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Investigation into the imprisonment of a woman found unfit to stand trial

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The Victorian Ombudsman respectfully acknowledges the Traditional Owners of the lands throughout Victoria and pays respect to them, their culture and their Elders past, present and future.

Letter to the Legislative Council and the Legislative Assembly

To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973* (Vic), I present to Parliament my *Investigation into the imprisonment of a woman found unfit to stand trial.*

Deborah Glass OBE
Ombudsman

16 October 2018

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Foreword

This is the saddest case I have investigated in my time as Ombudsman. A 39-year-old woman spent over 18 months in prison, locked in her cell up to 23 hours a day, where she would scream with distress for hours on end. She had been charged with breaching an intervention order taken out by her family, who could not cope with her behaviour, and resisting police. This woman, whom we refer to as Rebecca, was found unfit to stand trial and not guilty because of mental impairment. She remained in prison simply because there was nowhere for her to go.

The judge in her case said she might have been sentenced to a month in prison had she pleaded guilty and been sentenced.

While Rebecca had a lifelong history of behavioural difficulties, professionals were unable to agree whether she had a mental health condition or a disability. Her changing diagnosis meant she fell into a service gap. Professionals agreed she needed support, but no one could agree on who was responsible. Her challenging behaviour, which could be anti-social and sometimes violent, brought her into contact with the criminal justice system, and into prison.

Prison is not a therapeutic environment. Despite the care of individual prison officers and staff, her condition deteriorated markedly as a result of her 18 months in solitary confinement. Although valiant efforts are now being made to integrate her into the community, both she and society are still paying a high price.

While agencies mostly followed procedure, and in some cases went beyond them in an attempt to provide support, the State failed Rebecca. Her long and damaging stay in prison was a breach of her human rights.

Having examined Rebecca's case, we wanted to find out if the problem was systemic. I thank the organisations and people who provided information to us, from which it is clear her case is not an isolated incident.

There is, however, no data on how many people like Rebecca are in prison. No agency is responsible for tracking people who are deemed unfit to stand trial. But there is no doubt hers is not an isolated case. We heard many more stories, some as sad as Rebecca's, which highlight both the trauma of incarceration on acutely vulnerable people, and the threat to community safety in failing to provide a safe and therapeutic alternative to prison.

There have been many reviews of secure therapeutic facilities over the years, all of which highlight the acute shortage of beds. Women with disabilities are particularly affected. It is good to see the State government's recent investment in secure mental health facilities, although as we heard, the recent increase is not for cases like Rebecca's. The State must do more to invest in secure therapeutic facilities; in the words of a forensic psychiatrist we spoke to, Victoria needs a community facility that is both clinical and lockable.

Further complexities arise with the introduction of the National Disability Insurance Scheme, which presents both an opportunity and further questions about its application to people like Rebecca. I will be monitoring these over the coming year and will report as needed.

Whatever the future holds, we need to ask ourselves how a humane society can justify such treatment. Whoever forms government in November, fixing this must be a priority.

Deborah Glass

Ombudsman

Why we investigated

1. In July 2017, Colleen Pearce, the Public Advocate, raised concerns with Ombudsman officers about the imprisonment of one of her clients – a 39-year-old woman with 'pervasive developmental disorder' (see page 7) and 'borderline intellectual function'.

2. This report calls the woman Rebecca to protect her identity.

3. Rebecca had been in Victoria's main women's prison – the Dame Phyllis Frost Centre – since 2016. She had been charged with breaching an intervention order taken out by her family and resisting police.[1] County Court juries found her unfit to stand trial and not guilty because of mental impairment under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (the CMIA) (see page 8). But Rebecca remained in prison.

4. The Public Advocate became Rebecca's legal guardian while Rebecca was in prison. The Public Advocate expressed concern that:

    - The prison was holding Rebecca in its mental health unit, even though she did not have a mental illness.
    - The prison was locking Rebecca in her cell for 23 hours a day. The Public Advocate said Rebecca 'screams with distress, for hours on end' when returned to her cell.
    - The prison was using untrained prison officers to help Rebecca with her personal care needs.
    - Rebecca had spent more time in prison than if she had been found guilty and sentenced, and her condition was getting worse. The Public Advocate said authorities could not release Rebecca because there was nowhere else for her to go.

5. The Victorian Ombudsman conducted a human rights-based inspection at the prison in July 2017.[2] Ombudsman officers visited Rebecca's unit during the inspection. They were not able to meet her, but saw her conditions and spoke to prison officers caring for her.

6. After the inspection, Ombudsman officers sought more information from the prison and the Office of the Public Advocate (OPA). These enquiries confirmed the prison was locking Rebecca in her cell for 22-23 hours a day because she was considered a risk to, and at risk from, other prisoners. They confirmed Rebecca was struggling with personal hygiene, including showering, toileting and menstruation. The enquiries identified that agencies had been discussing other accommodation options for over a year, but progress was slow. Officers also heard about other people with significant disabilities who had spent lengthy periods in prison.

7. During the Ombudsman's enquiries, agencies finalised a suitable house for Rebecca, funding under the new National Disability Insurance Scheme (NDIS) (see page 56) and a care provider. Rebecca was released from prison in late 2017, after spending more than 18 months in custody.

8. The Ombudsman remained concerned by Rebecca's case and evidence of broader problems with the prison, mental health and disability systems' treatment of people found unfit to stand trial.

1 The charges of breaching the intervention order were later withdrawn.

2 The results of the inspection are described in Victorian Ombudsman, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* (2017).

9. On 8 December 2017, the Ombudsman notified the following people of her intention to investigate Rebecca's case – the Minister for Corrections; the Minister for Housing, Disability and Ageing and the Minister for Mental Health; the Secretary of the Department of Justice and Regulation (DOJR); and the Secretary of the Department of Health and Human Services (DHHS).

10. The Ombudsman said she intended to investigate:

    - the prison's management of Rebecca, including whether the prison had acted in a manner compatible with her rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) (see page 9)
    - the steps taken by agencies to find an appropriate placement for Rebecca.

11. The Ombudsman said she might also consider the cases of other people found unfit to stand trial or not guilty because of mental impairment.

What is a pervasive developmental disorder?

Pervasive Developmental Disorder Not Otherwise Specified was a disorder listed in the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders*[3] – the manual used by medical professionals to classify mental impairments.

It was one of a family of developmental disorders that included Autistic Disorder and Asperger's Disorder. The Manual said it should be used:

> when there is severe and pervasive impairment in the development of reciprocal social interaction associated with impairment in either verbal or nonverbal communication skills or with the presence of stereotypical behaviour, interests and activities, but the criteria are not met for [other disorders]. For example, this category includes 'atypical autism' – presentations that do not meet the criteria for Autistic Disorder because of late onset, atypical symptomology or subthreshold symptomology, or all of these.[4]

The current edition of the *Diagnostic and Statistical Manual of Mental Disorders*, published in 2013, changed the classification system for these disorders. It uses one classification – Autism Spectrum Disorder – for people who were previously diagnosed with Autistic Disorder, Asperger's Disorder and Pervasive Developmental Disorder Not Otherwise Specified.[5]

For this reason, some of the evidence in this report refers to Rebecca having a pervasive developmental disorder, while other evidence refers to her having autism spectrum disorder.

3 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th edition – Text Revision, 2000).

4 Ibid 84.

5 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th edition, 2013) 51.

‘Unfitness to stand trial’ laws in Victoria

In the 19th century, the legal system developed special procedures for people with mental impairments who were accused of crimes.

The procedures dealt with people who were unfit to plead to criminal charges because of mental impairment. They also dealt with people who were found not guilty on the ground of ‘insanity’ because they did not know the nature or quality of their actions, or did not know what they were doing was wrong. They allowed such people to be held in custody at ‘the Governor’s pleasure’.[6]

The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (the CMIA) sets out the current laws in Victoria.

It can apply to people with mental impairments such as severe mental illness, intellectual disability, autism spectrum disorder and dementia.

A person who may be unfit for a standard criminal trial undergoes a series of hearings in the County Court or Supreme Court:

- The process begins with an ‘investigation’ hearing, where a jury decides if the person is unfit to stand trial. The jury must be satisfied the person is unable because of disordered or impaired mental processes to: enter a plea; exercise their right to challenge jurors; understand the nature of the trial; follow the course of the trial; understand the substantial effect of prosecution evidence; or instruct their lawyer.
- If the jury decides the person is unfit to stand trial, a judge decides whether the person is likely to become fit within 12 months. If the person is likely to become fit, the judge can adjourn the proceedings.
- If the person is not likely to become fit to stand trial, the court holds a second ‘special hearing’ in which a jury hears the evidence against the person. The jury has three options. It can find: (1) the person committed the offence (2) the person is not guilty or (3) the person committed the offence but was not guilty because of mental impairment.
- If the jury finds the person committed the crime or is not guilty because of mental impairment, the judge can make one of three orders: (1) a custodial supervision order detaining the person (2) a non-custodial supervision order that allows the person to live in the community subject to conditions or (3) an order releasing the person without conditions.

There are a limited number of places where the courts can detain adults under the CMIA:[7]

- the Thomas Embling Hospital, Victoria’s forensic mental health hospital
- two DHHS-operated services for people with an intellectual disability – the Disability Forensic Assessment and Treatment Service in Fairfield and the Long Term Rehabilitation Program in Bundoora
- the prison system.

The CMIA makes it clear that prison should be a last resort. The court must not make an order remanding or committing a person to a prison unless there is ‘no practicable alternative in the circumstances’.

6 *R v Pritchard* (1836) 7 Car & P 303 (173 ER 135); *Daniel McNaughten’s Case* (1843) 8 ER 718; *R v Porter* [1933] HCA 1. See Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: Consultation Paper* (2013) 12.

7 There are separate rules for children who may be unfit to stand trial: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (‘CMIA’) pt 5A.

The Ombudsman's jurisdiction

12. The Ombudsman conducted the investigation under section 16D of the *Ombudsman Act 1973* (Vic). This section, along with section 16A of the Ombudsman Act, gives the Ombudsman the power to investigate a matter referred, or information provided about an administrative action taken by or in 'an authority'.

13. Section 13(2) of the Ombudsman Act states that the function of the Ombudsman includes the power to investigate whether an administrative action is 'incompatible with a human right set out in the [Charter]'.

14. DOJR and DHHS are authorities as defined by section 2 of the Ombudsman Act. The prison is managed by Corrections Victoria, a business unit in DOJR. DHHS is the department responsible for mental health and disability services in Victoria.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic)

The Charter is a law that sets out civil and political rights shared by everyone in Victoria.

These include rights to:

- equality before the law (section 8)
- freedom of movement (section 12)
- freedom of expression (section 15)
- liberty and security of person (section 21).

Some rights are particularly important for people in detention. They include rights to:

- protection from torture and cruel, inhuman or degrading treatment (section 10)
- humane treatment when deprived of liberty (section 22).

The term 'cruel, inhuman or degrading treatment' includes acts that fall short of torture but involve a minimum level of physical or mental suffering. The European Court of Human Rights has stated this assessment:

> depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.[8]

The right to humane treatment can be engaged by less serious mistreatment or punishment. It means people in detention must not be subject to any hardship or constraint other than that resulting from the deprivation of their liberty.[9]

Public authorities, like prisons, must act compatibly with the rights and freedoms in the Charter when providing services and making decisions. They must also consider relevant human rights when making decisions.

The Charter allows public authorities to limit human rights where the limitation can be 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. Public authorities must take into account 'all relevant factors', including the nature of the human right, the importance and purpose of the limitation and whether there is 'any less restrictive means reasonably available to achieve the purpose'.

8 *Ireland v United Kingdom* (1978) 25 Eur Court HR (ser A) [162].

9 *Castles v Secretary of the Department of Justice* (2010) VSC 141 [108]; *Certain Children v Minister for Families and Children* [2016] VSC 796 [172].

How we investigated

15. The investigation:

- inspected records held by OPA, the prison, DHHS and Forensicare (the Victorian Institute of Forensic Mental Health)
- visited Rebecca at her home with her OPA guardian, and spoke with her father to inform her family of the investigation
- obtained information about Rebecca's case from Corrections Victoria, DHHS and the Office of Public Prosecutions (which prosecuted her charges)
- viewed the Magistrates' Court and County Court files for Rebecca's court proceedings, with the permission of those courts
- researched international human rights standards and case law regarding solitary confinement, and literature on the treatment of people with autism spectrum disorder in prison
- commissioned an expert opinion from forensic and clinical psychologist, Dr Astrid Birgden
- interviewed seven people involved in Rebecca's case, and two subject matter experts:
    - the OPA officer who acted as Rebecca's OPA guardian from March to October 2017, under the Public Advocate's delegation
    - Rebecca's legal aid lawyer
    - a prison officer involved in Rebecca's care
    - the Forensicare psychiatrist working at the prison
    - three DHHS officers who helped find Rebecca's new home and services – the Chief Psychiatrist; the Senior Practitioner, Disability; and a representative from the Multiple and Complex Needs Initiative program
    - a consultant forensic psychiatrist
    - a senior DHHS officer involved in policy issues regarding the NDIS.
- reviewed relevant legislation in Victoria and other jurisdictions around Australia
- obtained data on people subject to CMIA orders from the Sentencing Advisory Council and DOJR
- invited submissions from legal and community organisations about the treatment of other people who have been found unfit to stand trial but spent significant time in prison. The Ombudsman received submissions from:
    - OPA
    - Law Institute of Victoria
    - Victoria Legal Aid
    - Mental Health Legal Centre
    - Liberty Victoria
    - Australian Community Support Organisation
    - the relative of a person killed by someone found not guilty of murder because of mental impairment.

- received information from the Supreme Court, Jesuit Social Services and the Melbourne Social Equity Institute to assist the investigation. The parents of two people with disabilities involved in the criminal justice system also contacted the Ombudsman to share their experiences.
- considered earlier reports on these issues by the Victorian Law Reform Commission, the Australian Human Rights Commission and parliamentary committees
- obtained information from DHHS and DOJR about arrangements for transitioning people with a disability to the NDIS in 2019, and the potential impact on people found unfit to stand trial or not guilty because of mental impairment.

16. At the end of the investigation, the Ombudsman convened a meeting to discuss solutions to the problems identified by the investigation with the Secretary of DOJR; a representative of the Secretary of DHHS; the Chief Executive Officer of Forensicare; and the Commissioner, Corrections Victoria.

This report

17. This report is divided into two parts. The first part describes Rebecca's case and considers whether her treatment was compatible with the Charter and international standards. The second part looks at how often authorities detain people unfit to stand trial in prison. It considers systemic issues and the possible impact of the NDIS on such cases.

18. This report includes adverse comments about Corrections Victoria, DHHS, OPA and the National Disability Insurance Agency (NDIA). In accordance with section 25A(2) of the Ombudsman Act, the Ombudsman provided each agency with a reasonable opportunity to respond to the material in the report. The Ombudsman has fairly included the agencies' responses in this report.

19. In accordance with section 25A(3) of the Ombudsman Act, any other persons who are or may be identifiable from the information in this report are not the subject of any adverse comment or opinion. They are named or identified in the report as the Ombudsman is satisfied that:
    - it is necessary or desirable in the public interest, and
    - identifying those persons will not cause unreasonable damage to those persons' reputation, safety or well-being.

20. The report also seeks to comply with a County Court suppression order prohibiting publication of any information that would enable Rebecca's name or whereabouts to be identified. The Ombudsman provided a copy of relevant sections of the report to the judge in Rebecca's case. The report uses a pseudonym for Rebecca and omits some details about her case.

21. The report also uses pseudonyms for other people described in case studies.

Part One:

Rebecca

Why was Rebecca in prison?

22. Rebecca was 39 years old when the Public Advocate referred her case to the Ombudsman. The evidence in this investigation focused on Rebecca's disabilities and time in prison, but some evidence paints a fuller portrait. Her current care provider, for example, has said she loves listening to music and enjoys magazines, being taken for drives and swimming at the beach.

23. To understand why Rebecca was in prison, however, it is important to look at her disability and her history.

Rebecca's behaviour and diagnoses

24. According to professional reports viewed by the investigation, Rebecca's parents first took her to a paediatrician at the age of four because she was 'different'. Doctors began referring her for psychological and other assessments from the age of nine. She had difficulties with other children and left school early in Year 8.

25. After Rebecca entered adulthood, the reports describe consistent patterns of behaviour including:

    - 'Perseverative communication'. This means Rebecca does not engage in back-and-forth conversation and talks repeatedly about a narrow range of interests.
    - Difficulty socialising and forming relationships.
    - Difficulty adjusting to changes in routine and managing stress.

26. The reports also describe behaviours that the disability sector calls 'behaviours of concern'. There are multiple references to Rebecca verbally abusing or assaulting carers and destroying property. This sometimes led to police involvement and criminal charges.

27. Rebecca's behaviour was complex and professionals could not always agree on the cause.

28. From Rebecca's teens into her 30s, doctors diagnosed her with mental health conditions and possible personality disorders.

29. When Rebecca was 32 years old, the Victorian Dual Disability Service diagnosed her with Pervasive Developmental Disorder Not Otherwise Specified and borderline intellectual function. However, professionals from DHHS's Office of the Senior Practitioner disputed this diagnosis when they assessed Rebecca the following year.

30. There was also disagreement about whether Rebecca had an intellectual disability. The *Disability Act 2006* (Vic) requires an intellectual disability to have been 'manifest' before the age of 18. When Rebecca was tested at the age of 12, she recorded an IQ of 84. This score was above the commonly understood threshold for an intellectual disability – an IQ of 70 or below. However, when Rebecca was tested again at the age of 34, she recorded a IQ of 65.

