



## WITNESS STATEMENT OF DAN NICHOLSON

I, Dan Nicholson, Executive Director of Criminal Law at Victoria Legal Aid (VLA), of 570 Bourke Street Melbourne in the State of Victoria, say as follows:

- 1 I am giving evidence to the Royal Commission on behalf of my employer, Victoria Legal Aid. I confirm I am authorised to do so.

### ***Professional Background***

- 2 I have been the Executive Director of Criminal Law and the Executive Director for the Western Suburbs at VLA since 2018. In my current role I am responsible for the delivery of legally aided criminal law services across the state. This includes VLA's in-house criminal practice, the largest criminal law practice in Victoria, which provides duty lawyer services, information, advice, and representation to eligible persons, and also the private profession engaged in delivering legal aid services, noting that more than 70 per cent of grants of aid in criminal law are undertaken by firms on our criminal law panels.
- 3 As well as my current role at VLA, I have previously held the following roles at VLA: Executive Director of Civil Justice, Access and Equity and Executive Director for the Western Suburbs from 2015-2018; Acting Director of Civil Justice, Access and Equity and Acting Director for the Barwon and South Coast regions from 2014-2015 and Associate Director of Access and Equity from 2012-2015.
- 4 I have also held the role of Commissioner at the Victorian Law Reform Commission since 2018.
- 5 Prior to working at VLA, I held the following roles:
  - (a) A number of roles in the Human Rights Unit at the Department of Justice from 2010 to 2012, including as Acting Manager from 2011 to 2012.
  - (b) Coordinator of the Asia and Pacific Program at the Centre on Housing, Rights and Evictions from 2007 to 2009;
  - (c) Associate to Justice Maxwell at the Court of Appeal of the Supreme Court of Victoria from 2005-2006; and
  - (d) Articled Clerk/Solicitor at the Fitzroy Legal Service from 2004-2005.
- 6 I obtained a Bachelor of Arts (Hons)/LLB (Hons) from the University of Melbourne in 2003 and was admitted as a Barrister and Solicitor of the Supreme Court of Victoria in 2005.

7 Attached to this statement and marked 'DN-1' is a copy of current curriculum vitae.

### **Role of VLA**

8 VLA plays an important institutional role within the justice system. VLA plays a role in crisis-based services and systems, as well as in early intervention and preventing people's life and legal issues from escalating. Our statewide footprint in all regions and courts and tribunals gives us a unique perspective on the justice system as a whole.

9 In 2018-19, VLA provided assistance to over 100,000 unique clients. Of these clients, over 25,000 people disclosed having a disability or experiencing mental health issues.<sup>1</sup> Our 2019 Client Satisfaction Survey found that 46 per cent of clients reported having a disability or mental health issues, with the most common being mental health issues.<sup>2</sup>

10 While VLA works directly with clients who are in the mental health system, much of our work with clients experiencing mental health issues is our day-to-day work in the mainstream systems for summary crime, indictable crime, child protection, family law, family violence, discrimination, social security, migration, tenancy, National Disability Insurance Scheme (**NDIS**) and prisoner legal help. We have direct experience of the flow-on effects of the gaps in the mental health system.

11 VLA's specific services for people experiencing mental health issues include:

- a. specialist legal and non-legal expertise in the mental health system via our Mental Health and Disability Law service, our non-legal Independent Mental Health Advocacy (**IMHA**) service, and our specialist practice with clients who fall under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).
- b. Our specialist Therapeutic Courts team, including lawyers working in the Assessment and Referral Court (**ARC**) in the Magistrates' Court. We also see high volumes of clients experiencing mental health issues in the mainstream criminal justice system. Through this work we see the impact of the mental health system on people's justice outcomes.

<sup>1</sup> Victoria Legal Aid, *Annual Report 2018 – 2019* (2019) <<https://www.legalaid.vic.gov.au/about-us/our-organisation/annual-report>>. 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.

<sup>2</sup> Client Satisfaction Survey 2019 <<https://www.legalaid.vic.gov.au/about-us/what-we-do/research-and-analysis/client-satisfaction-surveys>>.

*Please note that the information presented in this witness statement responds to matters requested by the Royal Commission.*

### **QUESTIONS FOR THE PANEL**

**Question 1: The Royal Commission is concerned that young people and adults living with a mental illness are disproportionately represented in the criminal justice system and in prisons and youth justice centres.**

**In your view, what is the reason for this disproportionate representation? Please consider:**

- a) the capacity of the mental health system to provide care, treatment and support for young people and adults living with mental illness;**
- b) changes to police policies and practice;**
- c) the passage of more stringent criminal and sentencing laws over the past 5 to 10 years;**
- d) community attitudes, including the understandings of the community, the police and the judiciary, of the relationship between mental illness, offending and violent offending.**

**Can the causes of disproportionate representation be addressed?**

- 12 Most people experiencing mental health issues are not violent and are not involved in criminal activity. However, our experience is that people experiencing mental health issues are at greater risk of contact with the justice system and are overrepresented in the prison population.<sup>3</sup>
- 13 A number of factors contribute to overrepresentation, including:
- (a) *Insufficient access to support, particularly in the “missing middle” in services.* In our practice experience there is significant unmet need for a middle level of care and treatment, which sits between the basic level of treatment accessed under a GP mental health care plan and the acute crisis system. The current system does not support people to manage their own health in the way that they have identified works for them and for support or treatment to be ‘flexed up’ or ‘flexed down’.<sup>4</sup>
  - (b) *The net of the criminal justice system is cast too wide.* Because of a lack of other services, Victoria Police are too often first responders when people are experiencing mental health issues. Once contact is made, our current settings mean that people are too often caught in the net of the criminal justice system. These settings include: police practices including in respect of charging, cautioning, bail and remand; ongoing criminalisation of minor offending such as begging and drug use; and the consequences of bail laws. People experiencing mental health issues may also find it more difficult to understand and comply with

<sup>3</sup> This overrepresentation is well documented, see Victorian Auditor-General's Report, *Mental Health Strategies for the Justice System* (2014), 2.

<sup>4</sup> In our first submission we talked about the lack of services available between the ten sessions with a psychologist subsidised by Medicare, and crisis-based services, which may rapidly lead to a person's loss of liberty and autonomy: Victoria Legal Aid, *Submission to the Royal Commission into Victoria's Mental Health System – Roads to Recovery: Building a Better System for Victorians Experiencing Mental Health Issues* (July 2019) <[www.legalaid.vic.gov.au/roadstorecovery](http://www.legalaid.vic.gov.au/roadstorecovery)>.

court orders, such as bail conditions or the conditions of a family violence intervention order, which increases likely repeat contact with criminal justice system.

- (c) *The inability of the mainstream criminal justice system to support people with mental health issues* to participate in the system, engage in meaningful rehabilitation and to be appropriately diverted from punishment to treatment.
  - (d) *Insufficient access to stable housing and system failures* mean that people often end up in prison because there is nowhere else to go, particularly people with dual diagnoses and complex intersecting issues.
  - (e) *Insufficient access to treatment in custody and insufficient supports upon leaving custody* to avert reoffending and break the criminal justice system churn.
- 14 In summary, the net is cast too wide, then once people experiencing mental health issues are propelled into the criminal justice system, it is not sufficiently therapeutically oriented and resourced to support them to recover and return to stable lives. They find themselves unable to get out of the system which is often harmful for their mental health and hinders recovery.
- 15 This overrepresentation carries a significant cost to the health and wellbeing of people experiencing mental health issues. It places significant demands on limited public resources through the direct cost of imprisonment<sup>5</sup> and the indirect consequences of imprisonment on the individual, their families and the community.
- 16 The causes of disproportionate representation can be addressed with steps that:
- (a) Reduce the frequency and intensity of contact with the criminal justice system for people experiencing mental health issues; and
  - (b) Use the criminal justice system as a moment of intervention to assist those who come into contact with it to access supports and services, deal with underlying causes of offending and support their recovery.
- 17 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.<sup>6</sup> Reducing the number of remands and short sentences, and prioritising approaches that enable people with mental health issues to remain in the community wherever appropriate, gives people

<sup>5</sup> 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.

<sup>6</sup> 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>.



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 NDIS, community and family. It also reduces the likelihood of re-offending.

