

Intersections between mental health and the legal system and the impacts for people and communities

Submission to the Productivity Commission's *Inquiry into the Economic Impact of Mental Ill-Health*

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Executive Summary

Victoria Legal Aid (VLA) welcomes the opportunity to contribute to the Productivity Commission's *Inquiry into the Economic Impacts of Mental Ill-Health*.

We welcome the Commission's consideration of:

*the effect of mental health on people's ability to participate in and prosper in the community and workplace, and the effects it has more generally on our economy and productivity ... [and] how governments across Australia, employers, professional and community groups in healthcare, education, employment, social services, housing and justice can contribute to improving mental health for people of all ages and cultural backgrounds.*¹

We also commend the Commission's framing of its examination of mental health from a participation and productivity perspective as a question of:

*how people can be enabled to reach their potential in life, have purpose and meaning, and contribute to the lives of others ... [which] is good for individuals and for the whole community.*²

Mental health, life and legal issues

Through our work, VLA sees the intersection between people's mental health – and the systems, supports and services that impact on their mental health – with other life and legal issues. For example, we see the way a lack of access to housing, disability services, employment, income support and/or mental health services in the community, can damage people's mental health and undermine their economic and social participation.

These support and service gaps can also contribute to escalating issues, which can include family breakdown, homelessness, criminal offending, loss of income and employment or hospitalisation. Once people have entered crisis-based systems, their exit, reintegration and recovery are again dependent on access to adequate housing and supports in the community.

This submission highlights the stories of eight people whose mental health affected, and was affected by, their housing, employment, family and care of their children, ability to access appropriate treatment and support, and imprisonment. These stories highlight the way in which laws, services and systems can:

- Impact heavily on people experiencing mental health issues.
- Fail to meet the needs of people in ways which promote people's rights and recovery.
- Actively contribute to deterioration in a person's mental health.

The consequences of these system failings lead to reduced life opportunities for people in ways which carry heavy personal, social and economic costs.

Supporting recovery and avoiding high personal and economic costs

Our submission focuses on areas where we see high costs to individuals, the community and the economy, as well as significant potential to improve mental health, support recovery and reduce reliance on costly, ineffective responses including:

- Reducing the impact of justice involvement for people experiencing mental health issues.

¹ Productivity Commission, 'Why the inquiry?' (Submissions Page, 23 April 2019) <<https://www.pc.gov.au/inquiries/current/mental-health#draft>>.

² Productivity Commission, *The Social and Economic Benefits of Improving Mental Health: Productivity Commission Issues Paper* (Issues Paper, January 2019) 1 (**Issues Paper**) <<https://www.pc.gov.au/inquiries/current/mental-health/issues/mental-health-issues.pdf>>.

- Improving responses of the child protection, family law and family violence systems to mental health.
- Strengthening recovery-focussed mental health treatment and services.
- Reforming services and systems that directly impact upon people’s mental health, including housing and evictions, social security, guardianship and administration, and fines.
- Making the National Disability Insurance Scheme work as part of a coordinated, accountable system.
- Reducing discrimination and workplace sexual harassment and promoting inclusion and social participation.
- Recognising the benefits of early access to legal assistance as part of a community-wide response to mental health.

We have also highlighted VLA’s independently evaluated Independent Mental Health Advocacy (**IMHA**) service as an example of an initiative that improves mental health, including through consumer leadership, advocacy and self-advocacy, a regional presence and a commitment to rights and recovery.

We reiterate that consumers – people with lived experience of mental health issues – should shape and have influence over the process and outcomes of the Commission’s Inquiry. This should include processes for consumers to contribute and be heard and ensuring that recommendations and resulting system changes are informed by lived experience.

We are optimistic about the potential of this Inquiry to take a broad look at the way in which our laws, services and systems across sectors can be improved to support people’s mental health, uphold their rights and strengthen our communities.

Relevant reports for the Commission's Inquiry

In a number of parts of this submission, we have referred to previous reports or submissions VLA has prepared, which may be of interest to the Commission in your Inquiry. The following documents are annexed:

- **Annexure 1:** RMIT University, *Evaluation of the Independent Mental Health Advocacy Service (IMHA): Final Report* (November 2018) (**IMHA Evaluation Report**).
- **Annexure 2:** Victoria Legal Aid's *Care Not Custody* report (2016) (**VLA Care Not Custody**).
- **Annexure 3:** Victoria Legal Aid's Submission to the Consultation on the Terms of Reference for the Royal Commission into Victoria's Mental Health System: *Roads to Recovery: 10 themes that must be considered by Victoria's Royal Commission into Mental Health* (January 2019) (**VLA Roads to Recovery**).
- **Annexure 4:** Victoria Legal Aid's Report for the Victorian Ombudsman: *State of Trust: Making sure State Trustees protects and promotes the rights of Victorians with disability* (**VLA State of Trust**).
- **Annexure 5:** Victoria Legal Aid's Submission to the Joint Standing Committee on the National Disability Insurance Scheme's Inquiry into the general issues around the implementation and performance of the NDIS: *The NDIS: Six Priority Issues and Models that are Working Well* (March 2019) (**VLA NDIS Joint Standing Committee Submission**).
- **Annexure 6:** Victoria Legal Aid's Submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces: *Change the culture, change the system: Urgent Action Needed to End Sexual Harassment at Work* (February 2019) (**VLA Sexual Harassment Submission**).
- **Annexure 7:** Power to Prevent Coalition, *Joint Statement: Urgent Actions Needed to Stop Sexual Harassment at Work* (February 2019) (**Power to Prevent Joint Statement**).

These reports and submissions contain detailed recommendations. We have not re-produced the recommendations in this submission, but we would welcome the Commission's consideration of them as part of the Inquiry.

Victoria Legal Aid, mental health and our clients and consumers

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

Our Legal Help telephone line is a resource for all Victorians to seek information, advice and assistance with legal problems. We also deliver specialist non-legal services, including our Family Dispute Resolution Service, Independent Mental Health Advocacy and Independent Family Advocacy and Support, as well as providing community legal education, and contributing to policy and law reform.

Our contribution is informed by our work with clients and consumers experiencing mental health issues, including:

- **Over one-quarter of our clients.** During 2017–18, VLA helped 94,485 unique clients: 26% disclosed having a disability or mental health issue and 11% were in custody, detention or psychiatric care.³ While some of VLA's work is specifically within the mental health system, much of it is VLA's other day-to-day work across summary crime, indictable crime, child protection, family law, family violence, discrimination, social security, migration, tenancy and legal help for people in prison. Other characteristics of VLA's clients that may be of interest to the Commission are set out in the infographic below.
- **Specialist mental health legal practice.** The Mental Health and Disability Law program provides advice and representation to people with a mental health diagnosis or cognitive disability. We work to realise people's rights and autonomy, and to help make sure the justice and health systems operate fairly. In 2017–18, we represented 1046 people before the Victorian Mental Health Tribunal, including 772 matters for people with inpatient treatment orders. We also appeared for clients in 93 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) hearings in the County Court and Supreme Court, as well as at the Forensic Leave Panel for clients on supervision orders seeking access to leave.
- **Non-legal advocates and consumer experts.** The Independent Mental Health Advocacy (IMHA) service, a non-legal advocacy service, supports people who are receiving compulsory mental health treatment to have as much say as possible about their assessment, treatment and recovery. IMHA's *Speaking from Experience* advisory group is made up of people who have lived experience of mental health issues and the public mental health system. IMHA is included in Victoria's *10-Year Mental Health Plan* as a service that will 'strengthen a rights-based framework for the delivery of treatment and support, and help embed person-directed assessment, treatment and recovery as the norm for service delivery'. IMHA has been favourably externally evaluated over three years, providing insights into current issues within the mental health system and the importance of advocacy, as well as mechanisms to ensure coordinated oversight and safeguards.⁴

³ See Victoria Legal Aid, *Annual Report 2017–18* <<https://www.legalaid.vic.gov.au/about-us/our-organisation/annual-report-2017-18>> (**VLA Annual Report**). This includes clients seen by a private practitioner duty lawyer. Unique clients are individual clients who accessed one or more of Victoria Legal Aid's legal services. This does not include people for whom a client-lawyer relationship was not formed, who received telephone, website or in-person information at court or at public counters or participated in community legal education—we do not create an individual client record for these people. Neither does this client count include people assisted by our Independent Mental Health Advocacy service. We note that, because this figure relies on clients disclosing their disability or mental health issue at the time of receiving legal assistance, the actual number of clients experiencing mental health issues is likely to be significantly higher.

⁴ Dr Chris Maylea, et al, 'Evaluation of the Independent Mental Health Advocacy Service (IMHA)' (Final Report, November 2018) (**IMHA Evaluation Report**) (**Annexure 1**).

- **Specialist work in the criminal justice system.** Our Criminal Law program provides specialist support for people whose mental health issues intersect with their criminal law issues. This includes our Therapeutic Courts team, comprising lawyers working in the Assessment and Referral Court (**ARC**) List in the Magistrates' Court,⁵ and our specialist practice with clients who fall under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

Image: VLA's clients in 2017–18⁶



⁵ See also Law and Justice Foundation of New South Wales, 'In Summary: Evaluation of the appropriateness and sustainability of Victoria Legal Aid's Summary Crime Program' (Final Report, June 2017) <<http://www.legalaid.vic.gov.au/about-us/research-and-analysis/summary-crime-evaluation-report>>. This report identified that of 14,591 grants of legal assistance made in the review period, 64% related to family violence, mental ill-health and offending-driven by drug addiction.

⁶ VLA Annual Report (n 3).

1. Reducing the impact of justice involvement for people experiencing mental health issues

Most people experiencing mental health issues are not violent and are not involved in criminal activity. However, people experiencing mental health issues are at greater risk of contact with the justice system and are overrepresented in the prison population. This overrepresentation carries a significant cost to the health and wellbeing of these people and places significant demands on limited public resources through the direct cost of imprisonment⁷ and the indirect consequences of imprisonment on the individual, their families and the community.

There are a number of factors that contribute to this increased risk – ranging from insufficient access to treatment, accommodation and support, to the particular vulnerability of people experiencing mental health conditions when in contact with enforcement and prosecution agencies. For example, people experiencing homelessness and living in public spaces may be subject to additional police surveillance and more likely to receive fines or other enforcement action.⁸ People experiencing mental health issues may also find it more difficult to understand and comply with court orders, such as bail conditions or the conditions of a family violence intervention order, which increases likely contact with criminal justice system.