31. Reports prepared at the time of Rebecca's legal proceedings confirmed the diagnosis of pervasive developmental disorder and borderline intellectual function. A report by a psychiatrist with expertise in autism spectrum disorder said Rebecca's 'mental age is well below an adult.'

The 'service gap' between mental health and disability

32. Rebecca's diagnoses are significant because they determined the services available to her.

33. Victoria's services for people with a mental impairment are divided into two streams:

    - The mental health system provides services to people who have a treatable mental illness under the *Mental Health Act 2014* (Vic).
    - The disability services system provides services to people with a disability under the Disability Act. These include intellectual disability, acquired brain injury and neurological impairments like autism spectrum disorder.

34. From her teens into her 30s, Rebecca received services through the mental health system. This included extended periods living in her local area mental health service's acute care, secure extended care and community care units.

35. Rebecca's new diagnosis of pervasive developmental disorder and borderline intellectual function meant she was no longer eligible for these services. Her local area mental health service continued to accommodate her for some time but discharged her just before she turned 35. The discharge notes refer to Rebecca's 'lack of an axis 1 psychiatric disorder', her unwillingness to engage with treatment and the wishes of Rebecca and her family. They state:

    > It was decided that [Rebecca] should be discharged … with her care being transferred to a GP. Her GP can refer her on to Disability Services if this is felt necessary in the future.

36. When given an opportunity to comment on a draft of this report, DHHS also noted that mental health units are high-stimulus, rapidly-changing environments and said they were 'fundamentally unsuitable for Rebecca'. DHHS said it had become clear that Rebecca required disability support services and not medical treatment.

37. Rebecca was not eligible for disability services, however. DHHS' Disability Services files do not record precisely when or why this decision was made. In its comments on the draft of this report, DHHS said '[t]he narrow application of the criteria required to be considered as having an intellectual disability and eligible for service was a key barrier to Rebecca receiving the services appropriate to her needs.'

38. Many of Rebecca's recent assessments and reports describe her falling within a 'service gap'. She no longer fitted the criteria for the mental health system, and she did not meet the criteria for the disability services system.

Homelessness and prison

39. Professional reports note Rebecca's parents were also having difficulty coping with her behaviours.

40. In mid-2015, the Magistrates' Court issued family violence intervention orders preventing Rebecca going within 200 metres of the family home.

41. Some of the professionals who assessed Rebecca questioned her capacity to understand these orders. Police and prison records show she returned home repeatedly. There are multiple reports of Rebecca's family calling the police, Rebecca refusing to leave and police officers physically carrying her from the house. One police statement describes Rebecca hiding under a blanket in a bedroom and curling into a ball. On some occasions officers took her to the local hospital. Other incidents resulted in criminal charges.

42. Rebecca was first remanded to prison in mid-2015 after she assaulted a staff member at a supported residential service. She was released after 16 days.

43. Just over a fortnight later, Rebecca went to prison a second time for breaching the intervention orders, resisting police and other charges. She stayed for over five months. The prison transferred her to the Thomas Embling Hospital - Victoria's secure forensic mental health hospital - for several weeks during this time. When Rebecca was released from prison, she was given two nights' crisis accommodation in a hotel.

44. Just over five weeks later, Rebecca was in prison again on charges of breaching the intervention orders and resisting police. This time she served a sentence of 13 days.

45. According to prison records, the prison was not able to find crisis accommodation for Rebecca this time. The records say she was given Myki tickets and 'limited transport assistance'. Rebecca refused to get dressed and leave her cell and was 'taken out to freedom' by emergency response group officers at 6.20pm.

46. A fortnight later, Rebecca was in prison again for breaching the intervention orders and related charges. She stayed for 12 days.

47. The prison records do not show where Rebecca went after she was released this time but, according to police statements, she returned home a week later. After several days, her parents called the police after an argument. Rebecca was charged with breaching the intervention orders and resisting police. The police took her to the local police station, where a medical officer found her unfit to be interviewed.

48. A magistrate remanded Rebecca in custody and she returned to prison for the fifth time in nine months. This time she had been free for less than a fortnight.

How did the prison manage Rebecca?

49. Rebecca was taken to the Dame Phyllis Frost Centre after she was remanded and stayed there for more than 18 months over 2016 and 2017. The Dame Phyllis Frost Centre is the main women's prison in Victoria and the only prison that can hold women on remand awaiting trial or sentencing.

50. Rebecca had spent her earlier periods in custody at the prison and it was familiar with her disabilities and associated behaviours.

51. Rebecca's disabilities were obvious on her arrival. The prison officer who processed Rebecca recorded she 'presented as extremely unwell'. The records kept by officers in her first few days describe her behaviour as 'erratic' and say she was refusing food, yelling, crying and asking for her father.

52. The investigation looked at how the prison managed Rebecca over the next 18 months.

Placement in the mental health unit

53. The Public Advocate expressed concern that the prison kept Rebecca in a mental health unit when she did not have a mental illness. The investigation confirmed this was the case.

54. The men's prison system in Victoria has a specialist unit for prisoners with an intellectual disability, but there is no equivalent in the women's system.

55. Women like Rebecca, who cannot be housed in 'mainstream' units because of behaviours of concern, have two placement options:

    - The management unit, known as Swan 2. Placement in the unit is often used as punishment for women who commit disciplinary offences in prison. Women are routinely locked in their cells for 22-23 hours a day in conditions described as 'bleak' in the Ombudsman's report on the July 2017 inspection at the prison.[10]
    - The mental health unit, known as Marrmak. Forensicare provides specialist forensic mental health services in the unit, working alongside prison officers to care for women with serious psychiatric conditions.

56. Rebecca spent her first three nights in the prison's medical centre before being moved to the management unit 'to allow ongoing psych[iatric] and medical assessment and observation'. Prison officers continued to describe her behaviour as 'erratic' in their records. There were also reports that other women in the unit were verbally abusing Rebecca.

57. After three weeks in the management unit, Corrections Victoria moved Rebecca to Marrmak.

58. At interview, the Forensicare psychiatrist in Marrmak said the management unit is unsuitable for women like Rebecca:

    > their mental state gets deteriorated, their behaviours become more entrenched, they learn some of the maladapted behaviours through other … people around. It's a downwards spiral.

    He said Marrmak has a psychologist and can engage other supports and is 'a much better scenario for them.'

59. The psychiatrist described cognitive function disorders as a 'very unmet need' in prisons. He said Marrmak is not designed for people with intellectual disabilities or developmental disorders: 'In the women's prison … there is actually no resource for people with these difficulties.'

10 Victorian Ombudsman, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* (2017) 52.

Solitary confinement[11]

60. Corrections Victoria's decision to place Rebecca in Marrmak was partly intended to 'ensure that [Rebecca] does not become a long term management prisoner in Swan 2'. Despite this, the prison continued to lock Rebecca in her cell for 22-23 hours a day while she was in Marrmak.

61. The prison's management regime for Rebecca initially allowed her a minimum of one one-hour period outside her cell (referred to as an 'airing') each day. In early 2017, an external psychologist assessed Rebecca and said 'extending her time outside of her cell needs immediate focus.' The prison began giving Rebecca a second one-hour 'airing' in mid-May 2017.

62. Corrections Victoria's Deputy Commissioner, Operations explained the reasons for the lockdown regime in a letter to the Public Advocate dated 21 July 2017. The Deputy Commissioner referred to incidents in which Rebecca had assaulted, threatened or spat at officers and damaged property. He also wrote:

> [Rebecca] does not engage well with the other prisoners and her behaviour, which at times causes a level of disruption to the unit, leaves her vulnerable to, and at risk of, other women in the unit directing abuse at her. Her behaviour, coupled with her mental health needs and low IQ, requires a carefully considered placement to ensure not only her safety, but that of the other women and staff at the [prison].

63. Prison records show there were occasions when Rebecca verbally abused or spat at officers. They describe her sometimes becoming 'elevated' during 'airings', tipping over furniture and exercise equipment and throwing food and other objects. They show she was sent back to the management unit for two days in September 2016 after she spat at officers, and for 14 days in June 2017 after she assaulted an officer.

64. The Forensicare psychiatrist and a prison officer from Marrmak confirmed at interview there were also concerns for Rebecca's safety. The Marrmak officer said Rebecca sometimes insulted other women and her screaming behaviour kept them awake at night. Officers locked the other women in Marrmak in their cells during Rebecca's 'airings'. The investigation heard this was one reason it was difficult to increase the 'airings' – more time out of cell for Rebecca meant less time out of cell for other women in the unit.

The legal basis for the regime

65. Corrections law in Victoria uses the term 'separation' rather than 'solitary confinement'.

66. Regulation 27 of the *Corrections Regulations 2009* (Vic) allows the Secretary of DOJR to order the separation of a prisoner from other prisoners '[i]f reasonable for the safety or protection of the prisoner or other persons, or the security, good order or management of the prison'.

67. The Regulations state the period of separation 'must not be longer than necessary' to achieve these purposes, and the Secretary must consider the medical and psychiatric condition of the prisoner. The order must also be in writing.

11 The main international standard for the treatment of prisoners, the Nelson Mandela Rules, defines solitary confinement as 'confinement of prisoners for 22 hours or more a day without meaningful human contact': *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175. UN GAOR, 70th sess, Agenda Item 206, UN Doc A/Res/70/174 (17 December 2015) rule 44.

68. The Secretary delegates this power to senior officers. Corrections Victoria's *Sentence Management Manual*[12] lists the different 'separation regimes' that can be used in prisons and sets out the process for authorising and reviewing separation orders.

69. Corrections Victoria provided copies of separation orders for the periods Rebecca spent in the prison's management unit. There were no written orders authorising her separation in Marrmak.

70. When asked to clarify the basis for Rebecca's lockdown regime, Corrections Victoria wrote:

> Marrmak is a mental health unit managed by Forensicare. Placement in the unit is managed by Forensicare in consultation with location staff and the Sentence Management Division.
>
> [Rebecca] was on a management regime separation each time she was separated. Swan 2 is the management unit requiring a separation order.

71. In contrast, when investigators asked the Forensicare psychiatrist in Marrmak who decided to keep Rebecca in lockdown, he said prison officers consult Forensicare but '[t]hat decision is a Corrections Victoria decision'.

72. When given an opportunity to comment on a draft of this report, Forensicare confirmed it:

> makes clinical recommendations to Corrections Victoria (including in respect of whether a prisoner might need to be in lockdown), however the ultimate decision regarding placement of prisoners, lockdown and time out of cell sits with Corrections Victoria.

Oversight and record keeping

73. The Deputy Commissioner's letter to the Public Advocate acknowledged it was 'far from ideal' to be accommodating any prisoner in their cell for 23 hours a day, particularly over an extended period. He said the prison was reviewing Rebecca's placement weekly in consultation with Forensicare or Corrections Victoria's Sentence Management Division.

74. The Forensicare psychiatrist in Marrmak said at interview there were weekly discussions about Rebecca during the early part of her placement, but they became less frequent.

75. The prison provided records of 2017 meetings at the investigation's request. They show officers met once or twice a month between January and June 2017.

76. The prison did not always keep regular records of Rebecca's daily 'airings', making oversight of the regime difficult.

77. The notes kept by prison officers often say Rebecca's 'airings' did not go ahead, or ended early, because Rebecca refused to leave her cell or because officers were concerned her behaviour was 'elevated'. The Marrmak officer interviewed by the investigation said Rebecca was rarely in her cell for more than 24 hours at a time, but this is not documented.

78. The prison advised that officers were meant to keep records of prisoners' 'airings', but this had been inconsistent. The prison said it started retaining 'airing' records in Marrmak after the Ombudsman's human rights-based inspection at the prison in July 2017.

12 The Manual applies to all Corrections Victoria prisoners including remand prisoners like Rebecca.

Behavioural management

79. Rebecca's OPA guardian questioned the prison's use of lockdown to address Rebecca's disability-related behaviours during her interview. She said:

> the prison staff were not able to safely manage [Rebecca's] behaviour towards themselves and to other Marrmak unit residents. So they were managing it by just keeping her locked up … My understanding working with autism is that … in order to achieve safe, good, therapeutic outcomes for someone, you need to provide an environment that is conducive to that.

80. The investigation commissioned psychologist Dr Astrid Birgden to review the prison's records for Rebecca. Dr Birgden has postgraduate qualifications in forensic psychology and mental disability law and over 30 years' experience working in prisons and disability services.

81. Dr Birgden's report said '[t]he evidence-based approach to managing behaviours of concern is Positive Behaviour Support.'

82. The disability sector uses Positive Behaviour Support to increase helpful behaviours through reinforcement rather than punishment, and to prevent unhelpful behaviours rather than reacting to them. Autism Spectrum Australia states Positive Behaviour Support plans include:

> developing an environment that minimises and removes the things that make challenging behaviour more likely as well as promoting positive behaviours; developing and reinforcing an appropriate behaviour that replaces the challenging one … and teaching other new skills as needed.[13]

83. Some professionals recommended this approach while Rebecca was in prison. For example, a February 2017 report by an external psychologist said a Positive Behaviour Support Plan 'should … be of immediate focus' for Rebecca. The psychologist suggested strategies including:

- implementing a rewards system where Rebecca could have more time out of cell or more personal items in her cell to reward positive behaviour
- development of 'social scripts' or 'social stories' for staff to encourage appropriate social interactions.

84. Corrections Victoria's *Sentence Management Manual* also requires a behavioural management plan when separation is used to manage challenging behaviour of prisoners with cognitive impairment. The Manual states:

- The behavioural management plan is developed by a disability clinician in consultation with relevant staff and is reviewed weekly.
- Securing prisoners in their own cell forms part of a staged process and is the 'last option' for addressing behaviours of concern.
- Prisoners 'will only be secured in their cell for up to four hours in any day'.
- The process 'can only be used on three consecutive days without a formal review of the Behavioural Management Plan and requires the approval of a disability clinician in consultation with the officer in charge of the Unit'.

Rebecca's behavioural management plans

85. At interview, the Forensicare psychiatrist in Marrmak said Rebecca had a behavioural support plan as part of her Corrections Victoria Intensive Case Management Plan. These plans set out goals and arrangements for each prisoner.

13 Autism Spectrum Australia, 'What is Positive Behaviour Support?' (December 2015) https://www.autismspectrum.org.au/sites/default/files/Aspect%20Practice%20What%20is%20Positive%20Behaviour%20Support.pdf.

86. The prison provided 10 versions of Rebecca's Intensive Case Management Plan, all dated from 2017, to the investigation.

87. Although one of the Plans was titled 'Behavioural Management Plan', the plans did not meet the requirements of the Sentence Management Manual.

88. They provided for the prison to lock Rebecca in her cell for 22-23 hours a day over an extended period.

89. They described Rebecca's triggers and behaviours and her lockdown regime and other security arrangements. They did not set out other, less restrictive options for responding to her behaviours of concern.

90. The plans were prepared by prison officers, not disability clinicians. In email correspondence, Forensicare told the investigation its clinicians attend case conferences with Corrections Victoria and discuss the contents of plans. It said:

> Forensicare clinicians offer recommendations regarding overall care of the patient and assist with information, such as patients' early warning signs, ways to communicate, introducing things such as sensory items, and communication cards that may assist [Corrections Victoria] staff to manage patients.

However, it confirmed the plans 'are prepared and owned by [Corrections Victoria] staff'.

The prison's actions

91. The investigation asked the Forensicare psychiatrist and Marrmak officer about Rebecca's behavioural management strategies at interview. The Forensicare psychiatrist recalled Rebecca's plans and said Marrmak developed social scripts. The Marrmak officer did not recall being given scripts until Rebecca was ready to leave the prison.

92. In its comments on a draft of this report, Forensicare noted it also:

- provided 'intensive multidisciplinary input' including daily occupational therapy and nursing and, in collaboration with prison officers, its clinical team was able to 'form some rapport with Rebecca'
- sought secondary consultations from a psychologist and psychiatrist who specialise in autism spectrum disorder
- sought ongoing support from another psychologist to maintain a consistent team approach for Rebecca.

93. Dr Birgden reviewed the 10 Intensive Case Management Plans supplied by the prison and other prison records regarding Rebecca. She said:

> It is understood that the prison would be concerned with the safety of staff and prisoners from verbal aggression, spitting and property damage by the client and the safety of the client from assault from prisoners. However, there is little evidence that behavioural strategies based on a functional analysis to determine what needs the client was seeking in her behaviours of concern had been considered. Such strategies need to be consistent and predictable with a focus on environmental changes (eg allowing self-isolation to her cell when stressed but without a locked door), skills-based training (eg social stories about how to get on with others), and short term behavioural strategies (eg a reward system at double the rate per day as the behaviours of concern).

94. Dr Birgden's report said in Rebecca's case '[t]he behavioural response to a person with disability and behaviours of concern was ad hoc and unplanned'. She noted, for example, 'there was no consistency in the timing of [Rebecca's] airing. The client has disabilities which require predictability'. She also said '[i]t appears that even a most basic strategy to address spitting at staff was not developed'.

Human contact

95. The investigation identified that officers in Marrmak tried to provide meaningful human contact for Rebecca when she was out of her cell, although her disabilities made this challenging.

96. At interview, the Marrmak officer said it took time for Rebecca to become comfortable with officers in the unit. The officer said, when they opened Rebecca's cell in the first few months, she would 'stay in her cell and get in the bottom of the shower and hold on to her head and scream constantly, just scream.' She said over time Rebecca started to come out and sit and talk with officers.

97. Prison records describe Forensicare's occupational therapist and other staff sometimes involving Rebecca in activities like cooking during her 'airings'.

98. After Rebecca assaulted a prison officer in June 2017, the prison limited her contact with Marrmak officers for around a month. Rebecca was moved to the management unit for 14 days and was subject to a 'handcuff regime'. This meant officers handcuffed Rebecca whenever she was out of her cell.

