



# **Inclusion and accessibility for all Victorians**

Submission on the Victorian Government's Consultation paper for  
state disability plan 2021-2024



## Contents

Executive Summary	2
1. Accessible legal systems for people with disability	3
2. Strengthening the NDIS and mainstream interface	4
Gaps between the NDIS and mainstream services	5
Co-ordination of mainstream and NDIS services	11
3. Protecting human rights in the criminal justice system	12
4. Priorities for the <i>Disability Act</i> review	13
About Victoria Legal Aid and clients with disability	16

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Victoria Legal Aid operates on Aboriginal country throughout Victoria. We acknowledge the traditional custodians of the land and respect their continuing connections to land, sea and community.

## Executive Summary

Victoria Legal Aid (VLA) is a Victorian statutory agency responsible for providing information, advice and assistance in response to a broad range of legal problems. In the 2018-2019 financial year, over 25,000 of our clients identified as having a disability or experiencing mental health issues. Through our casework, we see how people with disability are overrepresented in Victoria's legal systems: as victims of family violence, as tenants at risk of eviction into homelessness, as part of families in the child protection system, as workers facing discrimination in workplaces, as residents in forensic disability services, and as vulnerable people in the criminal justice system.

We are committed to ensuring that the rights of people with disability are protected, and to supporting the development of holistic and innovative approaches which would prevent people with disability from becoming "lost" in the justice system. This includes advocating for systemic change that would reduce the likelihood of people with disability experiencing serious legal problems.

State disability plans are a critical tool to drive whole-of-government action and resourcing to address largescale accessibility and inclusion initiatives for people with disability. We welcome the opportunity to contribute to the Victorian Government's framework to achieve the vision of an inclusive Victoria for people with disability to live satisfying lives. We commend the Victorian Government on its implementation of the *Absolutely everyone: state disability plan 2017-2020* and encourage the Government to focus the next plan on key intersections between disability and legal sectors.

All Victorians should have access to reasonable and necessary supports to live lives with choice and control, have their disability appropriately taken into account at every stage of criminal justice processes, be able to understand their treatment, and have the opportunity to full and equal participation in our legal system.

In summary, we make the following overarching recommendations for the Victorian legal system:

1. **Accessible legal systems:** People with disability should be supported to understand and fully participate in legal proceedings affecting them, including through better referral pathways, legal sector training on accessibility, trauma-informed and inclusive services, and client-centred service design.
2. **A service safety net under the National Disability Insurance Scheme (NDIS):** Gaps between the NDIS and mainstream services should be addressed by introducing a service safety net. This is particularly important where market failure leads to people with complex needs engaging with the criminal justice system, ensuring appropriate therapeutic disability supports are available in custody, and reducing delays in providing pathways out of restrictive environments.
3. **Disability supports in the criminal justice system:** A whole-of-government commitment to addressing the overrepresentation of people with disability in the criminal justice system should include: access to specialist courts and services; human rights protections for people with disability in the system; and targets for legal sector staff training.
4. **Disability Act review priorities:** The Disability Act review should prioritise improving treatment plans, including requiring detailed transition processes, accessible formats and timely provision, and include forensic residents in residential treatment facilities under the Disability Act for the purposes of a treatment plan.

Our submission focuses on key areas relevant to our day-to-day practice experience – namely topics 5 and 6 in the Consultation Paper.

## 1. Accessible legal systems for people with disability

Through VLA's work in courts and tribunals across Victoria, we see too many cases where people with disability are not able to understand and participate in legal decisions and processes affecting them.

### ***Self-determination and accessibility for Aboriginal and Torres Strait Islander peoples***

Aboriginal and Torres Strait Islander people with disability are overrepresented across a number of legal systems, including the criminal justice and child protection systems. It is important for the next state disability plan to acknowledge intersectionality for an Aboriginal and Torres Strait Islander person who presents with other aspects of their identity – including having a disability, caring for a family member with a disability, or a range of other factors – and the challenges this creates within the legal system. For example, Aboriginal and Torres Strait Islander people who have a disability and are also members of the LGBTIQ+ community often face barriers to appropriate supports within our current legal system.

Through VLA's Aboriginal Community Engagement Officers, we hear how cultural safety is extremely important for Aboriginal and Torres Strait Islander people, and how many of our clients do not disclose their identity if they do not feel culturally safe. As a result, Aboriginal and Torres Strait Islander people do not have equal access to a culturally safe and accessible legal system where they have the opportunity to fully participate in a legal process which takes into account their identity and community context, as well as their accessibility needs related to their disability.

