

Paving the roads to recovery: Building a better system for people experiencing mental health issues in Victoria

Our recommendations for the
Royal Commission into Victoria's
Mental Health System

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Executive summary

The Royal Commission into Victoria's Mental Health System (**Royal Commission**) provides a once-in-a-lifetime opportunity to build a coordinated mental health system with the voices, rights and recovery of people experiencing mental health issues at its centre. Our *Roads to Recovery* submission outlined overarching systemic problems and demonstrated the need for urgent systemic change.¹ Here, we provide a roadmap for how to achieve that change. Last year, Victoria Legal Aid (**VLA**) worked with over 25,000 people who identified as experiencing a mental health issue or disability. From our duty lawyer services to our legal help line to our specialist mental health services, VLA has a unique perspective on how Victoria's mental health system intersects with other systems, supports and services that impact on mental health (e.g. housing, disability services, employment, income support, criminal justice and family violence).

People experiencing disadvantage should be able to access the mental health supports that work for them, when they need them, before their issues escalate to a crisis point. Early access to high quality, effective supports will prevent people's mental health issues and legal problems spiralling out of control. This will in turn reduce hardship and suffering for people experiencing mental health issues, their friends, families, and communities. Consumer leadership and engagement must be embedded to ensure people directly affected by the mental health system have the power to shape a new, fairer system.

In our vision for Victoria's mental health system, all Victorians experiencing mental health issues can access tailored and safe services, including Aboriginal and Torres Strait Islander people, people from CALD communities, LGBTIQ+ people, older people, women, people diagnosed with dual disability, and people in regional areas. We recommend key changes for children and young people, including increasing specialist mental health services for children and young people to avoid them experiencing legal problems when experiencing a mental health crisis, and raising the age of criminal responsibility to delay and prevent entry into the criminal justice system. We also recommend supporting people who experience and use family violence to access family violence services, and improving responses to family violence in the mental health system by implementing a whole of service approach.

Non-legal advocacy should be available to all consumers subject to compulsory treatment, and access to legal assistance should be available for people experiencing mental health issues, particularly before the Mental Health Tribunal. Mental health services should adopt the least restrictive treatment, only use compulsory treatment as a last resort, and support people to remain in the community wherever possible. This requires effective oversight and accountability mechanisms to ensure the *Mental Health Act 2014* (Vic) (**Mental Health Act**) principles are implemented and consumers' rights are upheld, including by implementing supported decision-making in mental health services.

Reducing reliance on Victoria Police as first responders to people experiencing a mental health crisis, and increasing resources for trained, trauma-informed and holistic mental health responses for all services will reduce the net-widening impact of law enforcement responses. People can be diverted away from the criminal justice systems by a reorientation of police practices and the increased use of discretion to warn, caution and divert, and proceed by summons rather than arrest. Addressing the

¹ Victoria Legal Aid, *Submission to the Royal Commission into Victoria's Mental Health System – Roads to Recovery: Building a Better System for Victorians Experiencing Mental Health Issues* (July 2019) (**Roads to Recovery**) 31 – 36. <www.legalaid.vic.gov.au/roadstorecovery>.

impact of Bail Act reforms on people experiencing mental health issues and resourcing state-wide access to the Court Integrated Services Program would reduce the number of people experiencing mental health issues spending time on custody because of the issues and challenges in their lives rather than the offences that they have committed. Pathways in the summary jurisdiction should be expanded, including mechanisms for fitness determinations, state-wide access to therapeutic courts, and an increased range of dispositions where mental health has contributed to offending. We also recommend increased access to mental health services to support people to remain in the community, access appropriate therapeutic supports while in custody and transition support when exiting custody into the community.²

In the aftermath of the COVID-19 crisis, the need for a responsive, recovery-focused mental health system will be more important than ever. Victoria will need to ensure that people experiencing social problems that drive and exacerbate mental health issues are supported to reduce the strain on our health system at a time when resources are already stretched due to economic impacts of the COVID-19 pandemic.

Guiding principles

In preparing these recommendations, VLA consulted with our mental health lived experience advisory group, Speaking from Experience. These guiding principles developed by consumers with direct experience of mental health services have informed our recommendations. These principles may also provide useful reminders for the Royal Commission in developing your final recommendations for reform.

1. Would what you are proposing for reform be good enough for you or your family?
2. Are you looking through a human rights lens?
3. What are consumers' views on what you are proposing?
4. Is this unnecessarily restrictive or 'one size fits all'? Or is this flexible and responsive enough to respond to different people with different needs?

² We have provided recommendations of varying levels of specificity. For example, we outline detailed legislative amendments where this is a simple and appropriate way to address current problems (e.g. Bail Act reforms to mitigate the impact of reverse onus tests, or Mental Health Act reforms to clarify information-sharing to facilitate legal representation at hearings). We provide more general recommendations where there are a range of ways to potentially implement the measures (e.g. developing policies for family violence risk screening, capacity building for services). To assist the Royal Commission to place responsibility for implementing recommendations, we have suggested which bodies or agencies each recommendation relate to, but accept that depending on the Royal Commission's recommendations, there may be other options for allocating responsibility for implementation.

1 Consumer leadership

VLA supports embedding consumer leadership and engagement as part of a rights-focused system.³ Consumers of mental health services are the people most directly affected by mental health and related systems. The needs and expertise of consumers must drive the operation and reform of these systems to ensure they are tailored, effective and responsive. Changes recommended by the Royal Commission can only succeed with substantial lived experience workforces and embedded consumer engagement and leadership.

Consumer leadership is the leadership provided by consumers at a systemic level which privileges the voices of consumers so that they shape professional and organisational practice. It is based on emerging evidence that services designed, delivered and evaluated by the people who use them are more likely to achieve better outcomes and improve satisfaction.⁴

1.1 Consumer leadership in mental health services

VLA supports the Royal Commission's Interim Report recommendation 5 to develop a lived experience led residential mental health service, and recommendation 6 to expand the lived experience workforce.⁵ Effective implementation will require the development of organisational structures, capability frameworks and programs, as well as organisational readiness and accountability mechanisms. Implementing these recommendations will also require appropriate training that is co-produced and co-facilitated by consumers with relevant experience.⁶ The lived experience workforce will also need to be supported by training and discipline-specific supervision that enables a range of consumer leadership roles to be filled.

It is important that recommendations for consumer lived experience workforce promote and embed consumer leadership at all levels of the workforce. VLA's non-legal advocacy services, Independent Mental Health Advocacy (**IMHA**)⁷ and Independent Family Advocacy Service (**IFAS**),⁸ embed consumer leadership through various initiatives, including advisory groups (Speaking from Experience and the Shared Experience and Support reference group respectively), and designated lived experience leadership roles. Although VLA is early in our journey to fully embedding consumer leadership, measures such as including lived experience members on some organisational steering committees and working groups, and lived experience members on interview panels, have demonstrated the value of this leadership internally. The recent establishment of our Client First

³ Roads to Recovery (n 1) 24.

⁴ Roads to Recovery (n 1) 24.

⁵ Royal Commission into Victoria's Mental Health System, *Interim Report* (November 2019) (**Royal Commission Interim Report**) 423, 435.

⁶ We use 'co-production' to mean an approach that sees consumers involved in, or leading, defining the problem, designing and delivering the solution and evaluation the outcome, either in partnership with others or independently. Wherever possible, services and policies should be co-produced. Where co-production is not suitable or available, the highest level of consumer participation should be sought. See: Cath Roper, Flick Grey and Emma Cadogan, *Co-production: Putting principles into practice in mental health contexts* (February 2018) <https://recoverylibrary.unimelb.edu.au/data/assets/pdf_file/0010/2659969/Coproduction_putting-principles-into-practice.pdf>

⁷ IMHA was also awarded the Lived Experience Leadership award at the 2019 Mental Health Service Awards of Australia and New Zealand. See further: <https://www.imha.vic.gov.au/about-us/news/imha-wins-top-award-for-leadership-in-mental-health>.

⁸ IFAS was established as a pilot in 2018 to assist families who are involved in the child protection system before they go to court with non-legal support and advocacy to understand their rights and responsibilities. The pilot services prioritising Aboriginal and Torres Strait Islander families and parents with intellectual disabilities. IFAS is being independently evaluated, with the mid-term evaluation currently in progress.

Strategy⁹ is an example of our commitment to strengthening the role client and consumer voices play within VLA.

Our practice experience has observed significant variability in the uptake and support of consumer leadership within mental health services.¹⁰ This variability in practice highlights the need for improved reporting and oversight mechanisms for services funded to have these roles, and increased support for consumer leadership roles and processes by government. Without these mechanisms in place, consumer leadership roles intended to have internal systemic, quality improvement and safeguarding functions risk isolation, co-option and becoming ineffective.¹¹ Guidance should be developed to support mental health services to embed consumer leadership and advocacy (e.g. how to establish, consult with, and implement recommendations from Community Advisory Committees).¹² Lived experience roles should be recruited at all levels to reflect the varied roles consumers can take on, particularly at a senior level where consumers have a greater opportunity to influence decision-making.

In implementing the Royal Commission's recommendations, we encourage Mental Health Reform Victoria to build on the knowledge and expertise reflected by organisations who have effectively built in consumer leadership and advocacy, as assessed by coproduced evaluations.¹³

Recommendation 1: Embed consumer leadership in mental health services

The Department of Health and Human Services should require and fund all designated mental health services to implement the 'Strategy for the consumer mental health workforce in Victoria'¹⁴ and embed Consumer Advisory Groups within their governance, oversight and quality improvement structures.

Mental Health Reform Victoria should oversee the implementation of consumer roles and the mechanisms to support them, in partnership with current consumer leaders and peak bodies, ensuring the diversity of the consumer workforce reflects the diversity of consumers eligible for the service.

Recommendation 2: Require co-production of Royal Commission report recommendations

The Victorian Government and Mental Health Reform Victoria should ensure that implementation of all recommendations made in the Royal Commission interim and final reports is co-produced with consumers.

⁹ Our Client First Strategy outlines how Victoria Legal Aid will create and nurture a client-first work culture, support clients to participate in the decisions that affect them, strengthen and better connect entry points to improve navigation of, and access to, our systems, and reimagine our service models to promote holistic approaches and stronger partnerships. See further: <https://www.legalaid.vic.gov.au/about-us/our-organisation/how-we-are-improving-our-services/client-first-strategy>.

¹⁰ See also: Stephanie Stewart et al, "It depends what you mean by leadership": An analysis of stakeholder perspectives on consumer leadership' (2019) 28(1) *International Journal of Mental Health Nursing* 339.

¹¹ See: Brett Scholz et al, "Not an afterthought": Power imbalances in systemic partnerships between health service providers and consumers in a hospital setting' (2018) 122(8) *Health Policy* 922.

¹² The Community Advisory Committee guidelines outline the place of these committees within a health services governance. These committees are statutorily required under s 65ZA(1)(a) of the *Health Services Act 1988* (Vic). Community Advisory Committee, *Community Advisory Committee Guidelines: Victorian Public Health Services* (May 2006) <<https://www2.health.vic.gov.au/about/publications/policiesandguidelines/Community-advisory-committee-guidelines%C2%A0>>.

¹³ E.g.: Chris Maylea et al, *Evaluation of the Independent Mental Health Advocacy Service (IMHA)* (Final Report, November 2018) (IMHA **Evaluation Report**) 35.

¹⁴ Lived Experience Workforce Strategies Stewardship Group, *Strategy for the Consumer Mental Health Workforce in Victoria* (Report, June 2019) <<https://cmhl.org.au/sites/default/files/resources-pdfs/Consumer-Workforce-Strategy-web.pdf>>.

1.2 Consumer leadership in intersecting systems and services

Consumer leadership is also required in sectors that interact with the mental health system, which often have lower levels of understanding of the importance of consumer. For example, IFAS has seen the lack of lived experience and peer support roles within the child protection system, meaning parents are without vital supports in navigating the system.¹⁵ People engaged in these systems have regularly spoken up about the failures in these systems and the associated impacts on their mental health – they have expertise that should shape system improvement. This will require a cross-government initiative to improve recovery outcomes for consumers in healthcare systems (including hospitals), criminal justice, courts and tribunals (particularly therapeutic courts), Victoria Police, child protection, housing and family violence.¹⁶

A recurrent theme we have observed is the need for cultural change to ensure compliance with well-intended policy and legislation. Consumer leadership is one strategy for embedding cultural change.

Recommendation 3: Embed consumer leadership in intersecting systems

The Royal Commission should extend recommendation 6 of the Interim Report to include lived experience workforce initiatives in systems that intersect with the mental health system.

Mental Health Reform Victoria could coordinate this recommendation in partnership with relevant government departments.

2 Access to advocacy

2.1 Access to representational non-legal advocacy (IMHA)

IMHA supports people receiving compulsory mental health treatment, or at risk of receiving compulsory treatment, to make decisions and have as much say as possible about their assessment, treatment and recovery. IMHA does this by employing an instruction-based representational advocacy model. In practice, this means that IMHA advocates listen to people, support them to make decisions if they request this, and communicate their views and preferences as expressed by them.¹⁷

Supported decision-making is the process used to assist people to make their own decisions, and representational advocacy is a mechanism to ensure people are part of clinical decision-making processes.

RMIT conducted an independent evaluation of IMHA's first three years of operation in 2018. The key relevant findings are:¹⁸

- IMHA was overwhelmingly positively received by consumers who had used the service.

¹⁵ Although IFAS is not a service specifically for people with mental health issues, of the 99 clients to date, 54 identified experiencing mental health issues. IFAS is being evaluated, with the mid-term evaluation currently in progress. See recommendation 63: Supporting families to remain together.

¹⁶ We note the development of the Victim Survivor Advisory Council, to inform broader reforms arising from the Family Violence Royal Commission, but that these structures are not built into service delivery: Department of Health and Human Services, *Victim Survivor Advisory Council* (Web Page) <<https://www.vic.gov.au/victim-survivors-advisory-council>>.

¹⁷ A similar advocacy model is used by IFAS when working with parents who have child protection involvement in their families. See recommendation 63: Supporting families to remain together.

¹⁸ IMHA Evaluation Report (n 14) 7.

- IMHA is instrumental to the maintenance of the rights of people subject to compulsory treatment.
- Mental health services are not consistently operating in compliance with the Mental Health Act, and where IMHA services are utilised, it is effective at assisting them to do so.
- For IMHA to continue to be successful in maintaining the rights of people subject to compulsory mental health treatment, IMHA's services need to be accessible to all who require them. This requires an opt-out system where every person who is eligible is offered advocacy. Increased funding is necessary for IMHA to be able to provide services to all eligible consumers.

IMHA should be an opt-out advocacy service with adequate funding to ensure that consumers' rights are upheld and their self-determination respected. This would also ensure that consumers understand and self-advocate about their rights, and make informed decisions about their mental health treatment and recovery. Importantly, this change would facilitate consumers accessing services to support their recovery, including key supported decision-making mechanisms (e.g. legal support, second psychiatric opinions, advance statements) and other social supports.¹⁹

There are a series of legislative and practice changes required to introduce an opt-out model (similar to the effective model in the UK), including:

- **Opt-out system:** Giving IMHA authority to contact every person on a compulsory treatment order²⁰ (particularly consumers in Secure Extended Care Units (**SECUs**));
- **Consumer data:** Providing IMHA with access to centralised data providing information about people placed on a compulsory treatment order;
- **Consumer access:** Authorising IMHA to access inpatient units to provide non-legal advocacy to consumers; and
- **Service guidelines:** Developing guidelines for clinical decision-makers at designated mental health services that require them to respond to IMHA advocacy within a reasonable timeframe, including avenues to escalate matters which do not receive a timely and effective response.

Recommendation 4: Ensure access to non-legal advocacy for consumers on compulsory treatment orders

The Victorian Government should introduce an opt-out system for independent non-legal advocacy for consumers on compulsory treatment orders and provide adequate funding for IMHA to meet service demand.

¹⁹ This recommendation is further supported by recommendation 19.

²⁰ We have used 'compulsory treatment orders' to refer to both Temporary Treatment Orders and Treatment Orders made under the *Mental Health Act 2014* (Vic).

2.2 Access to legal assistance for people with mental health issues

(a) Legal assistance before the Mental Health Tribunal

Legal information, advice and representation provides multiple benefits to people appearing before the Mental Health Tribunal (**the Tribunal**) in relation to improved consumer experience, less restrictive outcomes and broader, including systemic, benefits.²¹

The Mental Health Act does not require the Tribunal or mental health services to facilitate legal representation, refer consumers for legal assistance, or notify VLA of hearings. We see many consumers unable to access legal assistance because legal assistance providers do not receive adequate funding to provide advice and representation in the majority of hearings, and the system is complex for consumers to navigate.

At many mental health inpatient units, VLA and IMHA have established good working relationships and arrangements with the mental health service to support consumer access to the legal service. However, the approach is inconsistent between services (e.g. service agreements exist with some, but not all services). Other jurisdictions in Australia have higher rates of legal representation before equivalent tribunals due to a combination of funding, legislation and practice.²²

Legal assistance for all consumers would require a substantial increase in funding. However, services could also be delivered more efficiently by systems that shift the responsibility for referral and linking from the individual mental health service and consumer level to a central, single point, allowing legal services to be focused on client facing service delivery, rather than facilitating access. Funding for legal assistance before the Tribunal should – at a minimum – ensure that a duty lawyer is available for all regular sitting days.