99. When Rebecca returned to Marrmak, she had 'airings' on her own or with officers from the prison's emergency response group. The prison scaled back this regime over time and Marrmak officers began attending her 'airings' again in early July 2017.

100. The Forensicare psychiatrist and Marrmak officer said they tried introducing other women from the unit into Rebecca's 'airings' but Rebecca was not interested in mixing with the other women.

101. There was initial confusion about whether Rebecca's parents could contact her because of their intervention orders against Rebecca. In January 2017, a prison officer recorded that Rebecca's parents had been calling but were denied permission to speak with her, and the prison had withheld a Christmas card from her mother. The officer wrote '[Rebecca] thinks her parents passed away and we are hiding it from her.'

102. After the officer raised this issue within the unit, the prison appears to have clarified the problem internally because prison records show Rebecca began having telephone calls with her father, as well as some visits.

Cell conditions

103. The investigation identified there was little to occupy Rebecca's time when she was in her cell during lockdowns.

104. The Marrmak officer told the investigation Rebecca moved between two cells in Marrmak. The photos on the following page show one of the cells and were taken in July 2017 during the Ombudsman's human rights inspection. The cells were basic but had a window, bed, toilet and shower.

105. A list of items Rebecca was allowed in her cell in August 2017 is shown in Exhibit 1 on the following page.

106. One of the cells contained a television but there was no television in the second cell. Prison records show Forensicare provided a weighted toy cat in September 2016 (weighted items are used as a sensory tool by some people with autism to maintain calm). Officers also gave Rebecca a 'small brown velvet teddy' in November 2016. Prison officers noted Rebecca sometimes soothed herself by combing her hair and officers were instructed not to remove her comb.

Photo 1 and 2 : One of Rebecca's cells in Marrmak unit, July 2017

Exhibit 1: Extract from Rebecca's Intensive Case Management Plan, August 2017

Cell Allocation (regime, cell type, modifications)

Marrmak B-Side Cell no television or kettle or cell 18 (modified)

1 x toilet roll to be issued each day in the morning with breakfast.

1 x Book or Magazine to be issued and swapped only at meal times (If misused, to be removed)

1 x comb (DO NOT REMOVE UNLESS APPROVED BY UNIT SPO/SUP)

Toiletries

Writing pad

1 x Flexi Pen

Puzzle/word searches (5 pages per day, as per daily request only)

Exempt Mail

1 x to pet therapy cat (white)

1 x black and white pillow (Mary had a little lamb)

1 x toilet roll – if misused, to be replace with 15 sheets of toilet paper

(Staff be mindful, Prisoner [redacted] will use excessive amounts of TP and clothing items)

Prison issue clothing

Bedding pack

Shop spends (To be issued on ration based)

No sharps (Tweezers, nail clippers, plastic cutlery or plastic containers)

107. The Marrmak officer said she got permission to manage Rebecca's prison allowance, which prisoners can use to buy food and personal items. She said:

> I started budgeting her money. Before I knew it, she had a couple of hundred dollars saved up and then she could start getting some nice things in her cell.

108. The investigation heard the prison removed other items from Rebecca's cell because of her behaviours. The prison initially gave Rebecca magazines because she liked the royal family, but stopped because she was tearing them up and blocking the toilet. The investigation heard the prison also removed the toilet seats in the cells because Rebecca broke them, and limited her supply of toilet paper because she blocked the toilet.

109. Rebecca's OPA guardian questioned the prison's response at interview. She said:

> [Rebecca] was bored … I'd be [breaking things] if I was locked in a cell for 24 hours … I shouldn't say that. But … it's not entirely surprising that's what happened.

110. She said Rebecca developed bruising on her buttocks from sitting on the toilet and 'a therapeutic, skill-building framework' would have been a more appropriate response to this type of behaviour from someone with disability.

Personal care and hygiene

111. The Marrmak officer interviewed by the investigation confirmed the Public Advocate's reports that Rebecca needed support for her personal care. She said:

> When [Rebecca] first came to the unit, she didn't even know how to use sanitary items. She didn't wear clothing … She was scared of the shower … [She] wouldn't use toilet paper.

She said: '[i]t was like looking after a kid'.

112. Prison officers often commented on Rebecca's cell and hygiene in their records. The evidence shows Rebecca did not shower for long periods, and there were faeces or menstrual blood on her clothes, sheets and towels. Further details have been omitted from this report in the interests of Rebecca's privacy.

113. The records kept by prison officers also show Rebecca refused food sometimes. The records show Rebecca lost over 50 kilograms in the first seven months of her imprisonment. This was half her original body weight.

114. At the time of Rebecca's imprisonment, the prison did not have a formal system for providing personal care support to prisoners with disabilities.

115. Prison officers provided personal care support to Rebecca on their own initiative. The officer interviewed for the investigation said she and other officers went into Rebecca's cell to mop her floors, strip her bed and do her laundry.

116. Prison officers, along with Forensicare staff, also spent time encouraging Rebecca to shower and eat. The Marrmak officer interviewed for the investigation said she sometimes gave Rebecca her dinner on a plate, with proper cutlery, and ate with her 'so she felt like … she had someone to talk to over the dinner table.'

117. Prison officers tried to assist Rebecca when she had to attend one of her court hearings. The records show they spent a month talking to her about the hearing to prepare her, helped her dress and got permission to transport her by car instead of a prison van. A Forensicare officer and a prison officer from Marrmak accompanied her to the hearing.

118. Prison records show some progress with Rebecca's hygiene. However, this deteriorated after she spent time in the management unit in June 2017.

119. The Forensicare psychiatrist said Rebecca's weight stabilised and she remained at a healthy weight for the rest of her time in the prison.

120. The Marrmak officer said at interview: 'I was probably like a personal carer with [Rebecca].' She said she had never previously changed sheets or washed clothes for a prisoner. She said:

> In all honesty I hope we don't ever have to have someone like [Rebecca] here again because I don't think prison is the place for her … [but] I think she got the best care she could ever have got in the prison environment.

Training and support for officers

121. The investigation looked at the training and support provided to officers about working with people with disabilities and behaviours of concern.

122. Rebecca's OPA guardian said at interview that, when she visited Rebecca in prison, some officers asked for advice about managing Rebecca. She said:

> A lot of [staff] pulled me aside and said 'Why is she here? We can't do this.' It was actually really obvious that those prison staff are not trained in supporting people who present with autism and difficult behaviours. It's not a disability setting. It's not a therapeutic setting … Certainly the staff that I met, they were all kind … but a number of them were saying 'How do you want us to actually do this?'

123. The Forensicare psychiatrist said his medical training had covered issues like intellectual disability. Forensicare's comments on a draft of this report, however, noted the clinicians in Marrmak do not necessarily have specialist training in treating people with intellectual disability. Forensicare said this requires different skills and competencies than treating people with a mental illness.

124. The Marrmak officer interviewed by the investigation said she had 'never met anyone like [Rebecca]. Ever.' She said she had cared for an elderly relative and for her own children. She said she had no specialist training and questioned if formal training could prepare people for someone like Rebecca.

125. At one stage the prison engaged a health service that provides advice about personality disorders to speak with Marrmak officers about responding to Rebecca's challenging behaviours. The Marrmak officer said Rebecca's care provider, which began visiting the prison towards the end of Rebecca's time, was also informative.

126. Corrections Victoria recently advised the Ombudsman that the Victorian Dual Disability Service has started co-delivering training for officers at the prison.

The impact on Rebecca

127. There is substantial international research showing the negative impact of solitary confinement on the physical and mental health of prisoners. Reported effects range from anxiety, depression and anger through to paranoia and psychosis. The research states that individuals with impaired functioning such as borderline cognitive capacities are especially at risk.[14]

128. Research on the experience of prisoners with autism spectrum disorders, like Rebecca, is more limited.[15]

129. The Forensicare psychiatrist said at interview that people with autism spectrum disorders have trouble adjusting to prison and being in close proximity with strangers. He said '[f]or them it's like standing in a war zone … It's a totally unfamiliar place'.

130. In Rebecca's case, prison records corroborate the Public Advocate's concerns about the amount of time Rebecca spent screaming in her cell. Prison officers often recorded this behaviour in their notes. On one occasion a prison officer wrote:

> Rebecca sounds like the exorcist over the intercom as she continues to spit and scream like a scene from a horror movie. The other women in the unit and even Forensicare listened in horror.

Prison records show, at one stage, officers gave ear plugs to other women in Marrmak at night.

131. Rebecca's OPA guardian and her legal aid lawyer said at interview they had worked with Rebecca prior to this period in prison, and her condition had gotten worse.

132. Prison officers also recorded concerns for Rebecca's mental health in their notes. In November 2016, an officer wrote '[Rebecca's] condition in the opinion of the writer is deteriorating.' In April 2017, an officer recorded Rebecca crying after they had been talking during an 'airing'. The officer wrote:

> I think she is very lonely and needs more interaction. I spoke with [the Forensicare nurses] about [Rebecca's] vocabulary and mental health as I have noticed it has deteriorated in the past 12 months.

Later that month, the same officer wrote 'I have major concerns that [Rebecca's] mental health is deteriorating'.

133. Rebecca's OPA guardian said at interview she thought the prison's management of Rebecca also made her behaviour worse. She said she was not a clinician but has experience with people with disabilities. She said:

> [Rebecca] was experiencing a level of distress that was only responded to by locking her up … I think there is a clear link between those circumstances and then the escalation in her behaviour. The tipping the furniture over, … assaulting staff and various things that happened.

134. Some professional reports support this opinion. In a September 2016 report, for example, a Forensicare psychologist noted Rebecca's:

> aggressive behaviours during her admission resulted in prolonged periods of being locked down, which likely contributed to problems with compliance and responsiveness to treatment.

135. The investigation asked Dr Birgden to review the prison's records for Rebecca and provide an expert opinion on the impact of the separation regime on Rebecca's wellbeing and behaviour.

14 See, eg, Sharon Shalev, *A sourcebook on solitary confinement*, (Mannheim Centre for Criminology, London School of Economics, 2008); Stuart Grassian, 'Psychiatric Effects of Solitary Confinement' (2006) 22 *Washington University Journal of Law & Policy* 325.

15 See, eg, Clare Allely, 'Experiences of prison inmates with autism spectrum disorders and the knowledge and understanding of the spectrum amongst prison staff: a review' (2015) 6(2) *Journal of Intellectual Disabilities and Offending Behaviour* 55.

136. Dr Birgden's report noted she did not have access to data regarding Rebecca's past behaviour that she could compare with Rebecca's behaviour in prison, and there were some gaps in the prison's records. She said it could not be definitively stated that Rebecca's behaviour worsened in prison as she had a history of similar behaviours in other settings. However after reviewing the available records, she concluded:

> There is evidence that the client's well-being did worsen while under separation in terms of physical health (substantial weight loss and declining hygiene management), psychological well-being (increased anxiety which exacerbated an existing trait), and social well-being (isolation may be self-soothing in a person with [autism spectrum disorder] but this was not volitional or freely chosen 'time out').
>
> On balance, the separation regime that the client was subject to in [Dame Phyllis Frost Centre] is likely to have had a negative impact on her behaviour and wellbeing and there is no evidence that it improved her behaviour and wellbeing.

What did agencies do to find an alternative for Rebecca?

137. Many of the people who spoke with the investigation about Rebecca said prison was the wrong place for her – the prison officer and Forensicare psychiatrist from Marrmak, her OPA guardian, her legal aid lawyer and DHHS officials. Rebecca's OPA guardian said at interview 'it was acknowledged by every agency, everyone involved, that it was unacceptable.'

138. At one stage, the judge in Rebecca's case said she might have been sentenced to a month in prison if she had pleaded guilty and been sentenced for her charges.

139. Agencies were concerned, however, that Rebecca had been in and out of prison since 2015 and had no housing or services in the community. Forensicare wrote to the Magistrates' Court after Rebecca had been in prison for around two months, and asked it to adjourn Rebecca's case for 'an eight to ten week period' so agencies could put a plan in place.

140. It took another 16 and a half months and many more court hearings before agencies finalised a solution.

141. The investigation examined the steps taken by agencies to arrange an alternative for Rebecca and why she was in prison so long.

The multi-agency case conference process

142. A DHHS officer interviewed by the investigation said there was no single person or agency responsible for helping people like Rebecca, who fall outside standard mental health and disability services.

143. The Forensicare psychiatrist in Marrmak said he could see they needed a 'coordinated effort' to find appropriate care for her. After Rebecca arrived in Marrmak, he contacted Victoria's Chief Psychiatrist (a DHHS officer appointed under the Mental Health Act who provides clinical leadership and advice to public mental health services). They set up a 'case conference' process to bring relevant agencies together. In its comments on a draft of this report, DHHS noted this function was outside the scope of the Chief Psychiatrist because Rebecca did not have a mental illness.

144. The first case conference meeting was held in June 2016. It was the first of at least 17 case conference meetings to discuss Rebecca's situation.

145. The meetings generally included people from:

- Forensicare
- the Office of the Chief Psychiatrist
- the Office of the Senior Practitioner, Disability (the Senior Practitioner is a DHHS officer appointed under the Disability Act who monitors restrictive interventions and compulsory treatment in disability services). The Senior Practitioner told the investigation he brought practice experience and knowledge of disability services to the meetings.
- the Multiple and Complex Needs Initiative (MACNI) program. MACNI is a specialist program for people with combinations of mental illness, substance dependence, intellectual impairment or acquired brain injury who are a risk to themselves or others. It is funded by DHHS and DOJR and managed and delivered by DHHS.
- Rebecca's local area mental health service.

146. Rebecca's OPA guardian and her current care provider attended meetings after they became involved in her case. Other people attended from time to time, such as clinical specialists engaged to provide advice about Rebecca.

147. Minutes show the meetings were large and often included senior professionals. One meeting had 18 people. A person interviewed by the investigation said she attended another meeting where:

> the meeting room had so many people in it, there was almost two layers. You couldn't actually move your chair.

148. Early meetings discussed ways to improve Rebecca's conditions in prison and organised additional clinical assessments.

149. When Rebecca arrived at prison, she did not have funding under the NDIS or an appointed legal guardian. Three months after Rebecca arrived, Forensicare applied to enrol Rebecca in the NDIS. It also applied to the Victorian Administrative and Civil Tribunal to appoint a legal guardian for Rebecca.

150. There was less progress securing accommodation or services so Rebecca could leave prison.

151. The meetings agreed to look at:

- interim options so Rebecca could exit prison in the short term, such as mental health secure extended care units
- supported accommodation options so Rebecca could move back into the community in the long term.

152. It was not always clear who was accountable for securing an option. The action plans from case conference meetings between July and October 2016 list the 'lead agency' for determining accomodation options as 'All'.

153. Meeting minutes show discussion but no outcome. In September 2016, agencies discussed potentially transferring Rebecca to the Thomas Embling Hospital, Victoria's forensic mental health facility, as an interim option. This option was still under discussion eight months later in May 2017.

Service gaps and stand-offs

154. The aim of the case conference process was to bring agencies together, but the evidence shows there were still service gaps and disagreements.

155. In August 2016, Rebecca's local area mental health service wrote an open letter saying it would provide consultation and advice but would 'not be providing ongoing mental health treatment or services such as … [its] secure extended care unit.' It said Rebecca did not appear to have a treatable mental illness and 'the most appropriate model of care and skills required are more likely to be delivered through disability stream of services'.

156. Several people interviewed by the investigation said Thomas Embling Hospital would have been a better option for Rebecca than prison. They noted she had been there before.

157. The Chief Psychiatrist approached Thomas Embling Hospital about taking Rebecca but was unsuccessful.

158. The Chief Psychiatrist explained people need a treatable mental illness under the Mental Health Act to access services like Thomas Embling. Rebecca's condition – pervasive developmental disorder – cannot be treated. He said:

> To go to Thomas Embling [Rebecca] would have needed to have a psychiatric illness that met their criteria and could be treated. And she didn't. This is I know very hard to understand when she has a disability like a pervasive developmental disorder. But Thomas Embling is set up to treat people. If she doesn't have an illness that requires treatment, this is a permanent disability.

159. The Chief Psychiatrist also noted there is high demand for mental health services. He said using services to accommodate people like Rebecca has 'enormous implications' for people who need mental health treatment. He said Rebecca 'needed a different sort of a service.'

160. Forensicare and DHHS reiterated Rebecca's ineligibility for these services in their comments on a draft of this report. Forensicare said it had no discretion to accept Rebecca at Thomas Embling. It said the hospital 'is not equipped to treat those who have an intellectual disability (without a co-occurring mental illness) as it was not set up to provide such services and does not have the specialist skills to do so.' DHHS said Rebecca could not be treated in an acute inpatient unit because she has a lifelong disability and it would have represented a breach of her human rights.

161. The disability services system could not provide a solution either.

162. DHHS told the investigation there are two secure accommodation options for people with disabilities under the CMIA:

- the Disability Forensic Assessment and Treatment Service (DFATS) in Fairfield
- the Long Term Rehabilitation Program, a five-bed unit in Bundoora.

163. DHHS advised that admission to these facilities is limited to people with intellectual disabilities. This report notes that Rebecca did not satisfy the definition of intellectual disability under the Disability Act (see page 14).

164. DFATS is also unsuitable for women because it is an all-male facility which houses sex offenders.

165. The Forensicare psychiatrist told the investigation they tried to find an appropriate residential disability service for people with autism spectrum disorders in Victoria, however 'unfortunately there are none'.

166. The MACNI program was willing to assist Rebecca even though she did not meet the criteria in its legislation.[16] It does not provide accommodation, however. There was also confusion about which MACNI team should be involved.

167. The evidence shows the MACNI team in DHHS's West Division went to the early case conference meetings because Rebecca's prison fell within its area. It wanted the MACNI team in DHHS' North Division to take over because Rebecca's family and other connections were in their area.