Ensuring the legal system is accessible for Aboriginal and Torres Strait Islander people with disability should be added as a commitment in the Victorian Government's next disability plan. We recommend incorporating the eleven self-determination guiding principles developed following extensive community engagement with Aboriginal Victorians: human rights, cultural integrity, commitment, Aboriginal expertise, partnership, decision-making, empowerment, cultural safety, investment, equity and accountability.<sup>1</sup>

### ***Family violence across the legal system***

In cases involving family violence, data and research shows that women with disability face a heightened risk of experiencing intimate partner violence and may face additional challenges in leaving a violent relationship. For example, women with disability are likely to be more dependent on a partner for support. They are also more likely to be already socially isolated, which poses challenges in how to seek help from others to leave violence in the relationship. Family violence legal assistance is also generally not tailored to the needs of individuals with disability. This is why additional support is required at courts to help individuals with disability to understand the family violence intervention order process, and to also assist with making referrals to specialised disability support services.

### ***Accessibility in courts and tribunals***

Unfortunately, similar examples to those mentioned above exist in other legal processes in the criminal justice system, child protection system, and in civil and administrative law matters. In our view, the Victorian Government should commit to ensuring that legal processes and systems are fully accessible for people with disability, particularly people with an intellectual disability, who need to be

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<sup>1</sup> Victorian Government, *Self-Determination Reform Framework* (Report, July 2019) 7.

able to understand the legal process to make informed decisions. While VLA takes steps to explain legal matters to our clients, we are restricted in what we can do because of the existing format of many court forms and documents, the limited opportunity in some contexts (such as a busy summary crime duty lawyer service) for us to provide lengthy and tailored explanations, and the type of language used in most court hearings across a range of jurisdictions.

Accessibility in courts and tribunals is particularly important to ensure that people with disability can advocate for their rights to be upheld in other contexts, where legal representation and support may not be available.

**Recommendation 1: The Disability Action Plan should include a commitment to improve accessibility of courts, tribunals and legal processes for people with disability, including a plan to:**

- (a) establish better referral pathways between mainstream legal services and specialised legal and non-legal disability support services.**
- (b) fund training for courts, tribunals and legal assistance providers to provide safe, accessible, trauma-informed and inclusive services for people with disability.**
- (c) implement client-centred approaches to service design, including user testing, consultation and consumer leadership involving people with disability in the service planning and design process.**

## **2. Strengthening the NDIS and mainstream interface**

As the NDIS roll-out continues in Victoria, this is a critical opportunity to ensure the next state disability plan implements lasting positive change. With the transition to the NDIS, Commonwealth and State Governments have a responsibility to ensure essential supports are provided to realise the promise of the NDIS for all people with disability.

By the time the next state disability plan is in place, the formal transition to the NDIS should be completed. However, VLA's clients continue to experience hardship and suffering because of interface issues between mainstream Victorian services and the NDIS. Some of these issues are new, as a result of conflicting views about whether Commonwealth or State agencies are responsible for relevant supports, but some problems are gaps which existed before the NDIS was implemented.

Despite ongoing concerns around “thin markets” and market failure,<sup>2</sup> there is still no enforceable obligation on any government body to ensure that an NDIS participant receives their funded supports and no systematised way of ensuring a person accesses the disability supports they need.

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<sup>2</sup> The Joint Standing Committee's 'Market Readiness Report' recommended that 'the NDIA publicly release the outcomes of the Maintaining Critical Supports project and its policy on provider of last resort (PLR) arrangements as a matter of urgency' (recommendation 24) in September 2018. This is the third time that Committee has highlighted that the publication and implementation of a PLR arrangement (or similar framework) is necessary. These remarks have been echoed by the Productivity Commission, the Australian National Audit Office and in the McKinsey & Company Independent Pricing Review. See: Joint Standing Committee on the NDIS, *Report on Transition Arrangements for the NDIS (2018)* and *Report on Provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition (2017)*; Productivity Commission, *National Disability Insurance Scheme – Costs (2017)* 36; Australian National Audit Office, *National Disability Insurance Scheme—Management of the Transition of the Disability Services Market (2016–2017)* 27; McKinsey & Company, *Independent Pricing Review, Final Report (2018)* (see especially 59 onwards).

The effectiveness and sustainability of the NDIS requires the next state disability plan to respond to the needs of people with disability, and to ensure there is a seamless experience across NDIS and mainstream Victorian services.