Legal assistance services could also be more efficiently deployed to reach more consumers by allowing lawyers to appear in the Tribunal remotely. This is commonly available in courts and other tribunals but has generally rarely been allowed in the Tribunal. The current move to a fully remote hearing model in the context of COVID-19 has enabled VLA to provide representation to clients we would normally not reach. This improved access could continue by providing clear guidance that lawyers can appear via video or phone link in any matter on request.

There are practical, process-focused changes required to improve access to legal assistance for consumers in mental health proceedings, including:

- implementing a centralised system for referral of consumers with Tribunal hearings to obtain legal assistance for their hearing;
- requiring designated mental health services and the Tribunal to provide:
 - consumer contact details to VLA for the purpose of facilitating legal assistance before the Tribunal without requiring consumer consent (this may require amendments to the Mental Health Act);

²¹ Benefits of legal representation at the Mental Health Tribunal is discussed further in: Victoria Legal Aid, *Answers to questions on notice from the Productivity Commission inquiry into mental health* (January 2020) (**Answers to Questions on Notice**) 3 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-answers-to-productivity-commission-questions-on-mental-health.docx>>; Roads to Recovery (n 1) 18 – 19.

²² The difference in rates of legal representation before Australian Mental Health Tribunals is further explored in Victoria Legal Aid, *Response to question on notice to the Royal Commission into Victoria's Mental Health System* (July 2019) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-letter-responding-to-question-on-notice-30-july-2019-redacted.pdf>>.

- any documents the consumer is entitled to in relation to their hearing to a consumer's legal representative, electronically or otherwise, with consumer consent; and
- requiring the Tribunal to allow legal representatives to appear by telephone or video in any matter on request.

Recommendation 5: Increase access to legal assistance for Mental Health Tribunal proceedings²³

The Victorian Government should fund additional Mental Health Tribunal legal assistance services and improve referral, information-sharing and processes to ensure all consumers can access free legal assistance.

3 Accessibility and safety of services

3.1 Trauma informed care and family violence

Many VLA clients and consumers experiencing mental health issues have experienced trauma and/or family violence. Previous Royal Commissions into Institutional Child Sexual Abuse and Family Violence have recognised the long-term mental health impacts of trauma.²⁴

The Department of Health and Human Services (**DHHS**) should resource trauma-informed resources tailored for specific groups who are more likely to have experienced trauma. For example, there is a lack of understanding that government policies, especially regarding child removal and incarceration, can cause harm and contribute to trauma to Aboriginal and Torres Strait Islander communities.

Family violence and the experience of trauma is also under-recognised and too frequently responded to solely as an individualised mental health issue. This can lead to clients missing out on early access to legal and non-legal support and family violence services and cause or exacerbate mental health issues, putting women²⁵ in particular at greater risk of experiencing legal problems, including child protection involvement, and the continuation of family violence.²⁶

A better understanding of the dynamics of family violence may prevent tipping people into the mental health system and keep them safer. VLA client experiences demonstrating the ramifications of a poor understanding of family violence, include:²⁷

- As part of their control or abuse, perpetrators of family violence can make allegations that the victim is experiencing mental health issues. We have seen women admitted to mental health units solely on the basis of their partners' reports of their behaviour or mental state.
- Reports of family violence can be dismissed as symptomatic of mental health issues, therefore not properly addressed or responded to.

²³ The difference in rates of legal representation before Mental Health Tribunals in Victoria and New South Wales is further explored in Victoria Legal Aid, *Response to question on notice to the Royal Commission into Victoria's Mental Health System* (July 2019) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-letter-responding-to-question-on-notice-30-july-2019-redacted.pdf>>.

²⁴ *Royal Commission into Institutional Responses into Child Sex Abuse* (Final Report, December 2017); *Royal Commission into Family Violence* (Final Report, March 2016).

²⁵ VLA notes that men also experience family violence, and require safe and responsive services, but acknowledges that family violence is overwhelming experienced by women and children.

²⁶ We note that many families who experience child protection intervention also experience family violence. See Recommendations related to child protection intervention for parents experiencing mental health issues set out in section 7.2 below.

²⁷ Roads to Recovery (n 1) 53.

When experiences of family violence are not recognised or appropriately responded to in mental health settings, it can retraumatise people who have experienced family violence, jeopardise therapeutic relationships and quality of care and represent a missed opportunity for intervention and support. Adequate training and support for mental health service staff will ensure that family violence understanding and response is a core element of the mental health system and that the presence of family violence and its effects are not unnecessarily missed or misdiagnosed. We refer to recommendation 9 below on training for mental health services.²⁸

The Royal Commission into Family Violence made extensive recommendations recognising the impact of family violence on mental health and the need for improved training and collaboration, however these recommendations have not been fully implemented and we have not seen the cultural change they intend to bring about.²⁹

Recommendation 6: Require screening for family violence risks by mental health services

The Department of Health and Human Services should require and fund mental health services to develop policies to ensure family violence risk screening is undertaken as part of the intake process within the mental health system (e.g. risk identification, referrals to family violence services for safety planning).

If systems and interventions do not acknowledge the co-existence of both mental health issues and use of family violence, the capacity for the mental health of people who use family violence to be supported and the behaviour addressed is limited. Where a perpetrator of family violence is experiencing mental health issues, a combination of justice, therapeutic and family violence responses may be required (depending on the circumstances) to better ensure safety for the victim and fair treatment for the perpetrator.

Recommendation 7: Improve responses to people experiencing mental health issues who use family violence

The Victorian Government should provide guidance to require all aspects of the mental health and justice systems (e.g. mental health services, Victoria Police, courts) to improve their responses to people who use family violence and are experiencing mental health issues.

3.2 Reducing regional inequalities

Through our work we see that there are regional disparities between metropolitan and regional areas,³⁰ including access to services (particularly specialist mental health services), mental health treatment in border towns, including when people are transferred interstate (e.g. Victorian consumers admitted to Nolan House in Albury, NSW cannot access Victorian-based services such as IMHA, and there are no equivalent supports in NSW), and isolation and separation from family and community when accessing inpatient units.

There are a range of innovative options with potential to improve access to mental healthcare in regional Victoria. For example, increasing capacity of GPs, mental health workers and support

²⁸ Training in family violence should include specific elder abuse training for services to identify and respond to older people experiencing elder abuse.

²⁹ See particularly recommendations 95, 97, 98, 99 and 102.

³⁰ These are discussed in greater detail in: Roads to Recovery (n 1) 60.

workers in regional Victoria to provide mental health supports. VLA supports increased resourcing of designated mental health services to provide more outreach services in remote areas, or effective partnerships between local services in country Victoria with specialist services in Melbourne (including effective referral and consultation pathways to ensure access). Increasing access to telehealth, webchat and other remote mental health support options could also be further explored, where appropriate.

The Victorian Government should also work with other state and territory governments to support the smooth transition of mental health supports for people who move to or from Victoria. Regional approaches need to consider how to ensure continuity of mental health supports in cross-border locations (e.g. Albury-Wodonga, Mildura), where people may be caught between overlapping or inconsistent service systems and legislative frameworks. DHHS should use local demographic data as a starting point for designing co-produced mental health services.

Recommendation 8: Respond to local mental health need in the regions

The Victorian Government should ensure people can access specialist and high quality mental health treatment across rural, regional and remote Victoria.

3.3 Tailored, culturally safe and inclusive services

VLA has advocated for system changes which reduce inequality and ensure Victorians have access to tailored, culturally safe services.³¹ Mental health issues affect the whole community, but focused and targeted responses for groups within our community are needed for everybody to equally access the care and support they need for their recovery.³²

The Mental Health Act states that people receiving mental health services should have their individual needs recognised and responded to.³³ In practice, our consumers and clients report that this is too often not reflected in their experience. Inpatient units, in particular, are often ill-equipped and poorly resourced to safely respond to people's diverse and intersecting needs. Mental health services also have obligations under the *Equal Opportunity Act (2010) (Vic) (EOA)* not to discriminate against consumers on the basis of protected attributes (see section 6).³⁴

a) Cultural change within mental health services

Through VLA's practice experience, we have seen the need for mental health services to improve their service delivery to provide tailored, safe and inclusive services for Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities,³⁵ people who

³¹ Roads to Recovery (n 1) 62.

³² Roads to Recovery (n 1) 60.

³³ *Mental Health Act 2014 (Vic)* ss 11(g) and 11(f).

³⁴ See recommendation 34.

³⁵ IMHA Evaluation Report (n 14) 23. This has been confirmed by other oversight bodies. See e.g.: Office of the Public Advocate, *Community Visitors Annual Report 2018-2019* (Report, 2019) <<https://www.publicadvocate.vic.gov.au/resources/annual-reports/community-visitors-annual-reports/637-opa-cv-annual-report-2018-19/file>>.

experience and use family violence,³⁶ LGBTIQ+ communities,³⁷ older people,³⁸ women,³⁹ and people with co-existing issues (e.g. problematic drug and/or alcohol use, problem gambling, disability, Acquired Brain Injury (**ABI**), neurodiverse consumers, people diagnosed with personality disorders).⁴⁰

Key recommendations for change include developing mechanisms to effectively embed tailored, safe and inclusive service delivery across the mental health system. This should include:

- Mandatory training for mental health workers to respond to individual needs;⁴¹
- Development of practice guides, policies and procedures which respond to the local need for each service (e.g. addressing racism, unconscious bias and racial literacy for consumers from culturally and linguistically diverse communities);
- Embedding consumer leadership and a lived experience workforce at all levels of mental health services and the system with consumers from diverse communities (see section 1);
- Appropriate funding for services to effectively implement these measures including training and infrastructure to ensure physical safety within inpatient units;
- Expanding capabilities of specialist, including dual-treatment, services;
- Improving coordination between mental health and intersecting services to ensure seamless and integrated care;
- Ensuring services are designed to provide flexible and responsive services that can be adapted to provide what the consumer wants (i.e. rather than a 'one size fits all' approach), recognising diverse and intersecting needs; and
- Monitoring and evaluation frameworks to ensure effective implementation of inclusive training and policies, with independent oversight for both individual complaints and systemic investigations.⁴²

Recommendation 9: Secure, safe and responsive mental health services for diverse communities

The Department of Health and Human Services should require and fund mental health services to implement specific strategies to provide capacity building, policy development and training, and to ensure their service delivery is trauma-informed, responsive and tailored to the diverse needs of the consumers accessing their services.

³⁶ We note the commitment to the Chief Psychiatrist coordinating the development of a family violence learning agenda that includes continuing professional development and guidance on appropriate response to people with mental illness who have also suffered family violence: Office of the Chief Psychiatrist, *Commitment to a family violence learning agenda* (June 2019) <<https://www2.health.vic.gov.au/about/publications/policiesandguidelines/commitment-family-violence-learning-agenda>>.

³⁷ See Section 6 below, in particular, Recommendations 29 and 30. National LGBTI Health Alliance, *Snapshot of mental health and suicide prevention statistics for LGBTI people* (Report, February 2020).

³⁸ Royal Commission into Aged Care Quality and Safety, *Terms of Reference* (Web Page, 6 December 2018) <<https://agedcare.royalcommission.gov.au/Pages/Terms-of-reference.aspx>>.

³⁹ World Health Organisation and Calouste Gulbenkian Foundation, *Social determinants of mental health* (2014) <https://apps.who.int/iris/bitstream/handle/10665/112828/9789241506809_eng.pdf>.

⁴⁰ Roads to Recovery (n 1) part 5.

⁴¹ This should include: cultural diversity training to develop culturally safe practices for culturally and linguistically diverse communities including interpreter use; Aboriginal and Torres Strait Islander cultural training to better support the social and emotional wellbeing of Aboriginal and Torres Strait Islander people that is embedded and ongoing to ensure cultural competency and, ultimately, cultural safety; targeted training in providing safe and inclusive services to LGBTIQ+ consumers; and specialist training to identify and respond to co-existing issues, including problematic drug and/or alcohol use, problem gambling, disability, communication practices for engaging with neurodiverse consumers, stigma and discrimination against people diagnosed with personality disorders, including making appropriate referrals.

⁴² See recommendations 19 – 28.

b) Mental health capacity building for intersecting services

Intersecting services providing support for people experiencing mental health issues also need to have in place effective mechanisms, guidance and training to appropriately provide services that meet a person's needs, including where tailored or specialised response are required. For example, ongoing training and capacity building about mental health issues should be required for all essential agencies and services that support people with mental health issues, including drug and alcohol services, disability support services, family violence services, housing providers and legal services.

Recommendation 10: Build mental health support capacity of intersecting services

The Victorian Government should build the capacity of intersecting services to provide rights based and recovery focused support for people with mental health issues, particularly around identification and referrals to appropriate mental health supports.

We refer to section 7 of this submission for a more detailed discussion of reforms affecting children and young people.

4 Service delivery and community supports

4.1 Supported decision-making, recovery and least restrictive practice

The Mental Health Act was intended to embed supported decision-making, recovery and least restrictive practice into the Victorian mental health system.

Consumers frequently report that they are not supported to make decisions around their treatment, do not receive the least restrictive treatment, and are subjected to coercive practices. We also hear from consumers that their treating team does not hear or give genuine consideration to their views or preferences, and that they are not provided with genuine choices, alternatives, or a variety of support and treatment options (e.g. different types of medication, Open Dialogue). Mental health service staff also report they have insufficient time and resources in order to fully realise supported decision-making, recovery and least restrictive treatment.⁴³

Creating new legal frameworks is ineffective unless services and individuals responsible for the system on the ground are supported to change the culture and practice.⁴⁴ Consumer-focused voluntary assessment and treatment should be a measure of success, and compulsory treatment used only as a last resort. We refer to section 1 on consumer leadership above as part of this cultural change.

Practical processes should be put in place to support consumers to have a greater say in their treatment including greater input into clinical notes, improved support to access clinical files (without needing to make formal Freedom of Information requests, such as policies to facilitate access), and co-producing treatment and discharge plans.

⁴³ Roads to Recovery (n 1) 17.

⁴⁴ Roads to Recovery (n 1) 13.

a) Embedding key principles in practice

Supported decision-making, recovery and least restrictive treatment principles should be embedded into the practice of mental health services, with adequate funding to realise the objectives of the Mental Health Act.

Recommendation 11: Embed key recovery principles within mental health services

The Department of Health and Human Services should require and fund mental health services to embed key principles of supported-decision making, recovery and least restrictive practice into their practice through the use of service agreements, policies and procedures and practice support to increase rates of voluntary mental health services and treatment in the community.

b) Mandatory training for mental health services and staff

Building staff capacity through training, education, supervision, and ongoing professional development has a crucial role to play in improving compliance and embedding cultural change, as is incorporating these requirements into clinical tools, measuring outcomes and reporting on them.⁴⁵ The development and roll-out of a rights-based approach to mental health for services (including Mental Health Act and Victorian Charter training, guidance and policy development) is essential for preventing mistreatment and abuse, and safeguarding the human rights of mental health service users.

IMHA's role and supported decision-making training are examples of the kinds of initiatives needed to translate the letter of the law into tangible protections for consumers which enable them to be actively involved in decisions about their treatment, discharge planning, risk assessment or recovery.⁴⁶ Outcomes reported by participants after undertaking IMHA's supported decision-making training included an 85 per cent increase in knowledge of supported decision-making and how to put supported decision making into practice.⁴⁷ Unfortunately, supported decision-making is broadly misunderstood across the mental health sector, and often confused with shared decision-making.⁴⁸

The independent evaluation of IMHA undertaken by RMIT in 2018 notes that the responsibility for ensuring clinical decision-makers complete training on supported decision-making and mental health legislation to understand their legal obligations should not sit with IMHA alone. In other jurisdictions, training is mandated. For example, in the UK, all decision-makers must complete training on mental health laws before they can subject a person to compulsory treatment.⁴⁹

Recommendation 12: Require supported decision-making and rights training

The Department of Health and Human Services should require and fund mental health services and all clinicians who can make compulsory treatment decisions to undertake mandatory

⁴⁵ This recommendation is further supported by recommendation 4.

⁴⁶ Roads to Recovery (n 1) 16.

⁴⁷ Roads to Recovery (n 1) 16.

⁴⁸ Shared decision-making is where the consumer participates in the decision-making process but does not make the final decision.

⁴⁹ IMHA Evaluation Report (n 14) 35.

training on the Mental Health Act (including supported decision-making, recovery and least restrictive treatment) and application of the Victorian Charter.

The Victorian Government should adequately fund IMHA to continue designing and delivering supported decision-making and rights training to designated mental health services to build services' capacity to work from a rights-based framework, as required by the Mental Health Act.⁵⁰

4.2 Flexible treatment and support options

VLA has highlighted the opportunity to build a recovery-focused mental health system.⁵¹ Consumers should have their autonomy and right to self-determination respected. Victoria's mental health system can make this a reality by ensuring access to voluntary services and treatment in the community.

