensic facilities. Therefore, while forensic patients may be held in forensic mental health units, forensic disability units or psychiatric hospitals, they may also be held in adult prisons or juvenile detention centres. The forensic mental health system aims to progress forensic patients through the system and ultimately release them to community-based accommodation.⁵

Risk of indefinite detention

Each state and territory in Australia has its own regime to determine the issue of fitness to be tried and the consequences of a finding that an accused is not fit to be tried.⁶ The regimes are intended to protect people with disability, particularly those with cognitive disability and mental health conditions. However, in practice, they can deny people with disability the right to exercise legal capacity⁷ and expose them to long-term detention.⁸

Forensic patients can be at risk of indefinite detention, meaning no date is fixed for their release. This can lead to a period of detention longer than if they had been convicted and sentenced in an ordinary criminal trial.⁹ Prolonged detention places forensic patients at risk of violence, abuse and neglect and of experiencing cumulative trauma.

Some forensic patients in Australia have experienced conditions amounting to cruel and unusual punishment in breach of Australia's human rights obligations. One example is the case of 'Winmartie', a First Nations man found unfit to be tried in the Northern Territory (as outlined further in Section 4.2).¹⁰ The Australian Human Rights Commission (AHRC) found the conditions in which Winmartie was held at the Alice Springs Correctional Centre amounted to cruel, inhuman and degrading treatment.¹¹

International criticism and calls for reform

In 2015, the Committee on the Rights of Persons with Disabilities (CRPD Committee) stated the detention of people on the basis of declarations of unfitness to stand trial or non-responsibility is '[c]ontrary to article 14 of the [*Convention on the Rights of Persons with Disabilities (CRPD)*]' since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant'.¹² The CRPD Committee called on States Parties to remove those declarations from their criminal justice systems. It recommended people with disability be allowed to defend themselves against criminal charges and be 'provided with required support and accommodation to facilitate their effective participation, as well as procedural accommodations to ensure [*sic*] fair trial and due process'.¹³

Australia has been the subject of international criticism for its treatment of forensic patients. In 2013 and 2019 the CRPD Committee expressed concern that people with disability who are found unfit to be tried in Australia can 'be detained indefinitely in prisons or psychiatric facilities without being convicted of a crime and for periods that can significantly exceed the maximum period of custodial sentence for the offence'.¹⁴

In 2019 the CRPD Committee recommended Australia abolish the doctrine of unfitness to plead. It urged Australia to:

stop committing persons with disabilities to custody and for indefinite terms or for terms longer than those imposed in criminal convictions.¹⁵

Calls for reform in Australia

In Australia there have also been many calls for reform of laws to end the indefinite detention of people with cognitive and psychiatric impairments.

In 2014, the Australian Law Reform Commission (ALRC) in its report *Equality, capacity and disability in Commonwealth Laws* recommended that, where a person is found unfit to be tried, the maximum period of detention should be set by reference to the period of imprisonment likely to have been imposed had the person been convicted of the offence charged.¹⁶ The ALRC argued if the person is a 'threat or danger to themselves or the public at that time, they should be the responsibility of mental health authorities, not the criminal justice system'.¹⁷

Also in 2014, the AHRC said in its *Equal Before the Law* report:

The Commission is extremely concerned about arrangements and processes for people with disabilities deemed unfit to plead. Concerns were raised across Australia about inadequate safeguards and access to supports to ensure effective access to justice. Many people deemed unfit to stand trial are being held without appropriate review mechanisms.¹⁸

The AHRC did not make recommendations on this issue because criminal justice is the responsibility of states and territories.¹⁹

Around this time, the case of Ms Rosie Ann Fulton was reported in the media. Ms Fulton, a First Nations woman with cognitive disability, was charged with driving offences and held for 18 months in a Kalgoorlie prison without trial or conviction. She was found unfit to plead.²⁰ She was imprisoned because there were no alternatives in Western Australia for her detention.

Mr Graeme Innes, the then Disability Discrimination Commissioner, said:

It is simply unacceptable that a nation of Australia's standing, and commitment to the rule of law, should lock people up for undetermined periods when they have not been found guilty of an offence. Prison is simply not an alternative accommodation option for people with disabilities.²¹

In 2014, the A Line in the Sand Summit was convened to look for solutions to the over-representation of First Nations Australians with cognitive impairment in prison. It was chaired by the then Social Justice Commissioner, Mr Mick Gooda. The summit brought together First Nations and non-Indigenous experts, including lawyers, psychologists, social workers, disability advocates and human rights advocates who had direct experience working with First Nations people with cognitive impairment in the criminal justice system.²² It identified:²³

- a lack of sentencing and service outcomes other than prison for First Nations people with cognitive impairment
- a need for culturally responsive accommodation options and community support and transitional options.

It called for human rights-focused law reform, including legislation that limits terms of detention and requires regular review of people who are detained, together with case management and therapeutic and non-punitive treatment.²⁴

In 2015, Chief Justice Martin of the Supreme Court of Western Australia commented extrajudicially that:

Lawyers do not invoke the [fitness to be tried] legislation, even in cases in which it would be appropriate because of the concern that their client, might end up in detention, in custody, in prison, for a lot longer period that they would if they simply plead guilty to the charge brought before the court ...²⁵

The Royal Australian and New Zealand College of Psychiatrists has said:

The rights to justice and freedom from arbitrary detention have been breached by the indefinite incarceration of forensic patients and the lack of needed treatment, support and planning for their return to the community. The right to freedom from cruel and degrading treatment may have been compromised by detention in prison due to a lack of forensic facilities, the excessive use of solitary confinement (seclusion) to control forensic patients and the lack of effective legal remedies for mistreatment.²⁶

Respondents to our *Criminal justice system issues paper* identified the protracted or indefinite detention of people with disability as an area requiring reform.²⁷ They noted people with disability may choose to plead guilty to an offence so they can avoid prolonged detention in the forensic mental health system.²⁸ This means some defendants may be wrongly convicted and punished.

Senate Committee inquiry

In 2015, the Senate referred the indefinite detention of people with cognitive and psychiatric impairment in Australia to the Community Affairs References Committee (Senate Committee) for inquiry and report. The need for the inquiry grew out of the Senate Committee's 2015 inquiry into violence, abuse and neglect against people with disability where evidence was presented on the indefinite detention of people with cognitive or psychiatric impairment.²⁹

In its 2016 report the Senate Committee said most people who are indefinitely detained on forensic orders:³⁰

- are First Nations people
- have been prescribed the forensic order in Western Australia and the Northern Territory
- have a cognitive impairment, cultural communication barrier or hearing loss.

The Senate Committee noted the lack of official data about the prevalence of indefinite detention in Australia.³¹ Its report referred to the high rates of cognitive and psychiatric impairment in the general prison population.³²

The Senate Committee acknowledged the work of the then Council of Australian Governments (COAG) Law, Crime and Community Safety Council in developing a *National Statement of Principles Relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment (National Principles)*.³³ Among other things, the Senate Committee recommended:

- the *National Principles* adopt the position indefinite detention is unacceptable and state and territory legislation be amended in line with that principle (Recommendation 8)³⁴
- COAG ensure the legislative approach in all states and territories is consistent and provides additional options for the placement of forensic patients beyond either unconditional release and prison (Recommendation 16)³⁵

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- COAG ensure a consistent legislative approach to limiting terms for forensic patients in all Australian jurisdictions (Recommendation 17).³⁶

A 'limiting term' is a term nominated by a court as being the maximum period a person found unfit to be tried can be detained. For example, in New South Wales the limiting term the court must nominate is its 'best estimate of the sentence that the court would have imposed on the defendant' if the special hearing had been an ordinary trial of criminal proceedings.³⁷

The Senate Committee also made recommendations on the transition of forensic patients held in prison to non-prison secure care forensic facilities (Recommendations 20, 26).³⁸

4.2. The forensic system

In Public hearing 11, we inquired into the circumstances of 'Melanie' and 'Winmartie', two First Nations forensic patients.³⁹

Both Melanie and Winmartie's experiences show how some people with disability remain in detention well beyond the period they would have served in prison if they had been convicted of the criminal offences for which they were initially charged. They also show how, without proper support, treatment and step-down accommodation, a forensic patient can be prevented from transitioning to less secure environments. Step-down accommodation provides an intermediate level of support and supervision between prison or a forensic hospital and independent living in the community.

Melanie: A case study

Melanie committed a serious act of violence at age 16. At 17, while in juvenile detention, she committed a second serious act of violence, which resulted in the death of a staff member. Melanie was found unfit to be tried and the Supreme Court of New South Wales imposed limiting terms of three and 10 years.⁴⁰

Melanie was held in a male prison in conditions that the court described as inhumane. In 2003 the court ordered that Melanie be detained in a place other than prison. Despite this, Melanie remained in prison for a further eight years.

In 2006 a visiting forensic psychiatrist said Melanie was managed in prison in 'a most Draconian manner'.⁴¹ He said she was being confined to her cell 23 hours or more per day in a group of cells in a unit that 'can only be described as Dickensian'.⁴²

In 2009 the Mental Health Review Tribunal ordered that Melanie be transferred to the Forensic Hospital in New South Wales - a high-security mental health facility for mentally ill patients who have had contact with the criminal justice system and high-risk civil patients. Melanie was transferred nearly 15 months later.

In 2012 Melanie's limiting terms ended, but she continued to be held as an involuntary patient under the *Mental Health Act 2007* (NSW). In 2012 and 2013 Melanie was placed in seclusion for increasing periods of time. From December 2013 to November 2020 Melanie was held in seclusion continuously, sometimes for more than 23 hours a day. When food and medication were taken to Melanie, she had to lie down on the floor of her seclusion area and five staff restrained her. If staff decided it was not safe to enter the seclusion area, Melanie would not receive food or medication.⁴³

In November 2014 Melanie was moved into a modified seclusion setting with two rooms adjoined by a 'courtyard'.⁴⁴ Seclusion room one had a window slit in the steel entry door and a high window above eye level that was blacked out. No natural light came into the room. The courtyard between the two rooms had a high brick fence around it and rubbery asphalt on the ground. A person could not see out. The second seclusion room had a TV mounted high on the wall encased in protective safety coverings and a window at eye level.⁴⁵

In 2017 the Mental Health Review Tribunal inspected the rooms where Melanie was being held. It observed they were filthy and degrading, substandard and clearly not aimed at helping her recover.⁴⁶

Even though her limiting term expired in 2012, Melanie continued to be detained in the Forensic Hospital for a further eight years. She remained there at the time of Public hearing 11 in February 2021.

The Royal Commission was advised on 8 November 2021 Melanie had been transitioned out of the Forensic Hospital into appropriate accommodation in the community.

There was an important factor in breaking prolonged seclusion for Melanie. In November 2020, a dedicated nursing and allied health team was allocated to her care. Before this, she had no core team for her dedicated care.⁴⁷ The evidence showed that in 2018 the Forensic Hospital had a significant shortfall in staff across all disciplines including staff suitable to assist Melanie. Staff were spread thinly to cover vacancies and it was not possible to put together a core team at that time.⁴⁸ Five days after a core team was allocated to Melanie she was moved to the ward. Staffing was therefore a significant barrier to ending prolonged seclusion for Melanie.⁴⁹

We were told Melanie's own clinical engagement in therapeutic work was also a factor in her move from long-term seclusion.⁵⁰ In a pre-recorded statement at Public hearing 11, Melanie told us 'normally I wouldn't say I'm proud of myself ever but everyone is proud of me and so I'm proud of myself'.⁵¹

Winmartie: A case study

In 2007, at 16 years of age, Winmartie was charged with a serious criminal offence resulting in the death of a family member. The Supreme Court of the Northern Territory found he was not fit to plead. A jury returned a qualified finding of guilty of manslaughter by reason of diminished responsibility.⁵² In 2010, the Supreme Court made a custodial supervision order – a fixed term of nine years and two months – and committed Winmartie to custody in the Alice Springs Correctional Centre, a maximum security prison.⁵³

Northern Territory law stated the court could not make an order committing the accused person to custody unless there was ‘no practicable alternative given the circumstances of the person’.⁵⁴ At the time, there was no place in the Northern Territory, other than maximum security prison, where a person could be held under a custodial supervision order.⁵⁵ This did not change until 2013.⁵⁶

In 2014, the Australian Human Rights Commission (AHRC) inquired into a complaint about the indefinite detention of Winmartie and three other First Nations men with disability. It found Winmartie had been subjected to ‘the most severe treatment while in prison, including frequent use of physical, mechanical and chemical restraints, seclusion and shackles when outside his cell’.⁵⁷ It found the conditions in which Winmartie was held at the Alice Springs Correctional Centre amounted to cruel, inhuman and degrading treatment in breach of Australia’s human rights obligations.⁵⁸

The AHRC said in cases where people with intellectual disability were found unfit to plead, the Australian Government had powers to work with the Northern Territory to provide accommodation and support services outside of a maximum security prison. However, it failed to do so, and this constituted a breach of their human rights.⁵⁹

Winmartie was detained in Alice Springs Correctional Centre for about seven years. In 2018, after a lengthy four-year process, Winmartie was transferred to the Forensic Disability Unit (FDU), a secure facility operated by Northern Territory Department of Health.

At the FDU, the two staff members responsible for direct clinical input into the implementation of Winmartie’s Behaviour Support Plan – the Senior Clinician and the Behavioural Clinician – did not attend staff meetings between April 2020 and March 2021. These staff members were not based in Alice Springs, but were responsible for continuous clinical analysis and review of Winmartie’s behaviour management plan.

The Supreme Court conducted the first review of Winmartie’s custodial order in 2019. It concluded Winmartie could not be safely released into the community at that time.

In July 2020, the FDU prepared a transition plan for Winmartie, which anticipated Winmartie would remain living at the FDU until 2023 when he would be placed in community-based accommodation. At the time of Public hearing 11, Winmartie remained detained at the FDU.

Like Melanie, Winmartie remained detained after the expiry of the term fixed by the court. Like Melanie, there is no requirement Winmartie be transitioned to community living by a particular date.

Under the *Criminal Code 1983* (NT) if a person is not released before a particular time (the nominal term) an independent review of the person's detention must take place. However, the original order is not discharged, and the person remains in detention unless the court orders otherwise.⁶⁰

Between 2012 and 2015, Winmartie was placed in a restraint chair in prison on 17 occasions.⁶¹ He often spent 23 hours a day in a prison cell.⁶² Between May 2018 and December 2020, after his transfer to the FDU, Winmartie was subjected to 104 instances of the use of *pro re nata* (PRN) medication for chemical restraint.⁶³ A seclusion room was used once and there were three instances of what was described as emergency use of physical restraint or 'holds'.⁶⁴

The fact two staff responsible for direct clinical input into implementing Winmartie's Behaviour Support Plan did not attend staff meetings held between April 2020 and March 2021⁶⁵ calls into question whether there was adequate clinical oversight of Winmartie during that time.

Restrictive practices were also used on Melanie. For instance, we heard evidence that twice a day, for four of the seven years Melanie was in seclusion, she was subject to prone position restraint - that is, a process of physically restraining a person so they are lying face down.⁶⁶ Medical staff expressed their concerns about the reliance on restraints at the Forensic Hospital and there were two reports into the use of seclusion at the Forensic Hospital in 2016 and 2017.⁶⁷

Dr Andrew Ellis, the Clinical Director and the Medical Superintendent for the Forensic Hospital, gave evidence at Public hearing 11. He said that shortly after he commenced his role at the Forensic Hospital in 2018 he formed the view Melanie needed to be removed from seclusion.⁶⁸ He described the use of long-term seclusion as 'anti-therapeutic' and said it could be quite damaging for the patient.⁶⁹ Dr Ellis also described the challenges of moving a person from a highly restrictive environment to the largely unrestricted environment one of an open ward.⁷⁰

Use of seclusion and restraint in New South Wales

We acknowledge efforts have been made to reduce and eliminate the use of seclusion and restraint in New South Wales. In 2017, the Chief Psychiatrist in New South Wales, Dr Murray Wright, reviewed the use of seclusion and restraint on 'consumers with a mental illness in NSW Health facilities'. Dr Wright found:

The current seclusion and restraint policy environment is confusing. NSW Health should have a single simplified principles-based policy that works towards the elimination of seclusion and restraint.⁷¹

On 6 March 2020, NSW Health introduced a new Seclusion and Restraint in NSW Health

Settings policy, which states seclusion must only be used:⁷²

- where there is a legal basis to do so as a last resort to prevent serious harm
- for the minimum duration necessary.

The policy also requires NSW Health staff to ‘avoid’ the use of prone restraint.⁷³

The associated NSW Health Performance Framework sets key performance indicators or targets, including a target of less than 5.1 acute seclusion episodes per 1,000 bed days.⁷⁴

Following Public hearing 11, Counsel Assisting proposed recommendations about seclusion. In submissions in reply, the New South Wales Government accepted the following recommendation:

The New South Wales Government review existing policy on the use of seclusion for adults with cognitive disability in the Justice Health and Forensic Mental Health Network, including the use of clearly designated authorisation and mandatory clinical and administrative review.⁷⁵

Accordingly, we make that recommendation.

Recommendation 8.9 Use of seclusion in New South Wales Justice Health and Forensic Mental Health Network

The New South Wales Government should review existing policy regarding the use of seclusion for adults in the Justice Health and Forensic Mental Health Network, including the use of clearly designated authorisation and mandatory clinical and administrative review.

Lack of step-down options

People found unfit to be tried are at risk of being detained in unsuitable placements that do not provide the support or services they need to progress towards unconditional release to live in the community.

An issue in Winmartie’s case was the lack of ‘step-down accommodation’ in the Northern Territory to enable him to transition to living in the community. Step-down accommodation provides an intermediate level of support and supervision between a detention environment or acute care in a forensic hospital and independent living in the community.

Some jurisdictions provide medium and low secure facilities where a person under a forensic order can be moved after a period in a high secure setting such as prison, before they proceed to community-based accommodation.

The *National Principles* state forensic systems should build their capacity to provide high, medium, low secure and community environments that allow people to recover and transition to life in the community. They also state step-down accommodation options should be available to help transition to the community.⁷⁶

If step-down options are not available, forensic patients face a barrier to being able to transition out of prison environments. This results in them being held in a more restrictive environment than is necessary.

Professor Patrick Keyzer gave evidence in Public hearing 11. Professor Keyzer has a particular interest in supporting First Nations people with complex needs. He was involved in preparing two communications to the United Nations Human Rights Committee on behalf of two First Nations men with cognitive impairment detained in custody.

Professor Keyzer told us the Northern Territory fitness laws confer discretionary powers that could be used to 'develop orders that are just'.⁷⁷ However, First Nations people with cognitive impairment face significant gaps in the service system, and this means they can be detained in unsuitable places where their needs are not met.⁷⁸ Professor Keyzer said it was possible to develop graduated release and service options that vary in intensity depending on the needs of the people under forensic orders.⁷⁹ The issue is not the law; rather it is the lack of options for supporting people to leave prison.

In the Northern Territory, a number of inquiries and the Supreme Court of the Northern Territory have raised concerns about the absence of a secure forensic mental health hospital facility and community-based accommodation and support options. For example, in 2018, Chief Justice Grant of the Supreme Court of the Northern Territory observed, 'supervised persons subject to custodial supervision orders continue to be detained in mainstream correctional facilities for extended periods due to the unavailability of any suitable alternative'.⁸⁰

In 2020, Chief Justice Grant made a similar observation when sentencing a 16-year-old boy with significant intellectual disability and severe functional impairment who had been declared unfit to stand trial. His Honour said:

the Court is entirely reliant on the Executive to make appropriate facilities and services available for the custody, care or treatment of accused people who continue to present the relevant level of risk to either themselves or the community. There is in this jurisdiction a dearth, or at least a shortage, of appropriate secure accommodation outside the custodial correctional context to house supervised persons subject to custodial supervision orders.⁸¹

His Honour said this situation was 'far from ideal'.⁸²

Reviews of the forensic system in the Northern Territory

In 2018 the Northern Territory Department of Health (NT Health) engaged Dr Peter Norrie, a senior consultant psychiatrist, to review orders made by the Supreme Court for supervision

(including custodial orders) of people with mental impairment who are found unfit to be tried. Dr Norrie found there was a lack of placement options to support people moving from custodial orders to non-custodial settings. People on custodial orders were moving from 24-hour custody to placements with limited professional care or supervision.

Dr Norrie said step-down interim options of full-time supervised care were needed before transition to the community. He saw benefit in the government establishing a 'slow stream rehabilitation unit with 24 hour professional care'.⁸³

In 2019, the Northern Territory Government commissioned an independent review of Northern Territory health services provided to people in contact with the criminal justice system who have a mental health or cognitive impairment.⁸⁴ The review, known as the McGrath report, found:

- The forensic system in the Northern Territory had limited options to move forensic patients out of prison while maintaining both the forensic orders under which they had been sentenced and appropriate care and support.⁸⁵
- The majority of people placed on custodial orders were held in prison and 'kept in prison as a consequence of their disability rather than their offending behaviour'.⁸⁶ This was despite the legislation saying prison should be a last resort.⁸⁷
- There was a lack of a 'properly resourced pathway, with settings involving graduated supervision and levels of security', to achieve the aim of recovery and community reintegration.⁸⁸
- There was no secure NT Health-run facility and the demand for secure supported accommodation exceeded supply.⁸⁹

The McGrath report stated:

There is a need to model a forensic clinical pathway that allows patients to move through a least restrictive care paradigm and progress toward community placement. This is a fundamental objective of any forensic care system. There is also an apparent deficiency of community accommodation and secure non-acute care facilities for forensic clients, and this diminishes movement through the system.⁹⁰

The report recommended the urgent introduction of a territory-wide services plan for clients of forensic mental health and forensic disability services that incorporates secure inpatient or residential care, secure supported accommodation and access to community-based forensic supports, at a minimum. It said the role and responsibility of, and interface with, the National Disability Insurance Scheme (NDIS) should be made clear in the plan.⁹¹

NT Health has recently finalised a review of the mental health legislation for the Territory, which commenced in 2022. This resulted in recommendations for legislative reform, including that NT Health continue to implement the recommendations of the McGrath report.⁹²

At the time of Public hearing 11, the Northern Territory had no plan to establish a medium secure care facility. Its plan was for the government to obtain accommodation in the community for any person who remains on a custodial supervision order who no longer requires a high secure facility such as prison.⁹³ The Northern Territory Government told us there were varying levels of support in community-based care, including full-time supervised care involving one-on-one and two-on-one support. This level of support was said to be sufficient to meet the needs of people on custodial supervision orders.⁹⁴ This was the plan for Winmartie.⁹⁵

The Northern Territory Government said developing further community-based accommodation options is the only practicable solution, taking into account the number of people who are subject to custodial supervision orders.⁹⁶

It appears to us that, in the absence of a medium secure facility or more secure accommodation options in the Northern Territory, there is a real risk people with disability will remain in high secure environments, such as a correctional facility or the FDU, beyond the time when less restrictive facilities could meet their care needs.

Based on the single case of Winmartie we cannot assess how frequently that risk materialises. However, his circumstances demonstrate the gravity of what can occur when a person with cognitive disability is found unfit to plead and placed in prison for a prolonged period of time. The AHRC found the conditions in which Winmartie was held at the Alice Springs Correctional Centre amounted to cruel, inhuman and degrading treatment in breach of Australia's human rights obligations.⁹⁷

Further, we heard evidence that there is a risk non-government providers will be unwilling or unable to offer complex forensic clients community-based placements, without adequate funding or support. Professor Catherine Stoddart, Chief Executive of the NT Health, and Ms Celia Gore, Senior Director, Mental Health and Alcohol and Other Drugs Branch, NT Health, told us clients in custody cannot access NDIS Supported Independent Living (SIL) funding because the Australian Government deems them ineligible under the relevant funding agreement.⁹⁸ As we explain in Part C of Volume 7, *Inclusive education, employment and housing*, SIL funding is a type of paid personal support for an NDIS participant to assist them to live independently, including help with personal care and cooking meals.⁹⁹ This means the only option may be remaining in prison or a high secure care facility.

If there was a medium secure forensic facility, a forensic patient could be stepped through that setting to less restrictive models of care, thereby complying with the obligation to impose the least restrictive care.

The Northern Territory Government submits that any person on a custodial supervision order who no longer requires high secure facilities should be provided accommodation in the community without the need for a purpose-built medium secure facility.¹⁰⁰ The Northern Territory Government contends that one-on-one and two-on-one support is able to meet the needs of people in these circumstances and this model could be provided in smaller communities without the development of a facility.¹⁰¹

We accept community-based models with those staffing levels have a role but there is a need for an intermediate form of medium secure accommodation or sub-acute secure accommodation. We do not accept the Northern Territory Government's argument that the numbers of forensic patients on custodial supervision orders and demand for a purpose-built facility 'from both clients, clinicians and advocates' means that step-down medium secure or sub-acute supported accommodation is not required.¹⁰² Rather, it is the lack of this intermediate form of secure accommodation that prevents forensic patients from accessing supported community-based accommodation. This can result in them remaining in high secure care indefinitely.

Northern Territory Government's failure to provide supported step-down accommodation

The Northern Territory Government does not provide supported step-down accommodation in community-based settings for people with disability subject to custodial supervision orders.

As a result, people with disability in the Northern Territory remain in high secure facilities, including the Forensic Disability Unit, beyond the time when less restrictive facilities could meet their care needs.

Recommendation 8.10 Transition from custodial supervision in the Northern Territory

The Northern Territory Government should provide supported step-down accommodation in community-based settings for people with disability subject to custodial supervision orders.

4.3. Fitness to plead laws in Australia and the risk of indefinite detention

Commonwealth, state and territory laws

Fitness to plead laws vary between Australian states and territories. If a person is found unfit to plead and a court makes a finding about the person's conduct, some jurisdictions require the court impose a fixed term of detention that cannot be extended. Other jurisdictions allow for an application to be made for an extension order.

Of most concern to us are the laws in Victoria, the Northern Territory, Queensland and Tasmania where there is no fixed maximum term of detention. In New South Wales, people who receive a verdict of 'act proven but not criminally responsible' may also be subject to indefinite detention.

The Commonwealth and the Australian Capital Territory: a fixed detention period

Under Commonwealth¹⁰³ and Australian Capital Territory laws, an order can be made for the detention of a forensic patient for a specified period.¹⁰⁴ That period is determined by considering the sentence that would have been imposed if the person was convicted in criminal proceedings. There is no provision for a term of detention to be extended.

South Australia and New South Wales: limiting terms can be extended

In South Australia and New South Wales, a limiting term is set if the court finds the person who is unfit to be tried committed an offence following a trial conducted under special rules. A limiting term is a period beyond which a person cannot be detained.

In New South Wales, a person who receives a verdict of ‘act proven but not criminally responsible’ remains in detention unless released by the court unconditionally or, if that does not occur, until the Mental Health Review Tribunal makes an order for conditional or unconditional release.¹⁰⁵

For people with a limiting term, their supervision (South Australia) or status as a forensic patient (New South Wales) can be extended. Laws authorising an extension were introduced in 2013 in New South Wales¹⁰⁶ and in 2019 in South Australia.¹⁰⁷

Mr Todd Davis, from the Mental Health Advocacy Service, Legal Aid NSW, said defined limiting terms provide some protection for people with disability who are found unfit to stand trial. The 2013 amendments in New South Wales ‘fostered a failure to properly prepare forensic patients for discharge’.¹⁰⁸ Mr Davis said:

Without a mark in time ... indicating that a person’s limiting term will cease in the near future, there is little impetus for preparing a patient’s transition to the community.¹⁰⁹

Mr Davis’ view was that the possibility of extending the patient’s forensic status ‘compensates for inadequacies in services, care and treatment’.¹¹⁰

We agree there is a risk of inertia when treating practitioners and other agencies are aware a forensic patient’s limiting term may be extended and therefore the patient’s status is unlikely to change.

Victoria and the Northern Territory: indefinite detention

The laws in Victoria and the Northern Territory do not fix a maximum term of detention. The order for detention or ‘supervision order’ continues for an ‘indefinite term’, unless the court orders otherwise.¹¹¹ This can mean that the onus is on the forensic patient to justify an order for release or a reduction in the level of supervision, rather than on the state to justify their continued detention.¹¹²

These laws can result in people who are unfit to stand trial being detained for a prolonged period in prisons. One example is the case of 'Rebecca', a 39-year-old mentally impaired woman who was found unfit to stand trial and not guilty due to mental impairment. She spent 18 months in a maximum security women's prison because there was nowhere else for her to go. The judge in her case said she might have been sentenced to one month in prison had she pleaded guilty and been sentenced.¹¹³ The Victorian Ombudsman found she had been held in solitary confinement for up to 23 hours a day 'where she would scream with distress for hours on end'.¹¹⁴ The report noted there was no data on how many people like Rebecca were in prison, but there was no doubt it was not an isolated case.¹¹⁵

In the Northern Territory, it is not uncommon for people to remain on an order long after the expiry of the nominal term.¹¹⁶ In 2022, NT Health completed a review of the mental health legislation in the Northern Territory. The Consultation report on the review recommended the Northern Territory's legislation be amended to require that supervision orders made in the Supreme Court specify a limited term.¹¹⁷ However, the report also recommended the legislation allow 'a party to make an application to extend an order before its expiration'.¹¹⁸ NT Health is currently developing an exposure draft of the legislation for release at the end of 2023.¹¹⁹

Queensland and Tasmania: indefinite detention

In Queensland and Tasmania there is no fixed maximum period of detention.¹²⁰ In Queensland the Mental Health Court can set a non-revocation period of not more than 10 years, during which the relevant tribunal cannot revoke the order.¹²¹ In Tasmania, an application has to be made for the discharge of the 'restriction order'.¹²²

In 2019, the Tasmania Law Reform Institute recommended the *Criminal Justice (Mental Impairment) Act 1999* (Tas) be amended by abolishing the indefinite nature of forensic orders and introducing limiting terms, which would be the court's best estimate of the term of imprisonment that would have been imposed if the person had been found guilty at a normal trial.¹²³ It also recommended that, as in New South Wales, an application should be able to be made for an extension order.¹²⁴ The recommendations have not been implemented.

Western Australia: a limiting term

In March 2023 the Parliament of Western Australia passed the *Criminal Law (Mental Impairment) Act 2023* (WA). This legislation is yet to commence, but when in force it will require a court making a custodial order (in relation to an accused who has been acquitted on account of mental impairment or found unfit to stand trial following a special hearing) to set a limiting term.¹²⁵

Variation in regimes for reviewing forensic orders

The regimes for reviewing forensic patients and the frequency of reviews varies considerably across the jurisdictions. For example:

- The Australian Capital Territory requires monthly reviews of forensic patients by the ACT Civil and Administrative Tribunal.¹²⁶
- Six-monthly reviews are required under the Commonwealth law (by the Attorney-General)¹²⁷ and under New South Wales and Queensland laws (by the Mental Health Review Tribunal).¹²⁸
- Reviews are required in Tasmania every 12 months (by the Tasmanian Civil and Administrative Tribunal).¹²⁹
- In Western Australia the Mentally Impaired Accused Review Board provides a report to the Attorney General within eight weeks after the custody order is made and at least every 12 months.¹³⁰
- In the Northern Territory and Victoria there is no requirement for a review until three months before the expiry of the 'nominal term'.¹³¹ In Victoria reviews are only required every five years after the expiry of the nominal term.¹³² In the Northern Territory a report must be made to the court every 12 months on the treatment and management of the supervised person's mental impairment, condition or disability.¹³³

We recommend both the Northern Territory and Victoria review their fitness to plead laws to require regular reviews throughout the entire order. As the *National Principles* state, 'orders relating to persons found unfit to plead, of unsound mind, or not guilty for reason of cognitive or mental health impairment should be reviewed by a reviewing authority at regular intervals'.¹³⁴

In Victoria, section 28 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) specifies the 'nominal terms' the court must impose by reference to the maximum penalty for the offence, or a proportion of it (there is an exception for offences that do not have a statutory maximum term). It would be preferable if the law required the court to calculate the nominal term by deciding what would have been the appropriate sentence to impose if the person had been found guilty of the offence charged. This is the case in the Northern Territory.¹³⁵

4.4. Ending indefinite detention

We make recommendations to end indefinite detention of people with disability in Australia.

Part of the solution is to reform the laws in Victoria, the Northern Territory, Queensland and Tasmania to require the court to fix a maximum period of detention for a person found unfit to be tried in respect of whom a detention order is made.

In some jurisdictions that already provide for limiting terms, those terms can be extended by order of the court. While this ensures oversight by a court at the time of an extension

application, the risk remains of prolonged detention of forensic patients well beyond any period they would have served had they been convicted and sentenced. No forensic patient should be subjected to a period of detention beyond the period they would have been sentenced had they been found fit to plead and convicted of an offence.

Other solutions are to:

- support people with disability to participate in legal proceedings to maximise the prospect they are fit to stand trial
- improve the fitness inquiry undertaken by courts
- educate court practitioners about the needs of people with cognitive impairment
- review and implement the *National Principles*
- collect and publish data about the number of people found unfit to stand trial around Australia.

We address those issues in this section.

Supporting people with disability to be fit to stand trial

People with cognitive disability should be supported to participate on an equal basis to others in legal proceedings. A person can be found fit to be tried provided their impairment is recognised and addressed during the course of the trial by the provision of appropriate supports or assistance. For example, a person's difficulty in understanding and answering questions asked in court may be overcome if other participants in the trial, including counsel and the judicial officer, take into account the person's cognitive impairment or communication needs.¹³⁶

Ultimately, the supports given to a defendant to participate in a trial are concerned with ensuring a fair trial. This is the touchstone for a court making a judgement about whether or not the defendant's degree of incapacity is, or is not, sufficient for them to be 'fit'.¹³⁷ If people with disability are adequately assessed and assisted, court proceedings would become more accessible and the need for fitness regimes would be reduced.¹³⁸

In 2015, the CRPD Committee recommended people with disability be allowed to defend themselves against criminal charges and be 'provided with required support and accommodation to facilitate their effective participation, as well as procedural accommodations to ensure [sic] fair trial and due process'.¹³⁹

Dr Piers Gooding, a Research Fellow at the Melbourne Social Equity Institute and Melbourne Law School at the University of Melbourne, gave evidence in Public hearing 11. Dr Gooding undertook a two-year research project to 'develop practical and legal solutions to [address] the problem of persons with cognitive disabilities ... being found unfit to plead and detained indefinitely in Australia'.¹⁴⁰ The research team developed, implemented and evaluated a Disability Justice Support Program for accused people who are at risk of being found unfit to be tried. The program operated for six months in 2016 in the Northern Territory, New South Wales

and Victoria. Three community legal centres participated, and four trained part-time support persons provided support to people with cognitive disabilities charged with a crime.¹⁴¹ An estimated 60 to 80 individuals were assisted.¹⁴²

The research project found:¹⁴³

- people with cognitive disability can find it difficult to participate in court proceedings because complex language is used
- support might not be available to people with cognitive disability throughout the proceedings. For example, a person might have a support person at conferences with their lawyer, but not throughout their trial
- legal services are under-resourced and not necessarily able to respond to the access needs of people with disabilities
- there can be long delays in proceedings involving accused persons with cognitive disability because of the need to obtain expert reports.

The research team concluded the Disability Justice Support Program appeared to reduce the need for courts to find an accused person unfit to stand trial due to the supports provided to help the person participate in proceedings and exercise their legal capacity.¹⁴⁴

Dr Gooding gave evidence that people with disability do receive support in some courtrooms, but these supports were applied in an ad hoc way and used inconsistently.¹⁴⁵

Dr Gooding said a more ‘inclusive design’ of the criminal justice system is needed to ‘shift the focus somewhat away from a protectionist and therapeutic approach to ensuring equal recognition before the law’.¹⁴⁶ As an example of how this might work, Dr Gooding referred to the placement of support workers in community legal centres, as part of the Disability Justice Support Program. This initiative appeared to improve participants’ capacity to participate in criminal proceedings by:¹⁴⁷

- supporters spending more time with clients and explaining criminal proceedings and answering questions
- improving disability awareness and competencies in community legal services
- building relationships between community legal centres and local disability and community support services
- providing resources to lawyers and courts about accessibility and procedural accommodations.

In 2013, the New South Wales Law Reform Commission (NSWLRC) proposed that in determining whether a person is unfit for trial the court must consider ‘whether modifications to the trial process can be made or assistance provided to facilitate the person’s understanding and effective participation’.¹⁴⁸ The NSWLRC said assistance can be provided by:¹⁴⁹

-
- giving the person an opportunity to become familiar with the courtroom
 - providing a support person
 - reducing the formality of the proceedings.

The NSWLRC also gave examples from the *Equality Before the Law Bench Book* of the Judicial Commission of New South Wales, which describes adjustments that may assist a person with an intellectual disability. These include:¹⁵⁰

- using slow, simple and direct speech and short sentences
- avoiding double negatives, hypothetical questions, abstract concepts and legal jargon
- taking breaks in the proceedings.

In 2014, the Victorian Law Reform Commission (VLRC) made similar recommendations.¹⁵¹ It recommended a change to the law so that, when determining the question of fitness, a court must consider how the hearing process might be modified to assist the accused to become fit to stand trial. For example, the court could consider:¹⁵²

- whether a support person could help the person understand the trial
- whether more appropriate communication methods can be used in court
- whether court procedure can be appropriately modified.

The VLRC recommended more support measures should be made available so the court can modify proceedings. For example:¹⁵³

- a formal support person scheme should be introduced, similar to intermediary schemes that operate in other jurisdictions
- practice notes or practice directions should be developed to promote the use of support measures in court for accused with a mental illness, intellectual disability or other cognitive impairment.

In 2014, the Australian Law Reform Commission recommended amending the fitness test in the Commonwealth legislation to provide that a person cannot stand trial if the person cannot be supported to:¹⁵⁴

- understand the information relevant to the decisions they will have to make in the proceedings
- retain that information to the extent necessary to make decisions during the proceedings
- use or weigh that information as part of the decision-making process
- communicate their decisions in some way.

This would change the focus of the fitness test from the accused's passive understanding to the accused's decision-making capacity and ability to participate effectively in the proceedings.

In 2019, the Tasmania Law Reform Institute (TLRI) recommended Tasmanian legislation recognise the need for courts to consider support measures and accommodations that would increase an accused's fitness to stand trial.¹⁵⁵ The TLRI also recommended the legislation specify that a finding of lack of decision-making capacity (the focus of a reformed fitness test) is only to be made as a last resort when support measures have been exhausted.¹⁵⁶

The *National Principles* state that reasonable adjustments to usual processes, and assistance to help a person with cognitive disability participate effectively in court proceedings should be considered. Some examples it provides are:¹⁵⁷

- changing court procedures, including shorter sessions, additional breaks and reducing the formality of proceedings
- support schemes such as communication assistance schemes to assist a person to exercise their legal capacity
- ensuring information is accessible and communicated in a format and mode appropriate to the person with cognitive or mental health impairment
- culturally significant adjustments, including interpreters or support persons.

We examine accessible information and communications in Volume 6, *Enabling autonomy and access*.

Improving the fitness inquiry

We recommend the tests for fitness to stand trial be amended, insofar as necessary, so a court must consider whether the accused person could participate in a trial if they were provided with adequate support or assistance and modifications to court processes.¹⁵⁸ These should include cultural supports, particularly for First Nations people, necessary to support their disability needs.

Some jurisdictions have legislation that requires the court to consider the support measures that would enable the defendant to be fit to stand trial. For example:

- In Western Australia, the *Criminal Law (Mental Impairment) Act 2023 (WA)*, once in force, will provide that 'the court may have regard to the extent to which support measures that are, in the court's opinion, reasonably available would enable the accused to be fit to stand trial' when determining fitness.¹⁵⁹ If a person is found able to stand trial while they have access to support measures, those support measures must be made available to the person throughout the trial.¹⁶⁰ This will ensure supports are not withdrawn, should withdrawal cause the person to become unfit to stand trial.
- In New South Wales, under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW)*, a court must consider, among other matters, 'whether the trial process can be modified, or assistance provided, to facilitate the defendant's understanding and effective participation in the trial'.¹⁶¹

In 2020 the Victorian Government introduced the Crimes (Mental Impairment and Unfitness to

be Tried) Amendment Bill 2020 (Vic), but the Bill lapsed. It included amendments to ensure, when courts are determining fitness, they must consider support measures that may assist the accused to stand trial.¹⁶²

No similar provisions appear in the legislation in South Australia, Victoria, Australian Capital Territory, Tasmania or Queensland. While the court must hear evidence on the issue, and may require the defendant to undergo an examination by a psychiatrist or other appropriate expert, there is no requirement to consider the types of supports that could assist a person to follow the proceedings and have the capacity to be fit for trial.

Legislation requiring a court to consider whether the trial process can be modified and support provided, to facilitate a person's understanding and participation in the trial, would encourage courts and other participants to take proactive steps to provide those modifications and supports. As the NSWLRC said in recommending the introduction of such a provision in New South Wales, '[t]he defendant has a right to a fair trial if it is possible for one to be held, and it is in the public interest for the defendant to have a fair trial if that can be achieved'.¹⁶³

All states and territories should enact laws similar to the New South Wales provision, requiring a court to consider 'whether the trial process can be modified, or assistance provided, to facilitate the defendant's understanding and effective participation in the trial'.¹⁶⁴ This should include consideration of any particular needs of First Nations people who may seem, in the absence of assistance, to be unfit to stand trial.

No jurisdiction requires consideration of cultural supports for First Nations people in court proceedings. The over-representation of First Nations people with cognitive disability in the criminal justice system, including many whose cognitive disability has not been identified, warrants particular consideration of cultural supports in court proceedings.

Modifications or assistance to facilitate the participation of a First Nations defendant with disability may include measures to address potential hearing difficulties, language and communication issues, support for their cultural background or other social factors.

As we outline elsewhere in this volume, there are high rates of hearing impairment among First Nations people in custody in the Northern Territory.¹⁶⁵ Hearing loss can affect a defendant's ability to engage with lawyers and the court during trial proceedings.¹⁶⁶ The coronial case we refer to in Chapter 2, 'The right to humane treatment in criminal justice settings', shows unrecognised hearing loss may contribute to the impression a person has a cognitive impairment,¹⁶⁷ and this could contribute to a finding the person is unfit to stand trial.

Training and educating court practitioners

We consider lawyers, judicial officers and court staff should be provided with information about making adjustments or seeking supports and services for people with disability. One way this information could be provided by judicial commissions or courts is through practice notes and bench books.

The *National Principles* state courts and the legal profession should have access to information about reasonable adjustments and the supports and services available to persons with cognitive or mental health impairment and this should be through appropriate means such as practice notes or an equal treatment bench book.¹⁶⁸

The *Equality Before the Law Bench Book* published by the Judicial Commission of New South Wales provides information for judicial officers about disability and statistics about people with disability. It also describes different types of impairments and the impact these conditions can have on a person's functioning.¹⁶⁹ The bench book guides judicial officers on appropriate language to use when referring to people with disability and gives examples of effective communication techniques. It also gives courts important detailed suggestions on adjustments that can be made to court proceedings to enable people with disability to fully participate in proceedings. These include:¹⁷⁰

- moving the proceedings to a more accessible courtroom or venue
- changing the physical layout of the court or providing assistance with physical entry to the court
- listing the matter and setting start and finishing times to accommodate the person's requirements for food, medication, treatment, transport and other such needs
- having frequent breaks
- providing documents in an accessible format and in advance
- allowing a person to have prior access to the court to familiarise themselves with the environment
- providing a hearing loop, allowing the use of a telephone typewriter (TTY) in place of an ordinary telephone or providing an Auslan interpreter
- allowing the person to have a support person with them at all times
- allowing the person to use a computer or technology assisted communication devices, symbol boards or other communication aids
- allowing a person to attend or give evidence by closed-circuit television or for screens to be used or closing the court.

In 2014, the VLRC suggested lawyers could be better trained to support their clients' decision-making capacity and ability to participate in proceedings and in the use of appropriate communication methods.¹⁷¹ It recommended the Law Institute of Victoria, in collaboration with the Victorian Bar, develop practice information to guide lawyers acting in criminal matters that involve an accused with a mental illness, intellectual disability or other cognitive impairment.¹⁷²

The VLRC recommended Victoria Legal Aid develop training and education requirements for lawyers acting in matters under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) or the equivalent provisions in the *Children, Youth and Families Act 2005* (Vic).¹⁷³

The VLRC also recommended the Judicial College of Victoria develop and deliver education for judges and magistrates about best practice management of proceedings involving a person with a mental illness, intellectual disability or cognitive impairment.¹⁷⁴ The training should include how to identify and meet the person's needs, including modifications to court procedure, the use of appropriate communication methods, and services available.

In 2018, the Law Council of Australia recommended that the National Judicial College of Australia consider establishing a dedicated disability committee, with experts on disability including people with lived experience of disability, to develop and promote disability training for judges, magistrates and tribunal members.¹⁷⁵

We recommend all jurisdictions adopt a similar approach.

Recommendation 8.11 Information for courts and legal practitioners

The Commonwealth, state and territory criminal justice systems should provide information about seeking or making adjustments and supports and services for people with disability, and the circumstances in which they may be required. This information should be made available to judicial officers, legal practitioners and court staff, including through practice notes or bench books.

Implementing the *National Principles*

In 2015, the then COAG Law, Crime and Community Safety Council (now the Standing Council of Attorneys-General or SCAG) agreed to establish a working group 'to collate existing data across jurisdictions and develop resources for national use on the treatment of people with cognitive disability or mental impairment unfit to plead or found not guilty by reason of mental impairment'.¹⁷⁶ Later, a cross-jurisdictional Working Group on the Treatment of People Unfit to Plead or Found Not Guilty by Reason of Mental Impairment prepared the *National Principles*.¹⁷⁷

The *National Principles* 'recognise the rights of persons with cognitive and mental health impairment and seek to identify safeguards throughout legal processes and during the period in which a person who is unfit to plead or not guilty by reason of cognitive or mental health impairment is subject to orders'.¹⁷⁸ At the same time, the *National Principles* 'recognise the need to ensure community safety, the prevention of harm to others, and the rights of victims'.¹⁷⁹

The *National Principles* are a non-binding, best-practice guide for jurisdictions.¹⁸⁰ They include the following key elements:

- People should be detained for the minimum period necessary to address the risk they pose to themselves, victims or others. Time limits that exceed the maximum term of imprisonment that could have been imposed if the person had been convicted of the offence charged should be avoided.

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- Detention should occur in facilities appropriate to the person's needs.
 - The person is entitled to treatment and support in the least restrictive environment for the minimum period to address risk to themselves or others.
 - The person should receive a clinical review by experts at regular intervals, with individual case management plans updated accordingly.
 - Any decision, order or condition relating to a person should also be subject to regular review by a reviewing authority.
 - The use of restrictive practices should be minimised and mechanisms to monitor their use should exist.
 - A person's case management should factor in tailored treatment and care, support services and pathways towards less restrictive environments.
 - Step-down accommodation options should be available to facilitate transition to the community for people with mental health or cognitive impairment who are discharged from detention. Forensic systems should build capacity across high, medium and low secure settings and community accommodation to allow people to recover and transition to life in the community.
 - The person's effective participation in the criminal justice system should be facilitated by any reasonable adjustments or modifications to usual processes and necessary assistance.
 - There should be independent oversight of places of detention, this being a key safeguard to uphold the rights of people involuntarily detained.

As at August 2019, the Australian Capital Territory, Queensland, New South Wales, the Northern Territory, Western Australia, Victoria and Tasmania have endorsed the *National Principles*.¹⁸¹ South Australia is broadly supportive of their objectives but does not endorse them because they are inconsistent with its current legislative provisions, policies and procedures.¹⁸²

The Australian Government has committed to a review of the *National Principles* in 2024 in consultation with state and territory governments.¹⁸³

At present the *National Principles* do not state that indefinite detention is unacceptable. The *National Principles* should adopt that position and state and territory legislation should be amended accordingly, as recommended by the Senate Committee in its 2016 report.

A consistent approach should also be adopted to limiting terms for people found unfit to plead or not guilty by reason of cognitive or mental health impairment (as the Senate Committee also recommended). They should not exceed the sentence that would have been imposed had the person been sentenced following an ordinary criminal trial.

Legislation should enshrine the principle that prison is a place of last resort for people who have been found unfit to plead or not guilty by reason of cognitive or mental health impairment, and only to be used if all possible alternative options have been investigated.

The Australian Government should take primary responsibility for reviewing the *National Principles* and encouraging state and territory governments to implement them in legislation, policy and practice, to the extent they do not already do so. It is not enough to endorse them. All governments should reshape their forensic systems to be consistent with the *National Principles*.