## **Gaps between the NDIS and mainstream services**

From our practice experience, we see how our clients with disability suffer the consequences where there are gaps between the NDIS and Victorian mainstream services, or where the market or NDIS do not meet people's support needs. This submission illustrates how interface issues at the intersection of the NDIS and child protection, housing, mental health and criminal justice systems can cause real and significant hardship for our clients.

### ***Child protection***

In Victoria's child protection system, the lack of systemic coordination between the NDIS and state child protection authorities (such as the Department of Health and Human Services (**DHHS**)) can result in children and young people with disability falling through service gaps. VLA has seen examples where responsibility for a child or young person with disability is shifted between different agencies, with no one willing to take the lead to ensure that vital supports are provided in a timely manner.

The engagement between children and young people in out of home care and other interface areas such as transport, education, health and justice are also emerging as a key issue for families of children with disability. For example, where there is no transport available, but a child with disability has been funded for transportation to disability services in their NDIS plan, which effectively prevents the child accessing NDIS funded disability supports.

Isaac's story highlights how a scarcity of service providers to deliver NDIS-funded supports can result in serious harm for entire families, including at the interface between NDIS and the child protection systems.

#### **Isaac removed from his family due to inadequate supports in regional area**

Isaac is 16 years old and lives with his family in a regional area. Isaac's mother and stepfather also have five younger children, and he does not have a relationship with his biological father. Isaac has autism, and his family needs support – particularly respite – to manage his behaviours and minimise the impact on his siblings.

Isaac previously had access to weekend respite care supports and would participate in group activities such as fishing and camping with carers and other children. His mother says that this worked well. However, when Isaac transitioned to the NDIS, these supports ceased as his NDIS plan specified 1:1 respite care, and the service provider was only able to provide this on weekdays.

To access this service, Isaac's family was required to drive long distances between regional centres every day of the week – picking him up after school, dropping him off overnight, and then returning to collect him before school the next morning. Isaac's family explained that this was unmanageable, but the service provider said they were required to comply with the NDIS support plan.

Without appropriate supports, Isaac's behaviour became increasingly difficult and his mother and stepfather were concerned about the impact on their other children. His family instead attempted to manage the situation themselves by arranging for Isaac to live with his grandmother, and subsequently by renting a property so that Isaac and his stepfather could live there separately.

These arrangements were unsustainable and ultimately the family contacted DHHS seeking respite or shared care as Isaac's behaviours became too difficult to manage without appropriate supports. In response, DHHS issued a protection application and sought a Family Reunification Order, which was granted in 2018. Isaac was initially placed with his biological father, but when this arrangement broke down, he was placed in a residential unit.

Isaac has formally been in a residential care unit since July 2018. During this time, he has stopped attending school, no longer works in his part-time job umpiring football and his mother states that he has experienced bullying by other residents. Over the last few months, Isaac has spent a considerable amount of time at home with his family, at one time spending 12 out of 14 nights in a fortnight with his family.

Despite this, DHHS has made an application for a Care by Secretary Order. Isaac's mother sought an internal review of the case plan and successfully negotiated for DHHS to change their case plan to reunification. VLA has referred Isaac's case to the DHHS Intensive Support Team for consideration and will continue to monitor his matter to try to ensure that Isaac receives appropriate services and supports in accordance with his NDIS plan.

In this case, Isaac, his family, the service provider and the child protection system are all worse off as a result of the market's failure. There are compelling policy reasons for building a system that avoids these outcomes.

Through our practice experience, we are aware that children with disability are entering out of home care due to a lack of access to disability services. This is partially a result of "thin markets", where people cannot access services they are funded to receive, but there are a range of other factors at play, particularly for families in rural and regional communities, for children with complex disability presentations, and a lack of specialist disability support providers. For example, VLA assisted the parents of a child with disability, who were unable to access 24/7 disability support for their child, despite funding in the NDIS plan for this. This was creating significant challenges for the family, as without this support, the parents could only work approximately one day per fortnight.

VLA welcomes the Council of Australian Governments' (**COAG**) Disability Reform Council commitment to interface issues between child protection and the NDIS, specifically through committing to the implementation of arrangements for respite provision in Victoria by August 2020. We further welcome the announcement of an interim response to this issue, in providing child protection agencies with access to NDIS plans for children in out-of-home care.<sup>3</sup> However, further work needs to be done to improve how Commonwealth and State agencies interact.

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<sup>3</sup> COAG Disability Reform Council, *Meeting of the COAG Disability Reform Council* (Communiqué, 13 December 2019) 1.