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

**Question 2: What reforms would most effectively improve the interaction of, and outcomes for, people living with mental illness with the justice system**

**a. as offenders?**

- 19 The first way to improve interactions of people experiencing mental health conditions with the criminal justice system is to reduce the number of these interactions; that is, preventing people experiencing mental health issues from entering the criminal justice system, particularly in circumstances where the offending is low level. VLA supports measures to reduce the entry points into the criminal justice system where a therapeutic response would be a more effective use of public resources:

- (a) Our system has defaulted to police as the first responders. Despite their best efforts, police are at the front line too much, due to the lack of other services. While it is unavoidable that police will at times be the first responders to people experiencing a mental health crisis, and should be better supported when doing so, other service responses should be prioritised to reduce reliance on police.
- (b) We support a reorientation of enforcement practices, including increased and consistent use of cautions and diversions by Victoria Police. Police cautions or diversion can support a person to engage with support services to address the underlying causes of the offending behaviour.<sup>7</sup> Increasing the use of cautions and diversions for people experiencing mental health issues who are alleged to have committed minor offences could be achieved through:
  - reviewing and improving the current police cautioning policy to increase the range of offences for which a caution can be given and increase consistent use of cautioning across Victoria;

<sup>7</sup> Diversion began as an adult pilot program at the Broadmeadows Magistrates' Court in January 1997 and was reviewed and revised in late 2000. Diversion is now available in all Magistrates' Courts in Victoria. Youth diversion began as a pilot in the Children's Court in January 2017. In 2017 a legislated diversion option was inserted into the *Children, Youth and Families Act 2005*. The Crime Statistics Agency (CSA) has demonstrated that young people who were cautioned were less likely to re-offend than those charged (26.8 per cent compared to 57.6 per cent) and, for those who did reoffend, there was a longer duration between the police contact and the first reoffending incident compared with those charged. See: Crime Statistics Agency, *The Cautious Approach: Police cautions and the impact on youth reoffending*, 13  
<[https://www.crimestatistics.vic.gov.au/sites/default/files/embridge\\_cache/emshare/original/public/2017/09/7f/e1e924c80/20170925\\_in%20brief9%20FINAL.pdf](https://www.crimestatistics.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2017/09/7f/e1e924c80/20170925_in%20brief9%20FINAL.pdf)>.

- supporting and resourcing direct referrals from Victoria Police to health and social services, particularly where a person has complex needs or circumstances that make them vulnerable; and
  - removing the requirement for police to consent to diversion, ensuring the decision to grant diversion is made by an independent judicial officer.
- (c) If charges are required, Victoria Police should proceed by way of summons rather than arrest wherever possible, to ensure people experiencing mental health issues can remain connected to treatment and support in the community.
- 20 Reducing the number of people on remand and facilitating ongoing treatment in the community, particularly for those not facing a term of imprisonment, is critical for improving outcomes for people experiencing mental health issues in the criminal justice system. This shift will need legislative responses and practice responses.
- 21 Summary offences reform would reduce the involvement of people in the criminal justice system in circumstances where a health-based response would be more appropriate. Offences that penalise poverty and addiction should be repealed or decriminalised to reduce the overcriminalisation of people with complex needs, such as the offences of begging and low-level possession of drugs of dependence for personal use. Enforcement of minor offences does not address the underlying circumstances of mental health, disability, homelessness and social marginalisation, and can further entrench these issues.
- 22 The consequence of recent bail reforms has been a significant increase in the remand population. We often see clients on remand who are not facing a term of imprisonment because of the nature of the offending. Short periods on remand can be particularly detrimental for our vulnerable clients: long enough to disrupt existing supports, such as mental health treatment, training, employment and housing; but not long enough to get access to programs or any meaningful support while in custody. People are generally released with no post-release supervision or reintegration assistance. Other countries are moving away from short sentences, in contrast to the trend in Victoria.<sup>8</sup>
- 23 VLA supports providing therapeutically oriented justice responses to people experiencing mental health issues in the criminal justice system. This should include expanded access to our existing, world-class therapeutic courts. 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

<sup>8</sup> For example, Scotland created a presumption against sentences of less than three months in 2010 and the UK is considering preventing the courts from imposing prison terms of less than six months, except for violent or sexual offences: <https://www.bbc.com/news/uk-46847162>; and Helen Mills, 'Stopping short?' Sentencing reform and short prison sentences' *UK Justice Policy Review* (August 2019). In Victoria we see the opposite; a recent Sentencing Advisory Council report demonstrates an increasing trend towards short periods of remand and time served sentences: Sentencing Advisory Council, *Time Served Prison Sentences* (January 2020).



through the Drug Court for people with addiction to alcohol and drugs (which often co-exist with mental health conditions) and through the Neighbourhood Justice Centre. Currently, these therapeutic options have limited geographic reach, with little access outside metropolitan Melbourne in particular, despite strong evidence about the effectiveness of these programs.<sup>9</sup> In addition to increasing the reach of effective existing programs, the Courts should work to mainstream these therapeutic approaches.

- 24 It is also important to improve access to mental health treatment in custody. We see that people experiencing mental health issues, particularly people with dual diagnoses, enter the criminal justice system and then get stuck because of housing and disability support failures on the outside. They may spend months on remand because of system and service gaps rather than because of their offending. A number of investigations have highlighted the gaps in access to mental health treatment and support in Victorian prisons.<sup>10</sup> 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.<sup>11</sup>
- 25 In our experience, meaningful support upon release into the community is critical to preventing relapses. We often see clients released directly from court with no supports in place, and no time or opportunity to make appropriate arrangements for their release (for example - housing, transport from prison, employment and other support services).

**What reforms would most effectively improve the interaction of, and outcomes for, people living with mental illness with the justice system:**

**b. as victims of crime?**

- 26 VLA provides legal advice and representation to victims of family violence, and to victims of crime seeking to access financial assistance from the Victims of Crime Assistance Tribunal (VOCAT). Many of our criminal law clients have also been, at some point, victims of crime. VLA does not record data on our clients' history of victimisation, however research demonstrates a high interrelationship between victimisation and offending. For example, the Law and Justice Foundation's Legal Australia-Wide Survey found that 41.1 per cent of the respondents who had been alleged to have committed a crime also reported having been a victim of crime, and noted that 'over the life course the overlap

<sup>9</sup> 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>>.

<sup>10</sup> See e.g., Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015) 6 (**Ombudsman's Prison Report**) <<https://www.ombudsman.vic.gov.au/getattachment/5188692a-35b6-411f-907e-3e7704f45e17>>; Victorian Ombudsman, *Investigation into deaths and harm in custody* (March 2014) 111.

<sup>11</sup> 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' **Ombudsman's Prison Report**, *ibid*.

may be much greater still, with victimisation associated with negative offending outcomes'.<sup>12</sup> The Youth Parole Board's annual survey found that 67 per cent of the young people in custody that year had been victims of trauma, abuse and neglect.<sup>13</sup>

- 27 In the criminal justice system, complainants and witnesses who have a cognitive impairment, including impairment because of mental health issues, are afforded protections. There are several protective options for adult and child complainants and witnesses with a cognitive impairment, such as alternative procedures for giving evidence, ground rules hearings and intermediaries, and limitations on cross-examination in certain circumstances, which VLA supports.
- 28 Victims also face barriers to navigating the justice system, whether this be as an applicant in family violence proceedings, a complainant in a criminal matter, or to seek a grant of assistance or a compensation order. Victims typically do not have their own lawyer, and these systems can be difficult to manage without assistance, and a legal advice and representation service for victims would assist in improving interactions and outcomes for victims with mental health issues in the justice system.<sup>14</sup>

**What reforms would most effectively improve the interaction of, and outcomes for, people living with mental illness with the justice system:**

**c. as people seeking access to justice?**

- 29 The Law Foundation's Australia-wide Survey of Legal Need identified that people experiencing mental health issues and disability reported less knowledge about legal rights and processes, were more likely to ignore their legal problems, and were less likely to seek advice.<sup>15</sup>
- 30 Traditional legal service systems and service delivery models are based on problem type, where legal and non-legal services are not joined up. What is needed is connected legal and non-legal services to address multiple and intersecting needs. The finding that people experiencing mental health issues often need assistance to identify their legal issues and intervene early emphasises the important role of human services professionals in identifying the issues, and providing or referring to appropriate assistance and support.

**Question 3: How can innovation in therapeutically oriented justice policy be best facilitated?**

<sup>12</sup> Law and Justice Foundation of New South Wales, *Crime in Context: Criminal victimisation, offending, multiple disadvantage and the experience of civil legal problems*, 2013, 4.

<sup>13</sup> Youth Parole Board, *Annual Report 2018 – 2019*, 29.

<sup>14</sup> The Victorian Law Reform Commission recommended that VLA be funded to establish a legal service for victims of violent indictable crimes, modelled on the Sexual Assault Communications Privilege Service at Legal Aid NSW, to provide legal advice and assistance, in accordance with the *Legal Aid Act 1978* (Vic), in relation to: (a) substantive legal entitlements connected with the criminal trial process; (b) asserting a human right, or protecting vulnerable individuals, in exceptional circumstances. The legal service should be independently evaluated not more than three years after commencement: **Recommendation 23**. VLRC, *Victims of Crime in the Criminal Trial Process* (August 2016), 126 <<https://www.lawreform.vic.gov.au/all-projects/victims-crime-criminal-trial-process>>.