Ending indefinite detention will require states and territories to provide step-down options for people in the forensic system to facilitate their progressive transition to less restrictive environments. This includes providing medium and low secure and community-based accommodation options for placement. Without those options, people in the forensic system like Melanie and Winmartie may become entrenched in prisons and high secure environments where they are at high risk of violence, abuse and neglect.

Recommendation 8.12 Implementation of the *National Principles*

The Australian Government, together with state and territory governments, should review the *National Statement of Principles Relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment (National Principles)* through the Standing Council of Attorneys-General.

The *National Principles* should be revised to include the following:

- Indefinite detention is unacceptable and laws providing for it should be repealed.
- Where an order for detention is made, there should be a maximum term of detention nominated beyond which the person cannot be detained (a 'limiting term').
- The limiting term should not exceed the court's assessment of the sentence it would have imposed on the defendant had the person been found guilty of the offence in an ordinary trial of criminal proceedings.
- In hearings conducted to determine a person's fitness to stand trial or to plead, the court must consider whether it can modify the trial process or ensure assistance is provided to facilitate the defendant's understanding and effective participation in the proceedings. This includes any cultural or other trauma-informed supports a First Nations defendant may need to ensure the defendant can participate in a fair trial and understand the proceedings.

The Standing Council of Attorneys-General should agree to a timetable for implementation of reforms identified in the review of the *National Principles*.

The Commonwealth, states and territories should amend their legislation on fitness to stand trial to align with the revised *National Principles*.

The Australian Government and state and territory governments should build their capacity to provide step-down options, including medium and low secure and community-based accommodation options, for the placement of people in the forensic system to facilitate their progressive transition to less restrictive environments.

Collection and publication of data

There is no consistent available data on how many people deemed unfit for trial are held in custody around Australia.

Article 31 of the *CRPD* requires States Parties to collect appropriate statistical and research data to enable them to implement policies to give effect to the *CRPD*. States Parties are to use this information to assess the implementation of their obligations under the *CRPD* and to identify and address barriers that persons with disabilities face in exercising their rights.¹⁸⁴

Dr Gooding gave evidence that the lack of data makes it difficult to monitor and assess:¹⁸⁵

- whether forensic patients who are subject to nominal or limiting terms are detained for longer than those sentenced in ordinary criminal trials
- whether Australia is compliant with its domestic and international legal obligations
- the comparative efficacy of the various unfitness detention models.

Collection of this data is an essential first step in analysing how forensic systems are working and what effect they are having on people with disability, in accordance with Australia's human rights obligations. The data would assist governments evaluate their policy settings relating to people with cognitive and mental health impairments in the criminal justice system. It would also help them understand whether further resources are needed, including the extent of any shortfall for forensic services and accommodation placements (including secure care facilities and supported accommodation) in the community.

In 2015, the then COAG Law, Crime and Community Safety Council agreed to establish a working group 'to collate existing data across jurisdictions and develop resources for national use on the treatment of people with cognitive disability or mental impairment unfit to plead or found not guilty by reason of mental impairment'.¹⁸⁶

In 2016, the Senate Committee published data indicating the numbers of people detained as forensic patients but noted the official statistics were 'largely piecemeal and inconsistent between the states'.¹⁸⁷ It also noted, in some cases, no statistics were publicly available.¹⁸⁸

Following the report, the Attorney-General's Department wrote to the Senate Committee and noted 'existing gaps, or unavailability of data have made it challenging to assess the current situation in Australia regarding the experience of people with cognitive disability or mental health impairment in the criminal justice system to date'. The Attorney-General's Department stated the Law, Crime and Community Safety Council would further consider the data collection project at its first meeting in 2017.¹⁸⁹

The Working Group on the Treatment of People Unfit to Plead or Found Not Guilty by Reason of Mental Impairment (Working Group) prepared a paper on data for the Law, Crime and Community Safety Council meeting on 19 May 2017.¹⁹⁰

The paper stated the Working Group was given the task of collating existing data on people unfit to plead or found not guilty by reason of mental impairment in order to:

- get a current picture of the situation in Australia
- consider common issues affecting jurisdictions
- discuss what the most relevant data indicators are for informing policy development
- consider whether data collection processes could be refined to improve coverage, including whether a national data collection framework could be developed.

The paper also suggested the Working Group could consider developing a data collection framework for use by police and the courts, covering agreed data indicators to address and gaps in data, if appropriate.

The Working Group concluded there were gaps and inconsistencies in data collection between jurisdictions. It observed that the task was further complicated by the fact multiple agencies can be involved: justice, corrections and health.

The paper contains reference to data obtained from the Commonwealth, Western Australia, New South Wales, Queensland and Victoria showing numbers of people found unfit to for trial or not guilty by reason of mental impairment in the 2014–2015 financial year.¹⁹¹ It also presents data which aims to depict the total number of people found unfit to plead or not guilty because of mental impairment, who were in detention as at 30 June 2015.¹⁹² These figures are difficult to interpret because no exact figures are provided and the information is difficult to draw conclusions from because of its limitations. The presented data is unreliable, inconsistent and likely to underestimate the true number of people found unfit to be tried.

The Working Group paper highlighted that several jurisdictions did not provide personal data about forensic patients. One identified data gap was ‘differentiating between whether the person has a cognitive disability or mental impairment’. The Working Group also noted the importance of collection of data about the number of First Nations accused in the forensic system, given the over-representation of First Nations people in detention generally.

The Working Group suggested jurisdictions collect data on:¹⁹³

- total numbers of people found not guilty by reason of unsoundness of mind or not fit to stand trial
- personal information, including First Nations status, age and gender
- type of classification of offence
- type of order given
- number of people who received leave of absence or a conditional release order
- number of people detained in a custodial setting

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- number of people detained in a hospital or other mental-health secure facility
 - number of people on conditional release orders
 - total length of any detention, including custodial or under a forensic order
 - length of time detained until conditional release order or leave of absence
 - frequency of reviews.

Personal data about disability type should be collected. Data collected about numbers detained in a custodial setting should differentiate between adult correctional facilities and youth detention facilities. Data collected about people detained in hospital or other mental health facilities should also specify whether the person is held in a general psychiatric unit in the community, forensic mental health facility or forensic disability facility.

In 2019 the CRPD Committee urged Australia to:

Collect data on the number of persons indefinitely detained and on the number of such persons detained on an annual basis, disaggregated by the nature of the offence, the length of the detention, disability, Aboriginal and other origin, sex, age and jurisdiction, with the aim of reviewing their detention ...¹⁹⁴

The Australian Government should take primary responsibility for improving the consistency of data collection across the jurisdictions, including the development of a data collection framework and processes. All governments should commit to implementing such a framework.

As the Working Group stated in the data paper:

Robust data collection will effectively inform evidence-based policy developments and any necessary corresponding legislative reforms. This will provide the opportunity to create more just outcomes for mentally impaired accused in the criminal justice system.¹⁹⁵

Recommendation 8.13 Data about people detained in forensic systems

The Australian Government and state and territory governments should support legislation requiring the annual collection and publication of data relating to people found unfit to plead or not guilty by reason of cognitive or mental health impairment. The data collected should include:

- the number of people under forensic orders in their jurisdiction
- the number of people under orders for detention and the numbers subject to:
 - indefinite periods of detention
 - limiting terms (or equivalent)
 - orders extending their order for detention
- the number of people under orders for detention by sex, disability, disability type and First Nations status
- the number of such people detained in:
 - an adult correctional facility
 - a youth detention facility
 - a forensic mental health or forensic disability facility
 - a general psychiatric unit.

4.5. Conclusion

The reforms we recommend will not be effective unless the forensic system itself is reformed. For example, as we saw in Winmartie's case, a law may state a court cannot order that a person be detained in a prison unless there is 'no practicable alternative given the circumstances of the person'. This law will have no effect if there is nowhere other than maximum security prison where a person can be held under a custodial supervision order. A graduated pathway of less restrictive environments ensures forensic patients progress towards community living.

It is necessary for governments to provide appropriate rehabilitation to forensic patients to enable them to transition out of the forensic system. This must include appropriate clinical oversight and planning for the supports they need to live in the community, including options for supported or secure accommodation. Regular clinical review is also important, as is the provision of therapy and supports to address risk. As we saw in Melanie's case, an important factor in minimising the use of seclusion was that a dedicated nursing and allied health team with adequate supervision and training was allocated to Melanie's care.

Community Visitors, advocates and guardians play an important monitoring role, as will National Preventive Mechanisms for the purposes of Australian governments' compliance with the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)*. We address these measures in Volume 11, *Independent oversight and complaint mechanisms*.

Endnotes

- 1 *R v Presser* [1958] VR 45, at 48.
- 2 For example, see the test in *R v Presser* [1958] VR 45.
- 3 *Daniel M'Naghten's Case* (1843) 8 ER 718 (sometimes referred to as the M'Naughten Rules) set out the requirements for establishing what was called the defence of insanity. The accused must prove that at the time of committing the act, they 'were labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act [they were] doing; or, if [they] did know it, that [they] did not know [they were] doing what was wrong'.
- 4 *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).
- 5 See, for example, Australian Government Attorney-General's Department, National statement of principles relating to persons unfit to plead or not guilty by reason of cognitive or mental health impairment, August 2019, pp 3, 6–7.
- 6 Most jurisdictions have adopted criteria for determining fitness based on the *Presser* criteria: *Crimes Act 1900* (ACT) s 311; *Criminal Code Act 1983* (NT) sch 1, s 43J; *Criminal Law Consolidation Act 1935* (SA) s 269H; *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8; *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 6; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 9; *Mental Health and Cognitive Impairment Forensic Provisions Act No 12 2020* (NSW) s 36.
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103 Where a person is charged with a criminal offence under a Commonwealth law, they are dealt
with under that law, and, if convicted, detained in state or territory prisons.
104 Called a 'limiting term' in some jurisdictions. Section 20BC of the *Crimes Act 1914* (Cth) provides
that the 'order of detention' cannot exceed the maximum period of imprisonment that could be
imposed if the person has been convicted for the offence for which they were charged. See also
ss 301 and 305 of the *Crimes Act 1900* (ACT). Note that courts have stated that the limiting term
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Act 2016* (Qld) s 433.
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5. Screening, assessing and identifying disability in custody

Key points

- Identifying that a person in contact with the criminal justice system has a disability or multiple disabilities is critical to ensuring the person's support needs can be met.
- A significant number of people with disability in the criminal justice system in Australia are not identified as having a disability and not afforded reasonable adjustments or other supports in their interactions with the system.
- Methods for screening for and identifying disability should be available at all stages of the criminal justice process, including police, court and correctional settings.
- Without awareness that a person has a disability, the criminal justice system will not take into account the support needs of people with disability. In particular, evidence shows that people with cognitive disability experience considerable injustice at various stages in the criminal justice system, beyond that of other groups of alleged or actual offenders.
- Timely and accurate screening and identification processes are needed to identify opportunities to divert people with cognitive disability from the criminal justice system and to link them to appropriate services during and after criminal proceedings, including during the term of their sentences.
- Current practices for screening for disability in custodial settings vary widely across Australia. Corrective service and youth justice agencies rely heavily on self-reporting disability. Yet many people with disability may be unable or unwilling to report their disability.
- Where screening occurs in custodial settings, it is not comprehensive and may not be culturally appropriate or trauma-informed. A wide variety of screening and assessment tools are used. The effectiveness of disability screening and identification is also limited by poor information sharing practices within justice agencies and between criminal justice systems and other services systems.
- There is a need for national practice guidelines on screening for disability in custody to promote consistent practices between jurisdictions and improve standards and systems for identifying disability and responding to the disability needs of people in custody. Governments should also seek to engage First Nations organisations including Aboriginal community-controlled health organisations in screening of First Nations people with disability in custody.

5.1. Introduction

As we have discussed in Chapter 1, ‘People with disability in the criminal justice system’, people with disability – particularly people with cognitive disability and First Nations people with disability – are over-represented in the criminal justice system. However, the true number of people with disability in the criminal justice system cannot be determined, in part because of an absence of consistent and comprehensive screening practices.¹

In this chapter we examine current practices for the screening and identification of people with disability at various stages of the criminal justice system, but we focus particularly on custodial settings.

In this chapter, when we refer to ‘screening and identification’, we mean any process or assessment used to identify a disability and the support needs of a person with disability. We use that expression to include not only the initial screening undertaken during a person’s first interaction with a criminal justice agency, such as upon admission to custody. It includes any further assessments or referrals to specialists needed to confirm a person’s disability or support needs.

‘Screening’ usually involves a series of questions or tests that are administered when a person is first admitted to a prison or detention centre, such as during ‘intake’ to prison, to identify a disability or the possibility of a disability. A person may then be referred for more detailed assessment if the screen reveals a possible disability. Assessment generally involves a more detailed process involving appropriate professionals and in-depth testing.

Screening and identification for disability and support needs are significant to all people with disability who engage with a criminal justice system. They have particular significance for people with cognitive and psychosocial disabilities because they are over-represented in criminal justice systems. Screening may have an immediate benefit by identifying the person’s support needs while in prison or detention, as well as longer term benefits in identifying the supports and services they require upon the person’s release from custody.

Many past reports and witnesses who gave evidence in our public hearings have identified the importance of agencies in the criminal justice system, including police, courts and corrective services, being able to identify that a person has a disability, especially a cognitive disability. They said better screening and identification processes are needed to ensure this occurs.² They expressed concerns that disability screening and identification are inadequate and that there are poor information sharing practices between justice and other agencies for identifying a person’s support needs.

Based on the evidence we received, we are able to make recommendations to improve current screening processes in correctional settings.

5.2. Importance of screening and identification

It will always be preferable for a person to have any disability and related support needs identified before any interaction with the criminal justice system.³ However, research shows that many people with disability enter the criminal justice system without having been previously identified as having a disability, including cognitive disability.⁴ First Nations people with disability, in particular, are less likely to identify or be identified as having a disability outside the criminal justice system.⁵ People may be reluctant to disclose their impairment or disability for a number of reasons, including fear of victimisation or past trauma.⁶

We heard that timely and accurate identification that a person has a disability, particularly a cognitive disability, is important at all stages of the criminal justice process. Identifying that a person has a disability can affect the way police engage with a person. For example, a police officer who understands that apparently non-compliant behaviour is related to a person's disability is likely to respond to the behaviour differently than an officer who is unaware of the connection. In the former case, the officer may take steps to avoid escalating the situation, or may exercise their discretion to caution or warn the person, rather than proceeding to an arrest or charge.⁷

Mr Geoffrey Thomas told us he feels 'too often police are immediately aggressive' and 'assume the worst' about him because of his criminal history and disability, which has caused him to be scared of police.⁸ However, more recently he encountered some police who understood he has a disability:

I have experienced police who do exercise their duty of care and instead of being aggressive, ask me, 'how are you going Geoffrey?' 'How are you feeling?' 'Are you having any thoughts or feelings of self-harm?' This approach makes such a big difference ... Police should also have a better idea of what cognitive impairment and mental illness are. I think they have an obligation to understand these things.⁹

In a report commissioned by the Royal Commission examining police responses to people with disability, researchers found a 'defining feature of police contact with people with disability' is the lack of understanding among police officers of disability. This can affect their understanding of a person's behaviour, communication and compliance with instructions.¹⁰

One example involves a young Pintupi man from the very remote Aboriginal community of Kiwirrkurra, Western Australia with cognitive disability, Mr Gene Gibson, who was convicted following a guilty plea to a charge of manslaughter.¹¹ After five years in prison, Mr Gibson successfully appealed against his conviction. The Court of Appeal Division of the Supreme Court of Western Australia concluded there had been a miscarriage of justice because Mr Gibson had not adequately understood the legal process, the case against him, the legal advice he had received, the options available to him or the consequences of his guilty plea. There was therefore a real risk his plea was not attributable to a genuine consciousness of guilt.¹²

The Court of Appeal accepted fresh expert evidence that Mr Gibson had ‘cognitive impairments that were significant and pervasive’¹³ and at all material times seriously affected his ability to make or understand the implications of important decisions, to remember reliably detailed information, understand complex oral instructions and perform other cognitive functions.¹⁴

In a separate decision, the Supreme Court of Western Australia ruled that police interviews with Mr Gibson were inadmissible because he did not participate voluntarily and because police failed to comply with statutory requirements, including providing Mr Gibson with an interpreter.¹⁵ Researchers considered the actions of police in interviewing Mr Gibson extensively without a qualified interpreter over two days demonstrated a lack of awareness that Mr Gibson had a disability, despite his obvious difficulty understanding questions.¹⁶

The researchers said this case study underlined the importance of police, judicial officers and legal practitioners understanding how a cognitive disability can disadvantage a person coming in contact with the criminal justice system. The researchers also considered the case study illustrated the need for such a person to be screened as early as possible in the criminal justice system.¹⁷

Identifying that a person with disability requires support is a ‘gateway step’¹⁸ to ensuring that appropriate adjustments can be made as early as possible in the criminal justice process. The right of a person with disability to equality before and under the law, recognised by article 5(1) of the *Convention on the Rights of Persons with Disabilities (CRPD)*, may be empty unless, for example:

- court facilities are fully accessible¹⁹
- court procedures are modified to ensure the person can understand and effectively participate in the proceedings²⁰
- all available options to assist the person, such as diversion programs, are given appropriate consideration²¹
- appropriate information is placed before the court for the purpose of determining bail applications and sentencing proceedings.²²

Local courts (sometimes called magistrates courts) deal with the vast majority of criminal proceedings in Australia. As we discussed in Chapter 1 of this volume, research indicates that a significant proportion of defendants appearing in local courts or magistrates courts around Australia have a cognitive disability.²³ In 2012, the NSW Law Reform Commission (NSWLRC) reported that multiple studies consistently found people with ‘cognitive impairment and/or intellectual disabilities’ were over-represented among defendants appearing in local court in New South Wales.²⁴

As Professor Eileen Baldry AO told us, if a magistrate does not know a defendant has a disability or impairment, or they are unfamiliar with the behaviours associated with a disability or impairment, the defendant ‘may not receive appropriate supports and is at risk of an unfavourable outcome’.²⁵ Screening is therefore important to identify defendants with any type

of disability in the courts, including the local or magistrates' courts which hear the vast majority of criminal matters.²⁶

Due to this volume of work, judicial officers, prosecutors and defence lawyers in lower courts are under significant pressure to work efficiently through high workloads and have limited opportunity for flexibility or individualised approaches.²⁷ This increases the risk that a person's disability and support needs will not be identified or understood in the absence of screening mechanisms. When that risk materialises, it contributes to the disproportionate representation of people with disability, particularly cognitive disability, in the criminal justice system.²⁸

The Local Court of New South Wales told us in a submission that where a defendant is identified as having a disability and an application is made for their referral to a diversion program,²⁹ magistrates:

typically adopt procedures for the hearing of these applications which make the conduct of proceedings less intimidating for defendants ... Although proceedings are held in open court, they are generally scheduled for later in the day when the court is less busy and people other than the defendant and legal representatives are less likely to be present in the court room.³⁰

Meeting disability-related support needs in custody

We pick up stuff [disability] here in remand but it's not picked up further on. People with disabilities get lost in bigger prisons. If you're not screaming or kicking, and if your disability isn't visible, you're under the radar. You don't get the attention you need, you're invisible. They keep coming back, [we have] seen them so many times over the years.³¹

Timely and effective screening of prisoners or detainees to determine whether they have a disability or impairment is important in correctional settings. Effective screening is a necessary precondition to providing prisoners or detainees with:

- the supports they require to be in the same position, so far as feasible, as other prisoners, such as mobility aids or information in a form they can understand
- access to appropriate rehabilitation programs
- access to appropriate pre-release planning.

Pre-release planning should facilitate a person being referred to the right services upon release from prison, including disability, health and housing services.³² Identifying a prisoner's disability-related support needs is also important if the prisoner, upon release, is to apply successfully to become a National Disability Insurance Scheme (NDIS) participant. If the person is already a participant when they enter custody, it is necessary to receive approval for a plan that covers the reasonable and necessary supports they will need upon release.³³

For example, in Public hearing 11, 'The experiences of people with cognitive disability in the criminal justice system', Ms Taylor Budin gave evidence that she was able to be released on bail because her Legal Aid lawyer and Cognitive Impairment Diversion Program (CIDP) case manager informed the court she would receive supports and would attend assessments arranged by the CIDP.³⁴ As a result, Ms Budin was diagnosed with autism spectrum disorder and successfully applied to become an NDIS participant. CIDP also arranged referrals to a psychiatrist and to a disability employment service. Ms Budin said: 'I got an employment advisor who understands mental health, autism and my difficulties reading and writing. Not to mention my criminal record.'³⁵

Ms Budin's experience is reflected in other reports, such as the Council of Australian Government's *Prison to Work Report*, which concluded that better identification of prisoners' needs at intake, including disability support needs, would support the development of pathways to rehabilitation and employment upon release from prison.³⁶

No national standards or guidelines about screening and identification of disability in correctional systems

There are no national standards or minimum requirements for screening for disability in custodial settings. The Guiding Principles on Corrections in Australia prepared by the Corrective Services Administrators' Council (Guiding Principles) identify strategic principles and best practices in the operation of corrective services around Australia.³⁷ While the Guiding Principles 'are not procedural instructions', they are designed to guide the development of each jurisdiction's correctional policy in line with best practice.

The Guiding Principles provide that upon reception or transfer prisoners should 'undergo an initial assessment to identify any immediate support needs and facilitate access to appropriate services, including health, interpreters and disability services.'³⁸ They provide that wherever possible, prisoners with disability and people with disability on remand should be 'identified upon admission/registration and access to support, health and mental health services is facilitated'.³⁹

The Guiding Principles are intended to be applied by correctional services and justice health agencies. The latter are generally responsible for providing health care services to prisoners, people on remand and detainees while in custody. Depending on the state or territory, they are usually part of either a department of justice (or corrections) or a department of health. In New South Wales, for example, the Justice Health and Forensic Mental Health Network, known as Justice Health NSW, is a statutory health corporation that reports through its Board

to the Secretary of the New South Wales Department of Health. While the Guiding Principles are a starting point, they do not provide specific guidance about the procedures that should be adopted by correctional and justice health agencies on screening, assessing and identifying people with disability entering custody.

Inadequate screening and identification processes in justice settings

The adequacy of screening and identification processes in justice settings has been the subject of past government reports and research studies.

In 1996 the NSWLRC reported on the ‘failure of agencies to identify people with intellectual disability’ in the criminal justice system, recommending criminal justice agencies adopt a systemic approach to screening, assessing and identifying people with intellectual disability.⁴⁰

In 2012, the NSWLRC again raised concerns about the absence of court-based assessment services for people with cognitive disability in the New South Wales criminal justice system.⁴¹ It recommended identification and assessment for mental health and cognitive impairments be available to defendants in all local courts.⁴²

In 2014, the Australian Human Rights Commission, in a report titled *Equal before the law: Towards Disability Justice Strategies*, found that in the context of police, courts and corrections ‘there is widespread difficulty identifying disability and responding to it appropriately’ and ‘[n]ecessary supports and adjustments are not provided because the need is not recognised’.⁴³

In its 2016 report *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, the Senate Standing Committee on Community Affairs discussed the importance of screening for disability in the criminal justice system, including for fetal alcohol spectrum disorder (FASD).⁴⁴ The Committee examined screening processes around Australia, although it did not identify any routine screening processes for FASD.⁴⁵ The report suggested all jurisdictions should adopt the practice of screening all prisoners and detainees for ‘disability (including cognitive, sensory, physical) and mental illness’, which the Committee described as the practice in New South Wales.⁴⁶ It considered ‘[s]uch a practice would help to ensure that all prisoners with disability are provided with access to therapeutic and other supports appropriate to their needs’.⁴⁷ The Committee ultimately recommended the Council of Australian Governments (since replaced by the National Cabinet) ‘develop a disability screening strategy (including hearing assessments) for all Australian jurisdictions’ for use in multiple points throughout the criminal justice system.⁴⁸

In 2020, the Productivity Commission’s *Mental Health* report examined screening practices for mental health of adults and young people entering prisons around Australia. The report found inadequacies and disparities among the practices in different jurisdictions.⁴⁹ The report recorded concerns that screening is sometimes done by custodial officers, rather than qualified medical professionals.⁵⁰ It recommended state and territory governments ensure that people with mental illness have access to timely and culturally capable mental healthcare.⁵¹ The Productivity Commission also proposed that all people entering correctional facilities receive mental health screening and assessment by a mental health professional on admission.⁵²

In 2017, the Northern Territory Ombudsman raised concerns in investigation reports that data held by Northern Territory Correctional Services did not accurately reflect the rates of cognitive disability among female prisoners. The Ombudsman suggested ‘substantially more work needs to be done’ in identifying cognitive and other disabilities among female prisoners.⁵³

In 2019, the Queensland Productivity Commission’s *Inquiry into Imprisonment and Recidivism* reported that screening, particularly for cognitive disability, prior to entry into and within the criminal justice system is important in reducing the potential for reoffending, re-criminalisation and ultimately ‘enmeshment’ of people with disability in criminal justice systems.⁵⁴ It recommended reforming sentencing laws to create a presumption in favour of courts seeking pre-sentence assessments, including psychological assessments, ‘where there is reason to believe the offender is suffering from a mental illness or intellectual disability and the court is considering imposing a prison sentence’.⁵⁵

In 2020, the final report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory recommended that on admission into a detention centre, all children should undergo ‘comprehensive medical and health assessments’, including screening for mental health issues and FASD.⁵⁶

In 2022, the Office of the Inspector of Custodial Services in Western Australia made recommendations in response to deficits in screening, treatment and amenities for people with disability identified in its 2021 inspection of Hakea Prison.⁵⁷ The Inspector recommended that initial health screens conducted on incoming prisoners be revised to include identification of intellectual disability and cognitive disability.⁵⁸ The Western Australian Department of Justice supported this recommendation.⁵⁹

We have referred in Chapter 3, ‘Youth Detention’, to the high proportion of detainees in Banksia Hill Detention Centre who have intellectual or cognitive disability. The Inspector, Mr Eamon Ryan, told us his office has also ‘long stated’ that screening processes in the Detention Centre are inadequate in identifying cognitive impairments among detainees.⁶⁰

Studies have consistently found that procedures for identifying people with disability, especially cognitive disability, in criminal justice settings are poor.⁶¹ For example, they have shown that police often fail to recognise when a person has a cognitive disability, particularly if the person attempts to ‘pass’ as not having an impairment.⁶²

The Human Rights Watch report *He’s never coming back: People with disabilities dying in Western Australia* records nursing staff in a Western Australian prison identifying limited time and resources as the primary reasons for inconsistency in screening of prisoners with disability.⁶³

At Public hearing 27, ‘Conditions in detention in the criminal justice system’, Ms Kriti Sharma, Senior Disability Rights Researcher at Human Rights Watch, gave evidence that a person’s disability-related support needs cannot be met if the person’s disability is not identified upon entry into prison.⁶⁴ Failure to identify the disability can have serious repercussions, including prison staff not appreciating that behaviours exhibited by a prisoner with disability are a function of their disability.⁶⁵

Researchers have proposed methods for enhancing the early detection of cognitive disability. These include alerts to ‘flag’ accused persons likely to require supports when interacting with the criminal justice system in ways which attempt to deal with the ethical and legal issues involved in sharing information between health and criminal justice systems.⁶⁶

In submissions following Public hearing 11, Counsel Assisting proposed the following findings were open to the Royal Commission:

Barriers to accessing, and limited availability of appropriate services and supports, are factors that contribute to enmeshment of people with cognitive disability in the criminal justice system. So too is inadequate screening and diagnosis.

...

... inadequate screening and diagnosis, and the limited availability of culturally safe and competent services and supports are factors that contribute to enmeshment of First Nations people with cognitive disability in the criminal justice system.⁶⁷

None of the parties with leave to appear at that hearing – including the Australian and state and territory governments – contested those proposed findings. We agree with them.

5.3. Current screening practices in correctional settings

Our inquiry has included an examination of the screening practices used by corrective and youth justice agencies in all Australian states and territories.

We have focused on screening in prisons and detention centres because of the significant over-representation of people with disability in custody and because the evidence demonstrates custody often presents the first opportunity for a person to be assessed as having a disability or impairment. Notably, many people with disability proceed all the way through the criminal justice system to imprisonment without their disability ever being identified.⁶⁸

A person’s admission to custody presents an opportunity for state and territory governments to identify that a person has a disability and to provide supports to meet their support needs while in custody. Screening while in custody also provides an important opportunity to identify supports the person will need in future to reintegrate into the community and avoid reoffending.

While screening practices that take place earlier in the criminal justice process are also critical, information presented to us suggests they are often unavailable or are limited.

The South Australian Courts Administration Authority told us South Australian criminal courts ‘do not have any process by which a timely, initial assessment of a defendant can be completed to indicate whether a defendant may be a person with disability’.⁶⁹ We were told the cost of an expert report in South Australia can be prohibitive (unless the defendant is represented and funded by Legal Aid) and the waiting time for an assessment was usually four months

or longer.⁷⁰ This has often led criminal courts to rely on pre-sentence reports prepared by the Department of Correctional Services. Although these are usually available sooner, any information about the defendant's disability in the report 'will tend to be generalist in nature'.⁷¹

The Local Court of New South Wales told us in its submission court-based assessment and support services for identifying and assessing disability are 'extremely limited'.⁷² The state-wide Community and Court Liaison Service operates in 22 local courts and employs mental health nurses who may assist in assessing defendants with cognitive disability, but is not a dedicated disability service.⁷³

Legal Aid Queensland told us grants to fund expert reports for use in court are usually limited to a set fee which does not generally reflect the cost of the assessments. Legal Aid often struggles to find experts in psychiatry, psychology and neuropsychology willing to assess referred clients and they also encounter significant waiting times for reports.⁷⁴

Expert reports obtained during criminal proceedings, including at the sentencing stage, should contain information about any disability and support needs a defendant may have. That information is essential for sentencing purposes, and to enable corrective service and youth justice agencies to identify the supports needed by people being taken into custody or placed under supervision following court proceedings.

Because a person entering the criminal justice system may come in contact with a number of different government agencies, effective procedures for sharing information among agencies are important. Evidence at Public hearing 27 revealed procedures for sharing information among justice agencies are not necessarily well understood or properly utilised.

In Western Australia, Corrective Services Health Services is responsible for the health of all adults and children in custody.⁷⁵ Those people have often been the subject of court-ordered pre-sentencing reports which contain information about health of the detainee, including assessments of their neurocognitive functioning and any impairments they may have.⁷⁶

The evidence showed that since 2014 and until the time of Public hearing 27, the Western Australia Department of Justice had consistently misinterpreted provisions of the *Sentencing Act 1995 (WA)* concerning access by Corrective Services Health Services to court ordered pre-sentencing reports. The Department interpreted the legislation as prohibiting Corrective Services Health Services from accessing the pre-sentence reports,⁷⁷ thereby denying the agency access to crucial disability assessments in the reports.⁷⁸ Corrective Services Health Services was therefore required to duplicate previously conducted assessments, often resulting in delays and significant costs.⁷⁹

Failing to share relevant information about a person's disability or impairment held in separate parts of the criminal justice system works to that person's detriment. The person's support needs may be missed or misunderstood, even though they have previously been assessed and their support needs identified.

In submissions following Public hearing 27, Counsel Assisting proposed the following finding:

There is a need for improved systems for appropriate sharing of disability and health information between the corrective services/youth justice agencies and health agencies responsible for prisoner health services, including to access assessments undertaken before the person entered custody, to avoid delays in the identification of disability and disability support needs.⁸⁰

None of the parties with leave to appear at the hearing, including the Australian Government and states and territories contested this finding, which we accept.

Screening practices in prisons and detention centres

Counsel Assisting's submissions following Public hearing 27 provided a summary of the practices and policies for screening and identification of disability in prisons and detention centres in each state and territory, as at the time of the hearing.⁸¹ The accuracy of the summary was not disputed by any of the parties given leave to appear at the hearing.

The following account is based on Counsel Assisting's summary. It is not intended to be comprehensive, but illustrates variations among jurisdictions and gaps in screening practices.

Australian Capital Territory

In the Australian Capital Territory, all detainees are assessed by nurses and mental health specialists upon induction or within 24 hours.⁸² The detainee's reasonable adjustment needs are identified upon admission into custody using the Tool for Identification of Reasonable Adjustments based on the Washington Group Questions and the Mental Status Examination.⁸³

During their induction, detainees are asked if they identify as having a disability, or if they require reasonable adjustments.⁸⁴ The questioning process must also 'respond to language and comprehension barriers ... [including] intellectual, cognitive or other forms of learning disability'.⁸⁵ Disability may be identified through observation, speaking with parents or guardians, self-reporting, referral from other agencies, reviewing clinical records or advice from Justice Health Services.⁸⁶ Disability information is recorded on the detainee's file and can be accessed by all staff.⁸⁷

New prisoners undergo multiple assessments during induction, including health admission assessments undertaken by a registered nurse and mental health clinician.⁸⁸ These processes may identify disability through prisoner responses during screening, staff observations or health advice.⁸⁹ The screening does not involve screening for FASD.⁹⁰ If a disability is identified, the prisoner is referred to the Specialist Communities Team, where allied health professionals will conduct further assessments for functional and cognitive capacity, arrange specialist assessments, arrange equipment or aids.⁹¹ Mr Ray Johnson APM, the current Commissioner for ACT Corrective Services, said an enhanced screening process for disability was to be piloted in 2023.⁹²

New South Wales

In New South Wales, all detainees complete a Detainee Risk Questionnaire upon admission into a youth justice centre. This includes questions about 'identified or suspected disability' and relies on self-reporting, reports from family or from other professionals, as well as observations by the assessor.⁹³ Every detainee is assessed by a youth justice worker, a nurse and a psychologist within 24 hours of admission, except on weekends. Where a disability is suspected, the psychologist will complete a cognitive assessment.⁹⁴ Detainees may also undertake further diagnostic or functional assessment specific to their needs, including for the purpose of NDIS referral.⁹⁵ Caseworkers also conduct a Youth Justice Assessment Guide, which includes disability screening questions, such as questions about difficulty reading or writing, any diagnosis of intellectual disability, past enrolment in special classes or special education, and NDIS participation.⁹⁶ This information can be sought from third parties such as schools.⁹⁷

Prisoners undergo a staged screening process, commencing with a Reception Screening Assessment conducted by a nurse from Justice Health NSW upon reception into custody.⁹⁸ This process involves questions about the person's participation in the NDIS, their mental health and physical, cognitive or sensory disability.⁹⁹ Justice Health NSW can also issue requests for further information to the person's next of kin or to third parties as part of this process.¹⁰⁰

Separate to this process, Corrective Services NSW conducts Intake Screening Questionnaires for prisoners entering custody, including nine questions about a prisoner's disability and the disability supports they use in the community.¹⁰¹ Officers who conduct the screening must record any communication difficulties or other signs of disability they observe during the questionnaire within the database.¹⁰² If a prisoner has previously been in custody and information about their disability is recorded in the database, the officer must contact Statewide Disability Services; the arm of Corrective Services NSW that provides disability supports in the state's prison system.¹⁰³ This screening process can also result in referrals for secondary screenings for acquired brain injury, dementia, and sensory or mobility issues.¹⁰⁴ The screening results are available to all corrections officers through a central system to inform daily management of the prisoner.¹⁰⁵

Northern Territory

In the Northern Territory, detainees undergo an Initial Risks Needs Assessment, conducted by a Youth Justice Officer. This includes questions about whether the detainee has any visual, hearing or other physical disability and if they have been admitted to a psychiatric unit in the past six months.¹⁰⁶ All detainees undergo health screening within 24 hours of admission to custody, conducted by an Aboriginal Medical Service.¹⁰⁷ The detainee's case manager or primary health provider in detention may also obtain information from other sources such as the NDIS or external health service providers.¹⁰⁸

Detainees may also be assessed using the Youth Level of Service/Case Management Inventory, which examines 'eight domains of criminogenic risks and needs'.¹⁰⁹ This includes assessment of 'physical disability, development delay and learning disability'.¹¹⁰ A detainee may be referred to the Specialist Assessment and Treatment Services team for psychological or other assessments if initial screening identifies that further assessment is required.¹¹¹

Prisoners undergo an Initial Risks Needs Assessment which includes questions about intellectual disability, 'psychiatric/psychological' and 'physical disabilities'.¹¹² A prisoner may during this process disclose their disability, or give consent for release of medical information held by the Northern Territory Department of Health (NT Health) to Northern Territory Correctional Services.¹¹³ Upon reception into custody, a prisoner will undergo an initial medical screening and assessment, conducted by a registered nurse or Aboriginal Health practitioner, which may identify disability.¹¹⁴ Their medical records will also be reviewed by a medical officer to ensure screening and assessments are effective in identifying disability.¹¹⁵ Where screening identifies 'special needs', a prisoner can be referred to the Complex Behavioural Unit to further investigate the existence of disability and determine whether the prisoner should be housed separate to the general prison population.¹¹⁶

Queensland

In Queensland, detainees undergo multiple assessments, including primary and mental health assessments conducted by a registered nurse and mental health professional; case management, therapeutic, safety and risk assessments conducted by a multidisciplinary team; and educational assessments conducted by teaching staff.¹¹⁷ Detainees also participate in a two-phase induction interview with youth detention operational and case work staff where they are asked about their support needs, including disability-related supports.¹¹⁸ Youth detention staff can also refer detainees to further assessments by on-site, multidisciplinary teams as needed.¹¹⁹ Those teams can initiate and progress NDIS referrals.¹²⁰ These processes all involve consideration of FASD.¹²¹

Adult prisoners undergo screening through an Immediate Risks Needs Assessments, administered by a counsellor or psychologist.¹²² This includes questions about whether the prisoner is a 'current or potential' NDIS participant.¹²³ There is no screening for FASD.¹²⁴ The assessing officer also undertakes a short form Hayes Ability Screening Index (HASI) consisting of four questions asking the prisoner if they have a learning disability, if they think they are a slow learner, if they have ever participated in a special class or school for students with learning disability, or if they receive a disability pension.¹²⁵ These questions are used to identify a need for further assessment by a psychologist (for cognitive disability) or Offender Health Services (for physical disability).¹²⁶ The information is also provided to the accommodation manager 'to inform placement decisions'.¹²⁷

HASI is an Australian-designed cognitive disability screening tool used specifically for people in the criminal justice system. It is not a diagnostic tool but identifies whether a person may have an intellectual disability and require further assessment. Queensland Corrective Services considers HASI suitable across genders and capable of being administered on all prisoners in Queensland correctional facilities.¹²⁸

South Australia

In South Australia, detainees are screened within an hour of admission using a Custodial Intake Form, undertaken by a youth worker who may be assisted by a Speech Pathologist to support

people 'with a speech or processing disorder to understand and participate in the admissions process'.¹²⁹ Where there is an indication of disability, the detainee is referred to the Youth Justice Assessment and Intervention Service or to other health or disability services for a review or assessment.¹³⁰ The case manager liaises with the service provider and follows up with an NDIS application.¹³¹

At the time of Public hearing 27, Youth Justice (an agency within the South Australian Department of Human Services responsible for children and young people in the criminal justice system) was trialling the Child and Adolescent Intellectual Disability Screening Questionnaire (CAIDS-Q). The CAIDS-Q is used by non-allied health practitioners, youth workers and case managers to screen for intellectual disability on admission.¹³²

Adult prisoners are assessed by a registered nurse within 24 hours of admission for acute and chronic health conditions, as well as physical supports required in prison.¹³³ The tool used by nurses does not include questions about disability and FASD is not considered in the screening process,¹³⁴ although the assessment may result in referral to a general practitioner for triage.¹³⁵

Tasmania

In Tasmania, young people undergo a number of assessments that can take up to seven days. These include, among others:¹³⁶

- a Young Person Risk Questionnaire conducted by a youth worker. It asks questions about the detainee's disability, medication and NDIS plan
- a Tier 1 Assessment, conducted by a nurse within the first 24 hours of admission. It examines the person's presentation, health and behaviour
- a medical assessment by a general practitioner within 72 hours of admission.

Adult prisoners undergo screening interviews each time they enter into custody, also known as a Tier 1 Assessment.¹³⁷ This involves an assessment by custodial officers, which is intended to provide a referral mechanism to more specific services and supports in custody.¹³⁸ It also involves a health assessment by a nurse, which encourages self-reporting of disability, participation in the NDIS or receipt of a disability pension.¹³⁹

Victoria

In Victoria, all detainees receive a general nursing assessment, mental health assessment and comprehensive health assessment upon admission or within 72 hours, which may involve engaging specialists.¹⁴⁰ Detainees also undertake a CAIDS-Q assessment within 14 days of reception, unless deemed unnecessary, for example because the detainee already has a diagnosed disability.¹⁴¹ Where this screening indicates a disability, the detainee will be referred for further clinical assessments, including neuropsychological assessments, to take place within two weeks of referral.¹⁴²

All Aboriginal and Torres Strait Islander detainees are screened for disability by a Specialist Disability Advisor.¹⁴³ The Advisor conducts a file audit and consults with external agencies, including the Disability Justice Coordination team within the Department of Families, Fairness and Housing, Department of Education and Training.¹⁴⁴ FASD is 'considered' during this process.¹⁴⁵

Adult prisoners who enter custody for the first time are asked a series of questions by custodial officers about disability, including whether they live with intellectual disability or receive a disability pension.¹⁴⁶ Health staff conduct health and mental health assessments which may involve questions about disability, such as about their use of mobility or hearing aids.¹⁴⁷ Cognitive disability, including intellectual disability and FASD, is not specifically screened for during this process.¹⁴⁸

Within four weeks of entering custody, remandees are asked further questions about disability as part of a 'reintegration assessment', including if they are an NDIS participant.¹⁴⁹ The same questions are asked of sentenced prisoners 12 months prior to release or within four weeks of arrival if their sentence is less than 12 months.¹⁵⁰ Prisoners and remandees may also be referred to the recently established Prison Disability Support Initiative and Disability or Complex Needs Service for initial assessment and/or clinical specialist assessment at any time.¹⁵¹ The latter can include assessment for cognitive disability, but requires a referral based on 'extensive observational and historical information' and would not occur at reception.¹⁵²

Western Australia

In Western Australia, all detainees are screened 'on admission or as soon as practicable' by a custodial officer and health services nurse to determine risk of self-harm and 'initial management requirements'.¹⁵³ An 'Intake Summary/Immediate Needs Checklist' will involve questions about whether the person requires an interpreter, has a history of mental health issues or chronic health conditions, is registered with the Disability Services Commission or NDIS, and whether the person appears to have a disability.¹⁵⁴ Detainees 'identified as being vulnerable or in need of additional support' may be placed in a case management system if they meet specified criteria, including acquired or organic brain injury (including FASD), physical or cognitive disability.¹⁵⁵ However, detainees are not screened for FASD.¹⁵⁶

Adult prisoners undergo an 'At Risk Management System – Reception Intake Assessment' upon reception into the prison, which involves a custodial officer asking questions about health, wellbeing and risk of self-harm.¹⁵⁷ This process does not include questions specific to a person's disability, other than questions about the person's visual presentation and whether they are 'registered with the Disability Services Commission'.¹⁵⁸ At the time of Public hearing 27, this assessment was being updated to include questions about whether a prisoner is an NDIS participant, receives services from the Disability Services Justice Team within the Western Australia Department of Communities, has an appointed guardian or identifies as a person with disability.¹⁵⁹

Detainees and prisoners are also subject to Initial Health Screens by a registered nurse, within 12 or 24 hours of reception respectively.¹⁶⁰ The nurse has access to the first assessment and any information received from the transferring agency, which may include courts.¹⁶¹ No questions conducted in this process relate to disability. The Inspector of Custodial Services in Western Australia gave evidence that in the course of his 'general inspection and review work', his office has found these initial assessments 'overly' rely on self-disclosure to determine whether a prisoner has a disability.¹⁶² Validation ensures a tool is accurate and produces consistent results by having different providers screen or assess the same person using the tool, and comparing the results against those produced by existing tools.¹⁶³

The first formal assessment used to identify any disability or impairment in Western Australian prisons is conducted by a doctor within 90 days of reception, through a functional impairment screening tool (FIST).¹⁶⁴ Although the aim of the FIST is to identify impairments and determine an appropriate response, including connecting a prisoner with the NDIS,¹⁶⁵ the evidence at Public hearing 27 indicates the FIST is only in early stages of use. By August 2022 only 22 per cent of the Western Australian prison population had completed a FIST assessment¹⁶⁶ and the tool had not undergone validation.¹⁶⁷

This suggests that an adult with disability entering custody in Western Australia may go up to 90 days without a disability or impairment, and any necessary supports, being identified. It also means the results of that screening are not as reliable as if they had been conducted using a validated assessment tool. The Inspector of Custodial Services has found prisoners on short sentences or on remand will only interact with prison health services during the initial health assessment.¹⁶⁸ The 90 day window for the completion of the FIST is therefore problematic.

In submissions following Public hearing 27, Counsel Assisting proposed a recommendation that:

The Western Australian Government should ensure that detainees with disabilities are systematically assessed upon entry into prison to identify their disability support needs and that detainees receive appropriate support and humane conditions of confinement.¹⁶⁹

Similar recommendations have been made in previous reports and inquiries into the Western Australian prison system, including by Human Rights Watch.¹⁷⁰ The recommendation also reflects the standard for disability screening contained in the *Revised Code of Inspection Standards for Adult Custodial Services* published by the Office of the Inspector of Custodial Services in Western Australia in 2020.¹⁷¹ That standard requires prisoners to be 'systematically screened for various types of disability on entry to prison'.¹⁷²

The Western Australian Government supported the recommendation proposed by Counsel Assisting, although it noted certain practical difficulties in arranging complex, multidisciplinary assessments.¹⁷³ While we recognise the practical challenges, this does not diminish the responsibility of corrective service and youth justice agencies to undertake adequate and timely screening of people with disability in custody.

Disability Services and Units

A number of jurisdictions gave evidence that screening for disability can also result in prisoners with disability being referred to specific units and services in prisons. In some cases, these are services designed to respond to physical accessibility or mobility needs.¹⁷⁴ In other cases, prisoners and detainees with disability may be accommodated in prison units designed for vulnerable people, including older prisoners.¹⁷⁵ Some of these units employ additional staff, such as multidisciplinary allied health teams and disability support workers.¹⁷⁶ Limited numbers of beds are available in specialist units in prisons.¹⁷⁷

Given there are very few specialised units for prisoners around Australia and the evidence of the disproportionately high number of people in custody with cognitive and other disabilities, it is clear most people with disability complete their sentences in mainstream prisons, rather than in specific disability units.

5.4. Improving current practices

As we have explained in the previous section, the methods used for identifying disability or impairment vary among states and territories. This includes the kind of information sought, the procedures used to obtain the information, the timing of its collection and the manner in which it is recorded and used. There are also differences between the practices adopted in adult and juvenile detention settings within each jurisdiction.¹⁷⁸

Types of screening

In general, authorities across Australia tend to rely heavily on observation and self-reporting during face-to-face interviews, coupled with the use of screening questionnaires at the time of admission into custody.

The disability screening questions contained in questionnaires or checklists also vary significantly among states and territories. Some corrective service and youth justice agencies ask only a few questions. Generally, these include whether the person identifies as having a disability, receives a disability pension or is an NDIS participant. Other agencies ask many questions to assist in identifying a disability or impairment, such as questions directed to the detainee's education or employment history.

Reliance on self-disclosure is problematic. A detainee may refuse or fail to acknowledge their disability or impairment for any number of reasons, including fear of being vulnerable in a prison environment. In a 2022 study examining disability services and screening in prisons in Victoria, New South Wales and the Australian Capital Territory, prison staff agreed that 'refusal or failure to acknowledge one's own disability was a common occurrence and likely to happen often in prisons'.¹⁷⁹ Human Rights Watch's analysis of deaths of people with disability in Western Australian prisons found that fear of stigma may prevent people with disability, particularly First Nations people from self-disclosing their disability.¹⁸⁰

Professor Baldry explained that data sources relying on self-disclosure of disability are likely to underestimate the number of people with disability in the criminal justice system:

what we have seen in all of the interviews and so on that we have been doing, particularly First Nations people, don't necessarily want to say when they enter a prison that they have a disability. Or they may not perceive themselves as having a disability. They nevertheless may have one.¹⁸¹

In some cases, people do not disclose a disability or impairment simply because they do not know they have a disability. In other cases, they may fear being victimised as a result of being identified as a person with disability.