## **Housing**

The Victorian Government and government agencies have a legal obligation to make reasonable adjustments, and to clarify the roles and responsibilities of agencies where interface issues arise, and how these issues can be resolved as quickly as possible.

While the NDIS presents an opportunity to fill some of the gaps in appropriate accommodation for people living with disability, it has also added another layer of complexity to an already complicated social system.

It is a central feature of the NDIS that individuals are responsible for requesting access and navigating the system. This most significantly affects people with complex needs. For example, VLA has worked with a number of clients with intellectual disability, autism spectrum disorder and psychosocial disability who are experiencing or at risk of homelessness. A common theme that arises across VLA's work is the lack of systemic coordination to navigate the complexity of the system, which leads to isolation from services and a lack of awareness about where to go for help. Through our work, we see the way in which the absence of skilled assistance for people with complex needs can lead to a failure to engage with the NDIS or a failure to receive funded services that adequately respond to a person's needs.

Gaps in specialist disability housing support and services, together with the difficult interface between the NDIS and State and Territory-funded services, also contribute to homelessness and housing insecurity for people with complex needs. We refer to our previous submissions to the Victorian Homelessness Inquiry and Tune Review for more detailed information and client stories on intersecting issues around the NDIS and homelessness.<sup>4</sup>

The Disability Action Plan should prioritise NDIS interface issues to ensure people with disability have their dignity and wellbeing protected and respected into the future.

## **Mental health**

For people who do not yet have a plan, access and planning is extremely difficult to navigate. For people who do have a plan, they often face market failure (i.e. an inability to access funded supports for people with complex needs). People in these categories can spend unnecessarily protracted periods in prison or mental health inpatient units, in a way that can lead to damage to their health and wellbeing.

A lack of co-ordination between the NDIS and state systems can mean that a person exits a restrictive environment without adequate supports and becomes more vulnerable to re-offending or readmission. People who remain in custody or mental health units because of a failure to secure disability services should be identified and supported by the Victorian Government as a matter of urgency. Clear processes for planning for a person's release before their sentence is complete or discharge is imminent should be co-ordinated with the National Disability Insurance Agency (**NDIA**) and systematically introduced so that supports are in place to facilitate successful discharge or release.

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<sup>4</sup> Victoria Legal Aid, *It starts with a home: Ten legal issues that cause – or are caused by – homelessness in Victoria* (Submission to the Victorian Homelessness Inquiry, March 2020) 23-24 <<https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/other-activities#it-starts-in-the-home>>; National Legal Aid, *Putting people first: Removing barriers for people with disability to access NDIS supports* (Submission to the Review of the NDIS Act and the new NDIS Participant Service Guarantee, 4 November 2019) <<https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/other-activities#NDIS-11-2019>>.

Sam's story highlights the importance of strengthening the disability and mainstream services interface.

### **Sam held in acute psychiatric ward because he has no housing or services in the community**

Sam has spent over two years in an acute psychiatric ward of a public mental health service, despite not requiring inpatient mental health treatment. Sam has Huntington's disease – a neurodegenerative disease which is terminal and can lead to complex support needs.

His successful discharge from the health service relies on a delicate balance of housing and supports, which span across NDIS and mainstream services. There are questions, for example, about whether Sam is eligible for specialist disability accommodation funding, and what packages of state-based and federal funding could be combined to build durable housing and support options for him.

For over two years Sam has been confined to a restrictive environment which is not designed for his care because he does not have housing, is not funded to receive specialist disability accommodation (meaning that neither state nor federal options are realistically available), and has not been the subject of any overarching consideration of what supports could be provided across the NDIS/mainstream interface to create a pathway out of the psychiatric ward.

VLA escalated Sam's case to the DHHS Intensive Support Team. The Age reported that the Victorian Minister has "directed the department to prioritise finding suitable accommodation options" for Sam. It was also reported that the NDIA reiterated that state and territory governments remain responsible for providing affordable and accessible housing to the community, including people with disability.

We welcome the COAG Disability Reform Council's commitment to improve the interaction between the NDIS and clinical mental health services to remove barriers to people with mental health conditions from accessing NDIS supports, and the development of a psychosocial disability recovery framework in consultation with state and territory governments.