168. DHHS's comments on a draft of this report noted that Rebecca's charges arose because she kept returning to the family home, and said MACNI North thought it would be setting Rebecca up to fail on her release.

169. The investigation was also told MACNI North was concerned its assessment panel (which decides applications for the program) would not accept Rebecca because there was greater demand for the program in its area and access is harder. It wanted MACNI West's assessment panel to formally take Rebecca as a client and transfer her over.

170. MACNI North said it did not hear anything further. MACNI West thought MACNI North had agreed to its proposal and ended its involvement in October 2016.

171. Mental health services, disability services and the MACNI program fall under the one department – DHHS – but the issues were not resolved. One person with DHHS experience told the investigation DHHS has become more 'siloed' because of restructuring. The person said 'when you have more silos … people become more "precious" and … the criteria get tougher and tougher'.

16 The *Human Services (Complex Needs) Act 2009* (Vic) sets out legislative criteria for accessing the MACNI program. Assessment panels in DHHS area offices decide applications for the program. A person must have, amongst other things, two or more of (a) a mental illness within the meaning of the *Mental Health Act 2014* (Vic) (b) an acquired brain injury (c) an intellectual impairment and (d) a severe substance dependence: see *Human Services (Complex Needs) Act 2009* (Vic) s 7.

172. At interview, the Chief Psychiatrist said:

> I certainly didn't have a feeling that anyone was to blame, any individual or service sector was to blame for this. It was just the … gaps. Even with the willingness of people to come together, there were some structural, systemic challenges for us getting the solution.

The impact on Rebecca's court proceedings

173. In the meantime, the legal system was waiting for agencies to find a placement for Rebecca so it could finalise her case.

174. Rebecca's case began in the Magistrates' Court. Forensicare initially asked the Court to adjourn the case for eight to ten weeks so agencies could put a plan in place (see page 28).

175. When Rebecca's case returned to court, Forensicare wrote another letter stating 'we are yet to secure appropriate accommodation'. The letter said:

> if [Rebecca] was to be released … she would more than likely be released into a motel for a couple of days, and then would be homeless. Historically, once released from prison, [Rebecca] has returned to her parents' home, resulting in a breach of the IVO, being arrested and returning to prison. [Rebecca] is a vulnerable person and would be at risk from others too.

176. Rebecca's legal aid lawyer emailed Forensicare after the hearing and said the magistrate had only adjourned the case for a week. She reported:

> The magistrate indicated that he was feeling really uneasy about what is happening and said that he wants some 'accountability'. He indicated that he would like a member of [Rebecca's] treating team to appear in court directly so that he can be satisfied that the Marrmak staff are taking her case seriously, because [the magistrate] admitted that … keeping her in custody any longer at this point is 'unlawful'.

177. At the same time, another Forensicare psychiatrist provided a psychiatric opinion stating Rebecca was unfit to stand trial. This meant Rebecca's case was transferred to the County Court for hearing under the CMIA (see page 8).

178. The Office of Public Prosecutions took over the prosecution. In email correspondence with the investigation, it said it told police and Rebecca's lawyers it was likely it would discontinue the proceedings if Rebecca's care team could find a guardian or community-based treatment measures.

179. At the first directions hearing in the County Court, the court transcript records her legal aid lawyer saying 'no services will take her … There's just no one that will help.' The transcript records the judge saying 'This matter needs to be resolved speedily. It's intolerable that someone should be in custody for so long'.

180. By mid-2017, there had been another four court hearings and Rebecca had been found unfit to stand trial and not guilty because of mental impairment. The Court continued to express concern about Rebecca's imprisonment. According to court transcripts, the judge said at one stage:

> If Secretaries of Departments do not find a means of resolving it, I'll exercise my powers to require people to attend court and give evidence as to why it has not been resolved.

181. The CMIA states the courts must not make an order remanding a person or committing a person to a prison unless there is 'no practicable alternative in the circumstances'. There was no practicable alternative in Rebecca's case. She remained in prison.

Progress

182. In March 2017 Rebecca's OPA guardian became involved in her case.

183. The Victorian Administrative and Civil Tribunal (VCAT) made a guardianship order appointing the Public Advocate in 2016, when Rebecca had been in prison for around six months. OPA has a waiting list for guardians because the number of VCAT appointments exceeds its resources. In Rebecca's case, there was a wait of just over four months. At interview, Rebecca's OPA guardian said Rebecca was not prioritised by OPA and she thought this was a 'triaging error'.

184. When given the opportunity to comment on a draft of this report, the Public Advocate said she had sought a review of the management of Rebecca's case. She said:

    - OPA had a monthly average of 129 orders on its waiting list at this time (DOJR and DHHS advised the investigation that the 2018-19 state budget allocated an additional $5.4 million to OPA over two years, and it is anticipated the additional funding will shorten waiting times).
    - There were a number of communications between OPA's intake team and the prison while Rebecca was on the waiting list.
    - OPA assesses orders according to a risk matrix and Rebecca was categorised as 'low risk' because she was in protective custody, was awaiting a court hearing and was safe, and there were no guardianship decisions to make. The Public Advocate said no information was put to OPA that Rebecca was at risk of significant psychological harm, although 'On reflection, our staff could reasonably have surmised that Rebecca was at risk of psychological harm due to her incarceration and lock down and so assessed her differently'.
    - OPA's standard operating procedures for risk assessments have been updated since this time and the Public Advocate has recommended further changes.

185. Rebecca's OPA guardian attended her first case conference meeting in March 2017. She told the investigation:

> It was just going around in circles around who could pull [a solution] together … In terms of identifying a release option, no progress had been made … I was actually shocked … [Rebecca] had been in for ages.

186. The Public Advocate and Rebecca's OPA guardian began contacting agencies to advocate for Rebecca. Amongst other things:

    - The Public Advocate wrote to the Secretary of DHHS seeking her assistance and 'intervention to resolve the impasse between the MACNI West team and the MACNI North team as to who should work with [Rebecca]'. After this, MACNI North became involved.
    - Rebecca's OPA guardian contacted the National Disability Insurance Agency (NDIA) about funding.

187. These were important steps towards finding housing and services for Rebecca.

Housing

188. The MACNI officer interviewed by the investigation attended her first case conference meeting in May 2017. She said she suggested a model for releasing Rebecca into the community with support. She told the investigation '[s]ometimes you just need something to break the circuit'.

189. Meeting records show the case conference meeting on 17 May 2017 discussed 'designing an end-point community-based accommodation option' for Rebecca.

190. In June 2017, MACNI North's assessment panel formally agreed to provide some support for Rebecca.[17] The next day, MACNI identified a DHHS-owned house that was vacant awaiting sale. The MACNI officer said the house needed changes because of Rebecca's behaviours of concern. This included soundproofing and separate spaces for Rebecca and her care workers so they could withdraw when needed. Agencies visited the house and approved it subject to changes.

191. DHHS agreed to provide the house and pay for the changes and fit out.

NDIS funding

192. Rebecca also needed funding for a care provider to support her in the house. Rebecca's OPA guardian said at interview she thought the NDIS was the best option.

193. Forensicare had enrolled Rebecca in the NDIS in 2016, while she was in prison, and the NDIA had approved an initial plan for her.

194. Following her appointment in March 2017, the OPA guardian contacted the NDIA to progress Rebecca's funding. The NDIA provided interim funding the same month for a 'support coordinator' to prepare a proposal for Rebecca's care in the community.[18] The OPA guardian found a disability services organisation to take on this task. The organisation sent a funding proposal to the NDIA in June 2017 and agreed to become Rebecca's care provider once funding was approved.

195. The NDIA is a Commonwealth Government agency and the Victorian Ombudsman has no jurisdiction to investigate its actions. Several people criticised the NDIA in their evidence, however.

196. Rebecca's OPA guardian described at interview her experience with the NDIA as 'very frustrating'. She said NDIA officers:

- would not provide direct telephone numbers at the start so she had to communicate by email
- would not attend case conference meetings for Rebecca
- could not provide a date for deciding Rebecca's funding proposal. This meant Rebecca's care provider could not hire staff or start preparing Rebecca to leave prison.

197. Other people interviewed by the investigation also questioned the NDIA's capacity to deal with complex cases, such as people with disabilities in prison. Rebecca's OPA guardian said '[a]t the time, and I hope this has changed, the guidelines they had around preparing plans and providing support for people who were in prison were thin'.

198. She said the NDIA did not fund Rebecca's support coordination at its complex rate. She said:

> [Rebecca] wasn't standard. She required skill, diplomacy … but she didn't have that funding. So not surprisingly I contacted a number of agencies and they weren't able to provide a service. Because essentially I was saying 'Can you provide an urgent coordination service for this complex person? It will require liaison with a number of different agencies. And you're just getting the same rate you'd get for anyone.' They all said no.

She asked the NDIA to increase the rate and it did.

17 The panel did not formally accept Rebecca into the program because she did not meet the legislative criteria: see n 16. It agreed to provide some support outside the program.

18 The NDIS funds community-based organisations to work as support coordinators for people with disabilities. Support coordinators help people manage their NDIS funding and find services.

199. Rebecca's OPA guardian also said the NDIA initially refused to discuss what would be in Rebecca's NDIS plan until she had a date for her release from prison. The problem was Rebecca could not get a release date until she had a plan.

200. The Public Advocate raised some of these problems with the Commonwealth Parliament's Joint Standing Committee on the NDIS. The OPA guardian said the NDIA's responsiveness 'improved out of sight'.

201. When given the opportunity to comment on a draft of this report, the NDIA's Chief Executive Officer wrote:

> I acknowledge there were a number of challenges in NDIA processes at the time of Rebecca's access request and planning experiences with the [NDIS], and I apologise for the delays and difficulties these caused for Rebecca.
>
> Since the early rollout period in North Victoria, the NDIA has taken concerted efforts to improve the participant pathway, and Agency systems and processes. The Agency will continue to work collaboratively to further improve the NDIS experience, including the timeliness of access, planning and Agency decision-making.

202. The NDIA provided further information for 'context and minor clarification'. Amongst other things, the NDIA noted it:

- made an 'Access decision' for Rebecca in October 2016 following Forensicare's application
- contacted Forensicare in December 2016, following receipt of further evidence, seeking a report to inform the NDIS planning process. The NDIA noted that, although Rebecca had been known to Victorian service systems for many years, she was not included in data or information provided to the NDIA as part of transition planning and entered the system as 'new'.
- approved Rebecca's first NDIS plan in February 2017
- provided a list of support coordinators to OPA in March 2017
- sent a request for service quote to OPA's nominated provider in May 2017
- originally funded Rebecca for 174 hours of support coordination over five months but, when the complexity of other services involved became clearer, provided for 909 hours of support coordination in Rebecca's second NDIS plan. The NDIA said 265 hours was funded at its specialist rate, with total funding of $108,000.
- gave OPA's preferred care provider access to the NDIA to finalise a plan of funded supports. The NDIA noted that the care provider was involved in detailed case plan meetings and clinical reviews at the prison.

203. In August 2017, the NDIA approved an NDIS plan for Rebecca with over $1.3 million in funding. The plan paid for two care workers to support Rebecca in her home around the clock, as well as behavioural management and other supports.

204. Rebecca's OPA guardian said at interview:

> This is where we need the NDIS. For people who … have a significant disability and unmet need it will make a difference … If [Rebecca] didn't have an NDIS plan she'd probably still be in prison.

205. The OPA guardian said, in her opinion, Rebecca's plan was so expensive because prison made her behaviour worse and she needed extra support. She said Rebecca 'had been made into a risk'.

Transition and release

206. Shortly after Rebecca's NDIS plan was approved, DHHS submitted a certificate to the County Court setting out the plans for her housing and services. DHHS said it would provide a house and care coordination and planning for Rebecca. It said the NDIS would fund direct residential support for Rebecca in her home 24 hours a day, seven days a week, along with some other services.

207. The Court agreed to adjourn the case for three months so agencies could prepare the house, hire staff and prepare Rebecca for release. It ordered DHHS to provide monthly reports on progress.

208. At interview the Chief Psychiatrist said people with pervasive developmental disorder:

> don't cope well with change. And [Rebecca had] had a lot of change. One of the features of this illness is that people need routines, they need a very structured approach. Even mild changes that wouldn't upset other people can be terribly devastating.

209. The prison allowed care staff to regularly visit Rebecca in Marrmak, rather than the prison visitor's centre. This allowed Rebecca to become familiar with staff who would be caring for her. In Rebecca's last month in prison, care workers were visiting four to five times a week.

210. When Rebecca's case came back before the County Court, the judge made a non-custodial supervision order under the CMIA. It allowed Rebecca to live in the community subject to DHHS supervision and other conditions. Rebecca's care provider collected her from the prison and took her to her new home.

211. On the day of Rebecca's release, court transcripts show her legal aid barrister told the court:

> it's concerning that somebody who is as acutely vulnerable as [Rebecca] could nevertheless spend 18 months in custody on matters which would have been unlikely to attract a custodial sentence had she been able to plead guilty to them in the first place.

212. The judge said he 'entirely endorse[d] those remarks.' He commended the cooperative approach adopted by DHHS, Rebecca's care provider and others who had provided support for Rebecca. However, he said the fact that:

> [Rebecca] has been in custody for so long reflects very poorly on the criminal justice system and on the welfare system.

Did the State breach Rebecca's human rights?

213. The extended imprisonment of Rebecca – a person whose disabilities made her unfit to stand trial – raises human rights questions.

214. When the investigation began, the Ombudsman intended to investigate whether the prison's management of Rebecca was compatible with the Charter. Over time, it became clear Rebecca's case was the product of broader service issues for people with disabilities and high-risk behaviours.

215. This section considers the responsibilities of the State as a whole to Rebecca under international standards and Victoria's human rights laws.

International standards

216. The United Nations sets minimum standards for treatment of people with disabilities and for treatment of prisoners.

217. The Convention on the Rights of Persons with Disabilities is the main international treaty setting out the rights of people with disabilities. The United Nations adopted the Convention in 2006 and Australia ratified it in 2008.

218. Amongst other things, the Convention requires States to:

- ensure people with disabilities enjoy the right to liberty on an equal basis with others. It states that 'the existence of a disability shall in no case justify a deprivation of liberty'.
- take effective measures to prevent people with disabilities, on an equal basis with others, from being subject to torture or cruel, inhuman or degrading treatment'.[19]

219. In 2011, the former United Nations Special Rapporteur on Torture said solitary confinement of people with mental disabilities is cruel, inhuman or degrading treatment. He said:

> Given their diminished mental capacity and that solitary confinement often results in severe exacerbation of a previously existing mental condition … its imposition, of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment and violates [the International Covenant on Civil and Political Rights and the Convention Against Torture].[20]

220. The Nelson Mandela Rules are the main international standards for the treatment of prisoners. They prohibit:

- prolonged solitary confinement (defined as solitary confinement for more than 15 continuous days)
- solitary confinement of prisoners with mental or physical disabilities 'when their conditions would be exacerbated by such measures'.[21]

221. The Nelson Mandela Rules also state that people who are found not to be criminally responsible, or who are later diagnosed with severe mental disabilities, must not be detained in prison if that would lead to exacerbation of their condition. States must arrange to transfer such people to mental health facilities 'as soon as possible'.[22]

222. The evidence in this report shows the State did not meet these standards in Rebecca's case. The prison kept Rebecca in solitary confinement despite her disabilities and concerns for her wellbeing. Agencies did not transfer her to another facility as soon as possible. They were initially slow to find a solution because of disagreements between services and DHHS regions.

19 Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2017, 2515 UNTS 3 (entered into force 3 May 2008) art 14 and 15.2.

20 Juan E Mendez, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/66/268 (5 August 2011) para 78.

21 Nelson Mandela Rules, above n 11, rules 43-45.

22 Nelson Mandela Rules, above n 11, rule 109.

223. When given the opportunity to comment on a draft of this report, DHHS claimed Rebecca did not meet the criteria for the Nelson Mandela Rules 'as she did not have an intellectual disability or a mental illness'. The investigation notes the relevant parts of the Nelson Mandela Rules refer to people with 'mental disabilities', which would include Rebecca's condition.

Victoria's human rights laws

224. While international standards are not legally binding on agencies in Victoria,[23] public authorities have legal obligations under the Charter.

225. The Charter sets out civil and political rights shared by people in Victoria. Amongst other things, it provides:

- A person must not be treated or punished in a cruel, inhuman or degrading way (section 10).
- All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person (section 22).
- Every person has the right to enjoy his or her human rights without discrimination (section 8).
- Every person has the right to liberty and a person must not be subjected to arbitrary detention (section 21).

226. Section 38 of the Charter states that it is unlawful for a public authority to:

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

227. DOJR, which operates the prison, and DHHS, which is responsible for mental health and disability services in Victoria, are 'public authorities' subject to the Charter.

Did agencies give proper consideration to Rebecca's human rights?

228. The Supreme Court of Victoria has stated that public authorities can discharge their obligation to give proper consideration to human rights in 'a practical and common-sense manner' and 'a manner suited to the particular circumstances'.[24] One of the Court's decisions notes '[d]ecision-makers are not expected to approach the application of human rights like a judge'.[25]

229. The investigation asked the prison how it considered Rebecca's human rights under the Charter when reviewing her lockdown regime. The prison said:

> [Rebecca] was placed in Marrmak which is our designated mental health unit where she is supervised more closely than other units, she is safe, other prisoners cannot take advantage of her vulnerability and people are kept safe from her aggression and violent nature. The airings are dependent on [Rebecca's] own behaviours as it has been stated by Forensicare that having other prisoners around her, upsets [Rebecca] and she becomes violent and distressed. The unit staff try and manage this in a correctional setting. Prisoner's human rights are limited only to the extent that it is reasonably and demonstrably justifiable. All staff must act compatibly with human rights and consider human rights when making decisions. This is written on the majority of our [Local Operating Procedures] for staff to be reminded of their obligations.