1.1 Reducing the frequency and intensity of contact with the criminal justice system

In our view, there are some essential steps that must be taken to reduce the frequency and intensity of contact with the criminal justice system for people experiencing mental health issues. These are:

- Improve the mental health support for people experiencing mental health issues in the community.
- Early intervention including more effective and consistent use of discretion by police to divert people away from the justice system where their conduct is connected with their mental health.
- Increased access to therapeutic opportunities for people involved in criminal justice processes, such as community-based treatment conditions and referrals to therapeutic courts.
- Reduced rates of imprisonment for people experiencing mental health issues.
- Increased access to health support, including specialist mental health support, in custodial settings.

In our view, there is strong value in approaches that enable people with mental health conditions to remain in the community where appropriate. Keeping a person in the community gives people a greater chance of remaining connected to supports that are essential to their recovery and wellbeing, including housing, education, employment, health supports provided through the National Disability Insurance Scheme, community and family. There is evidence that people who are sentenced in the community and complete an order are less likely to reoffend than those sentenced to imprisonment.⁹

⁷ Productivity Commission, *Report on Government Services* (January 2019) Table 8A.17. The Council of Australian Governments reports that real net operating expenditure per prisoner per day in Victoria in 2017–18 was \$323.82 while net operating expenditure per Community Corrections offender per day in 2017–18 was \$32.40. Source: Corrections Victoria.

⁸ In 2017–18, VLA provided over 2000 advices on infringements matters, and representation at the Magistrates' Court Special Circumstances List in over 3000 cases for over 2000 clients.

⁹ Of the offenders who were discharged from Community Corrections orders in 2015–16, 13.9% had returned with a new community correctional sanction within two years. Of the prisoners who were released in 2015–16, 43.7% had returned to prison under sentence within two years of release. Source: Corrections Victoria, 'Corrections Statistics: Quick Reference' (2019) <<http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/corrections+statistics+quick+reference>>.

Supporting people to remain in the community also assists to reduce the harsh impact of imprisonment on particular groups in the community, including Aboriginal and Torres Strait Islander people, women and young people.

1.2 Therapeutic responses to offending

Strong benefits have been achieved through the use of therapeutic responses to criminal offending, including for people experiencing mental health issues. The Magistrates' Court of Victoria has a separate Assessment and Referral Court for people with mental health conditions, mental impairments and acquired brain injuries. Therapeutic responses are also available through the Drug Court of Victoria for people with addiction to alcohol and drugs (which can be comorbid with mental health conditions) and through the Neighbourhood Justice Centre. Currently these therapeutic options have limited geographic reach, with little access outside metropolitan Melbourne. This is despite a strong bank of evidence supporting their effectiveness against cost efficiency and outcome measures.¹⁰

1.3 Conditions, treatment and support in custodial settings

Once a person is in the criminal justice system it is more difficult for them to access treatment and support. This can have significant consequences for the management of their mental health condition and can cause instability, longer periods of imprisonment and reoffending. A number of investigations have highlighted the deficiencies in access to mental health treatment and support in Victorian prisons.¹¹ These have direct consequences for a person's rehabilitation and recovery and increase the cost to the community in the longer term, either through further offending, inability to participate in employment, community life and more substantial health and welfare needs once they have transitioned back into the community. This impact was recently noted by the Victorian Ombudsman: 'failure to properly treat a person's mental health condition during their imprisonment will have a significant effect on their rehabilitation and ability to reintegrate into the community'.¹²

The growing offender and prison population in Victoria has added to the challenges of health care and support for people experiencing mental health issues caught up in criminal justice processes.¹³ This ranges from delays in accessing assessment for the purpose of criminal proceedings such as fitness to plead, mental impairment and sentencing which impact the administration of justice and the management of prisons. There are also delays in the assessment and screening for mental health issues when people are received into custodial facilities. For example, a recent report by the Victorian Auditor-General found that there were issues with the timely completion of assessment, planning and service delivery for young people entering detention.¹⁴

There are also delays associated with transfer from prison to hospital for more intensive treatment. Demand for secure treatment facilities currently exceeds the number of available beds. These shortages impact across the criminal justice and forensic mental health systems (whether a person is on remand, sentenced, or found not guilty by reason of mental impairment) and can also result in the

¹⁰ See e.g., KPMG *Evaluation of the Drug Court of Victoria* (2015) <<https://mcv.vic.gov.au/news-and-resources/publications/evaluation-drug-court-victoria>>. Similarly, a recent evaluation of the NSW Drug Court found that it is more cost-effective than prison in reducing the rate of reoffending among offenders whose crime is drug related. See further BOCSAR (2017) *The NSW Drug Court: A re-evaluation of its effectiveness* <<https://www.bocsar.nsw.gov.au/Documents/CJB/cjb121.pdf>>.

¹¹ See e.g., Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015) 6 (**Ombudsman's Prison Report**); Victorian Ombudsman, *Investigation into deaths and harm in custody* (March 2014) 111.

¹² See e.g., Victorian Ombudsman, 'Investigation into the rehabilitation and reintegration of prisoners in Victoria' (Report, September 2015) 6 <<https://www.ombudsman.vic.gov.au/getattachment/5188692a-35b6-411f-907e-3e7704f45e17>> (**Ombudsman's Prison Report**).

¹³ There were 7,666 prisoners in the Victorian prison system on 30 June 2018. This represents an increase of 81.5% on the 30 June 2008 figure of 4,223. Source: Corrections Victoria, 'Corrections Statistics: Quick Reference' (2019) <<http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/corrections+statistics+quick+reference>>.

¹⁴ Victorian Auditor-General's Office, 'Managing Rehabilitation Services in Youth Detention' (Parliamentary Report, August 2018) <<https://www.audit.vic.gov.au/sites/default/files/2018-08/20180808-Youth-Detention.pdf>>.

prolonged detention in prison of people who have been found unfit to be tried. When a person is not able to access support at the level and intensity they require there is an impact on their stabilisation, recovery and wellbeing.¹⁵ It can also have consequences for the system and on the wellbeing and retention of custodial staff. While there has been some recent investment in beds at Thomas Embling Hospital and Dame Phyllis Frost Centre, there remain significant issues servicing the demand that flows into the forensic mental health system.

A further related consequence of the growing prison population in Victoria is the impact of overcrowding on the management of prisoners. Some of the custodial management practices, such as lockdowns and rotations, the use of solitary confinement and irregular access to programs and support can have a direct and harmful impact on people with mental health conditions. While these practices can be especially harmful for people with existing mental health issues, it is also possible that these practices may cause a person to experience a mental health condition for the first time.

¹⁵ See e.g., Victorian Ombudsman, 'Investigation into the imprisonment of a woman found unfit to stand trial' (Report, October 2018) <<https://www.ombudsman.vic.gov.au/News/Media-Releases/imprisonment-of-woman-found-unfit-to-stand-trial>> (**Ombudsman's Report on Imprisonment of a Woman Found Unfit to Stand Trial**). We emphasise that any consideration of additional forensic beds should always be carefully balanced with the need for less restrictive alternatives and access to adequate services in the community.

2. Improving responses of the child protection, family law and family violence systems to mental health

In 2017–18, VLA provided 39,000 people with legal advice for family violence matters and represented just over 37,000 unique clients across family law, family violence and child protection matters.

2.1 Adults engaged with the child protection, family law and family violence systems

Through our work, we see the way mental health is treated in the child protection, family law and family violence systems, including:

- Limited understanding of mental health issues in the child protection system, including people and their parenting capacity being pre-judged or assumed to be low despite mental health issues often being episodic.
- Removal of children or reduction of contact because parents – predominantly women – cannot get access to the mental health supports they need, impacting adversely on parents and children in the short and long term.
- Lack of access to child protection proceedings for people in acute mental health services.
- Parental mental health concerns as one of the key risk factors for children going into out of home care, particularly co-occurring with family violence or substance use.
- A lack of adequate access to appropriate mental health supports and services in the community for both victim survivors and perpetrators of family violence, which contributes to increased risk.
- The way in which involvement with the child protection or family law systems causes significant stress and can contribute to, or exacerbate, mental health issues for people.

Sarah is a client of VLA's new pilot non-legal advocacy and support service, Independent Family Advocacy and Support (**IFAS**). Her story shows the barriers people experiencing mental health issues can face when dealing with the child protection system.

Sarah:¹⁶ Advocacy and support helps mother navigate the child protection system

Sarah is a 46-year old single mother who has five children, three of whom are dependent. Sarah had been the victim of family violence perpetrated by her partner and had developed a safety plan with her family violence worker. She also experienced recurring mental health issues. When hospitalisation was required, she had an arrangement that her adult children and sister provided support and care for the younger children.

In December 2018 child protection services opened an investigation while Sarah was an inpatient at a hospital due to her mental health. A child protection worker spoke with Sarah and requested meetings with her support people and her children. After these meetings, the child protection worker requested that Sarah apply for an IVO against her partner. Sarah did not want to do this as she was concerned that it would escalate the violence.

Sarah was frustrated with child protection services, and it wasn't clear to her what steps she needed to take in order to have the investigation closed.

In February 2019 Sarah was referred to an advocate from VLA's Independent Family Advocacy and Support (**IFAS**) service. The IFAS advocate was able to assist with communication between Sarah and her allocated child protection worker. This included clarifying the support that Sarah had to manage the

¹⁶ Not her real name.

care of the children when she was in hospital and explaining Sarah's concerns about the IVO to child protection services. The advocate was also able to explain to Sarah the outstanding requirements of the investigation, so Sarah could comply with these, including arranging for the family violence safety plan to be provided to child protection services.

Through this advocacy and communication, child protection services were satisfied and the investigation was closed.

Sarah's story highlights the positive impact that a specialist advocate with an understanding of mental health, family violence and child protection can have for individuals, their families and the relevant systems. It highlights the benefits of providing early support with child protection issues to people experiencing mental health issues – including in inpatient units – to help resolve issues that are causing significant stress and presenting an increased risk of family separation.

We encourage the Commission to consider the findings of the Office of the Public Advocate's report regarding disproportionate rates of child protection removals for parents with disability, including mental health issues.¹⁷

We also note that family law proceedings provide a point of intervention to assist families to access mental health services in a time of crisis, but often the necessary mental health supports are not available. This impacts on parenting orders and the likelihood of parents spending time with their children.

We recommend that the Commission considers the impact on parents and children of disproportionate rates of child protection removals, limited access to mental health services for people involved in the child protection, family law or family violence systems and the benefits of meeting people's mental health and parenting needs earlier.