### ***Criminal justice***

We welcome the COAG Disability Reform Council's commitment to introduce Justice Liaison Officers to ensure there is a coordinated approach to disability supports from the NDIA and the justice system. Ideally, Justice Liaison Officers will take responsibility for managing urgent cases or cases where there have been substantial delays due to interface issues between government agencies. The role and success of the Justice Liaison Officers is also closely linked to the need for a service safety net to minimise the impact of market failure and make sure people with complex needs are able to access the services they are funded to receive.

VLA has also seen examples of the interface between the NDIS and the youth justice system causing hardship. For example, a young person in youth detention was unable to be released because of delays in the provision of specialist assessment and specialist supports with the outcome being that the young person was detained past the time of their sentence.

## **Continued need for the DHHS Intensive Support Team**

We recommend the continuation of the Victorian DHHS' Intensive Support Team. The Intensive Support Team has been largely successful when VLA has escalated clients in acute crisis for response through this model.

### **Victorian state-based Intensive Support Team provides pathway to escalate individual cases to expert coordination**

The DHHS Fact Sheet describes Victoria's Intensive Support Team in this way:

*The Intensive Support Team (IST) is a team within the DHHS Disability and NDIS Branch established to provide time-limited intervention to current Victorian disability clients experiencing significant and critical issues with their transition to the NDIS.*

It identifies the target group of the IST as "current Victorian disability clients with complex needs or circumstances who are experiencing significant issues in their NDIS transition, where the risk of an adverse outcome for the person is high, and the need for intervention is time critical due to the impact of the issue".

Specific examples are listed:

- people who have been unsuccessful in resolving their concerns with the NDIA planning process and the lack of resolution is leading to a (potential) gap/loss of critical services and significant risk to the person (this includes situations where a support coordinator has been unable to resolve the issues);
- people who were in receipt of state funded supports that do not align with NDIA support types, requiring negotiation about how their reasonable and necessary disability needs can be met; and
- people who use a combination of disability related and mainstream supports and require coordinated planning across mainstream service systems such as health or justice.

Victoria's Intensive Support Team's role includes triage, coordination and problem-solving, most commonly for clients involved in the justice system, and is funded to June 2020.

Brian's story illustrates the impact of people receiving inadequate NDIS plans that do not provide the level of support they need to fully participate in the community and to meaningfully engage in study, work or social activities. Brian's story further illustrates the ongoing importance of the Victorian DHHS Intensive Support Team. Without its intervention, it is likely Brian would have been held in custody unnecessarily for even longer, due to delays in having his NDIS plan reviewed.

### **Magistrate recommends increased NDIS supports so Brian can live in the community**

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

Due to his complex disability, Brian has trouble managing his impulses, and he needs ongoing support to work on regulating emotions like frustration and anger. When VLA first met Brian, in mid-2018, he was referred by the Children's Court to a program where he

could access a range of local health, education, employment and recreational supports. Brian was progressing well and his behaviours of concern had lessened, but the funding for that program stopped once Brian's court case finished.

When the NDIA rolled out where he lived Brian received an NDIS plan. Despite his complex needs, previous behaviours and the clear success of more structured supports, Brian's NDIS plan only provided modest supports with no significant outreach or specialist support coordination. Within six months, Brian was spending much of his time at home, away from peers and disengaged from positive community supports.

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

VLA continued to advocate to Brian's Disability Justice worker for urgent assistance and escalated the case to the state-based DHHS Intensive Support Team. An application for bail was made for Brian to be released from custody. At his bail hearing, the Magistrate insisted that more be done to increase funding to allow for greater outreach support for Brian in the community.

Brian spent nearly three months in prison on remand before he had access to the disability supports he needed to be released on bail. The delay in reviewing his plan was the difference between being held in custody and being supported to live in the community. In terms of its impact, the prolonged time he spent in custody took a significant toll on Brian's health, wellbeing and sense of safety.

Brian is now receiving the levels of NDIS support he needs to achieve his goals. He has access to specialist support coordination and a skilled outreach worker who helps him with his behaviour and takes him to participate in recreational activities. Brian's specialist support coordinator plays a crucial role in bringing together the various agencies and workers involved in supporting him to live well and safely.

Brian's story demonstrates the important role of the Intensive Support Team in service coordination and the positive outcome when the NDIS does work to make a real difference to people's lives. This model provides a single point of contact and accountability for whole-of-government (Victorian and Commonwealth) coordination in the system and enhances the skills of the multiple bodies engaging with the person. Prior to the creation of this team, clients and their lawyers were unsure what to do or where to go to resolve cases of crisis.