23 The Charter provides that international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision: *Charter of Human Rights and Responsibilities Act 1996* (Vic) s 32.

24 *PJB v Melbourne Health; Patrick's Case* [2011] VSC 327 (19 July 2011) [31]; *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur V Minister for Families and Children & Ors* [2016] VSC 796 (21 December 2016) [187].

25 *PJB v Melbourne Health; Patrick's Case* [2011] VSC 327 (19 July 2011) [31].

230. The investigation examined a large volume of prison records regarding Rebecca, including the separation orders for her periods in the management unit, her Intensive Case Management Plans and records of prison meetings. None of the records discuss the Charter or Rebecca's human rights.

231. The meeting minutes kept by agencies involved in finding another placement for Rebecca do not refer expressly to human rights either. Officials interviewed by the investigation said that all agencies agreed the situation was unacceptable and, when Forensicare commented on a draft of this report, it noted a concern to address Rebecca's human rights was implicit in the meetings. However, agencies did not document consideration of Rebecca's human rights in this context either.

Did agencies limit Rebecca's human rights?

232. The Charter has a two-stage process for determining if an agency has acted incompatibly with a human right. The first stage looks at whether the agency 'limited' the human right. The second stage looks at whether the limit was reasonable and demonstrably justified.

233. Based on international and Victorian human rights decisions, agencies limited some of Rebecca's human rights under the Charter.

234. Overseas courts have considered whether solitary confinement constitutes cruel, inhuman or degrading treatment on several occasions. They look at factors including the physical conditions experienced by the prisoner and their health.[26]

235. The European Court of Human Rights, for example, has stated:

> the prohibition of contact with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment.
>
> … whilst prolonged removal from association with others is undesirable, whether such a measure falls within the ambit of [the prohibition on torture and other cruel, inhuman or degrading treatment] depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.[27]

236. Overseas courts have also found that solitary confinement breaches the right to humane treatment when deprived of liberty in some cases.[28]

237. In 2016, the Supreme Court of Victoria considered the detention of young people in an adult prison in conditions that included long periods of solitary and prolonged confinement. The Court found the conditions engaged the prohibition on cruel, inhuman and degrading treatment and the right to humane treatment when deprived of liberty. It found the responsible minister had not given proper consideration to Charter rights in that case.[29]

238. Rebecca's solitary confinement also constituted a limit on her right to humane treatment when deprived of liberty, and 'inhuman' treatment for the purposes of the prohibition on cruel, inhuman or degrading treatment in the Charter.

26 See, eg, *Taunoa v Attorney-General* [2007] NZSC 70 (31 August 2007); *Vogel v Attorney-General* [2013] NZCA 545 (7 November 2013); *Shahid (Appellant) v Scottish Ministers (Respondent) (Scotland)* [2015] UKSC 58.

27 *Ahmad v United Kingdom* (2012) 56 EHRR 1 [207-209].

28 *Taunoa v Attorney-General* [2007] NZSC 70 (31 August 2007); *Vogel v Attorney-General* [2013] NZCA 545 (7 November 2013).

29 *Certain Children v Minister for Families and Children* [2016] VSC 796 (21 December 2016) [169], [178], [321].

239. The evidence shows Rebecca was in solitary confinement for more than 18 months – well outside the 15-day limit in the Nelson Mandela Rules. The problems with her personal care and hygiene in the prison compromised her dignity, and the regime affected her mental and physical wellbeing.

240. The evidence also shows the prison placed Rebecca in solitary confinement because of the behaviours of concern related to her disabilities. The *Equal Opportunity Act 2010* (Vic) prohibits discrimination on the basis of a disability, including behaviour that is 'a symptom or manifestation of a disability'. The solitary confinement regime therefore also limited Rebecca's right to enjoy her human rights without discrimination under the Charter.

241. The evidence that Rebecca's release from prison was delayed because of service gaps and disagreements raises questions about a fourth human right – the right to liberty and the prohibition on arbitrary detention in the Charter.

242. The United Nations Human Rights Committee and overseas courts have found that detention may be arbitrary even though it is lawful. These decisions look at factors such as whether the detention was inappropriate or disproportionate. The Human Rights Committee, for example, has stated that 'detention should not continue beyond the period for which the State can provide appropriate justification'.[30]

243. DOJR also takes this approach in its guidelines for state officials about the Charter. The guidelines state:

> The term 'arbitrary' does not only mean that a detention is 'against the law'. Arbitrariness includes elements of inappropriateness, injustice and lack of predictability.'[31]

244. The guidelines list a number of ways in which an otherwise valid power of detention may be considered arbitrary. These include:

> Continuation of detention: Although the initial power to detain a person may be valid, the detention may become arbitrary if there is no sufficient reason for continuing to detain the person. An individual should not be kept in detention as a matter of convenience.[32]

245. Victorian courts have expressed different views about the term 'arbitrary' in the Charter, however, and the issue is not settled.[33]

Were the limits on Rebecca's human rights reasonable and demonstrably justified?

246. Section 7 of the Charter allows authorities to limit human rights in some circumstances. It provides that human rights may be subject to 'such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. This involves consideration of 'all relevant factors' including:

- the nature of the right
- the importance and purpose of the limitation
- the nature and extent of the limitation
- the relationship between the limitation and the purpose
- any less restrictive means reasonably available to achieve the purpose.

30 Human Rights Committee, *Views: Communication No 560/1993,* 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) ('A v Australia') [9.4]. See also Human Rights Committee, *Views: Communication No 1050/2002,* 87th sess, UN DOC CCPR/C/87/D/1050/2002 (11 July 2006) ('*D and E and their two children v Australia*') [7.2]; *A v United Kingdom* (European Court of Human Rights, Application No 3455/05, 19 February 2009) [164].

31 Department of Justice (Vic), *Charter of Human Rights and Responsibilities: Guidelines for Legislation and Policy Officers in Victoria* (2008) 133.

32 Ibid 134.

33 See *DPP v JPH* (No 2) [2014] VSC 177 (16 April 2014) [121]-[126].

247. In Rebecca's case, the evidence shows agencies' limits on Rebecca's rights were motivated by legitimate aims. The prison was concerned for the safety of Rebecca, other prisoners and its officers. The mental health system did not believe Rebecca met the legal criteria for admission to its facilities. DHHS reiterated in its comments on a draft of this report that she could not be legally detained under the Mental Health Act. Forensicare and DHHS officers were concerned about what would happen to Rebecca if she was released from prison without housing and support.

248. However, there were some less restrictive alternatives reasonably available to agencies. The evidence shows prison did not implement a comprehensive behavioural management plan to address Rebecca's behaviour in line with Corrections Victoria policy and professional recommendations (see pages 20-21). DHHS services and regions could have acted faster to find an alternative placement for Rebecca (see pages 29-31).

249. At a broader level, Rebecca's case highlights a lack of suitable options for people with disabilities and high-risk behaviours in Victoria. The investigation heard the prison system lacks appropriate facilities for women with cognitive impairments. It heard the mental health and disability systems do not have secure therapeutic facilities for women with Rebecca's disabilities. The State as a whole is responsible for providing these alternatives.

Where is Rebecca now?

250. When this report was drafted, Rebecca was living in the community with around the clock support from her care provider. DHHS was supervising Rebecca's placement under the terms of her non-custodial supervision order, and the Public Advocate was still Rebecca's legal guardian.

251. In a March 2018 submission to the investigation, OPA said Rebecca was increasingly independent. It said she enjoyed going to the supermarket or the café on her own and had 'begun taking the lead in household tasks like laundry and caring for her own personal hygiene.'

252. The investigation heard that Rebecca's behaviours of concern are ongoing, although DHHS reports their intensity and frequency have diminished since Rebecca left prison. This requires ongoing intensive support from agencies.

253. OPA said Rebecca had been taken to her local hospital emergency department several times because her state was so heightened she needed medication. It also said she had gone missing on occasion, and sometimes returned to her family's home in breach of the intervention orders.

254. When this report was drafted, DHHS said it had moved Rebecca from her DHHS-owned house because her behaviours were affecting her neighbours. It had arranged up to seven respite or crisis placements for Rebecca and two longer term placements. DHHS said it was paying for property damage at the earlier placements, and two of its officers were spending 60-110 hours a week between them on Rebecca's case.

255. DHHS had moved Rebecca to a new house. DHHS said the NDIA had offered some funding for specialist disability accommodation for Rebecca, but it is not enough to engage a builder. DHHS said it was looking for a suitable long-term property to buy for Rebecca using its own resources.

256. The NDIA told the investigation it has approved a new two-month plan for Rebecca while agencies explore long-term options. It said it 'continues to work with Rebecca's provider and a possible builder of a home suitable for her needs.' It also said it has participated in regular meetings since Rebecca's release, receives weekly written updates and liaises with Rebecca's care provider and support coordinator on a weekly basis.

257. Rebecca's most recent professional assessment concluded:

> [Rebecca] will need ongoing supervision preferably by a small group of staff who are able to work with her in a flexible and creative way to minimise the difficulties she presents with by identifying and managing her triggers, re-direction when needed, implementing crisis plans and guiding her to make safe choices and to engage in meaningful activities … However it is acknowledged that supervision cannot contain her or change her behaviour [and] has a limited capacity to ensure her safety and [it] is likely that [Rebecca] will continue to exhibit her long standing patterns of behaviour … The throughput model of the mental health services is not appropriate for someone who has long term needs and does not have clear treatable mental illness. The justice system could contain her behaviour [but] it is unable to provide the therapeutic and supportive measures she requires.

258. According to DHHS, Rebecca's care provider 'strongly believes' she will be able to reside in the community with support, but she cannot reside alongside neighbours at present.

259. OPA's March 2018 submission warned:

> Should [Rebecca] be unable to secure appropriate accommodation going forward, that meets her needs and her staffing requirements, then it is possible that she could end up offending again and need to go back to remand.

Conclusions

260. Rebecca's disabilities and behaviours are complex and challenging and multiple services have struggled to respond over many years.

261. When she was 35, Rebecca fell into a 'service gap'. Her changing diagnosis meant she was no longer eligible for help under the Mental Health Act, but she could not get help under the Disability Act. Professionals agreed she needed support, but no one could agree on who was responsible. For Rebecca, this led to prison.

262. The investigation confirmed Rebecca's conditions in prison were harsh during the period under investigation. Although the prison placed her in the most suitable unit available – its mental health unit – it managed her disability-related behaviours through solitary confinement. The investigation recognises there were limited options available to the prison. However, the lack of a written order authorising Rebecca's separation in the mental health unit breached the Corrections Regulations. The arrangements were also inconsistent with Corrections Victoria policy. They compromised Rebecca's dignity and health.

263. Once Rebecca was in prison, agencies were concerned about releasing her because she had no housing or support in the community. There were many meetings and discussions, but it took pressure from the Public Advocate and the courts before agencies found a more appropriate placement.

264. The investigation noted the efforts of many individuals involved in Rebecca's case. They included prison officers in the Marrmak unit who treated Rebecca with care and kindness and went beyond their usual roles.

265. A strong human rights culture cannot rely on individual kindness, however. It needs proper processes and systems.

266. The systems in place in Rebecca's case were inadequate. There is no appropriate unit for women with cognitive impairments in the prison system. Corrections Victoria's systems for implementing positive behaviour management strategies were ineffective in Rebecca's case. The prison did not provide suitable training and support for officers in the unit.

267. When given the opportunity to comment on a draft of this report and the recommendations, the Secretary of DOJR said Corrections Victoria had been working with the Victorian Equal Opportunity and Human Rights Commission, with a particular focus on human rights and decision making. He also wrote:

> I acknowledge that it is more appropriate for persons subject to orders under the [CMIA] to be treated within the forensic mental health and disability system, rather than the corrections system, and that it was unacceptable that [Rebecca] remained in prison for so long. My department will work to address the recommendations set out in your report, in order to ensure that [Rebecca's] experience is not repeated.

268. DHHS's systems for finding an appropriate placement for Rebecca were also inadequate. There was no single agency or officer with clear responsibility for finding a solution prior to MACNI North becoming involved in May 2017, and no protocols for resolving differences between service systems and regional offices.

269. As a result, Rebecca – a women with significant lifelong disabilities who was deemed unfit to stand trial and not guilty because of mental impairment – stayed in solitary confinement in prison for more than 18 months.

Opinion

270. These arrangements were not compatible with Rebecca's right to humane treatment when deprived of liberty, the prohibition on cruel, inhuman and degrading treatment or Rebecca's right to enjoy her human rights without discrimination under the Charter.

271. At the time this report was drafted, DHHS was making a considerable effort to support Rebecca's placement in the community. This involves a financial cost to the community through NDIA and DHHS funding. It also carries risks for Rebecca and her local community.

272. For Rebecca, the only other option is prison.

273. On the basis of the evidence obtained by the investigation, the Ombudsman has formed the following opinion:

    The actions of DOJR and DHHS that resulted in Rebecca's placement in solitary confinement in prison for more than 18 months were unjust, oppressive, improperly discriminatory and wrong pursuant to section 23(1) of the Ombudsman Act because they:

    - were incompatible with Rebecca's right to be treated with humanity when deprived of liberty under section 22 of the Charter
    - were incompatible with the requirement in section 10 of the Charter that a person must not be treated or punished in a cruel, inhuman or degrading way
    - were incompatible with Rebecca's right to enjoy her human rights without discrimination under section 8 of the Charter
    - failed to comply with the Convention on the Rights of Persons with Disabilities and the Nelson Mandela Rules.

Part Two:

Is Rebecca's case isolated?

274. In the course of investigating Rebecca's case, Ombudsman officers heard about other people who spent significant time in prison despite being found unfit to stand trial. Media articles over the last 11 years record concerns expressed by the courts (Exhibit 2 on the following page). In 2014 the Victorian Law Reform Commission reviewed the CMIA and made recommendations for reform.[34] Rebecca's case shows the issues remain unresolved.

275. The investigation sought information about the extent of the problem from agencies and officials involved in the investigation. In February 2018, the Ombudsman also invited submissions from legal and community organisations. Seven organisations or people made submissions, while others provided information to assist the investigation (see page 10).

276. The submissions confirmed Rebecca's case is not isolated. Victoria Legal Aid, for example, told the investigation its lawyers have witnessed:

> repeated issues for several years in relation to the prolonged detention of people found unfit to be tried.

277. The Law Institute of Victoria said Rebecca's case 'is not an isolated incident but a mere example that points to a broader systemic problem'.

278. Some submissions pointed to a broader problem with imprisonment of people with mental illness and disability in Victoria. The Mental Health Legal Centre, for example, said 'people with cognitive and mental health impairments are vastly over-represented at all stages of the criminal justice system' and people found unfit to stand trial are 'just the tip of the iceberg'.

279. These cases are also arising in the context of growing prisoner numbers. The Victorian prison population grew by 71 per cent in the 10 years to 2017, including an increase in the number and proportion of unsentenced prisoners since 2014.[35]

280. This investigation focused on Rebecca's case and does not make findings about other cases. This part outlines the evidence to the investigation to show the systemic nature of the issues in Rebecca's case. It looks at the number of similar cases, likely causes, and the possible impact of Victoria's transition to the NDIS in 2019.

34 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*: *Report* (2014) 415-422. Other reports raise similar concerns about laws in other states and territories. See, eg, Australian Human Rights Commission, *KA, KB, KC and KD v Commonwealth of Australia: Report into arbitrary detention, inhumane conditions of detention and the right of people with disabilities to live in the community with choices equal to others* (2014); Senate Community Affairs References Committee, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia* (2016); Melbourne Social Equity Institute, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities: Addressing the Legal Barriers and Creating Appropriate Alternative Supports in the Community* (2017).

35 Department of Justice and Regulation (Vic), *Corrections Victoria Prisoner Profile* (2017).

Exhibit 2: A sample of articles about people who spent time in prison despite being found unfit to stand trial

Herald Sun

Too disabled for prison

Norrie Ross, 22 May 2007

A Judge says a bid to keep a Melbourne man with an IQ of 54 behind bars is a 'barbarity'.
Judge Liz Gaynor said yesterday there was no secure unit in Victoria to house [name withheld], 60, although he was a danger to the community.
... 'He is caught in a nightmarish vicious cycle born of inadequate service provision,' Judge Gaynor told the County Court.
'A man who has not been sentenced to a jail term will be placed there, possibly for the rest of his life, because there is nowhere else to put him.'

THE AGE

Unconvicted, Indigenous, disabled man is free after 543 days in jail

Adam Cooper, 18 June 2018

An intellectually disabled man who spent 18 months in jail despite being found unfit to stand trial has been released from custody after 543 days.
'Ryan', an Indigenous man who was born with foetal alcohol syndrome and at 21 has an IQ in the low 50s, was found unfit to stand trial and then found to be mentally impaired when, in September 2016, he touched a teenage girl over her clothing.

Herald Sun

Judge blasts plight of prisoner

Paul Anderson, 10 November 2009

A scathing judge has ordered the Department of Human Services to show 'some initiative and energy' by arranging accommodation for an intellectually disabled prisoner living in lockdown because he has nowhere suitable to be placed.
During a County Court mention hearing for [name withheld], 41, yesterday, Judge Mark Taft described the prisoner's current plight as 'inhumane' and 'intolerable'.
'I asked that this case be mentioned because of my concerns about the glacial progress that has been made to ensure that [name withheld] can be supervised within the community,' Judge Taft said.

THE AGE

Imprisonment of intellectually disabled man 'embarrassing'

Jane Lee, 23 February 2013

An intellectually disabled man was left in prison for more than a year for a crime he could not have understood, largely because accommodation could not be found for him.