2.2 Young people in the child protection system

Our 2016 report, *Care not Custody: A new approach to keep kids in residential care out of the criminal justice system (Care not Custody) (Annexure 2)* found that more than one in three of VLA's clients aged 11–17 who are placed in out-of-home care subsequently require help with a criminal matter.¹⁸ Bella was one of these clients.

Bella:¹⁹ Young person in residential care charged with smashing a mug

Bella is a young person who was placed in residential care at the age of 12 because her father is not in her life and her mother experiences serious mental health issues. By the time Bella was 15, she was frequently having contact with police and the courts because of her behaviour in the residential care unit.

On one occasion, Bella faced criminal charges for property damage when she smashed a mug that belonged to the residential care unit.

As we stated in *Care not Custody*:

Often ... our clients have had no history of involvement with the criminal justice system prior to their placement in residential care. They do often have a significant history of behavioural

¹⁷ Office of the Public Advocate, 'Report 2: Child Protection' in *Rebuilding the Village: Supporting Families Where a Parent has a Disability* (Report, 2015) <<https://www.publicadvocate.vic.gov.au/our-services/publications-forms/241-rebuilding-the-village-supporting-families-where-a-parent-has-a-disability-report-2-child-protection-2015>>.

¹⁸ Victoria Legal Aid, 'Care not Custody: A new approach to keep kids in residential care out of the criminal justice system' (Report, 2016) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-care-not-custody-report.pdf>> (Annexure 2).

¹⁹ Not her real name.

problems that pre-date and are in many cases the reason for their placement in care. These are usually closely linked to previous trauma and/or other protective issues such as mental health problems, intellectual disability, autism spectrum disorders or substance abuse problems. Predictably, these behavioural issues continue when they are placed in care – with the important difference that they begin to attract criminal sanctions.²⁰

VLA continues to advocate for a new approach to reduce the contact kids in out-of-home care have with the criminal justice system. This is crucial to supporting the mental health of young people in residential care and making sure their futures are not undermined by preventable engagement with the criminal justice system.

The approach, similar to that adopted in NSW and Queensland, should be developed in partnership with residential care providers and police, providing a clear and consistent framework and better training and support for staff in residential care units to help them manage low-level incidents within the unit, without needing to involve police.

²⁰ Ibid 11.

3. Strengthening recovery-focussed mental health treatment and services

VLA's specialist Mental Health and Disability Law (**MHDL**) program and non-legal Independent Mental Health Advocacy (**IMHA**) service work with people facing or subject to compulsory mental health treatment. Through this work, we see a gap between the principles of the *Mental Health Act 2014* (Vic) (**Mental Health Act**) in theory and practice.²¹

Relevantly for the Inquiry, the principles of the Mental Health Act provide that people receiving mental health services 'should be provided those services with the aim of bringing about the best possible therapeutic outcomes and promoting recovery and full participation in community life'.²² They also include a focus on least restrictive assessments and treatment, a preference for voluntary assessment and treatment, supported decision-making, choice and respect for rights, dignity and autonomy.

3.1 Supporting mental health in the community

When there is a breakdown in services in the community – in both mental health and interdependent systems, such as rehabilitation services, housing, drug and alcohol, and the NDIS – people can end up in crisis, and consequently in an inpatient mental health unit or the justice system. People can then also become stuck in these systems, including being indefinitely detained in personally and financially costly environments (for example, in Secure Extended Care Units (**SECUs**) or Victoria's Thomas Embling Hospital), because of a lack of support and services to enable discharge back into the community.

Our staff, clients and consumers identify the limited availability of:

- Care and supports for people after leaving acute inpatient services, including flexible 'step up' and 'step down' options where the service access points are visible and known to consumers so they can take an active role in the direction of their treatment.
- Therapeutic support, supported decision-making, advocates and free legal assistance for people experiencing mental health issues in the community.
- Outreach mental health services tailored to individual consumer needs.
- Treatment and recovery services that respond to the individual needs of consumers, for instance, international research now demonstrating peer workers as effective in supporting consumers' recovery.
- Services for people on Community Treatment Orders, including accessibility for people who work.

We note the Commission's reference to the finding of the 2014 review by the National Mental Health Commission that resources were concentrated in costly acute and crisis care, 'despite evidence that mental health services in community settings can be more effective in preventing pain and suffering, facilitating recovery, and keeping people in the community with their families and participating in employment or education'.²³ We reiterate the ongoing relevance and importance of this finding and also encourage the Commission to consider it in the context of the information we provide below regarding compulsory treatment and inpatient units.

²¹ See VLA's submission to the consultation on the Terms of Reference for the Royal Commission into Victoria's Mental Health System, *Roads to Recovery: 10 themes that must be considered by Victoria's Royal Commission into Mental Health* (January 2019) (**VLA Roads to Recovery**) (**Annexure 3**).

²² *Mental Health Act 2014* (Vic) s 11(b).

²³ Issues Paper (n 2) 12 citing National Mental Health Commission, *Contributing Lives, Thriving Communities: Report of the National Review of Mental Health Programs and Services* (Report, 2014) <<http://www.mentalhealthcommission.gov.au/our-reports/our-national-report-cards/2014-contributing-lives-review.aspx>>.

3.2 Compulsory treatment and inpatient units

We recommend that the Commission considers the impact on people’s mental health, and on their longer-term social and economic participation and engagement, of compulsory treatment and restrictive practices such as seclusion and restraint (noting the rates of this in Victoria relative to other jurisdictions).²⁴

We encourage the Commission to consider the mental health system’s reliance on medication and treatment of symptoms, rather than access to other kinds of therapies and support (and diverse professionals to deliver these), to help address underlying trauma or causes of mental distress, including social issues such as poverty and homelessness. In VLA’s experience, limited resourcing in mental health services can contribute to reliance on compulsory treatment, including medication and restraint, rather than less restrictive options, which promote people’s recovery and autonomy.

Through our work in inpatient units across Victoria, we also see the impact these environments can have on people’s wellbeing and recovery. The Commission should consider the immediate and longer-term costs of the conditions, physical environment, culture, safety and treatment of people who are hospitalised for their diagnosis or experience of a mental health issue or mental distress. For the Commission’s Inquiry, it is also relevant that inpatient services are more costly than providing services in the community.

VLA recently ran a test case, *PBU & NJE v Mental Health Tribunal* [2018] VSC 564 (1 November 2018), which considered how fundamental concepts of capacity and consent are applied when determining whether a person should be subjected to compulsory electroconvulsive treatment (ECT).²⁵ Our client’s comments and the comments of the judge highlight the potential impact of compulsory treatment on people and their recovery, as well as the need to uphold human rights and avoid discriminatory approaches on decisions about treatment.

PBU and NJE: Capacity to consent to or refuse treatment and the impact of this

VLA appealed to the Supreme Court of Victoria on behalf of clients ‘PBU’ and ‘NJE’ to clarify when ECT can happen without a person’s consent. Both had ECT ordered against their will by the Mental Health Tribunal. The Victorian Civil and Administrative Appeals Tribunal (VCAT) authorised those decisions.

NJE was facing 12 ECT sessions – ordered at a hearing where she did not have a lawyer. VLA began representing PBU after he had ECT without his consent in 2017.

Describing the impact of ECT for him, PBU said:

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

²⁴ See Edwina Light et al, ‘Community Treatment Orders in Australia: Rates and Patterns of Use’ (2012) 20(6) *Australasian Psychiatry* 478, 480. Victoria has the highest rate of people subject to CTOs (98.8 per 100,000). This is compared with 61.3 per 100,000 in QLD, 48.6 per 100,000 in WA, 46.4 per 100,000 in NSW, and 30.2 per 100,000 in Tasmania. There was no data available for SA or NT. See also Piers Gooding and Yvette Maker, ‘Why are the rates of restrictive practices in Victoria’s mental health services so high?’ (Article, 2019) <<https://pursuit.unimelb.edu.au/articles/why-are-the-rates-of-restrictive-practices-in-victoria-s-mental-health-services-so-high>>.

²⁵ See Victoria Legal Aid, ‘Landmark judgment strengthens patients’ rights in compulsory electroconvulsive treatment cases’ (2018) <<https://www.legalaid.vic.gov.au/about-us/news/landmark-judgment-strengthens-patients-rights-in-compulsory-electroconvulsive-treatment-cases>>.

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

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

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

'The issue is closely connected with the need to respect the human rights of persons with mental disability by avoiding discriminatory application of the capacity test. More should not be expected of them, explicitly or implicitly, than ordinary patients.' [173]

'When respect is afforded to the choice of the person to consent to or refuse medical treatment, the person is recognised for who they are.' [199]

3.3 Strengthening quality, accountability and the rights-based framework

We encourage the Commission to consider the benefits of investing in cultural drivers that would ensure a rights-based framework in mental health services and quality improvement, accountability and monitoring mechanisms. These could include:

- Development of appropriate systems and oversight, to make sure there is better understanding and implementation of the Mental Health Act and its safeguards, including supported decision-making, least restrictive assessment and treatment and a recovery-focus.
- Embedding consumer leadership and self-advocacy as part of systems and services, including opportunities, funding and support for consumer-led services and programs.²⁶
- Workforce reform and support required for mental health system reform, including the role and availability of peer workforce staff.
- Training and accountability to promote compliance with the Mental Health Act, the United Nations *Convention on the Rights of Persons with Disabilities (CPRD)* and, in Victoria, the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*. For example, IMHA is providing supported decision-making training to all designated mental health services in Victoria. Although evaluation has demonstrated its effectiveness, it is not funded and roll out is limited and slow.
- Including consumer feedback, an assessment of rights protection, and a focus on recovery in evaluations of service effectiveness.
- Access to advocacy and legal assistance for people facing compulsory treatment to promote the principles of choice, recovery and self-determination captured in the Mental Health Act in practice. Data from the Victorian and New South Wales Mental Health Tribunal Annual Reports indicates that legal representation was provided in 15% of hearings in the Victorian Mental Health Tribunal and in 70% of hearings in the NSW Mental Health Tribunal. As the Law Council of Australia has identified, '[I]legal representation for people facing the Mental Health Tribunal can make a noticeable difference to the outcome achieved', noting that the Victorian Mental

²⁶ See, e.g., Independent Mental Health Advocacy, *New resources help consumers speak up and protect their rights* (April 2019) <<https://www.imha.vic.gov.au/about-us/news/new-resources-help-consumers-speak-up-and-protect-their-rights>>.