Currently, Victoria's mental health system is skewed towards crisis response.⁵² Flexibility for people's different recovery needs in terms of intensity of support is not widely available. Our system should respect people's choice and autonomy to decide what they need and when they need it. This change will require specific funding to expand options in treatment team workforce and service models, including the expansion of social work, trauma-informed support, occupational therapist, psychology, talk therapy, and peer support roles within Victorian mental health services.

Community-based support – such as community mental health teams, continuing care units, and Prevention and Recovery Care (**PARC**) services – are inadequately funded, particularly in comparison to inpatient services.⁵³ IMHA's Speaking From Experience consumer advisory group notes the defunding of some assertive outreach programs has further compounded lack of access to consumer-focused community-based supports. Community-based services should be adequately resourced to play a crucial prevention role in Victoria's mental health system. Additional resourcing for community-based supports will ensure that consumers can access the supports they need when they need them in the community (before mental health issues escalate), and rates of crisis admission and compulsory treatment will decrease.

PARCs are intended to operate as both a 'step-up' and 'step-down' facility for people who require greater support than they can receive at home, but do not require hospitalisation. In practice, we see PARCs used almost exclusively as a 'step-down' for people leaving hospital, with limited capacity for use as a 'step-up' option. In addition, most PARCs have a maximum length of stay of 28 days.

VLA supports Interim Report recommendations 2, 3 and 5 to increase assertive outreach in the community, expand follow-up care and support for people after a suicide attempt, and develop a lived experience led residential mental health service.⁵⁴ It is critical that people be able to access flexible, responsive clinical and non-clinical community and inpatient services. In line with VLA's recommendations in the section 1 of this submission, any changes should be co-produced with consumers.⁵⁵

⁵⁰ This recommendation is further supported by recommendation 13 in section 4.2.

⁵¹ Roads to Recovery (n 1) 9.

⁵² Roads to Recovery (n 1) 9.

⁵³ National Mental Health Commission, *Contributing Lives, Thriving Communities: Report of the National Review of Mental Health Programs and Services* (Report, December 2014) <<https://www.mentalhealthcommission.gov.au/monitoring-and-reporting/national-reports/2014-contributing-lives-review>>; Victorian Auditor General's Office, *Access to Mental Health Services* (Independent Assurance Report, March 2019) <<https://www.audit.vic.gov.au/report/access-mental-health-services?section=33107--3-understanding-and-meeting-demand>>.

⁵⁴ See sections 1 and 2.

⁵⁵ This recommendation is further supported by recommendation 1 in section 1.1.

Recommendation 13: Improve access to holistic and flexible treatment

The Victorian Government should increase funding to expand community-based mental health supports and multidisciplinary options in treatment team workforce and service models for consumers to have genuine choice about the type of support they receive.

As discussed in *Roads to Recovery*, there are limited service options between ten Medicare-subsidised psychology sessions through a Mental Health Care Plan and crisis interventions.⁵⁶ Too often this gap draws people into compulsory treatment or other crisis-based services which often leads to loss of autonomy.⁵⁷

Recommendation 14: Work with Australian government to expand Medicare funding for Mental Health Care Plans

The Victorian Government should work with the Australian Government to bridge the gap between mental health supports available through a Mental Health Care Plan and an individual's mental health support needs.

4.3 Coordination between mental health, health and disability supports

Ensuring access to appropriate supports requires state and federal governments to work together to ensure that appropriate mental health, health and disability supports are available, regardless of which government has jurisdiction. This will require coordination between state and federal governments and mainstream services (including Medicare-subsidised psychologists, psychiatrists, GPs), the NDIS and mental health services.

As another example, the NDIS was intended to provide choice and control for people with psychosocial disability, but the NDIS has not fulfilled its promise, with demonstrated service gaps having a serious impact on people experiencing mental health issues.⁵⁸ Many people have lost access to services they previously had, and have been subjected to assessment processes that can be stressful and damaging to their mental health. Through our casework, we have seen barriers to people experiencing mental health issues, market failure where people cannot access services they are funded to receive,⁵⁹ and inadequate NDIS plans. This is particularly acute where people face extended periods of detention because of a lack of housing or supports in the community.⁶⁰ This can also cause and lead to long-term social problems, including homelessness and family breakdown.⁶¹

The siloing of mental health and disability support services means people who require both mental health and disability support may struggle to obtain suitable services. Many service providers lack

⁵⁶ Roads to Recovery (n 1) 9.

⁵⁷ The impact of this 'missing middle' is discussed further in section 8.1 below.

⁵⁸ Victoria Legal Aid, *Ten Stories of NDIS 'Thin Markets': Reforming the NDIS to meet people's needs* (Submission, June 2019) <<http://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-to-the-ndis-thin-markets-project-june-2019.docx>> (**Thin Markets Submission**); National Legal Aid, *Putting people first: Removing barriers for people with disability to access NDIS supports* (Submission, November 2019) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-putting-people-first-removing-barriers-for-people-with-disability-to-access-ndis-supports-11-2019.pdf>> (**Putting People First Submission**); Victoria Legal Aid, *Inclusion and accessibility for all Victorians – submission to the Victorian government's consultation paper for the state disability plan 2021-2024* (Submission, May 2020) <<https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/access-to-justice-for-people-with-mental-illness-and-disability>>.

⁵⁹ Thin Markets Submission (n 77); Putting People First Submission (n 77).

⁶⁰ Roads to Recovery (n 1) 47. See also: Recommendation 24: Facilitating discharge from SECU.

⁶¹ Roads to Recovery (n 1) 48 – 49.

knowledge, training and skills to understand and address both mental health issues and neurodiversity and/or disability.

The Victorian Government should coordinate with the Australian Government to address the gaps between federal and state-based mainstream services. For NDIS participants, this would include a service safety net in urgent cases where NDIS market failure leads to people with mental health issues and complex needs being unable to access supports (e.g. housing or community-based services to support transition out of detention). The Victorian Government should commit to funding community-based mental health supports regardless of a person's eligibility for the NDIS or federally funded supports.⁶²

Recommendation 15: Ensure cross-governmental coordination of mental health, health and NDIS supports

The Victorian Government should work with the Australian Government to coordinate access and availability of mental health supports and services to ensure consumers have a seamless experience of the mental health system, regardless of governmental responsibility for different types of services.

4.4 Secure Extended Care Units

SECUs are intended to provide medium to long-term treatment and rehabilitation. Many of our clients receive compulsory treatment in SECUs for lengthy periods of time, without transition or discharge planning. Consumers admitted to SECUs face much longer periods of detention and more complicated discharge planning than most people admitted to inpatient units. People who have been in SECUs for many years also face significant financial and socioeconomic disadvantage which presents barriers to transitioning into the community. SECUs are intended to be functionally distinct from acute inpatient wards, and providing long-term psychosocial rehabilitation and additional support is required in order to meet consumers' needs within SECUs and to support discharge and transitioning into the community.

VLA clients have reported unsatisfactory conditions, facilities and treatment in SECUs. SECUs should be subject to liveability standards that are appropriate for the usual length of residence and align with community expectations.⁶³

To facilitate effective discharge planning in recommendation 17 below, the appropriate regulator (e.g. independent regulator or Office of the Chief Psychiatrist⁶⁴ – see section 5.3) should set requirements that:

- are co-produced with consumers;
- are consistent with a recovery framework;
- commence on admission;

⁶² This recommendation is further supported by recommendation 13 in section 4.2.

⁶³ This standard should require rectification of deficiencies related to: damaged furnishings and unpleasant odours; inadequate space and privacy; inadequate multidisciplinary staff to meet the needs of consumers with a diverse range of needs; lack of lived experience workforce; lack of outdoor spaces; lack of meaningful activities to support people's recovery goals; lack of gender safe spaces; and inadequate natural light.

⁶⁴ Currently this function would be undertaken by the Office of the Chief Psychiatrist but may move to an independent mental health regulator as discussed in section 5.3(a).

- include treatment goals, plans for reduction in supervision and a proposed plan for transition from the SECU;
- prioritise activities and discharge options that are meaningful for the consumer;
- identify key stakeholders necessary for achieving the plan; and
- are required to be produced before the Tribunal on all applications relating to a consumer's stay in SECU.

Recommendation 16: Develop standards for Secure Extended Care Units

The Department of Health and Human Services should define Secure Extended Care Units as a unique service within designated mental health services and develop standards which regulate inpatient care, liveability standards and discharge and transition planning.

Recommendation 17: Facilitate effective discharge from Secure Extended Care Units into the community

The Victorian Government should fund broader options for accommodation in the community, step-down programs and community-based treatment for consumers in Secure Extended Care Units.

The appropriate regulator (e.g. independent regulator or Office of the Chief Psychiatrist) should establish and monitor implementation of effective discharge planning requirements, including consistent outcome measures and public reporting of compliance.

4.5 Safe and stable housing

Through our work we see the interconnected relationship between homelessness, poverty, mental health and legal problems. The links between housing, mental health and imprisonment were recognised by the Productivity Commission in its Inquiry into Mental Health. The Productivity Commission has recommended policies to prevent exits from prisons and inpatient units into homelessness and to encourage development of Specialist Disability Accommodation.⁶⁵

There are limited crisis accommodation options available and very few long-term stable housing options available for our clients. Inadequate access to safe, suitable housing can destabilise people's mental health and present an obstacle to discharge from inpatient units or release from prison.⁶⁶

There is no guarantee of secure housing for people leaving prison. Offenders released on parole are required to have their housing plans approved by the Adult Parole Board, and therefore lack of housing options limits parole eligibility. A recent research report by the Australian Institute of Criminology noted the high link between homelessness and contact with the criminal justice system, citing one study which found that nearly a quarter of detainees were homeless or experienced housing stress in the month before arrest.⁶⁷ State-wide housing (e.g. extension of integrated housing and rehabilitation initiatives such as the Atrium Housing and Support Program)⁶⁸ and dedicated post-

⁶⁵ Productivity Commission, *Mental Health Inquiry: Draft Report* (Report, 31 October 2019), Draft Recommendations 15.1 (housing security for people with mental health issues); 15.2 (support people to find and maintain housing); and 24.3 (the National Housing and Homelessness Agreement). See also responses to questions taken on notice by Ms Louise Glanville, CEO of VLA, following evidence given on 18 November 2019 before the Productivity Commission's Public Hearing into Mental Health: Answers to Questions on Notice (n 24) 3.

⁶⁶ Roads to Recovery (n 1) 46.

⁶⁷ Australian Institute of Criminology, *Supported housing for prisoners returning to the community: A review of the literature* (Research Report, No 7, 2018) v.

⁶⁸ See Melbourne City Mission, *The Atrium Housing and Support Program* (Web Page) <<https://www.mcm.org.au/justice/the-atrium-housing-and-support-program>>.

release planning and housing options, would significantly improve stable transitions into the community and reduce relapses and recidivism.

Access to safe, affordable housing for people experiencing family violence to leave violent relationships is also essential to support a person's mental health (see section 3.1 on family violence more broadly).⁶⁹ VLA's submission to the Victorian Homelessness Inquiry makes a series of recommendations aimed at reducing homelessness, which are relevant for the Royal Commission given the strong link between housing instability and poor mental health outcomes.⁷⁰ For example, we recommend:

- increasing the supply of safe, stable and affordable housing (including for people experiencing family violence, or in custody or inpatient units);
- a legal and services system that prevents evictions into homelessness;
- better ways of preventing and responding to homelessness in the child protection system;
- strengthening our social safety net; and
- tackling discrimination as a cause of homelessness.

Recommendation 18: Eliminate a key driver of poor mental health by reducing homelessness

The Victorian Government should resource the supply of safe, stable and affordable housing, including access to housing for people experiencing family violence, leaving custody or inpatient units, and for integrated rehabilitation housing programs and Specialist Disability Accommodation.

5 Mental health system oversight

5.1 Reforming compulsory mental health treatment

Detaining a person in a mental health facility and performing treatment without their consent is a significant intrusion on a person's rights to autonomy, freedom of movement and self-determination. These serious decisions to override a person's views and wishes about their own treatment for their mental health issues should only be authorised where absolutely necessary, and as a last resort.

Victoria continues to have some of the highest rates of compulsory treatment in Australia.⁷¹ Here we set out some key mechanisms for reducing the use of compulsory treatment and improving how decisions are made under the Mental Health Act. To improve alignment with the Convention on the Rights of People with Disabilities (**CRPD**), international best practice and current supported and substituted decision-making laws, we make the following recommendations.

⁶⁹ World Health Organisation, *Gender disparities in mental health* (Report, August 2009) 3 <https://www.who.int/mental_health/media/en/242.pdf?ua=1>.

⁷⁰ Victoria Legal Aid, *It starts with a home: Ten legal issues that cause – or are caused by – homelessness in Victoria* (Submission to the Victorian Homelessness Inquiry, March 2020) <<https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/other-activities/#it-starts-in-the-home>>

⁷¹ Edwina Light, 'Rates of use of community treatment orders in Australia' (2019) 64 *International Journal of Law and Psychiatry* 83. Although Victoria's rate of CTOs per 100,000 population fell from 98.8 in 2012 to 76.4 in 2016–17, it is still higher than all other states and territories for which data was reported.

a) Allowing consumers with decision-making capacity to make their own treatment decisions

The Mental Health Act currently allows consumers who have decision-making capacity to refuse electroconvulsive treatment (**ECT**). However, the Mental Health Act does not allow consumers with decision-making capacity to refuse mental health treatments other than ECT. This is inconsistent with the right to refuse medical treatment where a person has decision-making capacity including potentially life-saving treatment (e.g. chemotherapy or blood transfusions). It gives rise to discrimination against people with mental health issues as compared with people with other health conditions or disability.

Through our practice experience before the Mental Health Tribunal, we have assisted clients who have the capacity to make their own decision about a proposed treatment but are ordered to undergo non-consensual treatment (e.g. forced injections). Subjecting a person to treatment without their consent can have a detrimental impact on their recovery, dignity and autonomy.⁷²

In considering the application of the capacity test in the Mental Health Act, Justice Bell said:

The issue is closely connected with the need to respect the human rights of persons with mental disability by avoiding discriminatory application of the capacity test ... When respect is afforded to the choice of the person to consent to or refuse medical treatment, the person is recognised for who they are.⁷³

Where a person has decision-making capacity in relation to a treatment decision, they should be able to make this decision – regardless of whether this relates to mental health or other health treatment.⁷⁴

Increasingly, equivalent mental health laws in other Australian jurisdictions uphold the right of people with decision-making capacity to refuse mental health treatment. The mental health laws in the Northern Territory, Australian Capital Territory, Queensland, Tasmania and Western Australia only permit involuntary mental health treatment when a person lacks decision-making capacity.⁷⁵

There may be exceptional cases where compulsory treatment is justified to prevent serious harm to others notwithstanding that the person has decision-making capacity. To address these concerns, the treatment criteria in section 5 of the Mental Health Act should be amended to include an additional criterion that the person can only be made subject to a compulsory treatment order where the person does not have capacity to give informed consent to the immediate treatment, with an exception where compulsory treatment for a person with decision-making capacity is necessary to prevent serious harm to others. In addition, consequential amendments should be made to section 71 to provide that an authorised psychiatrist may only make a substituted decision for a person where the person does not have capacity to give informed consent to the treatment, or the treatment is necessary to prevent serious harm to others, and the person is refusing to consent to the treatment.⁷⁶

⁷² Roads to Recovery (n 1) 14.

⁷³ *PBU v Mental Health Tribunal* [2018] VSC 564 (1 November 2018 [173], [199]).

⁷⁴ See: *Guardianship and Administration Act 2019* (Vic) and *Medical Treatment Planning and Decisions Act 2016* (Vic).

⁷⁵ The Royal Australian & New Zealand College of Psychiatrist, *Powers and duties of psychiatrist in Australia and New Zealand Mental Health Acts: a literature review* (August 2017) 23 <https://www.ranzcp.org/files/resources/college_statements/mental-health-legislation-tables/powers-and-duties-of-psychiatrists-in-australian-a.aspx>.

⁷⁶ The requirement that the treatment decision be the least restrictive form of treatment should be retained. *Mental Health Act 2014* (Vic) s 71(3).

Recommendation 19: Allow consumers with decision-making capacity to make treatment decisions

The Victorian Government should amend the Mental Health Act to allow consumers with decision-making capacity to refuse treatment, unless immediate treatment is necessary to prevent serious harm to another person.

b) Giving effect to a person's will and preferences

The Mental Health Act currently provides that an authorised psychiatrist (or the Tribunal for ECT) may make a substitute decision for a consumer if satisfied there is no less restrictive way for the patient to be treated.⁷⁷ The decision-maker must have regard to the patient's views and preferences. This framework is in line with previous guardianship and administration laws in place when the Mental Health Act was passed in 2014, but is now inconsistent with the new standard and framework under the *Guardianship and Administration Act 2019* (Vic) as of March 2020.⁷⁸ The new standard protects consumers' rights to self-determination by requiring a substitute decision-maker to 'give all practical and appropriate effect to a person's will and preferences', and may only override the person's will and preferences if doing so is 'necessary to prevent serious harm'.⁷⁹

The Mental Health Act should provide that an authorised psychiatrist (or the Tribunal for ECT) must give all practical and appropriate effect to a person's will and preferences.⁸⁰ If the authorised psychiatrist or Tribunal is not able to determine a person's will and preferences, the authorised psychiatrist should give effect to what the authorised psychiatrist believes a person's will and preferences are likely to be, based on all the information available, as far as practicable in the circumstances. If the authorised psychiatrist or Tribunal is not able to determine a person's likely will and preferences, they should choose the least restrictive treatment. A patient's will and preferences should only be overridden where necessary to prevent serious harm, with the least restrictive means adopted to achieve this aim.