How many cases like Rebecca's are there?

281. The investigation found it is not possible to determine how many people like Rebecca are in prison because oversight of the CMIA is fragmented.

282. The CMIA allows the courts to detain people in a prison, a 'designated mental health service', 'residential treatment facility' or 'residential institution'. These facilities are managed by different agencies.

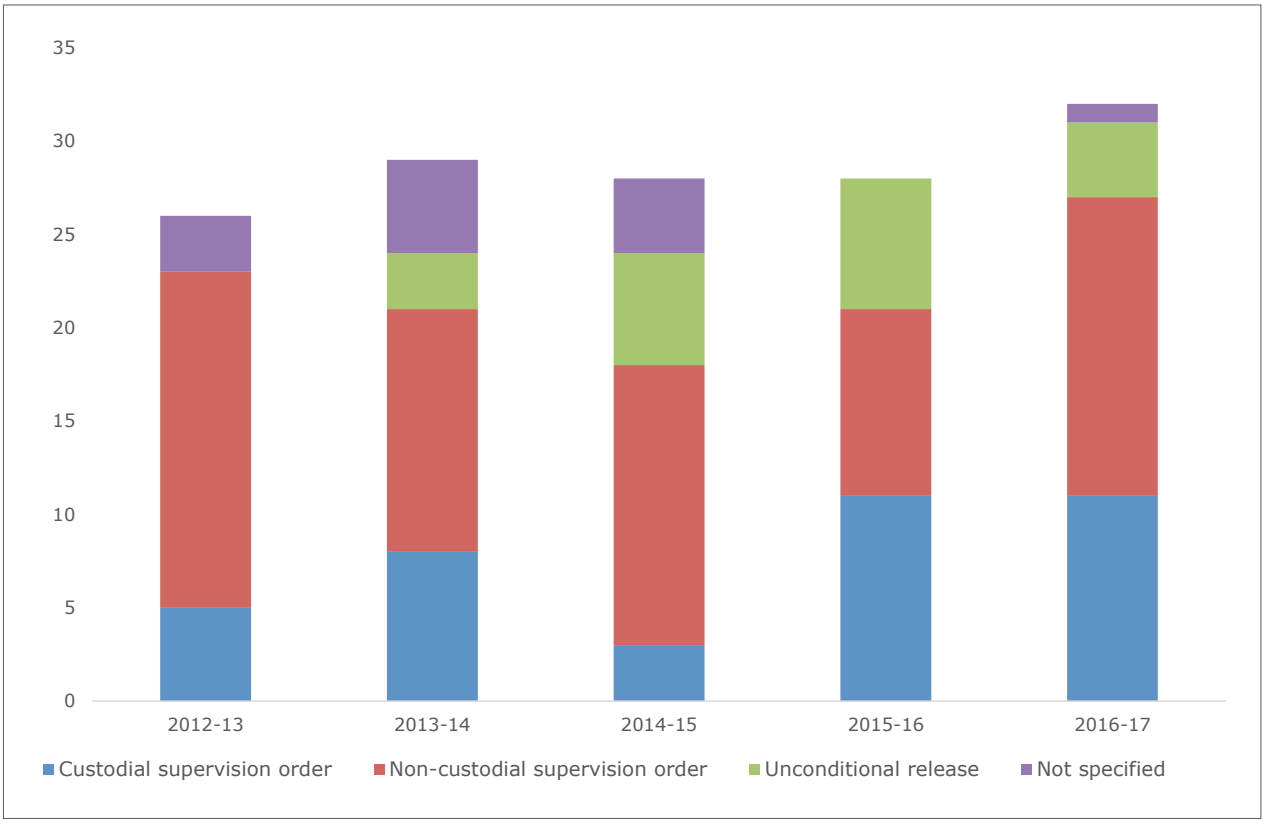
283. Forensicare told the investigation in correspondence that it manages people with mental illness subject to supervision orders under the CMIA, but not people with disabilities.

It said:

> it would appear that there is no single point of oversight of the operation and administration of the CMIA within Government. For example, there is no single point in Government that would have details of the number of people declared liable to supervision under the Act, what happens to each of these people whilst liable to supervision and how the CMIA is operating more generally.

284. The investigation asked the Sentencing Advisory Council and DOJR for data to try to determine the number of people in prison under the CMIA.

Graph 1: Number of cases under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)



Source: Sentencing Advisory Council (released with the permission of the Supreme Court and County Court). The chart shows the number of cases in which an order was made after (a) the person was found not guilty of the offence because of mental impairment or (b) was found to have committed the offence.

285. The Sentencing Advisory Council provided data showing the number of orders per year under the CMIA (Graph 1 on the previous page). Most of these orders are non-custodial supervision orders, which allow people to live in the community subject to supervision and conditions. Rebecca's case shows people can spend significant time on remand in prison before they are released on these orders. The Council does not collect data about how often this happens. The Council also does not collect data on where people on custodial supervision orders are detained.

286. In response to the request to DOJR, Corrections Victoria said it does not routinely report on people found unfit to stand trial or not guilty because of mental impairment under the CMIA. It provided data extracted manually from its systems, but noted the data was limited. The data showed that, between 1 July 2012 and 30 June 2017, six men and three women were held on remand for more than six months before being found not guilty because of mental impairment. It showed there were four men in prison on custodial supervision orders as at 15 December 2017.

287. Corrections Victoria said it was also worth noting that:

> in recent years [it] has seen an increase in cases where DHHS have issued a 'certificate of available [services]', which results in Disability or Mental Health clients being placed in prison custody.

What causes these cases?

288. There are several likely systemic causes of inappropriate treatment of people found unfit to stand trial, according to the evidence in the investigation.

Lack of therapeutic alternatives

289. In theory, the CMIA allows the courts to detain people in secure therapeutic facilities instead of prison. In reality, however, there are limited facilities available. Access to these facilities depends on a person's diagnosis, gender and age.

People with a mental illness or intellectual disability

290. The investigation identified three secure alternatives to prison available to people detained under the CMIA:

- the Thomas Embling Hospital
- the Disability Forensic Assessment and Treatment Service (DFATS)
- the Long Term Rehabilitation Program.

291. Thomas Embling Hospital is Victoria's secure forensic mental health hospital. It is a 116-bed facility operated by Forensicare.

292. There is a waiting list for Thomas Embling because demand for beds exceeds capacity. In 2017 the Chair of Forensicare's board, Bill Healy, said:

> The significant growth in the prison population combined with the growth of forensic patients has resulted in limited capacity at Thomas Embling Hospital and considerable waiting times for acutely mentally ill prisoners.[36]

36 Forensicare, 'Additional beds to reduce waiting times at Thomas Embling Hospital' (Media Release, 20 February 2017) http://www.forensicare.vic.gov.au/2017/02/20/media-release-additional-beds-reduce-waiting-times-thomas-embling-hospital/.

293. Many people have commented on this problem in the past, including the Victorian Ombudsman.[37]

294. The waiting list affects courts' decisions to remand people in custody under the CMIA. In a letter to the investigation, the Supreme Court wrote:

> While the legislation requires that prison remand be used only where there is no practical alternative, the lack of capacity at Thomas Embling often means the Court is presented with no choice.

295. The Court referred the investigation to eight Supreme Court CMIA cases since 2006 in which judges had to remand a person in prison because there was no bed available at Thomas Embling.

296. Forensicare provided data on the current waiting list for people recommended for custodial supervision orders under the CMIA. It shows there were 13 people waiting for a bed at Thomas Embling as at 25 July 2018. Eight of those people had been waiting more than 150 days. Two people had been waiting for 350 days. All but one of the 13 people was waiting in prison.

297. Work is currently being undertaken to increase capacity at Thomas Embling Hospital, including $16.5 million for 10 new beds and an eight-bed secure psychiatric intensive care unit.[38] Forensicare's 2016-17 annual report noted this is '[t]he first increase in more than 15 years.'[39]

298. The investigation asked Forensicare about the likely impact of these new beds. In a letter to the investigation, it said the new eight-bed unit is intended for patients detained under the Mental Health Act, not CMIA cases.

It said it anticipated the 10 new beds in its acute and subacute units:

> may initially allow for the admission of 4-6 men to Thomas Embling in the next 6 months. However, following the initial occupation of these additional beds, we anticipate that the status quo of waiting for a bed at Thomas Embling Hospital will remain.
>
> Please be aware that there are currently no new acute beds for women and consequently the new beds will have no impact on waiting times for women.

299. DFATS and the Long Term Rehabilitation Program are operated by DHHS. DFATS is co-located with Thomas Embling Hospital. The Long Term Rehabilitation Program is a five-bed unit located on the grounds of Plenty Residential Services. Both services are limited to people with an intellectual disability.

People with other types of mental impairment

300. The investigation heard there are no secure therapeutic facilities available under the CMIA for people with other types of mental impairment, such as autism spectrum disorder.

301. The Chief Psychiatrist said at interview:

> The gap … is for people with this sort of disability, for adults with challenging behaviours … We don't have any service sector that embraces this and when it impacts on accommodation it's really doubly challenging. So people get put in other accommodation services that are really inappropriate.
>
> … That's a whole sector that we don't have enough resources for, particularly for this hard group.

302. There are two options available to the courts under the CMIA for people with these mental impairments – prison or release into the community.

37 See, eg, Victorian Ombudsman, *Investigation into deaths and harm in custody* (2014) 119-121; Victorian Government, *Targeting zero: Supporting the Victorian hospital system to eliminate avoidable harm and strengthen quality of care* (2016) 138-142.

38 Forensicare, above n 36.

39 Forensicare, *Annual Report 2016-2017*, 13.

303. In its submission, OPA said:

> The people who are likely to end up on custodial supervision orders in prison are those with [an acquired brain injury] or other neurological disabilities. This is because, in the absence of a serious mental illness or diagnosed intellectual disability, they are considered unsuitable for Thomas Embling Hospital and ineligible for DFATS.

304. Associate Professor Andrew Carroll, a forensic psychiatrist who has worked in prisons and for Forensicare, told the investigation at interview that Victoria needs a community facility that is both clinical and lockable.

305. Dr Carroll noted implications for community safety as well as human rights. He said some people 'need high levels of procedural and physical security' to protect both themselves and the public. He said the current default option - prison – is neither clinical nor therapeutic:

> so the best that is often on offer is something like a supported residential service with a bit of outreach. That is not going to meet their needs. It is not going to be enough … It is not going to prevent access to the community. It is not going to prevent access to cigarette lighters, it is not going to prevent access to alcohol and drugs. Staff will be very vulnerable.
>
> …
>
> People don't want to hear it but there's a place for locked doors and only allowing supervised access to the community. It's always that bit where it falls over. Because politically, in terms of philosophy, there's understandable opposition to locking people up and I get that and that's a good thing … but the fact is, there are people whose risks … are so high that they need these high levels of procedural and physical security. Nothing to do with punishment but to do with protecting them from misadventure and to do with protecting the public and staff from what is going to happen.

306. The Victorian Law Reform Commission discussed these issues in its 2014 review of the CMIA. The Commission said barriers to facilities have 'resulted in circumstances that are inconsistent with community safety', as well as causing 'harm and trauma to vulnerable people in the criminal justice system.' The Commission recommended:

> The Department of Human Services should commission a review of current forensic disability services to identify appropriate models of care and the accommodation needs of people with an intellectual disability or other cognitive impairment who are subject to supervision orders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

307. When asked at interview about the Commission's recommendation, the Senior Practitioner, Disability said:

> there's a whole lot of work taking place around … what forensic disability service provision needs to look like in the new world.

308. OPA's submission included the case study on the following page, which illustrates the limited options for people with other types of mental impairment.

Case study: James

According to OPA, James has an acquired brain injury and Huntington's disease. OPA became his legal guardian in 2015 because of concerns for James's health. The guardian decided James should live in a nursing home but, after two months, he left to live in a tent by a river.

James was involved in a family disagreement and charged with arson. The court decided he was unfit to plead and had committed the offence.

OPA said the court initially made a non-custodial supervision order for James and he was placed in a specialist hospital unit. OPA said 'within a very short period of time, the [unit] said they could no longer offer services to [James] due to his behaviour and so [James] was taken back to prison.'

OPA said James was considered unsuitable for accommodation at Thomas Embling Hospital and his diagnosis made him ineligible for DFATS. It said '[a]s a result, the only place James could be detained on a custodial supervision order was prison, and so this is what the court ordered.'

OPA said at one stage DHHS was arranging community housing and services for James. DHHS later decided it could not manage the risks to the community.

OPA's submission said:

> [James] remains indefinitely detained in prison on a custodial supervision order, and has spent more than two and a half years in prison so far.
>
> … [James's] care team are concerned about the deterioration of his physical and mental health. They have reported that he is largely frustrated and angry, and constantly talks about wanting to be out of prison. He has said he would 'stab someone' if he did not get out. His Huntington's symptoms are worsening and he does not always take his medication. He can be abusive to other prisoners, as well as a victim of bullying from them. There is a real possibility that being in prison is exacerbating his behaviours of concern … There [are] very limited prospects for [James's] release until his Huntington's has progressed to such an extent that he is no longer physically able to present a risk to himself or others.

Women and young people

309. The investigation heard there are fewer options for women and young people under the current system.

310. Women with treatable mental illness can be placed in Thomas Embling. There are no secure facilities for women with other types of mental impairment under the CMIA. This report has already noted women cannot be accommodated at DFATS because it is an all-male facility that houses sex offenders.

311. Submissions from Victoria Legal Aid and the Law Institute said services for young people who are unfit to stand trial are also limited.

312. The Law Institute described a case involving a child with an intellectual disability whose charges are likely to be heard under the CMIA. It said the child is being held in isolation in a youth justice facility because of the nature of the alleged offences and the child's vulnerabilities. The submission said:

> a purpose built youth forensic facility is desperately needed particularly given the increase in drug induced psychosis, acquired brain injury from increase in the use of the drug ice and the gaps in disability services.

313. The Supreme Court drew the investigation's attention to the following case. It illustrates how the current service system produces different outcomes for different people based on factors like diagnosis and gender.

Case study: Jacob, Luke and Emma

In 2015, Jacob, Luke and Emma[40] killed a young man who shared an apartment with Jacob. Jacob and Luke have an intellectual disability and hearing impairments. Emma also has a hearing impairment and has been diagnosed with borderline intellectual function and autism spectrum disorder.

At a special hearing under the CMIA, a jury found the three friends committed the offence of murder.

In Jacob's and Luke's cases, the court made custodial supervision orders ordering their detention in DFATS.

In Emma's case, the court noted:

> there are no equivalent non-prison services or residential treatment facilities for females with special needs such as those experienced by [Emma]. Further, the s47 Certificate of Available Services issued by Forensicare … stated that there are no appropriate treatments or services that Forensicare could provide to [Emma], as she does not meet the criteria for admission to that facility. Therefore the only [custodial supervision order] option that is available to the court would be to commit [Emma] to the custody of a prison.

The prosecution argued Emma should be imprisoned because of the seriousness of her offence and identified risk factors.

Medical experts gave evidence prison would not be an appropriate environment because Emma 'would not receive the social or therapeutic support she requires' and would be 'particularly vulnerable' in prison. The Court also heard there are no staff at the prison who speak Auslan, and effective communication with Emma would be limited to weekly visits by a case worker.

The judge concluded 'the community would not be well-served by the imposition of a [custodial supervision order] that would increase the level of dysfunction experienced and exhibited by [Emma].' She said '[f]amily and friends of the deceased may struggle to understand why a [custodial supervision order] should not be imposed' but she was bound to apply the provisions of the CMIA.

The judge made a non-custodial supervision order allowing Emma to live in the community subject to supervision and conditions.

The impact on families

314. Some of the families of people involved in CMIA cases or the criminal justice system also contacted the investigation.

315. The father of a man with a significant mental illness said he had not been able to see his son in prison for two months until he was transferred to Thomas Embling Hospital for treatment. He said the situation had caused 'extreme distress'.

316. The mother of another man in prison despite his disabilities said '[t]here needs to be some place for my son … I'm begging you to please try and find a way.'

317. The investigation also received a submission from a close relative of a woman killed by a person found not guilty because of mental impairment. The submission raised concerns about the legal system's handling of the case and the defence of mental impairment. It also noted the court had adjourned the case twice because of lack of beds at Thomas Embling Hospital. The relative said the court process had been 'drawn out and very confusing' and said '[t]his has only added to the trauma, anxiety and ongoing concerns of my family.'

40 The information in this case study is drawn from the court judgments in the case.

Inadequate prison system

318. Some submissions also commented on the inappropriateness of prison for people with mental impairments under the CMIA.

319. In its submission, OPA said:

> Prison is a punitive rather than therapeutic environment, which is unsuitable and often harmful for people with disabilities and high support needs.

320. Corrections Victoria has multiple policies and programs for prisoners with mental impairment. The stated vision in its Disability Framework 2016-2019 is:

> To provide offenders and prisoners who have a disability and are within Victoria's corrections system with the best possible opportunity for rehabilitation and reintegration to reduce their risk of reoffending and maximise community safety.[41]

321. The Ombudsman has commented on Corrections Victoria's arrangements for prisoners with a disability and mental health needs in other contexts.[42]

322. Evidence to this investigation raised specific concerns about:

- the lack of specialist facilities for women with cognitive impairments in the prison system. Jesuit Social Services gave the investigation a copy of a recent budget submission to the Victorian Government. It recommended the Government fund specialist supports for women with intellectual disability or cognitive impairment in prison.
- the use of strip searching, separation and other restrictive practices. Victoria Legal Aid, OPA and Dr Andrew Carroll expressed concern about inflexible application of these practices to prisoners with a mental impairment. The case of Liam (see page 60) is one example. Dr Carroll noted behaviours of people with neurocognitive disorders can be construed as disciplinary infractions by prison officers.
- limited treatment for prisoners with mental illness in prisons. The Mental Health Legal Centre's submission said, for many prisoners, jail can be the first time they receive regular medical attention. However, it noted prisoners do not have access to the Pharmaceutical Benefits Scheme and this can exacerbate mental illness through lack of appropriate medication.