The clear message from the Victorian Government through this process is that there is support for vulnerable people who are reliant on disability support to live their lives. The existence of the Intensive Support Team is time-limited and its interventions are largely *ad hoc* in response to escalation, rather than addressing systemic problems on a broader scale. Its effectiveness does, however, provide guidance about the need to entrench and promote a systematic and efficient approach for people with complex needs at the interface NDIS and mainstream systems.

## Co-ordination of mainstream and NDIS services

While the NDIS is working well for many people with disability, its reliance on market-based support provision and coordination with mainstream services can result in its failure to work effectively for participants with more complex needs, putting them at risk of significant harm. Victoria needs a reliable and systematised framework of accountability, coordination and response for people with disability, for supports provided under the NDIS and through Victorian mainstream services.

The next state disability plan provides an opportunity to ensure there is ongoing and consistent implementation work undertaken by the Victorian Government to address the interface issues between the NDIS and mainstream services, including clear government commitments to achieve these intended outcomes over four years.

If a person has been found eligible for the NDIS and has a funded plan but cannot secure supports for reasons related to the market or the support provider withdrawing, the Victorian Government must intervene to ensure that the person with disability does not bear the burden of this system failure. It must be clear, including to the public, who is responsible for arranging, funding and providing services in these situations.<sup>5</sup> This is essential to making sure people do not slip through the cracks and end up in prison, in the mental health system or separated from their families.

The COAG Disability Reform Council has acknowledged this need for “an integrated and holistic framework for maintaining critical supports for participants” and requested that “implementation be expedited and that further refinement and consultation be undertaken”.<sup>6</sup> The Council noted in December 2019 that a “more flexible approach [is required] to address market challenges in the NDIS” and recognised that “a ‘one-size-fits-all’ approach to delivering the NDIS is not suitable to address market gaps faced by certain geographic locations, particular cohorts or disability support types.”<sup>7</sup>

We welcome the Council’s recognition of the impact of thin markets and commitment to developing initial projects to address the issue, including increasing the behavioural support market in Victoria. We support this important recognition of the need for intergovernmental cooperation to ensure that nobody is left to navigate the complexities of gaps in federal and state responsibility and the failures of the market on their own.

The next state disability plan should focus on implementing a service safety net for people with disability in Victoria that catches people with complex needs when the market fails. This should include a commitment for people with disability to be supported to access NDIS funded supports and clear responsibility for coordinating, funding and providing services where the NDIS market fails.

**Recommendation 2: The Disability Action Plan should commit to addressing the gaps between the NDIS and mainstream services by introducing a service safety net in urgent cases where market failure leads to people with complex needs engaging with the criminal justice system, ensuring appropriate therapeutic disability supports are available while in custody, and reducing delays in providing pathways out of custody for people with disability.**

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<sup>5</sup> We recognise that the NDIA and DHHS are not service providers and that the appropriate model requires further consultation in terms of accountability for funding, overall responsibility and service delivery. Such models could also include collaboration between government and non-government organisations.

<sup>6</sup> COAG Disability Reform Council, Meeting of the COAG Disability Reform Council (Communiqué, 9 October 2019) 1.

<sup>7</sup> COAG Disability Reform Council (n 3) 2.

### 3. Protecting human rights in the criminal justice system

Through our casework, VLA sees the significant numbers of people with disability who are involved in Victoria's criminal justice system.<sup>8</sup> It is important to help people as soon as they need it rather than when their lives have reached a crisis point.

#### ***Benefits of a whole-of-government commitment***

A whole-of-government commitment to addressing the treatment of people with disability in our criminal justice system is critical to achieving meaningful social inclusion and to minimising their contact with the criminal justice system. Any commitment in the next state disability plan should be supported by adequately resourced and accessible services delivered by people with the necessary knowledge, skills and attitudes to engage and assist people with disability.

This should include maximising opportunities to coordinate services and minimise administrative complications and establishing warm referral protocols. In particular, collaborative and coordinated service design between service providers is integral in ensuring improved pre-release and reintegration programs for prisoners with a cognitive impairment or intellectual disability.

Better integration of legal services with the broader non-legal service sector, and with organisations that routinely come into contact with disadvantaged individuals, would:

- encourage and make it easier for people with disability to obtain the support they need to resolve their problems at an early stage.
- increase the likelihood of an individualised response to their circumstances and the likelihood of meaningful and enduring positive results.
- promote the availability and distribution of accessible legal information to people with disability, thereby expanding the reach of legal assistance.