Health Tribunal approves applications for electro-convulsive treatment in 85% of cases but this approval rate drops to 50% if the person is legally represented.²⁷

- Making data publicly available regarding the mental health system, including data on how many people are subject to compulsory treatment, geographical location, age, gender, cultural background, type and length of order, and complaints. Data is critical to service design, evaluation and consumer choice, and essential to ensure accountability.²⁸
- Recognising the need for tailored, appropriate and culturally safe services for groups within our community, including Aboriginal and Torres Strait Islander people,²⁹ CALD communities,³⁰ LGBTIQ people,³¹ older people,³² women³³ and young people.³⁴ Consideration of the service needs of these priority groups should be informed by engagement with consumers who are members of these communities.

Rights-based, least restrictive treatment has a role to play in people's recovery and longer term social and economic participation. We recommend that the Commission considers the ways in which changes in laws, policies, services and culture can help build a system that supports people's choices and their recovery in ways that enable them to live the best lives they can, as determined by them.

²⁷ Law Council of Australia, 'The Justice Project Final Report: People with Disability' (2018) 60 citing the Victorian Mental Health Tribunal, *Annual Report 2016–17*.

²⁸ See Victorian Government, *Targeting Zero: Supporting the Victorian Hospital System to Eliminate Avoidable Harm and Strengthen Quality of Care: Report of the Review of Hospital Safety and Quality Assurance in Victoria* (Report, 2016) <<https://grattan.edu.au/wp-content/uploads/2016/10/Hospital-Safety-and-Quality-Assurance-in-Victoria.pdf>>. See also Victorian Government, *Better, Safer Care: Delivering a World-Leading Healthcare System* (Report, 2016) <<https://www2.health.vic.gov.au/hospitals-and-health-services/quality-safety-service/hospital-safety-and-quality-review>>.

²⁹ This includes: the importance of cultural competency to ensure cultural safety, responsiveness and inclusive services; an understanding of government policies that have contributed to trauma, such as the over representation of Aboriginal and Torres Strait Islander children in out of home care; the importance of being trauma-informed and the value of cultural strengthening for healing; and the importance of Aboriginal self-determination.

³⁰ This includes accessibility of interpreters, bicultural workers and approaches that engage with community.

³¹ This includes the availability of inclusive and appropriate services for lesbian, gay, bisexual, transgender, gender diverse and intersex members of the community; and preventing the impact of discriminatory service provision on these groups.

³² This includes consideration of the current availability of, and projected need for, mental health services for older people who experience mental health issues and neurological diseases. Also, conditions in aged care psychiatric services (including capacity, use of coercion and rights-based frameworks), particularly in light of Australia's ageing population.

³³ This includes the need for female-only treatment spaces, consistent with trauma-informed practice (noting the Mental Health Complaints Commissioner's recommendation of gender-specific wards). See Mental Health Complaints Commissioner, *Annual Report (2018)* 45, 49 and 51, which recommends: Gender-sensitive and trauma-informed practice; piloting and evaluating single-gender units, prioritising the piloting of women-only units; and support services to implement trauma-informed care and supported decision making as primary prevention strategies to prevent sexual safety breaches.

³⁴ This includes: continuity of access to services for young people who turn 21, recognising the impact of being cut off from youth services without adult services or case management planned; the need for more flexible transition processes (recognising the differential funding levels for adult and youth services, and the experience of service drop-off when adulthood comes); access to mental health services for young people in state care to prevent homelessness and engagement with the youth justice, and later adult criminal justice, systems.

4. Reforming services and systems that directly impact people's mental health

In addition to accessible mental health services in the community, designed with the needs of people at the centre, we can strengthen mental health through reducing homelessness, poverty and the stress and hardship caused by overwhelming fines and debts and lack of stable housing.

4.1 Housing and evictions

In 2017–18, 5% of VLA's clients reported experiencing homelessness. Through our work with clients experiencing or at risk of homelessness, we see the impact of housing instability and homelessness on people's mental health treatment and recovery. This includes people being discharged from hospital into rooming houses or onto the streets, and the risk of readmission into hospital that this presents.

As discussed above, we also see people being unable to be discharged from inpatient units or released from prison because of a lack of housing, leading to prolonged detention that negatively impacts their long-term wellbeing and recovery.

In 2017–18, VLA's tenancy assistance included: 4,296 information services; 2,372 advices; 79 casework files; and 301 appearances at the Victorian Civil and Administrative Tribunal. Through this work, we see:

- The challenges people experiencing mental health issues face in getting safe, affordable housing, including because of low incomes, discrimination and an acute shortage of affordable housing.
- The risk of eviction into homelessness for conduct directly related to a person's mental health and the costs that come with this.³⁵
- The impact on a person's mental health of homelessness or a risk to their housing.

Lydia's story highlights the two-way relationship: Lydia's hoarding – directly related to her mental health – placed her at risk of eviction; and the stress of facing eviction exacerbated her mental health issues.

Lydia:³⁶ Threat of eviction for hoarding behaviours

Lydia is a 53-year-old woman living in a property managed by a social housing provider in suburban Melbourne. She identifies as Aboriginal and regularly travels to regional Victoria to help care for her ageing parents. Lydia has had some involvement with the criminal justice system and has spent some time in prison. She has been a victim of severe family violence.

Lydia has been affected by complex trauma and this manifests in hoarding behaviours. This has caused issues throughout her 12-year tenancy. Her relationships with some of the other occupants of the apartment building have broken down and they complain frequently to the housing provider about Lydia's hoarding. The housing provider has issued Lydia with numerous breach of duty notices over the years, and has applied to VCAT for possession of the property on multiple occasions. Lydia has managed to defend many of these eviction applications and there have been negotiations with respect to others, such that she has been able to remain in the property until now.

³⁵ In 2011, the Victorian Department of Health and Human Services estimated that it costs around \$34,000 in publicly funded support services to rehouse someone following eviction from public housing. Victorian Department of Human Services, *Human Services: The Case for Change* (Report, 2011) 12 <https://www.thelookout.org.au/sites/default/files/1_iwas_human_services_case_for_change_0412.pdf>.

³⁶ Not her real name.

In 2018 Lydia was again issued with breach of duty notices and a new application was made to evict Lydia from the property.

Lydia sought VLA's assistance with opposing the application for possession of the property. Lydia's mental health was adversely affected by the proceedings – her mental health is inextricably entwined with her housing, and a threat to the one is a threat to the other. Her hoarding behaviours increased due to the stress, despite her best efforts, including consistent therapeutic engagement.

For the moment, the VCAT proceedings are adjourned indefinitely while VLA attempts to negotiate an appropriate outcome with the housing provider. Lydia is, however, overwhelmed by the knowledge that the proceedings could recommence at any time, and she could again face the threat of eviction into homelessness due to compulsions she has been unable to control.

Lydia's case highlights that community and public housing providers continue to resort to eviction as the mechanism for managing tenants with complex behaviours directly linked to their mental health.

While acknowledging the challenges of landlords and the competing obligations social landlords face managing multiple tenants, it is vital that we build a legal and services system that makes eviction for conduct related to a person's mental health a last resort. In the current housing environment, long waiting lists for social housing and an unaffordable private rental market mean homelessness is almost inevitable for low income people after eviction. Given the personal and economic costs of homelessness are well-known, legal protections, alternatives to eviction and effective tenancy sustainment programs must be prioritised.

In addition to sustaining existing tenancies, it is crucial that all levels of government invest in increasing the supply of social housing and supports for people experiencing mental health issues. Safe, affordable housing is a critical foundation for improving health, supporting mental health, keeping families together, avoiding offending and promoting social and economic participation.³⁷

4.2 Poverty and social security

Recent years have seen a widening gap between the Disability Support Pension (**DSP**) and Newstart Allowance, and significant hurdles to qualification for the DSP.³⁸ These include changes to the impairment tables setting out DSP qualification criteria, and the burden of 'program of support' requirements. In addition to lack of access to an adequate income, people are burdened by the approach Centrelink takes to pursuing people for alleged overpayments.

Since January 2017, we have provided over 500 legal services to people affected by Centrelink's Online Compliance Initiative, also known as 'robo-debt'.

The scale of robo-debt is immense with 927,000 initial assessment letters being sent and 445,000 debts being raised between July 2016 to December 2018.³⁹ Centrelink does not disclose how many people challenge the debts, but they have reported that approximately 77,500 robo-debts were changed or written off when people challenged them.

³⁷ See *Everybody's Home* (2018) <<https://everybodyshome.com.au/>>.

³⁸ See e.g. 'Over several years, governments have tightened DSP eligibility requirements ... Successful [DSP] claims have dropped from 63 per cent in 2010 to just 25 per cent in 2015'. Australian Council of Social Service, 'Disability Support Pension cuts bad news for people affected' (21 February 2018) <https://www.acoss.org.au/media_release/disability-support-pension-cuts-bad-news-for-people-affected/>

³⁹ See e.g., Shalailah Medhora, 'More than 77,500 Centrelink robo-debts have been reduced or waived' (28 March 2019) <<https://www.abc.net.au/triplej/programs/hack/more-than-77500-centrelink-robodebts-waived-or-reduced/10948942>>.

The legal and community sectors have expressed significant and sustained concern about the accuracy and the lawfulness of the robo-debt process and its impact on Australians who receive – or have previously received – social security.⁴⁰

The process to try to resolve a robo-debt can be complex and overwhelming. The most disadvantaged people in the community will face the most difficulty trying to navigate the complex system and are most likely to give up and accept the alleged debt.

We know from what our clients tell us that suddenly being told they owe a significant debt, and having to spend large amounts of time and energy to disprove it, is causing pain and hardship. One client said, 'I was an emotional and physical wreck' and 'I didn't want to get up and face the day'. People have reported taking time off work to try to resolve their debt or because of the stress. Parents talk about not being able to afford uniforms for their children because their income has been reduced to pay an alleged debt.

In our view, the robo-debt initiative actively undermines community mental health. The policy constitutes a hasty and poorly designed reform that has not worked as intended. It is costly for government to implement and it continues to impose an enormous personal toll. Its overhaul is vital to improving the mental health and social and economic participation of past and current recipients of social security.

4.3 Guardianship and administration

The appointment of a guardian or administrator to manage a person's health, lifestyle, legal or financial decisions involves a significant restriction on a person's right to autonomy and to make their own decisions about their affairs. It has far reaching effects on a person's day-to-day life and, for our clients who also experience social and financial disadvantage, it can be particularly disempowering.

In the 2017–18 financial year we provided nearly 500 advices to over 250 individual clients about administration orders; and legal information about administration orders in over 300 cases. In 2018, we prepared a report for the Victorian Ombudsman, *State of Trust: Making sure State Trustees protects and promotes the rights of Victorians with disability (State of Trust) (Annexure 4)*.⁴¹

The report contains 12 client stories that highlight the ways in which our clients were prevented from participating in activities or spending their funds in ways that they enjoy and contribute to their quality of life.