<sup>15</sup> Law and Justice Foundation of NSW, *Legal Australia-Wide Survey: Legal Need in Australia*, August 2012; [http://www.lawfoundation.net.au/jf/site/templates/LAW\\_AUS/\\$file/LAW\\_Survey\\_Australia.pdf](http://www.lawfoundation.net.au/jf/site/templates/LAW_AUS/$file/LAW_Survey_Australia.pdf).



- 31 First, the justice system needs to be redesigned with users or consumers at its centre. At its heart, the justice system is too often designed by and for the institutions in it – the courts, lawyers, and police – not those who use and should benefit from the system. Person-centred consumer leadership and coproduction, building on lived experience and using human-centred design techniques, is needed to design services differently and to reframe the way the system is built.
- 32 Consumer leadership has some foothold in the mental health system but it has a long way to go in the criminal justice system. As far as I am aware, no major criminal justice institution in Australia – including VLA – has a dedicated role for putting people with lived experience of criminal justice systems at the centre of service design.
- 33 Similarly, we routinely see changes to the justice system implemented with limited consideration for how those changes will affect the users of the system, and with limited use of techniques that are well-established in other service systems such as human-centred design. Likewise, there is limited evaluation of the impact of the changes on users' experience or outcomes.
- 34 Secondly, significant innovation can only be achieved by making more time and space in the traditionally fast paced and busy criminal justice system. Our practitioners consistently raise the need for more time and space to assist a person, not just work on the presenting legal issue, as the thing that would make the biggest difference in being more effective. In recent years, the Victorian criminal justice system has undergone significant reform without proper assessment of the impact those changes on the system as a whole, or the resourcing required to address that impact. That has made it more difficult than ever to have the time and space to innovate and improve services.

***Question 4: What gaps currently exist in relation to data sharing, research and knowledge translation that would facilitate future innovation?***

- 35 In my view there is a lack of publicly available data regarding the mental health system and intersecting systems, including:
- (a) data on how many people are subject to compulsory treatment, their geographical location, age, gender, cultural background, co-existing disability, and other demographic data, housing, type and length of order, and complaints;
  - (b) data on how many people in the civil mental health system go on to enter the criminal justice system;
  - (c) whole of criminal justice system data, including outcomes, the impact of different interventions and how many cases are finalised; and
  - (d) data on the experience of system users and the effectiveness of programs, in both the criminal justice and mental health systems.

## **ROLE OF VICTORIA LEGAL AID**

### ***The ways in which Victoria Legal Aid's policies and grants decisions consider and respond to the impacts of the justice system on people living with mental illness***

- 36 One of the great challenges for VLA is to make sure our limited resources reach as many people as possible, but also provide enough assistance to make a significant difference in addressing the legal issues that have the biggest impact on the enjoyment of human rights of our clients and the community.
- 37 In 2013, VLA developed a priority client framework that encouraged delivery of higher intensity services to priority clients. It included a simplified income test and was applied to some entry level services such as phone advice, and the availability of duty lawyer advice or advocacy at Magistrates' Courts. In 2018, we reviewed our priority client framework and developed a new policy, the *Client Priority and Capability Policy*.<sup>16</sup> To help make decisions about who we can assist, we have articulated broad groups of people for whom we will prioritise services.
- 38 Under this policy, people who experience a mental health issue that significantly affects their ability to engage in everyday activities are categorised amongst VLA's highest priorities. Depending on the legal situation and context, people experiencing mental health issues will typically be given priority for direct assistance at entry points, may receive extra assistance before a court event, and may be eligible for further casework assistance through a grant of legal aid. In addition, design and delivery of services to people experiencing mental health issues is a key organisational focus.

### ***VLA service or program innovations over the last decade for young people or adults living with mental illness***

- 39 VLA's Independent Mental Health Advocacy service (IMHA) began delivering services on 31 August 2015. IMHA advocates work with people who are receiving or at risk of compulsory treatment, and provide support to make or participate in decisions about treatment, care and recovery. IMHA supports people who are at risk of or are receiving compulsory mental health treatment to have as much say as possible about their assessment, treatment and recovery. IMHA also supports capacity building of mental health staff in the area of supported decision making and consumers ability to self-advocate. IMHA was the first of its kind in Australia and the first time that Victoria Legal Aid had provided a non-legal advocacy service.
- 40 As part of the establishment of IMHA, VLA committed to involving consumers in the design, delivery and evaluation of the service. VLA also created the first dedicated consumer role at any legal aid commission in Australia. We also established our first

<sup>16</sup> <https://www.legalaid.vic.gov.au/about-us/our-organisation/how-we-are-improving-our-services/client-priority-and-capability-policy>.

consumer advisory group, Speaking From Experience. As the Executive Director then responsible for the establishment of IMHA, I can personally attest to the fact that this approach to consumer leadership was quite transformative for the organisation.

- 41 VLA has recently established a similar program in child protection. The Independent Family Advocacy and Support (**IFAS**) is a three year Pilot in Darebin-Moreland and Bendigo (October 2018 to 2021). IFAS aims to assist families who are involved in the child protection system before they go to court with non-legal support and advocacy to understand their rights and responsibilities and to speak up about what they need to keep their family strong and children safe. VLA employs a senior advocate, two advocates and a Lived Experience Consultant. While it is not specifically a mental health specific service, of the 99 clients to date, 54 identified mental health issues. IFAS is being evaluated, with the mid-term evaluation currently in progress.
- 42 VLA established our first health justice partnership with Sunraysia Community Health Services in Mildura in 2017, with a focus on offering integrated services in child protection and civil law matters. A mid-term evaluation of the service found the health justice partnership had increased access to legal services, with legal services often provided in an integrated way that met clients' complex and clustered needs, that the service was assisting a high proportion of priority client groups, and that it was successfully building the knowledge and confidence of health service staff in identifying and responding to legal issues.<sup>17</sup> A final evaluation will be delivered in 2021.

***Future VLA service or program innovations for young people or adults living with mental illness***

- 43 VLA is working to put clients at the centre of our service design. This includes the increased use of lived experience in our service reviews. VLA client data and research, satisfaction surveys and service reviews of the child protection, family violence and family law programs have informed service delivery models, including:
  - (a) Identifying that people with a disability and/or experiencing a mental health issue are more likely to breach family violence intervention orders (because they do not understand or lack the capacity to comply with the orders).
  - (b) Findings that the first interaction for vulnerable children with the legal system, including those experiencing mental health issues or undiagnosed trauma, is often with family violence intervention orders and/or the child protection system, leading to their over-representation in the youth justice system, and later in life, the adult criminal justice system.

<sup>17</sup> For example, analysis of service data for 2018 and 2019 revealed that 28 per cent of the HJP's clients identified as Aboriginal or Torres Strait Islander, 38 per cent reported having a disability and 12 per cent identified as culturally and linguistically diverse; [https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-mid-term\\_-review-of-the-mildura-health-justice-partnership.pdf](https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-mid-term_-review-of-the-mildura-health-justice-partnership.pdf).



- (c) Our summary crime system review used human-centred design processes including journey mapping at different courts, highlighting the pressures experienced by court users beyond the stress of their legal problem.

***Measurement of the impacts (including benefits) of the services VLA delivers for young people and adults living with mental illness***

- 44 VLA has prepared a three-year *Client First Strategy*, a coordinated approach to improving how people find and receive assistance. It provides a framework for projects already underway at VLA to improve client experiences, including work to redesign legal aid summary crime services, and improvements to our technology for better client service. We consulted with clients, staff and partners involved in legal aid work to develop the Strategy.
- 45 The Strategy includes building clients' voices into our services, a focus on supporting people to understand and participate in legal processes, a continued focus on improving intake and referrals and integrated, trauma-informed models for people with multiple and high priority needs.
- 46 Although historically, like others in the justice system, our measures have focused on how many people we help, we are working to improve this. We conduct biennial Client Satisfaction Surveys, in which we ask adult clients targeted questions about their experiences of VLA. In future surveys we intend to include younger people.
- 47 We are using a Program Logic approach to identify what we want to achieve in key areas of our work like summary and youth crime, and our mental health and disability advocacy services, then developing evaluation plans and improved data collection to measure progress against these aims.
- 48 We are currently developing an organisational Outcomes Framework to allow VLA staff across the organisation to identify outcomes and measure the progress and impact of service delivery for all clients, inclusive of young people and adults experiencing mental health issues. From this we can start to identify what we need to measure in terms of activities and outcomes.