Ms Dorothy Armstrong received her diagnosis of acquired brain injury while serving a custodial sentence. She explained she was reluctant to disclose her disability in prison after witnessing a woman with physical disability being routinely put into solitary confinement 'because it was easier for the guards' and being 'bullied and bashed' by other prisoners:

It was shocking to see and reinforced not sharing information about my [Acquired Brain Injury] in case I was victimised like her. You don't talk about anything that would make you vulnerable in prison.¹⁸²

During the COVID-19 pandemic, some states and territories adopted policies requiring people to complete a 14 day isolation period upon entry into custody. They did not undergo screening until the end of this period.¹⁸³ Ms Tina Powney and Mr Trevor Barker of Gallawah told us that many of their clients chose not to disclose their disability, medical or mental health conditions during this screening for fear of being returned to isolation for a longer period.¹⁸⁴

The risk of being placed in isolation or seclusion can provide a strong disincentive to disclosing a disability. While there are legitimate reasons, including health requirements, to delay screening for a short period, any delay should be as short as possible. Unnecessary delays defeat the principal purpose of screening, which is to identify the immediate support needs of the person in custody.

State and territory governments appear to recognise the shortcomings of reliance on self-reporting. For example, at or following Public hearing 27:

- Tasmania's Department of Justice told us the effectiveness of screening processes is 'ultimately most limited by a heavy reliance on self-identification/report'.¹⁸⁵
- New South Wales submitted, 'Self-report[ing] is considered unreliable as many young people have not been previously diagnosed, or do not disclose their disability due to fear or shame.'¹⁸⁶
- The Western Australian Government suggested reception-based assessments are reliant on self-disclosure during a stressful period and therefore unreliable.¹⁸⁷

Evidence from government witnesses suggested a misunderstanding of the purposes of screening. For example, one witness told us ‘there are challenges involved with identifying disability in custodial environments, prison is generally late in a person’s journey through the criminal justice system, which limits the application of preventative and diversionary measures’.¹⁸⁸ We were also told that ‘reception is not the best time to assess [disability]’, because it is an ‘emotionally fraught’ and ‘very busy time’.¹⁸⁹

Following Public hearing 11, New South Wales submitted that ‘the primary purpose of screening is to address the immediate support needs associated with the admission of an individual into a custodial setting and consideration of the barriers that can prevent a person from adapting to a custodial environment.’¹⁹⁰ It also said there is no universal screening available for cognitive disability because disability manifests differently in different contexts.¹⁹¹

We accept that identifying a prisoner’s immediate support needs is the primary purpose of the screening upon admission to custody. However, rehabilitation is also a purpose of any sentence of imprisonment. Unless effective screening for disability takes place at an early stage of custody, a person’s cognitive disability and support needs may be missed, potentially throughout their entire period in custody.

Screening practices should (and to some extent already do) include mechanisms for identifying disability through means other than self-disclosure, such as:

- observation
- assessments by clinicians
- examination of reports provided to courts during legal proceedings, such as pre-sentencing reports
- consulting with family members or next of kin
- obtaining consent to access medical, NDIS and other relevant records.

For example, Justice Health NSW can issue requests to a person’s next of kin or to third parties during its Reception Screening Assessment for information about a detainee’s disability.¹⁹²

Disability screening is not a process that must or should only be completed upon a prisoner’s admission to custody. It should start upon admission and continue over such time as further assessments are required.¹⁹³ One purpose of initial screening is to determine whether a detainee’s actual or suspected disability or impairment warrants further assessments during the detainee’s period in custody.

Support for disability during screening

Some states and territories offer support to assist with screening assessments for prisoners or detainees who have or may have a disability or impairment:

- In South Australia, a speech pathologist assists with screening assessments conducted by youth justice workers to determine whether a detainee has a communication difficulty.¹⁹⁴
- In the Northern Territory, Auslan interpreters are offered to adults at reception ‘if a language barrier or hearing impairment is identified’.¹⁹⁵ Dr Frank Daly, Chief Executive Officer of the NT Health, said where an Auslan interpreter or appropriate language communicator cannot be identified or arranged due to the timing of reception, the prisoner is held overnight in the Prison Health Centre to minimise risk, until the interpreter or communicator attends the following day.¹⁹⁶
- In New South Wales, Auslan interpreters may also be provided for detainees to complete medical and psychological assessments, either in person or online.¹⁹⁷
- The Justice Health NSW Health Care Interpreter Services – Culturally and Linguistically Diverse and d/Deaf Patients policy provides that interpreters ‘are to be used in all health care situations where communication is essential including admission, obtaining consent, conducting assessments’ and other situations.¹⁹⁸
- Some jurisdictions use, or are in the process of developing, Easy Read and Easy English resources as part of their induction or admission process for new prisoners. However, no jurisdiction uses these in their screening processes.¹⁹⁹

These practices are examples of measures that can and should be taken to ensure screening processes are not compromised by a lack of support for the person. Support is particularly important for people whose impairments affect their ability to communicate.

The responses we received from corrective, youth justice and justice health agencies recognised that screening often occurs at a stressful time of reception or admission into custody, when a person with disability may require more support than usual.²⁰⁰ It follows that where a person with disability requires supports or adjustments to communicate, failure to provide such supports or adjustments may compromise the screening and assessment process. We examine access to information and communication in more detail in Volume 6, *Enabling autonomy and access*.

5.5. National practice guidelines

Most states and territories acknowledged to the Royal Commission that there is room for improvement in their disability screening processes, including at the stage of admission and induction. At the time of Public hearing 27, a number of states and territories said they were reviewing their admission and induction processes, including the tools used for screening for impairments and disability.

In submissions following Public hearing 27, Counsel Assisting proposed state and territory corrective service and youth justice agencies should develop national practice guidelines and policies relating to screening for disability in custody through the Corrective Services Administrators' Council and any equivalent youth justice body.²⁰¹ Counsel Assisting proposed the guidelines and policies should:²⁰²

- reduce reliance upon self-disclosure as the primary means of disability identification following admission to custody
- encourage investment in initial and ongoing training and education of staff in relation to disability identification and awareness
- encourage the development and use of validated screening tools that are culturally safe and address the particular needs of First Nations people and those in the youth justice system
- ensure screening and identification policies and practices are underpinned by a trauma-informed approach
- encourage collaborative practices that allow for the engagement of clinicians to conduct assessments, where it is identified such assessments are beneficial to the individual
- encourage the use of screening outcomes to inform transition plans and help link prisoners to appropriate services in the community
- contribute to data and information sharing within and between relevant agencies regarding disability identification and diagnosis
- ensure that screening, identification and diagnosis data is used to inform system-wide responses.

Western Australia accepted this recommendation in full.²⁰³ New South Wales agreed in principle with this recommendation, but suggested screening is limited in practice due to evidentiary and budgetary concerns. In relation to the evidentiary issue, New South Wales submitted 'there is no quick and consistent screening process anywhere in the world that currently does this effectively'.²⁰⁴

We accept the solution to the issues we have identified are not easy to implement. Nonetheless the evidence demonstrates a clear need for minimum standards to be adopted across Australia as a means of improving processes for screening and identifying disability in custodial settings, particularly cognitive disability.

National practice guidelines or standards would promote consistent approaches between jurisdictions and provide a benchmark for corrective and justice health agencies to evaluate their own disability screening and identification policies and procedures. It is very likely that each state and territory will need to adapt processes to meet local needs. Even so, minimum national practice guidelines and standards will encourage improvements across Australia in the processes used to screen, assess and identify people with disability in custodial settings. Minimum standards should result in the use of consistent definitions and indicators of disability

or impairment – an issue discussed further in Chapter 7, ‘Data collection by criminal justice systems on people with disability’.

Over time, national practice guidelines and standards will increase the likelihood of appropriate supports being provided to people with disability, both while they are in custody and after their release into the community.

Jurisdictions have already taken a collaborative approach through the Corrective Services Administrators’ Council to considering shared issues and promoting best practice in the delivery of corrections services. However, these efforts, including the Guiding Principles, provide insufficient detail and practical guidance on how screening should be undertaken.

We acknowledge no single tool can be used to identify a person’s disability. For instance, cognitive disability takes multiple forms and screening and assessment processes are complex and frequently resource intensive. These are compelling reasons why corrective services, youth justice and justice health agencies should systematically share their knowledge about best practice in this area.

Screening and identification processes can also inform data collection for broader government decision-making, including disability-related policy development and service planning and delivery. Screening provides the opportunity for agencies to obtain information about the profile of their corrections populations and the support needs to be met. This in turn has an impact on the quality of research and policy development relevant to criminal justice systems, and planning by governments to meet the support needs of people within those systems. National practice guidelines would promote the consistent collection of data relating to disability and its use to inform system-wide responses in the criminal justice system.

We therefore recommend that state and territory corrective service and youth justice agencies, together with all relevant justice health agencies jointly develop national practice guidelines and policies relating to screening, identifying support needs and diagnosing disability in custody.

People with disability, including those with lived experience of the criminal justice system, and people with expertise in cognitive disability should be involved in design and content of the national practice guidelines and supporting policies, and contribute to their implementation.

Building on the recommendations of Counsel Assisting, we consider that national practice guidelines should:

- explain the essential elements of screening, assessing and identifying prisoners and detainees with disability, including a trauma-informed approach to identifying disability and the person’s support needs
- reduce reliance upon self-disclosure as the primary means of disability identification following admission of a person with disability to custody
- require screening upon reception into custody or shortly thereafter both for prisoners and detainees who have been sentenced and for those on remand

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- promote the consistent collection of data relating to disability by correction authorities and its use to inform system-wide responses
 - encourage the development and use of culturally safe disability screening tools that address the particular needs of First Nations people with disability
 - encourage the development and use of disability screening tools that are culturally appropriate for people with disability from culturally and linguistically diverse communities
 - encourage investment in initial and ongoing training, education and support of staff in relation to disability identification and awareness
 - encourage collaborative practices including the engagement of clinicians to conduct assessments to identify the support needs of a person with disability in custody
 - require the identification of a disability or impairment be matched with appropriate support while in custody
 - promote the use of screening outcomes to develop plans for prisoners and detainees transitioning into the community. (We address the divide of responsibilities between the states and territories and the Australian Government through the NDIS in Chapter 6, 'The NDIS and criminal justice interface')
 - contribute to appropriate information sharing among agencies, including court-based assessments and reports.

There should also be regular review and evaluation of the national practice guidelines through the appropriate forum for considering best practice in the delivery of corrections services at a shared, national level.

Culturally appropriate screening, assessment and support for First Nations prisoners and detainees

The importance of culturally appropriate supports for First Nations prisoners and detainees with disability emerged from numerous hearings, including Public hearings 11 and 27.

As discussed in Volume 9, *First Nations people with disability*, we heard evidence about the inappropriateness of using standardised screening tools developed by and for western cultures on First Nations people.

Dr Tracy Westerman, psychologist and Managing Director of Indigenous Psychological Services, spoke about cultural bias in testing and assessment. She said cultural bias may affect the manner in which a test is constructed or developed, which could affect the reliability or validity of the test for particular cultural groups. Biases may also affect the administration and interpretation of the test, and the assessment process itself.²⁰⁵ Cultural bias during screening can result in misdiagnosis and inappropriate treatment of the person assessed.²⁰⁶

Throughout Australia, First Nations health practitioners and academics have made significant efforts to develop culturally validated screening tools for disability and mental illness, in response to the dearth of such tools.²⁰⁷ We discuss some of these in Volume 9.

Counsel Assisting concluded no such tools are used in custodial settings.²⁰⁸ This appears to be correct, except for two tools discussed below that are used to screen for the risk of mental illness among detainees in New South Wales youth detention.

As a consequence, First Nations people may leave the criminal justice system, including prisons and detentions centres, without ever receiving an accurate assessment of their disabilities or impairments and without having their support needs met. Similarly they might not have the opportunity to plan for the supports they need upon release into the community.²⁰⁹ Culturally appropriate and validated tools are necessary to ensure First Nations people with disability receive the supports they require while in custody and to plan for the supports required upon release from custody.

In response to Counsel Assisting submissions for Public hearing 11, the New South Wales Government submitted:

identification of cognitive disability, particularly in First Nations people and young people can be problematic. One reason is that there is a lack of evidence based, culturally appropriate screening tools for identification of disability in the criminal justice system.²¹⁰

The New South Wales Government submitted ‘there is no culturally validated screening tool available for disability identification’.²¹¹ We accept that proposition, but point to a number of emerging practices that appear to be promising and warrant consideration by governments.

Screening tools being developed

We heard about the culturally safe screening tools at various stages of development around Australia. For example, at Public hearing 8, ‘The experiences of First Nations people with disability and their families in contact with child protection systems’, we heard about the Westerman Aboriginal Symptom Checklist – Youth (WASC-Y) and the Westerman Aboriginal Symptom Checklist – Adult (WASC-A).²¹² These psychometrically validated screening tools were developed by Dr Westerman and are used to identify mental health risk among First Nations young people (aged 13 to 17) and adults, and identify cultural resilience factors specific to First Nations people.²¹³ Both tools include clinical and cultural validation guidelines ‘which aim to combat test error as a result of clinical bias’.²¹⁴ WASC-Y is also culturally validated.²¹⁵

Evidence from Public hearing 27 showed both the WASC-Y and WASC-A are used by Youth Justice NSW as part of its screening practices for youth detainees.²¹⁶

We also heard evidence about the Guddi Way Screen developed by Synapse, a culturally safe assessment tool used to screen for cognitive disability among First Nations people aged 16 and older.²¹⁷ This is not a diagnostic tool, but is used to flag possible cognitive disability,

functional impact, support strategies and identify the need for referral.²¹⁸ The tool has been used in the Brisbane Murri Court to inform court procedure²¹⁹ and in a post-release residential accommodation service for women exiting prison.²²⁰ It is also being used in a pilot program to facilitate post-release support and employment for First Nations prisoners in a number of Queensland detention settings by screening prisoners prior to release.²²¹ The Synapse Guddi Way Project Team carried out a validation study in 2021 to ‘evaluate the sensitivity, positive predictive value, specificity, and negative predictive value’ of the Guddi Way Screen.²²² The results of the evaluation indicated the Guddi Way Screen ‘shows promise as a culturally relevant and appropriate method to identify cognitive impairment and complex disability’. However, further analysis is required ‘to establish scale reliability and other measures of validity’.²²³

There is a clear need to improve the cultural safety of current screening processes across Australia. This requires both a long-term investment in the development and evaluation of culturally validated screening tools, and greater exploration of currently available tools by corrective services agencies.

Cultural safety measures in place

Some states and territories have taken measures to ensure the cultural safety of prisoners and detainees undergoing screening upon entry into custody:

- In the Northern Territory Aboriginal Health Practitioners conduct medical screening assessments of adult prisoners upon entry to custody.²²⁴
- In Queensland youth detention, ‘cultural staff may support the assessment process [for FASD] by encouraging and supporting the young person to engage and participate in the testing’.²²⁵
- In Victoria, First Nations detainees are screened for disability by a Specialist Disability Advisor ‘dedicated to responding to Aboriginal young people with disability’.²²⁶ They are also prioritised for general nursing and mental health assessments (conducted within 12 hours of reception, in comparison to within 24 hours for other detainees).²²⁷

Some corrective and youth justice agencies allow private service providers, including Aboriginal Community Controlled Health Organisations (ACCHOs) and Aboriginal Medical Services, to provide medical assessments to First Nations people in custody:

- Justice Health NSW has partnerships with ACCHOs in various locations that provide in-reach and post-custody services to prisoners.²²⁸ In a recent inquest, the Coroner’s Court of New South Wales recommended Justice Health NSW continue to explore and promote partnerships with ACCHOs to provide culturally safe primary health care in custody and to seek sustainable funding models for such partnerships.²²⁹
- In the Northern Territory, all primary health care in youth detention (including health assessments upon reception) is conducted by two Aboriginal Medical Services (now ACCHOs), Danila Dilba Health Service and the Central Australian Aboriginal Congress.²³⁰

Improving culturally safe practices

ACCHOs provide general medical and mental health care, rather than assess for disability and support needs.²³¹ ACCHOs are unable to provide their services to prisoners and detainees in the same way they would provide services to people in the community, because prisoners and detainees are excluded from Medicare and the Pharmaceutical Benefits Scheme.²³² Instead, it is the responsibility of the state to provide health services to prisoners and detainees, which is typically done by justice health agencies or privately contracted organisations. The latter can include ACCHOs.

The Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory recommended funding of FASD assessments in youth detention through Medicare or the NDIS as appropriate. It also recommended the Australian Government Minister for Health make the necessary directions under the legislation to enable the payment of Medicare benefits for medical services to children and young people in detention in the Northern Territory.²³³ We see good reasons for this recommendation to apply to all detainees across Australia.

At Public hearing 27 we received evidence that some First Nations-owned NDIS service providers like Gallawah assist clients to obtain disability assessments and support while they are in custody to inform the provision of supports, including NDIS supports, upon release.²³⁴ However, the ability of external service providers to provide 'in-reach' services (by visiting correctional centres) appears to be limited or inconsistent, and depends on providers having strong working relationships with particular correctional centres.²³⁵

We consider there needs to be a more systematic approach, supported by the Australian Government and state and territory governments, to enable appropriately skilled First Nations organisations and individuals to enter prisons to gain the trust of and support First Nations prisoners with disability. This approach should see First Nations organisations such as ACCHOs involved in screening practices for First Nations prisoners and detainees with disability who enter custody.

The particular needs and capabilities of correctional facilities and ACCHOs will differ among and within jurisdictions. However, corrective services and justice health agencies should explore the potential for First Nations organisations to be involved in disability screening and assessments for First Nations prisoners and detainees.

This would help justice agencies overcome the barriers to identifying First Nations people with disability and help provide the workforce with the skills, knowledge and attitudes needed when dealing with First Nations people with disability in prisons and detention centres. Many such organisations are equipped to increase culturally safe support for First Nations people with disability in prison and at the point of release into the community. But they need sustainable funding models and support from the relevant government agencies.

We acknowledge there are complex funding issues which affect how those services would be arranged. However, governments should explore options for developing funding models that enable partnerships and programs of this kind to be introduced, promoted and made sustainable in the long term.

Therefore, we recommend that the state and territory corrective services, youth justice agencies, and justice health agencies engage First Nations organisations, including ACCHOs, to provide culturally safe disability screening and assessment services for prisoners and detainees in custody. Such services should have dedicated funding streams.

5.6. Conclusion

Screening and identification of disability and impairment are the first vital steps in understanding and responding to the support needs of people with disability in criminal justice systems. We have identified the need for improved disability related screening and identification practices in custodial settings across all states and territories.²³⁶

Improvements in disability screening and assessment procedures are needed to ensure that people with disability, especially cognitive disability, are identified and their support needs are appropriately addressed while in custody and after release. We therefore recommend state and territory corrective services, youth justice agencies and justice health agencies develop national practice guidelines and policies relating to screening, identification and diagnosis of disability needs in custody.

Timely and accurate screening alone will not ensure that the support needs of prisoners and detainees with disability are met in custody. As we discuss in Chapter 8, 'Police responses to people with disability', more is needed to ensure the support needs of people with disability are met, including changes to the criminal justice workforce.

Recommendation 8.14 National practice guidelines for screening in custody

State and territory corrective services, youth justice agencies and justice health agencies, through the Corrective Services Administration Council and equivalent youth justice bodies, should develop national practice guidelines and policies relating to screening for disability and identification of support needs in custody. People with disability, including with lived experience of the criminal justice system, and people with expertise in cognitive disability should be involved in the design of the guidelines and contribute to the approaches to implementation. The guidelines and policies should:

- explain the essential elements of screening and assessment for people with disability, including a trauma-informed approach to identifying disability and the person's needs
- reduce reliance upon self-disclosure as the primary means of disability identification following admission of a person with disability to custody
- require screening upon reception into custody or shortly thereafter both for prisoners and detainees who have been sentenced and for those on remand
- promote the consistent collection of data and its use to inform system-wide responses
- encourage the development and use of culturally safe disability screening tools that address the particular needs of First Nations people with disability
- encourage the development and use of disability screening tools that are culturally appropriate for people with disability from culturally and linguistically diverse communities
- encourage investment in initial and ongoing training, education and support of staff about disability identification and awareness
- encourage collaborative practices including the engagement of clinicians to conduct assessments to identify the support needs of a person with disability in custody
- require the identification of a disability or impairment to be matched with appropriate support while in custody
- promote the use of screening outcomes to develop plans for prisoners and detainees transitioning to the community
- contribute to appropriate information sharing among agencies including court-based assessments and reports.

Recommendation 8.15 Policies and practices on screening, identifying and diagnosing disability in custody

State and territory governments should ensure that policies and practices concerning screening, identification and diagnosis of disability in respect of people with disability in custody are consistent with the national practice guidelines.

Recommendation 8.16 Support by First Nations organisations to people in custody

State and territory corrective service and youth justice agencies and justice health agencies should engage First Nations organisations, including Aboriginal Community Controlled Health Organisations, to provide culturally safe disability screening and assessment services for First Nations prisoners and detainees.

Endnotes

- 1 Exhibit 11-12.8, EXP.0024.0001.0001, p 102. See also, for example, House of Representatives Standing Committee on Indigenous Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, 2011, pp 96–102 (in relation to fetal alcohol spectrum disorder, specifically). For further information about the data available about people with disability in the criminal justice system, see Chapter 7 of this volume.
- 2 Exhibit 11-8.1, ‘Statement of James Ogloff’, 8 February 2021, at [136]; Exhibit 11-12.8, EXP.0024.0001.0001, p 166; Senate Community Affairs References Committee, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, November 2016 (Recommendation 10); Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Final report: Findings and recommendations*, vol 2A, November 2020, p 33 (Recommendation 15.1); Productivity Commission, *Mental health*, Final inquiry report, no 95, vol 2, 2020 (Recommendation 21) (Action 21.4); NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report 135, June 2012 (Recommendations 7.1–7.7); NSW Law Reform Commission, *People with an intellectual disability and the criminal justice system*, Report 80, December 1996 (Recommendation 51); Courts Administration Authority of South Australia, Submission in response to *Criminal justice system issues paper*, 6 April 2020, ISS.001.00109, p 4.
- 3 Transcript, Lewis Shillito, Public hearing 11, 23 February 2021, P-463 [38–47]; Transcript, Tanya Wolff, Public hearing 11, 23 February 2021, P-465 [8–28]. See also Human Rights Watch, *‘I needed help, instead I was punished’: Abuse and neglect of prisoners with disabilities in Australia*, Report, February 2018, p 3.
- 4 Eileen Baldry, Leanne Dowse, Ruth McCausland & Melissa Clarence, *Lifecourse institutional costs of homelessness for vulnerable groups: Report to the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs*, Report, 2012, p 109.
- 5 Law Council of Australia, *Justice project: People with disability*, Final report, part 1, August 2018, p 8; First Peoples Disability Network Australia, Ten-point plan for the implementation of the NDIS in Aboriginal and Torres Strait Islander Communities, 3 April 2016.
- 6 Exhibit 11-27.1, ‘Statement of Dr Kathy Ellem’, 3 November 2020 at [59]; Law Council of Australia, *Justice project*, Final report, August 2018, p 20.
- 7 Transcript, James Simpson, Public hearing 11, 23 February 2021, P-451 [7–29]; Transcript, Eileen Baldry, Public hearing 11, 18 February 2021, P-233 [13–33]; Exhibit 11-27.1, ‘Statement of Kathy Ellem’, 3 November 2020, p 17 [43]; Exhibit 11-27.6, EXP.0048.0001.0051, pp 238–39; Transcript, Kathy Ellem, Public hearing 11, 23 February 2021, P-483 [28–31]; Transcript, Cheryl Axleby, Public hearing 11, 23 February 2021, P-451 [35–46]; Transcript, Tania Wolff, Public hearing 11, 23 February 2021, P-450 [30–39]; Victorian Government response to *Criminal justice system issues paper*, 21 December 2020, ISS.001.00512, p 42; Queensland Productivity Commission, *Inquiry into imprisonment and recidivism*, Final report, August 2019, pp 191–92; see Royal Commission into Victoria’s Mental Health System, *Interim report*, November 2019, pp 181–82, 186. See also Royal Commission into Victoria’s Mental Health System, *Final report*, p 507 (Recommendations 10.1, 10.2).
- 8 Exhibit 11-28.1, ‘Statement of Geoffrey Thomas’, 15 January 2021, at [39–41].
- 9 Exhibit 11-28.1, ‘Statement of Geoffrey Thomas’, 15 January 2021, at [68].
- 10 Leanne Dowse, Simone Rowe, Eileen Baldry & Michael Baker, *Police responses to people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021, p 13.
- 11 *Gibson v The State of Western Australia* [2017] WASCA 141; (2017) 51 WAR 199, cited in Leanne Dowse, Simone Rowe, Eileen Baldry & Michael Baker, *Police responses to people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021, p 14. See also *Western Australia v Gibson* (2014) 243 A Crim R 68.
- 12 *Gibson v The State of Western Australia* (2017) 51 WAR 199, [157].
- 13 *Gibson v The State of Western Australia* (2017) 51 WAR 199, [161].

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- 14 *Gibson v The State of Western Australia* (2017) 51 WAR 199, [161]. Notably, the appellant's former barrister gave evidence at the appeal hearing that upon reviewing the appellant's police interviews, he became concerned about Mr Gibson's level of intellectual functioning and suggested he take an IQ test. According to counsel, this was ultimately not done 'because of limited financial resources available and anticipated practical difficulties in administering the test': (2017) 51 WAR 199, [128](5), [129](2), [175].
- 15 *Western Australia v Gibson* (2014) 243 A Crim R 68, [83–84].
- 16 Leanne Dowse, Simone Rowe, Eileen Baldry & Michael Baker, *Police responses to people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021, p 15.
- 17 Leanne Dowse, Simone Rowe, Eileen Baldry & Michael Baker, *Police responses to people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021, p 15.
- 18 Transcript, Cheryl Axleby, Public hearing 11, 23 February 2021, P-464 [4–6].
- 19 See, for example, Judicial College of Victoria, 'Disability Access Bench Book', 1 December 2016, 4.4, 5.5; Judicial Commission of New South Wales, 'Equality before the Law Bench Book', 25 October 2022, 5.4; Supreme Court of Queensland, 'Equal Treatment Bench Book', 2016, 2nd edn, pp 126–27.
- 20 See, for example, Judicial College of Victoria, 'Disability Access Bench Book', 1 December 2016, 4.4, 5.6–5.16; Judicial Commission of New South Wales, 'Equality before the Law Bench Book', 25 October 2022, 5.2.5, 5.4; Supreme Court of Queensland, 'Equal Treatment Bench Book', 2016, 2nd edn, pp 121–32.
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- 22 See, for example, *Sentencing Act 1991* (Vic) pt 5, div 1 and 2; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(j); *Sentencing Act 1995* (WA) s 46.
- 23 Courts Administration Authority of South Australia, Submission in response to *Criminal justice system issues* paper, 6 April 2020, ISS.001.00109, pp 2, 7; Exhibit 11-12.01, 'Statement of Eileen Baldry', 22 October 2020, at [55], citing Vivienne C Riches et al, 'Intellectual Disability and Mental Illness in the NSW Criminal Justice System', 2006, vol 29, *International Journal of Law and Psychiatry*, p 388; Madeleine Rowley, 'Invisible Clients: People with Cognitive Impairments in the Northern Territory Court of Summary Jurisdiction', 2014, vol 2, *Northern Territory Law Journal*, p 385.
- 24 New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report no 135, June 2012, pp 63–65.
- 25 Exhibit 11-012.01, 'Statement of Professor Eileen Baldry', 22 October 2020, at [55–58].
- 26 See, for example, Local Court of New South Wales, Submission in response to *Criminal justice system issues* paper, 2 November 2020, ISS.001.00506, [2]; Courts Administration Authority of South Australia, Submission in response to *Criminal justice system issues* paper, 6 April 2020, ISS.001.00109, p 2.
- 27 See Law Council of Australia, Submission in response to *Criminal justice system issues* paper, 17 August 2020, ISS.001.00370, p 30.
- 28 Exhibit 11-12.01, 'Statement of Professor Eileen Baldry', 22 October 2020, at [56–57].
- 29 Local Court New South Wales, Submission in response to *Criminal justice system issues* paper, 2 November 2020, ISS.001.00506, [8]. At the time of this submission, applications were made pursuant to the *Mental Health (Forensic Provisions) Act 1990* (NSW) s 32. This provision has since been repealed and has been replaced by the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 14.
- 30 Local Court New South Wales, Submission in response to *Criminal justice system issues* paper, 2 November 2020, ISS.001.00506, [8].
- 31 Quote from a psychiatric nurse in a Western Australian prison, as told to Human Rights Watch: Exhibit 27-37, 'Statement of Kriti Sharma', 9 September 2022, at [25], citing Human Rights Watch, *'I needed help, instead I was punished': Abuse and neglect of prisoners with disabilities in Australia*, February 2018, p 67.

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- 32 See, for example, 'Court Integrated Services Program', County Court Victoria, web page, 21 November 2022 <<http://www.countycourt.vic.gov.au/going-court/criminal-division/court-integrated-services-program>>; 'Assessment and Referral Court (ACR)', Magistrates' Court of Victoria, web page, 14 September 2022 <<http://www.mcv.vic.gov.au/criminal-matters/assessment-and-referral-court-arc>>; 'Intellectual Disability Diversion Program Court', Magistrates Court of Western Australia, web page, 11 Feb 2021 <<https://www.magistratescourt.wa.gov.au//intellectual-disability-diversion-program-court.aspx>>; 'Treatment Intervention Court', Legal Services Commission South Australia, web page, 1 May 2019 <<http://www.lsc.sa.gov.au/dsh/ch04s11.php>>; see also Courts Administration Authority of South Australia, Submission in response to *Criminal justice system issues paper*, 6 April 2020, ISS.001.00109, pp 7–8.
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- 34 Exhibit 11-29.1, 'Statement of Taylor Budin', 21 January 2021, at [36].
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- 40 NSW Law Reform Commission, *People with an intellectual disability and the criminal justice system*, Report 80, December 1996 (Recommendations 51–53).
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- 44 Senate Community Affairs References Committee, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, November 2016, p 74.
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- 48 Senate Community Affairs References Committee, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, November 2016, pp xv, 176 (Recommendation 10).
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- 54 Queensland Productivity Commission, *Inquiry into imprisonment and recidivism: Final report*, Report, August 2019, pp 145–46, 191–92.
- 55 Queensland Productivity Commission, *Inquiry into imprisonment and recidivism: Final report*, Report, August 2019, p xlix (Recommendation 9).

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- 57 Exhibit 27-83, 'Statement of Eamon Ryan', 31 August 2022, at [22]. See, generally, Office of the Inspector of Custodial Services, *Report no. 140: 2021 inspection of Hakea Prison, 2020*, pp 22–24, 58.
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- 60 Exhibit 27-83, 'Statement of Eamon Ryan', 31 August 2022, at [60–61].
- 61 Caroline Doyle, Shannon Dodd, Helen Dickinson, Sophie Yates & Fiona Buick, 'There's not just a gap, there's a chasm': *The boundaries between Australian disability services and prisons*, July 2022; Human Rights Watch, 'I needed help, instead I was punished': *Abuse and neglect of prisoners with disabilities in Australia*, February 2018, pp 66–67; Stewart Boiteux & Suzanne Poynton, *Offending by young people with disability: A NSW linkage study*, January 2023; Stewart Boiteux & Suzanne Poynton, 'Offending by young people with disability: A NSW linkage study', (2023), no. 254, *NSW Bureau of Crime Statistics and Research Crime and Justice Bulletin*, no 254, p 23; Human Rights Watch, 'He's never coming back': *People with disabilities dying in Western Australia's prisons*, Report, September 2020, p 12; Eileen Baldry, Damon B Briggs, Barry Goldson & Sophie Russell, 'Cruel and unusual punishment: an inter-jurisdictional study of the criminalisation of young people with complex support needs', (2017), vol 21(5), *Journal of Youth Studies*, pp 636–52.
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- 69 Courts Administration Authority of South Australia, Submission in response to *Criminal justice system issues paper*, 6 April 2020, ISS.001.00109, p 12.
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- 72 Local Court New South Wales, Submission in response to *Criminal justice system issues paper*, 2 November 2020, ISS.001.00506, pp 6–7.
- 73 Local Court New South Wales, Submission in response to *Criminal justice system issues paper*, 2 November 2020, ISS.001.00506, p 8.
- 74 Legal Aid Queensland, Submission in response to *Criminal justice system issues paper*, 6 July 2020, ISS.001.00235, p 3.
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76 Exhibit 27-127, WA.9999.0018.0010, at [23].
77 Transcript, Joy Rowland, Public hearing 27, 6 October 2022, P-309 [9]–P-310 [33]; Transcript, Mike Reynolds, Public hearing 27, 6 October 2022, P-377 [6]–P-379 [30].
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80 Submissions of Counsel Assisting the Royal Commission following Public hearing 27, 24 November 2022, p 9 (Finding 14).
81 Submissions of Counsel Assisting the Royal Commission following Public hearing 27, 24 November 2022, [48–67]; Appendix A, ‘Summary of screening practices’.
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83 The Washington Group questions were developed by the Washington Group on Disability Statistics. It seeks to address the statistical challenges in collecting valid, reliable and cross-nationally comparable data on disability, and to develop methods to improve statistics on people with disability globally. The Australian Government provided funding for administration support to the Washington Group. See Washington Group on Disability Statistics, *About the WG*, web page, undated. <www.washingtongroup-disability.com/about/about-the-wg/>
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88 Exhibit 27-209, ‘Statement of Ray Johnson’, 8 September 2022, at [7].
89 Exhibit 27-209, ‘Statement of Ray Johnson’, 8 September 2022, at [9].
90 Exhibit 27-209, ‘Statement of Ray Johnson’, 8 September 2022, at [10].
91 Exhibit 27-209, ‘Statement of Ray Johnson’, 8 September 2022, at [9–10].
92 Exhibit 27-209, ‘Statement of Ray Johnson’, 8 September 2022, at [7].
93 Exhibit 27-300, ‘Statement of Paul O’Reilly’, 12 September 2022, at [32a], [33].
94 Exhibit 27-300, ‘Statement of Paul O’Reilly’, 12 September 2022, at [36].
95 Exhibit 27-300, ‘Statement of Paul O’Reilly’, 12 September 2022, at [36].
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97 Exhibit 27-300, ‘Statement of Paul O’Reilly’, 12 September 2022, at [37]; Exhibit 27-304, NSW.0075.0008.0001, p 1.
98 Exhibit 27-310, ‘Statement of Wendy Hoey’, 12 September 2022, at [14]; Exhibit 27-296, ‘Statement of Phillip Snoyman’, 12 September 2022, at [40]; Exhibit 27-312, NSW.0074.0003.0001.
99 Exhibit 27-310, ‘Statement of Wendy Hoey’, 12 September 2022, at [17]; Exhibit 27-312, NSW.0074.0003.0001.
100 Exhibit 27-310, ‘Statement of Wendy Hoey’, 12 September 2022, at [18].
101 Exhibit 27-296, ‘Statement of Phillip Snoyman’, 12 September 2022, at [32], [38–40].
102 Exhibit 27-296, ‘Statement of Phillip Snoyman’, 12 September 2022, at [38–39].
103 Exhibit 27-296, ‘Statement of Phillip Snoyman’, 12 September 2022, at [15], [38–39]; Exhibit 27-310, ‘Statement of Wendy Hoey’, 12 September 2022, at [11], [49–50].
104 Exhibit 27-296, ‘Statement of Phillip Snoyman’, 12 September 2022, at [34].
105 Exhibit 27-296, ‘Statement of Phillip Snoyman’, 12 September 2022, at [23].
106 Exhibit 27-295, ‘Statement of Kenneth Davies’, 15 September 2022, at [34].
107 Exhibit 27-295, ‘Statement of Kenneth Davies’, 15 September 2022, at [20–21], [30].
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111 Exhibit 27-295, ‘Statement of Kenneth Davies’, 15 September 2022, at [37], [39], [47].
112 Exhibit 27-293, ‘Statement of Matthew Varley’, 13 September 2022, at [21].
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- 115 Exhibit 27-294, 'Statement of Frank Daly', 12 September 2022, at [20], [24].
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- 118 Exhibit 27-245, 'Statement of Michael Drane', 13 September 2022, at [20], [28]; Exhibit 27-249, QLD.0021.0047.0096.
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- 120 Exhibit 27-245, 'Statement of Michael Drane', 13 September 2022, at [31–32].
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- 122 Exhibit 27-225, 'Statement of Ursula Roeder', 8 September 2022, at [14], [36].
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- 125 Exhibit 27-225, 'Statement of Ursula Roeder', 8 September 2022, at [40].
- 126 Exhibit 27-225, 'Statement of Ursula Roeder', 8 September 2022, at [60], [62], [64].
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- 129 Exhibit 27-272, 'Statement of Lois Boswell', 12 September 2022, at [26], [30].
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- 135 Exhibit 27-288, 'Statement of Andrew Wiley', 6 September 2022, at [16].
- 136 Exhibit 27-194, 'Statement of Chris Simcock', undated, at [9].
- 137 Exhibit 27-178, 'Statement of Rod Wise', 5 September 2022, at [9].
- 138 Exhibit 27-178, 'Statement of Rod Wise', 5 September 2022, at [15], [32].
- 139 Exhibit 27-178, 'Statement of Rod Wise', 5 September 2022, at [13], [15]; Exhibit 27-181, TAS.9999.0017.0029, pp 1, 5.
- 140 Exhibit 27-254, 'Statement of Jodi Henderson', 9 September 2022, at [49–50].
- 141 Exhibit 27-254, 'Statement of Jodi Henderson', 9 September 2022, at [24–25], [44–45].
- 142 Exhibit 27-254, 'Statement of Jodi Henderson', 9 September 2022, at [25], [47b].
- 143 Exhibit 27-254, 'Statement of Jodi Henderson', 9 September 2022, at [56].
- 144 Exhibit 27-254, 'Statement of Jodi Henderson', 9 September 2022, at [56].
The Department is now the 'Department of Families, Fairness and Housing'.
- 145 Exhibit 27-254, 'Statement of Jodi Henderson', 9 September 2022, at [64–67].
- 146 Exhibit 27-262, 'Statement of Larissa Strong', 9 September 2022, at [22].
- 147 Exhibit 27-262, 'Statement of Larissa Strong', 9 September 2022, at [22].
- 148 Exhibit 27-262, 'Statement of Larissa Strong', 9 September 2022, at [38], [51], [65].
- 149 Exhibit 27-262, 'Statement of Larissa Strong', 9 September 2022, at [25].
- 150 Exhibit 27-262, 'Statement of Larissa Strong', 9 September 2022, at [26(3)].
- 151 Exhibit 27-262, 'Statement of Larissa Strong', 9 September 2022, at [39], [52].
- 152 Exhibit 27-262, 'Statement of Larissa Strong', 9 September 2022, at [52].
- 153 Exhibit 27-116, 'Statement of Wade Reid', 10 September 2022, at [23(a)].
- 154 Exhibit 27-116, 'Statement of Wade Reid', 10 September 2022, at [27(b)]; Exhibit 27-118, WA.0021.0001.0486; Exhibit 27-119, WA.0021.0001.0492.
- 155 Exhibit 27-116, 'Statement of Wade Reid', 10 September 2022, at [33–34].
- 156 Exhibit 27-116, 'Statement of Wade Reid', 10 September 2022, [44], [48]; Exhibit 27-84, 'Statement of Adam Tomison', 24 August 2022, p 22.
- 157 Exhibit 27-127, WA.9999.0018.0010, [8]; Transcript, Joy Rowland, Public hearing 27, 6 October 2022, P-318 [1–11]; Exhibit 27-91, WA.0022.0001.0039; Exhibit 27-89, WA.0022.0001.0344.
- 158 See Exhibit 27-91, WA.0022.0001.0039.
- 159 Exhibit 27-84, 'Statement of Adam Tomison', 24 August 2022, p 16.
- 160 Exhibit 27-127, WA.9999.0018.0010, at [10]; Transcript, Joy Rowland, Public hearing 27, 6 October 2022, P-318 [44]–P-319 [1]; Exhibit 27-90, WA.0022.0001.0609; Exhibit 27-128, WA.0021.0001.0746; Exhibit 27-129, WA.0021.0001.0732.

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162 Exhibit 27-83, 'Statement of Eamon Ryan', August 2022, at [60].
163 Transcript, Joy Rowland, Public hearing 27, 6 October 2022, P-323 [31-36].
164 Exhibit 27-127, WA.9999.0018.0010, at [13]; Exhibit 27-103, WA.0022.0001.0496; Exhibit 27-84,
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165 Transcript, Joy Rowland, Public hearing 27, 6 October 2022, P-320 [5-9], P-323 [14-20]; Exhibit
27-127, WA.9999.0018.0010, at [15-16].
166 Exhibit 27-127, WA.9999.0018.0010, at [26].
167 Exhibit 27-127, WA.9999.0018.0010, at [15-16], [32]; Transcript, Joy Rowland, Public hearing 27,
6 October 2022, P-320 [5-9], P-323 [22-25], P-323 [31-36]. Validation ensures a tool is accurate
and produces consistent results by having different providers screen or assess the same person
using the tool, and comparing the results against those produced by existing tools.
168 Office of the Inspector of Custodial Services, *Report no. 140: 2021 inspection of Hakea Prison*,
2022, p 58.
169 Submissions of Counsel Assisting the Royal Commission following Public hearing 27,
24 November 2022, p 10 (Recommendation 7).
170 See, for example, Human Rights Watch, *'He's never coming back': People with disabilities dying
in Western Australia's prisons*, Report, September 2020, p 5; Office of the Inspector of Custodial
Services, *Report no. 140: 2021 inspection of Hakea Prison*, 2022, p xii (Recommendation 12).
171 Office of the Inspector for Custodial Services, *Revised Code of Inspection Standards for Adult
Custodial Services*, September 2020, p 68 (Standard 167).
172 Office of the Inspector for Custodial Services, *Revised Code of Inspection Standards for Adult
Custodial Services*, September 2020, p 68 (Standard 167).
173 Submissions by Western Australia in response to Counsel Assisting's submissions in Public
hearing 27, 22 December 2022, SUBM.0054.0001.0006, pp 7-8 [52-53].
174 Exhibit 27-296, 'Statement of Phillip Snoyman', 12 September 2022, at [15], [64], [73];
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'Statement of Ursula Roeder', 8 September 2022, at [60], [62], [64].
175 Exhibit 27-262, 'Statement of Larissa Strong', 9 September 2022, at [111-13]; Exhibit 27-296,
'Statement of Phillip Snoyman', 12 September 2022, at [62].
176 See, for example, Exhibit 27-245, 'Statement of Michael Drane', 13 September 2022, at [102];
Exhibit 27-300, 'Statement of Paul O'Reilly', 12 September 2022, at [87]; Exhibit 27-296,
'Statement of Phillip Snoyman', 12 September 2022, at [131-35]; Exhibit 27-178, 'Statement
of Rod Wise', 5 September 2022, at [94-95]; Exhibit 27-294, 'Statement of Frank Daly', 12
September 2022, at [70-73]; Exhibit 27-293, 'Statement of Matthew Varley', 13 September 2022,
at [49-53].
177 See, for example, Exhibit 27-84, 'Statement of Dr Adam Tomison', 24 August 2022, at [12(b)-(c)].
178 Submissions of Counsel Assisting the Royal Commission following Public hearing 27,
24 November 2022, [48-67], Appendix A.
179 Caroline Doyle, Shannon Dodd, Helen Dickinson, Sophie Yates & Fiona Buick, *'There's not just a
gap, there's a chasm': The boundaries between Australian disability services and prisons*, Report,
July 2022, p 13.
180 See, for example, Human Rights Watch, *'He's never coming back': People with disabilities dying
in Western Australia's prisons*, Report, September 2020, p 12.
181 Transcript, Eileen Baldry, Public hearing 11, 18 February 2022, P-240 [40-43].
182 Exhibit 11-21.1, 'Statement of Dorothy Armstrong', 28 May 2020, at [29].
183 Exhibit 27-24, 'Joint statement of Tina Powney and Trevor Barker', 8 September 2022, at [43].
184 Exhibit 27-24, 'Joint statement of Tina Powney and Trevor Barker', 8 September 2022, at [43].
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6. The NDIS and criminal justice interface

Key points

- The criminal justice system lacks a clear delineation of responsibilities between the National Disability Insurance Scheme (NDIS) and states and territories. This particularly affects people with disability in custody – for example, whether the NDIS or the states and territories are responsible for providing or funding their supports while they are in custody.
- The Australian Government and state and territory governments should review the *National Disability Insurance Scheme (Supports for Participants) Rules 2013* and the Applied Principles and Tables of Support to provide clear guidelines for determining which supports will be funded by the NDIS for participants involved in the criminal justice system.
- This should include clarification of the distinction between criminogenic-related supports and disability-related supports. Governments should consider specific initiatives to strengthen coordination between service systems, including joint funding arrangements when clearly defining responsibilities is not possible.
- The National Disability Insurance Agency should change its guidelines to expressly state that a release date for people with disability in prison and juvenile detention is not required to fund reasonable and necessary transition supports.

6.1. Introduction

In Public hearing 15, ‘People with cognitive disability and the criminal justice system: NDIS interface’ we examined the division of state, territory and Australian Government responsibilities to fund and provide supports to people with cognitive disability or complex needs in the criminal justice system.

State and territory governments are responsible for funding and providing supports and services to people with disability through their criminal justice systems, which include corrective services, juvenile justice and justice health agencies. The National Disability Insurance Agency (NDIA) funds supports for participants in the National Disability Insurance Scheme (NDIS) who are in contact with the criminal justice system, whether in prison, juvenile detention or while living in the community.

We refer to the way these systems interact as ‘the NDIS and criminal justice interface’. There are a range of legislative, policy and operational documents which make up the framework used to manage this interface.

We have identified that the division between NDIS and state and territory responsibilities at this system interface is unclear at a number of important points. This lack of clarity can contribute to negative outcomes for people with disability in the criminal justice system, including lack of access to supports, remaining in custody for long periods, and ongoing cycles of offending and reoffending.

6.2. Division of responsibilities between NDIS and states and territories

Before the introduction of the NDIS, states and territories were generally responsible for funding and providing disability services for people with disability in contact with the criminal justice system.

The introduction of the NDIS in 2013 changed disability service provision in Australia. Not every person with disability involved with the criminal justice system will be eligible to access the NDIS. To have an access request granted, a person needs to meet the requirements specified in the *National Disability Insurance Scheme Act 2013 (Cth) (NDIS Act)*, including certain criteria about the permanence of their impairment/s and having reduced functional capacity in certain activities.¹ The NDIS is discussed in-depth in Volume 5, *Governing for inclusion*.

Once access is granted, the person becomes a ‘participant’ and an NDIS plan is prepared.² This plan includes funding for ‘reasonable and necessary’ supports for the individual participant.³ The NDIA CEO must be satisfied of a range of matters, including that the support is:

most appropriately funded or provided through the [NDIS], and is not more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or systems of service delivery or support services offered:

- (i) as part of a universal service obligation; or
- (ii) in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability.⁴

This means that if the NDIA CEO or their delegate is not satisfied the NDIS should provide a particular support, because they consider it is more appropriately funded through other service systems, that support will not be included in a participant’s plan.

NDIS Rules

Volume 5 describes the role of the *National Disability Insurance Scheme (Supports for Participants) Rules 2013 (NDIS Rules)*.⁵ The NDIA CEO must have regard to the *NDIS Rules* when making decisions. The *NDIS Rules* set out three areas of NDIA responsibility for participants in contact with the criminal justice system.⁶ They are:

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- **person not in custody** – for example, a person on bail, under a community-based order, on parole, or in home detention. The NDIS will be responsible for reasonable and necessary supports on the same basis as all other people
 - **person in custody** – whether on remand or sentenced and in adult prison or youth detention, or in a secure mental health facility. The NDIS will be responsible for reasonable and necessary supports other than day-to-day care and support needs of a person in custody, including supervision, personal care and general supports, to the ‘extent appropriate in the circumstances of the person’s custody’
 - **transition supports** – which are supports to facilitate the person’s transition from the custodial setting to the community that are reasonable and necessary and ‘are required specifically as a result of the person’s functional impairment’.