323. The family of one young man with a mental illness in custody also noted that people cannot receive involuntary mental health treatment in prison. In its comments on a draft of this report, DHHS confirmed that enforced mental health treatment of prisoners is not permitted under the Mental Health Act. It said this is 'an intended policy decision to prevent inappropriate mental health treatment.'

41 Department of Justice and Regulation (Vic), *Corrections Victoria Disability Framework 2016-2019* (2015) 6.

42 See, eg, Victorian Ombudsman, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* (2017) 94-96; Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (2015) 87-94; Victorian Ombudsman, *Investigation into deaths and harm in custody* (2014) 111-115; Victorian Ombudsman, *Investigation into prisoner access to health care* (2011) 16-19.

324. The investigation heard different views about the capability of prison officers to work with people with mental impairments. Victoria Legal Aid recommended training for officers about their responsibilities. Dr Carroll said, in his experience:

> it's just not what [prison officers] are there for. Officers will be trained in the basics of mental health first aid, they might be trained in picking up early warning signs for mental illness … [T]here is a huge emphasis on self-harm but beyond that identifying frontal lobe deficiencies would be well beyond the staff. Some do have a good manner dealing with some prisoners but that is more to do with mindset and personalities.

325. Dr Carroll said:

> I don't want you to go away with an impression that prisons always do terrible things. Some prison officers do a fantastic job with these people. But nonetheless prisons are not the place for these people.

326. OPA's submission said it can be harder for courts to release people with a mental impairment after they have spent long periods in prison:

> Being held on remand for long periods is distressing for the person. It can lead to self-harming and other behaviours that make it more difficult for the person to be released … [I]t can also lead to a loss of services and greater challenges in negotiating appropriate supports for the person's release and reintegration back to the community.

Inadequate community housing

327. The other option for the courts under the CMIA is unconditional release or a non-custodial supervision order, which allows the person to live in the community.

328. The investigation heard lack of appropriate housing for people with a mental impairment makes this option unviable.

329. The DHHS MACNI officer interviewed for the investigation said, in her experience, 'stable accommodation is the key to virtually everything.'

330. The MACNI officer and the Chief Psychiatrist said DHHS have traditionally provided disability accommodation but will not continue this service under the NDIS. DHHS said it will remain responsible for forensic disability services, but the non-government sector will be responsible for other disability accommodation.

331. In its submission to the investigation, OPA said:

> while [people with a mental impairment] may have adequate funding in place and a service provider willing to assist them, a lack of accommodation may prevent their release on bail. In addition to a general lack of affordable housing stock, there is also a significant shortage of specialist disability accommodation. Without an address to reside at, a person will inevitably be considered an unacceptable risk for release on bail, even if there is funding available for intensive support services.

332. OPA said it is particularly difficult to find housing for people who need to live on their own because of behaviours of concern. It said the specialist disability accommodation market for these people 'is currently non-existent.' OPA noted:

> In practice, and especially if the matter has gained the attention of the DHHS Secretary or the Minister, then DHHS will step in with an offer of public housing or … 'surplus stock'.

333. Victoria Legal Aid's submission to the investigation recommended 'urgent action' to increase disability housing in Victoria. Jesuit Social Services' recent budget submission to the Victorian Government, which it provided to the investigation, also recommended the Government invest in housing options for people with multiple and complex needs and provide incentives for social housing providers to offer housing.

Service disputes

334. The investigation heard disagreements between services are common in cases where people fall within service gaps, and it is not clear who is responsible for finding a solution.

335. Victoria Legal Aid's submission said its lawyers report 'significant and, at times, overwhelming difficulty for clients' finding pathways out of custody. It listed several causes, including 'dislocation, inertia and responsibility shifting between the respective Victorian State and Commonwealth authorities'.

336. When the investigation asked Rebecca's legal aid lawyer who was responsible for finding solutions in these cases, she said:

> I think that's the problem … That's the problem for other clients I have and will probably continue to have. If they don't clearly fit within an existing service, or if they're not already engaged [with a service], they're going to fall through the cracks. This will happen again and again.

337. OPA and Victoria Legal Aid told the investigation that, in their experience, outside pressure is required before agencies find a solution.

338. At interview, Rebecca's OPA guardian said OPA's contact with ministers, senior officials and the Commonwealth Parliament's Joint Standing Committee on the NDIS helped Rebecca. She said '[i]t's amazing what can happen when there's a little bit of political pressure'.

339. Victoria Legal Aid's submission also said:

> In many cases, we observe that, despite considerable attempts by clients, their lawyers and non-legal advocates to overcome these impediments, the issues are often only resolved when there an imminent risk for the State, for example, direct criticism by a supervising Judge or coverage of a pending case in media.

340. Victoria Legal Aid recommended 'a whole-of-state approach, mandating cooperation between departments' and 'a single, responsible, point of contact for prisoners (or their advocates) … to build a pathway out of custody, and to escalate interventions to end prolonged detention'.

What effect will the NDIS have?

341. The NDIS started as a trial in 2013 to provide support to people with disability, their families and carers. It provides individualised financial support packages to eligible people with disabilities. It is jointly governed and funded by the Australian, state and territory governments and is administered by the NDIA.

342. The NDIS is currently being rolled out in Victoria and expected to be fully implemented by July 2019. By the time the scheme is fully operational, around 105,000 people in Victoria are expected to receive NDIS support. This includes approximately 76,000 clients from the existing Victorian specialist disability and mainstream systems.[43]

43 Victorian Government, *NDIS Victoria: Rollout in Victoria* https://www.vic.gov.au/ndis/rollout-in-victoria.html.

343. The scale of this program is not without its challenges, particularly in relation to people like Rebecca with complex behavioural and disability needs.

344. While the NDIS helped ensure a solution for Rebecca, concerns were raised during the investigation that the NDIS will not solve the issues that arose in her case, and people like Rebecca may continue to fall through gaps in the system.

345. Victoria Legal Aid said in its experience:

> the historical issues which have limited the pathways out of custody for people who are, or may be, unfit to be tried are now being made more extreme and complex by a critical issue raised by transition of Victorians with disability, including psychosocial disability, to the National Disability Insurance Scheme (NDIS) … [T]here is:
>
> - uncontroversially a 'thin market' under the NDIS for disability supports available to people with complex needs; and
> - currently no enforceable obligation on State or Commonwealth authorities to ensure that people with complex needs actually receive the NDIS supports they have been determined to be eligible for.

Access to the NDIS

346. As Rebecca's case shows, the first hurdle for people with disabilities in prison is accessing the NDIS. OPA said in its experience it:

> is exceedingly difficult for a person in custody to apply to the NDIS, have their support needs assessed and have a suitable plan developed.

347. Once funding is provided, the challenge is to find appropriate supports and services. OPA said without these, the court will:

> likely consider that the person is an unacceptable risk of further offending or of failing to comply with the conditions of bail, and will keep them in prison until this can be arranged.

348. The NDIA is a market-based system. It provides the funding for participants to access services but does not provide the services itself.

349. For those with complex needs and behavioural concerns, access to those services through the market can be difficult. OPA said, in its experience:

> many service providers are reluctant to accept the business risk of commencing or continuing to support people exhibiting challenging or potentially harmful behaviours, and so they are more likely to withdraw services – or decline to provide them at all – if a person is remanded. This is the case even where substantial funding has been made available for the services.

350. Victoria Legal Aid also noted:

> the failure of our clients to attract a service provider has, in some cases, become the very factor that prevents their release from custody after being remanded, in some cases for relatively minor offending (eg shop theft or minor assaults). Critically these issues appear to be affecting young adults with complex disabilities, both with and without prior criminal history, on remand.

Market failure and a Provider of Last Resort

351. The Victorian and Commonwealth Governments signed a Bilateral Agreement setting out their respective roles and responsibilities during the transition to the NDIS. The Agreement is silent regarding what will happen in the event of market failure.

352. The NDIA has said:

> Historically, state and territory governments have been responsible for delivering, directly or through contracted services, 'Provider of Last Resort' arrangements for people with disability, including where a participant is at imminent risk of losing, or is unable to secure critical supports that will affect their safety and wellbeing.
>
> As the NDIS rolls out across Australia, state and territory governments continue to share this responsibility.[44]

353. A Provider of Last Resort is an organisation which steps in to provide support or services to NDIA clients when no other provider is willing to, or there is a crisis situation.

354. Victoria Legal Aid and OPA provided case studies showing the impact of market failure for NDIS clients with complex needs. Victoria Legal Aid described the following case of Elijah in its 2017 submission to the Commonwealth Parliament's inquiry into transitional arrangements for the NDIS, a copy of which it provided to the investigation. Victoria Legal Aid and OPA both described the case of Liam (see page 60) in their submissions to this investigation.

44 National Disability Insurance Agency, Submission to the Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, Inquiry into the market readiness for provision of services under the NDIS, 23.

Case study: Elijah

According to Victoria Legal Aid, Elijah has autism and a profound intellectual disability. He is prone to impulsive behaviour and often cannot understand the consequences of his actions. He cannot live independently and previously lived in public housing with DHHS-funded support workers.

Elijah was remanded in custody in 2016 after being charged with breaching an intervention order taken out by his family and assaulting police attending the family home. His fitness to stand trial was referred to the County Court.

Elijah transitioned to the NDIS while in custody. His NDIS plan included funding for a number of substantial services, including a specialist support coordinator to coordinate the allocation of the funds.

Elijah's complex disabilities and imprisonment meant he could not search for service providers himself. The specialist support coordinator role was critical for Elijah because it was his gateway to accessing the services funded under his plan.

Victoria Legal Aid told the Commonwealth Parliament's Joint Standing Committee on the NDIS that no service provider was willing to take on this role. It said:

> The NDIA have said that they are the provider of funds, not a provider of services. DHHS have said that it is not possible for them to take on the specialist support coordinator role.

Victoria Legal Aid told the Committee:

> Market failure in this case has profoundly affected Elijah's liberty, independence and inclusion in the community. Without a specialist support coordinator, Elijah has not been able to use his NDIS funds to go 'shopping' for agencies to provide him with 24/7 care. This meant that the rest of the funding under Elijah's package was rendered inaccessible to him.
>
> Until services are in place for him, Elijah's lawyer has had to withdraw his bail application which would have enabled him to remain in the community pending the determination of fitness to stand trial. This is because Elijah's access to the substantive support services under his funding plan are critical to him being safe at home.

Case study: Liam

Liam is 20 years old and has a significant intellectual disability and autism. According to Victoria Legal Aid, he likes 'everything Metro Trains, listening to music with big headphones and singing songs by Rihanna'.

Liam's disabilities mean he is not capable of living independently. He previously lived in a DHHS house with DHHS-funded workers who provided live-in care 24 hours a day, seven days a week. After he transitioned to the NDIS, the NDIS paid for private companies to provide these residential supports. According to OPA, there were a number of problems with these arrangements, including allegations that Liam was assaulted by one of his care providers.

In September 2017, Liam was remanded on charges relating to an assault. Victoria Legal Aid said:

> After [Liam] was remanded, the agency contracted to provide services to [Liam] in his home quit, stating that they were withdrawing services because [Liam] posed a 'business risk'. In custody, [Liam] was initially detained in solitary confinement. He was clothed in a canvas smock and subject to handcuffing at all times outside his cell … He [was] very vulnerable in custody.

No service provider was willing to take on Liam's contract. Victoria Legal Aid said:

> DHHS initially said to [Liam] that they were only his landlord and that it was up to the NDIA to find a service provider. The NDIA said they were merely [Liam's] insurer and 'just a bank'. No-one came forward, claiming it was [Liam's] responsibility to find a new service provider. Since [Liam] has been remanded, the NDIA increased the funding in his NDIS plan to over $1,000,000 from about $200,000 but despite this, no other service provider expressed any real interest in taking on this contract.

In November 2017, the Victorian Government intervened following advocacy by multiple organisations and media coverage.

Victoria Legal Aid said DHHS collaborated with key service providers to retain a service provider for Liam. In late November 2017, the prosecution and judge agreed that Liam would not pose an unacceptable risk to the safety of the community if he was properly supported in his home. Liam was granted bail.

Victoria Legal Aid said, on the day Liam was granted bail, he allegedly assaulted two staff members in the context of arriving back at his former residence. Initially, the police said that they were not planning to arrest Liam or take him back to custody as the alleged assaults were minor. Half an hour later, Liam's service provider quit and there was no one else to provide residential support for him. In these circumstances, the police charged Liam with a minor assault and he was taken back into custody, where his behaviour continued to deteriorate.

Victoria Legal Aid said DHHS located another service provider to work with Liam in January 2018 and Specialist Disability Accommodation funding was sought from the NDIA. However, because of the unavailability of disability housing stock, Liam had to wait for the residents of an existing DHHS house to be moved, and for renovations to be completed at the house.

The new service provider said it needed to be able to use restrictive interventions to work with Liam, in part because of the impact of the prison environment on his sense of safety. A wall was built through the middle of Liam's accommodation to separate Liam from his carers.

Liam was released on bail in March 2018. According to Victoria Legal Aid, the magistrate who heard the bail application said the issues before her were not criminal justice problems, but a health problem, and custody was not the right place for Liam.

Victoria Legal Aid said Liam is not able to plead guilty because of his complex disabilities but, if he were able to plead, a likely sentencing outcome would be a good behaviour bond or a fine.

It said it is 'uncontroversial' that he would not receive a custodial sentence, given his age, lack of prior criminal history and disabilities.

When Liam was released, he had been detained for six months

355. The investigation heard there is an urgent need to clarify 'provider of last resort' arrangements. Victoria Legal Aid said:

> [i]n Victoria, provider of last resort measures or any real solution to address the very serious effects of market failure remain opaque, unclear and incomplete.[45]

356. The Victorian Government also said 'there is an urgent need for clarity of roles and responsibilities' in relation to a provider of last resort in Victoria in its submission to the Commonwealth Parliament's Joint Standing Committee on the NDIS's inquiry on market readiness. The Government's submission said that without:

> clear processes and authorisation to manage crises, participants will continue to default into mainstream services such as prisons, hospitals, child protection, and in the worst case scenarios, people may fall into homelessness.[46]

357. The investigation asked DHHS about responsibility for provider of last resort arrangements in Victoria in correspondence. In response, DHHS wrote:

> The NDIA is responsible for identifying and developing approaches to ensure that a provider of last resort is available, and for supporting NDIS participants in crisis. The NDIA needs to have a crisis response capacity (including out of hours) and provider of last resort arrangements to support participants in crisis until longer term arrangements can be established. At this stage, NDIA appears reliant on Victoria to step in and provide unfunded case management type supports for participants in crisis situations. This is not a role that Victoria can or should provide in transition – it is a market co-ordination and planning function of the [NDIA].

358. The investigation also interviewed a senior DHHS officer involved in policy issues regarding the NDIS. He said there are ongoing discussions about a provider of last resort.

359. In May 2018, the Chief Executive Officer of the NDIA said:

> we are working closely and collaboratively with the states and territories to ensure supports are in place for participants in crisis situations, and to identify where gaps in service provision might emerge as the NDIS rolls out. We are calling this project 'Maintaining Critical Supports'.[47]

360. At the time this report was drafted, no clear protocols had been agreed.

45 Submission from Victoria Legal Aid, Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, Inquiry into the market readiness for provision of services under the NDIS, 21.

46 Submission from the Victorian Government, Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, Inquiry into the market readiness for provision of services under the NDIS, 7.

47 National Disability Insurance Agency, *From the CEO – May 2018*, https://www.ndis.gov.au/news/from-ceo/may18.html.

Managing supervision orders and services for forensic patients

361. The Council of Australian Governments has agreed on Principles to Determine the Responsibilities of the NDIS and other Service Systems. This document sets out where the NDIA and other service systems, such as the criminal justice system, have responsibility for providing supports to NDIS participants.

362. Under the Principles, the NDIA is responsible for:

> Supports to address behaviours of concern (offence related causes) and reduce the risk of offending and reoffending such as social, communication and self-regulation skills, where these are additional to the needs of the general population and are required due to the impact of the person's impairment/s on their functional capacity and are additional to reasonable adjustment.

363. The Principles say 'other parties' are responsible for:

> Offence specific interventions which aim to reduce specific criminal behaviours, reasonably adjusted to the needs of people with a disability and which are not clearly a direct consequence of the person's disability.

364. If a person's offending behaviour is related to their disability, it is possible that the services required to reduce their risk of reoffending may be split across two different service systems. The MACNI officer interviewed for the investigation said the NDIA:

> is trying to make a clear-cut definition between … what needs are disability-related versus forensic.

365. The MACNI officer illustrated this point by discussing a scenario where a person is required to attend court. She noted the NDIA will not fund transport to court on the grounds it is a justice matter. She stated, however, it is actually about what a person might do on public transport, or if they are they able to take transport to attend court without being accompanied. She stated this is related to disability, and the fact that the destination is court is irrelevant.

366. In a meeting with this office, the Australian Community Support Organisation also raised concerns about this approach, stating that people's offending behaviour cannot always be separated from behaviours related to disability.

367. Furthermore, while the NDIA may be responsible for funding supports required for a person to be released on a non-custodial supervision order under the CMIA, DHHS continues to have a co-ordination role regarding supervision of relevant orders.

368. When asked at interview about whether there was an arrangement between DHHS and the NDIA or NDIS providers in relation to the supervision of orders, the DHHS officer working on NDIS policy issues noted DHHS wanted to integrate planning with the NDIA, but did not explain how this would work.