## CHANGES OVER TIME

### ***The trends and changes in approaches to law and practice in Victoria over the last decade that have most impacted on young people and adults living with mental illness***

#### *Diversion*

- 49 The number of court proceedings initiated by Victoria Police has continued to increase and the number of non-court actions continue to decrease.<sup>18</sup> Our lawyers report that the availability of cautioning and consent for diversion can depend on the geographical region where an accused is charged and varies significantly from station to station. The anecdotal experience of our lawyers is supported by information from the Crime Statistics Agency and other research projects, which reveals that different groups experience cautioning and diversion differently depending on location and other factors. There is evidence that police cautioning rates in many rural and regional areas of Victoria are below that of metropolitan Melbourne and the state average.<sup>19</sup>
- 50 Police cautioning and diversion offers a range of benefits, including reduced recidivism and longer delays until reoffending. For example, findings from several studies indicate that a young offender who participates in a diversion program is far less likely to reoffend than a young person whose case is determined in court and who is subsequently incarcerated, even where the seriousness of the offending is taken into account.<sup>20</sup> This may be because cautioning and diversions can be used to engage an offender with support services to help address the underlying causes of the offending behaviour.<sup>21</sup>
- 51 These benefits could be enhanced by expanding the cautioning policy beyond shop stealing and drug offences, and giving the Courts powers to order cautions and diversions in the absence of police consent.

#### *Bail*

- 52 Following reforms to the *Bail Act 1977* (Vic) in 2018, VLA has seen a significant increase in our work with people on remand. We saw a 10 per cent increase in grants of aid (our most intensive form of assistance) in summary crime year on year following the introduction of the changes, in line with the growth in the remand population. We also saw

<sup>18</sup> Australian Bureau of Statistics data shows that the court actions as a proportion of police proceedings increased from 52% in 2012-13 to 71% in 2018-19; conversely non-court proceedings have decreased from a high of 65% in 2012-13 to 32% in 2018-19. 4519.0 *Recorded Crime – Offenders, 2018-19*, released 06/02/2020, *Police proceedings, selected states and territories - Table 27 Victoria*; <https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4519.02018-19?OpenDocument> accessed March 2020. The use of diversions has steadily decreased, from 25.6% of matters receiving diversion in 2008/08 to 12.5% of matters in 2016/17 (a drop in real numbers from 22,098 to 18,165 diversions): Cowan, D, Strang, H, Sherman, L et al. 'Reducing Repeat Offending Through Less Prosecution in Victoria, Australia: Opportunities for Increased Diversion of Offenders' *Cambridge Journal of Evidence Based Policing* (2019), 3, 109-117.

<sup>19</sup> Crime Statistics Agency, *The cautious approach: Police cautions and the impact on youth offending*, 2017; accessed 30 April 2018.

<sup>20</sup> Caitlin Grover, Victorian Parliamentary Library & Information Service, *Youth Justice in Victoria*, April 2017.

<sup>21</sup> Ibid.

a significant increase in our most intensive duty lawyer services, including a 28 per cent increase in bail applications in a year.

- 53 VLA started servicing the Bail and Remand Court (**BARC**) in 2018, and now delivers duty lawyer services at Melbourne in two sessions, ten hours each day, 7 days a week, 365 days a year.
- 54 Our experience of the bail reforms was perhaps best summed up by one of our most experienced regional managers, who reflected that since the bail changes, we are finding more and more people are in custody "because of the issues in their lives and not the offences they've committed".
- 55 This is a summary of the changes we have seen:
  - (a) Significantly more people on remand who are not facing a term of imprisonment, particularly marginalised people including those experiencing mental health issues. VLA duty lawyers resolve about 15 per cent of our matters in BARC, and over 85 per cent of the matters which resolved with a plea of guilty in BARC in 2018/19, did not result in a sentence of imprisonment.
  - (b) The escalating impact of the bail schedules result in people finding themselves facing a reverse onus position, needing to satisfy the court that there are compelling reasons or exceptional circumstances for not remaining in custody, despite not having been found guilty of the offence charged, and even when charged with low level offending. The reverse onus categories enlivened by the bail schedules, were previously reserved for the most serious crimes. Our lawyers report this has been striking for people experiencing mental health issues, who may have difficulty complying with bail conditions or desisting from minor offending.
  - (c) Remand rates are indirectly affecting sentencing outcomes, because time spent on remand increases the likelihood that a court will ultimately impose a sentence of imprisonment.<sup>22</sup>
  - (d) Remand rates may be contributing to the recidivism rate, because time in custody is criminogenic - people are much more likely to go back to prison once they have been there, even for short periods.<sup>23</sup> As set out above, short periods of imprisonment are increasing and are particularly problematic.

<sup>22</sup> SAC, n 8, found that the number of prison sentences imposed on people who had spent time on remand that were equal in length to pre-sentence detention increased from 246 to 1828, meaning that time served sentences nearly tripled in proportion from 11% to 29% of all imprisonment sentences imposed on people who had spent time on remand. In contrast, the proportion of cases where the imprisonment term *exceeded* pre-sentence detention dropped from 87% to 66%, and the proportion of cases where pre-sentence detention exceeded the imprisonment sentence increased from 2% to 5%.

<sup>23</sup> Dr McMahon cited a recent Texan study which compared two groups of 'similarly situated' people who had been arrested and charged with criminal offences. One group was granted bail and the other held on remand in prison, the



- (e) Remand rates increase the risk of accused persons pleading guilty to offences where the evidence may not have sustained a finding of guilt. Our practice experience backs up recent research that accused people who have limited prospects of bail may plead guilty in order to be released from custody, even if they have a legitimate challenge to some or all of the prosecution case.<sup>24</sup>
- 56 These consequences of the bail reforms could be addressed without a wholesale revisiting of bail laws. Rather, they could be addressed by minor changes to the schedules of the Bail Act to mitigate the escalating impacts of the reverse onus tests, and adjustments to police charging and bailing practices. For example, the offence of committing an indictable offence while on conditional liberty and offences against the Bail Act could be removed from Schedule 2 to minimise the impact of minor breaches of conditions of bail; the Bail Act could explicitly state that a person should not be remanded for an offence which is unlikely to result in a sentence of imprisonment; the offence of breaching a condition of bail could be removed (the consequences of breaching would then be reconsideration of the conditions or revocation); children could be explicitly exempt from the reverse onus tests.
- 57 The Court Integrated Services Program (CISP) is a pre-trial and bail program that provides case management and coordinates referrals to external treatment and support services. Our lawyers' experience is that CISP is often a precondition to helping people with complex health and other issues get bail. However, there is significant geographical disadvantage in access to court-based services like CISP.<sup>25</sup> There are commonly delays of days to weeks for people in custody seeking an assessment as to CISP suitability; recent research finds that 'most CISP sites are running at full capacity'.<sup>26</sup>
- 58 There is no specific bail support for people with mental health issues. We endorse the Magistrates' Court of Victoria recommendation for a specialist bail program to be linked with CISP for people with mental health issues. Our experience is that there can be lengthy delays with clients being able to access mental health and psychosocial supports, particularly in regional areas which suffer from a lack of allied services. A service which

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participants were *all* assessed to be equal risk. During an 18-month follow-up period, those who had been remanded into prison were more likely to be charged with offences; this difference persisted even after controlling for offence, accused demographics, criminal history and legal representation. Pre-trial detention was associated with a 30% increase in new serious charges and a 20% increase in new minor charges: Dr M McMahon, Parliament of Victoria Research Paper No. 3, *No bail, more jail? Breaking the nexus between community protection and escalating pre-trial detention*, August 2019, 22; citing P Heaton, S Mayson & M Stevenson (2017) 'The downstream consequences of misdemeanor pretrial detention', *Stanford Law Review*, 69(3) 714-716.

<sup>24</sup> SAC, above n 8 **Error! Bookmark not defined.** at 10; and Dr McMahon, *Ibid*, 7 concludes that "pre-trial detention is associated with an increased likelihood of pleading guilty, being more likely to be found guilty, and being given a custodial sentence. ... there is some evidence that pre-trial detention itself independently contributes to these adverse outcomes—that is, being held on remand itself contributes to the probability that a person will plead guilty, be convicted and be given a sentence of imprisonment."

<sup>25</sup> Less than half of all courts in regional Victoria have access, CISP is available in eight of ten metropolitan courts and only 12 of 41 regional courts (Ballarat, Bendigo, Geelong, Korumburra, La Trobe, Mildura, Portland, Shepparton, Warrnambool, Wangaratta, Wodonga and Wonthaggi) <<https://www.mcv.vic.gov.au/find-support/bail-support-cisp>>.

<sup>26</sup> Angelica Panopoulos, *The recent changes to bail laws in Victoria and the consequences for the justice system*, Victorian Parliamentary Internship Program, (October 2019) 26.

could provide care planning and link clients promptly with locally based services that are connected and responsive would have significant benefits.

- 59 Stable accommodation is also key factor needed to successfully secure bail. In all areas of Victoria, the demand for accommodation options outstrips the available resources, there are limited crisis accommodation options available and no long-term stable housing options available.