Recommendation 20: Update substitute decision-making framework in the Mental Health Act

The Victorian Government should amend the Mental Health Act to make the substituted decision-making framework consistent with the *Guardianship and Administration Act 2019* (Vic) by requiring a substitute decision-maker to give all practical and appropriate effect to a person's will and preference.

c) Presumption that treatment criteria do not apply

In our practice experience, the introduction of an explicit presumption that a person has capacity to give informed consent has been a positive development in Victorian mental health law. We see the benefit of this presumption in ECT hearings in particular.

⁷⁷ Currently substituted decisions can be made regardless of whether or not the person has decision-making capacity. This reform should happen in tandem with Recommendation 19: Allow consumers with decision-making capacity to make treatment decisions, and should therefore only apply to consumers who lack decision-making capacity.

⁷⁸ *Guardianship and Administration Act 2019* (Vic).

⁷⁹ *Guardianship and Administration Act 2019* (Vic) s 9(1).

⁸⁰ This could be achieved through amending sections 71, 93 and 96 of the Mental Health Act.

Despite the objective for the Mental Health Act to provide for treatment in the least restrictive way possible,⁸¹ in our experience, services and the Tribunal often default to compulsory treatment. A presumption that the treatment criteria do not apply, equivalent to the presumption of capacity, could play a role in reducing the high rates of compulsory treatment in Victoria.

Recommendation 21: Insert a presumption that Mental Health Act treatment criteria do not apply

The Victorian Government should amend the Mental Health Act to include a requirement that a person determining whether the treatment criteria apply must presume that each of the treatment criteria does not apply.

d) Prospective community treatment orders

Where community-based supports or less restrictive treatment options are not available, it limits the ability of the Tribunal to have an impact on service practice or change outcomes for consumers. In our practice experience, it is common for a consumer to be clinically ready for community-based treatment, but accommodation or other supports are not yet in place. In these cases, the Tribunal generally makes an inpatient treatment order.⁸² This order may have a duration of many weeks if the Tribunal is satisfied the Mental Health Act criteria are likely to continue to be met for a longer period, even if inpatient treatment is only required in the very short term.⁸³

Under the previous *Mental Health Act 1986* (Vic), the Mental Health Review Board had the power to order the authorised psychiatrist to make a community treatment order within a reasonable period specified by the Board,⁸⁴ but this power was not extended to the Tribunal under the current Mental Health Act.

Recommendation 22: Empower the Mental Health Tribunal to make prospective community treatment orders

The Victorian Government should amend the Mental Health Act to allow the Mental Health Tribunal to make an order that the authorised psychiatrist vary the order to a Community Treatment Order within a period specified by the Mental Health Tribunal.

e) Oversight of Mental Health Act decisions

The Mental Health Act gives public authorities enormous power greatly affecting the fundamental rights of individuals. In some instances, these decisions are subject to review,⁸⁵ however many decisions are not reviewable.

Consumers' rights should be subject to greater systemic accountability and have enforceability options for affected consumers. Currently, the Mental Health Act creates rights for consumers and

⁸¹ *Mental Health Act 2014* (Vic) s 10(b).

⁸² *Mental Health Act 2014* (Vic) s 55(3).

⁸³ 66 per cent of Inpatient Treatment Orders were of a duration of 21 – 26 weeks of a maximum 26 weeks. Mental Health Tribunal. *Annual Report 2018 – 2019* (Report, 6 August 2019) 18 < <https://www.mht.vic.gov.au/sites/default/files/documents/201910/MHT-2018-2019-Annual-Report.pdf>>.

⁸⁴ *Mental Health Act 1986* (Vic) s 36(4) (repealed).

⁸⁵ For example, decisions to place a person on a Temporary Treatment Order, to vary a Community Treatment Order to an Inpatient Treatment Order, to transfer between Designated Mental Health Services, or to give compulsory ECT are reviewable by the Mental Health Tribunal. Further, if a person has obtained a second psychiatric opinion and their psychiatrist has decided to adopt none of only some of the recommended changes, the person may apply to the chief psychiatrist to review their treatment (*Mental Health Act 2014* (Vic) s 87).

guidelines for supported decision-making, but there are no mechanisms for accountability. For example, there is currently no oversight of decisions:

- restricting a consumer's right to communicate;⁸⁶
- making a treatment decision contrary to an advance statement;
- making a substitute treatment decision under section 71 of the Mental Health Act;
- a decision to transfer a person to or from a SECU;⁸⁷ and
- refusing or revoking leave⁸⁸.

To facilitate greater oversight, services should also be given clear guidance around recording how these decisions are made, including documenting capacity assessments, the person's views, preferences and recovery goals and how these have been considered as part of the decision-making process.

Recommendation 23: Increase oversight of restrictions on consumers' rights

The Victorian Government should consider measures to provide increased oversight of decisions made under the Mental Health Act that restrict a person's rights, that are currently not subject to review by the Mental Health Tribunal.

5.2 Measurement and monitoring

One of the key aims of the Mental Health Act is to reduce the use of compulsory treatment, with a preference for voluntary treatment.⁸⁹ It is not clear how the drivers of system practice, such as performance measures and transparent data, align with the intention of the Mental Health Act.

a) Monitoring and evaluation of Mental Health Tribunal outcomes and impact

Despite the Tribunal's critical function in Victoria's mental health system, there is limited oversight and transparency of Tribunal processes and decisions. Appeals are rare,⁹⁰ hearings are not recorded and consumers commonly do not have legal representation. Given the critical role the Tribunal plays, quality assurance measures to ensure it is fulfilling its statutory function are necessary.⁹¹ These should include:

- role clarity for legal, medical and community members;
- recording of all hearings;

⁸⁶ *Mental Health Act 2014* (Vic) s 16.

⁸⁷ Unless the SECU is within a different designated mental health service, in which case a person may seek review of the decision under *Mental Health Act 2014* (Vic) s 66.

⁸⁸ *Mental Health Act 2014* (Vic) s 64.

⁸⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 20 February 2014, 476 (Michael Wooldridge, then Minister for Mental Health) (**Minister Wooldridge, Second Reading Speech**).

⁹⁰ Of 6,794 hearings in 2018 – 2019, 823 were initiated by a patient's application for revocation of their order. During that period 27 applications were made to VCAT for a review of a Tribunal decision, 11 of which were subsequently withdrawn: Mental Health Tribunal, *Annual Report 2018 – 2019* (Report, 6 August 2019) <<https://www.mht.vic.gov.au/sites/default/files/documents/201910/MHT-2018-2019-Annual-Report.pdf>>.

⁹¹ Improvements to the UK Mental Health Tribunal, including becoming more rigorous and rights-focused, have been attributed in part to its move out of the Department of Health into the Ministry of Justice. See: Eleanore Fritze, *Shining a Light Behind Closed Doors: Report of the Jack Brockhoff Foundation Churchill Fellowship to better protect the human rights and dignity of people with disabilities, detained in closed environments for compulsory treatment, through the use of innovative legal services* (Report, December 2015) 58–9 <https://www.churchilltrust.com.au/media/fellows/Fritze_E_Shining_a_light_behind_closed_doors.pdf>.

- ensuring designated lived experience positions continue to guide its work;
- training and support to members about their role and the Tribunal's function;
- development of clear regulations and communications about the Tribunal's role, function and processes to provide certainty and avoid confusion for consumers;
- improved systems for consumer feedback about their experience of the Tribunal; and
- the introduction of maximum terms for members.

Recommendation 24: Introduce Mental Health Tribunal evaluation measures

The Victorian Government should introduce quality assurance mechanisms and measures to evaluate the effectiveness of Mental Health Tribunal processes and decision making. Measures should include consumer experience.

b) Data collection and reporting

Current data to measure the use of compulsory treatment is limited. Data is not publicly available on how many people are subject to compulsory treatment, and most available data is episode-based and does not provide insight into trends or the full consumer experience. This makes it difficult to measure the system impact of the Mental Health Act, and to track and ensure the increase in voluntary services and treatment in the community over time.

Services should be given clear guidance around data collection, record keeping and service delivery tools that are in line with the Mental Health Act. Consistent with the DataVic access policy,⁹² data on compulsory treatment should be publicly accessible in order to increase accountability and transparency in the mental health system, to accurately measure an increase in voluntary services and treatment in the community.

Data on compulsory treatment for collection and public reporting should include:

- number and type of applications made;
- number of compulsory treatment orders made, their setting and duration;
- number of compulsory treatment orders revoked prior to expiring;
- number of orders made for ECT;
- number of courses of ECT undertaken;
- length of time on an order for each consumer (including under consecutive compulsory treatment orders);
- type of order a person was on at the time of their hearing and any order made at the hearing;
- order sought (including setting and duration) and any order made (including setting and duration); and
- number of substituted decisions made on the basis that a person does not have capacity to make their own decision, or that the person has capacity and is refusing the proposed treatment.

⁹² Victorian Government, *DataVic Access Policy* (Web Page, 20 November 2019) <<https://www.data.vic.gov.au/datavic-access-policy>>.

Data should be reported in a way that makes it possible to cross-reference between datasets to provide a clearer picture of services, Tribunal practice and consumer experience. For mental health services to provide responsive services, they need to appropriately collect, use and publicly report on demographic data for their service.⁹³ Consumer reported outcome and experience measures should reflect diversity to ensure cohorts within the Victorian community have access to high quality and non-discriminatory mental healthcare.⁹⁴

Recommendation 25: Improve data collection and public reporting of mental health services

The Department of Health and Human Services and the Mental Health Tribunal should publicly report service level and demographic data to improve transparency and accountability, and support service planning and delivery.

c) Performance measures

Currently, there are few publicly available mental health performance measures that are outcome based or include consumer feedback. The Royal Commission has an opportunity to recommend the implementation of systems and processes to evaluate, measure and monitor whether Victoria's mental health system is meeting the needs of consumers, and for the Victorian Government to quickly respond when it is not. Performance measures should also include clear system objectives to reduce compulsory treatment, capacity-building and implementation frameworks to meet these objectives in practice, and independent monitoring and evaluation of outcomes.

Recovery-based assessment and treatment objectives, policies and frameworks should also be incorporated into the program plans for all mental health services and the Mental Health Tribunal. For example, DHHS' outcome measures for SECUs should include lengths of stays and consumers' experiences. Data on these measures should be published and practice learnings shared between services.

Recommendation 26: Introduce a statewide mental health system monitoring and evaluation framework for Victoria

The Department of Health and Human Services, Mental Health Reform Victoria or an appropriate regulator should work with mental health services and consumers to develop a state-wide monitoring and evaluation framework which sets out clearly defined targets, basic standards and objectives for the mental health system.

Recommendation 27: Require co-produced monitoring and evaluation frameworks for mental health services

Mental Health Reform Victoria or an appropriate regulator should ensure mental health services develop co-produced service-based monitoring and evaluation frameworks tailored to the needs of consumers accessing each service to ensure effective implementation of existing and new policies and guidelines.⁹⁵

⁹³ See also section 3.2.

⁹⁴ Victorian Clinical Council, *Diversity and cultural safety advice* (Report, December 2019) 4 <<https://www.bettersafecare.vic.gov.au/sites/default/files/2019-12/Victorian%20Clinical%20Council%20-%20Diversity%20and%20cultural%20safety%20advice%202019.pdf>>.

⁹⁵ See section 1.

5.3 Regulation and oversight

In Victoria's mental health system, existing oversight mechanisms have different funding and reporting arrangements, including the Office of the Chief Psychiatrist, the Mental Health Complaints Commissioner and the Mental Health Tribunal. The *Targeting Zero* report found that 'the Department has not been fully exercising its leadership of the system to drive improvement or to create economies of scale in centralised data analysis, performance benchmarking and common improvement resources.'⁹⁶ As the Royal Commission has recognised in its Interim Report, there are shortfalls in system-wide planning, governance and accountability.⁹⁷ In our view, improved systems for oversight would lead to better understanding and implementation of the Mental Health Act and its safeguards.

a) System governance and coordination

Our practice experience indicates that there is a lack of clarity about responsibility and authority for mental health system governance. Responsibility for system planning, service coordination and standard setting, monitoring and auditing is dispersed and poorly coordinated. It is not clear who is responsible for identifying, reporting and resolving system-wide issues in partnership with consumers and providers.

The independent evaluation of IMHA undertaken by RMIT in 2018 recommended that oversight bodies be supported and enabled to work together to share information and take action on the governance and reduction of compulsory mental health treatment. The development of mechanisms ensuring coordination of key safeguarding, monitoring and oversight bodies is essential to drive quality improvement.

An improved system for oversight must be authorised and adequately funded to perform the following system oversight and regulatory functions:

- set benchmarks and targets for the delivery of mental health services that include access, quality standards, compliance with legal obligations, rates of compulsion and consumer satisfaction that are co-produced with people with lived experience of compulsory treatment;
- respond to and report on service-level complaints;
- provide capacity building tools and practice guidance to support least restrictive practice in all services;⁹⁸
- make recommendations for corrective action by mental health services, the Mental Health Tribunal and DHHS where targets are not met;
- publicly report on progress (e.g. whether targets are met, action on recommendations, level of implementation of guidance by services); and

⁹⁶ Department of Health and Human Services, *Targeting Zero: Supporting the Victorian hospital system to eliminate avoidable harm and strengthen quality of care* (Report, October 2016) 10.

⁹⁷ Royal Commission Interim Report (n 6) 110 – 119.

⁹⁸ Currently the OCP develops practice guidelines for services, but rates of compliance with these guidelines are not publicly reported. Our practice experience is that mental health services have little awareness of or regard to these guidelines in making compulsory treatment decisions or delivering services.

- Analyse data reporting from mental health services, the Mental Health Tribunal, the Mental Health Complaints Commission,⁹⁹ the Office of the Chief Psychiatrist,¹⁰⁰ the Office of the Public Advocate and service providers (e.g. VLA, IMHA, MHLC).

Recommendation 28: Ensure greater oversight and regulation of mental health system

The Royal Commission should ensure greater oversight and regulation of Victoria’s mental health system, including consideration of appropriate system regulator/s.

b) Mental health complaints

If the Royal Commission recommends retaining existing bodies, there are significant changes needed to improve complaint handling mechanisms. IMHA advocates have experience facilitating complaints to the Mental Health Complaints Commission that result in positive outcomes for consumers and for the broader mental health system.¹⁰¹ However, the current complaints process can often be slow and frustrating for consumers and pathways to pursue legal rights from substantiated complaints are unclear and difficult to access.

Recommendation 29: Improving complaint handling mechanisms

The Victorian Government should improve the handling of complaints relating to mental health services by¹⁰²

- (a) increasing resources to improve complaint resolution;
- (b) clarifying and developing pathways for consumers to pursue claims for compensation or other redress following substantiated complaints; and
- (c) requiring public reporting of service level complaints data, systemic learnings and quality improvements.

6 Human rights and discrimination law

In our practice experience, people experiencing mental health issues are more likely to interact with public authorities (such as police, public housing providers or public mental health services) or be subject to decisions that have an impact on their rights (such as involuntary mental health treatment). We briefly outline necessary consumer-focused and rights-focused reforms to ensure human rights protections provide effective safeguards, and necessary legislative reforms and policy responses to prevent discrimination and sexual harassment as drivers of adverse mental health outcomes.

6.1 Framework to eliminate use of restrictive practices

Restrictive practices are harmful and traumatising to many consumers, represent a loss of their dignity and autonomy, and damage therapeutic relationships, which can result in a reduced likelihood

⁹⁹ The functions of the Mental Health Complaints Commissioner could be consolidated into an independent mental health system regulator.

¹⁰⁰ The functions of the Office of the Chief Psychiatrist could be consolidated into an independent mental health system regulator.

¹⁰¹ IMHA Evaluation Report (n 14) 33.

¹⁰² Currently, the Mental Health Complaints Commission has responsibility for managing complaints. As identified in section 5.3(a), We recommend the Royal Commission consider whether to improve funding and operation of the MHCC or consolidate these functions into an independent mental health system regulator.

of seeking help in the future. This avoidance can result in more assertive or coercive practices by community mental health services, which may give inadequate consideration to how previous restrictive practices can impact on consumers' help seeking behaviour and engagement with services.

Consumers with trauma histories can be re-traumatised by restrictive practices, particularly interventions which trigger underlying issues of loss of control and self-determination. There must be effective human rights safeguards in place to ensure restrictive practices do not unjustifiably breach a person's rights to freedom of movement, liberty and security of person, health, and freedom from cruel, inhuman and degrading treatment. The Victorian Government's commitment to 'reduce and wherever possible eliminate the use of bodily restraint and seclusion by designated mental health services'¹⁰³ must be implemented through an effective framework.

Recommendation 30: Implement a framework to eliminate use of restrictive interventions

The Department of Health and Human Services should publish a commitment to the reduction and elimination of restrictive practices and develop and implement co-produced strategies to achieve this.