The NDIA's response

369. The investigation provided a draft of this report to the NDIA for comment. In its response, the NDIA said:

> The [NDIA] acknowledges that there were opportunities for improvement in the early stages of the NDIS rollout. The NDIA has subsequently learnt many lessons through transition, and applied concerted effort nationally to improve the NDIS experience for participants with complex needs and circumstances.

It also noted 'the importance of a shared response to address the needs of those who require support and collaboration across many service systems.'

370. The NDIA outlined a series of initiatives 'to improve the NDIS experience for participants with complex needs and circumstances' and 'to better delineate roles and responsibilities for states and territories and the NDIA'.

These include:

- Implementation of a 'complex support needs pathway' to assist participants with complex support needs.
- 'Greater strategic collaboration across sectors', such as development of a list of individuals in the state disability service system who are in custody and due for release.
- A specialised team to oversee a quality assurance framework for the pathway, document NDIA practices, collate research into effective interventions and ensure internal expert advice and support.
- Plans to release an invitation to the market to work with the NDIA through 'a panel arrangement'. The NDIA said this 'will be designed to assure availability for a referral of a participant and to assist other providers develop their skills and capabilities in working with this cohort of participant'.
- Mapping an NDIS pathway for adult and youth disability justice clients.
- Ensuring 'reasonable and necessary NDIS supports' are provided in a 'nationally consistent manner for disability related needs for those in custody where appropriate to prevent a deterioration in circumstances'.

371. The NDIA also acknowledged that finding appropriate housing for NDIS participants with complex requirements presents a 'significant challenge'. It noted Specialist Disability Accommodation is limited in some markets and said it would:

> welcome collaborative design and strategy across developers, providers of complex supports, and participant representatives in building a clear vision for how [Specialist Disability Accommodation] and the NDIS can create innovative solutions for appropriate housing.

372. Appendix 1 (see page 68) sets out in full the information provided by the NDIA about these issues and initiatives.

Other issues

373. Although the investigation focused on administrative actions of DOJR and DHHS, it also heard evidence of concerns about legislative and other problems with the CMIA process.

374. OPA, Victoria Legal Aid and the Mental Health Legal Centre said the CMIA process can be lengthy. OPA's submission said:

> [i]t necessarily takes a long time, far longer than if the person was able to participate in the criminal justice process and simply resolve their case through a plea of guilty or not guilty.

375. The Mental Health Legal Centre said:

> ordinary court processes will continue to be quicker and less stressful for an accused person who may otherwise be unfit. This is particularly relevant for the vast majority of accused persons who are facing summary offences and indictable offences tried summarily in the Magistrates Court.

376. Forensic psychiatrist Dr Andrew Carroll also said at interview that he had been involved in cases where:

> people have already spent so long in custody that, if they had pleaded guilty, they would be out and about by now.

377. The Victorian Law Reform Commission made a series of recommendations following its review of the CMIA in 2014.[48] At the time this report was drafted, a bill implementing some of those recommendations was before the Parliament.[49]

48 Victorian Law Reform Commission, above n 34.

49 Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016.

378. The Commission's report also said:

> The importance of support measures in the unfitness to stand trial process was one of the strongest themes to come out of the Commission's review of the CMIA. In the Commission's view, support measures should be considered in determinations of unfitness with the aim of optimising an accused's fitness where they might otherwise be unfit.[50]

379. The Melbourne Social Equity Institute sent the investigation a copy of its recent report on people with cognitive impairments found unfit to plead and indefinite detention. This report also said:

> Various forms of support can improve the accessibility of proceedings. The Disability Justice Support Program appears to reduce the need for unfitness to plead determinations by assisting accused persons to participate in proceedings and exercise their legal capacity. Such formal support is increasingly shown to be effective for many persons with disabilities and appears to provide a cost-effective and rights-affirming practice for securing access to justice.[51]

380. OPA's submission included the following case study. It shows how early alternative treatment and support can provide better outcomes for people with a mental impairment, avoiding the need for involvement with the criminal justice process and the types of problems raised in this report.

Case study: Charles

OPA became Charles' guardian in late 2014. At the time, Charles was on remand in prison, mainly for assaults. OPA said Charles was released on bail three times but:

> his inability to comply with the conditions of bail and to comply with the directions of his guardian meant that he invariably breached his bail conditions … On each occasion he was bailed [Charles] was subsequently rearrested and returned to custody within two weeks.

The OPA guardian advocated for Charles to be transferred to Thomas Embling Hospital, which ultimately occurred in October 2015, because of concerns for Charles' mental health. While at the hospital, Charles was diagnosed with Huntington's Disease. Victoria Police agreed to withdraw all charges on condition Charles would be treated at Thomas Embling and remain in a secure setting. OPA's submission said:

> [Charles'] charges were dismissed so he did not become subject to a supervision order under the CMIA … Instead, he was made an involuntary inpatient under the Mental Health Act.

OPA said Charles was eventually discharged to an aged care facility, aged in his mid-30s, because no other services were available. OPA has had to engage specialist services to help manage Charles' behaviour, but said he is settled and it is not pursuing age-appropriate accommodation at this time, other than Huntington's Disease-specific facilities. OPA said:

> For [Charles], the treatment pathway available under the Mental Health Act enabled advocates to convince the police to drop criminal charges, and [Charles] has been effectively supported by the service system since that time, without the need for a non-custodial supervision order.

50 Victorian Law Reform Commission, above n 34, 89.

51 Melbourne Social Equity Institute, above n 34, 11.

Conclusions

381. Based on the evidence in this investigation, Rebecca's case is not isolated. Multiple organisations and individuals told the investigation about similar cases of people who were unfit to stand trial but stayed in prison for long periods, sometimes in equally restrictive conditions.

382. The evidence shows these cases have been arising for at least a decade and the causes are systemic – gaps in therapeutic services for people with mental impairment, under-resourcing of existing services, and disputes between services about who is responsible for finding solutions.

383. The problems are compounded by fragmented responsibilities at the bureaucratic level. There is no single minister or agency monitoring the overall operation of the CMIA. No agency can authoritatively say how many cases like Rebecca's there are in Victoria.

384. The NDIS offers an opportunity to solve some of these problems in Victoria. The evidence in this investigation about the NDIS was both heartening and concerning. The NDIS helped produce a solution for Rebecca, but the evidence raises doubts about its capacity to respond to people with complex needs in the criminal justice system. In its response to a draft of this report, DHHS said that its officers, OPA and Rebecca's care provider developed the solutions in this case and have funded services not covered by Rebecca's NDIS package, including her accommodation. While the recommendations in this report focus on State agencies, these problems need to be addressed quickly in the interests of human rights and community safety.

Recommendations

To the Minister for Housing, Disability and Ageing and the Minister for Mental Health/the Victorian Government:

Recommendation 1

Invest in secure therapeutic alternatives to prison for people found unfit to stand trial and/or not guilty because of mental impairment under the CMIA. Priority should be given to the service gaps identified in this report and the Victorian Law Reform Commission's 2014 report.

To the Department of Justice and Regulation:

Recommendation 2

Consider options for specialist units and services for women with an intellectual disability or cognitive impairment in Victorian prisons.

Department's response:

Accepted.

Recommendation 3

Seek advice from relevant disability experts when determining placements within the prison system in complex cases of prisoners with mental impairment.

Department's response:

Accepted.

Recommendation 4

Within three months of this report, request the Victorian Equal Opportunity and Human Rights Commission under section 41(c) of the Charter to review the application of the following policies and practices to prisoners with mental impairment at the Dame Phyllis Frost Centre:

- the use of behavioural management plans and separation to address behaviours of concern
- strip-searching
- use of restraint
- personal care support.

Once the review is completed, the department should develop a plan to apply the review's findings and recommendations to other prisons.

Department's response:

Accepted.

Recommendation 5

Through the Sentence Management Division in Corrections Victoria:

(a) Ensure compliance with the Corrections Regulations and Sentence Management Manual where prisoners with a mental impairment are subject to separation outside management units.

(b) Oversee Intensive Case Management Plans that require separation or modified regimes for prisoners with a mental impairment. The Assistant Director responsible for the Sentence Management Division should endorse changes to the Plans, and DHHS should provide relevant health service advice.

Department's response:

Accepted.

Recommendation 6

Coordinate regular, whole-of-government reporting on the 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 including DHHS, the Office of Public Prosecutions, the courts, Forensicare and the Office of the Public Advocate.

Department's response:

Accepted.

To the Department of Health and Human Services:

Recommendation 7

Designate a senior officer to:

(a) Coordinate and oversee DHHS service responses to people subject to CMIA proceedings.

(b) Act as a contact point regarding DHHS service responses and advice for agencies and people involved in CMIA proceedings. These should include people subject to CMIA proceedings, their families and/or guardians, the courts, the Office of Public Prosecutions, defence lawyers and other advocates.

Department's response:

Accepted.

Recommendation 8

Provide, or commission, guidance about acting compatibly with the Charter for public authorities providing mental health and disability services, including Forensicare.

Department's response:

Accepted.

Appendix 1: NDIA initiatives[52]

2. NDIS Participant Pathways Reform

The Agency acknowledges that there were opportunities for improvement in the early stages of NDIS rollout. The NDIA has subsequently learnt many lessons through transition, and applied concerted effort nationally to improve the NDIS experience for participants with complex needs and circumstances.

I have outlined below a range of efforts taken by the Agency to improve the NDIS experience for participants with complex needs, and note the importance of a shared response to address the needs of those who require support and collaboration across many service systems.

On 24 August 2018, the then-Minister for Social Services, the Hon Dan Tehan, announced a range of these improvements to be rolled out commencing in the second half of 2018. This includes among other pathway enhancements:

- improved connections with other service systems;
- improved collaboration between NDIA planners, Local Area Coordinators, and providers across the participant pathway and;
- implementation of a complex support needs pathway to assist participants with complex support needs and improve their access to services.

These improvements are designed to improve access support, connections and coordination across multiple service systems, including community, mainstream and informal supports. The pathways reform also involves greater strategic collaboration across sectors, such as the development of a list of individuals within the state disability service system who are in custody and due for release. Such data is essential to ensure appropriate proactive planning and service delivery.

The pathway will have a rigorous quality assurance framework overseen by a specialised team who will further document the NDIA's practices, collate research into effective interventions, and ensure internal expert advice and support for complex circumstances and any escalated individual needs. Service delivery teams will be able to seek professional clinical and practice guidance from this team on developing and interpreting the NDIS legislation and work practices as they will apply to this cohort of individuals.

The NDIA will shortly release to market an invitation to work with the NDIA through a panel arrangement. This will be designed to assure availability for a referral of a participant and to assist other providers develop their skills and capabilities in working with this cohort of participant

The NDIA supports your findings regarding the challenge of building NDIS processes in a transparent manner and recognises the funding pressures on all other service systems. There are many points of intersection between the NDIS and other service systems that continue to be refined and will over time ensure a consistent experience for participants.

52 Extracts from letter from NDIA Chief Executive Officer to Victorian Ombudsman 6 September 2018.

3. Interface issues

The Council of Australian Governments' (COAG) Disability Reform Council has nominated health and justice as two of the four priority interface areas for cross-service and governmental attention. The NDIA is working with state and territory governments and the Department of Social Services (DSS) through COAG and the Senior Officials' Working Groups (SOWG) to better delineate roles and responsibilities for states and territories and the NDIA, and ensure that participants who interact with the justice system have a positive experience and transition to the NDIS.

3.1 Health interface

Through Transition, the NDIA has undertaken significant work to clarify the interface between the NDIS and other service systems, including the health and mental health sectors. This work continues, and aims to primarily ensure continuity of support for participants while also establishing clear roles and responsibilities across service systems.

The health system will remain responsible for diagnosing drivers of a person's behaviours and functional impact. The NDIA aims to enable appropriate and early attention for those who are newly diagnosed with a permanent and significant disability, leading to timely investment and supports.

During transition, the NDIA has faced a range of challenges including:

- Consistently accessing appropriate diagnoses that focus on functional impairment
- Proactive engagement with individuals ahead of NDIS rollout (often due to lack of timely provision of such information)
- Unclear and/or conflicting clinical documentation and advice regarding a person's diagnosis, typically impacting the type of services that person can access from various sectors.

The Agency has been working with the health, mental health and community sectors to increase awareness and improve these processes and timeframes. Work continues across governments to develop a shared understanding of the roles and responsibilities of each service system, and how collaborative efforts can achieve best outcomes for participants.

Where involuntary admission is suggested or where medication is required to manage behaviours of concern there will need to be ongoing collaboration with jurisdictional expertise relating to restrictive practices in order to ensure sustainability of housing and other support solutions. These practices themselves, however, are not within the scope of the NDIS.

3.2 Justice interface

As detailed above, the NDIA will continue to work with Commonwealth, states and territory governments to address interface issues.

In relation to justice, SOWG priorities include:

- facilitate an integrated service experience for people with a disability in contact with the justice system including ensuring a shared understanding within the justice system of the access requirements of the NDIS;
- further refine the agreed roles and responsibilities of the NDIS and other government services;
- map NDIS pathways for adult and youth disability justice clients;
- work collaboratively with other mainstream service systems to prevent delays in release planning by ensuring proactive engagement, and;
- ensure reasonable and necessary NDIS supports are provided in a nationally consistent manner for disability related needs for those in custody where appropriate to prevent a deterioration in circumstances.

4. Further improvements

4.1 Housing

As discussed in your report, finding appropriate housing for participants with complex requirements presents a significant challenge for the NDIS and relevant service systems.

Specialist Disability Accommodation (SDA) refers to accommodation for people who require specialist housing solutions, including to assist with the delivery of supports that cater for very high functional impairment. SDA prices include sufficient funds to cover both the land and build costs of a dwelling that meets SDA criteria.

Nonetheless, SDA is limited in some local markets, and the NDIA would welcome collaborative design and strategy across developers, providers of complex supports, and participant representatives in building a clear vision for how the SDA and the NDIS can create innovative solutions for appropriate housing.

4.2 Market Engagement Framework

In relation to your concerns at paragraphs 359-368, the NDIA has developed a rigorous approach to monitoring the growing disability services market. The Agency works to identify potential issues and determine necessary involvement in markets and submarkets. The Market Engagement Framework (MEF) aims to balance responsiveness to current market issues with advance warning and mitigation of potential future issues.

The Framework is currently being considered by the NDIA Board and once endorsed will be shared with the Disability Reform Council out of session prior to the October meeting. The MEF will be released publically shortly thereafter.

4.3 National Quality and Safeguards Commission

A key challenge for the NDIA has been the different regulatory frameworks that the Agency and providers are required to work with ahead of full Scheme transition. The establishment and transition of all jurisdictions at full Scheme to the national Quality and Safeguards Commission will provide for greater consistency in the provision of supports and services.

Victorian Ombudsman's Parliamentary Reports tabled since April 2014

2018

Investigation into allegations of improper conduct by officers at Goulburn Murray Water
October 2018

Investigation of three protected disclosure complaints regarding Bendigo South East College
September 2018

Investigation of allegations referred by Parliament's Legal and Social Issues Committee, arising from its inquiry into youth justice centres in Victoria
September 2018

Complaints to the Ombudsman: resolving them early
July 2018

Ombudsman's recommendations – second report
July 2018

Investigation into child sex offender Robert Whitehead's involvement with Puffing Billy and other railway bodies
June 2018

Investigation into the administration of the Fairness Fund for taxi and hire car licence holders
June 2018

Investigation into Maribyrnong City Council's internal review practices for disability parking infringements
April 2018

Investigation into Wodonga City Council's overcharging of a waste management levy
April 2018

Investigation of a matter referred from the Legislative Council on 25 November 2015
March 2018

2017

Investigation into the financial support provided to kinship carers
December 2017

Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre
November 2017

Investigation into the management of maintenance claims against public housing tenants
October 2017

Investigation into the management and protection of disability group home residents by the Department of Health and Human Services and Autism Plus
September 2017

Enquiry into the provision of alcohol and drug rehabilitation services following contact with the criminal justice system
September 2017

Investigation into Victorian government school expulsions
August 2017

Report into allegations of conflict of interest of an officer at the Metropolitan Fire and Emergency Services Board
June 2017

Apologies
April 2017

Investigation into allegations of improper conduct by officers at the Mount Buller and Mount Stirling Resort Management Board
March 2017

Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville
February 2017

Investigation into the Registry of Births, Deaths and Marriages' handling of a complaint
January 2017

2016

Investigation into the transparency of local government decision making

December 2016

Ombudsman enquiries: Resolving complaints informally

October 2016

Investigation into the management of complex workers compensation claims and WorkSafe oversight

September 2016

Report on recommendations

June 2016

Investigation into Casey City Council's Special Charge Scheme for Market Lane

June 2016

Investigation into the misuse of council resources

June 2016

Investigation into public transport fare evasion enforcement

May 2016

2015

Reporting and investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting

December 2015

Investigation of a protected disclosure complaint regarding allegations of improper conduct by councillors associated with political donations

November 2015

Investigation into the rehabilitation and reintegration of prisoners in Victoria

September 2015

Conflict of interest by an Executive Officer in the Department of Education and Training

September 2015

Reporting and investigation of allegations of abuse in the disability sector: Phase 1 – the effectiveness of statutory oversight

June 2015

Investigation into allegations of improper conduct by officers of VicRoads

June 2015

Investigation into Department of Health oversight of Mentone Gardens, a Supported Residential Service

April 2015

Councils and complaints – A report on current practice and issues

February 2015

Investigation into an incident of alleged excessive force used by authorised officers

February 2015

2014

Investigation following concerns raised by Community Visitors about a mental health facility

October 2014

Investigation into allegations of improper conduct in the Office of Living Victoria

August 2014

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