#### *Parole*

- 60 A number of changes were made to the parole system in 2013, following high-profile cases of offenders committing serious offences while on parole. Changes included:

- (a) the default position of automatic consideration for parole after a certain period was changed to a requirement for prisoners to apply;
- (b) parole eligibility was tightened;
- (c) parole monitoring requirements were increased;
- (d) parole conditions became stricter; and
- (e) new penalties for breaches were introduced.

- 61 The number of parole grants in Victoria has dropped over the past seven years. There were at least 1,000 fewer adults released on parole in 2019 than in 2013, a reduction of over 60 per cent. The number of parole denials has also increased significantly.<sup>27</sup>

- 62 Following parole law changes there has been an increasing number of prisoners facing straight release from prison without supervision or formal post-release support in the community, even after serving lengthy sentences.<sup>28</sup> Prisoners subject to short terms of imprisonment are not eligible for parole,<sup>29</sup> and are unlikely to be able to access transition support services given the wait times and length of time taken to organise entry into the limited spots.

- 63 The level of supervision available for the majority of prison leavers varies depending on whether the prisoner exits custody on parole or on a straight release.<sup>30</sup> Eighty-one per

<sup>27</sup> Adult Parole Board, *Annual Report 2017 – 2018*, 24.

<sup>28</sup> In 2018-19, 803 prisoners were granted parole: Adult Parole Board, *Annual Report 2018 – 2019*, 27. In comparison, 14,200 prisoners were discharged from a Victorian Corrections facility, who had served time under sentence at some point during that episode of imprisonment, although they may not have been sentenced at the time of discharge: Department of Justice and Community Safety – Corrections Victoria, *Systemwide monthly time series prisoner and offenders* (December 2019) <<https://www.corrections.vic.gov.au/publications-manuals-and-statistics/monthly-time-series-prisoner-and-offender-data>>.

<sup>29</sup> Which requires a minimum term of 12 months imprisonment.

<sup>30</sup> 'Straight release' refers to prisoners who were unable to obtain parole because they did not have adequate housing or support externally; and prisoners released on a 'time served prison sentence' where, at the point of being sentenced, the length of a sentence of imprisonment imposed on the offender equals the time already spent on remand in custody.

cent of parole participants successfully complete their parole period.<sup>31</sup> The provision of support by Corrections Victoria and non-profit service providers is critical to this good success rate.

- 64 Overall a very small proportion of prisoners are leaving prison with supervision and appropriate support. The Victorian Ombudsman's investigation into the rehabilitation and reintegration of prisoners in Victoria found that only 700 of the approximately 6,600 people who left prison each year (as at 2015) were provided with transitional support, and that this is typically between three and 22 hours of support.<sup>32</sup> This can be particularly detrimental for young adult offenders leaving adult prisons, as they can often have compromised mental and physical health which contributes to their post-release mortality rate.<sup>33</sup>
- 65 In our experience, early planning which properly links children and adults with necessary services and supports is more likely to facilitate the person's rehabilitation and effective reintegration rather than straight release.

***Trends and changes in sentencing law and practice in Victoria over the last decade that have most impacted young people and adults living with a mental illness***

- 66 Sentences are getting longer. This is partly legislative, partly attributable to judicial practice.
- 67 The Sentencing Advisory Council (**SAC**) Report, *Time Served Prison Sentences*, highlights the proportion in clients experiencing mental health issues (diagnosed and undiagnosed) who without pro-social supports are unable to meet the necessary threshold to be granted bail, resulting in an increase in the time spent on remand and an increased in time served sentences.<sup>34</sup> The impacts could be minimised with the reforms discussed above in relation to bail.
- 68 VLA is concerned about the increase in time served prison sentences imposed on children, in a situation where a child has spent extended time on remand. Magistrates should be satisfied that a custody component is necessary because all non-custodial options have been exhausted and satisfied that if time served is the only component of the combined sentence; that it will not result in an unnecessary conviction which will increase stigma; and time served on remand should be taken into account as a mitigating factor in sentencing children.
- 69 Sentences for children are getting longer due to the uplift of children's matters to the adult jurisdiction. In 2018 a presumption in favour of uplift from the Children's Court to the adult

<sup>31</sup> Adult Parole Board, *Annual Report 2018 – 2019*, 30.

<sup>32</sup> Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015) (**Ombudsman's investigation into reintegration of prisoners**).

<sup>33</sup> Jesuit Social Services, *All Alone: Young Adults in the Victorian Justice System* (2018) 36.

<sup>34</sup> SAC, n 8.



jurisdiction was created for certain offences. It has been our experience that the introduction of the uplift has led to a number of instances where young people, often with limited or no prior criminal history, have spent increasingly longer periods on remand as a result of applicable adult matter case management timelines. The adult jurisdiction sentencing dispositions are also less flexible for addressing the complex needs of young people with mental health issues.

***Impacts of increases in the prison population over the last decade on the delivery of Victoria's forensic mental health services***

- 70 The growing offender and prison population in Victoria has added to the challenges of health care and support for people experiencing mental health issues in the criminal justice system.<sup>35</sup> Impacts range from delays in assessments for fitness and impairment proceedings and sentencing (delaying finalisation of proceedings), to delays in custodial intake assessment and screening for mental health issues.<sup>36</sup>
- 71 Overcrowding and 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.
- 72 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, as the number of beds has not kept pace with the growth in the prison population. 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 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.<sup>37</sup>
- 73 These issues were recognised by the Victorian Ombudsman in her investigation of Rebecca's case. The Ombudsman recommended that the Department of Justice and Regulation (as it then was): *"Coordinate regular, whole-of-government reporting on the*

<sup>35</sup> 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: Corrections Victoria, 'Corrections Statistics: Quick Reference' (2019) <http://www.corrections.vic.gov.au/utility/publications+manuals+and+statistics/corrections+statistics+quick+reference>.

<sup>36</sup> 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>>.

<sup>37</sup> 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>>. 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.

*management of people subject to custodial and non-custodial supervision orders under the CMIA. To ensure appropriate decisions about placements, the department should share the reports with relevant agencies ....”<sup>38</sup>*

- 74 These issues do not necessarily require a new policy or legislative response. They require additional investment in transitional support, accommodation and forensic mental health services to match increased demand and overall population growth to ensure that the service response gives effect to the current legislation and clinical framework.

***Trends and changes in recidivism rates for young people and adults living with mental illness in the criminal justice system***

- 75 Our lawyers see people with mental health issues in the criminal justice system, often charged with low level offences, who continue to reoffend and become entrenched in the system.
- 76 Incarceration is criminogenic and expensive. The Productivity Commission’s Report on Government Services finds that prisoners sentenced to a term of imprisonment are more likely to reoffend in the subsequent two years than people sentenced to a community sentence. In 2018-19, the percentage of released prisoners who returned to either prison or community corrections was 54.9 per cent; in contrast 23.9 per cent of offenders who served community corrections orders returned to either prison or community corrections within two years.<sup>39</sup>
- 77 Effective supervision and support in the community is therefore a key factor in reducing recidivism. In our practice experience, clients are going to custody because they cannot access proper supports in the community.
- 78 In particular, where a client has a dual diagnosis with disability, failures in the service system means that people cannot get access to the right services. In our experience transition to the NDIS is exacerbating these issues. There is:
- (a) un-controversially a ‘thin market’ under the NDIS for disability supports available to people with complex needs in the criminal justice system, who lose the supports through being remanded which would enable them to remain in or be released into the community;<sup>40</sup> and

<sup>38</sup> Ombudsman’s Prison Report, n 10, 67 (recommendation 6).

<sup>39</sup> Productivity Commission, *Report on Government Services 2020 Part C: Justice* released 29 January 2020: <https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice>.

<sup>40</sup> 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/sites/www.legalaid.vic.gov.au/files/vla-submission-putting-people-first-removing-barriers-for-people-with-disability-to-access-ndis-supports-11-2019.pdf>; Victoria Legal Aid, ‘Ten stories of NDIS ‘Thin Markets’: Reforming the NDIS to meet people’s needs’, *Submission to the Department of Social Services and the National Disability Insurance Agency’s NDIS ‘Thin Markets’ Project* (June 2019) <https://www.legalaid.vic.gov.au/about-us/news/reforming-ndis-to-meet-peoples-needs>.

- (b) currently no enforceable obligation on State or Commonwealth authorities to ensure that people with complex needs actually receive the NDIS supports they have been funded for.