We encourage the Commission to consider the impact of guardianship and administration regimes on the rights, autonomy and recovery of people experiencing mental health issues, and the potentially limiting role this can have for social and economic participation. State of Trust highlights the system's current failure to build the capacity of people experiencing mental health issues to manage their own finances and lives. It also contains detailed recommendations aimed at promoting the rights, autonomy and independence of people with disability, including mental health issues.

⁴⁰ See e.g., list of submissions and appearances at public hearings for the Senate Standing Committee on Community Affairs, 'Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative' (June 2017)

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/SocialWelfareSystem/Report>.

⁴¹ See e.g., Victoria Legal Aid, 'State of Trust: Making sure State Trustees protects and promotes the rights of Victorians with disability' (Report, September 2018) <<http://www.legalaid.vic.gov.au/about-us/news/our-report-for-victorian-ombudsmans-investigation-into-state-trustees>> (Annexure 4).

4.4 Fines

People experiencing mental health issues can be at greater risk of receiving fines for a range of sometimes co-existing reasons. These can include the impact of mental health issues on a person's decision-making or an inability to comply with requirements for other socio-economic reasons (for example, committing public space offences while experiencing homelessness or being unable to afford a public transport ticket). In addition to increasing a person's risk of receiving fines, mental health issues can also impact upon a person's capacity to pay a fine and to navigate the complex process required to address the infringement.⁴² When people receive multiple fines, which they are unable to pay and face enforcement action for, the overwhelming financial and legal burden can contribute to or exacerbate mental health issues.

As the NSW Law and Justice Foundation recently identified, without proactive assistance, fines systems, including the fines which arise from infringements, uniquely perpetuate and exacerbate a 'vicious cycle' of disadvantage that people with disability (and other particular communities) already experience.⁴³

The NSW Law and Justice Foundation also found that 'when disadvantaged people do get appropriate assistance for their fines problems, they achieve outcomes on par with others' (see also part 7 below).⁴⁴

The Commission should consider the way in which communities can avoid overwhelming fines debt causing or exacerbating mental health issues for people. In addition to well-designed systems that allow people to exit the infringements system efficiently, it is vital that we continue to work toward reducing the number of infringements issued to people for conduct directly related to their experience of mental health issues (including ongoing training for enforcement officers such as police and public transport officers).

⁴² See e.g., Victoria Legal Aid, 'Vulnerable People and Fines' (Position Paper, 2013)

<<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-vulnerable-people-and-fines-position-paper.doc>>.

⁴³ Law and Justice Foundation of New South Wales, 'Fines: Are Disadvantaged People at a Disadvantage?' (Issues Paper, 2018) 19 <<http://www.lawfoundation.net.au/ljf/app/&id=D5D375991CE8E1B68525823A000641F4>>.

⁴⁴ Ibid 1.

5. Making the National Disability Insurance Scheme work as part of a coordinated, accountable system

We appreciate the Commission's previous reviews of the NDIS and that this Inquiry is limited to the interface between the NDIS and other services for those experiencing mental health issues, and any new developments which have significant implications for population mental health, participation and productivity.⁴⁵

With this in mind, we refer the Commission to a recent submission VLA made to the Joint Standing Committee on the National Disability Insurance Scheme's Inquiry into general issues around the implementation and performance of the NDIS, *The NDIS: Six priority issues and models that are working well (VLA NDIS Joint Standing Committee Submission) (Annexure 5)*.⁴⁶

5.1 Priority NDIS issues VLA is seeing through our work

The VLA NDIS Joint Standing Committee Submission identifies the following issues related to the NDIS's interface with other services, and other issues that have implications for people's mental health, participation and productivity:

1. 'Market failure' or 'thin markets', which mean people are not able to access services and supports they are funded to receive. This is particularly acute for people engaged with the justice system and people with complex needs.
2. Plans and supports that do not adequately meet people's needs and the implications this has for their community engagement and participation.
3. The unhelpful tension that continues to emerge between the NDIA and State and Territory funded services, meaning that people are falling through the gaps. One clear example of this is where it cannot be agreed whether supports relate to a person's disability needs or to their offending, so agreement cannot be reached on the agency responsible for the provision of services.
4. Failing to update the *Operational Guideline on Transport* in response to the Federal Court decision in *McGarrigle v National Disability Insurance Agency* [2017] FCA 308, which means the NDIA is continuing to apply a policy that the Federal Court of Australia has found does not comply with the *National Disability Insurance Scheme Act 2013* (Cth). In practical terms, this is limiting people's ability to access transport essential for economic and social participation.
5. Ongoing challenges with discharge and release planning for people in prisons or inpatient units. This includes delays and lack of accountability in relation to access requests. In the absence of proactive discharge and pre-release planning, discharge or release can be (a) delayed, causing people to be stuck in prison or inpatient units; or (b) ineffective, because poor planning means a person exits with inadequate supports and is more vulnerable to re-offending or readmission.
6. The importance of the NDIA conducting itself as a model litigant in the Administrative Appeals Tribunal (**AAT**), including the requirements to deal with claims promptly and not cause unnecessary delay, limit the scope of legal proceedings wherever possible, for example through considering alternative dispute resolution and offers of settlement and making early assessments of prospects of success.⁴⁷ The failure to comply with these obligations creates a burden on both individuals and the legal system and undermines the efficient functioning of the NDIS.

⁴⁵ Issues Paper (n 2) 4.

⁴⁶ VLA has recently worked on a joint briefing paper with the Australian Federation of Disability Organisations and Victoria's Office of the Public Advocate on the interactions between the justice system and the NDIS. The paper, which will be published shortly, sets out current challenges, successful examples and detailed suggestions for system improvement, informed by the practice of our respective organisations at the interface of disability and justice.

⁴⁷ Appendix B to the Legal Services Directions 2017, made under s 55ZF of the *Judiciary Act 1903* (Cth) (**Model Litigant Guidelines**).

The VLA NDIS Joint Standing Committee Submission provides a more detailed snapshot of issues we are encountering with the NDIS that continue to impact the health, wellbeing, family, housing, independence and dignity of people with psychosocial disability. In addition, it highlights models that are working well in the hope that these models can be invested in, maintained and replicated.

5.2 The NDIS, mental health and the personal and economic costs of the justice system

We are particularly aware of the implications of the NDIS for people's contact with the justice system. This includes:

- Inability to get bail or parole because of a lack of housing or supports for people in the community and the impact imprisonment can have on people's ability to recover, reintegrate and engage socially and economically. For example, in our client Francis's case, in granting him bail after he had spent 180 days in jail because his NDIS accommodation and supports failed, Justice Lasry said:

*He's in 23-hour lockdown at Melbourne Assessment Prison. I can't imagine a worse place for him. The longer he is there the more he will be damaged. Who knows what damage has been done already?*⁴⁸

- Preventable offending or re-offending contributed to by a lack of adequate NDIS funded supports.

Each of these issues, together with the difficult interface between the NDIS and the housing and justice systems, are highlighted through John's story below.

John:⁴⁹ The costly maze of NDIS, housing and the justice system

John has an ABI and schizophrenia, and his disabilities have contributed to past substance abuse, lack of employment, and limited community engagement. He has a history of offending, most commonly at the lower level. His disabilities have a significant impact on John's everyday functioning. His housing has been unstable, and his behaviours of concern make his housing options limited. John has been most successful in retaining accommodation and reducing recidivism when he has received consistent supports both at his accommodation and during outreach.

NDIS-funded supports and offending

John's NDIS plan initially included only nine hours per week of core supports for him, which were largely absorbed by taking John to and from multiple weekly appointments. This meant that John's support provider did not provide support for John to engage in daily activities of his choice, or provide opportunities for him to be active and safe in the community.

With these more limited supports, John committed further offences and was taken into custody.

Cycling in and out of court and prison

⁴⁸ Emma Younger, 'Man with Intellectual Disability released from Melbourne prison after Judge 'horrified' by conditions' (News Article, 2017) <<https://www.abc.net.au/news/2017-11-24/judge-releases-man-with-autism-from-melbourne-jail/9186352>>. See also, 7.30 Report, 'Emergency Intervention Removes Disabled Young Man from Prison' (News Article, 2017) <<https://www.abc.net.au/7.30/emergency-intervention-removes-disabled-young-man/9135942>>.

⁴⁹ Not his real name.

After being taken into custody, John appeared before the Magistrates' Court. At the same time, he became homeless. John's NDIS providers did not attend Court to provide information about John's needs or what services they provided to him. John was provided short term accommodation for four nights at a motel and he was bailed to this address.

In the context of this instability, John was remanded again. He had failed to attend his next Court date and spent the weeks between hearings on the streets, in emergency departments or at his father's house in breach of a current IVO.

John cycled repeatedly in and out of custody with individual nights of accommodation being obtained in emergency situations.

After re-entering custody, John remained in custody on remand for seven months, and applications for bail for John were adjourned and then withdrawn because of the absence of suitable accommodation in the context of his minimal supports. Community housing providers and the Victorian DHHS could put John on their waiting lists, but these lists did not guarantee housing and it was also recognised that this housing was unlikely to be sustainable for John without intensive daily support.

Escalation to Victoria's Intensive Support Team

VLA had been unsuccessful in encouraging John's support coordinator to push for a review of John's plan in light of his crisis situation and the inadequacy of his funded supports in meeting his needs.

VLA escalated John's case to the DHHS Intensive Support Team in Victoria. This team began working in a coordinated way with the multiple people and organisations engaged with John. The team liaised with VLA to progress accommodation and support options with reference to the criminal trial process timing, bail hearings, upcoming mentions in the matter and effectively 'stepped in' for a period of time to provide a central, coordinating, and solution-focussed role at the justice interface.

The benefits of expert planning and coordination

John's existing plan was ultimately considered by a new specialist support coordinator with established expertise working with people with complex needs.

This support coordinator worked with a Victorian Supported Residential Service to identify a creative accommodation solution which would see John share a two-bedroom unit with a previous co-resident who he had maintained a good relationship with. The Supported Residential Service advised that it could not work with John if his funded supports remained minimal, but were happy to hold this accommodation to allow the pre-release planning to occur.

As John's hearing date and potential release from custody approached, there were significant delays from the NDIA in relation to John's plan review and difficulty maintaining communication.

The Magistrate indicated she would be satisfied that John had spent sufficient time in custody in relation to his offences, but would only release him if appropriate supports were in place. The Supported Residential Service also indicated that they could not hold John's housing indefinitely if the support was not confirmed so his housing option was also at risk.