The *NDIS Rules* state the NDIS is not responsible for a number of supports, including:⁷

- ‘the day-to-day care and support needs of a person in custody, including supervision, personal care and general supports’
- ‘ensuring that criminal justice system services are accessible for people with disability including appropriate communication and engagement mechanisms, adjustments to the physical environment, accessible legal assistance services and appropriate fee waivers’
- ‘general programs for the wider population, including programs to prevent offending and minimise risks of offending and re-offending and the diversion of young people and adults from the criminal justice system’.

We were told that the application of the *NDIS Rules* has proven to be complex where responsibilities between the state and territory governments and the Australian Government are ‘ambiguous, shared or intersect’.⁸

The Applied Principles and Tables of Support

As explained in Volume 5, the *NDIS Rules* are supported by the ‘Principles to determine the responsibilities of the NDIS and other service systems’. This sets out six general principles used to determine funding and delivery responsibilities of the NDIS.⁹ It also includes the Applied Principles and Tables of Support (APTOS). These are an agreed set of principles developed by the Australian Government and state and territory governments to further define the funding and delivery responsibilities of the NDIS and other service systems, including justice, health, mental health, school education, child protection and employment.¹⁰

The APTOS tables list specific activities that are considered ‘reasonable and necessary NDIS supports for eligible people’. We refer to the APTOS Justice Table below.

Criminogenic supports versus disability supports

Living in the community

The APTOS Justice Table addresses the supports and interventions to assist people in contact with the criminal justice system who are living in the community (including people on bail, parole and non-custodial orders) to address their behaviour.

The APTOS Justice Table states the NDIS has responsibility for:

[s]upports to address behaviours of concern (offence related causes) and reduce the risk of offending and reoffending such as social, communication and self-regulation skills, where these are additional to the needs of the general population and are required due to the impact of the person's impairment/s on their functional capacity and are additional to reasonable adjustment.¹¹

The APTOS Justice Table also provides that 'other parties' (not the NDIS) are responsible for '[o]ffence specific interventions which aim to reduce specific criminal behaviours, reasonably adjusted to the needs of people with a disability and which are not clearly a direct consequence of the person's disability'.¹²

The *NDIS Rules* state the NDIS is responsible for 'reasonable and necessary supports [for persons not in custody] on the same basis as all other persons'.¹³

This statement in the *NDIS Rules* appears to place greater responsibility on the NDIS to fund supports for people who are not in custody but at risk of being drawn into the criminal justice system, compared with the language in the APTOS. Differences between the *NDIS Rules* and the APTOS can create uncertainty and confusion for those responsible for assessing and approving supports. This can lead to inconsistencies and practices designed to shift costs, rather than support people with disability.

People in custody

The APTOS Justice Table specifies that 'the only supports funded by the NDIS [for people in custodial settings] are those required due to the impact of the person's impairment/s on their functional capacity and additional to reasonable adjustment'.¹⁴ It states that these supports are limited to:¹⁵

- aids and equipment
- allied health and other therapy directly related to a person's disability, including for people with disability who have complex and challenging behaviours
- disability-specific capacity and skills-building supports that relate to a person's ability to live in the community post-release
- supports to enable people to successfully re-enter the community
- training for staff in custodial settings where this relates to an individual participant's needs.

The APTOS states ‘where a person is remanded in custody, NDIS funding for reasonable and necessary supports in the participant’s plan will continue to be available to the person when they are released.’¹⁶

By contrast, the *NDIS Rules* do not limit the types of supports that the NDIS will fund.¹⁷ Paragraph 7.24(b) of Schedule 1 of the *NDIS Rules*, which applies to persons in custody, provides that the NDIS is responsible for ‘reasonable and necessary supports for a person in custody [other than day to day care and support needs] to the extent appropriate in the circumstances of the person’s custody’.

The APTOS Justice Table states that for people with disability in custody, the state and territory governments are responsible, among other things, for interventions to reduce criminal behaviour that are ‘not clearly a direct consequence’ of disability (‘criminogenic-related supports’).

The distinction between disability-related and criminogenic-related supports can be unclear. For example, the APTOS Justice Table does not clearly delineate between the supports the NDIS will provide for prisoners or detainees with cognitive impairment and criminogenic-related supports to be provided by state and territory governments.¹⁸ An illustration is where a person’s impairment affects their ability to self-regulate, plan or problem solve, but these characteristics contribute to the person’s criminal behaviour. As the Victorian Government submitted, the issue is particularly complex where a person’s disability affects their cognition, emotional regulation or consequential thinking.¹⁹

In Public hearing 15, witnesses from government agencies in New South Wales, Victoria, Queensland and Tasmania raised concerns that the distinction between disability-related supports and criminogenic-related supports contributes to uncertainty, complexity and confusion in relation to NDIS funding.²⁰

Specifically, they expressed concerns that the distinction encourages the NDIA to make decisions limiting NDIS funding available to participants.

Mr Michael Coutts-Trotter, then Secretary of the New South Wales Department of Community and Justice, said trying to differentiate disability-related and criminogenic-related supports was ‘the fundamental cause of confusion between roles and responsibilities’ and ‘they are very, very difficult to distinguish and the impact of either disability or risk of re-offending changes over time.’²¹ He gave examples of disputes about supports that ‘are sometimes seen as supports that are driven by someone’s risk of reoffending, where in actual fact they are also a function of someone’s cognitive impairment’.²²

The hypothetical examples included disputes about the support hours in an NDIS package to link a person with disability into supports provided by mainstream systems on release from prison. The required supports can include a methadone program or a domestic violence support service, each of which needs to be equipped with knowledge of the individual, their communication needs and their behavioural support plan.²³

Disputes also arise about the need for medium-term accommodation while the person released from custody attempts to settle into the community.²⁴ Mr Coutts-Trotter observed the ‘division of responsibility for funding of supports for participants in the criminal justice system remains contested and unclear’.²⁵

Mr Matthew Lupi, Assistant Director-General, Disability Accommodation, Respite and Forensic Services of the Queensland Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships, said the delineation for forensic disability clients is particularly complex.²⁶ He gave as an example the disagreement about the hours of Supported Independent Living (SIL) support (being NDIS funding to assist a person to live independently) the NDIA deems is reasonable and necessary because of the person’s disability needs, and the hours of support Queensland’s Mental Health Court and Mental Health Review Tribunal deemed necessary for a person to live safely in the community and mitigate their risk of reoffending.²⁷

The Tasmanian Government also told us the distinction between criminogenic and disability needs can be very difficult to separate.²⁸ It said NDIS supports are currently under-delivered to people held in detention in Tasmania.²⁹ It noted the importance of NDIS support for addressing criminogenic needs of people with disability in contact with the justice system:

Often when cognitive and psychosocial disability needs are met, then any criminogenic needs are also addressed and therefore support from the NDIS is key to successful transition from a corrective or forensic institution to the community.³⁰

The Tasmanian Government submitted ‘coordination of appropriate services and supports should be regarded as an issue of providing appropriate disability support, rather than corrective services support’.³¹

The Victorian Government also told us about ‘continuing areas of uncertainty and implementation challenges’ in the division of responsibility between the Australian Government and the state government in situations where it is unclear if a participant requires support for a criminogenic need or a disability-related need. For example: ³²

- A support worker may assist a person with daily tasks, such as purchasing groceries, but the support worker might also assist in developing the person’s social skills, thereby reducing the risk of reoffending.
- Supports are often required for people with intellectual disability under supervised treatment orders who live in disability residential services or accommodation in the community. These are civil orders made by the Victorian Civil and Administrative Tribunal to prevent a significant risk of harm to others which cannot be substantially reduced by less restrictive means. The APTOS principles do not make clear whether NDIS funding is available for support required under this type of order, creating inconsistency in funding for people subject to supervised treatment orders.

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- NDIS participants with complex needs may be unable to access NDIS-funded supports to assist their independent living (Specialist Disability Accommodation (SDA) or SIL supports). The lack of supports adversely affects their capacity to develop daily living skills and strategies needed to reduce the risk of reoffending.

A joint submission by the justice agencies in South Australia told us of inconsistencies in youth justice settings in applying the APTOS. This submission advocated for greater clarity and detail in the APTOS defining the respective responsibilities of the NDIA and the state for young people with disability in custody.³³ It contended a fast-track NDIS application process should be available to young people in the youth justice system.³⁴ The justice agencies pointed out that the parents or guardians often lack the information or knowledge to apply on behalf of their children and, in any event, the young people are often in detention for short periods of time.³⁵

Responses to the *Criminal justice system issues paper* also expressed concerns about the lack of clarity of the APTOS.³⁶ Some responses claimed access to NDIS supports for people in the criminal justice system requires sustained advocacy.³⁷ We examine the role of advocacy and informal supports in more detail in Volume 6, *Enabling autonomy and access*.

The observations made by the state and territory governments contrast with the Australian Government's position that the APTOS is 'clear on its face'.³⁸ Despite this contention, the Australian Government acknowledged 'the distinction between "disability-related supports" and "criminogenic-related supports" can be difficult to draw in complex cases' and can be a 'distinction without a difference'.³⁹ The Australian Government submitted that notwithstanding some uncertainty, the APTOS functions as a useful day-to-day guide in the vast majority of cases.⁴⁰ The Australian Government emphasised the legislative framework (the *NDIS Act* and *NDIS Rules*) determines the activities that the NDIS should fund, not the APTOS.⁴¹

In Public hearing 15, witnesses from the Department of Social Services (DSS) accepted the 'distinction between criminogenic and disability needs is hard to determine'.⁴² But they disagreed the APTOS is not fit for purpose, suggesting the 'principles apply in many cases but not all, and are designed to guide action, not to define with precision what that action has to be'.⁴³

The *NDIS Act* and the *NDIS Rules* define the functions and responsibilities of the NDIS and the NDIA as a matter of law but their language leaves much room for interpretation. The APTOS Justice Table is intended to provide guidance as to the respective responsibilities of the NDIS and other service systems, especially those conducted by the states and territories. It does not have the force of legislation, but aims to guide the day-to-day application of the legislative framework.

The difficulty in reconciling the language in the APTOS and in the *NDIS Act* and *NDIS Rules* is an issue of considerable practical importance.

Efforts to date to address interface issues

In 2019, disability ministers committed to nine actions to resolve interface issues.⁴⁴ In December 2020, the Australian Government and state and territory governments agreed that six of the actions had been completed or transitioned to normal business operations:⁴⁵

- ‘implementation of NDIS Justice Liaison Officers (JLOs) and jurisdictional Points of Contacts’ (see Section 6.3 of this chapter for further information)
- ‘awareness raising activities of NDIS and justice systems operational roles and responsibilities’
- ‘implementation of the NDIS information sharing protocol and new consent forms; and commencement of bilateral Data Sharing Agreement (DSA) discussions between NDIA and respective state and territories regarding a schedule specifically for justice agencies’
- ‘actions to strengthen relationships between Aboriginal and Torres Strait Islander justice settings’
- ‘development of a process guidance map to help guide both NDIA and state and territory justice staff working with NDIS participants (or people who wish to apply to access the NDIS) who are transitioning from justice settings into the community’
- ‘linkages with the National Disability Data Asset (NDDA) are being progressed through another broader governance mechanism given the deliverables are broader than the remit of the [Justice Working Group]’ (see Volume 5, *Governing for inclusion* for further information).

At the end of 2020, three actions were not yet resolved and required further work:⁴⁶

- ‘determining service system responsibilities regarding NDIS participants interacting with justice systems’
- ‘resolving NDIS access for young people with disability in youth justice settings’
- ‘development of guidance material for behavioural supports action’.

A number of initiatives have been implemented since 2020. For example, the Australian Government held bilateral meetings with each state and territory government to discuss policy issues; jurisdictions agreed to strengthen the use of escalation pathways to resolve specific participant issues and monitor systemic issues; and the NDIA’s Justice Operational Guidelines have been revised.⁴⁷

Some of the actions implemented as part of this work are considered further below.

Escalation pathways

States and territories have agreed to a Critical Service Issues Response (CSIR), which manages the escalation of critical issues impacting an individual.⁴⁸ If a matter cannot be resolved at a local level or through the CSIR, it can be escalated to executive steering committee meetings, which are held quarterly and include senior representatives from the NDIA and each state and territory government.⁴⁹

If a service gap is identified, a case conferencing model may be implemented which brings together the NDIA and state and territory governments 'to ensure responsibilities are clearly defined according to APTOS'.⁵⁰ Case conferencing involves regular meetings to ensure an individual's immediate needs are met and risks are managed.⁵¹

For policy issues, where the implementation of responsibilities under the APTOS is unclear, state and territory governments can raise issues with DSS and the NDIA through intergovernmental senior official working groups and subgroups.⁵² When consensus cannot be reached, the issues may be escalated to the Disability Reform Ministerial Council.⁵³ The Disability Reform Ministerial Council is described further in Volume 5.

In speaking about the CSIR agreements, during Public hearing 15, Ms Catherine Rule from DSS said:

no [state and territory government] has raised issues around justice through that protocol ... in 2021. So I think the other way of framing that, Counsel, is to say we were expecting [state and territory governments] to provide – we've asked [state and territory governments] to provide further evidence about the issues that they may have with APTOS, and to do that via the CSIR protocol, but that has not happened.⁵⁴

However, this differs from what we have heard from states and territories.

Revising the Justice Operational Guidelines

As part of the actions to resolve unclear service system responsibilities, the Australian Government held meetings with state and territory governments throughout 2020 to identify systemic policy issues and clarify service system responsibilities.⁵⁵

During Public hearing 15, Ms Catherine Rule from DSS and Mr Scott McNaughton from the NDIA said the outcome of these meetings was that issues were operational in nature.⁵⁶ The Australian Government informed state and territory governments it had addressed issues that had been raised, including implementation of data-sharing and information-sharing arrangements, escalation processes, and using governance processes to raise emerging policy issues.⁵⁷

An update from the Australian Government from January 2021 on engagement with state and territory governments on the delineation between criminogenic and disability-related drivers of supports, included the following statements:⁵⁸

- ‘Officials agreed that, as causation is unclear, roles and responsibilities are better understood by considering the primary intent of a support when applying the APTOS, rather than assigning a cause to the offending behaviour or related support needs. For example, the intent of an NDIS support to assist a participant to live independently in their own home is different to the intent of a justice support that ensures a person complies with their parole conditions, although the two outcomes are not always mutually exclusive.’
- ‘The criminal justice system continues to be responsible for meeting the needs of people with disabilities through the provision of general programs that are available to the wider population both in custodial and community settings, including programs to prevent offending and minimise risks of reoffending, and to divert young people and adults from the criminal justice system.’
- ‘The [Australian Government] and NDIA agreed to discontinue use of the term criminogenic (except where it is a direct quote from other official documents).’

Amendments have been made to other operational materials, such as the Justice Operational Guidelines. Jurisdictions had recommended that the NDIA update the Justice Operational Guidelines to align better with the APTOS including an increased focus on primary intent of a support, rather than causation.⁵⁹ Mr McNaughton confirmed the Justice Operational Guidelines talk about how an individual can access the NDIS, the supports the justice system provides while an individual is in a justice setting, and what supports the NDIS provides while a person is in custody.⁶⁰

Mr Coutts-Trotter said these guidelines do not resolve interface issues. In Public hearing 15, Mr Coutts-Trotter said:

I think there is a fundamental difference that [state and territory governments], on my reading of submissions to the [Royal] Commission, my discussions with colleagues, are of the view that this area is insufficiently clear whereas the [Australian Government] would say it's sufficiently clear and it can be operationalised in guidelines inside the [NDIA]. That, of course, has the effect of being effectively a unilateral decision by the [Australian Government] in the face of concerns that have been expressed, I think, by every [state and territory government].⁶¹

When specifically asked if the updated Justice Operational Guidelines resolved confused roles and responsibilities, Mr Coutts-Trotter said, '[w]e think they're an improvement but they are not a real fix'.⁶²

In response to the Australian Government's position that issues raised by jurisdictions during meetings were operational in nature, Mr Coutts-Trotter said:

state and territory officials acknowledged that some progress had been made through the Justice Working Group, however, the consensus view was that there was more work to be done, particularly in relation to clarity of responsibilities under the APTOS – Justice. For example, the APTOS - Justice provides two brief sentences to describe the NDIS responsibilities for the complex process of transition planning for release to the community.⁶³

Further clarification is needed

Following Public hearing 15, Counsel Assisting submitted the evidence showed the uncertainty about the responsibilities of different governments to provide support for people coming into contact with the criminal justice system has not been resolved.⁶⁴ Counsel Assisting proposed a finding that the APTOS does not adequately delineate responsibilities between the NDIS and other systems for people with cognitive disability.⁶⁵ Counsel Assisting submitted this ambiguity creates barriers for individuals, particularly people in custody, to access appropriate supports.⁶⁶ Some state and territory governments accepted these contentions.⁶⁷

The Australian Government disagreed. It submitted the delineation of responsibilities was not a systemic issue.⁶⁸ Rather, in some complex cases, the delineation of responsibilities between the NDIS and other service systems can be complex and can in some circumstances be a distinction without a difference.⁶⁹

The APTOS is not intended to cover every circumstance. Nonetheless, the evidence in Public hearing 11, 'The experiences of people with cognitive disability in the criminal justice system', and Public hearing 15 showed that it is not effectively achieving its object of defining parties' responsibilities to fund supports for a cohort of people with cognitive disability and complex needs in the criminal justice system.

There should be a review of, and potential reforms to, the APTOS, as well as other NDIS guidelines and relevant documents, to clarify 'reasonable and necessary' supports. In particular, the distinction between 'criminogenic-related supports' and 'disability-related supports' in the APTOS should be clarified.

More broadly, there needs to be a better understanding of the types of support that can prevent a person with disability from being criminalised or incarcerated for behaviour that is a product of their disability. This requires better processes for identifying a person's disability and disability-related needs when they enter prison. We consider this question in Chapter 5, 'Screening, assessing and identifying disability in custody'.

Recommendation 8.17 NDIS Applied Principles and Tables of Support concerning the justice system

Through the Disability Reform Ministerial Council, the Australian Government and state and territory governments should:

- review the *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) and the Applied Principles and Tables of Support (APTOS) and operational guidelines to align and provide clear parameters in determining which supports will be funded by the National Disability Insurance Scheme (NDIS) for participants involved in the criminal justice system
- resolve issues related to the interface between the NDIS and the criminal justice system, particularly the distinction between ‘criminogenic-related supports’ and ‘disability-related supports’
- where such issues cannot be resolved, agree on a mechanism for joint-funding of individual supports.

Proposed amendments to the *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) and the APTOS should be agreed by National Cabinet.

6.3. Improving access to the NDIS for people in custodial settings

A fundamental object of the NDIS is to enable a participant to exercise ‘choice and control’ in the pursuit of their objectives.⁷⁰ Achieving this objective poses obvious challenges for a person in custody. Prisoners and detainees generally have difficulties seeking access to NDIS services of their own accord, particularly if they have a cognitive disability. They must rely on the prison or detention centre to facilitate their engagement with NDIA. Prisoners and detainees need staff to advocate for them and, in due course, an NDIS planner, support coordinator and service providers willing to provide services. Multiple factors have to align for a person who is deprived of their liberty and has diminished capacity to advocate for themselves, to apply and arrange for NDIS support while in custody.

It is clear that the same level of services and supports that people with disability might receive in the community through participation in the NDIS is not available in prisons, if only because service providers cannot freely gain access to the participant in prison.⁷¹

Applying to the NDIS while in custody

Prisoners can apply to access the NDIS and become an NDIS participant. However, we have been told there are ‘significant barriers’ for a person with disability in a custodial setting to access the NDIS.⁷² This includes ‘limited support to complete the referral process’.⁷³

The Tasmanian Government said NDIA staff ‘frequently’ advise that the person in custody is the responsibility of the justice system.⁷⁴ It said people can leave prison ‘without an appropriate NDIS plan or supports in place and without an opportunity to develop a relationship with service providers’.⁷⁵ It also said that it would be beneficial for NDIS planners to attend the prison ‘to meet with people rather than conducting planning assessments over the phone’.⁷⁶

The Tasmania Prison Service’s experience is that the phone meetings are not a suitable way to obtain information from clients and better plans would be developed if the meetings were face to face.⁷⁷

We do not make any findings about advice given by NDIA staff. However, we accept the Tasmanian Government’s contention that it would be beneficial for NDIS planners, where possible, to meet prisoners in person.

Access to NDIS-funded supports in custody

A limited list of NDIS-funded supports are included in the APTOS Justice Table for NDIS participants in custody, if they are ‘due to the impact of the person’s impairment/s on their functional capacity and additional to reasonable adjustment’.⁷⁸ However, we have heard inconsistent evidence regarding individuals who are NDIS participants being able to access to NDIS-funded supports in custody.

The joint submission by justice agencies in South Australia stated the NDIA does not enable or fund community in-reach for prisoners eligible for NDIS and people can therefore sometimes be released from prison with an approved but ‘unfunded’ NDIS plan.⁷⁹ The submission said that best practice would allow supports to be provided while the person is in prison ‘to support skill development to prepare for release’.⁸⁰

The South Australian justice agencies also said there is a ‘major gap’ in ‘the lack of provision of supports and interventions for people in custody/prison with cognitive impairment’ who have an approved NDIS plan.⁸¹ They said such people should be provided with positive behaviour support as a therapeutic framework to assist both the prison health service and corrective services to meet the person’s needs. Support of this kind would also assist prison staff to plan for discharge and prepare the person for release.⁸²

We have been told about issues in the availability and willingness of NDIS service providers to provide supports to NDIS participants in custody. The Victorian Government told us about NDIS-funded clinicians being reluctant to accept referrals for participants in custodial facilities.⁸³ This is because the NDIS pricing model does not capture the time needed to navigate processes involved in visiting a prison.⁸⁴

The Tasmanian Government told us that disability service providers are ‘generally not coming into the prison environment’ to provide supports ‘aimed at improving transitions from custodial settings to the community’ as set out in the APTOS.⁸⁵ In addition the Tasmanian Government is of the view that these supports go beyond the reasonable adjustments which are the responsibility of the Tasmania Prison Service.⁸⁶

There are particular issues regarding NDIS participants being able to access NDIS-funded transition supports to support them to exit custody. This is discussed in Section 6.4 of this chapter.

In December 2020 the Joint Standing Committee on the NDIS recommended the NDIA develop a 'strategy for engaging with participants in custody' to ensure they are not disadvantaged in planning and are assigned to planners with appropriate expertise.⁸⁷ The Committee also pointed out that NDIS participants in custody find it difficult to advocate for themselves (because of such factors as limited documentation, a history of homelessness, substance abuse, trauma and mental illness).⁸⁸ The difficulties are exacerbated by the challenges in planning for a group of NDIS participants who are in custody but must interact with multiple service systems.⁸⁹

Earlier in 2020 NDIS JLOs were introduced to assist workers in state and territory justice systems to coordinate support for NDIS participants in custody who are approaching release. We were told that the introduction of JLOs has been a positive development⁹⁰ because they can assist young people in the justice system to access the NDIS.⁹¹

We were also told that JLOs, NDIS planners and support coordinators all play an important role in supporting people with disability in the criminal justice system to navigate the NDIS and to transition from prison to living in the community. Planners are NDIS employees who support participants in 'intensive' or 'super intensive' streams to develop their NDIS plans. Support coordinators are not directly employed by the NDIA, but are funded through participant's plans. They work with participants to understand funding arrangements, manage expectations and design their plans.⁹²

At the time of Public hearing 15, there were 14 JLO positions around Australia. The NDIA said it intended to engage a total of 25 JLOs by November 2021, a target based on the success of existing JLOs and feedback from states and territories.⁹³

Witnesses said current numbers of JLOs were insufficient to meet demand and to address the problems associated with the interface between the NDIS and the criminal justice system.⁹⁴ We were also told JLOs and NDIA planners do not always have the necessary expertise in or understanding of the needs of people with disability in the criminal justice system.⁹⁵ Mr James (Jim) Simpson of the New South Wales Council for Intellectual Disability told us there was 'inadequate expertise (and available time) amongst NDIS local area coordinators and planners for people with justice system issues and people with complex needs generally'.⁹⁶

The Tasmanian Government told us about the experience of Community Forensic Mental Health Service staff from the Tasmanian Department of Health, who provide case management to forensic clients in the community. The Tasmanian Government said that at times NDIA staff had insufficient training and experience 'working with patients with serious mental illness, complex needs and those who have had contact with the criminal justice system'.⁹⁷ They said a high staff turnover 'also at times prevented a consistent and structured approach through an intensive support plan for participants'.⁹⁸

Mr Coutts-Trotter said that funding disputes can arise because:

there is an inconsistent approach from individual to individual ... explained by the lack of expertise and therefore insight into the complex interaction between a person's disability and their risk of offending, and, indeed, their risk of being a victim of crime ...⁹⁹

He suggested the issue was 'the capability of NDIS planners and the processes that allow the gathering of expert advice' and the need for adequate coordination of disability supports with other services the person is receiving in the community.¹⁰⁰

Following Public hearing 15, Counsel Assisting proposed a finding that:¹⁰¹

- NDIS planners, support coordinators and specialist support coordinators often lack expertise in and understanding of –
 - the support needs of people with cognitive disability in the criminal justice system
 - the scope of the NDIS' responsibility to provide supports to people with cognitive disability in the criminal justice system and to implement them.

There is a need for better training and continuing education of NDIS planners, support coordinators and specialist support coordinators to enable them to support, understand and address the needs of people with cognitive disability involved with the criminal justice system.¹⁰²

These findings were supported by the New South Wales Government.¹⁰³ The Victorian Government stated that it was 'important that there is adequate training and education of NDIS service providers (and others) to develop forensic awareness and understand the complex support needs of people with cognitive disability involved in the criminal justice system'.¹⁰⁴ The Victorian Government also suggested that 'improving joint service coordination and planning and the integration of supports would be beneficial'.¹⁰⁵

Counsel Assisting also submitted that JLOs have performed very useful functions but more suitably trained and skilled JLOs are needed.¹⁰⁶ This was supported by the Victorian Government¹⁰⁷ and the New South Wales Government.¹⁰⁸

In response to these workforce-related findings, the Australian Government argued the Royal Commission could not draw any conclusions based on anecdotal experience of individual witnesses or de-identified examples, and that the evidence could not be applied to NDIA staff as a whole or to support coordinators who are not employed by the NDIA.¹⁰⁹ The Australian Government accepted more JLOs are needed, but interpreted this recommendation 'to deal with the number of JLOs rather than dealing, in any way, to their training and skill'.¹¹⁰ The Australian Government also referred to evidence of positive experiences that disability advocates have had with support coordinators.¹¹¹

There is no doubt that people who work with or support people with complex needs require training and supervision to ensure they respond appropriately to those needs and understand the complexity of the issues which arise in the interaction between service systems in meeting those needs.¹¹² We have been told the JLO model continues to expand, adjust and mature.¹¹³ While we do not make a specific recommendation on this issue, the Australian Government, through the NDIA, should continue to engage JLOs. The skills and expertise of JLOs, NDIS planners and support coordinators should be built up to enable them to respond to the complex needs of people with disability in contact with the criminal justice system, and understand the interaction between the NDIS and other service systems.

6.4. Access to NDIS-funded transition supports

An individual can be released from custody in a number of ways. For example, for adults in prison this includes:¹¹⁴

- people under sentence being released on parole
- people under sentence being released when their full sentence has been served
- people on remand being released after being found not guilty
- people on remand being released if the court 'does not impose a custodial sentence or because they have already served the custodial sentence given by the court'
- people in remand being granted bail.

Limited NDIS supports are available to NDIS participants while in a custodial setting. Under the APTOS, one of the applied principles in the Justice Table provides that the NDIS will fund specialised supports:

delivered in custodial settings (including remand) aimed at improving transitions from custodial settings to the community, where these supports are required due to the impact of the person's impairment/s on their functional capacity and are additional to reasonable adjustment.¹¹⁵

The APTOS states that the criminal justice system is responsible for:

training and skills to increase people's capacity to live in the community post-release, in line with the supports offered by these systems to other people in custodial settings, as part of the reintegration process and to reduce recidivism, including general education services and self-regulation.¹¹⁶

This creates a somewhat complex shared responsibility between the NDIS and states and territories to ensure NDIS participants have the support they need to help them transition to the community. We have heard evidence which points to concerns regarding the timing and adequacy of transition supports available to NDIS participants in custody.

Assessments of functional capacity

At Public hearing 15, the Victorian Government said NDIS assessments of functional capacity for the purposes of pre-release planning do not always accurately indicate what supports a person requires to live independently in the community. This can occur because the assessment is effectively limited to the person's functioning and needs in a secure, regimented environment. An assessment completed in these circumstances may not be of great benefit to a person with complex support needs who requires funding from the NDIS to meet those needs upon release.¹¹⁷ An assessment of a person's functional capacity and support needs should take account of their likely circumstances and functioning when they are living in the community.

Requirement for confirmation of release date to receive transition supports

The Australian Government told us the *NDIS Act* and *NDIS Rules* do not prescribe a timeframe for the NDIA to approve or provide transition funding to NDIS participants in custody.¹¹⁸ But in practice approval for transition funding in a participant's plan 'typically occurs when a release date is advised to the NDIA'.¹¹⁹ The Australian Government pointed out the NDIA does not determine a participant's release date.

At the time of Public hearing 15, the NDIS Justice Operational Guidelines provided a timeframe of 12 to 14 weeks before the participant's earliest known possible release date when the NDIA would approve transitional supports.¹²⁰ We have been advised the 'earliest possible release date' could include 'a date a person must be released from custody, or a date from which release is legally possible'.¹²¹

The Justice Operational Guidelines state that if a person has 'complex support needs or has been in custody a long time', the NDIA may meet with them earlier.¹²² The Justice Operational Guidelines remain the same in the version dated 23 June 2022.¹²³

The Australian Government told us this 12- to 14-week guideline has not unduly fettered the exercise of the NDIA's functions and there is flexibility in the application of 'that general rule'.¹²⁴

Mr McNaughton told us the NDIA, in collaboration with state and territory governments, developed the standard practice map.¹²⁵ This map 'aims to clarify the process and actions that need to be taken by each party for participants approaching release from a custodial setting'.¹²⁶ This map aligns with the timeframes provided in the Justice Operational Guidelines.¹²⁷

However, the South Australian, Tasmanian, Northern Territory and New South Wales governments criticised this practice.¹²⁸ They said the practice can cause delays in a prisoner or detainee being released from custody; a lack of supports for the person when released; diminished opportunities for people in custody to build relationships with service providers; and an increased likelihood the person will reoffend and return to custody.¹²⁹ Individuals would benefit from accessing transition supports prior to a release date being known, for example, when applying for parole. While this may be possible under the NDIA's flexible practice, we have heard that delays in approving transition supports can affect timing of parole decisions.

In Public hearing 15, Ms Cecelia Gore, Senior Director, Mental Health, Alcohol and Other Drugs Branch, Northern Territory Department of Health, said:

Matters in which the NDIA withholds funding until a known release date affects the chance of such persons of [sic] being released on parole, as the parole board declines parole when there is no support in place for the person upon their release. This leads to the person being unable to be released early on parole to a period of supervision in the community, and the risk the person is released on their fulltime discharge date without supports in place.¹³⁰

The South Australian Government submitted:

people in custody can be supported to access the scheme, be found eligible for the NDIS, be assessed for funded supports, receive specialist support coordination to populate the Plan and have an approved NDIS Plan in place but it is a zero dollar plan which is only activated upon release. Currently, prisoners receive no NDIS funded supports while in custody.¹³¹

Although South Australian Government agencies have processes for working collaboratively with the NDIA on release planning, we have been told that a key barrier has been a ‘person’s release date and timely activation of a person’s NDIS Plan do not align which means that a person’s NDIS plan is not funded upon their release’.¹³² The South Australian Government advocated for some NDIS funding to be available while individuals are in custody, so that when they are released they do not enter the community with an approved but unfunded NDIS plan.¹³³

It is concerning to hear of instances where no NDIS funding, including for transition supports, is available to individuals in custody. This raises significant questions regarding the consistency of access to transition supports, and overall access to supports in custody (discussed further in Section 6.3).

The importance of transitional supports and timely release planning

Public hearings 11 and 15 showed the importance of well-timed and adequate transition planning and supports for people in custody and detention settings. These supports mitigate the risks of people with disability being drawn back in to the criminal justice system due to a lack of support. Recovery and transition to life in the community for First Nations people with disability could include programs that offer practices for culturally informed healing and wellbeing.

In Public hearing 11, Mr Lewis Shillito, the Director of Criminal Law for the Aboriginal and Torres Strait Islander Legal Service (Queensland), emphasised the need for supports and services, particularly accommodation, to help people transition from prison. He suggested contact with support services needed to be made well before a person’s release:

if their first point of contact is with a person ... after they have been released, you might have missed the window in which to meaningfully engage with them to develop a rapport, to put in place plans that might actually see something sustainable in place for when they are released.¹³⁴

Mr Justen Thomas' experiences reflected that evidence. Mr Thomas, a First Nations man with lived experience of disability, gave evidence in Public hearing 11 and explained how his homelessness and sleeping rough brought him into contact with the criminal justice system. He came into contact with police and was taken into custody because he had nowhere else to go.¹³⁵

Professor Eileen Baldry AO said a 'lack of stable and appropriate housing' for people with disability is linked consistently with frequent criminal justice interactions.¹³⁶

According to Dr Kathy Ellem, a wide spectrum of interventions is needed for people with cognitive disability to successfully re-enter the community after prison. Therapeutic support may be needed to address specific behaviours as well as support to access housing, income and employment.¹³⁷ She said having a caseworker to assist a person to forge social relationships, to co-ordinate assistance for the person and to advocate for them is also important.¹³⁸

Pre-release planning is equally relevant to people detained in the forensic system.

The experiences of 'Melanie', whose case we discuss in Chapter 4, 'The rights of people found unfit to be tried an indefinite detention', illustrate this. Melanie experienced a protracted transition planning process and ongoing issues around securing funding and supports from the NDIA. The difficulties demonstrated the NDIA's transition planning and decisions to fund or provide supports should have happened earlier during Melanie's time in the forensic hospital.¹³⁹ Referring to Melanie's experiences and the attempts to transition her from seclusion in a forensic mental health setting, the New South Wales Public Guardian, Ms Megan Osborne, said discharge planning should start immediately once a person enters the forensic system.¹⁴⁰

The Psychosocial Disability Practice Guide, an internal NDIA document for planners and NDIS plan delegates, states that forensic patients in hospital or mental health facilities should have a NDIS plan developed within six to 12 weeks of a known discharge date.¹⁴¹

No need to wait for a release date to be set

Several reports have highlighted challenges to NDIA planning processes for people in custody if there is no fixed release date.¹⁴² The Victorian Office of the Public Advocate reported that failure to fund necessary supports in a timely manner may prevent people being released from detention at the earliest opportunity, as they generally will not be released until such supports are in place.¹⁴³

Greater flexibility is required to support transition planning for people in custodial settings, given the evidence we heard that transition planning is often a protracted process and supports can be difficult to obtain after release. The timing of planning for transition supports should not risk a person staying in custody longer than necessary or not having appropriate supports available after their release from prison. However, we are concerned that the timeframes specified in NDIS' Justice Operational Guidelines and Psychosocial Disability Practice Guide may unduly fetter the discretion NDIA staff have to fund transition supports. A narrow approach is not required by the *NDIS Act*, *NDIS Rules* or the APTOS. The timeframes specified may also be contrary to the NDIA's General Principles, particularly the principle that the interactions of

people with disability with the NDIS and other services systems should be ‘as seamless as possible’.¹⁴⁴

The NDIA should change its guidelines to expressly state that a release date is not required as a precondition to planning for and funding reasonable and necessary transition supports for people with disability in custody.

We do not make any recommendations regarding the scope of responsibilities for the NDIS in funding transition supports. As previously highlighted, it is critical both the NDIS and state and territory governments meet their responsibilities to provide appropriate supports to people with disability.

Recommendation 8.18 Timing of NDIA-funded transition supports

The National Disability Insurance Agency (NDIA) should issue guidelines to stating expressly that a release date is not a precondition for approving funding for transitional supports for participants in custody. The NDIA’s Justice Operational Guidelines and internal practice guides should be amended to make this clear.

6.5. Availability of SDA dwellings and SIL funding

The Victorian Government ‘identified a thin market of NDIS service providers willing to work with participants involved in the justice system, in particular those who engage in behaviours that present a significant risk to the community’.¹⁴⁵ The Victorian Government submitted:

The market has not kept pace with demand for services and there is little incentive for NDIS providers to take on complex clients with behaviours of concern who are often in and out of custody.¹⁴⁶

Access to SDA is a key issue. As we set out in Part C of Volume 7, *Inclusive education, employment and housing*, SDA is a type of specialist dwelling funded under the NDIS for people with ‘extreme functional impairments’ or very high support needs who meet specific eligibility criteria.¹⁴⁷ SDA funding is not available for support services but for the accommodation in which services are delivered.

Robust SDA is housing ‘designed to incorporate a high level of physical access provision’ and to be very resilient, while reducing the likelihood of the need for reactive maintenance and reducing the risk to the participant and the community.¹⁴⁸ We were told there was a limited supply of Robust SDA for participants with complex behaviours and support needs.

Mr James MacIassac, Executive Director, Disability, Department of Families, Fairness and Housing, Victoria, told us with respect of forensic disability clients:

Where NDIS participants with complex needs are unable to access appropriate NDIS-funded SDA and/or SIL supports, this has a negative impact on their capacity to develop daily living skills and work on strategies to reduce the risk of reoffending. Without a home and a consistent approach to the supports required, there can be an escalation in offending behaviour or behaviours of concern leading to incarceration and consequential restricted access to NDIS supports.¹⁴⁹

A failure to secure SDA can cause a person to remain in custody longer than is necessary.¹⁵⁰

Mr Coutts-Trotter explained there is unmet need for SDA accommodation, particularly Robust SDA. At the time of Public hearing 15, at least 1,160 people in New South Wales were seeking an SDA dwelling.¹⁵¹ However, this was likely to be an underestimate and the total shortfall was more likely to exceed 3,000 SDA places in New South Wales.¹⁵² New South Wales was of the view the NDIA should be commissioning Robust SDA and related support services to meet demand.¹⁵³

The South Australian Government also told us about insufficient supported accommodation for people with complex behaviours and the difficulties in securing such accommodation especially for consumers with a forensic history.¹⁵⁴

The NDIA acknowledged:

Thin markets may be exacerbated within the individualised funding model of the NDIS, because there are fewer signals for providers to enter or expand. The NDIA understands that there is a need for greater stewardship to ensure there are clear market signals and incentives for market growth and expansion aligned to participant's needs and preferences.¹⁵⁵

The Australian Government said the NDIA has 'thin market trials; underway in all states and territories'.¹⁵⁶ The aim of the trials is to 'address market gaps in liaison with state and territory governments and other key stakeholders'.¹⁵⁷ Ms Liz Neville said the focus of each trial and its location had been the subject of agreement with each state and territory.¹⁵⁸ We discuss thin markets further in Volume 9, *First Nations people with disability* and Volume 10, *Disability services*.

We acknowledge that work is underway on thin market issues. We also note the Australian Government's position that the NDIS was not intended to replace crisis services delivered by other service systems.¹⁵⁹

However, although the NDIS market continues to mature, the evidence shows that insufficient access to SDA and supports for participants with complex needs transitioning from the criminal justice system is an ongoing issue. This is a significant barrier to a successful transition for many of these participants, back into the community.

We conclude this discussion with the words of Melanie. After a complex process involving the formation of a Highly Complex Housing Pathway Governance Group, chaired by the New South Wales Public Guardian, to secure SIL funding and identifying medium-term SDA accommodation, Melanie transitioned into a home in the community. Through Ms Osborne, Melanie said:

I'm living in the community, I'm now free and living life to the fullest.¹⁶⁰

Endnotes

- 1 *National Disability Insurance Scheme Act 2013* (Cth) s 24.
- 2 *National Disability Insurance Scheme Act 2013* (Cth) ss 28, 32.
- 3 *National Disability Insurance Scheme Act 2013* (Cth) s 33.
- 4 *National Disability Insurance Scheme Act 2013* (Cth) s 34(1)(f).
- 5 *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth).
- 6 *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) sch 1, cl 7.24(a), (b)(i).
- 7 *National Disability Insurance Scheme (Supports for Participants) Rules 2013*, (Cth) sch 1, cl 7.25.
- 8 Exhibit 15-13.1, 'Statement of James Maclsaac', 9 June 2021, at [15].
- 9 Council of Australian Governments, Principles to determine the responsibilities of the NDIS and other service systems, 27 November 2015, p 1.
- 10 Council of Australian Governments, Principles to determine the responsibilities of the NDIS and other service systems, 27 November 2015.
- 11 Council of Australian Governments, Principles to determine the responsibilities of the NDIS and other service systems, 27 November 2015, p 23.
- 12 Council of Australian Governments, Principles to determine the responsibilities of the NDIS and other service systems, 27 November 2015, p 23.
- 13 *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) sch 1, cl 7.24(a).
- 14 Council of Australian Governments, Principles to determine the responsibilities of the NDIS and other service systems, 27 November 2015, p 24.
- 15 Council of Australian Governments, Principles to determine the responsibilities of the NDIS and other service systems, 27 November 2015, p 24.
- 16 Council of Australian Governments, Principles to determine the responsibilities of the NDIS and other service systems, 27 November 2015, p 24.
- 17 *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) sch 1, cl 7.24(b); Council of Australian Governments, Principles to determine the responsibilities of the NDIS and other service systems, 27 November 2015, pp 23–24.
- 18 Submissions of Counsel Assisting the Royal Commission, Public hearing 15, 7 March 2022, SUB.0040.00001.00001, p 94 (proposed findings 1–2).
- 19 Victorian Government, Submission in response to *Criminal justice system issues paper*, 21 December 2020, ISS.001.00512, p 26.
- 20 Exhibit 15-9.1, 'Statement of Michael Coutts-Trotter', 15 June 2021, at [21]; Exhibit 15-16.1, TAS.9999.0001.0001, p 7; Exhibit 15-7.1, 'Statement of Matthew Lupi', 9 June 2021, at [52–53].
- 21 Transcript, Michael Coutts-Trotter, Public hearing 15, 13 August 2021, P-99 [28–34].
- 22 Transcript, Michael Coutts-Trotter, Public hearing 15, 13 August 2021, P-100 [23–24].
- 23 Transcript, Michael Coutts-Trotter, Public hearing 15, 13 August 2021, P-99 [43]–P-100 [25].
- 24 Transcript, Michael Coutts-Trotter, Public hearing 15, 13 August 2021, P-100 [11–21].
- 25 Exhibit 15-9.21, NSW.9999.0041.0001, p 11 [48].
- 26 Exhibit 15-7.1, 'Statement of Matthew Lupi', 9 June 2021, STAT.0373.0001.0001, at [52–53].
- 27 Exhibit 15-7.1, 'Statement of Matthew Lupi', 9 June 2021, STAT.0373.0001.0001, at [53].
- 28 Exhibit 15-16.1, TAS.9999.0001.0001, p 7.
- 29 Exhibit 15-16.1, TAS.9999.0001.0001, p 4.
- 30 Exhibit 15-16.1, TAS.9999.0001.0001, pp 6–7.
- 31 Exhibit 15-16.1, TAS.9999.0001.0001, p 7.
- 32 Exhibit 15-13.1, 'Statement of James Maclsaac', 9 June 2021, at [67–69].
- 33 Exhibit 15-15.1, SAG.0003.0025.0001, pp 25–26.
- 34 Exhibit 15-15.1, SAG.0003.0025.0001, p 26.
- 35 Exhibit 15-15.1, SAG.0003.0025.0001, pp 25–26.
- 36 Australian Community Support Organisation, Submission in response to *Criminal justice system issues paper*, 27 April 2020, ISS.001.00114, p 6; Community Restorative Centre, Submission in response to *Criminal justice system issues paper*, 20 March 2020, ISS.001.00089, pp 6–8. Victorian Office of the Public Advocate, Submission in response to *Criminal justice system issues paper*, March 2020, ISS.001.00166, p 30.

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- 37 Uniting Church in Australia, Submission in response to *Criminal justice system issues paper*, 30 September 2020, ISS.001.00464, p 8; Darwin Community Legal Service (DCLS), Submission in response to *Criminal justice system issues paper*, 20 March 2020, ISS.001.00092, p 2.
- 38 Submission by Australian Government in response to Counsel Assisting's submissions in Public hearings 11 and 15, 3 May 2022, SUBM.0040.0001.0100, p 7 [28].
- 39 Submission of Australian Government in response to Counsel Assisting's submissions in Public hearings 11 and 15, 3 May 2022, SUBM.0040.0001.0100, pp 7 [28], 9 [34].
- 40 Transcript, Catherine Rule and Scott McNaughton, Public hearing 15, 13 August 2021, P-169 [47], P-171 [22–26]; Submission by Australian Government in response to Counsel Assisting's submissions in Public hearings 11 and 15, 3 May 2022, SUBM.0040.0001.0100, p 7 [29].
- 41 Submission by Australian Government in response to Counsel Assisting's submissions in Public hearings 11 and 15, 3 May 2022, SUBM.0040.0001.0100, p 7–8 [29–31].
- 42 Transcript, Kerri Mellifont (Counsel Assisting), Catherine Rule and Scott McNaughton, Public hearing 15, 13 August 2021, P-169 [11–29], P-171 [7–55], P-181 [12–18].
- 43 Transcript, Catherine Rule, Public hearing 15, 13 August 2021, P-169 [37]–P-170 [2]; Transcript, Scott McNaughton, Public hearing 15, 13 August 2021, P-164 [11].
- 44 Exhibit 15-1.3, CTD.8000.0013.1426; Exhibit 15-1.1, 'Statement of Liz Neville', 14 June 2021, at [48].
- 45 Exhibit 15-1.1, 'Statement of Liz Neville', 14 June 2021, at [52a–f].
- 46 Exhibit 15-1.1, 'Statement of Liz Neville', 14 June 2021, at [53a–c].
- 47 Exhibit 15-1.1, 'Statement of Liz Neville', 14 June 2021, at [53a], [53c].
- 48 Exhibit 15-1.1, 'Statement of Liz Neville', 14 June 2021, at [68].
- 49 Exhibit 15-1.1, 'Statement of Liz Neville', 14 June 2021, at [55], [74].
- 50 Exhibit 15-1.1, 'Statement of Liz Neville', 14 June 2021, at [75].
- 51 Exhibit 15-1.1, 'Statement of Liz Neville', 14 June 2021, at [75].
- 52 Exhibit 15-13.1, 'Statement of James Maclsaac', 9 June 2021, at [13].
- 53 Exhibit 15-13.1, 'Statement of James Maclsaac', 9 June 2021, at [14].
- 54 Transcript, Catherine Rule, Public hearing 15, 13 August 2021, P-163 [6–10].
- 55 Exhibit 15-1.1, 'Statement of Liz Neville', 14 June 2021, at [53a]; Exhibit 15-9.1, 'Statement of Michael Coutts-Trotter', 15 June 2021, at [55–56].
- 56 Transcript, Kerri Mellifont (Counsel Assisting), Catherine Rule and Scott McNaughton, Public hearing 15, 13 August 2021, P-161 [3–11].
- 57 Exhibit 15-17.73, CTD.8000.0011.4381, pp 1–2; Transcript, Kerri Mellifont (Counsel Assisting), Catherine Rule and Scott McNaughton, Public hearing 15, 13 August 2021, P-154 [22–32], P-161 [24–35], P-162 [14–32].
- 58 Exhibit 15-17.45, CTD.8000.0011.0889, pp 1–2.
- 59 Exhibit 15-17.45, CTD.8000.0011.0889, pp 1–2.
- 60 Transcript, Scott McNaughton, Public hearing 15, 13 August 2021, P-165 [24–27].
- 61 Transcript, Michael Coutts-Trotter, Public hearing 15, 13 August 2021, P-104 [10–18].
- 62 Transcript, Michael Coutts-Trotter, Public hearing 15, 13 August 2021, P-104 [47]–P-105 [1].
- 63 Exhibit 15-9.1, 'Statement of Michael Coutts-Trotter', 15 June 2021, at [58].
- 64 Submissions of Counsel Assisting the Royal Commission following Public hearing 15, 7 March 2022, p 42.
- 65 Submissions of Counsel Assisting the Royal Commission following Public hearing 15, 7 March 2022, p 47 (proposed finding 1).
- 66 Submissions of Counsel Assisting the Royal Commission following Public hearing 15, 7 March 2022, p 48 (proposed finding 3).
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7. Data collection by criminal justice systems on people with disability

Key points

- No jurisdiction in Australia, with the partial exception of New South Wales, comprehensively collects or publishes data that records the number of people with disability in criminal justice systems or the types and prevalence of disability within custodial settings.
- Inconsistent and incomplete disability screening processes, a lack of data collection and poor data linkage all contribute to the poor understanding of the prevalence and types of disability in the criminal justice system.
- Data linkage under the National Disability Data Asset provides an opportunity to vastly improve the understanding of the experiences of people with disability in the criminal justice system, both as offenders and as victims of crime.