## TRANSITIONS

### *Support when transitioning between services*

- 79 Support for offenders transitioning into the community is also significant for assisting reintegration and preventing recidivism. The Victorian-Auditor General noted that: “[P]eople from disadvantaged and marginalised backgrounds are significantly over-represented among offenders who repeatedly engage in criminal activities. ... The likelihood that a recently released prisoner will reoffend is higher if they experience delays in accessing welfare benefits, housing, health and other social services.”<sup>41</sup>
- 80 We see that typically people lose any health improvements made in custody after release from prison, and their health and substance issues can often deteriorate. People released from prison are admitted to hospital at higher rates for mental health issues and substance use disorders than the general population,<sup>42</sup> and are at risk of poor health outcomes including an increased risk of death by preventable causes compared to the general population. The risk of suicide in people released from prison is approximately seven times higher than in the general population,<sup>43</sup> and death by overdose is 22 times more likely than the general population.<sup>44</sup>
- 81 Victoria does not have an integrated health service which ensures that any treatment which began in prison can meaningfully continue in the community and vice versa. The experience of our lawyers and non- legal advocates continues to reflect the Victorian Auditor-General’s findings from 2014 that: “There is insufficient coordination across agencies allocating support and housing to prisoners of varying levels of need nearing release from prison. Processes for allocating places are not coordinated across the programs or regions, meaning agencies are unable to show that prisoners nearing release with the most significant multiple needs and mental illness are receiving places.”<sup>45</sup>
- 82 The lack of housing pathways out of both prison and Thomas Embling Hospital, into stable, supported accommodation is one of the key blockages in the system. These links between housing, mental health and imprisonment were recognised by the Productivity Commission in its Inquiry into Mental Health. Recommendations in the Commission’s

<sup>41</sup> Victorian Auditor-General’s Office, *Problem-Solving Approaches to Justice* (April 2011) 1.

<sup>42</sup> Michael Hobbs, Kati Krazlan, Steve Ridout, Qun Mai, Matthew Knuiman, Ralph Chapman, ‘Mortality and morbidity in prisoners after release from prison in Western Australia 1995-2003’, 320 *Australian Institute of Criminology: Trends & issues in crime and criminal justice* (July 2006).

<sup>43</sup> Daniel Jones and Alan Maynard, ‘Suicide in recently released prisoners: a systematic review’ 17(3) *Mental Health Practice* (2013) 20.

<sup>44</sup> Simon J Forsyth, Megan Carroll, Nicholas Lennox, Stuart A Kinner, ‘Incidence and risk factors for mortality after release from prison in Australia: A prospective cohort study’, 113(5) *Addiction* (2018) 937.



draft report – which we support – include policies to prevent exits from prisons and inpatient units into homelessness and to encourage development of Specialist Disability Accommodation.<sup>46</sup>

- 83 A recent research report by the Australian Institute of Criminology noted the high link between homelessness and contact with the criminal justice system, citing one study which found that nearly a quarter of detainees were homeless or experienced housing stress in the month before arrest.<sup>47</sup>
- 84 There are limited crisis accommodation options available and no long-term stable housing options available. If a prisoner is released within business hours and they have means to access public transport they may seek crisis accommodation through a non-government service provider such as the Salvation Army. In some instances, they may be offered a night or two at a motel and anecdotally there are reports of prisoners being given camping swags.<sup>48</sup>
- 85 The vast majority of people are released from prison into the community, and supporting that transition is critical for their rehabilitation and reintegration. Transition planning should commence as soon as a person enters the correctional system, rather than at the end. We note the recent work done on supervision in the Victorian youth justice system. The same Youth Justice case manager supervises a person in custody and when they are released into the community. As a result, the client has the same case manager whichever part of the justice system they are in, promoting continuity of care which increases post-release support and engagement.

## **DISPOSITIONS FOR PEOPLE LIVING WITH MENTAL ILLNESS AND THERAPEUTIC RESPONSES**

### **Court outcomes for people whose offending was due to mental health issues or cognitive impairments**

- 86 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (CMIA)* provides alternative processes for people who are not fit to be tried, and alternative outcomes for people whose offending was due to mental health issues or cognitive impairments. However, people may hesitate to invoke the CMIA, because if they are found not guilty by mental impairment or not fit to stand trial, they face lengthy forensic supervision orders.

<sup>46</sup> Productivity Commission, *Mental Health Inquiry: Draft Report* (Report, 31 October 2019), Draft Recommendations 15.1 (housing security for people with mental health issues); 15.2 (support people to find and maintain housing); and 24.3 (the National Housing and Homelessness Agreement). See also responses to questions taken on notice by Ms Louise Glanville, CEO of VLA, following evidence given on 18 November 2019 before the Productivity Commission's Public Hearing into Mental Health.

<sup>47</sup> The report concluded that: "Several recent studies have reinforced the need for housing support for people leaving prison. ... The literature provides further support for the contention that transitional and housing support services have the potential to reduce recidivism, thereby bringing direct benefits to clients, increasing community safety, and reducing criminal justice system costs. ... While supported housing initiatives can be resource-intensive, there is evidence to suggest that they are nonetheless more cost-effective than imprisonment and can contribute to reduced reoffending. Australian Institute of Criminology, *Supported housing for prisoners returning to the community: A review of the literature* (2018).

<sup>48</sup> Ombudsman's investigation into reintegration of prisoners, above n 32, 687.

These orders can far exceed the term of imprisonment or other penalty that would be imposed if the person was dealt with by the mainstream criminal trial process, except for the most serious cases of murder.

- 87 There is scope for significant additional reform in the summary jurisdiction as the CMIA is only available in the County and Supreme Courts. As a result:
- (a) There is no power in the Magistrates' Court to conduct a fitness hearing and no mechanism to determine an accused's fitness to be tried.
  - (b) While the defence of mental impairment is available in the Magistrates' Court, a complete discharge is the only outcome available for a finding of not guilty on the grounds of mental impairment, resulting in the lifting of minor charges into the higher courts.
- 88 In practice, this has resulted in a number of challenges for the summary jurisdiction and a range of consequences for clients with mental health issues, including:
- (a) people enter the system who would likely be found to be unfit to be tried if there were a process available, but instead have little choice but to plead guilty to charges in the summary jurisdiction, resulting in extended time in custody;
  - (b) people who are unfit to plead are repeatedly returning to the Magistrates' Court on a series of low-level matters but not being able to have these matters dealt with by the court in a timely manner due to issues of fitness to be tried being uplifted to the County Court even if they would be fit to plead to the charges;
  - (c) because the only disposition available in the Magistrates' Court is discharge, prosecutors may oppose the mental impairment defence even where evidence clearly demonstrates mental impairment;
  - (d) police suggest diversion for minor summary matters where a defence of mental impairment, and discharge, are available;
  - (e) prosecutors may oppose summary jurisdiction for indictable offences triable summarily where a defence of mental impairment is raised;
  - (f) a significant number of matters which could be dealt with efficiently and quickly in the summary jurisdiction are instead uplifted to the expensive jury fitness hearing process in the County Court.
- 89 Introducing processes for assessing fitness in the Magistrates' Court will allow appropriate matters to be dealt with in the summary jurisdiction rather than uplifted. We support the development of a mechanism for the Magistrates' Court to determine fitness to plead or to participate in summary proceedings, which is appropriate to the nature of the proceedings in that court, and with more flexible, light-touch dispositions.

## LEGAL ASSISTANCE AT THE MENTAL HEALTH TRIBUNAL

### *The benefit of legal assistance at the Mental Health Tribunal*

90 In our practice experience, legal information, advice and representation provide multiple benefits to people appearing before the Tribunal in terms of improved consumer experience, less restrictive outcomes and systemic benefits, such as:<sup>49</sup>

- (a) **Consumer participation:** As lawyers act on the instructions of their clients rather than in their 'best interests', legal assistance is an effective way of ensuring consumers are involved in decisions and are supported to make or participate in them, aligning with principles of supported decision making as set out in the Mental Health Act and United Nations *Convention on the Rights of Persons with Disabilities*.
- (b) **Power Imbalance:** Lawyers are able to assist in mitigating the inherent power imbalance between the mental health service and the consumer. The Tribunal, which is a panel of experts (including a lawyer and psychiatrist or medical member), covers difficult and technical medical and legal issues which often involves complex and inaccessible language.<sup>50</sup>
- (c) **Hearing outcomes:** Consumers who are legally represented at their hearings are more likely to obtain a less restrictive outcome including:<sup>51</sup>
  - Their order being revoked (this is nearly twice as likely to occur when a consumer is represented);<sup>52</sup>
  - A shorter order being made than is sought; and
  - A community treatment order being made where an inpatient treatment order is sought.
- (d) **Other benefits:** Other benefits of legal advice and representation include:
  - Greater awareness by consumers of their rights under the Mental Health Act;
  - Ensuring consumers views and preferences are clearly understood by the Tribunal;
  - Supporting the Tribunal to make legally sound decisions; and

<sup>49</sup> Benefits of legal representation at the Mental Health Tribunal is discussed further in Victoria Legal Aid, *Responses to Productivity Commission questions* (January 2020), 3 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-answers-to-productivity-commission-questions-on-mental-health.docx>>.