Tension between NDIA and mainstream services

A new NDIS planner was allocated to John's case just before his hearing date and indicated a further three months would be needed to assess the information and make an informed decision.

This planner also raised concerns regarding the references in evidence to both John's offending and his disability support needs. There was some indication that funding for supports to meet John's complex needs might be refused because of their relationship with reducing his risk of re-offending (because this was seen as a justice issue).

VLA again escalated John's case with the DHHS Intensive Support Team, noting that John was facing further unnecessary time in custody if his pre-release planning was delayed. The Intensive Support Team contacted the NDIA and arranged for the planning to be promptly undertaken.

VLA lawyers worked with the Court and prosecution to obtain a new hearing date for the matter. The plan review was completed and John's supports were increased to provide 24/7 support for him in his home. These supports made the shared accommodation option feasible for John in circumstances where previously his disability had made shared accommodation options impossible to maintain.

The need for a plan review in order to build a sustainable post-release package of supports for John had taken 10 months to resolve. For the majority of this time, John had been in custody.

As John's case shows, a common theme that arises across VLA's work with people who are – or should be – engaged with the NDIS is the lack of systemic coordination i.e. no one agency or worker is responsible for a person's matter and for navigating the system, particularly for people who face additional barriers to doing that themselves. Similarly, with what we observe is working well, the common factor is skilled coordination by someone with a strong knowledge of the system.

Victoria's Intensive Support Team is an example of this.

Victorian State-based Intensive Support Team: An expert coordination service

Victoria's Intensive Support Team is a model that has been largely successful when VLA has escalated clients in crisis to it. The Intensive Support Team's role has included triage, coordination and problem-solving, most commonly for clients involved in the justice system.

As John's case (above) highlighted, this model adds accountability and whole-of-government (State and NDIA) coordination into the system and enhances the skills of the multiple bodies engaging with the person.

It is not clear whether this service will continue post-transition and, in our view, it should (whether resourced and coordinated at the State or Federal level).

We also note that this mechanism continues to be ad hoc, based on case-by-case escalation. We reiterate that a systematised and efficient approach for people with complex needs at the interface NDIS and mainstream systems needs to be put in place and promoted.

5.3 Improving the NDIS's impact on people's mental health

Key changes that will improve the ability of the NDIS to function as part of a system – including interfacing with health, housing and justice services – that strengthens people's mental health, participation and productivity include:

- Well-designed and funded mechanisms for coordination and accountability to ensure people, particularly people with complex needs, have:
 - plans that fund services that adequately and appropriately meet their needs;
 - skilled and experienced support coordinators to problem-solve cases, navigate systems and think creatively about supports (not just as an introductory requirement); and
 - assured access to their funded supports.⁵⁰

It is crucial that we avoid the NDIS becoming a two-tiered system that only meets the needs of those best able to navigate the market it creates.

- Clear processes for planning for a person's release before their sentence is complete or discharge is imminent so that supports are in place to facilitate successful discharge or release and reduce risk of reoffending or readmission. This may require the funding of supports for transition prior to release.
- A system-wide approach to issues arising at the interface between the NDIS and mainstream services. Clear pathways and principles for resolution of these inevitable issues should be developed to make sure that it is government agencies – not NDIS participants – that are working to join up multiple regimes.

The NDIS is a potential source of optimism and may be able to meet the support needs of people with psychosocial disability to strengthen their ability to contribute to their communities and the economy. In its current form, however, it has added another layer to an already complex system, and in some cases is exacerbating rather than resolving problems.

At its worst, the transition to the NDIS is part of a system that is having long-term negative impacts on people's mental health and wellbeing. People have lost access to services they previously had and are subjected to assessment processes that are stressful and damaging. Without the services and supports they need to live well and independently, people are spending protracted periods in prison or mental health units and facing homelessness and family breakdown. The immediate and long-term harm being caused, and the impact this has on people's social and economic participation now and into the future, should be the subject of the Commission's further consideration.

⁵⁰ The Joint Standing Committee on the NDIS's *Market Readiness Report* recommended that 'the NDIA publicly release the outcomes of the Maintaining Critical Supports project and its policy on provider of last resort (PLR) arrangements as a matter of urgency' (Recommendation 24) in September 2018. This was the third time that Committee has highlighted that the publication and implementation of a PLR arrangement (or similar framework) is necessary. See Joint Standing Committee on the NDIS, *Report on Transition Arrangements for the NDIS* (2018) and *Report on Provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition* (2017); Productivity Commission, *National Disability Insurance Scheme – Costs* (2017) 36; Australian National Audit Office, *National Disability Insurance Scheme—Management of the Transition of the Disability Services Market* (2016–2017) 27; McKinsey & Company, *Independent Pricing Review, Final Report* (2018) (see especially 59 onwards). For more information on VLA's recommendations regarding market failure see Victoria Legal Aid, *Explainer – the NDIS and the need for a provider of last resort* (2017) <<https://www.legalaid.vic.gov.au/about-us/news/explainer-ndis-and-need-for-provider-of-last-resort>>.

6. Reducing discrimination and workplace sexual harassment and promoting inclusion and social participation

Victoria Legal Aid's Equality Law Program provides advice and representation to clients who suffer discrimination, sexual harassment, victimisation and vilification in all areas of public life, including employment. We represent clients with complaints of discrimination and sexual harassment in various state and federal jurisdictions.

In the last five years, the VLA Equality Law Program has provided over 6,500 legal advices regarding discrimination matters, including 994 advices about sexual harassment and sex discrimination. By helping people seek redress for discrimination and sexual harassment, we seek to promote equality and reduce disadvantage in the community.

The most common area in which we provide advice and assistance is to clients experiencing discrimination in employment. In particular, we regularly advise clients facing discrimination on the basis of a disability, including mental health issues.⁵¹ Frequently these clients face barriers to workforce participation both when applying for jobs and during their employment. Many are dismissed for a discriminatory reason.

6.1 The personal, social and financial costs of discrimination

Discrimination is a significant public health issue that causes psychological harm to large numbers of people in our community and prevents their full participation in public life. Its prevalence and damaging effects are well documented. Studies have shown that experiencing discrimination can cause stress and anxiety and increase the risk of mental health problems, as well as lead to other forms of social disadvantage, such as unemployment, poor education and social isolation,⁵² and an increased risk of physical illness.⁵³

Discrimination is a legal problem that reflects and compounds socioeconomic disadvantage: it is more often experienced by poorer people, particularly people on government payments,⁵⁴ and it causes multiple adverse impacts, such as physical and stress related illness, relationship breakdown, having to move home and significant financial hardship.⁵⁵ Further, there is a stronger link between discrimination and poor wellbeing among more disadvantaged groups than among those who are relatively advantaged.⁵⁶

⁵¹ See also VLA's work regarding the discrimination faced by people experiencing mental health issues, including in employment, service provision and education. See e.g., VLA's cases *Ella Ingram v QBE Insurance (Australia) Ltd* [2015] VCAT No H107/2014 (18 December 2015) regarding discrimination by insurance companies in relation to mental health issues; and *Slattery v Manningham CC* (Human Rights) [2013] VCAT 1869 regarding mental health discrimination by a council.

⁵² See M Kelaher et al, 'Discrimination and Health in an English Study' (2008) 66(7) *Social Science and Medicine* 1627–36; AD Otiniano and GC Gee, 'Self-Reported Discrimination and Health-Related Quality of Life among Whites, Blacks, Mexicans and Central Americans' (2012) 14(2) *Immigration Minor Health* 189–97; CA Okechukwu et al, 'Discrimination, Harassment, Abuse and Bullying in the Workplace: Contribution of Workplace Injustice to Occupational Health Disparities' (2013) 57(5) *American Journal of Industrial Medicine* 578–9.

⁵³ Richard Delgado, 'Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling' in Mari J Matsuda (ed), *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendments* (New York: Routledge, 2018) 89, 92–3.

⁵⁴ Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey: Legal Need in Victoria* (Report, 2012) 27, 85 <[http://www.lawfoundation.net.au/ljf/site/templates/LAW_Vic/\\$file/LAW_Survey_Vic.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_Vic/$file/LAW_Survey_Vic.pdf)> (**LAW Survey**).

⁵⁵ *Ibid* 172.

⁵⁶ Michael T Schmitt et al, 'The Consequences of Perceived Discrimination for Psychological Well-Being: A Meta-Analysis' (2014) 140(4) *Psychological Bulletin* 2, 10.

6.2 Barriers to effective protection from discrimination

Our clients' experiences highlight two key barriers to Australia's discrimination laws providing effective protection from discrimination:

1. The reliance on individuals to enforce their rights, and the difficulties individuals face in proving discrimination.
2. The limited scope of the legal protection from discrimination, and the lack of any positive obligation on duty holders to prevent discrimination.

As a result of these system flaws there is a lack of any significant consequences for employers that discriminate against employees or fail to prevent such discrimination. This in turn leads to low levels of compliance with discrimination laws and a lack of impetus for cultural change to promote inclusiveness and equality for people with a mental health issue.

We have recently made detailed recommendations about how to reform our approach to preventing and addressing sexual harassment in Australian workplaces. Many of these recommendations are equally applicable with respect to other forms of discrimination, and all are relevant to this Inquiry given that people with a disability are at heightened risk of experiencing sexual harassment and sexual harassment itself often causes psychological harm. We have summarised our key recommendations below.

6.3 Preventing and addressing the mental health impact of sexual harassment in the workplace

To promote mentally healthy workplaces, we need a better, stronger way to support victims of sexual harassment and prevent it from occurring in the first place. As the system stands, unaddressed or inadequately addressed sexual harassment in Australian workplaces is stopping women reaching their full potential. It is causing women harm personally and professionally. It is damaging their mental health, their relationships and their futures. We consider that if effective action is taken to prevent and respond to sexual harassment it will benefit all Australians by preventing poor mental health outcomes and improving workplace safety and participation.

Over the past three years, 252 people have sought assistance from VLA's Equality Law Program specifically in relation to workplace sexual harassment. Of these people:

- The majority – 83% – were women.
- Approximately 50% were between the ages of 25 and 34 years of age.
- 36% were born overseas.
- Almost 30% disclosed having a disability with the vast majority of these clients (78%) experiencing mental health issues. While we do not have data that demonstrates whether our clients were experiencing mental health issues at the time of their experiences of sexual harassment, in practice, many clients experience mental health impacts as a result of being sexually harassed.