6.2 Stronger human rights protections

Human rights frameworks, such as the *Charter of Human Rights and Responsibilities 2006* (Vic) (**Victorian Charter**), Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (**CAT**), the accompanying Optional Protocol (**OPCAT**) and the CRPD provide important protections for consumers to enforce or assert their rights, and for appropriate oversight of human rights abuses.

The Victorian Charter is an important tool to promote and enforce human rights. Charter rights of consumers¹⁰⁴ can only be limited under law and subject to specific considerations,¹⁰⁵ such as those currently prescribed for compulsory treatment decisions under the Mental Health Act.¹⁰⁶ The 2015 Human Rights Charter Review recommended a series of reforms, including reviewing decisions of public authorities (including mental health services) incompatible with human rights, improving access to remedies, and ensuring oversight bodies can deal with Victorian Charter issues when they arise, including the Mental Health Complaints Commission (i.e. without needing to make a separate complaint to the Victorian Ombudsman).¹⁰⁷ The Victorian Charter could be strengthened to broaden the scope of protected rights, improve the practices of mental health services through cultural change and policy development, and provide avenues for redress when a person's human rights are breached.

The Mental Health Act provides that Aboriginal and Torres Strait Islander people 'should have their distinct culture and identity recognised and responded to' in receiving mental health services,¹⁰⁸ but

¹⁰³ Minister Wooldridge, Second Reading Speech (n 115) 476.

¹⁰⁴ These include the right to be treated equally before the law (s 7), the right to protection from torture and cruel, inhuman or degrading treatment (s 10), the right to freedom of movement (s 12).

¹⁰⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 7(2)-(3). Section 21(3) makes clear that a person must not be deprived of his or liberty except on grounds, and in accordance with procedures, established by law.

¹⁰⁶ For example, a Treatment Order is an order made by the Mental Health Tribunal that enables a person to be treated compulsorily in the community or in a designated mental health service: *Mental Health Act 2014* (Vic) s 52. Even after an order is made, mental health services must have regard to the mental health principles in s 11.

¹⁰⁷ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Report, September 2015) 110 (recommendation 25) <<https://engage.vic.gov.au/human-rights-charter-review>>.

¹⁰⁸ *Mental Health Act 2014* (Vic) s 11(h).

this does not always occur in practice.¹⁰⁹ The Victorian Charter does not currently protect the right to self-determination for Aboriginal and Torres Strait Islander peoples,¹¹⁰ despite self-determination being a critical starting point for Aboriginal and Torres Strait Islander people to engage with Victoria's mental health system. The Victorian Government has set out 11 self-determination guiding principles which should be implemented across government and within mental health and intersecting services: human rights, cultural integrity, commitment, Aboriginal expertise, partnership, decision-making, empowerment, cultural safety, investment, equity and accountability in mental health service design.¹¹¹ These principles should be embedded in mental health services, and safeguarded with legislative protection for the right to self-determination.

The Victorian Charter does not currently protect the right to health – a fundamental human right which forms part of Australia's international obligations under the International Covenant on Economic, Social and Cultural Rights. Protecting the right to health within a strengthened Victorian Charter will ensure public authorities act consistently with this right, and improve the ability of consumers to enforce their rights. Queensland's *Human Rights Act 2019* (Qld) includes a right to health services which states that every person has the right to access health services without discrimination, and a person must not be refused emergency medical treatment that is immediately necessary to save the person's life or to prevent serious impairment to the person.¹¹²

Recommendation 31: Strengthen human rights protections for consumers under the Victorian Charter

The Victorian Government should strengthen human rights protections for consumers by implementing recommendations from the 2015 Human Rights Charter Review, and ensuring rights to health and self-determination are protected.

a) Incorporating the Convention on the Rights of People with Disabilities into Victorian laws

The CRPD provides guidance to states on their responsibilities when making laws and developing policies that affect the lives of people with disability, including people experiencing mental health issues. The CRPD Committee regularly reviews Australia's compliance. For example, the most recent concluding observations raised serious concerns around the absence of data on the number of people found not guilty due to 'cognitive or mental health impairment' indefinitely detained.¹¹³

Victorian mental health services should comply with the CRPD, and Victorian laws should provide adequate protections for the human rights of people experiencing mental health issues in practice (e.g. access to effective remedies for breaches of human rights).

¹⁰⁹ Roads to Recovery (n 1) 62 – 63.

¹¹⁰ See also Recommendation 14: Adequate Resourcing for ACCOs.

¹¹¹ These guiding principles set the minimum standards for all existing and future work with Aboriginal Victorians and will guide all government work to progress self-determination going forward: Victorian Government, *Victorian Aboriginal Affairs Framework 2018-2023* (Report, 2018) <https://w.www.vic.gov.au/system/user_files/Documents/av/VAAF%20FINAL.pdf>.

¹¹² *Human Rights Act 2019* (Qld) s 37.

¹¹³ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third periodic reports of Australia*, CRPD/C/AUS/CO-2-3 (15 October 2019) 7 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/AUS/CO/2-3&Lang=en>.

Recommendation 32: Incorporate the Convention on the Rights of People with Disabilities into Victorian laws

The Victorian Government should consider how Victorian laws can better implement the Convention on the Rights of People with Disabilities to better safeguard the human rights of people experiencing mental health issues.

b) Implementation of OPCAT

The implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**) is an important opportunity to implement effective monitoring, oversight and accountability measures to prevent and address human rights abuses in closed environments, such as Victoria's mental health system.¹¹⁴ Any changes to the monitoring and oversight system should complement the forthcoming appointment of the National Preventive Mechanism (**NPM**) in Victoria. This NPM must be established in line with international law and best practice, including embedding consumer leadership.¹¹⁵

VLA recommends that OPCAT inspections should have particular regard to the availability of adequate and timely mental health services for prisoners who have complex medical needs,¹¹⁶ the supervision and care of prisoners experiencing significant mental health issues, and the treatment of people experiencing mental health issues in all closed environments.¹¹⁷

Recommendation 33: Ensure effective implementation of the Optional Protocol of the Convention Against Torture

The Victorian Government should ensure that Victorian mental health services and prisons facilitate inspections by the National Preventive Mechanism and comply with reports in a timely manner.

6.3 Discrimination as a driver of mental health issues

Through our work with clients and consumers, VLA sees the impact of discrimination on people's mental health as well as people experiencing discrimination because of their mental health issues or disability.¹¹⁸ Discrimination causes and exacerbates people's mental health issues, and people experiencing mental health issues can face discrimination on this basis.

A significant weakness of Victorian discrimination laws is its reliance on a complaints-based system, where people experiencing discrimination, including on the basis of their mental health, bear the burden of bringing a complaint against services and people who have discriminated against them to access justice. Through our casework, we also see the mental health strains of bringing a discrimination complaint. There are a series of reforms to discrimination laws needed to better

¹¹⁴ M Lea et al, 'A disability aware approach to torture prevention? Australian OPCAT ratification and improved protections for people with disability' (2018) 24(1) *Australian Journal of Human Rights* 70.

¹¹⁵ Steven Caruana, *Enhancing best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention Against Torture focus* (Report to the Winston Churchill Memorial Trust, 2017) 50
<https://www.churchilltrust.com.au/media/fellows/Caruana_S_2017_inspection_methodologies_for_oversight_bodies_with_an_OPCAT_focus.pdf>.

¹¹⁶ See e.g.: Victoria Legal Aid, *Submission to the Victorian Ombudsman on a pilot investigation of Dame Phyllis Frost Centre to help inform the practical changes needed in Victoria to implement OPCAT* (Submission, August 2017)
<<https://www.legalaid.vic.gov.au/node/610#dame-phyllis>>.

¹¹⁷ Including disability specific facilities, secure mental health facilities, police custody, youth justice centres, prisons, aged care facilities and immigration detention.

¹¹⁸ See Roads to Recovery (n 1) 56.

prevent and address discrimination and its impact in causing or exacerbating mental health issues, and stalling recovery (e.g. people being reluctant to access services due to previous experiences of discrimination and harassment).¹¹⁹

The EOA should be amended to impose an enforceable positive duty to prevent discrimination, empower the Victorian Equal Opportunity and Human Rights Commission to effectively address discrimination, reduce the costs risks for people bringing complaints and shift the burden of proof for proving unlawful discrimination to the employer once the employee has established a prima facie case. These changes will play an important preventative function to reduce the harmful impact of discrimination against people because of their mental health issues, and based on other personal attributes which could cause or exacerbate mental health issues.

Recommendation 34: Reduce discrimination as a driver of mental health issues

The Victorian Government should amend the *Equal Opportunity Act 2010* (Vic) to prevent discrimination as a driver of mental health issues, including by introducing an enforceable positive duty, stronger enforcement powers, and reducing the burden on individuals to bring complaints.

6.4 Preventing sexual harassment as a driver of mental health issues

In March 2020, the Australian Human Rights Commission released its *Respect@Work* report into sexual harassment at work.¹²⁰ The report confirmed research findings that victims of workplace sexual harassment commonly experience a range of mental health issues, including stress, anxiety, depression and PTSD.¹²¹

Many VLA clients are reluctant to make a complaint, including concerns around the strain it will have on their mental health, and fears it will have a negative impact on their reputation and career.¹²² Victims of sexual harassment should have access to appropriate and timely specialist support when they need it, including access to information and counselling that is appropriately resourced and coordinated. However, many of our clients report difficulties accessing supports in the mental health system, including access problems relating to wait times and financial constraints.¹²³ There are also insufficient measures to prevent sexual harassment, the need for a fairer and more accessible complaints system, and systems needed to increase the impact of individual complaints, as well as better support for victims of sexual harassment.¹²⁴

¹¹⁹ See: Victoria Legal Aid, *Addressing discrimination to prevent violence, abuse, neglect and exploitation: Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Submission, April 2020).

¹²⁰ Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (Report, March 2020) <<https://www.humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.

¹²¹ Ibid 266.

¹²² Ibid 266.

¹²³ Victoria Legal Aid, *Change the culture, change the system – urgent action needed to end sexual harassment at work: Submission to the AHRC National Inquiry into Sexual Harassment in Australian Workplaces* (Submission, 28 February 2019) 44 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-ahrc-national-inquiry-sexual-harassment-at-work.pdf>>.

¹²⁴ Ibid.

Recommendation 35: Prevent and address workplace sexual harassment to reduce mental health impacts

The Victorian Government should implement relevant Australian Human Rights Commission's *Respect@Work* recommendations to reduce workplace sexual harassment as a driver of mental health issues.

7 Children and young people

Children and young people are often not able to access appropriate services because services are limited where they live or because there is no one to take them to the service. Children and young people require specialist support and mental health services reflective of their age and cognitive development that recognise the unique difference in supports required by children and young people. Where young people are themselves experiencing family violence in the home, this can impact on their mental health and act as a barrier to them accessing support. Receiving tailored, specialist support can assist in avoiding them experiencing legal problems when experiencing a mental health crisis.

7.1 Access to tailored services

Children and young people receiving mental health services should have their best interests recognised and promoted as a primary consideration, including receiving services separately from adults.¹²⁵ Our *Roads to Recovery* submission highlights the lack of appropriate youth-specific services available throughout Victoria, including for children in Secure Welfare Services.¹²⁶

Across VLA's practice areas we see the impacts if young people do not receive the right supports at the right time. We see how a lack of mental health supports can increase the likelihood of being drawn into homelessness or the child protection, family violence, compulsory mental health treatment or youth justice systems. Early intervention and support for children to address their underlying issues, can prevent ongoing behavioural and emotional patterns which can lead to offending.¹²⁷

Young people are also affected by the differential funding levels for adults and youth services, and the consequential experience of service drop-off for those reaching adulthood. Mental health services should have regard to facilitating continuity of access to services for young people aged 18-25, the impact of being cut off from youth services without adult services or case management planned, and the need for more flexible transition processes.

Recommendation 36: Guarantee specialist supports for children and young people

The Victorian government should ensure that young people can access tailored youth services statewide (including inpatient care) and improve transitions from youth to adult services.

¹²⁵ *Mental Health Act 2014* (Vic) s 11(i).

¹²⁶ See section 7.2(a).

¹²⁷ For further detail and client examples, see: National Legal Aid, *Submission to the Council of Attorneys-General's Review of the Minimum Age of Criminal Responsibility*: <https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/other-activities#criminal-responsibility-feb-2020>.

7.2 Specialised supports in child protection and out of home care

a) Supports for children in out of home care

Children with child protection involvement are already vulnerable, but they face further difficulties in accessing appropriate mental health support when they need it. Links with existing supports can be interrupted by moving between out of home care placements. For some, this is exacerbated by placement in Secure Welfare. More generally, there are often only limited mental health supports provided at all currently for Victoria's most vulnerable children in state care, including in Secure Welfare, despite children being placed in Secure Welfare often having increased need for mental health support.¹²⁸

We have seen cases in which young people already had a treating psychologist who they had an established relationship with, but DHHS sought new psychiatrist/psychologist assessments once the young person was in Secure Welfare. On other occasions a mental health assessment is not arranged at all, even when a young person's mental health was one of the issues that placed them in immediate and substantial risk causing their placement in Secure Welfare.

Recommendation 37: Prioritise mental health supports for young people in out of home care

The Victorian government should ensure that all children in out of home care have access to the mental health supports they need, in recognition that children and young people in out of home care are some of Victoria's most vulnerable community members.

b) Child protection responses to parents experiencing mental health issues

In our practice experience we also see assumptions being made about people's capacity to parent due to current or former experiences of mental health issues. These assumptions can result not only in parents having children removed from their care but also not being supported to have contact with their children or be involved in decisions regarding their children's care during the parents' inpatient admissions. Similarly, parents often do not receive adequate support to be reunified with their children when discharged.¹²⁹

Considering both a child's best interests and the often episodic nature of mental health issues, wherever appropriate, families should be supported to remain together as a family unit in accordance with the Charter and Victoria's child protection legislation. Child protection and mental health services should work together to understand on what basis, if any, a mental health issue may present a current or future risk of abuse or neglect to the child, and then determine what services could be put in place to support the family including the parent and, where relevant, children to give the best opportunity for family preservation rather than child removal.

Recommendation 38: Support mental health needs to keep children with their families wherever possible

The Victorian government should provide clear guidance to improve the child protection system's response to families where a parent or child is experiencing mental health issues, including greater access to mental health support services for vulnerable families.

¹²⁸ Roads to Recovery (n 1) 66 – 67.

¹²⁹ Roads to Recovery (n 1) 49 – 50.

7.3 Prevent the use of Family Violence Intervention orders as a response to children experiencing a mental health crisis

Adolescent family violence is a distinct phenomenon to adult-perpetrated intimate partner violence and requires a distinct response, including recognising that the adolescent may themselves also be a victim of family violence. Research has found that childhood trauma is a major contributor to adolescent's use of violence in the home, yet our family violence court system does not systematically record or respond to this.¹³⁰

Children caught up in the family violence court system may have undiagnosed mental health issues driving their behaviour but not previously identified or addressed.¹³¹ These young people will often be ordered to comply with a Family Violence Intervention Order (FVIO), which could exclude them from their home, putting them at risk of becoming involved in the criminal justice system if they are later charged with breaching the FVIO.

Recommendation 39: Implement expert recommendations to respond appropriately to vulnerable young people's behaviours in the home

The Victorian Government should implement and adequately resource:

- (a) recommendations 123 to 128 from the *Royal Commission into Family Violence* for establishing a specialised response for adolescents; and
- (b) key recommendations of the PIPA project: Positive Interventions for Perpetrators of Adolescent violence in the home report (2020).¹³²

7.4 Age appropriate responses to reduce entry and entrenchment in the criminal system

a) Raise the minimum age of criminal responsibility

In Australia, the minimum age a child can be found guilty of committing a crime is ten years old. Most similar jurisdictions set a minimum age of at least 14 years old, which is consistent with international human rights law. Peak bodies for doctors, psychologists and lawyers agree that children under 14 do not have the maturity to be held criminally responsible for their actions.¹³³

Most children in the youth justice system have experienced serious trauma and early life stresses such as abuse or neglect,¹³⁴ as well as mental health issues and cognitive impairment.¹³⁵ Children in the youth justice system have: 'significantly higher rates of mental health disorders and cognitive

¹³⁰ Elena Campbell et al, *The PIPA Project: Positive Interventions for Perpetrators of Adolescent violence in the home (AVITH)* (Report, March 2020) 103.

¹³¹ Victoria Legal Aid, *Submission to the Royal Commission into Family Violence* (Submission, June 2015) 40 <<https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/more-effective-responses-to-family-violence/royal-commission-into-family-violence>>.

¹³² Elena Campbell et al (n 182) 16 – 17.

¹³³ Royal Australasian College of Physicians, *Submission to the Council of Attorneys General Working Group reviewing the Age of Criminal Responsibility* (Submission, July 2019); Australian Medical Association, 'AMA Calls for Age of Criminal Responsibility to be raised to 14 years of age' (Media release, 25 March 2019) <<https://ama.com.au/media/ama-calls-age-criminal-responsibility-be-raised-14-years-age>>; Australian Indigenous Doctors' Association, 'Doctor Joint media release, Doctors, lawyers, experts unite in call to raise the age of criminal responsibility'. Available at: <https://www.aida.org.au/mediareleases/doctors-lawyers-experts-unite-in-call-to-raise-the-age-of-criminal-responsibility>.