7.1. Introduction

Following Public hearing 11, ‘The experiences of people with cognitive disability in the criminal justice system’, Counsel Assisting proposed a finding that there is ‘no national, state or territory reporting of data in relation to people with disability in the criminal justice system’.¹ This proposed finding was accepted by the Australian Government.² We make that finding here.

There are no mechanisms that can effectively and accurately tell us the number of people with disability in custody or forensic systems in any jurisdiction.³ Nor do we have data disaggregated for intersectional characteristics such as First Nations status, culturally and linguistically diverse status, gender and type of disability.

In Volume 12, *Beyond the Royal Commission*, we explain data should be ‘disaggregated’, or split into smaller components, as far as possible to enable analysis on groups with intersecting or multiple disadvantages. Inconsistent definitions of disability and approaches to collecting data also reduce the effectiveness of national surveys and other compilations of data collection mechanisms.

In this chapter we address the inconsistencies between and gaps within data mechanisms that are used to identify the prevalence and types of disability across correctional settings around Australia. Commonwealth legislation created federal criminal offences, principally through the *Criminal Code Act 1995* (Cth). Each state and territory has its own criminal laws. However, all prisons, detention centres and other custodial settings are operated and regulated by the states and territories or by agencies under the authority of state or territory legislation. Accordingly, all

the custodial settings and the policies and practices relating to them discussed in this chapter concern the states and territories.

This chapter also addresses concerns arising from poor data linkage within particular states and territories and the implications of these shortfalls for the effective operation of the criminal justice system. We examine promising practices, including commitments by various jurisdictions to improve their data screening practices. We identify the need for all states and territories to commit to cooperation and consistency in data collection in the criminal justice system, which should be informed by the recommendations on data consistency in Volume 12.

7.2. The importance of data collection

In Volume 12, we discuss the importance of data collection for undertaking informed and evidence-based policy and decision-making. In that volume we examine the difficulties with obtaining good quality data about people with disability around Australia. We explain the challenges faced by governments, policy-makers and decision-makers where there is an absence of disaggregated and intersectional data about the experiences of people with disability across various systems and settings. We also discuss the challenges arising from inconsistent definitions of 'disability' used in various surveys and other data collection mechanisms around Australia. While it is not necessary to repeat those observations here, these challenges have specific implications for the criminal justice system.

Evidence at public hearings indicated the lack of complete, consistent and disaggregated data about people with disability in the criminal justice system has serious implications. These include limitations on:

- the ability to identify and plan for the disability support needs of the prison population⁴
- evaluations of programs, services and policies offered in custodial settings, because they failed to identify and consider their use by, relevance to, and efficacy for people with disability⁵
- assessment of diversionary programs⁶
- evaluation of the practical effect of legislative changes.⁷

As discussed in Chapter 3, 'Youth detention', and Chapter 4, 'The rights of people found unfit to be tried and indefinite detention', the absence of data about the number of people with disability subjected to indefinite detention and solitary confinement makes it difficult to identify any abuses of human rights in custody and forensic settings. Inconsistencies in disability screening practices in custody settings around Australia, discussed in Chapter 5, 'Screening, assessing and identifying disability in custody', have also led to significant gaps and inconsistencies in the data available.

Several past inquiries by governments and non-government bodies have identified the consequences of inadequate data about people with disability within the criminal justice system.

Parliamentary inquiries in South Australia and Victoria have pointed to the absence of comprehensive, systemically collected data about the involvement of people with disability in the criminal justice system.⁸ In Victoria, the Parliamentary Law Reform Committee found the absence of such data had consequences for determining the nature of investments in services and supports for people with disability, and that delivery of those services would be improved with better data.⁹ Both inquiries made recommendations to establish data repositories that could record the number of people with disability engaging with the criminal justice system as victims of crime and offenders.¹⁰

In 2008, the Northern Territory Ombudsman found there was ‘no quantitative or qualitative data which would reliably indicate the level of mental health or disability needs among [Northern Territory] prisoners or the actual types of needs present.’¹¹ This made it difficult to ‘objectively measure the adequacy of service provision’ for prisoners with disability.¹²

Non-government inquiries into the conditions and treatment of people with disability in the criminal justice system have identified similar gaps in data collection. These gaps undermine the ability to identify people with disability, plan supports and services responsive to them and measure their effectiveness.

In 2014 the Australian Human Rights Commission recommended all criminal justice agencies should monitor and evaluate ‘participation rates by people with disability as victims or crime, witnesses, accused, defendants, offenders and jurors in all parts of the justice system’, as well as the provision of adjustments to those people, with regard to indicators such as age, sex, gender, disability and race.¹³

In 2018, the Law Council of Australia pointed to systemic gaps and inconsistencies in data collected in the criminal justice system. It recommended governments ‘lead a coordinated and sustained effort to improve data collection ... and to fill knowledge gaps, in particular with respect to disadvantaged groups’ interaction with the system’.¹⁴

In 2019, the Committee on the Rights of Persons with Disabilities (CRPD Committee) raised concerns about the data collection practices used to measure the prevalence of disability among people in Australia’s criminal justice system. The CRPD Committee expressed particular concern about the ‘absence of national data disaggregated by disability at all stages of the criminal justice system, including data on the number of persons unfit to plead who are committed to custody’.¹⁵ The CRPD Committee also expressed concerns about the absence of data about ‘the number of persons found not guilty due to “cognitive or mental health impairment” indefinitely detained and the number of such persons detained on an annual basis’.¹⁶

Following Public hearing 11, Counsel Assisting proposed a finding that:

Data gaps adversely impact on governments being able to make properly informed decisions in respect of supports and service provisions to people with cognitive disability in relation to the criminal justice system.¹⁷

New South Wales accepted this proposed finding in substance, but proposed its form be amended:

Data gaps present challenges for governments when designing and delivering supports and service for people with cognitive disability involved in the criminal justice system.¹⁸

We agree with and make the finding proposed by New South Wales.

In Volume 12, we make recommendations for a nationally consistent approach to collecting disability information, including:

- adopting a disability flag across data collections for mainstream services, including the criminal justice system, to identify people with disability
- extending data about people with disability, including for intersectional analysis
- expanding the National Disability Data Asset (NDDA) to include the outcomes and experiences of people with disability transitioning into and out of the justice system.

Those recommendations respond to many of the concerns identified in this chapter. We urge all corrective services agencies to have particular regard to the recommendations.

Current data collection within custodial settings

Throughout our inquiry, we sought information about the data collection practices undertaken in criminal justice systems around Australia to understand the prevalence and types of disability in those systems. Although data is collected to varying extents to identify people with disability engaging with police and courts, our inquiry focused on people with disability entering correction settings. This is because of the over-representation of people with disability within correction settings and the poor quality of data collection about people within those settings. We refer to adult prisons as ‘prisons’ and the people incarcerated there as ‘prisoners’. We use ‘detention centres’ to describe juvenile detention centres and ‘detainees’ to describe children detained in them.

Prisoners and detainees cannot access many mainstream services and supports while in prison,¹⁹ and their access to the National Disability Insurance Scheme (NDIS) is limited. It is therefore particularly important to understand the current gaps in data collection systems and identify ways to improve those mechanisms, to understand the nature of supports that people with disability require in custodial settings.

The following section summarises data collection systems intended to identify people with disability among prison and detention populations in each state and territory at the time of Public hearing 27, ‘Conditions in detention in the criminal justice system’. We also refer to initiatives to improve the quality of data collection systems.

Australian Capital Territory

The ACT Child and Youth Protection Services client management system records disability information about detainees and children sentenced to community-based orders. This data is not easily analysed, but can be collated by manual review and case by case analysis.²⁰ ACT Justice Health Services, the agency responsible for case managing detainees with disability and complex needs, captures disability information on assessment but does not ‘routinely’ collect it for reporting purposes.²¹

According to evidence provided on behalf of the ACT Justice and Community Safety Directorate data about prisoners with disability and people with disability on remand is not routinely collected by prison authorities, and information obtained through assessments and staff reporting is not recorded in a way that facilitates automatic reporting.²²

The ACT Justice and Community Safety Directorate has undertaken surveys and data collation processes which provide limited insight into people with disability in custody. The ACT Corrective Services Disability Action & Inclusion Plan 2021–2023 records that in 2016, an ACT Detainee Health and Wellbeing Survey found 52 per cent of detainees surveyed ‘reported having experienced head injuries which caused a loss of consciousness or black-out’.²³ The plan also records that trials of the Hayes Ability Screening Index (a screening tool that indicates possible intellectual disability) returned positive results for 28 per cent of detainees screened.²⁴ No more recent surveys were available at the time of this report.

The Disability Action & Inclusion Plan 2021–2023 identifies a commitment by the Australian Capital Territory Government to ‘investigate opportunities to improve data capture on individuals with disability interacting with [ACT Corrective Services]... noting the need for consent and transparency of data usage’.²⁵ Improved data capture in turn is expected to inform ‘future design of services’ administered by ACT Corrective Services.²⁶

Additional improvements to ‘disability reporting capacity’ within the broader criminal justice system are identified under the ACT Disability Justice Strategy 2019–2029.²⁷ These include the ‘alignment’ of disability definitions between the ACT Justice Health Services and Corrective Services systems.²⁸ One goal of the Strategy is for the ACT Justice and Community Safety Directorate to be capable of reporting the percentage of people with disability remanded or imprisoned in the Australian Capital Territory’s only adult prison.²⁹ The Disability Justice Strategy *Third annual progress report* indicates the ACT Justice and Community Safety Directorate has also begun collecting data about the numbers of people with disability (particularly those requiring reasonable adjustments) who engage with ACT Policing, ACT Courts and Legal Aid ACT.³⁰ Work is underway to allow similar data collection for people who engage with Victim Support ACT.³¹

New South Wales

Youth Justice NSW is the agency within the New South Wales Department of Communities and Justice responsible for children aged 10 to 18 who have committed criminal offences (including

detainees) or are at risk of offending. Youth Justice NSW began collecting data about disability in its youth detention population in 2021, relying on screening and assessment tools, as well as a range of formal and informal interactions between Youth Justice staff and detainees.³² This information is stored in the Client Information Management System and includes a person's disability status, including where disability is 'suspected', 'under assessment' or 'diagnosed';³³ NDIS funding information; and information about the child's NDIS referral pathway stage.³⁴

We also received evidence about the Young People in Custody Health Survey, undertaken every six years to obtain 'comprehensive physical health, mental health and disability cohort data' among the detainee population in New South Wales.³⁵ This relies on face to face interviews, physical, mental health and cognitive assessment, pathology testing, screening and other screening. Although participation in the survey is voluntary, it appears to be a useful and comprehensive source of data. It relies upon both self-disclosure and information obtained from third-parties to identify disability.³⁶

The most recent survey examined in evidence was conducted in 2015. That survey identified that detainees significantly under-reported or under-recognised the extent of their own disability. Only 8.4 per cent reported any chronic health conditions or disabilities that impacted 'learning, applying knowledge', one area of daily functioning.³⁷ However, information obtained through clinical assessments and third parties indicated that 6.2 per cent of 193 detainees screened were identified as potentially having an intellectual disability,³⁸ and 48.7 per cent had 'severe' core language difficulties, which could indicate disability.³⁹

Of 192 detainees assessed for psychological disorders, 83.3 per cent met the threshold for one psychological disorder and 63 per cent met the threshold for two or more.⁴⁰ However, only 44.5 per cent of detainees indicated they were aware of a current diagnosis for a mental health problem.⁴¹

The Youth Justice NSW Disability Action Plan 2021–2024 identifies the state's commitments to improve disability data collection among detainees, following analysis which indicated under-recognition and under-reporting of disability.⁴² The plan identifies an objective to 'accurately, respectfully and appropriately' collect disability data, including information about detainees' support needs.⁴³ It also aims for records to be 'accessible to appropriate stakeholders, ensuring implementation of timely and targeted supports'.⁴⁴

We received evidence that Youth Justice NSW has recently implemented changes to its Client Information Management System to 'improve the accurate recording of disability information related to each young person in detention and mandated to community supervision', in line with the plan.⁴⁵ Youth Justice NSW also maintains a data sharing agreement with the Disability Policy Unit within the NSW Department of Communities and Justice to 'identify mutual clients receiving services from the NDIS and Youth Justice'.⁴⁶

Data about disability among adult prisoners in New South Wales has been collected since 1998, including within private correctional centres.⁴⁷ This includes the type of disability or impairment (cognitive, sensory, physical or psychosocial), confirmation of the impairment, management of people with impairment of custody, and NDIS participant status.⁴⁸ The information may also

include 'details about the functional impairment and barriers that need to be addressed so a person can access services and programs in [a] correctional centre.'⁴⁹ The data collected is drawn from a range of sources, including 'observations, behaviours, reports by staff ... or from external people such as family, carers, guardians, medical and allied medical staff or professionals involved in the criminal justice system'.⁵⁰ It is also reviewed, verified and updated by Statewide Disability Services staff, the agency within Corrective Services NSW (CSNSW) responsible for providing disability support services.⁵¹ The data is not collated on a regular basis, but rather 'when requested by CSNSW or external agencies'.⁵²

Periodic health surveys undertaken by Justice Health and Forensic Mental Health Network have 'also facilitated an understanding of disability needs among the prison population using aggregate data'.⁵³ Although the Network does not currently collate data identifying the types or prevalence of disability experienced by people in custody,⁵⁴ it is 'considering ways in which to improve the exchange of disability information between CSNSW and Justice Health'.⁵⁵

Northern Territory

In the Northern Territory, different types of disability data about children in detention is collected across various systems. These include the corrections-managed Integrated Offender Management System, client information systems used by the Northern Territory Department of Health (NT Health) for detainees in contact with the child protection system, information systems managed by primary health providers, Youth Justice Officer case management systems and other NT Health systems.⁵⁶ Each of these contains different data obtained through different sources. For example, the Integrated Offender Management System contains data obtained through screening processes.⁵⁷

Mr Kenneth Davies, Chief Executive Officer of Territory Families, Housing and Communities, considered updates to outdated data collection systems and automated access to health databases necessary to improve data linkage and use.⁵⁸

For adult prisoners, disability data is collected during the screening process, although staff will consult and update the prisoner's records in NT Health's information systems as needed.⁵⁹ This process involves staff recording diagnoses against particular codes, but there are 260 codes used for disability and a further 450 for mental health.⁶⁰ This creates significant risks of inconsistency in the categorisation of disability and mental health conditions,⁶¹ further undermining data collection. Both NT Health and NT Correctional Services hold data about the provision of disability supports to prisoners, albeit in separate systems.⁶²

Commissioner of NT Correctional Services, Mr Matthew Varley, noted that the collection of disability data by NT Health creates difficulties because those systems are not readily accessible by Correctional Services.⁶³ He said disability data held by NT Correctional Services was dependent on prisoners self-disclosing their disability, or individually consenting to sharing of records kept by NT Health.⁶⁴

Both Dr Frank Daly, Chief Executive of NT Health, and Mr Varley identified the Joint Operational Plan 2020–2023 Health of Adult Prisoners as an important mechanism for

‘reviewing current data, data gaps and emerging needs; and developing a process that improves the capture of data, including developing and improving data capture and reporting of disability’.⁶⁵ The outcomes of that plan were not available at the time of this report.

Queensland

In Queensland, the Department of Children, Youth Justice and Multicultural Affairs predominantly collects data about disability among detainees through screening processes,⁶⁶ and an annual census.⁶⁷ This includes information about children receiving disability support and disability types – neurodevelopmental including fetal alcohol spectrum disorder (FASD), Autism, Attention Deficit Hyperactivity Disorder (ADHD) and ‘developmental/language disorders’, ‘cognitive/intellectual’, physical or sensory.⁶⁸ For each disability listed, information is sought about whether the disability is diagnosed or suspected,⁶⁹ and if the disability ‘causes significant impairment in the day-to-day life of the young person’.⁷⁰

Disability may also be identified and recorded in the course of the Youth Level of Service/Case Management Inventory, a ‘scientifically valid tool designed to provide a preliminary estimate of the level of risk for antisocial behaviours’,⁷¹ or on the Integrated Client Management System, which lists 20 disability categories including ‘other’.⁷² This information is sought within five weeks of a detainee entering custody, regardless of sentencing status.⁷³ This data is then collated annually for the *Youth Justice Census*.⁷⁴

Mr Michael Drane, Senior Executive Director of Youth Detention Operations and Reform, said the accuracy of disability data relies on timing of data entry and the design of the information system ‘to record detail in a manner that will be easy to consume’.⁷⁵ Mr Drane said that the department was ‘moving toward a new information recording system’ which was in ‘design phase’ at the time he gave evidence at Public hearing 27.⁷⁶

Queensland Corrective Services (QCS) uses ‘Cognitive Impairment’, ‘Guardianship and/or Administration Order’, ‘National Disability Insurance Scheme’ and ‘Prisoner of Concern’ warning flags within its Integrated Offender Management System to report disability in its adult prison population.⁷⁷ The Cognitive Impairment flag includes prisoners with diagnosed or suspected impairment,⁷⁸ where suspicion has arisen through observing the prisoner in custody or screening at admission.⁷⁹ The Prisoner of Concern flag is used for prisoners ‘who have self-reported that they have a significant vulnerability, including disability, that requires individualised management and support in custody’.⁸⁰ ‘Vulnerable’ here is defined by QCS to mean the prisoner ‘needs special care, support or protection, due to factors that may be inclusive of their: age; disability; impairment; risk of abuse, harm or neglect; or due to some other identified risk factor/s’.⁸¹

Data about these flags is ‘collated if and when necessary and are accessible on demand’.⁸² However, it is not possible to extract this data in disaggregated form, such as by disability type, because it is maintained through manual and local records.⁸³ Other information pertaining specifically to Prisoners of Concern is maintained locally and is not available in a consistent and centralised format that can be readily extracted.⁸⁴

QSC acknowledged 'its reporting on disability amongst prisoners is currently limited' and expressed a commitment to improving processes for both identifying prisoners with disability and reporting data on disability more comprehensively.⁸⁵

South Australia

In South Australia, the Department of Human Services records disability data about detainees who are NDIS participants.⁸⁶ Aggregate data about disability among detainees is 'not routinely collected',⁸⁷ although information about a detainee's disability, their support needs and NDIS participant status can be recorded in the Department's Connected Client Case Management System.⁸⁸ This information is recorded in free text and is not capable of being easily extracted and collated, although manual collation has been used in past projects relevant to disability screening.⁸⁹ Information pertaining to disability may be obtained through screening processes, information obtained through other agencies such as South Australia Police, interviews with the child and meetings with stakeholders, including family and guardians.⁹⁰

Disability data collection about adult prisoners is limited to data collected in the implementation of the NDIS Offender Services Pilot Program.⁹¹ This information is stored on the South Australian Department of Correctional Services' Justice Information System, and is used to 'track, support and analyse NDIS participants' in the custodial system.⁹² This dataset includes the prisoner's name, age, gender, Aboriginal/Torres Strait Islander identification, location, significant dates, primary disability listed with the NDIS, relevant stakeholder details, progress notes and other NDIS-related information.⁹³ It is intended to be 'dynamic' and regularly updated, although general Correctional Services staff can only see that the person has an NDIS flag, rather than other details in the dataset.⁹⁴

Mr John Strachan, Principal Advisor, Offender Services within the Department for Correctional Services considered the Department's data collection systems and processes would be improved through developing an electronic case note system, which is due to occur at the end of 2023.⁹⁵ He also suggested integrating South Australian Department of Health databases and information systems with those used by clinical staff in the Department of Correctional Services.⁹⁶ At present, a prisoner must consent to their information to be shared in this way.⁹⁷

Tasmania

Representatives of the Tasmanian Department of Communities told us the Department does not capture information 'concerning young people with disabilities in the Youth Custodial Information Services', although information concerning a detainee's disability status is recorded in case notes in a person's electronic file.⁹⁸ Data is 'not collated' at all and 'there is no easy way to accurately identify the types and prevalence of disability experienced by [young] people in custody' without a manual review of all individual files.⁹⁹

Similarly, we were told that although data about disability was captured through some screening processes for adult prisoners and remandees, the Tasmanian Department of Justice had no processes in place for regular collation of statistics about prisoners with disability.¹⁰⁰ Some

data collected during screening is collected and retained by Correctional Primary Health Services, which is part of the Tasmanian Department of Health.¹⁰¹ This information captured in the 'NDIS and Disability Register', including information collected during admission screening processes, 'could, in theory, be collated as required', but this would involve a 'manual review and extraction process'.¹⁰²

Mr Rod Wise, Deputy Secretary of Corrective Services in the Tasmanian Department of Justice, said there 'are certainly some limitations' impacting the capacity of Tasmanian Corrective Services to accurately identify the types and prevalence of disability experienced by people in custody.¹⁰³ These included reliance on self-reporting of disability,¹⁰⁴ the absence of a central repository of information accessible to staff who regularly interact with prisoners,¹⁰⁵ 'no useful definition of disability that will allow capture of the most critical information',¹⁰⁶ limitations in the current database to record 'even the more identifiable disabilities' in a manner allowing data linkage,¹⁰⁷ and issues regarding retention and sharing of personal information.¹⁰⁸ Although a new prisoner information database is being introduced in 2023,¹⁰⁹ the 'range of disabilities to be captured' in that system had not been finalised at the time of Public hearing 27.¹¹⁰

Victoria

Evidence at Public hearing 27 indicates that 'some' information about disability among detainees in Victoria is collected: confirmed disability, suspected disability awaiting assessment, and type of disability.¹¹¹ The Victorian Government Department of Justice and Community Safety also 'obtains information on the descriptions of impairments and support needs, date of diagnosis, relevant assessments and reports, functional impairment and strategies for working with and supporting' the person.¹¹² This information is collected through Child and Adolescent Intellectual Disability Screening,¹¹³ Youth Offender Program clinical assessments,¹¹⁴ requests for information from other service systems,¹¹⁵ and a variety of other sources.¹¹⁶

Youth Justice Senior and Specialist Disability Advisors also record and collate data, including 'type of disability, information on referrals and disability supports'.¹¹⁷ Specialist Disability Advisors also 'record and collate additional data on a quarterly basis'.¹¹⁸

In contrast, data about Victorian adult prisoners with disability is stored in 'various applications', many of which do not 'interface with each other' due to security restrictions placed on staff.¹¹⁹ This results in staff recording the same data in different places and being required to check multiple information sources to ensure accuracy and completeness of data across those systems.¹²⁰ Ms Larissa Strong, Commissioner of Corrections Victoria, suggested 'improved interfaces across multiple applications and ... an integrated offender management system would significantly improve data collection, analysis and management and support of people in custody'.¹²¹

Ms Strong identified specific data collected in relation to people who are supported by the Prison Disability Support Initiative (PDSI) and the Disability and Complex Needs service (DCNS), the latter of which is located at Victoria's only maximum security prison for women. This data identifies that a person is supported by PDSI or DCNS and their disability type.¹²² It is collected

through collateral information in referral forms, and built upon ‘through direct interactions with people in prison’.¹²³ It can be extrapolated to provide information about people with intellectual disability, Acquired Brain Injury, Borderline Intellectual Functioning (‘for those accepted into the Forensic Intervention Service “Disability Support Pathways”’), gender, age, Aboriginality and details of the nature of the supports provided.¹²⁴ Data is collated ‘at minimum’ upon reception to the prison, one to four weeks following reception (Corrections Victoria Case Planning Transition) and twelve months prior to release (known as the ‘ReGroup assessment’).¹²⁵

Both Ms Jodi Henderson, Commissioner of Youth Justice, and Ms Strong suggested the data collection systems used by Victorian corrections and justice health agencies could be improved to better reflect disability types, and to ensure data could be ‘more readily and regularly extracted’.¹²⁶ Ms Henderson pointed to Inclusive Victoria: State Disability Plan (2022–2026) as reflecting the Victorian Government’s commitment to improving the use and collection of data about people with disability.¹²⁷ Although the plan does not identify data collection in criminal justice as a specific priority, it identifies ‘effective data and outcomes reporting’ as one of its six system reforms, which ‘requires all government departments to report on how they are embedding the six systemic reform commitments across all their activities’.¹²⁸

Western Australia

During Public hearing 27, witnesses representing the Western Australian Department of Justice told us ‘data on the total number of prisoners who are people with disability is not available’.¹²⁹ This is because information of this nature is recorded as a medical diagnosis within a person’s medical record and cannot practicably be extracted without a manual review of individual files.¹³⁰ The Department collects some NDIS data about people with physical disability, but does not have similar information about NDIS participants with other types of disability, including speech or sensory disability.¹³¹ The evidence also indicated that data about prisoners with disability could not be disaggregated to identify prisoners with disability from culturally and linguistically diverse backgrounds, or LGBTIQ+ prisoners with disability.¹³² No data is specifically collected about the number of prisoners who require ‘assisted daily living aids’.¹³³

As the number of prisoners with disability in Western Australia is unknown, data regarding ‘at-risk prisoners’ or ‘prisoners requiring protection’ may be useful to understanding some of the experiences of prisoners with disability. This is because prisoners with disability, particularly those with intellectual disability and cognitive impairment, and prisoners held under the *Criminal Law (Mentally Impaired Accused) Act 1986* (WA) are considered particularly vulnerable to suicide, self-harm and harm in the prison environment.¹³⁴ Notably, the At-Risk Management System – Reception Intake Assessment (the screening tool used to identify at-risk prisoners) only asks one question aimed at identifying disability: whether the prisoner is registered with the Disability Services Commission.¹³⁵

Significant deficiencies relating to data collection about this group of prisoners were identified by the Office of the Inspector of Custodial Services in March 2022.¹³⁶ In his report, *Management of prisoners requiring protection*, the Inspector found numerous deficiencies in data collection about protection prisoners, including poor data collection about their participation in education

programs,¹³⁷ the effect of restrictions imposed on participation in various activities for the purposes of protection,¹³⁸ and records of self-harm.¹³⁹ The Inspector found the Department of Justice had ‘little insight’ into the restrictions imposed on those prisoners, and its ability to undertake monitoring and quality-control checks on the delivery of services to those prisoners was ‘severely limited’.¹⁴⁰ He recommended the Department, ‘[i]mprove data input and extractability in the offender database to enable greater oversight of prisoner cohorts and the delivery of services.’¹⁴¹

Dr Joy Rowland, Director Medical Services – Health Services in the Department of Justice Western Australia identified the functional impairment screening tool (FIST) as a mechanism that would improve data collection about disability among the Western Australian prison population, through ‘a snapshot of the population as a whole’.¹⁴² However, this tool is administered within 90 days of a person’s admission into custody and is only in its infancy. It had been applied to less than one quarter of the adult prison population in Western Australia as at August 2022.¹⁴³

Since the FIST had not been validated at the time of Public hearing 27, it appears unlikely that it will provide an effective way to identify and build a database of prisoners with disability in the immediate future.¹⁴⁴ As we have noted, validation is the process through which tools are assessed to determine their accuracy and ability to produce consistent results.¹⁴⁵

Despite the absence of systemic screening and data collection relating to people with disability in prison, detention or on remand in Western Australia, some research bodies have conducted valuable projects that have identified the prevalence and type of disability among the population in custody. For example, research conducted by the Telethon Kids Institute sought to identify the prevalence of FASD among detainees in Banksia Hill Detention Centre in 2015–2016.¹⁴⁶ That study assessed 99 sentenced detainees and found 89 per cent had at least one domain of severe neurodevelopmental impairment (indicative of cognitive disability) and 36 per cent were diagnosed with FASD in the course of the study.¹⁴⁷

National surveys

National surveys and datasets analysing prison populations around Australia provide limited insight about the prevalence and types of disability in prisons and other corrective settings. As a consequence, no nationally consistent data indicates how many First Nations people, women, culturally and linguistically diverse and/or LGBTIQ+ people with disability are in prison, detention or other custodial settings.

The Australian Bureau of Statistics’ *Prisoners in Australia* is the primary source of data on prisoners in Australia and includes information about the sex, age, country of birth, sentencing status and First Nations status of prisoners.¹⁴⁸ The dataset relies on the *National Prisoner Census* and includes all persons remanded or sentenced to adult custodial corrective services agencies in Australia, but includes no information about disability.¹⁴⁹

Similarly, the *Report on Government Services* published by the Productivity Commission analyses various aspects of prison life including prisoner employment, education and training,

time outside cells as well as recidivism rates.¹⁵⁰ This dataset is disaggregated for jurisdiction and Aboriginal and Torres Strait Islander status.¹⁵¹ Neither ‘disability’, nor any proxies for disability such as NDIS participant status or receipt of Disability Support Pension, are included in the dataset or accompanying report.

The Australian Institute of Health and Welfare (AIHW) also collects, collates and publishes data about the health of prisoners and detainees. Data about prisoners is obtained through the National Prisoner Health Data Collection every three years.¹⁵² This dataset relies on data collected over a two-week period from prison entrants and people about to be discharged from prison, and clinic services.¹⁵³ Although it is the ‘only national source of information on the health of prisoners in Australia’, it is an incomplete dataset because New South Wales does not participate, and collection is based on convenience sampling and self-reported data.¹⁵⁴ As we explain in Chapter 5, data collection about disability which predominantly relies on self-reporting is problematic and likely to result in underreporting.

Data collected about prisoners is reported in *Health of Prisoners*, which was most recently published in 2022.¹⁵⁵ That data reports on the prevalence of self-reported ‘mental health disorders’ among survey participants, a term defined to mean ‘chronic condition such as depression, anxiety disorders, psychotic disorders, and alcohol and other drug use disorders’.¹⁵⁶ To some extent, this may provide insight into the prevalence of psychosocial disability in the prison population. Of prison entrants surveyed in 2018, two in five (40 per cent) reported having been told they had a mental health disorder at some point during their lives; females (28 per cent) were almost twice as likely as males (15 per cent) to be dispensed mental health-related medication; and almost one in five (18 per cent) were referred to mental health services for observation and further assessment.¹⁵⁷

The *Health of Prisoners* dataset also records information about ‘chronic diseases’ among prisoners, which are defined as ‘long-lasting conditions with persistent effects’.¹⁵⁸ However, survey participants are asked whether they have specific chronic health conditions, namely asthma, arthritis, cardiovascular diseases, diabetes or cancer.¹⁵⁹ While people with disability generally experience higher rates of comorbidities, including chronic health conditions,¹⁶⁰ this question provides little insight into the prevalence of various types of disability in the prison population.

The AIHW also publishes national data about detainees in the *Youth detention population in Australia* and *Young people returning to sentenced youth justice supervision* reports. These disaggregate data about detainees for age, sex, Aboriginal and Torres Strait Islander status, sentencing status and recidivism rates.¹⁶¹ No health-related data or data about disability is available in these datasets. In the *National data on the health of justice-involved young people: a feasibility study 2016–2017*, the AIHW recommended the development of a national youth justice health-data collection to address the significant gaps in the available national data about the health of detainees.¹⁶²

While these national surveys are important sources of information, very significant gaps remain in the data available about people with disability in the criminal justice system. This is concerning in circumstances where indicative datasets show people with disability

are over-represented in the criminal justice system. We examine the AIHW's efforts to develop a 'disability flag' and the challenges associated with implementing a consistent disability flag in Volume 12. We recommend a mechanism for developing a nationally consistent approach to collecting disability information in that volume.

Data about people with disability as victims of crime

In Volume 3, *Nature and extent of violence, abuse, neglect and exploitation*, we examined the data available about the violence, abuse, neglect and exploitation that people with disability experience, including the particular experiences of women, LGBTIQ+ people, First Nations people and culturally and linguistically diverse people with disability. Although not every instance of violence, abuse, neglect or exploitation is a criminal offence, the data examined in that volume establishes that people with disability experience substantially higher rates of violence and abuse than people without disability.

The Victorian Government told us it is 'difficult to determine' the exact figure of people with disability who are victims of crime 'because data systems do not capture information on the intersection between victimisation and disability'.¹⁶³ The Victorian Royal Commission into Family Violence recognised these challenges and recommended the Victorian Government 'adopt a consistent and comprehensive approach to the collection of data on people with disabilities who experience or perpetrate family violence'.¹⁶⁴ It also recommended Victorian Police 'ensure that disability data is collected, including on the type of disability and the support required' in the course of redesigning police referral forms.¹⁶⁵

Despite concerns about the apparent difficulty of identifying and collecting information about disability raised by the Victorian Government, the NDDA appears to have provided new opportunities to identify people with disability who are victims of crime.

The NSW Bureau of Crime Statistics and Research (BOCSAR) led the 'Justice Test Case' under the NDDA pilot.¹⁶⁶ The study aimed to understand the characteristics of people with disability as victims of crime. This was done by examining data about crimes reported or detected by NSW Police Force, linked to other data sources to identify people with disability, including the National Disability Insurance Agency (NDIA), state agencies that provided disability support prior to the NDIS, and the Disability Support Pension.¹⁶⁷

Researchers found that as at 1 January 2014, 542,388 people aged 15 years or older within the data sample were identified as people with disability.¹⁶⁸ Of those who identified as having a disability, 17 per cent were recorded as a victim in one or more criminal incidents between 2014 and 2018.¹⁶⁹ First Nations women with disability were most likely to be victims of crime, with 34 per cent of that cohort being victims of any crime, 18 per cent victims of violent crime and 19 per cent victims of domestic violence crime.¹⁷⁰ First Nations men with disability were also more likely to be victims of crime than non-Indigenous men or women with disability: 29 per cent were victims of any crime, 15 per cent were victims of violent crime and 9 per cent were victims of domestic violence crime.¹⁷¹

We consider improved data collection about people with disability who are victims of crime is critically important for two reasons. The first is to better understand and evaluate efforts to improve the experiences of people with disability who are victims of crime, when they engage with the criminal justice system. The second is to improve understanding of the life course of people with disability, many of whom are victims of crime before becoming offenders themselves.¹⁷² The BOCSAR study suggests the NDDA is a valuable mechanism for collecting such data and furthering understanding of the experiences of people with disability in the criminal justice system.

We make a recommendation in Volume 12 to the effect that the Australian Government and state and territory governments make long-term commitments to the NDDA. The research conducted in New South Wales under the NDDA pilot indicates clear potential to vastly improve data collection and linkage practices for people with disability in the criminal justice system.

7.3. Challenges with current data collection in custody

Inconsistent data collection practices

We have provided a summary of data collection mechanisms aimed at understanding the prevalence and nature of disability in custody settings employed in and between different jurisdictions. Many of these rely on disability screening practices which, as we explained in Chapter 5, differ significantly between jurisdictions. Those processes seek and obtain different information, are conducted by staff with different types of qualifications and training, and provided different levels of support to the person undergoing the screening process.

At Public hearing 27, Counsel Assisting proposed a finding that data collection practices relating to disability adopted by corrective service and youth justice agencies in each state and territory vary significantly. The type of information collected, the method of collection, the frequency with which information is sought and the way it is recorded and used differ.¹⁷³ None of the parties with leave to appear at the hearing contested this finding.¹⁷⁴

This proposed finding reflects information obtained through other parts of our inquiry, including two of Counsel Assisting's findings proposed in submissions following Public hearing 11:

There is a lack of current disaggregated, consistent, and comparable data collected by each state and territory in relation to people with disability in the criminal justice system.

...

There is no national, state or territory reporting of data in relation to people with disability in the criminal justice system.¹⁷⁵

New South Wales accepted these findings in principle, but noted the role of the NDDA pilot program in prioritising data collection about the interaction of people with disability in the justice system.¹⁷⁶ We agree this is an important and valuable project that should continue.

During Public hearing 27, a number of government witnesses indicated support for a proposal to harmonise data collection mechanisms used by corrective services across Australia. Some agreed it would 'be advantageous' if every jurisdiction captured the same data about disability so as to allow national comparative analysis.¹⁷⁷ Mr Rod Sims of the Tasmanian Department of Justice noted efforts underway through the Correctional Services Administrators' Council to harmonise data collection practices, starting with 'a manageable list of disabilities that will assist decision-making in the future.'¹⁷⁸ While it is promising that corrections agencies have identified the need for harmonised approaches to collecting disability information, we think this should be informed by harmonisation efforts we recommend in Recommendation 12.5 of Volume 12.

Lack of disaggregated data

As noted earlier, a number of national data collection surveys, including the Australian Bureau of Statistics' *Prisoners in Australia*, record information about prisoners' First Nations status and some indicators of culturally and linguistically diverse status (for example, country of birth).¹⁷⁹ However, they do not collect information about disability, meaning they do not provide an intersectional understanding of Australia's prison population that takes into account disability.

Witnesses at Public hearing 11 emphasised the importance of data being capable of identifying an individual's disability in addition to whether they are a First Nations person.¹⁸⁰ Similar recommendations were made by the Human Rights Law Centre in its 2017 report, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*.¹⁸¹

Following Public hearing 11, Counsel Assisting submitted it was open to the Royal Commission to find:

As a result of the lack of available data, there is limited targeted research with respect to people with cognitive disability and First Nations people with cognitive disability in the criminal justice system.¹⁸²

New South Wales accepted this proposed finding in principle but described efforts it has taken to better understand data about First Nations people with cognitive disability in the criminal justice systems both as victims and offenders.¹⁸³

Data linkage and sharing

Counsel Assisting made the following observations about data sharing arrangements relevant to screening, identification and diagnosis of people with disability in the criminal justice system:

A number of the jurisdictions commented that an area requiring improvement is the sharing of disability information between government agencies, particularly between the corrective service agencies and health agencies responsible for prisoner health services. Corrective service agencies do not have automatic or ready access to health records and health information systems. Several responses highlighted that the delay in obtaining health information about a person's disability can impact upon the capacity of the corrective service or youth justice agency to identify the person's disability needs and to provide appropriate support. A number of jurisdictions said that access to disability and health assessments undertaken before the person entered custody are particularly important but difficult to obtain.¹⁸⁴

Mr John Walsh, actuarial consultant and former Associate Commissioner at the Productivity Commission, explained that data collected in the human services sector is often collected and held in silos by service providers, rather than being person-centred.¹⁸⁵ This can result in a lack of data that measures the wider impacts of services on individuals including people with disability, and has implications for understanding the long term costs and benefits of those services.¹⁸⁶

We received evidence of research that has sought to link data obtained from these 'silos'. Professor Eileen Baldry AO gave evidence about the value of data linkage conducted through the course of two studies, 'People with mental health disorders and cognitive disability in the criminal justice system in NSW' and the 'Indigenous Australians with Mental Health Disorders and Cognitive Disabilities in the criminal justice system'.¹⁸⁷ These studies examined data relating to a sample of 2,731 people with 'mental or cognitive disability' extracted from multiple state government agencies, including police, justice health, courts, disability, housing, health and community services.¹⁸⁸ Professor Baldry and her co-researchers were able to use it to map individuals' involvement across a range of systems, which 'opened new ways of understanding people's pathways into the criminal justice system'.¹⁸⁹

In the second study, which examined 676 people or 25 per cent of the original cohort who were identified to be First Nations people, researchers were able to identify participants' pathways into the criminal justice system.¹⁹⁰ Of this cohort, 91 per cent had at least one identified cognitive disability or mental health diagnosis.¹⁹¹ This work was also informed through cooperation with four First Nations communities, where researchers had the benefit of interviewing community members and leaders to inform their analysis of the data.¹⁹² The study concluded that First Nations people in the cohort were more likely to have been in out-of-home care as children, come into contact with police at a younger age and at a higher rate as both a victim and offender, have higher numbers and rates of convictions, more episodes of remand and higher rates of homelessness.¹⁹³

Using data to understand the particular pathways that lead people with disability, including First Nations people with disability, into the criminal justice system has clear benefits, despite being an intensive exercise that requires analysis of information held by multiple agencies and sectors.

Inquiries examining data collection in the criminal justice system around Australia have made similar findings and tied these directly to reducing recidivism and enmeshment of people with disability in the system. In 2017, the Northern Territory Ombudsman recommended the Northern Territory Government:

adopt a whole-of-government approach to reduce offending and recidivism and to promote rehabilitation of offenders, to include ...

Improved collection, sharing and use of data across agencies to drive evidence based reforms and improved service delivery.¹⁹⁴

Throughout Public hearing 27, a number of government representatives gave evidence of their intention to improve data linkage and sharing about people with disability in the criminal justice system between agencies. Young People Connected, Communities Protected: South Australia's Youth Justice State Plan 2020–2023 identifies improved data sharing between agencies as 'an opportunity to see and respond to a much bigger picture than individual interactions within a single system'.¹⁹⁵ Similarly, the Youth Justice NSW Disability Action Plan 2020–2024 recognises that improved data sharing between agencies will cause children in detention to 'receive faster referrals and better-connected services'.¹⁹⁶

7.4. Conclusion

In submissions following Public hearing 27, Counsel Assisting proposed this finding:

The data collection methods and systems used by corrective service and youth justice agencies in the States and Territories do not allow them to identify the prevalence, types and degree of disability among prisoners and detainees. The States and Territories do not collect or record sufficient data about disability to enable them to present disaggregated data or to identify the disability support needs of their respective prison and detention centre populations.¹⁹⁷

Only the New South Wales Government opposed making this finding. New South Wales submitted data collection in Corrective Services NSW does allow for identification of prevalence and type of disability.¹⁹⁸ In part this was due to updates to the Youth Justice NSW Client Information Management System in December 2021.¹⁹⁹ It submitted the accuracy of data collection may be affected by consistent data entry by staff, and time limitations where children on remand are not held in custody for sufficient time to 'undergo assessment/diagnosis'.²⁰⁰ We acknowledge that of the jurisdictions examined in our inquiry, the data collection practices conducted by New South Wales are the most comprehensive.

While poor data collection practices have clear ramifications for the experiences of people with disability in the criminal justice system, we do not make recommendations about data collection in this chapter. Rather, we identify opportunities for data collection, publication and improvement of data practices in Chapters 3, 4 and 5. In particular, we have made recommendations directed to states and territories to:

- collect and publish data on the number of people with disability subject to indefinite detention in Australia
- collect and publish data on the use of solitary confinement on people with disability in the criminal justice system
- collect data about disability obtained through prisoner screening, assessment and diagnosis mechanisms.

We make recommendations in Volume 12 in relation to:

- developing a national approach to collecting disability information to support the collection of better data about people with disability
- adopting a disability flag to identify people with disability in data collections, including in criminal justice data collections
- extending the scope of disability data to improve the capacity for intersectional analysis
- establishing the NDDA as a national resource for linked data across service systems. This includes setting up a specific data project on people with disability transitioning in and out of criminal justice settings.

As we have noted, most Australian jurisdictions have recorded their intention to improve their data collection systems. Jurisdictions that are already taking steps to improve their systems and practices have provided updates on their progress. We urge all jurisdictions to take account of the recommendations in this *Final report* relating to data collection practices for the benefit of all people with disability, particularly those in the criminal justice system.

Endnotes

- 1 Submissions of Counsel Assisting the Royal Commission following Public hearing 11, 4 August 2021, p 180.
- 2 Submissions by the Australian Government in response to Counsel Assisting's submissions in Public hearing 11 and Public hearing 15, 3 May 2022, SUBM.0040.0001.0100, [139].
- 3 For definitions of 'custody' and 'forensic systems', see Chapter 1 of this volume.
- 4 Transcript, Kriti Sharma, Public hearing 27, 21 September 2022, P-224 [21–27].
- 5 Exhibit 27-154, WA.0021.0001.0511, p 13, citing Australian Human Rights Commission, *Equal Before the Law: Towards disability justice strategies*, Report, February 2014.
- 6 See for example Transcript, John Walsh, Public hearing 11, 24 February 2021, P-557 [1–7]; Exhibit 11-32.10, 'Statement of John Walsh', 28 January 2021, at [31(a)].
- 7 Transcript, Piers Gooding, Public hearing 11, 18 February 2021, P-216 [1–10].
- 8 Victorian Parliament Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*, Final report, March 2013, pp 20–21, 30–31; South Australian Parliament Social Development Committee, *Inquiry into Comorbidity*, Report No. 38, September 2015, p 18.
- 9 Victorian Parliament Law Reform Committee, *Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers*, Final report, March 2013, p 20.
- 10 Victorian Parliament Law Reform Committee, *Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers*, Final report, March 2013, pp xxix, 31 (Recommendation 1); Social Development Committee, Parliament of South Australia, *Inquiry into Comorbidity*, Report no. 38, September 2015, pp 14, 18 (Recommendations 14, 16, 34).
- 11 Northern Territory Ombudsman, *Women in Prison I (Darwin)*, Report, April 2008, p 166.
- 12 Northern Territory Ombudsman, *Women in Prison I (Darwin)*, Report, April 2008, pp 166–67.
- 13 Australian Law Reform Commission, *Equal before the law: Towards disability justice strategies*, Report, February 2014, p 38 (Action 4.6.5).
- 14 Law Council of Australia, *Justice Project*, Final report, August 2018, p 74 (Recommendation 7.8).
- 15 Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (advanced unedited version)*, UN Doc CRPD/C/AUS/CO/2-3, (15 October 2019), [25(f)].
- 16 Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (advanced unedited version)*, UN Doc CRPD/C/AUS/CO/2-3, (15 October 2019), [27(d)].
- 17 Submissions of Counsel Assisting the Royal Commission following Public hearing 11, 4 August 2021, p 164 [495] (F10.7).
- 18 Submissions by the New South Wales Government in response to Counsel Assisting's submissions in Public hearing 11, 26 April 2022, SUBM.0040.0001.0132, p 19.
- 19 Such as Medicare: see *Health Insurance Act 1973* (Cth) s 19(2). See also Legal Aid NSW, Submission, 31 December 2022, SUB.001.03483, p 10.
- 20 Exhibit 27-205, 'Statement of Kostantina Brendas', 6 September 2022, at [2], [6].
- 21 Exhibit 27-205, 'Statement of Kostantina Brendas', 6 September 2022, at [2].
- 22 Exhibit 27-209, 'Statement of Ray Johnson', 8 September 2022, at [4–5].
- 23 Exhibit 27-211, ACT.9999.0010.0012, p 9.
- 24 Exhibit 27-211, ACT.9999.0010.0012, p 9.
- 25 Exhibit 27-211, ACT.9999.0010.0012, p 16.
- 26 Exhibit 27-211, ACT.9999.0010.0012, p 16.
- 27 Exhibit 27-209, 'Statement of Ray Johnson', 8 September 2022, at [5–6].
- 28 Exhibit 27-209, 'Statement of Ray Johnson', 8 September 2022, at [6].
- 29 Exhibit 27-209, 'Statement of Ray Johnson', 8 September 2022, at [6].
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- 31 ACT Community Services Directorate and Justice and Community Safety Directorate, *Disability Justice Strategy*, Third annual progress report, 2022, p 32.

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8. Police responses to people with disability

Key points

- People with disability who are victims of crimes have had negative experiences when they seek to report these crimes to police.
- States and territories should consider developing alternative reporting pathways for people with disability to report crimes or incidents to police.
- The Australian Government, state and territory governments and police services should collaborate with people with disability in the co-design, implementation and evaluation of strategies to improve police responses to people with disability.
- All police services should introduce dedicated disability liaison officer positions.