<sup>50</sup> See 'Red Panther Report – Legal Advocacy in Mental Health: Exploring the needs, preferences, and opinions of people experiencing treatment under the Victorian Mental Health Act' (May 2017).

<sup>51</sup> VLA conducted a snapshot analysis of hearings where clients were represented by VLA between July and September 2019. Of 73 treatment order hearings, 53 per cent resulted in a less restrictive outcome being obtained than was sought by the mental health service.

<sup>52</sup> The order was revoked in 7 per cent of hearings where the consumer attended but was not represented compared to twelve per cent of hearings where the consumer was represented. See Mental Health Tribunal, *Submission to Productivity Commission Mental Health Inquiry* (January 2020).

- Ensuring hearings are fair and the evidence of the mental health service is properly explored and tested.

(e) **Systemic Changes:** The provision of legal assistance has a role to play in identifying and addressing systemic issues regarding compulsory mental health treatment and the application of the Mental Health Act.

91 Having been Executive Director of Civil Justice at VLA before becoming Executive Director of Criminal Law, the difference between the importance ascribed to legal representation in the two legal systems is striking. In criminal law, the High Court of Australia has ruled that people must have access to legal representation at a jury trial, and that right to representation has been give effect to in legislation. By contrast, 85 per cent of people facing the Mental Health Tribunal do so without the assistance of a lawyer, even though necessarily they are quite unwell at the time of the hearing. There are of course differences between the formality of jury trial and a tribunal hearing; however, the presence of a lawyer is considered essential in many jurisdictions for meaningful participation in a process which can so significantly restrict a person's rights.

*Best practice in other jurisdictions*

92 In both New South Wales and Queensland, mechanisms are in place between their respective Mental Health Tribunals and legal aid services to facilitate legal representation and information sharing, including legal aid services being provided with hearings lists and/or contact information for consumers.

93 The New South Wales Mental Health Tribunal has issued practice directions to mental health services to facilitate legal representatives having timely access to consumers' clinical files and medical reports.

94 The UK has near universal legal representation before its Mental Health Tribunal, due to decisions made under the *European Convention on Human Rights* and the *Human Rights Act 1998* (UK). Without a significant increase in funding, this would be impossible to achieve in Victoria.

95 There are limitations to the comparisons between jurisdictions due to the different legislative frameworks for compulsory mental health treatment, including appeal rights and timeframes for review of orders. Different jurisdictional contexts make it difficult to highlight one jurisdiction as having a 'best practice' approach across their system and we do not advocate for a wholesale adoption of another jurisdiction's model.

96 However, in my view if Victoria aims to be a leader in the protection of rights and supported decision-making, better access to legal representation before the Mental Health Tribunal is essential.



## Integrated legal and mental health services

- 97 Embedding legal services with mental health services can also ensure that other legal issues can be addressed. There are significant benefits in building the capacity of health professionals to identify and appropriately refer legal needs, and in lawyers being able to provide legal advice where people are located, and already seeking help or services, including in health settings.
- 98 Consideration should be given to different models of service delivery, including Health Justice Partnerships. While there may be tensions between the role of an embedded lawyer simultaneously working with treating teams on a person's legal issues while also advocating to ensure compliance with the Mental Health Act, it may be possible to manage these tensions. Alternatively, different services may need to fulfill these different functions.
- 99 Some examples of effective integration of legal services with mental health services which have been positively evaluated include:
- (a) Inner Melbourne Community Legal's partnership with Melbourne Health – which includes outreach to the Waratah Community Clinic and John Cade inpatient unit;
  - (b) WEstJustice's partnership with Werribee Mercy Hospital; and
  - (c) First Step Legal, which is fully integrated within the First Step wraparound addiction and mental health outpatient clinic.
- 100 While these particular services do not generally provide representation at the Mental Health Tribunal, examples of such comprehensive services do exist elsewhere.<sup>53</sup>
- 101 Both IMHA and VLA Mental Health and Disability Lawyers provide outreach services to clients and consumers at mental health services. The independent evaluation of IMHA demonstrated its importance in connecting people with legal services.

## COMPULSORY TREATMENT

### *The factors that lead to the use of compulsory treatment*

- 102 In Victoria, the *Mental Health Act 2014* (Vic) (the **Mental Health Act**) states that compulsory treatment is to be used to provide immediate treatment to prevent a serious deterioration in the person's mental or physical health or to prevent serious harm to the person or to another person.

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<sup>53</sup> See for eg <http://mobilizationforjustice.org/wp-content/uploads/MFY-Legal-Services-Mental-Health-Legal-Partnership.pdf>

- 103 In the experience of our IMHA advocates and VLA lawyers, often factors other than the legal criteria of the Mental Health Act from part of decision-makers' consideration in making compulsory treatment orders including:
- (a) for the perceived ability of compulsory treatment to facilitate access to treatment in a resource-constrained environment and 'to ration or determine access' to services;
  - (b) 'just in case', that is to manage perceived future risk;
  - (c) to provide and compel 'clinically optimal' treatment rather than treatment that is necessary to prevent serious deterioration or harm (due to a misapplication of the criteria);
  - (d) as a proxy for responding to other perceived risks to a person such as homelessness or drug use; and
  - (e) a lack of understanding of the principles of the Mental Health Act notably supported decision making.
- 104 There is still much work to be done in realising the rights promised in the Mental Health Act.

***The impacts of the Mental Health Tribunal approving the use of electroconvulsive therapy (ECT) for mental illness on consumer outcomes and timely access to treatment***

- 105 The introduction of provisions requiring approval from the Tribunal to perform compulsory electroconvulsive therapy (**ECT**) where the mental health services considers the person to lack capacity has had a positive impact on consumer experience. The effect of the Tribunal refusing an application for ECT is that people can be treated in a manner more in keeping with their views and preferences, and helps to ensure that people receive treatment in the least restrictive way possible.<sup>54</sup>
- 106 In VLA's experience the Tribunal has been a useful safeguard in ensuring that the ECT provisions are properly complied with, especially when someone is legal represented. VLA and Tribunal records indicate that where a person is legally represented, the application to perform ECT is refused in 40-50 per cent of cases (compared to refusal of 15 per cent of all ECT matters).
- 107 In the experience of our lawyers, mental health services may present ECT as the only viable treatment, when in fact other treatment options are available, as demonstrated by

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<sup>54</sup> *Mental Health Act 2014* (Vic) s10(a) and to promote recovery of persons with mental illness (s 10(b)).

the experience of our clients 'PBU' and 'NJE'.<sup>55</sup> Their cases highlight the benefits of not only Tribunal, but also higher court oversight of compulsory mental health treatment.

- 108 Conducting hearings urgently presents an obstacle to consumers' meaningful preparation for and participation in the hearings. Consumers are represented in only around 6 per cent of ECT hearings in Victoria, compared to NSW, for example, which has a representation rate of 70 per cent in ECT matters.
- 109 Many clients report to us that their experience of being faced with, or experiencing, ECT is different to that in relation to other treatments and that their concerns are often minimised or dismissed by clinicians.

## **OTHER SAFEGUARDS**

### ***The effectiveness of existing safeguards contained in the Mental Health Act, current non-legal advocacy and legal representation arrangements***

- 110 In our experience, other existing safeguards contained in the Mental Health Act, including advance statements, nominated persons and the second opinion scheme are underutilised. None are binding on clinicians or the Mental Health Tribunal when making decisions under the Mental Health Act, and we find they are often given limited weight in practice. Further, there are no requirements for clinicians to record or report if or how they have considered Advance Statements or Nominated Persons in making treatment decisions.
- 111 The independent evaluation of IMHA recommended that oversight bodies such as the Mental Health Complaints Commission and the Office of the Chief Psychiatrist be supported and enabled to work together to share information and take action on the governance and reduction of compulsory mental health treatment.
- 112 None of the relevant bodies oversees treatment decisions made under the Mental Health Act once a person is subject to compulsory treatment. This means there is no oversight of the extent to which mental health services have regard to the principles of the Mental Health Act, or a person's views and preferences, assess decision-making capacity or make substituted decisions.
- 113 In my view, appropriate systems and oversight will help to ensure 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-

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<sup>55</sup> Examples of the important role that the new jurisdiction has played, include in the cases of *PBU* and *NJE*, which Victoria Legal Aid appealed to the Supreme Court. In both cases at first instance at the MHT, and on review at VCAT, the services' evidence was that ECT was the only viable treatment, and that if it were not approved the consumers would face indefinite and lengthy detention in hospital. However, after the orders were stayed pending resolution of the appeals, the services found treatments that were more in keeping with our clients' views and preferences and were successfully able to discharge our clients to community treatment, without the need for ECT.

focus. This should include embedding consumer leadership and self-advocacy as part of systems and services.