¹³⁴ The Victorian Youth Parole Board's annual survey found that 67 per cent of young people in custody have been victims of trauma, abuse and neglect Youth Parole Board, *Annual Report 2018 – 2019*, 29.

¹³⁵ The Victorian Youth Parole Board's annual survey found that 48 per cent presented with mental health issues, 27 per cent had a history of self-harm or suicidal ideation, 38 per cent presented with cognitive difficulties that affect their daily functioning; *Ibid*, 29.

disabilities when compared with general youth populations'.¹³⁶ They are also more likely to have a range of other co-occurring issues, including attention deficit hyperactivity disorder, autism spectrum disorder, Foetal Alcohol Spectrum Disorder, ABI and problematic drug or alcohol use.¹³⁷

The likelihood of a child progressing from the Children's Court to the adult criminal jurisdiction is associated with their age at 'entry' into the criminal courts. The younger a child is at their first sentence, the more likely they are to reoffend generally, reoffend more frequently, reoffend violently, continue offending and be sentenced to an adult sentence of imprisonment before their twenty-second birthday.¹³⁸

Recommendation 40: Raise the minimum age of criminal responsibility

The Victorian Government should raise the minimum age of criminal responsibility to 14, to link young children into treatment and support to recover, rather than become entrenched in the criminal justice system.

b) Recovery focused youth justice responses

In *Roads to Recovery*, we highlighted the paucity of mental health services within the youth justice system which manifests in delays in assessment and screening for mental health issues at entry into custody, and insufficient access to mental health care in custody. In our current system, children experiencing mental health issues are placed in more restrictive settings or subjected to highly restrictive management conditions.¹³⁹

The recently released Youth Justice Strategic Plan 2020-2030 makes several commitments which, if implemented, would dramatically improve mental health services for children in the youth justice system.¹⁴⁰ It commits to:

- a Community Forensic Youth Mental Health Service to support early intervention services for at risk young people;
- a Mental Health Advice and Response Service in the Children's Court to inform bail, remand and sentencing decisions;
- expanded mental health services in custody;
- a dedicated health and mental health facility for voluntary mental health treatment and monitoring at the new Youth Justice facility at Cherry Creek; and
- three youth forensic beds at Footscray Hospital for compulsory treatment required by children in custody.¹⁴¹

We strongly support these commitments. To be effective, youth forensic mental health facilities should be staffed by dual specialists in forensic mental health and disability to effectively address the complex needs of children experiencing mental health issues. Youth forensic mental health facilities

¹³⁶ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility, Research Report' (2017), *Comparative Youth Penalty Project UNSW*. Available at <http://cyp.unsw.edu.au/node/146>.

¹³⁷ Ibid.

¹³⁸ Victorian Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (15 December 2016). Available at: https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Reoffending_by_Children_and_Young_People_in_Victoria.pdf. SAC found that, after accounting for the effect of other factors, each additional year in age at entry into the criminal courts was associated with an 18% decline in the likelihood of reoffending. See also: Victorian Sentencing Advisory Council, *Rethinking Sentencing for Young Adult Offenders* (Report, December 2019) 14 – 17.

¹³⁹ *Roads to Recovery* (n 1) 39 – 42.

¹⁴⁰ Youth Justice Strategic Plan 2020-2030 (May 2020), 38 – 39.

¹⁴¹ Department of Justice and Community Safety, *Youth Justice Strategic Plan 2020–2030*, 22 May 2020, 29 and 38.

should be available for young people on remand. We also encourage the Mental Health Advice and Response Service rollout to the Children's Court being expanded to all Children's Court locations.

While the operation of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* (CMIA) has been extended to the Children's Court, it is not widely used. Our lawyers report that they have seen children experiencing mental health issues and/or disability detained for long periods while awaiting fitness determinations or a trial at which the defence of mental impairment will be raised, during which time they may not be receiving appropriate mental health support. This is particularly marked in regional areas. This highlights the need to resource court-based youth mental health services to provide assessments and reports, to avoid vulnerable children spending extended periods on remand simply due to lack of services.

We further suggest that these services should be available to young people where appropriate, in accordance with the mainstream dual track system and research which highlights the benefits of age appropriate facilities and services for young offenders under 25 years of age.¹⁴² We also suggest that dual-track sentencing approach available in the mainstream system be applied to the CMIA, so that the shorter nominal terms applicable to children subject to a CMIA Supervision Order would also apply to young people up to 25 years old.

Recommendation 41: Youth forensic mental health response

The Victorian Government should:

- (a) Expand the availability of the Children's Court Mental Health Advice and Response Service to all locations where the Children's Court sits;
- (b) Ensure new youth forensic mental health facilities are available on remand as well as post-sentence for young people up to 25 years of age; and
- (c) Extend nominal term limits for children under the CMIA to apply to young people up to 25 years old, mirroring the mainstream dual track system.

8 Criminal justice

VLA supports measures that will reduce the number of people with mental health issues entering the criminal and youth justice systems and reduce the harm of criminal justice involvement for people experiencing mental health issues.¹⁴³ This includes increased access to diversion, therapeutic programs and courts, community-based sentencing options, and appropriate mental health facilities in custody, including dedicated forensic facilities. People should also be supported to access rehabilitation and recovery-based services and live well in the community.

People experiencing mental health issues are at greater risk of contact with the justice system and are overrepresented in the prison population.¹⁴⁴ This carries a significant cost to their health and wellbeing and places significant demands on limited public resources through the direct cost of

¹⁴² Sentencing Advisory Council, *Rethinking Sentencing for Young Adult Offenders in Victoria* (Report, 3 December 2019).

¹⁴³ Roads to Recovery (n 1) 42 – 43.

¹⁴⁴ Victorian Auditor-General's Office, *Mental Health Strategies for the Justice System* (Report, 2014) 2.

imprisonment¹⁴⁵ and the indirect consequences of imprisonment on the person, their family and the community.

There are a number of factors that cast the net of the criminal justice system too wide, contributing to overrepresentation, including:

- overreliance on Victoria Police as first responders;
- particular vulnerabilities of people experiencing mental health issues when in contact with enforcement and prosecution agencies;
- criminalisation of minor offending (e.g. begging and drug use); and
- people being remanded for minor offending which would not attract imprisonment.

Once drawn into the criminal justice net, the mainstream system is not resourced or equipped to support people with mental health issues to participate or to provide tailored and responsive pathways from punishment to treatment. Insufficient access to treatment in custody and insufficient supervision and supports upon leaving custody, including access to stable housing, mean that people do not transition into stable lives and may relapse into crisis, and may find themselves returning to the system.

The overrepresentation of people experiencing mental health issues in Victoria's criminal justice system can be addressed by:

- diverting people away from entry points into the criminal justice system to reduce the frequency and intensity of engagement;
- resourcing early intervention programs and services to deal with underlying causes of offending and support recovery;
- implementing a therapeutically oriented criminal justice system in which there is time and space to support a person's mental health and connected issues, and individually tailored and recovery focused sentences;
- enabling rehabilitation and recovery while in custody through appropriate facilities, treatment and programs; and
- supporting exits from custody to stable community supports, averting further crises and reducing recidivism.

8.1 Community based responses to mental health issues

a) Preventing mental health crises before the police are called

In our *Roads to Recovery* submission and response to the Productivity Commission Mental Health Inquiry's question on notice,¹⁴⁶ we outline how people experiencing mental health issues can be drawn into the criminal justice system due to service gaps in the community and failures in the civil mental health system.

¹⁴⁵ Productivity Commission, *Report on Government Services* (Report, January 2019) Table 8A.17. The Council of Australian Governments reports that real net operating expenditure per prisoner per day in Victoria in 2017–18 was \$323.82 while net operating expenditure per Community Corrections offender per day in 2017–18 was \$32.40.

¹⁴⁶ *Roads to Recovery* (n 1); Answers to Questions on Notice (n 24).

There is insufficient access to community treatment, accommodation and support, particularly to address the unmet level of care and treatment between crisis or acute services and a mental health care plan through one's general practitioner.¹⁴⁷

Recommendation 42: Resource early intervention and community supports

The Victorian Government should resource community mental health care and treatment options, particularly between primary care and acute care, to help people manage their mental health needs before they escalate to crisis.

See also Recommendation 14: Work with Australian government to expand Medicare funding for Mental Health Care Plans

b) First responders to mental health crises

Our mental health system has defaulted to police as the first responders, police are at the front line too much simply due to the lack of other appropriate and targeted services. Victoria Police noted in their submission to this Royal Commission that they are 'increasingly relied upon to operate as gatekeepers to the mental health service system',¹⁴⁸ and highlighted the significant increase in the number of responses to psychiatric crisis events in recent years.¹⁴⁹

Police contact can compound stigma and be distressing for people experiencing mental health issues, and increase the likelihood of being caught in the net of the criminal justice system. As Victoria Police submitted, 'greater emphasis on mental health interventions in community and primary care could both reduce reliance on police attendance at matters not requiring a crisis response and prevent the escalation of circumstances that result in an emergency law enforcement intervention'.¹⁵⁰

Due to their role in the civil mental health system and their 24/7 state-wide coverage, it is unavoidable that police will at times be the first responders to people experiencing a mental health crisis and they should be better supported when doing so. However, police officers are not clinicians, and are therefore not adequately trained to be first responders for people experiencing mental health crises. Other service responses should be resourced and prioritised, to reduce reliance on police responders and the net-widening impact of police contact. VLA favours an alternative responder service, rather than a dual-responder model, to minimise police contact and more effectively reduce overrepresentation in the criminal justice system.

Recommendation 43: Improve mental health responses to people in crisis

The Royal Commission should consider more appropriate organisations or professionals to provide a mental health focused first response to people experiencing mental health issues, to reduce the reliance on Victoria Police as first responders and minimise unnecessary police contact.

¹⁴⁷ The Victorian Auditor-General identified that substantial system stress has resulted in only the most unwell being eligible to receive services: Victorian Auditor-General's Office, *Access to Mental Health Services* (Report, 2019), 7. In their submission to this Royal Commission, the Royal Australian and New Zealand College of Psychiatrists (RANZCP) highlighted the lack of services for the 'missing middle' and noted that community-based care needs to be available across a range of settings, at different degrees of intensity and assertiveness, and in close links with the NDIS; Victorian Branch RANZCP, *Formal Submission: Royal Commission into Victoria's Mental Health System* (Submission, July 2019), 20. This gap is also discussed in section 4.

¹⁴⁸ Victoria Police, *Submission: Royal Commission into Victoria's Mental Health System* (Submission, July 2019) (**Victoria Police Submission**) 32.

¹⁴⁹ There was an 87.9 per cent increase from 2014/15 to 2017/18 in responding to events for psychiatric crisis alone and a 32.2 per cent increase in events for both psychiatric crisis and suicide attempt or threat: *Ibid* 5.

¹⁵⁰ *Ibid* 23.

Once police have been called a criminal justice response is not inevitable, police can and do refer people to appropriate services and supports. However, there are limitations with current referral systems, including that they are only used for people who are not in crisis.¹⁵¹

In our practice experience, police officers may not opt to use a referral for several reasons; they may not be confident in correctly determining the person's needs and the appropriate pathway (acknowledging that police officers are not clinicians), or in applying eligibility guidelines for different services, or that a consent based referral would be effective or engaged with. They may feel more secure relying on criminal justice responses or Mental Health Act powers.

We support direct referrals from Victoria Police to health and social services as a key opportunity for early intervention as well as greater training and clinical support for police where a law enforcement response is not necessary. In our view, reducing police contact through investment in health and therapeutic services would be a more effective use of public resources and have a greater impact on reducing net widening.

Recommendation 44: Consider a Victoria Police direct referral system

The Royal Commission should consider whether a Victoria Police direct referral system to adequately funded mental health services could be a genuine alternative to criminal justice responses, to enable referrals to be made in more circumstances.

c) Health and welfare-based responses to offences of poverty and addiction

People experiencing mental health issues often face multiple challenges such as homelessness, problematic alcohol or drug use, or insufficient supports, and are more likely to be visible in public spaces. This means they are more likely to have ongoing and regular contact with police. Criminal enforcement of minor offences does not address the underlying causes of these problems, and can further entrench them.

Offences that penalise mental health issues, addiction and poverty should be decriminalised or amended to reduce the overcriminalisation of people with complex needs, as is already underway in relation to public drunkenness offences. This type of behaviour is more effectively dealt with by the health and social services sector.

Recommendation 45: Introduce health and welfare responses to minor offending behaviours

The Victorian Government should:

- (a) decriminalise or amend minor offences which disproportionately criminalise mental health issues, addiction and poverty, including: begging,¹⁵² offensive language,¹⁵³ using a drug of dependence or possession of quantities of a drug of dependence for personal use;¹⁵⁴ and

¹⁵¹ This was highlighted in the Victoria Police Submission; Victoria Police also noted that there was a 172 per cent increase in Victoria Police eReferral (VPeR) mental health referrals between 2014/15 and 2017/18, creating service imposts for Monash Health: Ibid 17.

¹⁵² *Summary Offences Act 1966* (Vic) s 49A.

¹⁵³ *Summary Offences Act 1966* (Vic) s 17(1)(c). The Australian Law Reform Commission (ALRC) has recommended that State and territory governments repeal or narrow the application of provisions that criminalise offensive language: ALRC, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, 27 March 2018) (**Pathways to Justice**) 16 – 17 (recommendations 12 – 14).

¹⁵⁴ *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 75(a) (use of cannabis), s 75(b) (use of any other drug of dependence), s71(1)(a) (possession of personal use quantities of cannabis), s 71(1)(b) (possession of personal use quantities of any other drug of dependence).

(b) implement public health responses for addressing the underlying causes of these behaviours (e.g. additional housing supports, early intervention mental healthcare).

8.2 Police discretion, caution and diversion

a) Increasing the use of caution and diversion

Once a police responder has determined that a criminal justice system response is necessary, there should be greater use of discretion to minimise the intensity of criminal justice response. This can significantly decrease stigma and disruption for people experiencing mental health issues and enable them to remain in the community to receive treatment and maintain employment, housing and social connections.

Because people experiencing mental health issues may also find it more difficult to understand and comply with bail conditions and court orders, particularly if they have coexisting cognitive impairment or substance dependence, light touch options can decrease ongoing contact with criminal justice system.

In our practice experience, in many instances police officers default too readily to charging people for minor offending which warrants a caution or a health-based response and linking to support services; placing people on bail who could appropriately be charged on summons or via the notice to appear procedure; seeking to remand accused people in circumstances where the accused person should be bailed by police. Data shows that police are increasingly likely to commence court proceedings rather than utilise non-court action including referrals, diversions and cautions.¹⁵⁵

A reorientation of police practices, to focus on diverting people experiencing mental health issues from the gates of the criminal justice system, would assist to reduce the overrepresentation of people with mental health issues in the criminal justice net.

Police officers have discretion to give a formal warning, an official caution or to charge and refer to court diversion. Each of these options may be accompanied with direct referral to a service or support, voluntary in the case of a warning and caution, or obligatory (though consent based) in the context of diversion.

Official cautions may be issued where the accused admits the offence and if the accused is a child (under 18 years old), for any offence, or if the accused is over 18 years old, for a shop stealing offence or for minor drug offences (such as use and possession offences).¹⁵⁶ We note that in NSW that the Children's Court can issue cautions on the same terms as police.¹⁵⁷ Court Diversion is available for summary offences which do not have a minimum or fixed sentence and require the

¹⁵⁵ Australian Bureau of Statistics data shows that court actions as a proportion of police proceedings have increased from 52 per cent in 2012-13 to 71 per cent in 2018-19; conversely the proportion of non-court proceedings has decreased from a high of 65 per cent in 2012-13 to 32 per cent in 2018-19. Australian Bureau of Statistics, *4519.0 Recorded Crime – Offenders, 2018-19*, (Catalogue No 4519.0, 6 February 2020) Police proceedings, selected states and territories - Table 27 Victoria <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4519.02018-19?OpenDocument>>.

¹⁵⁶ Victoria Police, *Victoria Police Manual – Policy Rules* (2019).

¹⁵⁷ *Young Offenders Act 1997* (NSW) s 31.

accused to take responsibility for the offence.¹⁵⁸ The police informant or prosecutor must consent to a diversion; the matter then proceeds to a judicial officer for a decision.¹⁵⁹

Cautions and diversions reduce recidivism, engage people with supports to address the underlying causes of the offending behaviour, and reduce the stigma and distress associated with criminal proceedings. Studies indicate that a young offender who participates in a diversion program is far less likely to reoffend than a young person whose case is determined in court and is subsequently incarcerated, even where the seriousness of the offending is taken into account.¹⁶⁰

However, the use of diversions in Victoria has steadily decreased, from 25.6 per cent of matters receiving diversion in 2008-09 to 12.5 per cent of matters in 2016-17.¹⁶¹ Data also highlights the inconsistent application of cautioning and consent for diversion across Victorian regions and police stations.¹⁶²

Successful diversionary responses are reliant on funded services which can help people address underlying issues. The improved interaction and integration between social, mental health and legal services is critical to ensuring better outcomes for people with mental health issues in the community.