8.1. Introduction

People with disability come into contact with the police as alleged offenders, victims or witnesses to crime. In addition, people with disability also interact with police via welfare checks, where the police are requested to attend a person either in their home or in the community to confirm their health and safety. A further form of police contact with people with disability is responding to missing persons reports. These are commonly associated with staff in disability residential settings calling police when residents leave or fail to return to these settings.¹

The effectiveness of police responses to people with disability was raised in a number of public hearings. Some people with disability reported positive experiences with police officers and how they were supported as victims of crime. In our *Report of Public hearing 17: The experience of women and girls with disability with a particular focus on family, domestic and sexual violence: Niky case study*, 'Niky' said the police were 'really helpful, down-to-earth, explained things well and believed me'.² Local police officers went to Niky's home to take a statement and advised Niky's father to take Niky to her GP for a check-up and testing for sexually transmitted infections.³

In Public hearing 11, 'The experiences of people with cognitive disability in the criminal justice system', we heard that many people with disability who are charged with criminal offences were likely victims of crime first. One study found 96 per cent of people with complex needs who had been in prison sometime between 2000 and 2008 were known to police as victims of crime.⁴ First Nations people with mental health disorders and cognitive disabilities were much more likely to have come into contact with police at a younger age, and at a higher rate as victims and offenders, than non-First Nations people.⁵

We considered the Australian Human Rights Commission's (AHRC) *Equal Before the Law: Towards disability justice strategies* report.⁶ The AHRC described the nature of police contact with people with disability as being 'marked with the range of societal fears, prejudices and discrimination' that are all too common in the lives of people with disability.⁷

We also commissioned a report, *Police responses to people with disability*, by the University of New South Wales.⁸ The report found police responses to people with disability are 'inadequate'.⁹ While some individual police officers demonstrate good practice, the research concluded there is a systemic lack of effective response by police to people with disability who are victims, witnesses and alleged offenders.¹⁰

In 2022, a report examining the factors linked to the victimisation of people with disability in New South Wales presented similar findings.¹¹ The NSW Bureau of Crime Statistics and Research (BOCSAR) and the Australian Government Department of Social Services led the study. It drew on 'linked data' from state and national data collections to 'examine the intersection of disability and the criminal justice system'¹² and found that:

- between 2014 and 2018, 17 per cent of people with disability were victims of at least one criminal incident¹³
- people with psychosocial or cognitive disability, and First Nations people with disability, are the most likely to be victims of violent crime¹⁴
- police were less likely to act on violent incidents involving victims with disability – chances of them proceeding against an alleged offender were 17 per cent lower than for a person without disability¹⁵
- young, female and First Nations people with disability were at greater risk of being victims of domestic and violent crimes¹⁶
- people with disability were more likely to experience revictimisation than people without disability.¹⁷

Similar results are reflected in another BOCSAR study drawing on the National Disability Data Asset. Statistics show rates of contact with the criminal justice system are higher for offenders with disability also recorded as being a victim of a criminal incident.¹⁸ However, a report we commissioned indicates that crimes against people with disability are generally more serious than those committed by people with disability, which tend to be lower-level offences.¹⁹

8.2. Policing and disability in Australia

Law enforcement is an essential element in maintaining fundamental human rights, preserving life and property, and protecting the innocent.²⁰ Law enforcement agencies, such as the police, should protect people's human rights, including the rights of people with disability.²¹

The fundamental purpose of an effective police service is to work with the community to reduce violence, crime and fear.²² Generally, the police exercise powers in the community to:²³

- prevent and detect crime
- protect people from injury or death, and property from damage, whether arising from criminal acts or in any other way
- provide essential services in emergencies.

The Productivity Commission, in the *Report on government services 2012*, said:²⁴

Broadly, the whole community is a 'client' of the police. Some members of the community, who have more direct dealings with the police, can be considered specific client groups, for example:

- victims of crime
- those suspected of, or charged with, committing offences
- those reporting criminal incidents
- those involved in traffic-related incidents
- third parties (such as witnesses to crime and people reporting accidents)
- those requiring police services for non-crime-related matters.

The police have powers conferred by legislation to arrest, detain and use force. These powers, while intended to protect the community and victims of crime, may also impair others' liberty and rights, as we have addressed in Chapter 2, 'The right to humane treatment in criminal justice settings'. The *Handbook on police accountability, oversight and integrity*, published by the United Nations Office on Drugs and Crime,²⁵ describes the unique position of the police as follows:

It is precisely this monopoly on the use of force and the power to arrest and detain that place the police in a unique and sensitive position within the democratic State, so that adequate control mechanisms are required to ensure that these powers are consistently used in the public interest. Like any other public service, the police must operate with impartiality.²⁶

Citizens therefore have the right to expect the highest standard of conduct from police.²⁷

The *Police responses to people with disability* report examined how policing in relation to people with disability is planned for, monitored and reported. The report found the approaches in all states and territories, except for the Northern Territory, are driven by Disability Inclusion and Action Plans or Disability Service Plans. Some of these are specific to police services and others apply more widely. All plans align with state and territory disability strategies or plans and generally have a legislative basis.²⁸

The report found the plans demonstrate varying degrees of engagement and collaboration with disability advocacy and support services in their design, implementation and monitoring.²⁹ It also found there was limited attention devoted to understanding the nature of policing in relation to people with disability.³⁰ The report identified several key themes about the nature of the contact between police and people with disability from past reports and the literature.

In summary, there were four key themes:

- Negative assumptions and discriminatory attitudes.³¹ The report referred to a finding of the Victorian Equal Opportunity and Human Rights Commission in 2014, in *Beyond doubt: The experiences of people with disabilities reporting crime*, that ‘negative attitudes among police toward people with disabilities are commonplace’.³²
- Failure to identify or accept disability.³³ The report said research has consistently shown that police lack an understanding of disability and how it affects a person’s behaviour or ability to comply with police orders. In particular, evidence indicates that the police have difficulty in distinguishing between mental health issues, intellectual disability, acquired brain injury and fetal alcohol spectrum disorder.³⁴
- Failure to provide appropriate support to people with disability who are either alleged offenders, witnesses or victims.³⁵ The report found there is almost no literature on people with disability as witnesses and that, in most of the cases reported in the literature, people with disability who witnessed a crime were the victims of the crime. The widespread need for the provision of procedural and emotional support by police to people with intellectual disability who are alleged offenders is also commonly identified.³⁶
- Police violence against people with disability.³⁷ The report referred to a finding of the Australian Anti-Corruption Commission Committee that people with disability or mental health issues are more vulnerable to police misconduct and have ‘distinctive challenges to making complaints about police misconduct’, but noted the lack of research and data.³⁸

8.3. Police engagement with women and girls with disability

Public hearing 17 focused on the experiences of women and girls with disability of domestic, family and sexual violence. Despite the prevalence of such crimes, we were told that women and girls with disability often have negative experiences in making reports to police.

Ms Cathy Want, the service manager at Rosie’s Place, a counselling and support service for children, young people and families who have experienced violence, told us many young people, including many people without disability, often do not know where to go for assistance and support and often go to the police in the first instance. She described the police response as ‘critical’.³⁹

Women With Disabilities Australia points out:

Research has also found that discriminatory attitudes and negative police culture, including the tendency to blame the victim; refusal to investigate allegations of violence; treating crimes of violence as a 'service incidents'; failing to make reasonable adjustments; assuming that a prosecution will not succeed because the court may think the person lacks credibility; along with negative or paternalistic stereotypes of people with disability – contributes to the pervasive and extensive violence perpetrated against women and girls with disabilities.⁴⁰

Being believed

Women and girls with disability and their families told us they were not believed or taken seriously by police when reporting incidents as victims of family, domestic or sexual violence.

Ms Nicole Lee, a survivor of domestic and sexual violence and now President of People with Disability Australia, said:

I was not believed, not just because I have a physical disability, but more because of my mental health condition. I was completely and utterly dismissed. My ex would say 'You're crazy, who is going to believe you'. It was quite shocking.⁴¹

She said her ex-husband would call the police and when they arrived, he would be calm and portray her as 'hysterical', the 'problem' and 'the crazy wife'.⁴²

Ms Libby Crawford's husband was violent towards her and also financially abusive. Ms Crawford said she would call the police for assistance, but 'every time I called, they laughed at me'.⁴³ This affected her ability to trust the police.

Ms Jen Hargrave, Senior Policy Officer at Women with Disabilities Victoria, spoke about the accounts of women with disability being easily discredited. She said:

for decades we've been hearing stories from women telling us how the perpetrator of the violence, whether it's a partner, a parent or a disability support worker, is seen as having so much more credibility than they themselves are, they are easily dismissed as being crazy, attention seeking. And all of this allows the perpetrator to hide in plain sight, as we might say – so, he is helping her with her money, he is helping her with her medical appointments.⁴⁴

Misidentification as the perpetrator

Witnesses and advocates described how police often take the word of the perpetrator above that of the woman with disability. In some cases, police misidentified the victim as the perpetrator.

Ms Lee described how the system turns away from the abuse, especially when the person's carer is their abuser:

It is easier to look away. It's easier to look away and disbelieve that the – you know, we have this issue of carer pedestal. You know, carers are placed on this pedestal as being self-sacrificing, loving, caring people that, you know, take on us as these horrible burdens in the world to be looked after. And we're not. We're people. We're individuals. We have dreams. We have hopes. We have, you know, feelings. We're not burdens. We're not vulnerable. This person was vulnerable to abusing his position of power ...⁴⁵

We heard about First Nations women with disability who are often at particular risk of being incorrectly identified by police as the perpetrator.

Ms Kobie Hicks, a Gubbi Gubbi woman, experienced intimate partner violence. Once she called the police after her abuser slammed her head against the concrete, and she thought her head was bleeding. Police identified her as the perpetrator and took out a domestic violence order against her. She tried to explain to them what happened, but they did not believe her. She no longer trusts the police.⁴⁶

Mr Vincenzo Caltabiano, Director of Tasmania Legal Aid (TLA) at the time of giving evidence, said TLA lawyers frequently encounter female clients who have been misidentified as the perpetrator. The issue is 'particularly acute for people with disability'.⁴⁷ Mr Caltabiano told us:

Misidentification of the predominant aggressor by police is a key concern for women and girls with disability. National research shows First Nations women, women from migrant and refugee backgrounds and women with disability are more at risk of being misidentified as the offender. The research found that this often occurs where the woman has an intellectual or cognitive disability.⁴⁸

Ms Thelma Schwartz, the Principal Legal Officer at Queensland Indigenous Family Violence Legal Service, told us:

So what I see more often than not in my practice, especially with people with disability, is this issue of misidentification. It happens at alarming rates. It is absolutely unacceptable and it comes down to – and I know there is a lot of pressure on police when they are called out to incidents – but it really comes down to moving away from this idea of incident-based reporting and when you're getting there, actually focusing on investigating techniques – what do I need to do? If someone else has contacted me and I then speak to someone and it's clear to me they actually need assistance, maybe I need to call someone who can, ie, make available that interpreter to assist this person actually access justice so I can actually get the full story.⁴⁹

Ms Schwartz gave a case example of a woman client who is deaf. When police were called on her behalf, they attended and the client appeared to be in a heightened emotional state because she is non-verbal and uses hand gestures. The perpetrator, on the other hand, was very calm. Because of this, police misidentified the woman as the perpetrator. The police did not offer the

woman an interpreter. They charged her and issued a Police Protection Notice against her, which recorded the man as the victim.⁵⁰

Trauma-informed approaches and responses

We heard about the importance of trauma-informed approaches and responses to women and girls with disability who are victim-survivors of family and domestic violence.

Ms Lee explained:

People refused to see the role and impact of trauma and why someone completely shuts down or is frightened and trying to escape and not understanding that this is because she has trauma which has physiological responses.⁵¹

Ms Kristy Hill explained how police officers' actions can be triggering and frightening for survivors of sexual violence. Once, when she was picked up by the police and taken to the watch house, they wanted her to remove her clothes and put new clothes on.⁵² Ms Hill was very upset and 'going off'.⁵³ She did not want to because of her experiences of sexual assault.⁵⁴ A male police officer was standing near her head and holding her down while other officers cut off her clothes.⁵⁵ Ms Hill said the police should ask women accused of crimes whether they have been sexually assaulted:

that's why female don't like taking their clothes off, especially when they've been sexually assaulted by males ... when they do that, it comes back in your head, 'What's going to happen next? Am I going to get assaulted again?' That's what it feels like.⁵⁶

Assistance and supports not provided

We heard that women with disability are not given assistance or supports when they engage with the police. Nor are they connected to services or supports that could help them.

Ms Lee told us that her ex was eventually arrested and did not return to the house. Police demonstrated a lack of awareness about what the removal of her primary carer would mean:

You know, they'd removed my carer and they knew he was my carer, but I don't think they were aware of what services were available. No questions like, well, what are your immediate needs right now ... what do you need to go home and stay home safely on your own? None of those questions were asked.⁵⁷

'Clarisse' told us about her daughter, 'Romi', who lives with intellectual disability and developmental delays.⁵⁸ Romi was sexually assaulted by a worker at her day program. The police asked Romi to come to the police station for an interview. Clarisse described this process as 'extremely distressing' as the police would not allow Clarisse, Romi's father or her disability support case manager to be in the room to support her. She said they offered no support after the interview and refused to refer Romi to the Sexual Assault Unit.⁵⁹ Clarisse found the

police 'so intimidating and not approachable' and 'there was no empathy ... there was no support really'.⁶⁰

'Brigitte' had to go to court to be a witness for her nephew.⁶¹ She said her trauma and dyslexia meant it was very hard to make a statement to police. She made some suggestions to the Royal Commission about how the police could improve their practices when working with people with disability who have difficulty reading. She suggested recording a witness statement and playing or reading it to the witness several times so the witness understands the contents. She also recommended the police explain things verbally, rather than hand out written information. The explanations should cover what the witness can expect at court.⁶²

Communication

People with disability told us about the importance of understanding the information provided by police.

At Public hearing 5, 'Experiences of people with disability during the ongoing COVID-19 pandemic', Ms Kalena Bos shared a particularly frightening experience that occurred in April 2020 when she wanted to have her sister-in-law visit her during lockdown. Ms Bos' husband called a family friend for advice; however, the family friend 'took it to the next level', saying that Ms Bos was not allowed to have visitors, leave the house or visit her parents and, if she did, she would face a \$16,000 fine or six months in jail. This particular friend also called the police on her.⁶³ This made Ms Bos 'upset and scared'.⁶⁴ An advocate from Speak Out provided assistance to Ms Bos by taking her to a local police station where she was able to confirm what rules were in place. What followed was inconsistent messages from a woman detective who called Ms Bos two days later and told her that the police were watching her.⁶⁵ This caused Ms Bos to feel 'afraid'.⁶⁶ A few weeks later, the Acting Commander for Tasmania Police visited Ms Bos at her home to personally apologise on behalf of the North West regional police for being told she was unable to leave her home.⁶⁷

Police training and specialist expertise

Many of the accounts shared by women and girls with disability showed a lack of understanding by the police about the experiences and needs of women with disability reporting sexual or family violence. Without this understanding, the police risk being a barrier to a victim reporting, or giving a statement about, violence against them. Police also risk misidentifying the victim as the perpetrator. Without an understanding of trauma, police officers may misunderstand the reactions or behaviour of people with disability who are victims of abuse. They may even inflict further trauma on them through their actions or lack of appropriate responses.

Police officers who understand disability and what can be done to assist communication are likely to obtain more useful information from victims of sexual and family violence. The police also need ready access to information about what support is available to women and girls seeking to make reports to police about violence.

Women with disability told us about positive experiences with the police. Ms Lee told us the Victoria Police Sexual Offences and Child Abuse Investigation Team understood the dynamics of family violence, trauma, abuse and manipulation:

[T]hat's the difference between having police officers that understand, you know, family violence, understand the manipulation, understand ... all of those factors is the difference between having a good experience with police versus a bad experience with police. So in that regard, I was very lucky.⁶⁸

Clarisse described a good experience with the police. She said:

The police came to our house and supported Romi in her own environment. They made a really big effort to establish a rapport with her ... before she had to do the next step of an interview. [The officer] was very understanding and very compassionate about the whole thing and did his utmost to get it further than it got.⁶⁹

'Chloe' told us that when she reported the violence perpetrated against her by a paid carer, the police officer believed her and was 'very helpful, friendly, very understanding and he listened'. She said, 'he believed me all the way'.⁷⁰

Tasmania Police practices in response to family, domestic and sexual violence towards women and girls with disability

Public hearing 17 (Part 2) was held in Hobart, Tasmania. During the hearing, we examined the effectiveness of Tasmania Police in responding to family, domestic and sexual violence towards women and girls with disability.

Commissioner Darren Hine, then Commissioner of Police in Tasmania, gave evidence. Commissioner Hine told us the policies, practices and training at Tasmania Police are constantly under review and he would welcome the identification of any deficiencies by our inquiry.⁷¹

Safe at Home

Tasmania was one of the first jurisdictions to develop an integrated whole-of-government response to family violence.⁷²

Under Safe at Home (SAH) a family violence service set up by TLA in 2004, Integrated Case Coordination committees (ICCs) operate in each of the three police regions in Tasmania. The ICCs are made up of representatives from justice and other government agencies such as the education and child safety departments.⁷³ The ICCs meet weekly to review family violence incidents that occurred in the region that week and to look at current cases before the court.⁷⁴ They also assess applications to vary or revoke family violence orders or police family violence orders as well as applications for financial assistance for victim-survivors and affected children.⁷⁵

Heightened risk of violence and barriers to making police reports

Mr Caltabiano said TLA has extensive experience working with women and girls with disability who experience family, domestic and sexual violence. Over a quarter (1,091) of the 4,000 services provided by TLA to women and girls experiencing family and sexual violence in 2020 to 2021 were provided to women and girls with disability.⁷⁶

TLA provides the SAH service through Legal Aid lawyers and private practitioners with grants of legal aid.⁷⁷ In 2020 to 2021, approximately 29 per cent (125) of SAH clients were women and girls with disability.⁷⁸ SAH lawyers assist clients to navigate the justice system, including their engagement with police.⁷⁹

Mr Caltabiano said women and girls with disability are at a heightened risk of violence.⁸⁰ They face additional challenges leaving a violent relationship if they depend on a partner for care or parenting support, and their social isolation makes it difficult to seek help.⁸¹ According to Mr Caltabiano, women and girls with disability need additional support to report violence to police, partly because they are more likely to be disbelieved or dismissed, especially if they have an intellectual disability.⁸²

Ensuring that police record, and act on, reports of violence

Mr Caltabiano said that, while Tasmania's SAH program has improved responses to family violence, women and girls still encounter barriers. These are magnified for people with disability.⁸³ He said some women and girls receive a poor response from the police when they seek to make a report of family or sexual violence. He noted:

TLA lawyers report that women and girls with intellectual disability are at higher risk of an incident not being recorded [by police].⁸⁴

Mr Caltabiano said a failure by police to record the family violence report in the Family Violence Client Management System means that the integrated system response is not triggered. This means the victim is not referred to the Tasmania Police Safe at Home Family Violence Response, and therefore does not receive police, specialist family violence or legal support.⁸⁵

He also told us:

TLA lawyers report that a woman's legal capacity is more likely to be questioned, denied, or diminished if she has disability. She is less likely to be believed and her credibility as a complainant, defendant or witness is more often doubted.⁸⁶

Commissioner Hine explained that Tasmania Police does not tailor its approach to family violence based on factors such as disability or age.⁸⁷ Senior Counsel Assisting asked Commissioner Hine whether this approach might create barriers to the *Family Violence Act 2004* (Tas) protecting people with a multi-layered experience or how police respond to that cohort. Commissioner Hine replied that by taking this approach police are more 'inclusive' and they have been trained to take account of these barriers.⁸⁸

Avoiding misidentification

As discussed earlier, Mr Caltabiano said the problem of misidentifying the victim as the perpetrator is 'particularly acute for people with disability'.⁸⁹ He said this can occur when police interact with a woman with disability who makes a full report to police, but her partner does not. Police then might assume the woman is the perpetrator, not the victim.⁹⁰ In other cases, police did not believe women with an intellectual or cognitive impairment when they denied accusations against them.⁹¹ Mr Caltabiano explained misidentification can also arise during interaction with police because of a person's presentation:

They may not appear to be a conventional victim, if you like. They may be angry. They may be shouting. And it's at those moments where, as I say, those difficult decisions need to be made [by police].

... and if there isn't a further exploration as to the history and the circumstances in that relationship, that misidentification can lead to significant consequences for the person involved ...⁹²

Commissioner Hine acknowledged the heightened risk for victims of violence with disability being misidentified as offenders.⁹³ He said police were trained to question everything and to see through situations where the victim may be extremely upset and the offender is cool, calm and collected.⁹⁴

Mr Caltabiano recommended more training for police on family and sexual violence concerning people with disability to reduce the incidence of misidentification.⁹⁵ The training should encompass the issues that can arise, such as challenges in communication, the presentation of the victim and the need for taking a detailed history.⁹⁶ He also called for more comprehensive police guidelines and protocols to reduce the risk of misidentification.⁹⁷

Improving police services for women and girls experiencing family, domestic and sexual violence

We heard from women and girls with disability and their families and advocates. We also heard from lawyers and experts about family, domestic and sexual violence. Without targeted training and protocols in place, the risk of poor police responses to people with disability remains. Counsel Assisting did not ask Commissioners to make findings with respect to the Tasmania Police. However, Counsel Assisting's submissions identified key themes and areas for improvement. We used the evidence provided by Tasmania Police to identify some of these areas.

Engaging and co-designing responses to family, domestic and sexual violence with women with disability

Commissioner Hine told us the Tasmanian Department of Police, Fire and Emergency Management (DPFEM) has a Disability Working Group. He said the group is made up of representatives from across the department and has many members with disability or lived experience of disability.⁹⁸

Directly engaging with women and girls with disability is essential to address effectively the issues raised about police responses to violence against women and girls with disability. In addition to better disability awareness and responsiveness, witnesses observed the need for police to understand how trauma can impact how victims of violence, particularly people with disability, may present.

Police need to work with women with disability to co-design police training and to consult them about operational guidelines in this area.

Police services should consider engaging directly with Disabled People's Organisations about the development, delivery and evaluation of training on responding to violence against women and girls with disability.

Improving and evaluating police training

Police recruit training in Tasmania consists of a 31-week course at the academy.⁹⁹ The course includes a module about young people and 'vulnerable and at risk people'. This module runs for 48 sessions of 40 minutes each.¹⁰⁰ The course content includes guest speakers from LGBTIQ+, First Nations, anti-racism and refugee groups. It also addresses mental health and raises awareness of the groups in society who are particularly at risk due to their 'vulnerability attributes'.¹⁰¹

In Tasmania, investigation training is offered to police officers who are interested in improving their investigation skills. This course is offered at four levels – Frontline, Investigator, Supervisor and Specialist – with 75 hours of learning spread over 3 to 4 months. The course is certified through the University of Tasmania. There is also an abridged course for detectives. The course includes a 'Specialist Interviewing' unit aimed at experienced investigators wishing to advance their skills in interviewing 'vulnerable people such as those with complex communication needs or children'.¹⁰²

Commissioner Hine told us the online course 'Disability Confidence in the Workplace' is mandatory for all DPFEM employees. The course consists of two modules of approximately 20 minutes each and has only recently been introduced.¹⁰³

According to DPFEM's 2021 Disability Action Plan,¹⁰⁴ training for recruits on interviewing vulnerable witnesses or suspects was only added to the curriculum in 2018.¹⁰⁵ This means only recent graduates have received this training.

We accept there may be common features – but also differences – in police training throughout Australia. For Tasmania Police and all police services in Australia, ensuring police officers have the skills and experience to engage with people with disability should be a key objective. There are opportunities to review existing training and to collaborate with Disabled People’s Organisations to improve the content and delivery of training.

For example, for women and girls with disability experiencing family, domestic or sexual violence, training should incorporate specific content about:

- the prevalence of family, domestic and sexual violence against women and girls with disability, including the higher rates of violence, offending patterns such as the possibility of multiple perpetrators over a victim’s lifetime, and differences in the nature and severity of the violence perpetrated against them
- ways to prevent misidentification in family and domestic violence situations involving women and girls with disability.

This content could be added at multiple points in recruit training, for example:

- in the module on young people and ‘vulnerable and at risk people’
- in the module on ‘victimology and person offences’, including in the content on sexual offences
- ‘family violence policing’, especially in the training on attending family violence incidents and police procedures.¹⁰⁶

Tasmania Police is currently developing another sexual assault training package.¹⁰⁷ This presents an opportunity to engage with Disabled People’s Organisations in the design, delivery and evaluation of the package.

Building further expertise in Tasmania Police

Tasmania Police has specialist family violence units in each criminal investigation branch and employs specialist family violence prosecutors.¹⁰⁸ The intention is that all members within criminal investigation branches should undertake training in specialist interviewing.¹⁰⁹

Counsel Assisting asked Commissioner Hine whether the family violence units have any particular expertise in supporting people with disability. He replied:

Whilst they actually are trained in dealing with everyone, no matter what background or circumstances they come from – and including disability – we have several assistance and guidelines for them ... to assist them to where to get the various expertise to help not only the victim but also for them to understand ... They’ve certainly had expertise ... gained over many, many years to assist not only people with a disability, but from various other backgrounds as well.¹¹⁰

Commissioner Hine described those working in the specialised family violence units as ‘generalists but with specific expertise in family violence’.¹¹¹

Because of the high prevalence of violence against women and girls with disability, there is a strong case for building expertise in disability and supporting people with disability into the family violence units in all police services in Australia.

8.4. Building the confidence of people with disability in police

An historic trust deficit

In Public hearing 28, ‘Violence against and abuse of people with disability in public places’, we examined violence and abuse experienced by people with disability in public spaces.

We heard from a panel of senior police officers, including:

- Assistant Commissioner Linda Fellows, who oversaw the Vulnerable Persons portfolio for South Australia Police, then the development of the Disability Access and Inclusion Plan
- Senior Sergeant Jay Pickard, who worked in the State Domestic Family Violence and Vulnerable Persons Unit in Queensland Police and was the State Coordinator for programs in mental health, working alongside the Senior Sergeant in charge of programs and developments for disabilities
- Acting Deputy Commissioner Anthony Cooke, who was Commander of Central Metropolitan Region in the New South Wales Police Force and Corporate Sponsor for the Communities portfolio, which covers the Ageing Disability and Homeless portfolio.

Counsel Assisting asked the panel whether people with disability have confidence in making reports to police and whether there is a historic trust deficit between people with disability and the police.

Senior Sergeant Pickard replied that it is clear such a lack of trust exists. ‘It’s evident from the voices of lived experience, and I think if we don’t listen closely to that, we’re going to miss the mark’,¹¹² he stated, adding:

there is a lack, I guess, a lack of confidence in that reporting and I think to - to really start the question is how do we address that lack of confidence so that we can get the reporting, because we need the reporting. Without the reporting of the incidents from policing, how do we create preventative measures or how do we even respond, how do we investigate.¹¹³

Assistant Commissioner Fellows agreed ‘without doubt’ that there is a historic trust deficit that needs to be overcome.¹¹⁴

Acting Deputy Commissioner Cooke also accepted the proposition that there is a historical trust deficit, having heard or read particularly some of the evidence.¹¹⁵

The research report we commissioned on police responses reinforces this, pointing to the barriers victims and witnesses with disability face in coming forward to police and being believed.¹¹⁶ It found police responses were often inadequate because when people did make reports, they were unable to provide a clear account of what occurred, were not believed, or were dismissed as either substance affected or as wasting police time. This had the effect of corroding the trust in police of victims with disability, increasing their reluctance to report future abuse to police.¹¹⁷

Implementing an alternative reporting pathway

In Public hearing 28, we heard about the feasibility and availability of alternative reporting pathways for people with disability to report incidents or crimes to police.

Professor Nicole Asquith is Professor of Policing and Emergency Management in the School of Social Sciences at the University of Tasmania and Director of the Tasmanian Institute of Law Enforcement Studies. She is also the current convenor of the Australian Hate Crimes Network,¹¹⁸ which is looking into the establishment of third-party reporting systems.¹¹⁹ She described a third-party reporting system as:

almost a liaison between police and targeted communities, where somebody can report an incident that they can receive support from people that know and understand what that violence is, that we can put in place a victim support package; all of those sorts of things.¹²⁰

The victim then decides whether they want the third party to report the incident to police or whether an information-only report is made to police without any further investigation.¹²¹

Professor Asquith explained that:

third-party reporting systems are used in the UK predominantly and are incredibly effective in not only being able to monitor patterns of behaviour, but also as a - almost a step into the criminal justice system.¹²²

Safeguarding mechanisms

We discuss adult safeguarding mechanisms in Volume 11, *Independent oversight and complaint mechanisms*. Only New South Wales and South Australia have adult safeguarding laws, designed to promote and protect the right of people with disability to live free from violence, abuse, neglect and exploitation in a manner that affords them choice and control.

We explain the operation of the two state safeguarding bodies in Volume 11 – the NSW Ageing and Disability Commissioner and the South Australian Adult Safeguarding Unit. We also make recommendations in that volume that all state and territory governments establish adult safeguarding functions operated by an adequately resourced independent statutory body.

Once established in each state and territory, these safeguarding bodies should provide assistance and support directly, or by referral, to a person with disability, by:

- helping them make a report to police or another regulatory body
- connecting them with peer-support groups, disability advocacy organisations and other supports.

Acting Deputy Commissioner Cooke agreed with Counsel Assisting that such bodies need to:

- have the expertise to identify crimes and an appropriate response
- build community trust and engagement
- be able to make the right connections to the right organisation.¹²³

Police disability liaison officers

The panel of senior police officers also provided their views on whether the deployment of specialist disability liaison officers or units could assist in overcoming mistrust of police.

Assistant Commissioner Fellows explained South Australia Police had introduced Gay and Lesbian Liaison Officers (GLLOs) to build the LGBTIQ+ community's trust in them. Police officers volunteer for these roles as part of their normal duties.¹²⁴ She said the GLLOs network has had a positive impact as it gives people a pathway 'to either get advice or make a report or be confident that their issues will be heard'.¹²⁵

South Australia Police is also in a consultation phase on plans to have specialist Disability Engagement Officers in police districts as part of South Australia Police's Action Plan.¹²⁶

In Queensland, Senior Sergeant Pickard said a Senior Sergeant within the State Domestic, Family Violence and Vulnerable Persons Command is the designated State Coordinator for disability programs. This officer is responsible for 'designing programs and projects' for the various districts 'to address an increase of response and confidence in policing vulnerabilities, particularly with disabilities and elder abuse'.¹²⁷ Senior Sergeant Pickard said a dedicated liaison role focusing on people with disabilities, within Queensland Police districts, would be a positive development.¹²⁸

Acting Deputy Commissioner Cooke said his appointment as a 'corporate sponsor' by the New South Wales Police Commissioner is to lead the agency's response to ageing, disability and homelessness issues.¹²⁹

Senior Sergeant Pickard told us that since July 2019, the NSW Police Force has introduced dedicated specialist liaison officers known as ‘Aged Crime Prevention Officers’.¹³⁰ Acting Deputy Commissioner Cooke told us these officers are part of the Crime Prevention Unit in each police command and help deliver services to ‘the ageing population, those with a disability, and the homeless population’.¹³¹ They do this by supporting victims who have reported crimes, assisting any relevant investigating officers, and liaising with other relevant agencies, such as the NSW Ageing and Disability Commission.¹³²

In 2018 it was announced that there would be one Aged Crime Prevention Officer in each of the 57 NSW Police Force area commands. However, at the time of Public hearing 28, there were only 12 such officers.¹³³ Acting Deputy Commissioner Cooke explained he was in the process of evaluating the role and function of these officers and this was at the ‘scoping’ stage.¹³⁴

Mr Robert Fitzgerald, the NSW Ageing and Disability Commissioner, told us the Aged Crime Prevention Officers were an ‘essential part of the [police] architecture’.¹³⁵ He said that in November 2018 the NSW Government made a commitment to fund 1,500 additional police officers over a four-year period. Among these, 56 officers were to be appointed as Aged Crime Prevention Officers to deal with crimes against older people, people with disability and people experiencing homelessness.¹³⁶

Mr Fitzgerald observed that no appointments had been made for 18 months and there was a review of these appointments. He said there had been no consultation about whether the NSW Police Force now intends to take a different approach. Mr Fitzgerald said the Aged Crime Prevention Officers offer a ‘source of expertise’. He said they have become ‘an integral part of spreading and disseminating information about people with disability and older people and people experiencing homelessness right throughout the police force’ and ‘an extraordinarily important point of contact for community members’.¹³⁷

Professor Asquith told us police liaison officers should be a specialist role rather than something a police officer does on top of their existing job. She believed the Aged Crime Prevention Officers focused largely on supporting older people, had no investigative functions and were only available when they are on shift.¹³⁸

Clarifying the legal obligations of police in the provision of services

As we addressed in Chapter 2, it is well established that the area of ‘services’ in section 24 of the *Disability Discrimination Act 1992* (Cth) (*DDA*) does not cover the interaction between police and people with disability suspected of committing an offence because such interactions do not involve the provision of a ‘service’ for the purpose of the *DDA* and in the comparable state and territory anti-discrimination laws.¹³⁹ However, the police do provide ‘services’ to victims of crime and members of the public.¹⁴⁰

We consider the police should be accountable if they discriminate against a person with disability, particularly in circumstances concerning a person's right to liberty and security or when in police custody. This anomaly in the *DDA* should be addressed. We recommend the *DDA* should be amended to ensure all people with disability are protected from unlawful discrimination, regardless of the nature of their engagement with police.

Recommendation 8.19 Amendment of the *Disability Discrimination Act 1992* (Cth) to cover police provision of 'services'

The *Disability Discrimination Act 1992* (Cth) should be amended to expressly include 'services provided by police officers in the course of performing policing duties and powers' in the definition of 'services' in section 4.

8.5. Conclusion

Ms Lee, in her evidence in Public hearing 17, stressed the importance of disability-led policies designed to counter gender-based violence. She said:

consultation is not enough ... experts with disability, women with disabilities who are experts in this field need to be brought in at the ground level from the very beginning and be involved in that process the whole way along and be continually brought in to go over how it is working. How it is being implemented. How successful it is and what do we need to change.¹⁴¹

We agree that any reforms aimed at improving police responses to people with disability, including those who have been victims of crimes, must start with collaboration with people with disability to develop, implement and evaluate these strategies. Our recommendation is as follows.

Recommendation 8.20 Improving police responses to people with disability

The Australian Government, state and territory governments and police services should collaborate with people with disability in the co-design, implementation and evaluation of strategies to improve police responses to people with disability.

All police services should introduce adequate numbers of dedicated disability liaison officers.

The Australian Government and state and territory governments should introduce an alternative reporting pathway for people with disability to report crimes to police.

Endnotes

- 1 Leanne Dowse, Simone Rowe, Eileen Baldry & Michael Baker, University of New South Wales, *Police responses to people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021, p 3.
- 2 Name changed to protect identity; see Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Report of Public hearing 17: The experience of women and girls with disability with a particular focus on family, domestic and sexual violence*, May 2023, p 13 [43]; Exhibit 17-027.02, TRA.3000.0005.0045, p 3 [14–20].
- 3 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Report of Public hearing 17: The experience of women and girls with disability with a particular focus on family, domestic and sexual violence*, May 2023, p 15 [47]; Exhibit 17-028.21, ASQ.5005.0001.0279, p 1.
- 4 Exhibit, 11-012.01, 'Statement of Professor Eileen Baldry AO', 22 October 2020, at [66].
- 5 Exhibit, 11-012.01, 'Statement of Professor Eileen Baldry AO', 22 October 2020, at [76].
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9. Diversion from the criminal justice system

Key points

- Diversion of people accused or suspected of criminal offences, including people with cognitive disability, can occur at various stages of the criminal justice process. Diversion practices seek to minimise a person's involvement with the criminal justice system, including by referrals to programs aiming to rehabilitate and prevent reoffending, rather than punish the person.
- The over-representation of people with cognitive disability in adult prisons and youth detention suggests existing diversion and early intervention programs are not reaching sufficient numbers of these people when they come into contact with the criminal justice system. Court-based diversion programs are essential, both to respond to the needs of people with cognitive disability and to address their significant over-representation in the criminal justice system.
- For diversion programs to be effective, they must be accessible, respond to the needs of people with disability and provide culturally appropriate support.
- States and territories should develop or expand diversion programs along the lines of the Cognitive Impairment Diversion Program formerly used in New South Wales.
- Children with disability are exposed to violence, abuse and neglect in youth detention facilities. This compounds the trauma detainees have experienced in other areas of their life.
- The earlier a child comes into contact with the criminal justice system, the greater the likelihood they will become enmeshed in that system and engage in chronic, long-term offending.
- States and territories should amend their laws to raise the minimum age of criminal responsibility to 14 as a means of ensuring young children are not enmeshed in the criminal justice system.

9.1. Introduction

Life was getting a bit hopeless. It's far from hopeless now.

- Cognitive Impairment Diversion Program participant¹

This chapter examines the availability of diversionary pathways for people with cognitive disability who come into contact with the criminal justice system. We define diversion as the formal and informal practices that seek to minimise an accused person's involvement with the criminal justice system. Formal diversionary pathways are designed to effect positive behavioural changes and rehabilitation in order to reduce the risk of future offending.²

The aim of diversion is to provide social, structural and therapeutic support to people with cognitive disability to reduce the likelihood that they will reoffend and become entrenched in a system that is ill-equipped to address their needs. Diversion recognises cognitive disability can result in reduced culpability, making 'the application of traditional criminal law processes unfair or inappropriate'.³

Diversionary pathways have been developed to assist a range of people, including young people, people with psychosocial disability, and those with substance abuse problems and mental health conditions.⁴

In this chapter, we focus on the diversionary pathways available to people with cognitive disability. People with cognitive disability, particularly First Nations people, are significantly over-represented in the criminal justice system. This reflects the disadvantages experienced by people with disability in other areas of their lives, including poverty, poor educational opportunities and limited access to social services. Chapter 1, 'People with disability in the criminal justice system' examines how compounding disadvantage can draw people with disability into the criminal justice system at a higher rate than those who do not live with disability.

Other volumes of the *Final report* examine how mainstream systems can and should address the needs of people with disability in ways that reduce their contact with the criminal justice system.

We recognise people with cognitive disability may experience cumulative disadvantages that make them more susceptible to contact with the criminal justice system.⁵ In addition, behaviours that may be associated with disability or a co-occurring mental health condition can attract police responses even when those behaviours are not themselves criminal.⁶ Criminalisation of disability brings people into the criminal justice system, even though an offence may not have been committed.⁷

Central to improving responses to people with disability in disadvantaged circumstances is recognising that they very often do not require a police or criminal justice response to their behaviour. Instead, they need a trauma-informed, culturally safe, community-based and holistic social service response.⁸

Diversion of people with cognitive disability can occur at any stage of the criminal justice system. Practices that seek to minimise a person's contact with the criminal justice system include:⁹

- pre-court diversion of people accused or suspected of criminal offences at the point of initial police contact – this includes police referral to other emergency or support services, or the exercise of discretion to issue a caution or warning rather than charge the person with an offence
- pre-sentence diversion options available to courts in criminal proceedings, including the power to dismiss charges on the grounds of mental health or cognitive impairment, refer an accused person to a support program or treatment service, or list their matter with a specialist court
- measures to support a person and reduce the likelihood of recidivism after their criminal case is finalised.

In this chapter, we focus on pre-sentence diversion programs available to people with cognitive disability once they come into contact with police and after they have been charged with a less serious offence that can be heard and determined by local or magistrates' courts. We refer to these people with cognitive disability as 'defendants'.

At Public hearing 11, 'The experiences of people with cognitive disability in the criminal justice system', we examined the Cognitive Impairment Diversion Program (CIDP) that operated in six New South Wales Local Courts from October 2017 until 1 July 2020. People with cognitive disability who participated in the CIDP told us about the positive changes it made in their lives.¹⁰ Court-based diversion programs like the CIDP appear to improve wellbeing for people with mental health issues and cognitive disability.¹¹ They also reduce re-offending and contact with the criminal justice system.¹²

There is value in diversionary pathways that operate at various stages of the criminal justice system.¹³ Diversion at the point of investigation and arrest, for example, can allow police to respond to the underlying causes of the apparent offending at the first point of contact. Diversion at this early stage in proceedings can include referral to support agencies or treatment services, or calling on emergency services, such as medical or mental health specialists.¹⁴ Where a person with disability engages in behaviour likely to be criminalised or considered anti-social, police may exercise their discretion to caution or issue a warning to a person and discuss any concerning behaviour with the person, their family or support workers, instead of arresting the alleged offender.¹⁵

We know a disproportionate number of people who appear before the lower criminal courts have a cognitive disability.¹⁶ For example, in 2012 the NSW Law Reform Commission (NSWLRC) examined multiple studies that consistently found people with ‘cognitive impairment and/or intellectual disabilities’ were over-represented among defendants appearing in the Local Court.¹⁷

Research we commissioned from the University of New South Wales on police responses to people with disability (*Police Responses* report) found people with cognitive disability are significantly more likely than people without disability to enter the criminal justice system at an early age and then become trapped in a cycle of low-level offending.¹⁸ That over-representation points to a need for more opportunities for diversion of people with cognitive disability at all stages of the criminal justice process.

Organisations working with people with disability who responded to our *Criminal justice system issues paper* identified the limited availability of diversion options as a factor contributing to the over-representation of people with cognitive disability in the criminal justice system.¹⁹

There is a particular need for such options in regional and remote communities, as the availability of diversion programs tends to be limited in these areas.²⁰

The evidence indicates diversion programs can be successful in supporting and rehabilitating people with cognitive disability who would otherwise be convicted and given a custodial sentence.²¹ However, research also suggests:

appropriate diversionary measures, both at the time of initial police contact and at court, are still underutilised, not available, or not effective due to the lack of appropriate community supports and services.²²

In this chapter, we recognise that for diversion to be effective, people with disability must be connected to a range of government and non-government support agencies – including in the areas of health, education and housing – that are able to meet their individual needs.

9.2. How diversion works

All Australian states and territories have programs to divert people with cognitive disability away from the criminal justice system. In this section, we consider how diversion operates at the pre-court and pre-sentencing stages of the criminal process.

Pre-court diversion

Police, magistrates and judges, and prison officers especially need a better understanding of disability since they are the ones with the most power. They can literally make or break your life. People with that much power should also have a responsibility to use it properly, and that definitely includes better understanding and supporting people with disabilities.²³

People with cognitive disability who engage with the criminal justice system typically first do so through contact with police. The *Police responses* report indicates this contact is driven, in part, by characteristics that can be associated with cognitive impairment, such as:²⁴

- difficulties processing information
- difficulties with decision making
- difficulty controlling strong emotions, often expressed as aggression or abruptness
- limited understanding of what constitutes an offence
- difficulty understanding the consequences of disclosing information and a tendency to over-disclose
- ‘appearing as if intoxicated’, particularly people with acquired brain injury or cerebral palsy
- unconventional behaviour that is not criminal but is viewed as a ‘difference’ or as anti-social
- limited understanding of the significance, impact or designation of their behaviour as a ‘criminal’ offence
- difficulty navigating the social service and legal systems
- exclusion from mental health and other social services, such as alcohol and drug services, because of disability
- ‘higher functioning’ persons learning to ‘mask’ disability
- decreased ability to understand and assert legal and civil rights
- impressionability and a higher susceptibility to be the ‘fall guy’ for co-offenders.

At Public hearing 11, Professor Eileen Baldry told us behaviours associated with cognitive impairment can lead to negative interactions with police because:

many of the ways in which people with cognitive disability, for example, those who have very poor impulse control, behave, when perhaps confronted by someone, they may lash out, they may run away, that behaviour can easily be criminalised by the police because the police then arrest that person. That person hasn't necessarily done anything wrong, or they may not at that point have done anything wrong.²⁵

Deploying police officers to perform welfare checks can also bring people with cognitive disability into contact with the criminal justice system.²⁶ The *Police responses* report identified police responses to mental health crises as contributing significantly to the criminalisation of people with cognitive disability:

An example was provided of a mother calling police to attend to her son who she was concerned was at risk of suicide. Despite asking the police to 'come up with a plan' before going into his premises, the man was assaulted by police and taken into custody, ending up with a number of charges, 'the trifecta' of assaulting police, resisting arrest and offensive language.²⁷

These findings are consistent with the finding by the Royal Commission into Victoria's Mental Health System that police are often inappropriately asked to respond to mental health crises, at risk to both the individual and police.²⁸

Our hearings into the experiences of people with cognitive disability in the criminal justice system did not focus on the availability of diversion programs before someone is charged with an offence. However, the *Police responses* report canvassed a range of diversion initiatives that can support people with disability in their interactions with police at the point of initial contact.

One example is the provision of targeted referral pathways for police to use when responding to a mental health crisis or conducting a welfare check. The *Police responses* report found police often struggle to identify the 'many agencies providing various services [to people with disability], many of which are changing under the [National Disability Insurance Scheme]'.²⁹ This means they are less likely to access the options available for diverting people with cognitive disability from the criminal justice system and into community-based support services.

Researchers have identified a 'promising initiative'³⁰ used by the Queensland Police Service, known as 'SupportLink' or, more simply, 'Police Referrals'. This consists of an online portal that police can use to refer individuals, including, but not limited to, those with cognitive disability, to 'over 200 registered support service agencies for victim support and counselling, trauma support, domestic violence, drug and alcohol abuse, amongst others'.³¹ The portal centralises the range of government and non-government agencies, making it easier for police to divert people to support services.³² Unfortunately, there has been no evaluation of the effectiveness of SupportLink that could provide information to other states or territories considering similar initiatives.

Victoria Police has implemented a similar e-referral scheme.³³ In its response to our *Criminal justice system issues paper*, the Victorian Government acknowledged that for such alternative measures to be effective, the specialist services to that people with disability are referred need to be improved.³⁴

The *Police responses* report highlighted other diversion programs as examples of good practice, such as alternative models to traditional policing. Researchers identified submissions from disability advocates that said:

that despite decades of police training, [advocates] had observed ‘little change’ in police responses to people with disability. There was general recognition of the numerous benefits of having non-police persons who have the necessary expertise and skills required to be the first responders to people with disability and an ‘obvious solution’ to preventing the increasing criminalisation and other forms of injustice and harm experienced by members of this group.³⁵

Disability advocates considered the ‘development and implementation of alternatives to the use of police as first responders [to be] a realistic, viable and achievable option’.³⁶ The use of specialist first responders who have disability-specific knowledge and are able to de-escalate mental health crises, such as mental health practitioners, was ‘observed to be much more likely to enable avoidance of the escalation many identified as associated with previous poor, harmful, traumatising or frightening experiences with police’.³⁷

Some Australian jurisdictions appear to have made progress in this area. The Australian Capital Territory, New South Wales and Victoria have established multi-disciplinary ‘coresponder’ units known as Police, Ambulance and Clinical Early Response (PACER).³⁸ The PACER units generally comprise a police officer, paramedic and a mental health clinician who attend situations that require a mental health response. While early results from the PACER programs in New South Wales and Victoria have been positive,³⁹ to date the evidence is insufficient to demonstrate the effectiveness of coresponder models.⁴⁰

Criminal procedure laws relating to children provide opportunities for diversion more broadly.⁴¹ For example, police may exercise their discretion to issue warnings and cautions for relatively minor offences, or to refer the matter to a youth justice conference.⁴²

Pre-sentence diversion

Depending on the state or territory, pre-sentence diversion takes the form of legislative provisions allowing a judicial officer to:⁴³

- refer the person to a particular program
- move the case to a specialist court or list
- dismiss a charge on the grounds of cognitive or mental health impairment.

The availability of, and eligibility for, these diversionary pathways differ among states and territories. Some programs and specialist courts are not specific to people with cognitive disability. For example, they may have been designed to assess people with mental illness or those who have drug or alcohol dependence. These people may often also live with cognitive disability but are not eligible for such programs by reason of their disability.⁴⁴ Other diversionary pathways are targeted to particular groups, such as children or First Nations people.⁴⁵

In this section, we briefly outline the pre-sentence diversion options for people with cognitive disability in each state and territory.

Diversion courts

Specialist courts or lists for defendants with mental health issues and cognitive disability have been established in South Australia, Tasmania, Western Australia and Victoria.⁴⁶ While the models vary, all are available to defendants who have been charged with a summary offence, or an indictable offence which can be dealt with summarily (that is, less serious charges than those which must be heard by a superior court).⁴⁷ Some courts also require the defendant to plead guilty to the offence for which they have been charged.⁴⁸ This reflects the view that diversion programs should not seek to diminish responsibility for offending behaviour, but rehabilitate the offender and prevent reoffending.

All specialist courts incorporate a therapeutic approach distinct from that of regular criminal courts. This can include:

a dedicated court team, with consistent judicial officers, dedicated prosecutors and defence lawyers, mental health workers and court staff. A non-adversarial approach to hearings is usually adopted. A plan of treatment and engagement with services is provided for each defendant. Regular court hearings are held to review the defendant's progress. If the defendant does not comply with the treatment plan they are first encouraged, supported and assisted to comply. However, if non-compliance is persistent, sanctions may be applied such as increased court appearances or changes to the treatment plan. Repeated non-compliance generally results in termination from the program.⁴⁹

The evaluations of the various specialist courts around Australia have been largely positive.⁵⁰ For example, results from a two-year study into Victoria's Assessment and Referral Court (ARC) suggest that participants who had their matters finalised in the ARC were significantly less likely to reoffend than defendants charged with a similar offence who did not participate in or complete the ARC.⁵¹ This finding is consistent with an evaluation of a similar program in a Tasmanian court.⁵²

Court-based diversion programs allow defendants to be assessed for their suitability to enter into treatment or rehabilitation programs designated to address the underlying causes of their offending.⁵³ These programs run concurrently with courts, and defendants who may be eligible are generally referred to the program by judicial officers.⁵⁴

Currently, New South Wales, South Australia, Western Australia and Victoria are the only jurisdictions with court-based diversion programs that target people with cognitive disability who have been charged with summary offences.⁵⁵ They provide support to defendants with cognitive impairment as their cases move through the court process. Defendants are also assisted to access treatment and appropriate community supports.⁵⁶

At Public hearing 11 and Public hearing 15, 'People with cognitive disability and the criminal justice system: NDIS interface', we heard evidence about the CIDP, the primary court-based diversion program in New South Wales in the period from 2017 to 2020 for people with cognitive disability. We heard that the program was discontinued, despite strong evidence of its success in diverting people with cognitive disability from the criminal justice system.⁵⁷ We discuss the CIDP and its history in more detail below.