Sexual harassment causes significant harm to individuals and their mental health.⁵⁷ People who experience sexual harassment along with other forms of discrimination can have their experiences compounded and the impacts on them can therefore be significant, as our client Choe⁵⁸ explained:

The interplay of bullying, sexual harassment and the subsequent impact this had on my health resulted in a debilitating post-traumatic stress disorder and other related ill health that affects every facet of my life. After 25-years as a confident successful career woman, my health, personal life and career have all been impacted. I've gone from someone who wouldn't think twice of travelling solo around the world to someone who fears walking down my own street after dark.

*Situations like mine would occur less in the workplace if companies, management and employees were made more accountable for harassment, homophobia and bullying. The stigma, methods and systems associated with raising complaints doesn't work to protect injured workers, it only causes more damage to workers' health.*⁵⁹

From our practice experience we see that sexual harassment has ongoing impacts on victims in various aspects of their life including an impact on financial security, mental and physical health, job security and the victim's relationships at work and in their family. In many cases of sexual harassment, the impacts can be significant and long lasting.

Sexual harassment can have a major impact on a person's ability to participate in the workforce. Individuals who are sexually harassed often decide to resign from their work due to feeling unsupported or because they face workplace exclusion. For example, we have seen clients who have experienced sexual harassment not receive further shifts, or experience social isolation from colleagues, or need time off work due to the impacts of the sexual harassment on their health.

We worked closely with our clients and other stakeholders across diverse sectors, to make recommendations to the AHRC's national inquiry into sexual harassment. Our submission, *Change the culture, change the system: urgent action needed to end sexual harassment at work (VLA Sexual Harassment Submission)* (**Annexure 6**) highlights the systemic failures of our laws, culture and complaints system to prevent sexual harassment and proposes a range of solutions to address these issues.⁶⁰

We also joined with over 100 stakeholders from across the legal, health, community, family violence and union sectors to reach a consistent, constructive position about the changes required to create sexual harassment-free workplaces. The Joint Statement, *Power to Prevent: Urgent Actions Needed to Stop Sexual Harassment at Work* (**Power to Prevent Joint Statement**) is at **Annexure 7**.⁶¹

⁵⁷ Australian Human Rights Commission, 'Everyone's Business: Fourth national survey on sexual harassment in Australian Workplaces' (Report, 2018) 9. <https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_WORKPLACE_SH_2018.pdf>.

⁵⁸ Not her real name.

⁵⁹ Victoria Legal Aid, *Change the culture, change the system: urgent action needed to end sexual harassment at work*, Submission: Australian Human Rights National Inquiry into Sexual Harassment in Australian Workplaces (Submission, 2018) 7 (**VLA Sexual Harassment Submission**) (**Annexure 6**).

⁶⁰ Ibid.

⁶¹ Power to Prevent Coalition, 'Power to Prevent: Urgent Actions Needed to Stop Sexual Harassment at Work' (Joint Statement, 2019) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/power-to-prevent-joint-statement-ahrc-inquiry-sexual-harrasment-work.docx>> (**Power to Prevent Joint Statement**) (**Annexure 7**).

Factors that increase the risk of sexual harassment and its mental health impacts

Our practice-based observations are consistent with the observations of VicHealth,⁶² Our Watch⁶³ and Women's Health Victoria that the prevalence of sexual harassment in Australian workplaces is driven by wider gender inequality and attitudes that condone violence against women in our communities. We believe these factors could be addressed if governments invested in dedicated primary prevention efforts to address the underlying gendered drivers of sexual harassment.

'Organisational climate' has also been identified as a significant predictor of sexual harassment incidents at organisations.⁶⁴ Our practice experience has shown us that organisational responses to victims once they complain about sexual harassment can contribute to an organisational climate that tolerates sexual harassment and discourages other victims from complaining.⁶⁵

There is also a heightened risk of sexual harassment and discrimination for employees who are in an insecure work arrangement. In our experience migrant workers are particularly vulnerable to exploitation because of their reluctance to complain for fear of deportation, the lack of alternative employment options, and unfamiliarity with workplace laws and entitlements. We have also had multiple clients who are unable to continue a complaint because they were forced to leave Australia after losing their employment. Labour hire and other forms of insecure work arrangements, including contracting arrangements, heighten this risk.

Reforms to prevent and address sexual harassment and improve mental health in workplaces

Sexual harassment is a problem that is deeply entrenched within our society and occurs because gender inequality is ingrained in our social and cultural norms, structures and practices. Informed by our work, the VLA Sexual Harassment Submission recommends 18 reforms to build an environment where women are truly safe in the workplace and can progress in their careers without the lingering threat of sexual harassment. In our view the most important reform to address sexual harassment and its effects is for our regulatory system to stop treating sexual harassment as an individual workplace issue and treat it as a cultural, systemic, and health and safety issue. Our reforms propose that when sexual harassment takes place there should be meaningful consequences which reduce the risk of it happening again.⁶⁶

Our key recommendations, informed by our clients and collaborations with other organisations, include:

- Invest in dedicated primary prevention efforts to address the underlying drivers of sexual harassment. These efforts should be part of a holistic strategy to prevent violence against women and promote gender equality in line with *Change the story: A shared framework for the prevention of violence against women and their children in Australia*.⁶⁷

⁶² Victorian Health Promotion Foundation, 'Submission: Australian Human Rights National Inquiry into Sexual Harassment in Australian Workplaces' (Submission, 2018) 9–10.

⁶³ Our Watch, 'Submission to the Australian Human Rights National Inquiry into Sexual Harassment in Australian Workplaces' (Submission, 2018) 8–9.

⁶⁴ See Chelsea R Willness, Piers Steel and Kibeom Lee, 'A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment' (2007) 60 *Personnel Psychology* 127, 133 citing CL Hulin, OF Fitzgerald and F Drasgow, 'Organizational influences on sexual harassment in Stockdale MS' in Margaret S Stockdale (ed), *Sexual Harassment in the Workplace: Perspectives, Frontiers, and Response Strategies* (California: Sage, 1996) 127, 150.

⁶⁵ VLA Sexual Harassment Submission (n 60) 12.

⁶⁶ Power to Prevent Joint Statement (n 61).

⁶⁷ Our Watch, Victorian Health Promotion Foundation (VicHealth) and Australia's National Research Organisation for Women's Safety (ANROWS), *Change the Story: A Shared Framework for the Primary Prevention of Violence Against Women and their Children in Australia* (Report, 2015) <<https://www.ourwatch.org.au/getmedia/0aa0109b-6b03-43f2-85fe-a9f5ec92ae4e/Change-the-story-framework-prevent-violence-women-children-AA-new.pdf.aspx>> (**Change the Story**).

- Work health and safety law in all jurisdictions should be amended to create an enforceable framework to prevent and address sexual harassment.⁶⁸
- Commonwealth, State and Territory work health and safety agencies should be resourced, empowered and trained to effectively address sexual harassment.⁶⁹
- Commonwealth, State and Territory anti-discrimination laws should impose an enforceable positive duty on employers to prevent sexual harassment,⁷⁰ supplemented by guidelines for compliance,⁷¹ and increased powers and resources for human rights commissions to effectively address sexual harassment.⁷²
- A series of reforms are required to provide fairer and more accessible complaints systems (this includes proposed reforms in relation to burden of proof, time limits for bringing complaints and costs orders under anti-discrimination legislation).
- Specialist support services should be funded to assist people who have experienced sexual harassment.

Each of these recommendations is discussed in detail in **Annexure 6** and we encourage the Commission to consider that publication.

⁶⁸ We recommend that the Model Work Health and Safety Regulations and Code of Practice be amended and that these amendments be adopted by all jurisdictions that have adopted the model laws. We also recommend that Victoria and Western Australia incorporate any necessary amendments into their work health and safety laws.

⁶⁹ Change the Story (n 67) 24, 28–30.

⁷⁰ Section 15 of the *Equal Opportunity Act 2010* (Vic) imposes a positive duty on employers and other duty holders to take reasonable and proportionate measures to eliminate sexual harassment as far as possible. Unfortunately, this positive duty is currently only enforceable through an investigation by the Victorian Equal Opportunity and Human Rights Commission, which does not currently have the powers to compel compliance.

⁷¹ The AHRC currently has the power to make guidelines under both the *Sex Discrimination Act 1984* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth) but they are not enforceable. The AHRC's guidelines regarding workplace sexual harassment, '*Effectively preventing and responding to sexual harassment: A code of practice for employers*' were last updated in 2008.

⁷² We note that this is consistent with the recommendation in the final report from the AHRC's '*Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability*' (2016) that a statutory agency be responsible for the promotion and improvement of equality for older people and people with disability in employment.

7. Recognising the benefits of early access to legal assistance as part of a community-wide response to mental health

In addition to proactive changes in laws and systems, access to free legal assistance before people's legal issues escalate is part of the network of services and supports that can contribute to people living well and with dignity in the community.

7.1 The mental health and other impacts of legal issues

The connection between a person's physical and mental health and their experience of legal problems is increasingly well understood. Data from the NSW Law and Justice Foundation's Legal Australia-Wide Survey (**LAW Survey**), the largest survey of legal need undertaken in Australia, showed that individuals frequently experience adverse health and social outcomes as a result of their legal problems.⁷³ Of the most commonly reported outcomes in the LAW Survey – physical ill-health, income loss and financial strain, relationship breakdown, stress-related illness and moving home – 45.2% of participants reported experiencing at least one, and where individuals were faced with multiple legal issues, these consequences were felt more often and more severely.⁷⁴ A 2015 UK study by Pleasence et al found that the experience of legal problems is a key predictor of mental health problems for young people.⁷⁵

7.2 Multiple and escalating legal issues and their costs

As the Commission knows, the relationship between mental health and legal problems is bidirectional – not only do legal problems cause and exacerbate mental health issues, but people experiencing mental health issues are significantly more likely to experience legal problems.⁷⁶ Over 60% of LAW Survey participants who reported experiencing at least six legal problems also reported having a mental health issue.⁷⁷ Frequently, people experiencing mental health issues are less equipped to adequately deal with legal disputes. As the Commission concluded in its 2014 *Inquiry into Access to Justice Arrangements*, people are often deterred from seeking advice about legal problems because they believe it will cost too much, or because they are unaware of the options that are available to them.⁷⁸

The potential for unresolved legal issues to escalate into subsequent, more severe legal problems is also well recognised. Again, LAW Survey data shows that 84% of participants with an alleged criminal offence had also reported experiencing one or more civil legal problems.⁷⁹ The LAW Survey also found that certain legal matters tend to be experienced by people concurrently. For example, those

⁷³ LAW Survey (n 54) xvi.