Recommendation 46: Increase use of cautions and diversions

The Victorian Government should:

- (a) introduce a legislated cautioning scheme for children and adults, with an expanded range of offences for which a caution can be given, available if the accused does 'not deny' the offence (rather than requiring the accused to admit the offence), and empowering the Children's Court to issue cautions on the same terms as police;
- (b) amend the *Criminal Procedure Act 2009* (Vic) and the *Children Youth and Families Act 2005* (Vic) to empower the Magistrates' and Children's Courts to order a court diversion without the prosecutor's consent; and
- (c) improve the availability of effective diversionary options, particularly from shared service providers or integrated partnerships which can address intersecting issues.

Victoria Police should review police cautioning and diversion policies, and provide additional training to increase use and consistency across Victoria.

b) Summons and Notice to Appear rather than arrest and bail

Where a prosecution is considered necessary, police should proceed by way of Summons or Notice to Appear, rather than arrest and bail wherever possible. This approach has a number of benefits:

- keeping people experiencing mental health issues connected to treatment and support in the community, and avoiding harmful experiences in custody;

¹⁵⁸ Diversion began as an adult pilot program at the Broadmeadows Magistrates' Court in January 1997 and was reviewed and revised in late 2000. Diversion is now available in all Magistrates' Courts in Victoria. Youth diversion began as a pilot in the Children's Court in January 2017. In 2017 a legislated diversion option was inserted into the *Children, Youth and Families Act 2005* (Vic).

¹⁵⁹ The Court Diversion Coordinator makes a suitability assessment and recommends conditions and services that may address the offending behaviour; a person who successfully completes the conditions and does not commit further offences during the diversion period, will not have the matter recorded as part of their criminal history.

¹⁶⁰ Caitlin Grover, 'Youth Justice in Victoria' (Research Paper, Victorian Parliamentary Library & Information Service, April 2017) 7.

¹⁶¹ This is a drop in real numbers from 22,098 to 18,165 diversions: D Cowan et al, 'Reducing Repeat Offending Through Less Prosecution in Victoria, Australia: Opportunities for Increased Diversion of Offenders' (2019) 3 *Cambridge Journal of Evidence Based Policing* 109.

¹⁶² There is evidence that cautioning rates in rural and regional Victoria are below that of metropolitan Melbourne and the state average; Kimberley Shirley 'The cautious approach: Police cautions and the impact on youth reoffending' (2017) 9 *Crime Statistics Agency* 3 <https://www.crimestatistics.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2017/09/7f/e1e924c80/20170925_in%20brief9%20FINAL.pdf>.

- reducing the number of people on remand;
- reducing the risk of a person being held in custody for minor offending which would not attract a term of imprisonment;
- averting escalation through the reverse onus thresholds for bail and further remand due breaching a bail; and
- reducing the volume of matters in the Magistrates' Court and high levels of demand for court-based support services (e.g. Court Integrated Services Program (**CISP**)).

Our lawyers' experience is that the majority of charges proceed by bail rather than summons, even charges against children – despite the presumption to proceed by summons in the *Children Youth and Families Act 2005* (Vic).¹⁶³ There has also been limited use of the Notice to Appear process introduced as part of the criminal procedure reforms in 2009.¹⁶⁴ Justice Coghlan's Bail Advice recommended that the Notice to Appear process be reviewed and reformed to ensure that it operates effectively.¹⁶⁵

Further incentives may be required to increase routine use of Summons or Notice to Appear. For example, removing the requirement for senior authorisation for issuing a summons, increasing the seniority of the authorisation required for issuing a charge sheet, or requiring the arresting officer to state on the charge sheet why proceeding by Summons or Notice to Appear was not appropriate.

Recommendation 47: Increase prosecutions initiated by Summons or Notice to Appear

Victoria Police should proceed by way of Summons or Notice to Appear rather than arrest whenever possible, to ensure people experiencing mental health issues can remain connected to treatment and support in the community.

The Victorian Government should introduce legislative amendments to increase the routine use of Summons or Notice to Appear for minor offending.

c) The use of bail to respond to minor offending

In the *Bail Act Review 2017 (Bail Review)*, the Hon Paul Coghlan QC stated:

Bail is rarely an appropriate process in cases involving minor, non-violent offending. People charged with such offences normally pose a negligible risk to the safety of the community, and the appropriate sentence for such offending is usually a fine or a lower sanction such as an adjourned undertaking.¹⁶⁶

Following the changes to the Bail Act in 2018, VLA has seen a significant increase in our work with people on remand, including a 28 per cent increase in bail applications in a year.¹⁶⁷ The experience of our lawyers is that bail is routinely used for minor, non-violent, low-level offending, including possession or use of drugs and minor thefts. As a result, people are increasingly spending time in custody for relatively minor offences that would not usually attract a custodial sentence. This was well

¹⁶³ *Children's Youth and Families Act 2005* (Vic) s 345(1).

¹⁶⁴ Notices to appear are rarely used by police. Justice Coghlan's Second Advice reported Magistrates' Court data which showed that as little as 0.1 per cent of 160,942 matters commenced in the Magistrates' Court in 2015-16 were by the notice to appear process: Paul Coghlan QC, *Bail Review: Second Advice to Victorian Government* (Review, 1 September 2017) 19.

¹⁶⁵ *Ibid* 19 (recommendation 25).

¹⁶⁶ *Ibid* 14.

¹⁶⁷ We saw a 10 per cent increase in grants of aid (our most intensive form of assistance) in summary crime year on year following the introduction of the changes, in line with the growth in the remand population. We also saw a significant increase in our most intensive duty lawyer services.

summed up by one of our most experienced regional managers, who reflected that since the bail changes we are finding more and more people are in custody, 'because of the issues in their lives rather than the seriousness of the offences committed'.

The changes we have seen include:

- Significantly more people on remand who are not facing a term of imprisonment, particularly marginalised people including those experiencing mental health issues.¹⁶⁸
- The escalating impact of the bail schedules propel people charged with low level offending into the reverse onus positions which are usually reserved for serious offending. This particularly affects people experiencing mental health issues who may have difficulty complying with bail conditions.
- The detrimental impacts of short periods on remand for people experiencing mental health issues, which disrupt continuity of mental health treatment, disability supports, training and employment opportunities, family relationships, and increasing the likelihood of reoffending.¹⁶⁹
- More serious sentencing outcomes as time spent on remand increases the likelihood of a sentence of imprisonment¹⁷⁰ remand rates increase the risk of accused persons pleading guilty to offences where the evidence may not have sustained a finding of guilt, because this is the fastest way to be released from custody.¹⁷¹

The Sentencing Advisory Council (**SAC**) has reported that the increase in bail-related secondary offences represent a growing proportion of all charges sentenced in Victoria,¹⁷² and that that 'these offences have increased the burden on police, prosecutors, defence lawyers, correctional staff, courts and court administrative staff.'¹⁷³ The Victorian Law Reform Commission recommended against a bail-related secondary offence in its *Review of the Bail Act*, noting that this might have a

¹⁶⁸ This particularly affects marginalised people including those experiencing mental health issues, over 85 per cent of the matters which resolved with a plea of guilty in the evening and weekend Bail and Remand Court in 2018 – 19 did not result in a sentence of imprisonment.

¹⁶⁹ Dr McMahon cited a recent Texan study which compared two groups of 'similarly situated' people who had been arrested and charged with criminal offences. One group was granted bail and the other held on remand in prison, the participants were *all* assessed to be equal risk. During an 18-month follow-up period, those who had been remanded into prison were more likely to be charged with offences; this difference persisted even after controlling for offence, accused demographics, criminal history and legal representation. Pre-trial detention was associated with a 30 per cent increase in new serious charges and a 20 per cent increase in new minor charges: Dr M McMahon, 'No bail, more jail? Breaking the nexus between community protection and escalating pre-trial detention' (Research Paper, Parliament of Victoria, August 2019) 22; citing P Heaton, S Mayson & M Stevenson 'The downstream consequences of misdemeanor pretrial detention' (2017) 69(3) *Stanford Law Review* 714.

¹⁷⁰ Sentencing Advisory Council, *Time Served Prison Sentences* (Report, January 2020). This report found that the number of prison sentences imposed on people who had spent time on remand that were equal in length to pre-sentence detention increased from 246 to 1828, meaning that time served sentences nearly tripled in proportion from 11 per cent to 29 per cent of all imprisonment sentences imposed on people who had spent time on remand. In contrast, the proportion of cases where the imprisonment term *exceeded* pre-sentence detention dropped from 87 per cent to 66 per cent, and the proportion of cases where pre-sentence detention exceeded the imprisonment sentence increased from 2 per cent to 5 per cent.

¹⁷¹ Our practice experience is supported by recent research finding that accused people who have limited prospects of bail may plead guilty in order to be released from custody, even if they have a legitimate challenge to some or all of the prosecution case: Sentencing Advisory Council, *Time Served Prison Sentences* (Report January 2020) 10. See also: Caitlin Grover (above n 160) 7, which concludes that "pre-trial detention is associated with an increased likelihood of pleading guilty, being more likely to be found guilty, and being given a custodial sentence. ... there is some evidence that pre-trial detention itself independently contributes to these adverse outcomes—that is, being held on remand itself contributes to the probability that a person will plead guilty, be convicted and be given a sentence of imprisonment."

¹⁷² SAC's examination of sentencing data between 2011-12 and 2015-16, found that in the Magistrates' Court secondary offences doubled from 5.87 per cent of all charges sentenced per year to 9.67 per cent (28,465); and in the Children's Court secondary offences increased from 2.83 per cent of all charges sentenced each year to 14.34 per cent (2,993): Sentencing Advisory Council, *Secondary Offences in Victoria* (Report, September 2017) 5.

¹⁷³ Sentencing Advisory Council, *Secondary Offences in Victoria* (Report, September 2017) 87.

disproportionate effect on vulnerable persons.¹⁷⁴ Other jurisdictions do not have offences of breach of bail conditions.¹⁷⁵

These unintended consequences of bail reforms can be addressed without a wholesale revisiting of bail laws. Changes to the Bail Act schedules would mitigate the escalating impacts of the reverse onus tests. The offence of breaching a condition of bail should be reviewed for effectiveness compared with its impact on vulnerable people such as those experiencing mental health issues.

Recommendation 48: Reduce impact of bail reforms on people with mental health issues

The Victorian Government should make minor amendments to the *Bail Act 1977* (Vic) to avoid people charged with minor offending being held on remand:

- (a) offences against the Bail Act and committing an indictable offence while on conditional liberty should be removed from Schedule 2 of the Bail Act;
- (b) the Bail Act should state that a person should not be remanded for an offence which is unlikely to result in a sentence of imprisonment;
- (c) children should be exempt from the reverse onus tests in the Bail Act, to ensure that detention of children is only used a last resort rather than because of the Bail Act categories;
- (d) the offence of breaching a condition of bail could be removed from the Bail Act to address their disproportionate impact on people who have difficulty complying with conditions, such as people experiencing mental health issues; and the consequences of breaching bail would then be reconsideration of the conditions or revocation of the bail.

8.3 A therapeutic and prevention-focused criminal justice system

Many people with mental health issues in the criminal justice system, often charged with low level offences, find it difficult to return to stable lives and permanently exit the criminal justice system and they may become entrenched. Our practitioners consistently highlight the busy and time-pressed environment of the Magistrates' Court as a significant barrier to effectively addressing the underlying causes of offending and reducing recidivism.

Too often we find that the justice system has been designed by and for the institutions in it – courts, lawyers, and police – rather than those who use and should benefit from the system. In recent years, the Victorian criminal justice system has undergone significant reform without proper assessment of the impact those changes on the system as a whole, the resourcing required to address that impact, or evaluation of the impact on users' experience or outcomes.

The justice system should be an opportunity to intervene positively in a person's life and support their recovery. It should provide an opportunity for integrated support to help people address the causes of their offending, rather than further entrench criminogenic patterns. In our vision:

- People would be supported to remain in the community as much as possible at each stage of proceedings: pre-sentence through granting bail and resourcing bail support programs; at sentence through ordering undertakings, deferrals, community sentences over short

¹⁷⁴ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (Report, 2007) 128.

¹⁷⁵ In Australia, NSW and the ACT do not have breach of bail offences, only for failure to appear. WA has a limited breach offence for breaches of a protective bail condition (a violence restraining order or conditions to not endanger a person, interfere with a witness or obstruct the course of justice) or of failure to attend court without a reasonable excuse. Neither the UK nor NZ have breach of bail offences, instead a person may be arrested and brought to court: *Bail Act 1976* (UK) s7; *Bail Act 2000* (NZ) ss 24 and 38.

sentences of imprisonment; and post-sentence through access to parole, supervision and proper transition supports.

- People struggling to break the cycle of offending due to their mental health and other issues would have access to specialist therapeutic courts to provide monitoring and case management of people, no matter where they live in Victoria.
- Magistrates would have a mechanism for assessing and resolving fitness and mental impairment for appropriate matters in the summary jurisdiction.
- Magistrates would have a greater range of options for managing and finalising offending which arose in part due to experiencing mental health issues, including an option for a Rehabilitation Order.
- Community Corrections Order (CCO) supervision would be responsive and recovery focused.

a) Supporting people to remain in the community and bail support programs

Prioritising approaches that enable people with mental health issues to remain in the community wherever appropriate, reduces the likelihood of reoffending as it gives people a greater chance of remaining connected to supports that are essential to their recovery and wellbeing, including housing, education, employment, health supports, NDIS services, community and family. In particular, where a client has dual diagnoses with disability, current failures in the service system mean that people cannot get access to the right services. In our experience, transition to the NDIS is exacerbating these issues.¹⁷⁶

Practical and prosocial supports are necessary for marginalised people to be granted bail, particularly clients experiencing mental health issues. The SAC highlighted the significant proportion of clients experiencing mental health issues (diagnosed and undiagnosed) for whom lack of supports results in an increase in time spent on remand and an increased in time served sentences.¹⁷⁷

The Court Integrated Services Program (CISP) is a pre-trial and bail program that provides case management and coordinates referrals to external treatment and support services. CISP is typically a precondition for people with complex needs to get bail. However, in regional Victoria less than half of all courts have access to this program, despite many having been positively evaluated.¹⁷⁸ There are commonly delays of days to weeks for people in custody seeking a CISP suitability assessment; recent research finds that 'most CISP sites are running at full capacity'.¹⁷⁹

There is no bail support program specifically for people with mental health issues, and our experience is that there can also be significant delays in referrals to psychosocial supports such as appointments with psychologists, particularly for people in regional Victoria.¹⁸⁰ We endorse the

¹⁷⁶ National Legal Aid, *Putting people first: Removing barriers for people with disability to access NDIS supports – Submission to the Review of the NDIS Act and the new NDIS Participant Service Guarantee* (Submission, 4 November 2019) <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-submission-putting-people-first-removing-barriers-for-people-with-disability-to-access-ndis-supports-11-2019.pdf>>; Victoria Legal Aid, *Ten stories of NDIS 'Thin Markets': Reforming the NDIS to meet people's needs – Submission to the Department of Social Services and the National Disability Insurance Agency's NDIS 'Thin Markets' Project* (Submission, June 2019) <<https://www.legalaid.vic.gov.au/about-us/news/reforming-ndis-to-meet-peoples-needs>>.

¹⁷⁷ Sentencing Advisory Council, *Time Served Prison Sentences in Victoria* (Report, February 2020) 15.

¹⁷⁸ CISP is available in eight of ten metropolitan courts and only 12 of 41 regional courts (Ballarat, Bendigo, Geelong, Korumburra, La Trobe, Mildura, Portland, Shepparton, Warrnambool, Wangaratta, Wodonga and Wonthaggi): Magistrates' Court of Victoria, *Bail Support (CISP)* (Web Page) <<https://www.mcv.vic.gov.au/find-support/bail-support-cisp>>.

¹⁷⁹ Angelica Panopoulos, *The recent changes to bail laws in Victoria and the consequences for the justice system*, (Research Paper, Victorian Parliamentary Internship Program, October 2019) 26.

¹⁸⁰ Specifically, CISP in Horsham and Warrnambool is noted as having these issues.

Magistrates' Court of Victoria recommendation for a specialist bail program to be linked with CISP for people with mental health issues.

Recommendation 49: Expand bail support programs

The Victorian Government should rollout the Court Integrated Services Program state-wide, and resource a mental health specialist bail program to provide case management and link clients promptly with locally based services (e.g. an expanded and specialised Court Integrated Services Program service).

b) Increasing access to therapeutic courts

Our *Roads to Recovery* submission sets out the benefits of people with mental health issues having access to therapeutic responses to criminal offending.¹⁸¹ Specialist and problem-solving courts such as the Assessment and Referral Court (**ARC**), Drug Court, Koori Court and Neighbourhood Justice Centre, recognise that recovery takes time and is not linear, and requires a collaborative and multidisciplinary approach that works towards a common outcome. They also provide the time and space for individualised responses and close monitoring. Many evaluations have highlighted the benefits of therapeutic courts.¹⁸²

There are a number of factors which currently limit the full potential of Victoria's therapeutic courts and diversion options, including geographical limitations, eligibility, resourcing and capacity limitations, and service and workforce shortages.