In response to our *Criminal justice system issues paper*, the Victorian Government told us about the Court Integrated Services Program (CISP).⁵⁸ To be eligible for CISP, a person must be experiencing one or more of the following:⁵⁹

- mental health issues
- disability, acquired brain injury or cognitive impairment
- substance dependence
- family violence
- inadequate social, family and economic support that contributes to the frequency or severity of offending
- homelessness
- other identified clinical support needs.

A defendant can be referred to the CISP by a judicial officer at any time prior to sentencing.⁶⁰ The CISP puts defendants into contact with community services that can address their specific needs. The services provide an average of four months individual support and wrap-around case management. Each participant meets regularly with an assigned case manager who reviews their progress and provides updates to the court.⁶¹

The CISP has operated in Victoria since 2006. The most recent published evaluation of the program was conducted in 2009.⁶² At the time, the CISP received annual funding of \$2.92 million.⁶³ The evaluation found significant economic benefits associated with the CISP, concluding that for every dollar invested in the CISP, there were savings of between \$1.70 and \$5.90 for the community.⁶⁴ The evaluation also found that three years after the program began, there was an estimated 20 per cent reduction in reoffending rates among CISP participants.⁶⁵

In the 2022–23 Victorian state budget, \$5.4 million in funding was allocated to continuing therapeutic court programs, including the CISP.⁶⁶

In South Australia, the Magistrates Court Diversion Program is available to defendants with mental illness or cognitive disability who have been charged with summary offences or minor indictable offences.⁶⁷ Legal proceedings are adjourned while the offender undertakes the program.⁶⁸

The program puts offenders in contact with community services that are appropriate to their needs and monitors their progress. It does not provide treatment, but it can refer offenders to agencies that can assist them.⁶⁹ Upon completion of the program, it is open to the magistrate to dismiss the charge or convict the accused without penalty.⁷⁰

In other states or territories, the separation between diversion court and diversion program is not so clearly defined. The Intellectual Disability Diversion Program (IDDP) Court in Western Australia, for example, is both a specialist court and a program. A matter will be eligible to be heard in the court if the accused person:⁷¹

- has been or is likely to be diagnosed with an intellectual disability, cognitive disability or autism spectrum disorder
- has entered or is likely to enter a plea of guilty to a significant proportion of their charges
- is suitable for conditional bail
- consents to take part in the IDDP.

Once accepted to the program, a participant is granted bail and is required to attend court to undertake regular progress checks in front of a magistrate.⁷² If a person is accepted into the IDDP Court, Adult Community Corrections develops a plan in conjunction with them, their family or carer, the Department of Communities and any relevant service providers.⁷³

Participation in the IDDP Court is voluntary, and an accused person may leave the program at any time.⁷⁴

Diversion legislation

With the exception of Tasmania, each state and territory has legislation permitting a court to dismiss a matter or release a defendant without penalty if they have a mental health or cognitive impairment.⁷⁵ These provisions are generally limited to people charged with summary offences or indictable offences that can be dealt with summarily (that is, less serious offences).⁷⁶ Some jurisdictions require the defendant first plead guilty or agree to take responsibility for the offence.⁷⁷

At Public hearing 11, we received evidence about section 32 of the (now repealed) Mental Health (Forensic Provisions) Act 1990 (NSW) (1990 Act).⁷⁸ That provision was repealed in response to recommendations made by the NSWLRC⁷⁹ and replaced by the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW) (2020 Act).

The 2020 Act empowers a magistrate hearing certain criminal proceedings to make various orders if it appears to the magistrate that:

the defendant has (or had at the time of the alleged ... offence ...) a mental health impairment or a cognitive impairment, or both.⁸⁰

The orders a magistrate may make include adjourning the proceedings to enable the defendant's apparent impairment to be assessed or a treatment plan to be developed.⁸¹ A magistrate also has power to dismiss the charge unconditionally subject to conditions such as requiring the defendant to attend a place for assessment and treatment.⁸²

The 2020 Act contains detailed definitions of 'mental health impairment' and 'cognitive impairment'.⁸³ A person has a cognitive impairment if:⁸⁴

- (a) the person has an ongoing impairment in adaptive functioning, and
- (b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory, and
- (c) the impairments result from damage to or dysfunction, developmental delay or deterioration of the person's brain or mind that may arise from a condition set out in subsection (2) or for other reasons.

The 2020 Act provides that a cognitive impairment may arise from various conditions, which include but are not limited to:⁸⁵

- (a) intellectual disability,
- (b) borderline intellectual functioning,
- (c) dementia,
- (d) an acquired brain injury,
- (e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,
- (f) autism spectrum disorder.

An application for a section 14 dismissal order can be made at any time during court proceedings.⁸⁶ An expert opinion from a psychiatrist or a psychologist is generally required to be tendered in support of an application.⁸⁷ When considering whether to grant a section 14 order, the magistrate is to consider a range of factors, including whether there is a treatment or support plan in place for the defendant.⁸⁸

The 2020 Act is an example of a court having broad powers to make orders diverting a defendant from the path of criminal proceedings to allow for assessment of the defendant's impairment, and referral to appropriate treatment or support.

Diversion programs in practice

Conferring powers on courts to make diversionary orders does not necessarily mean they will be exercised in all cases where they may be appropriate. We received evidence that diversionary schemes available to the courts have historically been under-used, especially for First Nations defendants, due to systemic issues.⁸⁹ These include difficulties linking defendants to supports because of a lack of viable community options, insufficient time for solicitors to speak with their clients, and delays in obtaining formal reports needed to justify diversion options to the court.⁹⁰

The responsibility for applying for a diversionary order generally falls on the lawyer representing the client. The lawyer will not necessarily be aware that the client has a cognitive impairment.⁹¹ Indeed, the client themselves may not be aware of the impairment. Cognitive disabilities can be difficult to identify without specific training or expertise.⁹²

We were also told that people in rural, regional and remote areas may not have access to services and programs in their communities.⁹³ One study reported that only 12 per cent of the people with impairment who were potentially eligible for a diversion order under section 32 of the (repealed) 1990 Act had ever applied for one.⁹⁴

Studies have also found First Nations people are far less likely than non-Indigenous people to be the subject of an order under section 32 of the 1990 Act or similar legislation.⁹⁵ Courts and legal practitioners may not recognise that a First Nations person has a cognitive disability due to poor awareness of disability or perceptions of how First Nations people and people with disability present.⁹⁶

Moreover, diversion programs may not be equipped to assist First Nations people with cognitive disability.⁹⁷ We received evidence that culturally competent diversionary pathways require investment in Aboriginal Community Controlled Organisations, support for families, and culturally safe responses.⁹⁸

Volume 9, *First Nations people with disability*, sets out the importance of ensuring disability services are culturally safe. Key components of cultural safety include recognising and responding to intersectional needs and experiences, and providing services that are respectful and judgment free. Improving the capacity of the Aboriginal community-controlled sector to support people accused or suspected of offending would facilitate the diversion of First Nations people away from the criminal justice system and into their community.

9.3. Benefits of diversion

The diversionary pathways we have examined above focus on people accused of summary offences rather than on people charged with more serious offences that must be heard and determined by judges of superior courts.

Past inquiry reports and research studies identify why it is beneficial to divert people with cognitive disability who have committed summary offences away from the criminal justice

system.⁹⁹ Imposing criminal penalties on people with cognitive disability is often ineffective to prevent repeat offending.¹⁰⁰ The courts generally consider incarceration to be more challenging and weigh more heavily on a person with cognitive and mental impairments than on other offenders.¹⁰¹ Diversion also recognises that incarceration can encourage repeat offending.¹⁰²

People with cognitive disability in contact with the criminal justice system are more likely to have experienced multiple disadvantages that contribute to their offending. These include lower socio-economic status, limited education and employment opportunities, social isolation, greater visibility to police, lack of support services, and difficulties in accessing those services.¹⁰³

Diversion programs provide an opportunity to respond to these underlying causes of offending. They do so by linking participants to support services. These services may identify family, health or other problems contributing to the offending behaviour. They are intended to address the causes of the offending conduct (for example, by connecting people to support services), not only the consequences of the conduct.

We heard that participants in diversion programs are less likely to re-appear before the courts and more likely to access National Disability Insurance Scheme (NDIS) supports and experience genuine inclusion in their communities.¹⁰⁴ Engaging with diversion programs can also dramatically increase a person's wellbeing.¹⁰⁵ This, together with early intervention, provides savings to the community over the person's lifetime.¹⁰⁶ People with disability told us these programs made a positive difference to their experiences of the criminal justice system.¹⁰⁷ They also meant participants could avoid the stigma associated with conviction and a custodial sentence.¹⁰⁸

The direct cost savings arising from diversion include avoiding costs of incarceration and hospital readmissions.¹⁰⁹ According to the Australian Institute of Criminology, in 2014–15, the average cost of incarceration in Australia was \$391.18 per prisoner, per day.¹¹⁰ The expense of accommodating a person with mental illness or cognitive disability in prison is likely to be even higher.¹¹¹ In that same period, the average cost of a community-based order was \$18.30 per offender, per day.¹¹²

These figures relate to the costs of correctional orders based in the community, as opposed to the costs of treatment programs or services. However, they indicate that diverting an offender from prison and seeking to treat or rehabilitate the person in the community has significant financial advantages.¹¹³

The potential cost savings of diversion are clearly demonstrated by the evaluation of the CISP in Victoria:

Noting that the program reduced the recidivism of participants, the economic evaluation calculated the cost savings that might be achieved in three scenarios around the chances of participants reoffending. The first scenario postulated that participants who do not reoffend as a result of their contact with CISP do not reoffend again. The second operated on the basis that the benefits in relation to reoffending lasted five years. The third scenario limited the benefits in relation to reduced

reoffending to only two years from program completion. All three scenarios, however, found that the benefits outweighed the costs, with the extent of the benefit increasing the longer that reoffending was reduced. The benefit to cost ratio ranged from 5.9:1 in the first scenario, to 1.7:1 in the third scenario. The evaluation noted that the primary benefits were largely associated with a reduction in costs associated with incarceration, rather than the direct costs of crime.¹¹⁴

Diversion programs are most effective when they connect the participant with the services they need, such as housing, health, employment, education, and domestic violence support.¹¹⁵ Mr Michael Baker, a former case manager with the CIDP, gave an example of the positive effects of targeted individual diversionary pathways:

One of my clients was an individual who had cycled in and out of custody for 9–10 years and was well-known to police in his local area. At the time we became involved, he was facing five criminal charges arising from an altercation between him and police officers, and a potential term of imprisonment. As far as I am aware, he had never before been identified by the criminal justice system as having a cognitive impairment. Legal Aid NSW referred him to the CIDP neuropsychologist for screening as he presented with difficulties related to his behaviour, communication and information-processing. His neuropsychological assessment revealed that he had significant frontal lobe brain damage resulting from a severe traumatic brain injury subsequent to an assault nine years prior ... The diagnostic report was used to support a successful application to the NDIS, obtain the [Disability Support Pension], obtain stable accommodation through Housing NSW, and a section 32 order with a support plan avoiding a very likely custodial sentence.¹¹⁶

At Public hearing 11, we received evidence that programs with the features described above – such as the CIDP – can effect lasting change for both the person with cognitive disability and the broader community.¹¹⁷

Case study: The Cognitive Impairment Diversion Program

The CIDP was a diversion program jointly run by Justice Health and the Intellectual Disability Rights Service (IDRS), a disability advocacy service and community legal centre in New South Wales.¹¹⁸ The New South Wales Government funded the program from October 2017 until 1 July 2020, at which time its funding was not renewed.¹¹⁹ We were told about the range of initiatives and supports the CIDP provided, and their benefits.¹²⁰ Witnesses described how the program used targeted intervention to successfully support people with disability to rehabilitate and reintegrate into the community with appropriate supports.¹²¹ Public hearing 11 heard evidence that the CIDP worked to divert individuals with disability from the criminal justice system and reduce recidivism.¹²²

The CIDP operated in the Local Court of New South Wales in Gosford and Penrith. People charged with summary offences in either court could be referred to the CIDP by any person, at any time prior to sentencing, if there was a likelihood that they had a cognitive impairment.¹²³

If accepted into the program, the person would receive support from a case manager employed by the IDRS,¹²⁴ who would arrange for an expert assessment of the defendant, to be tendered as evidence of the person's cognitive impairment.¹²⁵ The case manager would also assist the person to engage with the NDIS and other services, including employment services.¹²⁶ The case manager would draft a 'support plan' which was submitted to the court in support of an application for a diversionary order.¹²⁷ Making the order did not require that a finding of guilt be made, or that conditions be attached to the order requiring further treatment, unless the magistrate considered them to be necessary.¹²⁸

In the first 12 months of its operation, 118 people were referred to the CIDP.¹²⁹ Of these, 67 per cent were deemed eligible for the program.¹³⁰ First Nations people were significantly over-represented (32 per cent) among CIDP participants during this period.¹³¹

We heard evidence about the benefits of the CIDP from former participants during Public hearing 11. Mr Geoffrey Thomas was referred to the CIDP in 2019 by his mental health support worker after he was charged with malicious damage and intimidation.¹³² Following referral from his CIDP case manager, a neuropsychologist report confirming Mr Thomas' cognitive disability was prepared and provided to the court.¹³³ Mr Thomas ultimately received a nine-month good behaviour bond.¹³⁴ Mr Thomas told us the CIDP kept him 'Stable and on board and focused for the period of time that I had to go to court'.¹³⁵

Mr Thomas said this was a much more positive experience than his previous interactions with the criminal justice system. On other occasions at court, he had felt that the judicial officers and lawyers did not communicate with him or assist him to participate in proceedings.¹³⁶ When the CIDP supported Mr Thomas, communications improved dramatically:

people were communicating from the minute we walked in the door, from my support worker to the solicitor, from the solicitor to the prosecution, from the prosecution to the magistrate ...¹³⁷

Mr Thomas also expressed appreciation for the CIDP's assistance in communicating with different services and authorities,¹³⁸ and the additional NDIS funding he received after the CIDP obtained expert assessments for him.¹³⁹ He described this support as helping to improve his perspective on engaging with the criminal justice process:

It was not just the support that made a difference, but the impact it had on my mentality. When people let you down you can run away. But when you have wonderful people who care about you and work for you, you have to show up and do your part. When people try to help you, on some level in your psyche you feel a responsibility to them. I had to go to court and go to appointments because if I didn't, I knew I would be letting these people down.¹⁴⁰

Ms Taylor Budin is a woman with autism who received support from the CIDP during two separate criminal proceedings.¹⁴¹ She explained the CIDP:

helped me get my diagnosis, anything relevant for court that I needed, like supporting documents ... they help you with; they help you with like services that you might need, whether [Occupational Therapist], or anything like that, doctors, anything.¹⁴²

Ms Budin told us if she had had access to supports like the CIDP the first time she was prosecuted for a criminal offence, her experience 'would have been a whole different story'.¹⁴³

After the CIDP had been operating for approximately one year, the NSW Department of Communities and Justice (DCJ) commissioned a process evaluation and cost-benefit analysis of the program (CIDP Evaluation).¹⁴⁴ The CIDP Evaluation report was finalised in April 2019.¹⁴⁵ It concluded the CIDP was improving the health and welfare of participants by connecting them with external services and reducing the likelihood of their future interaction with the criminal justice system.¹⁴⁶ The data collected during the evaluation revealed the CIDP achieved a diversion rate of 87 per cent and that almost 25 per cent of participants received a clinical diagnosis of their disability for the first time in their lives as a result of its implementation.¹⁴⁷

The CIDP Evaluation found the program saved 23 cents for each dollar spent. That is, at that time of evaluation, the CIDP cost more – in purely financial terms – than it returned in immediate benefits.¹⁴⁸ However, the authors of the CIDP Evaluation noted the cost-benefit equation would improve over time as the program developed.¹⁴⁹ The report recommended changes to the program, including a review of the duration of case management and the referral and intake process.¹⁵⁰ It ultimately recommended a staged roll out of the program to other parts of New South Wales.¹⁵¹

A second model of the CIDP was trialled from 2019 to 2020.¹⁵² Mr Baker and Ms Janene Cootes of the IDRS gave evidence about the advantages of this model, which included:¹⁵³

- a single point of contact – an IDRS case manager – who would work with participants before their formal diagnostic assessment and throughout their participation in the program
- flexibility to choose from a suite of psychologists and neuropsychologists to assess clients and provide reports to the court. This enabled the use of clinicians who had the skills and specialisms particular to each participant's needs and with whom participants felt comfortable undergoing diagnostic assessments.
- shorter waiting times for assessments because more than one clinician was available to assess participants, and participants could move through the diagnostic stage more efficiently
- the ability to use reports both for obtaining a diversion order and for future NDIS funding applications and bail applications. This was because the reports dealt with the client's impairment and support needs, in addition to their diagnosis and offending.

Ms Cootes observed the second model of the CIDP was more effective in building relationships between participants and case managers.¹⁵⁴ Case managers were continuously involved with participants, from initial screening until their transition out of the program.¹⁵⁵ She added the CIDP had the ability to adjust its processes to meet the individual needs of each participant. This 'was an important basis for people accepting services that we recommended to them and linked them with'.¹⁵⁶ She reflected that participants had often felt 'let down by services' in the past.¹⁵⁷

Mr Baker was confident the CIDP had helped participants receive diversion orders where they would have ordinarily been likely to receive a custodial sentence:

I think because the clients had intensive humanistic support throughout the criminal justice process at each stage, so whether that's interacting with their solicitor, liaising with the registry staff, understanding what's going on in their court matter, having someone sort of co-design and co-produce a support plan that works for them, so that the magistrate and the court can understand what that person's needs and perspective of their needs really is ... I feel confident to say that clients developed a greater level of understanding and trust of the support service ecosystem, including an understanding of the criminal justice system. I think that there was positive feedback, I think is the best way I can phrase that, between that sense, that experience for the client, and also the court and court stakeholders better understanding the needs of the client.¹⁵⁸

Counsel Assisting referred to the practice adopted by magistrates of adjourning proceedings until supports could be put into place, which gave magistrates confidence that diversion would work.¹⁵⁹ Counsel Assisting suggested this practice was a 'meritorious approach, consistent with the spirit of the intention of the program'.¹⁶⁰ Mr Michael Coutts-Trotter, then Secretary of the New South Wales Department of Community and Justice, agreed.¹⁶¹

Discontinuance of the Cognitive Impairment Diversion Program

At the end of June 2020, the DCJ ceased funding the CDIP.¹⁶² This was approximately one year after it received the CIDP Evaluation and after changes were made to the program in response to the evaluation.¹⁶³ There was no formal evaluation of the second model.

We requested further information about the termination of funding to the CIDP. Mr CouttsTrotter said the costs associated with both models were 'significantly higher than other court-based diversion programs'.¹⁶⁴ From 2017 to 2020, total funding for the CIDP was \$3.18 million, resulting in an average cost per participant of \$32,780.¹⁶⁵ He said this limited the DCJ's ability to extend the program to the rest of New South Wales.¹⁶⁶

Counsel Assisting's submissions following Public hearing 11 examined in detail the influence of the CIDP Evaluation in the decision to discontinue the CIDP's funding.¹⁶⁷ Some witnesses expressed the view that conclusions reached in the CIDP Evaluation did not account sufficiently for indirect benefits.¹⁶⁸ For example, Professor Baldry and Mr James (Jim) Simpson stated that the CIDP Evaluation did not adequately account for the health and welfare benefits to CIDP participants and the community more broadly.¹⁶⁹

Mr John Walsh, a former member of the Productivity Commission and actuarial consultant with expertise in cost assessment and cost-benefit analysis, also gave evidence about the methodology of the CIDP Evaluation and the limitations of such assessments.¹⁷⁰ He said the CIDP Evaluation did not satisfactorily assess the reoffending outcomes against the immediate cost of the CIDP to government.¹⁷¹ He considered it odd to have discontinued the program based on an evaluation that relied on variable assumptions:

It seems counterintuitive to me not to invest in a program that's got a manifestly good outcome on the basis of a cost-benefit evaluation which is subject to big differences in the assumptions ... made by the same consultant in the draft report and the final report.¹⁷²

The New South Wales Government did not contest Mr Walsh's opinion. In its submissions following Public hearing 11, New South Wales agreed the 'Cost Benefit Analysis did not include health and welfare benefits, which the DCJ had sought in its tender documentation.'¹⁷³ Mr Coutts-Trotter accepted this was a limitation of the analysis in the following exchange with Counsel Assisting:

DR MELLIFONT: ...In circumstances where cost benefit analysis didn't take into account health and welfare benefits and you wanted it to, the Department wanted it to, that's a real problem, isn't it?

MR COUTTS TROTTER: I think in hindsight we, the Department, should have been more directive or demanding of the organisation producing the evaluation. They took the view they took and I'm sure it was reasoned and grounded but, given what we know about the broader benefits beyond those justice system benefits, I think we should have been more insistent in trying to include a better assessment, albeit a difficult to quantify assessment, of those health and welfare benefits.¹⁷⁴

Counsel Assisting proposed the following findings in submissions following Public hearing 11:

The NSW DCJ relied on the Cost Benefit Analysis to justify its decision to cease funding the CIDP. The DCJ did so notwithstanding that the Cost Benefit Analysis had not complied with the tender requirements, and that the authors considered there was insufficient data to accurately assess all of the benefits of the CIDP.

When deciding whether or not to make arrangements to continue funding CIDP, the NSW Government/DCJ should have placed greater weight on other benefits, including the health and welfare benefits to participants and the broader community.¹⁷⁵

In its submissions following the hearing, the New South Wales Government accepted both findings with amendments.¹⁷⁶ It submitted the cost-benefit analysis was but 'one of a number of considerations by the DCJ in its decision to cease funding for the CIDP'.¹⁷⁷ However, the New South Wales Government did not provide evidence of the other considerations that were taken into account. In these circumstances, we make the findings proposed by Senior Counsel.

Alternative diversion programs in New South Wales

At the time of our inquiry, the New South Wales Government had not confirmed whether a new diversion program would replace the CIDP. A witness at Public hearing 11 expressed concern there would be no replacement, leaving people with cognitive disability without support:

Keep the funding, please! Well, we need something in the court systems ... sorry, what I can't comprehend is why you get rid of something that was going so well.¹⁷⁸

Mr Coutts-Trotter told us the DCJ had not intended to cease CIDP's funding before establishing a replacement diversion program.¹⁷⁹ He said that a new program, 'Connect to Divert', had been in the early stages of development in 2020.¹⁸⁰

We heard the proposed model for Connect to Divert would have retained key features of the CIDP,¹⁸¹ but relied more on NDIS specialist support coordinators rather than dedicated, state-funded case managers.¹⁸² Mr Baker expressed doubt about the capacity of NDIS support coordinators to assist people with complex needs because they:

did not always have the expertise, confidence or indeed the time or capacity to engage with the multiple service systems on which many ... clients relied. I observed large caseloads, high levels of turnover among support coordinators and what appeared to be a degree of burn out.¹⁸³

The implementation of Connect to Divert ultimately did not occur. Mr Coutts-Trotter attributed this to the impact of the COVID-19 pandemic.¹⁸⁴ In correspondence dated 3 July 2020, Mr Coutts-Trotter stated, 'There are other court-based programs which have some similar functions as the CIDP pilot, albeit without all of the same benefits, which are less expensive to run.'¹⁸⁵ He identified the Justice Advocacy Service (JAS) as one of those programs.¹⁸⁶

The JAS provides individual advocacy support to victims, witnesses, suspects and defendants with cognitive disability in their interactions with police and courts.¹⁸⁷ Although it was not 'designed to be a diversionary program',¹⁸⁸ Mr Coutts-Trotter expressed the view that it nonetheless functioned as one.¹⁸⁹ He cited an independent evaluation of the program by consulting firm EY in 2021 (JAS Evaluation). It concluded that suspects and defendants supported by the JAS were less likely to be found guilty and more likely to receive a diversion order.¹⁹⁰

Since July 2022, the JAS has expanded to include a court-based diversion service in six Local Courts (Downing Centre, Parramatta, Blacktown, Penrith, Gosford and Lismore).¹⁹¹ The service promotes diversion orders for eligible defendants with a cognitive impairment in a similar manner to the CIDP.

We have not had the opportunity to examine the extent of support provided by the latest model of the JAS. However, it is unlikely that the JAS can provide the same or similar levels of intensive case management as the CIDP.¹⁹²

One strength of the CIDP was the duration of support by case managers. Participants received up to eight months of assistance.¹⁹³ This facilitated ‘the smooth and gradual transition to NDIS support coordinators as appropriate’,¹⁹⁴ and ‘enabled practical advice and support in accessing services to be given [to participants]’.¹⁹⁵ Together with the CIDP’s ability to link participants to wrap-around services such as housing support, this meant the CIDP delivered a ‘life-changing’ program for people with cognitive disability.¹⁹⁶

The ‘JAS Diversion Fact Sheet’ published by the IDRS identifies types of support the service may provide, including:

Assist the defendant to engage with other support services in the community that they believe will assist them and support diversion away from the criminal justice system.¹⁹⁷

However, the fact sheet makes it clear the JAS is not designed to provide wrap-around support, service coordination and casework:

The JAS Diversion Service is not a case management service. It is a strictly time limited service and will work with the defendant and services to develop a support plan for the court and establish links between defendants and the relevant mainstream and disability services.¹⁹⁸

The first evaluation of the expanded model of the JAS is not due to take place until late 2023.¹⁹⁹ The JAS Evaluation in 2021 canvassed the responses of key stakeholders who had experience with both the JAS and the discontinued CIDP. It concluded that in their view:

the adequacy of JAS support was found wanting. They expressed high regard for the CIDP and noted its success was in part because of its highly trained staff and tight case management ... it is important to note that while the evaluation noted that JAS is not funded to do ongoing casework, this was generally perceived as needed by stakeholders.²⁰⁰

Another difference between the CIDP and the JAS is the latter’s reliance on volunteers. The CIDP was operated by case managers employed through the IDRS and funded by the New South Wales Government. The JAS uses a mixture of staff and volunteers to deliver its services.²⁰¹ From 2021 to 2022, volunteers delivered 31 per cent of the supports provided by the JAS.²⁰²

The JAS Evaluation recorded some respondents’ concerns that volunteers:²⁰³

- did not sufficiently understand legal rights
- were not always well placed to identify the wrap-around supports that participants needed.

The evaluation stated that only 56 per cent of the JAS staff and volunteers agreed they had access to professional development and training, but observed that the JAS planned to expand volunteer training.²⁰⁴

The JAS Evaluation also found there may be barriers to recruiting volunteers for the JAS in some rural, regional and remote areas. Data collected by EY indicates that ageing demographics and the lack of a culture of volunteering in some areas made it difficult to rely on volunteers.²⁰⁵ One of the staff participants in the JAS Evaluation considered this particularly challenging:

So, and again, the whole program is supposed to be, you know, the underpinning of the program, is volunteers. Well, I've yet to have a volunteer in Broken Hill. Regional communities, Broken Hill, is an ageing demographic.²⁰⁶

As the evaluation of the current model of the program has not concluded, we cannot determine whether it is an adequate replacement for the CIDP. However, we consider there is reason to doubt it is.

Effective diversion programs: Lessons from the Cognitive Impairment Diversion Program

The CIDP demonstrated the potential of such a service to achieve real diversion from the criminal justice system for people with cognitive impairment and there is an urgent need to establish a similar service throughout NSW.²⁰⁷

Witnesses at Public hearing 11 considered the CIDP had been an effective diversion option for people with cognitive disability.²⁰⁸ Professor Baldry said:

this was a successful intervention, it was a useful intervention, and it does need to be continued. Because once you've found something that works like this, you should keep them because what will happen in the end is that it will be of a cost benefit to the state in the end that fewer people are ending up going in. Now in an immediate sense it might not have been as cost efficient or effective as they wanted it to be, but I can guarantee that it would over time be better.²⁰⁹

Counsel Assisting proposed the following findings about the CIDP, which were accepted by the New South Wales Government:

The CIDP provided a model of person-centred and rights-focused diversion, which prioritised individualised support and addressed underlying risk factors for offending.

The CIDP assisted people with disability being appropriately diverted from the criminal justice system.

Programmes such as the CIDP facilitate broader benefits than just cost savings for government, including community wide benefits, such as expenses involved in further offending and interaction with the criminal justice system being reduced, and assets being reinvested to help more people, and improved quality of life for the programme recipient.²¹⁰

We make those findings.

The evidence shows the CIDP delivered collaborative, accessible and high-quality supports due to its intensive case management and attention to wrap-around services.²¹¹ It connected people with cognitive disability to the NDIS – many for the first time – and helped them to obtain an NDIS plan.²¹² The CIDP successfully demonstrated that diversion programs should take into account the participant's various financial, emotional, social and psychological needs.²¹³

As the CIDP Evaluation concluded:

The success of the CIDP is seen in the number of section 32 orders and other diversionary orders achieved, the number of NDIS plans and reactivations achieved, as well as connections to other services. In addition, there are the qualitative outcomes in the lives of participants as reported by participants and their family members, case managers and service providers.²¹⁴

CIDP case managers from the IDRS were a central point of contact in the program. This was important because they had the skills and expertise to coordinate the various separate service systems – including drug and alcohol counselling, housing, family violence and mental health treatment – and could manage the range of problems a participant may have faced.²¹⁵ They also had sustained interaction with participants so that they could develop rapport and mutual trust.²¹⁶

As a result, participants left the program with a greater capacity to meet their own needs, having learnt 'where and how to seek support and to self-advocate'.²¹⁷

For the reasons set out above, we consider the CIDP to be a best practice model for diversion programs. Since states and territories other than New South Wales, South Australia and Victoria do not have their own court-based diversion programs, we recommend that all states and territories revise or develop diversion programs with reference to the CIDP.

Recommendation 8.21 Diversion of people with cognitive disability from criminal proceedings

The New South Wales, South Australian, Victorian and Western Australian governments should review and fund their existing court-based diversion programs for people with cognitive disability charged with offences that can be heard in local or magistrates' courts to ensure the programs:

- are accessible and culturally appropriate, particularly in regional and remote areas
- provide support for defendants to access the National Disability Insurance Scheme (NDIS)
- satisfy service needs, including connecting defendants to appropriate education, housing, employment and other services.

The Australian Capital Territory, Northern Territory, Queensland and Tasmanian governments should develop and fund court-based diversion programs for people with disability charged with summary offences in local or magistrates' courts which:

- are accessible and culturally appropriate, particularly in regional and remote areas
- provide support for defendants to access the NDIS
- satisfy service needs, including connecting defendants to appropriate education, housing, employment and other services.

All states and territories should commission independent evaluations of their diversion programs. Any evaluation should assess, and where feasible, quantify economic and social benefits for both individual defendants and the community as a whole.

9.4. Independent third person programs

We recognise not all people with disability need to be diverted from the criminal justice system. In addition to people accused or suspected of a criminal offence, people with cognitive disability also interact with police as witnesses or victims of a crime. Witnesses at our public hearings told us about their interactions with the police in all three capacities.²¹⁸ What we heard indicates the importance of support for people with cognitive disability during *all* of their interactions with police.²¹⁹

At Public hearing 17, 'The experience of women and girls with disability with a particular focus on family, domestic and sexual violence', 'Clarisse' shared the story of her daughter, 'Romi', who lives with intellectual disability.²²⁰ Clarisse described Romi's experience of a police interview after she was sexually assaulted by a support worker:

[Romi's] interview was extremely distressing. I took the disability support case manager with me to that interview and her father, and the police would not let her have any support in that interview at all. That's why I took the case manager, because I knew I couldn't support her in that, but the case manager was impartial and could [support Romi]. The police were adamant and quite intimidating because she begged them and said, 'look I've done this before, I've been in interviews before, had long discussions about it' and they [said] no, she can't go in there. So they took [Romi] out the back. I wish I was strong enough to say no ...²²¹

Police interviews can be demanding for anyone. They can be particularly challenging for a person with disability.²²² People with cognitive disability may have difficulty processing complex information quickly and particular difficulty communicating with people in positions of authority.²²³ They are likely to feel uncomfortable in the unfamiliar environment of a police station and not understand their legal rights.²²⁴ Interviews themselves can be distressing and traumatic, particularly for someone who has been a victim of a crime.²²⁵ In this context, a person with cognitive disability can find it very challenging to attend a police interview without the presence of a support person.²²⁶

For accused people with cognitive disability, there is a very real risk they may inadvertently waive their right to silence, misunderstand a question, or behave or answer in a way that unintentionally incriminates them.²²⁷ Having an independent third person present is important to assist people with cognitive disability to understand what is happening, especially to understand any questions the police may ask.²²⁸ An independent person may also be able to provide basic information as to the rights of the person with cognitive disability during the interaction with the police.

The extent to which laws or procedures protect the rights of people with disability to access a support person varies, depending on the state or territory. New South Wales legislation, for example, classifies persons with 'impaired intellectual functioning' as 'vulnerable persons'. Such persons are entitled to have a support person present during any 'investigative procedures in which [they are] required to participate'.²²⁹ However, the onus is on the vulnerable person to recognise the right and request a support person.²³⁰

Comparable Queensland legislation applies where a police officer wants to question a person the officer reasonably suspects is a person with 'impaired capacity'. In that situation the officer must not commence the questioning unless the officer, if practicable, allows the person to speak to a support person and a support person is present during the questioning.²³¹

Tasmania and the Australian Capital Territory are piloting witness intermediary schemes for people with communication needs²³² following recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse.²³³

In witness intermediary schemes, independent professionals facilitate communication between witnesses and police during interviews, and before or during court proceedings. However, a witness intermediary is not a support person. For example, their role does not include assisting a person with cognitive disability to understand their basic legal rights. Rather,

they act impartially in assisting a person to give evidence.²³⁴ Moreover, some of these schemes are limited to prosecution witnesses in child sexual offence matters.²³⁵ The current witness intermediary scheme in New South Wales, for example, does not specifically apply to people with disability or extend to offences beyond child sexual assault.²³⁶

The Australian Capital Territory is developing a trial to test the feasibility of a third-person advocate program for people with disability. This program aims to ‘assist a person with disability to understand their rights, support the person throughout the legal process and advocate for them in order to remove barriers to accessing justice’.²³⁷

Every jurisdiction except the Northern Territory has procedures in place directing how police officers are to interact with people with disability.²³⁸ Not all these procedures are publicly available, but they typically suggest people with disability should be provided with an advocate or support person when in police custody.²³⁹

Despite these procedures, a person with cognitive disability may not be given the opportunity to receive assistance from a support person.²⁴⁰ The literature consistently reports that police often lack an understanding of disability and have difficulty distinguishing between mental health problems and cognitive impairments.²⁴¹ There is evidence some police actively resist acknowledging that an accused person has a cognitive disability.²⁴²

Independent third-person support programs in New South Wales and Victoria provide communication assistance and individual advocacy to victims, witnesses and people accused or suspected of committing criminal offences during their interactions with police in certain matters.²⁴³ In New South Wales, the Justice Advocacy Service (JAS) provides this service.²⁴⁴ The JAS is staffed by trained employees and volunteers and is available across New South Wales.²⁴⁵ Its purpose is to assist people with cognitive disability to understand and exercise their rights – including the right to silence – during their contact with police and at court.²⁴⁶ Court, police and legal representatives are able to refer a person with cognitive disability to the JAS via phone.²⁴⁷

The JAS Evaluation by EY in 2021 found that the service:

plays an essential role in ensuring that people with cognitive impairment who are in contact with the criminal justice system are adequately supported within the system, that their rights are upheld and that they are able to understand the process and make appropriate decisions about their involvement. Without a service such as [the] JAS, this population, which is overrepresented in the criminal justice system, is likely to have more intensive involvement in the system, lower rates of diversion from prison and longer sentences ... [The] business model is appropriate and fit for purpose, and provides a cost-effective approach to achieving the objectives of the program.²⁴⁸

People with cognitive disability whom the JAS had assisted in their interactions with police told EY:

Well they put it to you in plain English instead of the double Dutch which they use ... you know what I mean?

[The JAS staffer] helped me out heaps because I am. I'm just a bit lost when it comes to all the words and stuff like that, you know?²⁴⁹

The *Police responses* report identified the importance of independent support in assisting people with disability who come into contact with the police to 'realise their fundamental right for access to justice'.²⁵⁰ It examined the JAS in New South Wales and the Independent Third Persons (ITP) program in Victoria.²⁵¹ It concluded that:

the success of the JAS model provides a robust, evidence-based blueprint from which to increase and expand the provision of vital supports to all people with disability who come into contact with the police.²⁵²

Victoria's ITP program is operated by the Office of the Public Advocate (OPA). Its primary role is to provide communication assistance rather than individual advocacy.²⁵³ Under this program, an independent third person:

is to be present during the interview of any person with a cognitive impairment, who is fit to be interviewed or have a statement taken as a suspect, an accused, an offender, a victim or a witness.²⁵⁴

In a submission to the Royal Commission, the OPA expressed concern that the ITP is not adequately resourced to meet the demand and estimated it did not respond to 10 per cent of requests for an independent third person.²⁵⁵ This represented:

42 interviews per month [on average] where a person with disability misses out on this important safeguard due to volunteer unavailability, remote location of police stations, or gaps in the roster.²⁵⁶

The *Police responses* report identified other efforts to establish independent third person programs in some Australian states and territories. However, it concluded 'the frequency with which supports are provided to people with disability [who come into contact with the police] remains low'.²⁵⁷ It attributes this in part to the fact that the provision of supports relies on police to identify that a person has a cognitive disability.²⁵⁸ Accordingly, increasing access to support persons depends on improving disability awareness among police and screening and identifying disability at the initial stages of the criminal process.

9.5. Raising the age of criminal responsibility

I've been in the system since I was a little kid. I'm looking for a way out.²⁵⁹

In Chapter 3, 'Youth detention', we examine the experience of children with disability at Banksia Hill Detention Centre (Banksia Hill) in Western Australia. We explain that children with disability are particularly at risk of violence and abuse in detention and may be denied adequate health care, education and other services. We heard time spent incarcerated, particularly in 'lockdown', almost invariably compounds the trauma detainees have experienced in other areas of their life.

During public hearings, a number of witnesses suggested children with disability should be diverted from the criminal justice system by raising the age of criminal responsibility.²⁶⁰ At Public hearing 27, 'Conditions in detention in the criminal justice system', 'Jasmin' told us:

I don't think they [children in detention] should be deprived of showers, food, education, self-worth, dignity. So, I don't think 10 to 13-year-olds should be in prison at all, and I think that we can change the way our youth detention settings are immensely and provide those that must be imposed a custodial sentence some actual rehabilitation as opposed to a punitive sentence.²⁶¹

Following Public hearing 27, Counsel Assisting submitted it is open to the Royal Commission to:

make a recommendation that all State and Territory Governments should raise the minimum age of criminal responsibility, noting this is being considered by several jurisdictions via the Standing Council of Attorneys-General.²⁶²

Counsel Assisting recognised this reform will 'require states and territories to fund and support families, communities and services to support children with disability in the community who would otherwise end up in detention'.²⁶³

A draft report prepared for the Age of Criminal Responsibility Working Group for the Standing Council of Attorneys-General in 2020 examined the negative effects of detention for any child aged 10 to 13. The report was not specifically concerned with children with disability but identified detention as increasing 'a child's risk of depression, suicide and selfharm',²⁶⁴ leading to 'poor emotional development', and resulting in 'poor education outcomes and further fracture [of] family relationships'.²⁶⁵ Ultimately, the draft report concluded that remanding or sentencing a child to detention 'creates life-long negative outcomes'.²⁶⁶

We also received evidence about violence, abuse and neglect that children with disability have experienced while in detention.²⁶⁷ In Chapter 3, we found children with disability at Banksia Hill

were confined to their cells for extended periods of time and that some detainees had limited opportunities to access education and therapeutic support.

We heard about ‘Aaron’, who lives with autism and attention deficit hyperactivity disorder.²⁶⁸ Aaron was placed on remand in juvenile detention when he was 15 years old.²⁶⁹ Two weeks after he entered detention, Aaron was sexually assaulted.²⁷⁰ The trauma of the assault has had an ongoing impact on him.²⁷¹

During 2018–19, 49,180 young offenders aged 10 to 17 years were charged with an offence in Australia. Of these, 8,353 were between 10 and 13 years old.²⁷²

We know that children with disability, particularly First Nations children with disability, enter youth justice systems at rates significantly higher than children without disability.²⁷³ We also know that some of the reasons children with cognitive disability are more likely to enter the criminal justice system include ‘trouble with memory, attention, impulse control, communication, difficulties withstanding peer pressure, controlling frustration and anger, and may display inappropriate sexual behaviour’.²⁷⁴ As a result, researchers have found this group of children are particularly visible to workers within the criminal justice system.²⁷⁵

The over-representation of children with cognitive disability in detention highlights the need for better and more robust options for diversion from the criminal justice system. Reports demonstrate traditional penal approaches, including detention, are:

ineffective due to the stigmatising effect of labelling young offenders, reinforcement of offenders’ criminal behaviour resulting from collective detention, lack of pro-social influences and failure to address the underlying behaviour behind the offending behaviour. Not only do these methods tend to be ineffective in reducing recidivism among young people, but they are also amongst the most costly means of dealing with juvenile crime due to high immediate costs and ongoing long-term costs to the juvenile justice system due to continued contact with the criminal justice system.²⁷⁶

In Australia, the general position under common law is that children are criminally responsible for their behaviour if they are aged 10 or over.²⁷⁷ This means a child aged nine years or younger at the time they engaged in behaviour that would otherwise be considered criminal cannot be charged or prosecuted. For children aged between 10 and 14, there is a rebuttable presumption of *doli incapax*, meaning the child is considered incapable of having criminal intent. The prosecution must therefore prove the child understood that their actions (which formed the alleged criminal offence) were wrong.²⁷⁸

Properly applied, the principle of *doli incapax* can prevent unnecessary detention of children.²⁷⁹ However, research indicates that in practice, this principle ‘has limited capacity to protect children under the age of 14 years’.²⁸⁰

Children with cognitive disability who are charged with an offence often cannot access the existing diversion options ostensibly available to them.²⁸¹ In New South Wales, this is primarily because the types of offences committed by children with disability differ from those committed

by children without disability. Children with disability in this state are more likely to be charged with more serious offences, making them ineligible to be dealt with via diversion orders or programs.

For example, the New South Wales Justice Test Case undertaken as part of the National Disability Data Asset pilot found in 2023 that:

While the rate of court diversion through police cautioning or youth justice conferencing was similar for young offenders with and without disability, those with disability were more often ineligible to receive a court alternative due to the type of the offence committed. These research findings point to a clear and immediate need for significant investment in supports for young people with disability, both before and after contact with the criminal justice system, and further expansion of diversion options for this vulnerable group.²⁸²

The New South Wales Justice Test Case also notes significant barriers to diversion for children with cognitive disability because of the difficulty of quickly and accurately identifying their disability.²⁸³ As discussed in Chapter 5, 'Screening , assessing and identifying disability in custody', state and territory youth justice agencies do not comprehensively screen children who enter youth detention for disability.

Research indicates that without identification and diversion, children with cognitive disability:

are likely to not receive appropriate disability and health services, or other supports such as disability-appropriate education and counselling. They are also more likely to transition into adult prison. They have significantly lower educational outcomes than their peers and are much more likely to develop further mental illness and chronic health problems.²⁸⁴

The earlier a child – whether they have or do not have a disability – comes into contact with the justice system, the more prolonged their involvement is likely to be,²⁸⁵ and the greater their likelihood of chronic, long-term offending.²⁸⁶

Placing children in detention, especially children with cognitive disability, exposes them to the risk of violence, abuse and neglect, and increases the chances that they will become enmeshed in the criminal justice system. There are a number of ways in which that risk can be minimised or removed for particular children. The most effective way of preventing very young children from 'a potential trajectory within the youth justice system'²⁸⁷ and from experiencing the trauma of detention is to raise the minimum age of criminal responsibility.

The United Nations Committee on the Rights of the Child (CRC Committee) has observed that 'the most common minimum age of criminal responsibility internationally is 14'.²⁸⁸ The CRC Committee has previously criticised Australia for its 'very low age of criminal responsibility'.²⁸⁹ Raising the minimum age of criminal responsibility to 14 would bring Australia into line with an internationally accepted standard.

Several states and territories are moving towards raising the minimum age of criminal responsibility. The Northern Territory introduced legislation in November 2022 to raise the minimum age from 10 to 12.²⁹⁰ The Australian Capital Territory Government has introduced legislation to raise the minimum age to 12 in 2023, and then to 14 in 2025.²⁹¹ Other states, such as Victoria, have signalled their intention to follow suit or have supported the change in principle.²⁹² Tasmania has announced plans to raise the minimum age of detention to 14, although the age of criminal responsibility would remain at 10.²⁹³

Other jurisdictions are considering raising the minimum age of criminal responsibility via the Standing Council of Attorneys-General Working Group on the Age of Criminal Responsibility. In November 2021, the Standing Council decided to support the development of a proposal to raise the age from 10 to 12.²⁹⁴ In August 2022, it agreed that the working group would 'continue to develop a proposal to increase the minimum age of criminal responsibility, paying particular attention to eliminating the over-representation of First Nations children in the criminal justice system'.²⁹⁵

Raising the minimum age of criminal responsibility to 14 will not alone end the over-representation of children with disability in the criminal justice system. The draft report prepared for the Standing Council of Attorneys-General concluded that the question of whether to raise the minimum age was 'far broader than a purely legal or justice policy issue and requires a holistic, multi-agency response'.²⁹⁶ This is consistent with our life course approach to understanding contact with the criminal justice system and the criminalisation of disability. It accords with the points discussed earlier regarding the benefits of access to wrap-around community support systems and the importance of early diversion and intervention.

We consider the recommendation to raise the minimum age of criminal responsibility is within our terms of reference. We are directed to inquire into what governments and the community should do to prevent and better protect people with disability from experiencing violence, abuse, neglect and exploitation in all settings and contexts. One setting is youth detention, where many detainees, particularly young children, experience violence, abuse and neglect and are at risk of serious, perhaps lifelong, harm. Raising the age of criminal responsibility to 14 is an appropriate means of preventing and protecting young children with disability from experiencing violence, abuse and neglect.

We appreciate a recommendation to increase the age of criminal responsibility to 14 will apply to some children who do not have a cognitive disability (or any other disability). However, we do not think it practicable to confine the recommendation to children with a cognitive disability. Among other things, there is no infallible mechanism for swiftly determining whether a particular child charged with or convicted of an offence has a cognitive disability. Moreover, the evidence demonstrates that a high proportion of children under the age of 14 in youth detention have a cognitive disability, even though the disability may not be detected until some time after the child enters detention.²⁹⁷

For these reasons we recommend that states and territories that have not already done so introduce legislation raising the minimum age of criminal responsibility to 14.

Recommendation 8.22 Age of criminal responsibility

States and territories that have not already done so should introduce legislation to raise the minimum age of criminal responsibility to 14.

9.6. Conclusion

Lived experience witnesses, advocates and expert witnesses at our public hearings told us about the importance of diversion programs for people with cognitive disability.

The relationship between the criminal justice system (police and courts) and the service sector is crucial to effective diversion programs. Effective diversion relies on connecting alleged offenders with the right services and maintaining that connection when problems arise.

Diversion programs tend to be of limited utility unless:

- mechanisms are in place to identify, so far as practicable, defendants who are people with cognitive disability
- the programs can rely on services in the community that can provide the supports required by defendants
- resources are sufficient to enable diversion of defendants to be properly managed and perceived
- the programs are culturally safe and appropriate for First Nations defendants with cognitive disability.