- 114 Rights-based, least restrictive treatment has a role to play in people's recovery and longer term social and economic participation. We see the need for changes in laws, policies, services and culture to 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.

### ***Impact of the establishment of the Mental Health Tribunal on the use of compulsory treatment***

- 115 A lack of transparent, publicly available data makes it difficult to quantify how much influence the creation of the Mental Health Tribunal has had on the use of compulsory treatment in Victoria. However, as the Tribunal's submission to the Royal Commission acknowledged, although reducing and minimising the use and duration of compulsory treatment was a main objective of the Mental Health Act which established the Tribunal that this has not been realised in practice: *"This Act was intended to promote a reduction in Victoria's very high rates of compulsory treatment. This has not happened to any significant extent."*<sup>56</sup>
- 116 The Tribunal continues to make most orders sought by mental health services, including of the duration and setting<sup>57</sup> sought, as was the case with its predecessor, the Mental Health Review Board.<sup>58</sup> Our practice experience is that many orders are revoked on the day prior to a Tribunal hearing, which indicates that the fact of a Tribunal hearing does in some cases compel services to consider whether the criteria are met, so the bringing forward of the hearing date (from eight weeks under the previous Act to four weeks) has likely been a positive development.

### **Non-Legal Advocacy Services (IMHA)**

- 117 Now four years into operation, IMHA has established itself as a key safeguarding body. A 3-year co-produced evaluation of IMHA found that:<sup>59</sup>
- (a) all consumers who were consulted gave overwhelmingly positive feedback on IMHA;

<sup>56</sup> Mental Health Tribunal, *Formal Submission to Royal Commission into Victoria's Mental Health System* (July 2019) 28.

<sup>57</sup> 'Setting' refers to whether an Inpatient or Community Treatment Order is made.

<sup>58</sup> The Tribunal revoked orders in 7 per cent of matters in 2018 – 19; compared to 6 per cent by its predecessor, the Mental Health Review Board in 2013 – 2014: see Mental Health Tribunal, *Annual Report 2018 – 2019* and Mental Health Review Board, *Annual Report 2013 – 2014*. However according to its own data provided to the Productivity Commission, the Tribunal is twice as likely to revoke an order if the consumer is legally represented (13 per cent). Similarly it refuses ECT applications 15 per cent of the time overall, but 45 per cent of the time if the consumer is legally represented.

<sup>59</sup> Dr Chris Maylea, Susan Alvarez-Vasquez, Matthew Dale, Dr Nicholas Hill, Brendan Johnson, Professor Jennifer Martin, Professor Stuart Thomas, Professor Penelope Weller, *Evaluation of the Independent Mental Health Advocacy Service (IMHA)* (Final Report, November 2018).

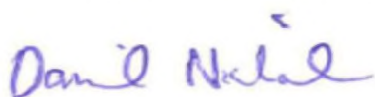


- (b) mental health practitioners who interacted with IMHA held it in high regard and acknowledged that consumers highly valued the service;
- (c) IMHA is under-resourced and not structurally placed to reach many consumers, particularly those in seclusion and on community treatment orders. An 'opt out' system would ensure that all consumers on compulsory treatment orders are contacted by an IMHA advocate and offered IMHA's services, including provision of information on their rights and self-advocacy as well as referrals for legal and other needs;
- (d) IMHA is instrumental in maintaining the rights of people subject to compulsory treatment;
- (e) IMHA provides supported decision-making training to mental health services, though the scope of this is limited by a lack of specific funding to do so; and
- (f) IMHA is an access point for the rest of the safeguarding and oversight system, with advocates regularly providing referrals to VLA, the Mental Health Legal Centre, MHCC, Second Psychiatric Opinion Service, and VMIAC.

118 As set out above, consumer leadership is central to IMHA's work, demonstrated by the award for Lived Experience Leadership at the 2019 Mental Health Service Awards of Australia and New Zealand.<sup>60</sup>

119 In order to better maintain the rights of people subject to compulsory treatment and progressively realise the objectives of the Mental Health Act, IMHA should be accessible to everyone who is eligible for it. This means that IMHA should become an opt-out service, where all persons placed on a compulsory treatment order are notified and offered contact with IMHA. This would require legislative reform and a significant increase in funding.

sign here ►



print name

Dan Nicholson

date

22 May 2020

<sup>60</sup> IMHA 'IMHA wins top award for leadership in mental health' (28 August 2019) < <https://www.imha.vic.gov.au/about-us/news/imha-wins-top-award-for-leadership-in-mental-health> >.



## ATTACHMENT DN-1

This is the attachment marked 'DN-1' referred to in the witness statement of Dan Nicholson dated 4 May 2020.

### Dan Nicholson

#### (a) Formal Qualifications

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<b>2005</b>	<b>Admitted as a Barrister and Solicitor of the Supreme Court of Victoria</b>
<b>1997-2003</b>	<b>BA (Hons) / LLB (Hons) – University of Melbourne</b>

#### (b) Relevant Professional Experience

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<b>2018- present</b>	<b><u>VICTORIAN LAW REFORM COMMISSION</u></b>  <b>Commissioner (part-time)</b>
<b>2012–present</b>	<b><u>VICTORIA LEGAL AID (VLA)</u></b>
<b>2018- present</b>	<b>Executive Director, Criminal Law</b> <b>Executive Director for the Western Suburbs</b> <ul style="list-style-type: none"> <li>• Overall responsibility for the delivery of criminal law services across Victoria including by in-house practice and private lawyers on grants of legal aid</li> <li>• Management of Victoria's largest criminal law practice</li> <li>• Leadership of significant change projects, policy and law reform work</li> <li>• Line management of Sunshine office</li> <li>• Member of the Senior Executive Team</li> </ul>
<b>2015–2018</b>	<b>Executive Director, Civil Justice, Access and Equity (CJAE)</b> <b>Executive Director for the Western Suburbs</b>
<b>2014–2015</b>	<b>Acting Director, Civil Justice, Access and Equity</b> <b>Acting Director for the Barwon and South Coast regions</b> <ul style="list-style-type: none"> <li>• Leadership of VLA's Civil Justice practice, including Mental Health and Disability Advocacy, Commonwealth Entitlements, Equality</li> </ul>

- Law, Migration and Social Inclusion sub-programs
  - Leadership of the Access and Equity Program including Legal Help and CLC funding
  - Responsible for various regional offices including Sunshine, Geelong and Warrnambool
  - Member of the Senior Executive Team
- 2012–2014, 2015**      **Associate Director, Access and Equity**
  - Leadership of the Access and Equity program, working closely with the Director, CJAE
  - Management of the Community Legal Centre (CLC) funding program, Community Legal Education program, Legal Help and Client Access Team
- 2010–2012**      **HUMAN RIGHTS UNIT, DEPARTMENT OF JUSTICE**
- 2011–2012**      **Acting Manager**
  - Managed and supervised advice to all areas of the Victorian Government on Charter implications of legislative and policy proposals
- 2010–2011**      **Policy Officer / Senior Policy Officer / Project Manager**
  - Led the Department's work on the 2010 Charter review, main author of government submission
  - Provided advice on complex and difficult Charter issues
- 2007–2009**      **CENTRE ON HOUSING RIGHTS AND EVICTIONS (COHRE)**

**Coordinator, Asia and Pacific Program**

  - Led the Asia and Pacific program of an international human rights organisation
  - Responsible for projects, advocacy campaigns donor and stakeholder relationships across seven countries in Asia
  - Managed offices based in Melbourne, Phnom Penh (Cambodia) and Colombia (Sri Lanka)
- 2005–2006**      **COURT OF APPEAL, SUPREME COURT OF VICTORIA**

**Associate to Justice Maxwell, President**

  - Research and drafting of judgments in complex appellate matters across civil and criminal law
- 2004–2005**      **FITZROY LEGAL SERVICE**

**Articled Clerk / Solicitor**

  - Criminal, employment law and general community law practice

## (c) Publications

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(With Tom Clarke), 'Unfinished Business in the Timor Sea' (2013) 38(2) *Alternative Law Journal*.

(With Depika Sherchan), *A Guide to Housing, Land and Property Rights in Burma* (2009), COHRE.

(With Rowan McRae) 'No place like home: homelessness in Australia and the right to adequate housing' (2004) 10(2) *Australian Journal of Human Rights* 27.

'The Human Right to Housing in Australia (2004) COHRE, ISBN 92-95004-30-2 (briefing paper for the Housing is a Human Right Project, managed by VCOSS, Shelter VIC, COHRE and Women's Housing Limited).

'Australia's Obligations and the Human Right to Adequate Housing' (February 2004) *Parity* Vol 17, Issue 1, Council to Homeless Persons.