#### ***Assessment and Referral Court***

For those who are eligible, the Assessment and Referral Court (**ARC**) List in the Magistrates' Court provides a dedicated justice pathway for a small number of people with cognitive or neurological impairments and mental health conditions. It focusses on addressing the underlying causes of offending through a collaborative and multidisciplinary approach. The environment of ARC is less formal than mainstream courts and hearings are conducted in plain language.<sup>9</sup>

ARC recognises that recovery takes time and requires a collaborative and multidisciplinary approach that works towards a common goal. When a person enters ARC, an Individual Support Plan is created that sets out the participant's goals. These plans may also include longer term goals such as study and work, community participation, and access and reconnection with family members. This provides a common vision and framework to guide the therapeutic response over a person's involvement in the program (which usually lasts for 12 months).

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<sup>8</sup> See Victoria Legal Aid, 'Shaping our future: Discussion on disability rights', *Submission to the Disability Discrimination Commissioner* (26 April 2017) <https://www.legalaid.vic.gov.au/node/610#disability-discrimination-commissioner>. See also: Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability, *Criminal Justice System Issues Paper*, January 2020, 6 <<https://disability.royalcommission.gov.au/system/files/2020-02/Issues-paper-Criminal-justice-system.pdf>>.

<sup>9</sup> *Magistrates' Court Act 1989* (Vic) s 4U(3).

Although evaluations demonstrate that ARC is effective,<sup>10</sup> it is only available to offenders in a few catchment areas. Distance from courts and related services, and inconsistencies in the level of services and therapeutic programs, combine to create an unequal system, with people in catchment areas at risk of experiencing different outcomes through the justice system compared with metropolitan residents.

**Recommendation 3: The Disability Action Plan should include:**

- (a) a whole-of-government commitment and approach to address the overrepresentation of people with a disability in the criminal justice system;**
- (b) commitments to improve the experience of people with disability in contact with the criminal justice system and ensure that their human rights are protected;**
- (c) state-wide access for people with a disability to specialist courts and services; and**
- (d) targets for specialist disability training to be provided to staff who work in the justice system.**

#### **4. Priorities for the *Disability Act* review**

Through VLA's work, we see that compulsory treatment of people with intellectual disability creates profound limitations on the human rights of our clients. This should be subject to appropriate oversight and scrutiny as regulated by Part 8 of the *Disability Act 2006* (Vic) (**Disability Act**).

In some cases, the Disability Act has played a role in improving the conditions of compulsory treatment for our clients. Specifically, we commend the existing requirements for:

- the required creation of treatment plans;
- Senior Practitioner oversight of both restrictive interventions and treatment plan creation; and
- Victorian Civil and Administrative Tribunal (**VCAT**) review of STOs and treatment plans.

These requirements encourage service provider collaboration, foster greater service provider accountability and enable closer scrutiny of restrictive practices. The treatment plan creation and review process also provide greater opportunities to a person affected by compulsory treatment to be involved in the decisions that affect their everyday life.

However, there are several areas in which these existing requirements can be strengthened to better support the human rights of people with disability.

#### ***Detailed transition planning***

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

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<sup>10</sup> Victorian Ombudsman, *Investigation into the reintegration and rehabilitation of prisoners in Victoria* (Report, September 2015). The report refers to an internal independent evaluation of the ARC List.

The Disability Act already includes a process for transition to be included in a treatment plan.<sup>11</sup>

Unfortunately, the current proposed processes are unclear. Transition planning frequently occurs as a parallel process to the treatment plan and is therefore not subject to external scrutiny. This approach also suffers from a relative lack of accountability and cannot as directly involve the person affected.

In addition, current transition planning documents are primarily focused on the external supports for the person affected, including accommodation, service provision, supervision and funding. These external supports are often vital for transition. However, they are unable to provide a clear outline to the person affected of the personal behaviour required to support a transition from compulsory treatment.

The effectiveness of this requirement can be improved by the requirement for a specific and detailed process. This would provide earlier accounting for factors that require problem-solving, create clear points of accountability and provide the person affected with greater opportunities to pursue a transition that better accords with their will and preferences.

### ***More accessible treatment plans***

Treatment plans are complex and long documents that can be difficult to understand and comprehend. We see through our daily casework that people with intellectual disability commonly require significant time to consider the information to understand the proposed effects, and additional time to consider their response. In addition, the language and length of the treatment plan can be difficult for some people with disability to meaningfully engage with without modifications of the content to make it more accessible.

Treatment plans have significant impacts on the everyday lives of people with disability. It is vital that a person has sufficient time to review and engage with the plan so that they can more meaningfully participate in the creation of its conditions.