If those conditions can be satisfied, diversion programs have an important part to play in reducing the over-representation of people with cognitive disability in the criminal justice system, including prisons and youth detention facilities. This outcome will assist in preventing people with cognitive disability from experiencing violence, abuse and neglect, and will reduce the human, economic and social costs associated with the criminalisation of disability.

Endnotes

- 1 Exhibit 11-32.07, NSW.0033.0278.0001, p 28.
- 2 Law Council of Australia, Submission in response to the *Criminal justice system issues paper*, 17 August 2021, EXP.0067.0002.0170, p 46.
- 3 New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report No. 135, June 2012, p 28.
- 4 Law Council of Australia, Submission in response to the *Criminal justice system issue paper*, 17 August 2021, EXP.0067.0002.0170, p 46.
- 5 Exhibit 11-27.1, 'Statement of Dr Kathy Ellem', 3 November 2020, STAT.0203.0001.0001 at [40]; Transcript, Eileen Baldry, Public hearing 11, 18 February 2021, P-246 [8–29].
- 6 Law Council of Australia, Submission in response to *Criminal justice system issues paper*, 17 August 2020, ISS.001.00370, pp 17–18.
- 7 Transcript, Eileen Baldry, Public hearing 11, Thursday 18 February 2021, P-233 [31–33].
- 8 Leanne Dowse, Simone Rowe, Eileen Baldry & Michael Baker, University of NSW, *Police responses to people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021, p 37.
- 9 New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report No. 135, June 2012, p XVI.
- 10 Transcript, Taylor Budin, Public hearing 11, 24 February 2021, P-578 [9–25]; Transcript, Geoffrey Thomas, Public hearing 11, 24 February 2021, P-509 [40–47].
- 11 Exhibit 11-12.1, 'Statement of Professor Eileen Baldry AO', 22 October 2020, at [137].
- 12 Exhibit 11-12.1, 'Statement of Professor Eileen Baldry AO', 22 October 2020, at [137]; Exhibit 1132.07, NSW.0033.0278.0001, p 6.
- 13 Exhibit 11-12.1, 'Statement of Professor Eileen Baldry AO', 22 October 2020 [142–159]; Exhibit 11012.07, DRC.1000.0002.8141, p 373.
- 14 Leanne Dowse, Simone Rowe, Eileen Baldry & Michael Baker, University of NSW, *Police responses to people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021, p 7.
- 15 New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report No. 135, June 2012, p 6.
- 16 Eileen Baldry, Leanne Dowse & Melissa Clarence, *People with mental and cognitive disabilities: Pathways into prison*, Background paper for Outlaws to Inclusion Conference, 2012, pp 14–15.
- 17 New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report No. 135, June 2012, pp 63–65.
- 18 Leanne Dowse, Simone Rowe, Eileen Baldry & Michael Baker, University of NSW, *Police responses to people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021, p 7.
- 19 Ermha365, Submission in response to *Criminal justice system issues paper*, 18 May 2020, ISS.001.00177, p 7; Just Reinvest NSW, Submission in response to *Criminal justice system issues paper*, 14 April 2020, ISS.001.00110, p 18; Jesuit Social Services, Submission in response to *Criminal justice system issues paper*, 3 April 2020, ISS.001.0107, p 16. See generally, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Overview of responses to Criminal justice system issues paper*, December 2020, p 3.
- 20 Just Reinvest NSW, Submission in response to *Criminal justice system issues paper*, 14 April 2020, ISS.001.00110, p 18; Leanne Dowse, Simone Rowe, Eileen Baldry & Michael Baker, University of NSW, *Police responses to people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021, p 8.
- 21 See for example, Exhibit 11-32.7, NSW.0033.0278.0001, p 72; Exhibit 11-12.01, 'Statement of Eileen Baldry', 22 October 2020, at [123–124]; Exhibit 11-24.1, 'Statement of Cheryl Axleby', 5 February 2021, at [92–94]; Department of Justice, *Court Integrated Services Program: Tackling the causes of crime*, Executive Summary Evaluation Report, June 2010, p 2.
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- 23 Exhibit 11-29.1, 'Statement of Taylor Budin', 21 January 2021, at [45].
- 24 Leanne Dowse, Simone Rowe, Eileen Baldry & Michael Baker, University of NSW, *Police responses to people with disability*, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021, pp 72–73.
- 25 Transcript, Eileen Baldry, Public hearing 11, 18 February 2021, P-233 [24–29].
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10. Acknowledging disability and family and domestic violence in law and policy

Key points

- People with disability, especially women with disability, experience more family and domestic violence compared to people without disability.
- Violence against women with disability is often inadequately addressed in policy, law and practice. The National Plan to End Violence against Women and Children 2022–2032 (National Plan) is one such example. We recommend the development of an Action Plan for Women and Children with Disability under the National Plan to address this gap.
- Each state and territory takes a different approach to defining family and domestic violence in law, policy and practice. Some definitions ignore or exclude the experiences of people with disability, meaning they have fewer legal protections and less access to support.
- People with disability experience violence from people such as support workers or carers. These relationships are not covered by family and domestic violence laws in all jurisdictions. Some types of violence experienced by people with disability in these relationships are not explicitly included in legislation.
- Consistent disability-inclusive definitions of family and domestic violence across Australian and state and territory legislation would:
 - encourage widely held community standards of behaviour toward people with disability
 - offer better protections in some jurisdictions and similar legal protections regardless of where a person lives in Australia
 - provide guidance to police, the judiciary and the wider community about the experiences of people with disability of family and domestic violence
 - lead to the compilation of more robust and comparable data across jurisdictions
 - align legal responses with national prevention and policy settings.

10.1. Introduction

While women and men with disability aged 18 to 64 experience similarly high rates of violence overall,¹ the types of violence they are most likely to experience are different. Women with disability are much more likely to experience sexual assault, violence and emotional abuse perpetrated by a domestic partner, or stalking.²

Gender inequality is one key driver of violence against women, and is reinforced by factors such as socio-economic status, mental illness and prejudice.³ For women and girls with disability, additional drivers arise from the intersecting and compounding aspects of gender inequality. These include:

- ableism and negative stereotypes
- accepting or normalising violence, disrespect and discrimination against people with disability
- controlling people with disability's decision making and limiting their independence
- social segregation and exclusion.⁴

Associate Professor of Disability and Inclusion Patsie Frawley told us ableism is 'one of the "isms", along with sexism, that sits at the heart of disability gender-based violence'.⁵ She said ableism is 'actually a complete discounting of disability in ideas and structures and processes that make up society and citizenship'.⁶ She further observed:

it's even stronger than discrimination, it's stronger than exclusion. It's actually that disability is discounted. It's not even really seen sometimes, and by not being seen, it's not engaged with or valued either.⁷

Ms Thelma Schwartz, Principal Legal Officer, Queensland Indigenous Family Violence Legal Service, told us about how women and girls with disability, particularly First Nations women and girls, experience 'a complete lack of respect ... recognition of who they are ... their inherent worth and what they bring to society'.⁸

The existence of ableist attitudes is compounded in circumstances where women with disability do not see themselves in roles in society where they can be valued and respected. This occurs because they are so often excluded from mainstream employment and education and 'because there has been a social system that has said if you are dependent and need supports, then ... you are actually "other" than the rest of society'.⁹

Social and geographic isolation is another key driver of violence against women and girls, and is particularly pronounced for those with disability. For some women, this is exacerbated by the interaction of other forms of oppression, such as racism, ageism or homophobia. Ms Catherine Dunn, disability advocate and survivor, gave evidence at Public hearing 17, 'The experience of women and girls with disability with a particular focus on family, domestic and sexual violence'. She said:

I'm a woman, I'm Deaf, I'm part of the disability community, I'm part of the CALD community. I grew up in regional Victoria. If we understand all of these parts, they are not separate. They're all intertwined.¹⁰

Violence and abuse of women and girls with disability is preventable, but prevention requires recognition of its causes and understanding of the risks to women and girls with disability because of their particular or unique circumstances. The *2017 National Community Attitudes towards Violence against Women Survey* found that 'attitudes towards gender inequality and violence' contribute to violence against women broadly.¹¹ It also noted that prejudice based on attributes such as race and disability is associated with 'a high level of support for violence against women'.¹²

Our Watch, Australia's leading organisation on prevention of violence against women, and Women with Disabilities Victoria, observed that over the last 30 years, 'gender-based violence and disability-based violence has moved from denial to wider understanding across our community'.¹³

This chapter draws on Counsel Assisting's submissions and the evidence in Public hearing 17 and other hearings on the experiences of women and girls with disability in criminal justice and associated systems. It also reflects information drawn from private sessions, submissions and research. Applying a human rights-based approach, this chapter examines how Australia's policy and legal frameworks address violence against, and abuse of, women and girls with disability, and highlights the failure to recognise the intersectional nature of their experiences.

We make two recommendations in this chapter. The first is designed to improve the policy response to prevent violence against women and girls with disability. The second seeks to ensure legal definitions of family and domestic violence across jurisdictions incorporate the experiences of women and girls with disability.

10.2. Family and domestic violence experienced by people with disability

The primary national data set on violence and abuse, the Australian Bureau of Statistics 2016 *Personal Safety Survey (PSS)*, shows that women with disability aged 18 to 64 are more likely to experience sexual assault or threat, intimate partner violence, emotional abuse and stalking than men with disability or women without disability.¹⁴ Women with disability are also more likely to experience violence by someone known to them than men with disability or women without disability.¹⁵ They are more likely to experience repeated incidents of violence than women without disability.¹⁶

The high rates of gender-based violence and abuse are outlined in further detail in Volume 3, *Nature and extent of violence, abuse, neglect and exploitation*. Evidence and accounts of the nature of violence and abuse towards women with disability suggest they are targeted by a wider range of perpetrators than people without disability, and also in a wider range of settings.¹⁷

They are subjected to:

- violence, abuse, neglect and exploitation by intimate partners who are also carers¹⁸
- violence and abuse by family members,¹⁹ co-residents²⁰ or support workers²¹
- abusers using specific forms of violence that target their disability-related needs or adjustments, such as controlling their access to mobility or communication aids and medication²²
- forced sterilisation, termination and other reproductive abuse or coercion, which is discussed in further detail in Chapter 6 of Volume 6, *Enabling autonomy and access*.²³

Laws and policies addressing violence and abuse should include and respond to these experiences. However, we heard that frequently they do not. Associate Professor Frawley gave evidence at Public hearing 3, 'The experience of living in a group home for people with disability'. She said the nature and impact of violence and abuse in an institutional environment is the same as any other domestic relationship:

what constitutes violence and abuse is actually the same for people with disabilities in group homes as for other people experiencing family violence, power and control, the lack of autonomy, etcetera ... we're not talking about something that should be dealt with differently. We should – we're talking about something that needs to be dealt with within the law of violence and abuse.²⁴

Volume 12, *Beyond the Royal Commission*, outlines the need for high-quality data to understand the violence, abuse, neglect and exploitation experienced by people with disability. The lack of data on experiences of people living in supported accommodation or institutional settings is well known. Numerous past reports have highlighted the need for better data collection about the experiences of violence against women and girls with disability in Australia.²⁵ As we discuss in Chapter 7, 'Data collection by criminal justice systems on people with disability', there are currently 'no nationally consistent data sets available to describe the extent of violence, abuse and neglect of people with disability',²⁶ or the experiences of women and girls with disability. The Australian Bureau of Statistics *PSS* is not administered to the 'estimated 201,100 adults with disability or a long-term health condition' living in these settings.²⁷ While the National Disability Insurance Scheme Quality and Safeguards Commission's reportable incidents data provides some information on violence and abuse in these settings, it cannot be compared with the broader population of people with disability, or Australians in general. It also cannot be broken down by demographic characteristics such as gender.²⁸ In Volume 12 we make recommendations to improve the intersectional analysis of violence, abuse, neglect and exploitation experienced by women and girls with disability, among others.

10.3. A human rights approach to family and domestic violence

Australia ratified the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* in 1983.²⁹ CEDAW's core objective is gender equality and the elimination of gender-based discrimination. The *Sex Discrimination Act 1984 (Cth)* was enacted in part to give effect to CEDAW in Australian law and introduce national laws prohibiting discrimination against women in certain areas of public life. It recognises sexual harassment and sex-based harassment as unlawful, but until recently it did not impose any positive duty to eliminate any such discrimination or harassment.³⁰

CEDAW was a significant step forward in the recognition of women's human rights. However, it did not specifically address the rights of women with disability or the intersectional experiences of women. Likewise, CEDAW did not specifically address violence against women and freedom from violence and abuse as a human right.³¹

In 1991, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) issued *General recommendation No. 18*, noting 'the situation of disabled women, who suffer from a double discrimination linked to their special living conditions'.³² The General Recommendation recalled 'the Nairobi Forward-looking Strategies for the Advancement of Women, in which disabled women are considered as a vulnerable group under the heading "areas of special concern"'.³³

In 1992, the CEDAW Committee issued *General recommendation No. 19*, which stated:

The Convention in Article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.³⁴

In 1993, the United Nations General Assembly adopted the *Declaration on the Elimination of Violence against Women (Declaration)*.³⁵ The *Declaration* defined the expression 'violence against women' to mean:

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.³⁶

The *Declaration* explicitly recognised the impact of violence against women in the enjoyment of human rights generally.³⁷

In 2017, the CEDAW Committee issued *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*.³⁸ The CEDAW Committee noted the definition in *General recommendation No. 19* reflected *opinio juris* (customary international law)³⁹ and traced the significant developments in the protection of women's rights over the previous 25 years.⁴⁰

Uniform definition of violence against women

Australia has not enacted a law that gives effect to the *Declaration* or incorporates a uniform definition of violence against women. As noted above, the *Sex Discrimination Act 1984* (Cth) addresses sexual harassment in certain areas of public life, but does not include violence against women in the form described by the *Declaration*. Similarly, the Act does not expressly address the intersectional and multiple forms of discrimination against women with disability or from a culturally and linguistically diverse background.

We discuss the implementation of the *Convention on the Rights of Persons with Disabilities (CRPD)* in Australia in Volume 4, *Realising the human rights of people with disability*. In their research report *Convention on the Rights of Persons with Disabilities: Shining a light on social transformation*, Ms Rosemary Kayess and Ms Therese Sands describe article 6 on women with disabilities and article 7 on children with disabilities as 'cross-cutting'.⁴¹ They say this means the 'issues and concerns of women and girls with disability and children with disability must be specifically included in all actions to implement the *CRPD*'.⁴² Article 8(1) of the *CRPD*, like article 5 of *CEDAW*, addresses the need to combat stereotypes and attitudes.

Article 16 recognises the right of women and children with disability to live free from domestic, family and sexual violence. Article 6 recognises 'multiple discrimination', which has been described as an important development in understanding the different causes of discrimination and inequality, and their effects, on the rights of women with disability.⁴³

Intersectional approaches

Ms Vanamali Hermans, Policy and Projects Officer at Women With Disabilities Australia (WWDA), observed that 'intersectionality' is a term used in the mainstream feminist movement and increasingly in public policy.⁴⁴ She said intersectional approaches are particularly important for women and girls with disability because:

we're not only oppressed on the basis of our gender, but also on the basis of our disability and, for many of us too, on the basis of our race and many different other parts of our personhood.⁴⁵

Ms Carolyn Frohmader, Executive Director of WWDA, and Ms Hermans emphasised the need to consider the international human rights treaties as interconnected, rather than individually.⁴⁶ Ms Hermans described the need to move away from legislative and policy approaches that attempt to 'neatly compartmentalise different forms of discrimination like sexism and ableism, rather than recognising the ... complex interplay between systems of oppression and power structures'.⁴⁷

A more integrated approach across policy and law would be more effective in preventing violence against women and girls with disability and in developing appropriate responses. For example, this approach would assist sexual assault response services to become fully accessible and culturally safe for women with disability from culturally and linguistically diverse and First Nations backgrounds. Ms Hermans described the current systems as requiring a person ‘to choose or prioritise one part [of] our identity over the other’, such as being a woman, having a disability or being First Nations.⁴⁸

Effective implementation of a rights-based approach requires people with disability to co-design systems, interventions and response services to prioritise their needs.⁴⁹ This should be implemented across all stages of response services, including prevention, early intervention, response and recovery:

Violence perpetrated against women and girls with disabilities continues to fall through legislative, policy and service response ‘gaps’ as a result of the failure to understand the intersectional nature of the violence that they experience, and the multiple and intersecting forms of discrimination which make them more likely to experience, and be at risk of, violence.⁵⁰

The following section discusses the gaps in key Australian policy frameworks on gender-based violence, and the need for concerted action by all Australian governments to address violence against women with disability.

10.4. National Plan to End Violence against Women and Children

The National Plan to End Violence against Women and Children 2022–2032 (National Plan) was released in October 2022. It sets Australia’s policy framework and guides future action on prevention of and responses to violence against women across Australia, with a goal of ‘ending gender-based violence in one generation’.⁵¹

The National Plan sets out actions across four domains:

- prevention, to address the attitudes and systems that drive violence against women and children to stop violence from occurring
- early intervention, to identify and support individuals at high risk of experiencing or perpetrating violence and to stop violence from occurring or reoccurring
- response, to provide services and supports to address existing violence, and support victims-survivors experiencing violence
- recovery and healing to reduce re-traumatisation, and support victims-survivors to recover from trauma and the physical, mental, emotional and economic impacts of violence.

The National Plan should be implemented through two five-year programs under an Action Plan for Women and Children with Disability (Action Plan), and an Aboriginal and Torres Strait Islander Action Plan for family safety, which will create the foundation for a standalone First Nations National Plan.⁵² These plans will outline actions on, and investments for, prevention, early intervention, response, and recovery and healing.⁵³

Progress reports will be coordinated by the Domestic, Family and Sexual Violence Commission. The Commission will work with the Australian Government, state and territory governments, and community organisations to promote coordinated and consistent monitoring of evaluation frameworks, and will provide annual reports to Parliament on progress against the National Plan.⁵⁴

Women and girls with disability in the National Plan

The National Plan recognises ‘violence against women and girls with disability tends to occur more frequently, over a longer period of time, and across a wider range of settings’.⁵⁵ It also acknowledges the ‘additional ableist drivers’ and the unique forms of violence experienced by women with disability.⁵⁶ It commits to building capacity in response services ‘to better understand and identify violence in all its forms against ... women with disability, including in institutions’.⁵⁷

However, the National Plan lacks adequate specific actions to address the drivers of violence against women and girls with disability, the specific experiences of violence against women and girls with disability, and the dearth of accessible supports. The National Plan notes that the outcomes and recommendations from this Royal Commission will guide future work towards ending violence against women and children with disability.⁵⁸

Updating the National Plan

We welcome the National Plan’s acknowledgment of the extent of violence against women with disability and the commitment to better prevent and respond to the violence. However, further action is needed due to:

- the lack of concrete actions focusing on women and children with disability
- the disproportionate rates of violence and abuse women and children with disability experience, which have not been yet adequately addressed.

More is needed to implement the components of the National Plan for women with disability, as follows:

- Prevention – We have been told of the lack of respectful relationships and consent education and support available to people with disability, and not just young people, but also adults with disability.⁵⁹ There is also a lack of inclusive and culturally safe education for LGBTIQ+ and First Nations people with disability.⁶⁰

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- Gender-based violence in disability services – Witnesses spoke of their and their families’ experiences of gender-based violence in disability services. They also spoke of barriers to support for women and girls experiencing violence and abuse by support workers in supported accommodation and other support settings.⁶¹ This issue is recognised in the National Plan, but not clearly addressed in the current list of actions.⁶²
 - Accessible early intervention and response – Evidence showed a lack of inclusive and accessible domestic, family and sexual violence screening⁶³ and responses for people with disability.⁶⁴ The National Plan recognises this need and commits governments to building capacity in support services to better identify and address violence against women with disability, but does not explain how this should occur.⁶⁵
 - Reproductive abuse – Women and girls with disability are at risk of reproductive violence and abuse, including involuntary sterilisation.⁶⁶ This form of violence is explicitly acknowledged in the National Plan, but no specific action is proposed.⁶⁷
 - Data, monitoring and evaluation – The National Plan recognises that data is crucial to understanding the problem of violence and measuring progress.⁶⁸ Specifically, data relating to people with disability’s experience of violence is required, including the establishment of baselines to better monitor the effectiveness of responses.⁶⁹

We consider action plans to be a useful method for addressing these gaps. As such, the Australian Government and state and territory governments should partner with women with disability, and their representatives and supporters, to develop a dedicated five-year Action Plan.

The Action Plan should be developed by and for women with disability. It should lead trauma-informed efforts to end violence against them, making the commitments contained in the National Plan a reality for women and girls with disability. It should prioritise those cohorts at greatest risk of violence, including women with cognitive and psychosocial disability. It should recognise the greater range of relationships and settings in which domestic, family and sexual violence against women and girls with disability can occur. It should provide consistent, inclusive definitions of gender-based and family and domestic violence in law, policy and practice, as addressed in the following section.

The Action Plan should embed a focus on equality and diversity to ensure all women and children with disability are considered.⁷⁰ It should address the needs of women and children with disability across the National Plan’s four domains of prevention, early intervention, response, and recovery and healing.

The forthcoming outcomes framework for the National Plan should include specific outcomes for women and children with disability. The Action Plan can then establish how actions will contribute to achieving these outcomes. The Domestic, Family and Sexual Violence Commission should monitor progress against the Action Plan, in collaboration with the proposed National Disability Commission. For further details about the National Disability Commission, see Volume 5, *Governing for inclusion*.

In Volume 5, we explain the need to coordinate government policies, plans, strategies and frameworks affecting people with disability. The National Plan refers to alignment with Australia's Disability Strategy 2021–2031,⁷¹ but provides little detail on what this means in practice. The Action Plan would provide a vehicle for coordinating the strategy, similar to the intent to align the Aboriginal and Torres Strait Islander Action Plan with the National Agreement on Closing the Gap, with complementary targets.

We also recommend in Volume 5 that the Australian Government review national agreements and strategies to ensure they better align with Australia's Disability Strategy 2021–2031. The Australian Government should ensure that the situation of women and children with disability are considered in that review.

Recommendation 8.23 Action plan to end violence against women and children with disability

The Australian Government and state and territory governments should develop a five-year Action Plan for Women and Children with Disability to accompany the National Plan to End Violence against Women and Children 2022–2032. The Action Plan should:

- be developed by and for women with disability
- prioritise cohorts at greatest risk of violence
- coordinate with other relevant plans and strategies, in particular the forthcoming Aboriginal and Torres Strait Islander Action Plan and Australia's Disability Strategy 2021–2031.

The Action Plan should include comprehensive actions and investment to address violence experienced by women and children with disability across the focus areas of:

- prevention
- early intervention
- response
- recovery and healing.

10.5. Family and domestic violence in law and policy

For many of us, our domestic setting can indeed be a typical home with a door. But it can also be a group home, a licensed or unlicensed boarding house. A hostel. A prison. A tent. A semi-supported accommodation facility. A respite centre. Aged care facility. Hospital. Just to name a few. But it can also be the street. It can be a park bench.⁷²

In Australia, there is no uniform definition in law or policy of gender-based violence, violence against women, or family and domestic violence. The National Plan recognises varied definitions of gender-based violence as a ‘whole-of-system issue’ and commits to further work ‘with states and territories in areas where we do not yet have consistent national definitions’.⁷³ It states that nationally consistent definitions are needed as the basis of ‘program design, public and private sector policies, as well as legislation across states and territories’.⁷⁴

Inconsistent definitions of family and domestic violence have consequences for:

- the legal protections available to people with disability when they experience these forms of violence
- the accessibility of family, domestic and sexual violence services and supports⁷⁵
- data collection, comparability and reporting.⁷⁶

Actions under the National Plan to address the issue of definitional inconsistency include promoting ‘greater consistency across all states and territories in terms of laws, justice responses and support’ across Australia.⁷⁷ At the time of writing this *Final report*, New South Wales, Queensland and Tasmania had also released state plans or major policy reviews to address gender-based violence. Neither the National Plan nor the state plans or reviews have specific commitments or actions to improve definitions of family and domestic violence in laws, policies or services to encompass violence against women with disability.⁷⁸

Inconsistent definitions of family and domestic violence and their impact on women with disability

Legal definitions of family and domestic violence vary across jurisdictions.⁷⁹ Some do not recognise the violence and abuse people with disability are subjected to or the contexts in which that violence occurs.⁸⁰ These gaps are particularly concerning given the disproportionate rates of family and domestic violence against women with disability. Gaps in existing laws broadly relate to definitions of relationships, living situations or settings, and types of conduct or behaviour constituting family and domestic violence and abuse that people with disability experience.

Laws regarding family and domestic violence are largely the responsibility of states and territories. All states and territories have laws regarding family and domestic violence, and provision for domestic violence protection orders.⁸¹ The Australian Parliament, however, has the constitutional power to make laws with regard to marriage and divorce, de facto relationships, parenting and custody.⁸² The *Family Law Act 1975* (Cth) defines family violence.⁸³

Not all legislative definitions of family and domestic violence cover the domestic relationships people with disability may have. These can include relationships with support workers, co-residents, other staff of services, and guardians and administrators. The definitions of relationships, including 'family' and 'domestic relationship', are not consistent. Dr Jacoba Brasch KC, then President of the Law Council of Australia, told us the legal coverage of such relationships across the states and territories is 'a land mine'.⁸⁴ She said there was a lack of clarity in some jurisdictions about whether workers supporting people with disability in a group home or private home are considered party to a domestic or family relationship.⁸⁵

WWDA explained the experiences of violence in settings such as group homes, respite services, institutions or boarding houses often do not fit neatly with understandings of family and domestic violence, or relevant laws.⁸⁶ Contexts in which women and girls with disability may experience these forms of violence are not limited to the family home or relationships. For this reason, the term 'family violence' may not be preferred by women with disability, and may contribute to the perception that people living in non-familial arrangements do not experience these types of violence.⁸⁷

Variations in the relationships and settings recognised in family violence laws are illustrated by the following:

- The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) does not define domestic violence, but recognises a wide range of relationships and settings in which domestic and personal violence can occur by using the term 'domestic relationship'. As well as intimate partners, family and kinship network members, it identifies domestic violence and abuse experienced by people with disability living in residential and institutional settings, including by co-residents and paid support workers.⁸⁸

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- The *Family Violence Protection Act 2008* (Vic) uses the term ‘family violence’ for specified conduct towards family members.⁸⁹ The term ‘family member’ includes someone who may reasonably be considered ‘like a family member’, such as a person who provides paid or unpaid care.⁹⁰ The Australian Capital Territory adopts a similar approach and includes reference to ‘family-like relationships’.⁹¹ Western Australian law recognises ‘other personal relationships’, including those ‘of a domestic nature in which the lives of the persons are, or were, interrelated and the actions of one person affects, or affected, the other person’.⁹²
 - Queensland refers to ‘relevant relationship’, and South Australia refers to ‘relationship’. In both states, this includes family members and some carer or informal care relationships, but not paid carers or support workers.⁹³ In addition, Queensland excludes unpaid care provided by a voluntary organisation.⁹⁴ Similarly, South Australia excludes care or assistance provided in the course of doing community work organised by a community organisation.⁹⁵
 - In Tasmania, family violence is limited to conduct against a ‘spouse or partner’.⁹⁶
 - The *Family Law Act 1975* (Cth) includes all family members and family members of current or previous partners. It does not include paid support workers or carers.⁹⁷
 - Northern Territory legislation primarily uses the term ‘domestic relationship’.⁹⁸ This legislation covers intimate partners, family and kinship network members, carer relationships and paid support workers.

Conduct considered to be family or domestic violence also varies across jurisdictions. As we have pointed out, particular forms of violence and abuse may be perpetrated against people with disability that target their disability-related needs or exploit negative attitudes toward people with disability. Family and domestic violence legislation often specifies conduct and may give examples of abuse that fall within its scope. But specific forms of violence that target people with disability, such as withholding personal supports or interfering with assistive devices, are rarely expressly mentioned.⁹⁹ Some of these variations in definitions and examples of conduct include:

- The family violence definitions in the *Family Law Act 1975* (Cth) and family violence laws in Western Australia approach family violence under the overarching concept of coercive controlling violence.¹⁰⁰ The Act describes behaviour that is ‘violent, threatening or ... coerces or controls a member of the person’s family’ and provides examples, but does not include any conduct or examples specific to people with disability.¹⁰¹
- In Western Australia, however, evidence of family violence includes evidence of ‘ways in which violence’ is ‘exacerbated by inequities’, including disability.¹⁰²
- In Victoria and the Australian Capital Territory, threatening to withhold a person’s medication is provided as an example of abuse.¹⁰³

Laws providing for protection orders (sometimes known as apprehended, family violence or personal violence orders) also have implications for the types of protections offered to people with disability experiencing family and domestic violence. Where a person with disability experiences violence or abuse in a relationship or setting that does not constitute domestic

or family violence in a particular jurisdiction, they may not be eligible for a domestic violence protection order or its equivalent. Instead, they will be reliant on a personal protection order, which may be more difficult to access, and if it is granted, sometimes provides less protection and support. For example:

- In Victoria and the Australian Capital Territory, the safety of the affected person and children are considered paramount when making the family violence order and setting conditions. There is no equivalent provision for personal protection orders.¹⁰⁴
- In Tasmania, courts and police can make family violence protection orders, but under the domestic violence legislation, this only applies to the person's spouse or partner.¹⁰⁵ Restraint orders may also be sought under the *Justices Act 1959* (Tas), which is not limited to specific relationships.¹⁰⁶ However, more severe penalties are attached to contravention of a family violence protection order.¹⁰⁷
- In New South Wales, the default duration for a domestic violence order for a person aged over 18 is two years, although they can be indefinite. If the court fails to specify, the default period for a personal violence order is one year.¹⁰⁸
- In the Northern Territory, the defendant in a family violence order may be ordered to undertake rehabilitation, but this is not the case for personal protection orders.¹⁰⁹

The terms 'family violence', 'domestic violence' and 'family and domestic violence' are used variously across jurisdictions. The expression 'family and domestic violence' is better suited to encompass the diverse relationships and settings in which violence and abuse occurs, beyond traditional understandings of 'family' and 'home'. The broader term is currently used in some Australian states and territories.¹¹⁰

The absence of a nationally consistent definition of family and domestic violence has direct consequences for the legal protections and supports available to women and girls with disability when they experience family and domestic violence, including in relation to protection orders. The various state and territory definitions may apply in ways that exclude some settings and relationships in which people with disability experience violence and abuse. Inconsistencies and gaps in legal protections for people with disability across Australia contribute to the continuation of violence and abuse. They can also have an impact on authorities' responses to violence and the supports that are made available.

Impacts of reform

The lack of a consistent and inclusive definition in Australian legislation has broad implications for people with disability. It can have an impact on policy, funding and service responses. Ms Frohmader of WWDA said, 'it's the legislation that sets the scope of policy frameworks that then set the scope of funding and service responses'.¹¹¹

At Public hearing 17 (Part 1), Dr Brasch gave evidence that a consistent definition of family and domestic violence would have potential benefits such as:¹¹²

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- improved community understanding of what constitutes family violence, which may assist relevant parties, including survivors, to identify and address violence. This in turn would send a 'national message' about appropriate behaviour.
 - better handling of cross-border matters, including improved transportability and enforcement of orders, evidence gathering, reduced confusion, and reduced legal or court costs.
 - the collection of more robust and comparable incident and prevalence data.

Past calls for reform

Previous inquiries have identified the need for nationally consistent and inclusive definitions of family and domestic violence. These inquiries have examined family and domestic violence laws and responses, and concluded people with disability are not adequately protected by, or included in, family and domestic violence laws.

- The Australian Law Reform Commission and NSW Law Reform Commission report *Family violence – A national legal response* recommended:

State and territory family violence legislation should include examples of emotional and psychological abuse or intimidation and harassment that illustrate conduct that would affect—although not necessarily exclusively—certain vulnerable groups including ... people with disability ...¹¹³
- The 2015 Senate Standing Committee on Community Affairs report *Violence, abuse and neglect against people with disability in institutional and residential settings* recorded that existing domestic violence legislation in most states and territories (except New South Wales) does not recognise residential facilities for people with disability as places that domestic violence may occur.¹¹⁴
- The House Standing Committee on Social Policy and Legal Affairs report on its *Inquiry into family, domestic and sexual violence* noted that 'existing legislation lacks clarity and is inconsistent across jurisdictions'.¹¹⁵ The Committee recorded its 'concerns that current definitions of family, domestic, and sexual violence do not capture the full spectrum of violence suffered by people with disability, including violence in collective accommodation'.¹¹⁶ The report noted the inconsistent inclusion of paid carers and people in residential settings, as pointed out by the Australian Human Rights Commission:

[there is a] lack of clarity around the issue of whether congregate or supported living settings are 'family' or 'domestic'. For example, in both Victoria and New South Wales, 'family violence' includes actions of a paid carer, whereas in Queensland the definition does not include carers acting under a commercial arrangement.¹¹⁷
- The Joint Select Committee on Australia's Family Law System *Improvements in family law proceedings (Second interim report)* recommended legislative consistency and disability awareness training for the judiciary.¹¹⁸

Prior inquiries have also recommended consistency in family and domestic violence legislation, without examining the impact on people with disability specifically.¹¹⁹

In November 2021, the Law Council of Australia released the Model Definition of 'Family Violence' (Model Definition).¹²⁰ It addresses the range of relationships in which family violence occurs in the following manner:

(3) For the purposes of this Act, a family member of a person (the relevant person) also includes any other person whom the relevant person regards or regarded as being like a family member if it is or was reasonable to regard the other person as being like a family member having regard to the circumstances of the relationship, including the following examples—

- (a) the nature of the social and emotional ties between the relevant person and the other person;
- (b) whether the relevant person and the other person live together or relate together in a home environment;
- (c) the reputation of the relationship as being like family in the relevant person's and the other person's community;
- (d) the cultural recognition of the relationship as being like family in the relevant person's or other person's community;
- (e) the duration of the relationship between the relevant person and the other person and the frequency of contact;
- (f) any financial dependence or interdependence between the relevant person or other person;
- (g) any other form of dependence or interdependence between the relevant person and the other person;
- (h) the provision of any responsibility or care, whether paid or unpaid, between the relevant person and the other person;
- (i) the provision of sustenance or support between the relevant person and the other person.

Example

A relationship between a person with a disability and the person's carer may over time have come to approximate the type of relationship that would exist between family members.

(4) For the purposes of subsection (3), in deciding whether a person is a family member of a relevant person the relationship between the persons must be considered in its entirety.¹²¹

The Model Definition recognises that First Nations and culturally and linguistically diverse communities may have a wider concept of family.¹²² It describes a broad range of conduct considered family violence¹²³ and includes disability-specific examples of violence and abuse. These include threatening to, or actually withholding, medication; threatening to withhold essential support; and threatening to institutionalise.¹²⁴

Amending legislative definitions of family and domestic violence

‘Family and domestic violence’, or similar expressions when used in legislation intended to protect people with disability, should be defined broadly. The responses to our *Violence and abuse of people with disability at home issues paper* supported definitions and understandings of family and domestic violence that include:

- disability-specific abuse (for example, deprivation of supports)¹²⁵
- domestic relationships involving support workers, unpaid carers, housemates, co-residents, wider First Nations kinship networks,¹²⁶ and people in all detention settings.¹²⁷

A number of organisations also made submissions recommending family and domestic violence laws across jurisdictions be amended to improve protections for women and girls with disability.¹²⁸

Counsel Assisting submitted any legislative definition of family and domestic violence should cover a wide range of behaviours, including any kind of assault, sexual assault or other sexually abusive behaviour, stalking and emotional, verbal, psychological and economic abuse.¹²⁹ Counsel Assisting also submitted the definition should include a non-exhaustive list of behaviours that reflect the range of ways in which family, domestic and sexual violence can occur for women and girls with disability, such as grooming, coercive control and patterns of behaviour, as well as single incidents.¹³⁰ We accept these submissions.

A similar non-exhaustive list of ‘domestic’ settings, such as group homes and boarding houses, may help ensure a uniform definition responds to the family and domestic violence experienced by people with disability, and particularly women with disability. WWDA, for example, has argued a nationally consistent definition of violence against women should include a broad definition of ‘domestic relationships’ that includes paid and unpaid support workers and co-residents.¹³¹

We consider that the Australian Government and state and territory governments should consult with people with disability and their representative organisations, supporters and advocates regarding the precise form and terminology of definitions. However, the Australian Government and state and territory governments should ensure that any gaps for people with disability, in particular regarding relationships, types of violence and settings in which violence may occur, are addressed.

Recommendation 8.24 Disability-inclusive definition of family and domestic violence

In working towards nationally consistent, inclusive definitions of gender-based violence under the National Plan to End Violence against Women and Children 2022–2032, states and territories should amend their legislative definitions of family and domestic violence to include:

- all relationships in which people with disability experience family and domestic violence, including but not limited to carer and support worker relationships
- disability-based violence and abuse
- all domestic settings, including but not limited to supported accommodation such as group homes, respite centres and boarding houses.

The *Family Law Act 1975* (Cth) and any relevant state and territory laws should also be amended consistently with this recommendation.

Endnotes

- 1 Australian Bureau of Statistics, *Microdata: Personal Safety Survey, 2016*, Results accessed using Australian Bureau of Statistics DataLab, by whether experienced any violence since age 15; by whether has a disability; by sex; by age (18–64).
- 2 Australian Bureau of Statistics, *Microdata: Personal Safety Survey, 2016*, Results accessed using Australian Bureau of Statistics DataLab, by whether experienced any physical assault since age 15, by whether experienced any physical threat since age 15, by whether experienced any sexual assault since age 15, by whether experienced any sexual threat since age 15, by whether experienced any current/previous partner violence since age 15, by whether experienced emotional abuse by current and/or previous partner since age 15, by whether experienced stalking since age 15; by whether has a disability; by sex; by age (18–64).
- 3 Department of Social Services, *Preventing and addressing violence against women and children: consulting on the next National Plan*, slide deck, April 2021, p 3. <engage.dss.gov.au/wp-content/uploads/2021/04/slide-deck-updated-13-april-2021.pdf>
- 4 Department of Social Services, National Plan to End Violence against Women and Children 2022–2032, 2022, pp 12, 27–29. See also Exhibit 17-2.2, ISS.001.00565, p 13.
- 5 Transcript, Patsie Frawley, Public hearing 17 (Part 1), 13 October 2021, P-21 [24–25].
- 6 Transcript, Patsie Frawley, Public hearing 17 (Part 1), 13 October 2021, P-21 [18–19].
- 7 Transcript, Patsie Frawley, Public hearing 17 (Part 1), 13 October 2021, P-21 [20–22].
- 8 Transcript, Thelma Schwartz, Public hearing 17 (Part 1), 13 October 2021, P-22 [20–23].
- 9 Transcript, Patsie Frawley, Public hearing 17 (Part 1), 13 October 2021, P-21 [30–34].
- 10 Transcript, Catherine Dunn, Public hearing 17 (Part 2), 29 March 2022, P-71 [10–14].
- 11 Jenny Morgan, Julie Stubbs, Kristin Diemer, Anastasia Powell, Nikki Honey, Kim Webster, Mayet Costello, Heather Nancarrow & Moksee Leung, for Australia’s National Research Organisation for Women’s Safety, *Australians’ attitudes to violence against women and gender equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)*, Research findings report, March 2018, p 5.
- 12 Jenny Morgan, Julie Stubbs, Kristin Diemer, Anastasia Powell, Nikki Honey, Kim Webster, Mayet Costello, Heather Nancarrow & Moksee Leung, for Australia’s National Research Organisation for Women’s Safety, *Australians’ attitudes to violence against women and gender equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)*, Research findings report, March 2018, p 149.
- 13 Our Watch and Women with Disabilities Victoria, *Changing the landscape: A national resource to prevent violence against women and girls with disabilities*, 2022, p 11.
- 14 Australian Bureau of Statistics, *Microdata: Personal Safety Survey, 2016*, Results accessed using Australian Bureau of Statistics DataLab, by whether experienced any physical assault since age 15, by whether experienced any physical threat since age 15, by whether experienced any sexual assault since age 15, by whether experienced any sexual threat since age 15, by whether experienced any current/previous partner violence since age 15, by whether experienced emotional abuse by current and/or previous partner since age 15, by whether experienced stalking since age 15; by whether has a disability; by sex; by age (18–64).
- 15 Australian Bureau of Statistics, *Microdata: Personal Safety Survey, 2016*, Results accessed using Australian Bureau of Statistics DataLab, by relationship to all perpetrators ever experienced violence; by since age 15 per violence type; by whether has a disability; by sex; by age (18–64).
- 16 Australian Bureau of Statistics, *Microdata: Personal Safety Survey, 2016*, Results accessed using Australian Bureau of Statistics DataLab, by whether experienced violence more than once; by whether has a disability; by sex; by age (18–64).

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- 17 See for example Women With Disabilities Australia, Submission in response to *Violence and abuse of people with disability at home issues paper*, 21 April 2021, ISS.001.00635, p 12; Respect Victoria, Submission in response to *Violence and abuse of people with disability at home issues paper*, 26 February 2021, ISS.001.00571, p 12; Women with Disabilities Victoria, Submission in response to *Violence and abuse of people with disability at home issues paper*, 26 February 2021, ISS.001.00565, p 10; AED Legal Centre, Submission in response to *Violence and abuse of people with disability at home issues paper*, 10 February 2021, ISS.001.00545, p 4; Breakthru, Submission in response to *Violence and abuse of people with disability at home issues paper*, 22 February 2021, ISS.001.00580, p 5; Women's Legal Service NSW, Submission in response to *Violence and abuse of people with disability at home issues paper*, 19 April 2021, ISS.001.00622, p 2 [11].
- 18 Exhibit 17-11.1, 'Statement of Nicole Lee', 16 February 2022, at [3], [11–13], [47], [51–56]; Transcript, Nicole Lee, Public hearing 17 (Part 2), 28 March 2022, P-24 [13–19], P-27 [25–30]; Exhibit 17-19.1, 'Statement of Margaret Burn', 15 March 2022, at [75], [86–87], [138–39]; Transcript, Margaret Burn, Public hearing 17 (Part 2), 30 March 2022, P-147–148.
- 19 Transcript, Kobie Hicks, Public hearing 17 (Part 2), 30 March 2022, P-171 [30–47], P-172 [4–7]; Exhibit 17-20.2, TRA.3000.0005.0073, 'Transcript of audio recording of Kristy Hill', P-2 [43–44].
- 20 Transcript, Patsie Frawley, Public hearing 3, 4 December 2019, P-180 [11–35]; Exhibit 17-7.001, 'Statement of Dr Jacoba Brasch QC', 30 September 2021, at [11].
- 21 Transcript, 'Jennifer', Public hearing 20, 8 December 2021, P-147 [21–39]; Transcript, 'Charlotte', Public hearing 26, 29 August 2022, P-19 [19–49], P-20 [1–46]; Transcript, Eliza, Public hearing 13, 25 May 2021, P-97 [4–47]; Transcript, Sherene Devanesen, Public hearing 3, 5 December 2019, P-293 [11–18], P-297 [2–14]; Transcript, Jane Rosengrave, Public hearing 3, 2 December 2019, P-62 [1–25]; Transcript, Ms Rogers, Public hearing 14, 8 June 2021, P-95 [28–33], P-96 [33–42].
- 22 See for example Exhibit 17-24.2, 'Statement of Chloe', P-4 [15–30]; Transcript, 'Chloe', Public hearing 17 (Part 2), 28 March 2022, P-12 [46–47]; Transcript, Nicole Lee, Public hearing 17 (Part 2), 28 March 2022, P-18–43.
- 23 Exhibit 26-8, 'Statement of Charlotte', Public hearing 26, 7 September 2022, [59]; Name withheld, Submission, 9 April 2021, SUB.100.01302, p 5; Exhibit 17-10.1, 'Statement of 'Chloe'', 14 March 2022, at [16–21]; Private session participant ; Name withheld, Submission, 30 September 2019, SUB.100.00121, pp 7, 12.
- 24 Transcript, Patsie Frawley, Public hearing 3, 4 December 2019, P-180 [25–27], [30–35].
- 25 Carolyn Frohmader, Leanne Dowse & Aminath Didi, for Women With Disabilities Australia, *Preventing violence against women and girls with disabilities: Integrating a human rights perspective*, Think piece document for the development of the National Framework to Prevent Violence Against Women, January 2015, p 17.
- 26 Senate Community Affairs References Committee, Parliament of Australia, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*, November 2015, p 37 [2.68].
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Acronyms and abbreviations

1990 Act – *Mental Health (Forensic Provisions) Act 1990* (NSW)

2020 Act – *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW)

ABI – acquired brain injury

ACCHOs – Aboriginal Community Controlled Health Organisations

ADHD – Attention Deficit Hyperactivity Disorder

AHRC – Australian Human Rights Commission

AIHW – Australian Institute of Health and Welfare

ALSWA – Aboriginal Legal Service of Western Australia

APTOS – Applied Principles and Tables of Support

Banksia Hill – Banksia Hill Detention Centre in Western Australia

BOCSAR – NSW Bureau of Crime Statistics and Research

CAIDS-Q – Child and Adolescent Intellectual Disability Screening Questionnaire

CALD – culturally and linguistically diverse

CAT – Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CEDAW – Convention on the Elimination of All Forms of Discrimination against Women

CEO – Chief Executive Officer

CIDP – Cognitive Impairment Diversion Program

CIDP Evaluation – Cognitive Impairment Diversion Program (CIDP) Final Process Evaluation Report, April 2019

CISP – Court Integrated Services Program

COAG – Council of Australian Governments

CRC – Convention on the Rights of the Child

CRC Committee – Committee on the Rights of the Child

CRPD – Convention on the Rights of Persons with Disabilities

CRPD Committee – United Nations Committee on the Rights of Persons with Disabilities

CSIR – Critical Service Issues Response

DCJ – NSW Department of Communities and Justice

DDA – Disability Discrimination Act 1982 (Cth)

Declaration – Declaration on the Elimination of Violence against Women

DPFEM – Tasmania Department of Police, Fire and Emergency Management

FASD – fetal alcohol spectrum disorder

FDU – Forensic Disability Unit operated by Northern Territory Health

FIST – functional impairment screening tool

GLLOs – Gay and Lesbian Liaison officers

Guiding Principles – Guiding Principles for Corrections in Australia

HASI – Hayes Ability Screening Index

Havana Rules – Rules for the Protection of Juveniles Deprived of their Liberty

ICCs – Integrated Case Coordination Committees

ICCPR – International Covenant on Civil and Political Rights

IDDP – Intellectual Disability Diversion Program

IDRS – Intellectual Disability Rights Service

ITP – Independent Third Persons

ISU – Intensive Support Unit

JAS – Justice Advocacy Service

JAS Evaluation – Evaluation of the Justice Advocacy Service, Final report, February 2021

JLO – Justice Liaison Officer

LGBTIQA+ – lesbian, gay, bisexual, transgender, intersex, queer or questioning, asexual +

National Plan – National Plan to End Violence Against Women and Children 2022–2032

National Principles – National Statement of Principles Relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment

NDDA – National Disability Data Asset

NDIA – National Disability Insurance Agency

NDIS – National Disability Insurance Scheme

Nelson Mandela Rules – United Nations Standard Minimum Rules for the Treatment of Prisoners

Northern Territory Royal Commission – *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*

NPM – National Preventive Mechanism

NSWLRC – New South Wales Law Reform Commission

NT Health – Northern Territory Department of Health

OAM – Medal of the Order of Australia

OPA – Office of the Public Advocate

OPCAT – Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

OPSM – Operating Philosophy and Service Model

PACER – Police, Ambulance and Clinical Early Response

Police responses report – Police responses to people with disability, Report prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021

PSS – Australian Bureau of Statistics 2016 *Personal Safety Survey*

PTSD – post-traumatic stress disorder

SAH – Tasmania Legal Aid's Safe at Home family violence service

SDA – Specialist Disability Accommodation

Senate Committee – Community Affairs References Committee

SIL – Supported Independent Living

SIL funding – NDIS Supported Independent Living funding

TLA – Tasmania Legal Aid

TLRI – Tasmania Law Reform Institute

VCAT – Victorian Civil and Administrative Tribunal

VLRC – Victorian Law Reform Commission

WASC-A – Westerman Aboriginal Symptom Checklist – Adults

WASC-Y – Westerman Aboriginal Symptom Checklist – Youth

Working Group – Working Group on the Treatment of People Unfit to Plead or Found Not Guilty by Reason of Mental Impairment

WWDA – Women With Disabilities Australia

YCO – Youth Custodial Officer



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