⁷⁴ Ibid.

⁷⁵ Law Council of Australia, 'The Justice Project Final Report: Children and Young People' (2018) 9

<<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Children%20and%20Young%20People%20%28Part%201%29.pdf>> citing Pascoe Pleasence, Nigel Balmer and Ann Hagell, 'Youth Access, Health Inequality and Access to Justice: Young People, Mental Health and Legal Issues' (2015).

⁷⁶ LAW Survey (n 54) 28 citing Pascoe Pleasence and Nigel Balmer, 'Mental Health and the Experience of Social Problems Involving Rights: Findings from the United Kingdom and New Zealand' (2009) 16(1) *Psychiatry, Psychology and Law*.

⁷⁷ LAW Survey (n 54) 25.

⁷⁸ Productivity Commission, 'Access to Justice Arrangements: Inquiry Report' (Report, 2014) 2

<<https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>> (**Productivity Commission Access to Justice Report**).

⁷⁹ Law Council of Australia, 'The Justice Project Final Report: Introduction and Overview' (2018) 56

<<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Introduction%20and%20Overview.pdf>> citing Pascoe Pleasence and Hugh McDonald, 'Crime in context: criminal victimisation, offending, multiple disadvantage and the experience of civil legal problems' (Updating Justice Paper No 33, Law and Justice Foundation, 2013) 1.

individuals who had legal issues relating to debt tended to also have criminal and family legal problems.⁸⁰

The escalation of legal issues and the flow-on costs for individuals and the economy were recognised by the Victorian Access to Justice Review:

*Unresolved civil legal problems, such as those related to a community member's housing, mental health, employment or family, are recognised as having far reaching consequences for both the individuals involved and the state. For individuals, unresolved legal problems can lead to diminishing health and restrict social and economic participation, as well as triggering further legal problems, including possible criminal legal issues. These consequences for individuals often generate costs which must be borne by the state, whether in the justice system or in other publicly funded systems.*⁸¹

7.3 Investing in the preventative benefits of access to legal assistance

Despite the emerging recognition of the costs of failing to address legal issues as early as possible, the legal dimension of issues people face related to their mental health often goes unrecognised. For example, issues are seen as related to money, housing, family or health, but not to the law or legal rights.

In addition, the legal assistance sector is not adequately funded to meet legal need. In the Commission's 2014 *Inquiry into Access to Justice Arrangements*, the Commission found that governments have a role to play in assisting disadvantaged Australians to deal with their legal problems, and estimated that funding from Commonwealth, State and Territory Governments of around \$200 million per annum was required to address the most pressing gaps in civil legal assistance services.⁸²

The Victorian Access to Justice Review recognised:

*Just as government has a role in providing access to healthcare and education, it has a role in supporting all Victorians, especially the disadvantaged and vulnerable, to gain access to justice.*⁸³

More recently, the Law Council of Australia confirmed that there is an urgent and ongoing unmet need for legal assistance services across the criminal, family and civil law spectrum and estimated \$390 million per annum investment in legal assistance services is required by the Commonwealth, State and Territory governments, 'pending additional work to determine a longer-term sustainable funding model'.⁸⁴

⁸⁰ LAW Survey (n 54) xiv.

⁸¹ Victoria State Government, 'Access to Justice Review: Summary Report' (Report, 2016) 4 <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/9814/8601/7130/Access_to_Justice_Review_-_Summary_and_recommendations.PDF>.

⁸² Productivity Commission Access to Justice Report (n 78) 30.

⁸³ Victoria State Government, 'Access to Justice Review: Summary Report' (Report, 2016) 4 <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/9814/8601/7130/Access_to_Justice_Review_-_Summary_and_recommendations.PDF>.

⁸⁴ Law Council of Australia, 'The Justice Project Final Report: Legal Services' (2018) 9 <<https://www.lawcouncil.asn.au/justice-project/final-report>>. Commonwealth, State and Territory Governments should invest significant additional resources in Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services, and Family Violence Prevention Legal Services to address critical civil, family and criminal legal assistance service gaps. The LCA proposed that this would: return the Commonwealth's share of LAC funding to 50% with States and Territories (based on a cost estimate by PricewaterhouseCoopers of \$190 million per annum); and implement the Productivity Commission's 2014 recommendation for an urgent interim injection of \$200 million to provide a reasonable level of civil legal assistance services, pending additional work to determine a longer-term sustainable funding model.

We encourage the Commission to continue its analysis of the role legal assistance has to play in supporting mental health, including through:

- Protecting and promoting people's rights and building understanding of rights and options.
- Preventing the escalation of legal issues.
- Reducing the stress that so often accompanies legal issues.

In doing these things, legal assistance, together with essential health and community services, contributes to the prevention of avoidable homelessness, family separation, incarceration and involuntary treatment, all of which carry heavy costs for people and communities.⁸⁵

⁸⁵ See e.g., Health Justice Australia, 'Mapping a New Path: The Health Justice Landscape' (Report, 2018) <<https://www.healthjustice.org.au/wp-content/uploads/2018/08/Health-Justice-Australia-Mapping-a-new-path.pdf>>; State Government of Victoria, 'Access to Justice Review Report and Recommendations' (Report, 2016) <<https://engage.vic.gov.au/accesstojustice>>; Victoria Legal Aid, 'Mallee region to benefit from health justice partnership' (2016) <<https://www.legalaid.vic.gov.au/about-us/news/mallee-region-to-benefit-from-health-justice-partnership>>; Mental Health Legal Centre, Bolton Clark: Project Summary <<https://mhlc.org.au/our-programs/bolton-clark/>>; Inner Melbourne Community Legal, 'Partners in Care: The benefits of community lawyers working in a hospital setting' (2018) <https://imcl.org.au/assets/downloads/IMCL_report_FA_web.pdf>; Justice Connect, 'A Just Life: The role for legal help in building fairer, safer and healthier communities' (2018) <<https://justiceconnect.org.au/wp-content/uploads/2018/06/AJustLifeReport.pdf>>.

8. Independent Mental Health Advocacy (IMHA): An evaluated program that improves mental health and participation

The Independent Mental Health Advocacy service (IMHA) was established in 2015 as an independent non-legal advocacy service for Victorians subject to or at risk of compulsory mental health treatment under the *Mental Health Act 2014* (Vic) (**Mental Health Act**). It is delivered by VLA and is funded by the Victorian Department of Health and Human Services (DHHS). At the time of introduction, it was the first of its kind in Australia, and Western Australia has subsequently introduced a similar service. IMHA services have existed in the UK since 2007.

IMHA was funded by DHHS in response to consultation during the development of the Mental Health Act as a mechanism to contribute to consumer rights and advocacy being embedded in the system. It is focused on realising the rights of consumers and making sure their voices are heard in their mental health treatment and recovery. IMHA undertakes both individual and systemic advocacy.

IMHA operates from four VLA offices: Melbourne CBD, Dandenong, Geelong and Bendigo. It consists of 19 staff and the service is guided by a mental health consumer advisory group, *Speaking from Experience*. IMHA also employs a Senior Consumer Consultant who informs and assists with client engagement and participation in programs delivered, and supports *Speaking from Experience* to inform service design, delivery and evaluation for IMHA and VLA. The Senior Consumer Consultant and *Speaking from Experience* have also assisted VLA by contributing to policy development, being on staff recruitment panels, and developing accessible resources for client groups.⁸⁶

IMHA services are delivered in-person and via the telephone, with regular visits to inpatient mental health units. IMHA adopts a representational model of advocacy, which means that its advocates directly represent the views, wishes and concerns of consumers. This is distinct from a best-interests approach which is still common within mental health treatment and care practices and is informed by clinical staff decisions about what is best for the consumer.

8.1 Key findings of the independent evaluation

IMHA's funding included resources for independent evaluation to assess its effectiveness as a system reform.

The three-year evaluation was undertaken by RMIT University's Social and Global Studies Centre and is at **Annexure 1**.

This evaluation team included experts in mental health law, service delivery and research, and co-produced with people who have lived experience of the mental health system. RMIT consulted 69 consumers who had used IMHA, 40 consumers who were eligible for but had not used IMHA, nine stakeholder body representatives, 292 mental health professionals, 31 mental health lawyers and 16 IMHA staff.

The key findings of the evaluation include:

- IMHA was overwhelmingly positively received by consumers who had used the service.
- IMHA is instrumental to the maintenance of the rights of people who are subject to compulsory treatment.

⁸⁶ See also Cath Roper, Flick Grey and Emma Cadogan, *Co-Production: Putting principles into practice in mental health contexts* (5 April 2018) <<https://healthsciences.unimelb.edu.au/departments/nursing/about-us/centre-for-psychiatric-nursing/news-and-events/test>> 4; Wanda Bennetts, Wendy Cross & Melissa Bloomer, 'Understanding consumer participation in mental health: Issues of power and change' (2011) 20(3) *International Journal of Mental Health Nursing*, 155–64, 2.

- Mental health services are not consistently operating in compliance with the Mental Health Act, and where IMHA services are utilised it is effective at assisting them to do so.
- IMHA is not resourced to service all those receiving compulsory treatment. For IMHA to continue to be successful in maintaining the rights of people subject to compulsory mental health treatment it needs to be accessible to all who require it. This requires an opt-out system where every person who is eligible is offered advocacy, and an increase in funding to be able to provide services to all those who are eligible for IMHA.
- There is a lack of available accurate data about how many Victorians are subject to compulsory treatment to assist with service planning and delivery.
- Stakeholder bodies and mental health professionals who had worked with IMHA held it in high regard.
- Referrals for assistance with legal issues are an important aspect of IMHA's service, including referrals to the VLA Mental Health and Disability Law team.
- The sector including government, mental health services and oversight bodies, such as the Mental Health Complaints Commissioner, Office of the Public Advocate and VLA need to come together and ensure that services are operating in compliance with the Mental Health Act. IMHA is working towards this goal but is hindered by lack of coordination and mechanisms in the sector.

8.2 Key evaluation recommendations

The report has four key recommendations:

1. Referral to IMHA must be automatic for any person subject to compulsory treatment through an 'opt-out' system.
2. IMHA must be adequately resourced to meet demand.
3. IMHA must continue to improve sector awareness and understanding of advocacy
4. Oversight and funding bodies must coordinate and adequately invest to ensure that services comply with legislation, are recovery-oriented and least-restrictive, and that consumers are supported to make decisions.

We encourage the Commission to consider the independent evaluation of IMHA as an example of a service model that improves mental health, including through consumer leadership, advocacy and self-advocacy, a regional presence and a commitment to rights and recovery.