### ***Forensic residents should be provided with treatment plans***

The Disability Act currently excludes forensic residents from receiving a treatment plan when they are admitted to a residential treatment facility.<sup>12</sup> In practice, this means that the forensic residents must rely on the provisions of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) in relation to most aspects of their compulsory treatment.

This exclusion creates a higher barrier for forensic residents to be involved in decisions about their compulsory treatment. Presently, the only formal avenue available to a forensic resident to discuss their compulsory treatment is in a court at a review of their Custodial Supervision Order. This is not usually an appropriate forum as it is not the primary purpose for the hearing, and the court is often reluctant to involve itself in these questions.

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<sup>11</sup> Section 153(2)(e) of the Disability Act applies to residents of a residential treatment facility and requires the Treatment Plan to “set out a proposed process for the transition from being a resident in a residential treatment facility to living in the community”; and s 191(7)(e) applies to STOs and requires the Treatment Plan to “set out a proposed process for transition of the person to lower levels of supervision and, if appropriate, to living in the community without a supervised treatment order being required”.

<sup>12</sup> Section 153(1) of the Disability Act excludes forensic residents from requiring the preparation of a Treatment Plan by the APO.



The inclusion of forensic residents in the treatment plan process would overcome this difficulty and is consistent with the current operation of the Disability Act. The Disability Act already requires the APO to prepare treatment plans to be consistent with the order under which a person is admitted to the residential treatment facility,<sup>13</sup> and operates for residents subject to different orders subject to court review.<sup>14</sup>

**Recommendation 4: The Disability Action Plan should prioritise the following matters in reviewing the *Disability Act 2006* (Vic):**

- (a) require the transition process to consider the will and preference of the person affected, the types of discharge supports that are required and the goals the person affected should achieve to support this process.**
- (b) require proposed treatment plans to be provided to the person affected in a timely manner and in an additional form, if necessary, that is appropriate to the person's circumstances (e.g. whether by using modified language, visual aids or other means).**
- (c) include forensic residents under the Disability Act for the purposes of a treatment plan when they are admitted to a residential treatment facility.**

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<sup>13</sup> *Disability Act 2006* (Vic) s 153(2A).

<sup>14</sup> This includes Supervision Orders and Interim Supervision Orders made under the *Serious Offenders Act 2018* (Vic).

## About Victoria Legal Aid and clients with disability

VLA is a Victorian statutory agency responsible for providing information, advice and assistance in response to a broad range of legal problems. VLA assists people with legal problems such as family separation, child protection, family violence, discrimination, criminal matters, fines, social security, mental health and tenancy.

In 2018–19, VLA provided assistance to over 100,000 unique clients from our 14 offices across Victoria. Our clients from the 2018–2019 financial year are diverse and experience high levels of social and economic disadvantage. Almost half of our clients are currently receiving social security and one in three of our clients receive no income at all. Over 25,000 people disclosed having a disability or experiencing mental health issues and a significant proportion live in regional Victoria or are from culturally and linguistically diverse backgrounds.

VLA provides advice across the Victoria legal system, including:

- VLA's Criminal Law program provides support for people involved in the criminal justice system, including those with disability issues that may be relevant to their offending or their experience of criminal justice processes. This includes our specialist Therapeutic Courts and Programs team, comprising lawyers working in the Assessment and Referral Court List in the Magistrates' Court, and our specialist practice with clients who fall under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)*.
- VLA's dedicated Mental Health and Disability Legal team is staffed by lawyers who have expertise in assisting clients who have mental health or disability issues, in a holistic way, with a range of legal issues including guardianship, administration, infringements, issues with Centrelink, victims of crime compensations claims and mental health treatment. VLA provides legal services for clients subject to compulsory treatment under the *Disability Act 2006 (Vic)* by reason of admission to a Residential Treatment Facility or by reason of being subject to a Supervised Treatment Order (STO).
- VLA's family youth and children's law directorate provides legal services to individuals with a disability (including children) in the areas of child protection, family law and family violence. From our practice experience and confirmed by relevant research, we note that individuals with a disability experiencing legal need in the areas of child protection, family and family violence, encounter additional challenges.

While some of VLA's work with people with disability is specifically related to the NDIS and forensic disability system, much of it is VLA's other day-to-day work across the mainstream systems of summary crime, indictable crime, child protection, family law, family violence, discrimination, social security, migration, tenancy, and legal help for people in prison.

## Our clients