Therapeutic courts should be accessible state-wide. Because of limited coverage across the state, the numbers of people who have access to ARC and the Drug Court remain relatively low.¹⁸³ In some ARC locations there are waiting lists for eligibility assessments and ongoing staffing shortages that can limit both access to ARC and the level and timing of support accessed.

There is a significant shortage of clinicians and infrastructure in regional Victoria, which will need to be addressed in order for a therapeutic courts rollout to be realised.¹⁸⁴

We also support broadening therapeutic courts' eligibility criteria, to give judicial officers greater discretion to determine appropriate participation.¹⁸⁵

While our vision is for mainstream courts to be therapeutically orientated, tailored and effective, we cannot wait for a wholesale system redesign to roll out existing and highly effective programs like ARC and the Drug Court.

¹⁸¹ Roads to Recovery (n 1) 31.

¹⁸² KPMG, *Evaluation of the Drug Court of Victoria* (Final Report, 18 December 2014); Department of Justice, *The Drug Court: an Evaluation of the Victorian Pilot Program* (Report, 2005); Zoe Dawkins et al, *County Koori Court* (Final Evaluation Report, 27 September 2011); Mark Harris, *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program, October 2002–October 2004* (Report, 2006); Stuart Ross, 'Evaluating neighbourhood justice: Measuring and attributing outcomes for a community justice program' (2015) 499 *Australian Institute of Criminology: Trends and issues in crime and criminal justice*; Anthony Morgan and Rick Brown, 'Estimating the costs associated with community justice' (2015) 507 *Australian Institute of Criminology: Trends and issues in crime and criminal justice*; Victorian Ombudsman, *Investigation into the reintegration and rehabilitation of prisoners in Victoria* (Report, September 2015).

¹⁸³ KPMG, *Evaluation of the Drug Court of Victoria* (Final Report, 18 December 2014) 47. In 2018-2019, there were 323 referrals to the ARC List, with 124 participants being found suitable. This compares with 3,967 referrals to CISP in the same period, with 2,112 participants being accepted.

¹⁸⁴ As an example, the roll-out of ARC to Gippsland has been delayed and partly wound back due to staff shortages. We are also aware that some Magistrates' Court buildings cannot provide rooms to accommodate clinical services or extra courtrooms to enable specialist listing capability.

¹⁸⁵ For example, the Drug Court excludes participants who are charged with offences that involved the infliction of more than minor harm. Many offenders in the County Court and Magistrates' Court who experience drug and alcohol dependence face assault related offences and it is with this cohort that these benefits and outcomes of the Drug Court could more fully realised, to the benefit of the community. Expanding the eligibility criteria would enable the judicial officer to consider participants charged with injury on a case by case basis.

Recommendation 50: Expand therapeutic courts

The Victorian Government and the Magistrates' Court should roll out state-wide access to ARC and the Drug Court, and consider expanded eligibility criteria, acknowledging that the existing facilities and skills gaps which need to be urgently addressed, particularly in regional Victoria.

c) Determining fitness and mental impairment in the summary jurisdiction

The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (CMIA)* provides alternative processes for people who are not fit to be tried, and alternative outcomes for people whose offending was due to mental health issues or cognitive impairments in the Children's, County and Supreme Courts.¹⁸⁶

There is no power in the Magistrates' Court to determine an accused's fitness to be tried. In practice, this has resulted in a number of challenges for the summary jurisdiction and a range of consequences for clients experiencing mental health issues and/or cognitive disabilities, including:

- people entering the system who would likely be found to be unfit to be tried if there were a process available, but instead have little choice but to plead guilty to charges in the summary jurisdiction, resulting in extended time in custody;
- people who are unfit to plead repeatedly returning to the Magistrates' Court on a series of low-level matters but not being able to have these matters dealt with by the court in a timely manner due to issues of fitness to be tried being uplifted to the County Court; and
- a significant number of matters which could be dealt with efficiently and quickly in the summary jurisdiction instead uplifted to the expensive jury fitness hearing process in the County Court.¹⁸⁷

The Magistrates' Court should be able to determine fitness to plead or to participate in summary proceedings and draw on the appropriate disposition options, which we discuss below.¹⁸⁸

Recommendation 51: Enable fitness determinations in the Magistrates' Court

The Victorian Government and the Magistrates' Court should develop a mechanism for assessing and determining fitness to plead or participate in proceedings in the summary jurisdiction.

The defence of mental impairment is available in the Magistrates' Court. However, a complete discharge is the only outcome available for a finding of not guilty on the grounds on mental impairment. In practice, this has a number of negative impacts on people whose offending is due their mental impairment:

¹⁸⁶ We noted in *Roads to Recovery* that people may hesitate to use the CMIA, because if they are found not guilty by reason of mental impairment or not fit to stand trial, they face lengthy forensic supervision orders which can exceed the term of imprisonment that would be imposed if the person was dealt with by the mainstream criminal trial process (except for the most serious cases): *Roads to Recovery* (n 1) 43.

¹⁸⁷ *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) s 30 temporarily enables fitness to stand trial to be determined by a judge alone.

¹⁸⁸ This could be achieved through empowering magistrates to order an assessment by a registered medical practitioner or a registered psychologist, as to whether the accused is fit to plead or contest a matter, or is likely to become fit within a particular period, and any measures that would assist the accused to become fit to proceed in the Magistrates' Court. The court could then be empowered to make a determination of fitness and draw on the appropriate disposition options. We do not propose that fitness determinations should be managed by ARC. ARC is a plea court, it is focused on participants' recovery, working towards a common goal, and requires participants to be actively engaged with treatment and case management.

- prosecutors may oppose summary jurisdiction for indictable offences triable summarily where the defence of mental impairment is raised;
- because the only disposition available in the Magistrates' Court is discharge, prosecutors may vigorously contest the mental impairment defence even where evidence clearly demonstrates mental impairment; and
- police may recommend diversion for minor summary matters where a defence of mental impairment, and discharge, are available.

We make recommendations below for an increase range of dispositions in the summary jurisdiction which would also be available to people found unfit or not guilty due to mental impairment.

d) Expanding the range of outcomes in the Magistrates' Court

The Magistrates' Court should have a range of dispositions available - from flexible, light-touch dispositions, to intensive supervisory dispositions for findings of mental impairment and unfitness. A clear pathway for referring criminal matters to the civil jurisdiction, by enabling the court to consider or impose civil orders in lieu of criminal dispositions, could provide less restrictive but effective alternatives for managing risk and facilitating treatment and recovery. It would also reduce further criminal justice system contact and allow for monitoring in a more cost-efficient system.

In Victoria, there is no formal transition mechanism from the criminal system to civil orders under the Mental Health Act, or continuity between the criminal and civil legislative frameworks, beyond Court Assessment Orders.¹⁸⁹ Our lawyers report that ARC magistrates sometimes dismiss charges on the basis that a person is being supported in the civil system, however this does not occur systematically or in the mainstream system.

NSW provides an explicit statutory framework for the transfer of people who are experiencing mental health issues or were at the time of the alleged commission of the offence from the criminal system to the civil system.¹⁹⁰ NSW magistrates may finalise criminal matters with a civil order,¹⁹¹ and the charge is to be taken to have been dismissed after 6 months, unless the defendant is brought before a magistrate within that period.¹⁹² We emphasise that to be effective there must be an assessment from an appropriately qualified person that the defendant meets criteria for the order, sufficient resources for these assessments, and resources for the civil system to admit, treat and discharge those patients.¹⁹³

We propose the following expanded range of dispositions, which should be available to all magistrates:

¹⁸⁹ *Sentencing Act 1991* (Vic) s 90; *Mental Health Act 2014* (Vic) ss 39 – 44.

¹⁹⁰ *Mental Health (Forensic Provisions) Act 1990* (NSW). NSW magistrates have several options, from including discharging a person unconditionally, into the care of a responsible person (unconditionally or subject to conditions), or on the condition that the defendant attend for assessment or treatment (if the defendant is found on assessment not to be a mentally ill person or mentally disordered person, the defendant can be brought back before a magistrate or granted bail by a police officer): s 32(3), s 33(1).

¹⁹¹ Magistrates may make a Community Treatment Order for implementation by a declared mental health facility as if the order were made under the *Mental Health Act 2007: Mental Health (Forensic Provisions) Act 1990* (NSW) s 33(1A). The *Mental Health (Forensic Provisions) Act 1990* (NSW) specifies that the *Mental Health Act 2007* applies as if the order had been made by the Mental Health Review Tribunal, and that the magistrate must notify the Secretary of the Ministry of Health of the proposed order (s33(1B), (1C)).

¹⁹² *Mental Health (Forensic Provisions) Act 1990* (NSW) s 33(2). The *Mental Health Act 2007* (NSW) completes the framework, by stating that if a person has been detained by a magistrate to a mental health facility under the Mental Health Forensic Provisions Act, an authorised medical officer may: detain a person, admit a person as a voluntary patient, discharge a person into the care of a designated carer or principal carer, or discharge the person unconditionally (s31(4)).

¹⁹³ We note that in Victoria the previous Restrictive Involuntary Treatment Order option in the Magistrates' Court was repealed. This order was not successful due in part to a lack of resourcing.

- Dismiss of some or all of the charges and discharge the defendant unconditionally (as currently available); discharge the defendant into the care of a responsible person, unconditionally or subject to conditions; discharge the defendant on the condition that the defendant attend for assessment or treatment at an appropriate facility.
- Refer to the civil system, with explicit provision for the dismissal of the criminal charges either at the time of referral or after six months (following an assessment for suitability to be treated under the civil system on either a voluntary or compulsory basis (e.g. mental health clinician or local designated mental health service for assessment as to suitability for treatment and services under the Mental Health Act).
- Defer sentencing and refer the person to an integrated case management program, a therapeutic court or specialist list, or restorative justice programs, with a view to dismissing the charges if conditions are met.
- Make a 'Rehabilitation Order' to fill the gap between a fine and a CCO, focused on rehabilitation with voluntary or compulsory treatment conditions (e.g. Therapeutic Treatment Orders available in the family division of the Children's Court). An option for servicing this Order could be through designated mental health services, noting they currently have restrictive eligibility criteria due to considerable resource constraints, as well as practical limitations.¹⁹⁴
- Refer for an assessment for a Non-custodial Supervision Order of up to two years with an option to extend on review, which could not be converted to a CSO but could be uplifted to the County Court if a variation to CSO is sought.¹⁹⁵
- Order a Justice Plan for people whose mental health issues result in disability, providing a person with specialist support and interventions, which can be attached to an adjourned undertaking order imposed by a magistrate.¹⁹⁶

Recommendation 52: Broaden summary jurisdiction dispositions during sentencing

The Victorian Government should increase the range of dispositions available in the summary jurisdiction, to enable tailored options to support recovery where a person's mental health or functioning contributes to their offending, including options for referral to the civil system and forensic supervision for people found not fit or not guilty due to mental impairment.

This should be accompanied by training for magistrates and judicial officers in principles of therapeutic jurisprudence and training around mental impairment and health issues.

¹⁹⁴ Including misaligned catchment areas and service levels: Victorian Auditor General's Office (n 72) 51.

¹⁹⁵ Forensicare's supervision framework, based on the indictable jurisdiction CMIA system, may be too intensive for the type of offending dealt with in the summary jurisdiction. A summary NSCO may need a corresponding lighter supervision service, or potentially through Forensicare's Professional Development Program, in which Forensicare provides forensic information and support to Designated Mental Health Service clinicians. Forensicare would need to be resourced in order to accommodate an expanded service for a new cohort.

¹⁹⁶ *Sentencing Act 1991 (Vic)* s 80. VLA supports the expansion of this sanction to people with other diagnosed cognitive or mental health conditions, to ensure that there are appropriately tailored therapeutic and appropriate sentencing alternatives.

e) Community sentences rather than short sentences of imprisonment

Spending time in custody on remand or a sentence is criminogenic and expensive. People who are sentenced in the community and complete an order are less likely to reoffend than those sentenced to imprisonment.¹⁹⁷

Like short periods on remand, short sentences are particularly detrimental for our vulnerable clients: they are long enough to significantly disrupt existing supports, but not long enough to provide access to programs or promote meaningful recovery while in custody. The stigma associated with time in custody, combined with a lack of post-release supervision or reintegration support, can all entrench patterns of offending behaviour. Reducing the number of people on remand or serving short sentences in favour of properly supported and supervised community sentences where possible, could reduce recidivism.¹⁹⁸

Some countries are moving away from short sentences. Scotland created a presumption against sentences of less than three months in 2010 and the United Kingdom is considering preventing the courts from imposing prison terms of less than six months, except for violent or sexual offences.¹⁹⁹ The only Australian jurisdiction to have abolished short sentences is Western Australia;²⁰⁰ NSW requires judicial officers to give reasons if they impose a term of imprisonment for less than six months.²⁰¹

A presumption against short sentences of less than three months combined with a requirement to give reasons if a judicial officer intends to impose a term of imprisonment for less than that period would reduce the number of short sentences imposed without limiting judicial discretion or flexibility. Properly resourced and recovery focused community sentences (including our proposed Rehabilitation Orders and therapeutically oriented CCOs) will provide a meaningful alternative to imprisonment to reduce the overrepresentation of people experiencing mental health issues and break the cycle of reoffending. It will also save significant incarceration costs, freeing resources to be redirected to improved community supervision and integrated services.

Options which enable people to remain in the community, receiving therapeutic treatment and supervision, should be used in favour of short sentences of imprisonment. An example is the youth specialist service Youth Junction, at the Visy Hub in Sunshine, which successfully provides pre-sentence programs for young people up to 25 years old. These programs provide mental health support through intensive case management and direct access to mental health clinicians. A recent

¹⁹⁷ Of the Victorian offenders who were discharged from Community Corrections Orders (CCO) in 2015–16, 13.9 per cent had returned with a new community correctional sanction within two years. In comparison, of the prisoners who were released in 2015–16, 43.7 per cent had returned to prison under sentence within two years of release: Corrections Victoria, Corrections Statistics: Quick Reference (Web Page, 30 June 2019) <<https://www.corrections.vic.gov.au/prisons/corrections-statistics-quick-reference>>.

¹⁹⁸ The Productivity Commission showed that the percentage of released prisoners who returned to either prison or community corrections was 54.9 per cent; in contrast only 23.9 per cent of offenders who served community corrections orders returned to either prison or community corrections within two years: Productivity Commission, *Report on Government Services 2020 Part C: Justice* (Report, January 2020) <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice>>.

¹⁹⁹ 'Ministers consider ending jail terms of six months or less', *BBC News* (online, 12 January 2019) <<https://www.bbc.com/news/uk-46847162>>; Helen Mills, "Stopping short?" Sentencing reform and short prison sentences' (2019) 6 *UK Justice Policy Review*.

²⁰⁰ ALRC, *Incarceration Rates Of Aboriginal And Torres Strait Islander Peoples* (Discussion Paper, 19 July 2017) 87.

²⁰¹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5. The ALRC discusses short sentences in *Pathways to Justice*, concluding that short sentences have a multitude of detrimental impacts and are highly problematic. The ALRC recommended that short sentences should not be abolished until appropriate community-based sentencing options are created and resourced, out of concern for people living in remote NSW where community-based sentences "are often not available." The ALRC explicitly noted that "there are no remote communities in Victoria" and praised Victoria's CCO regime.

independent evaluation found that the program was highly successful, with 74 per cent completion rate, compared with the 42 per cent completion rate for a CCO at a cheaper rate.²⁰²

Recommendation 53: Increase use of community-based sentences

The Victorian Government should create a presumption against short sentences of imprisonment for people experiencing mental health issues (in favour of sentences which allow the person to stay in the community), combined with a requirement for reasons to be given where a sentence of less than three months imprisonment is imposed.

The Victorian Government should resource pre-sentence programs which can provide integrated case management, intensive supervision, and prompt access to locally based clinicians and services.

8.4 Therapeutic support while serving a sentence

a) Reoriented community supervised sentences

Victoria's Community Correction Order regime has many positive characteristics and has been praised for its flexibility.²⁰³ However, in practice the effectiveness of CCO supervision for people experiencing mental health issues could be improved. This cohort often require additional support to comply with the conditions of a CCO. Our lawyers see that people who need more intensive case management and support may have difficulty complying with treatment conditions. This carries the risk of a person moving deeper into the justice system for breaching the conditions of their order, rather than because of new offending. If a person is not supported to manage related issues, such as drug or alcohol dependence, there is also a risk of further offending.

Corrections Victoria CCO case managers do not have a clinical background and do not provide treatment, they manage a range of participants with different presenting issues and needs. The Corrections supervision environment is inherently compliance driven and is not well equipped to manage and assist people experiencing chronic mental health issues, and does not routinely speak to the mental health system.

We recommend a reorientation of CCOs to be treatment focused, with an expanded range of treatment conditions made which are for the benefit of the person, and with a focus on case management and access to services. Funding for direct access to treatment services for people subject to CCOs would significantly improve the management and effectiveness of CCOs for people with treatment conditions,²⁰⁴ improving adherence and better address the underlying causes of the person's offending.²⁰⁵ Pending positive evaluation, the Forensic Mental Health in Community Health program may represent a suitable model to be rolled out more widely.

²⁰² The evaluation calculated that the cost of the successful completion of the program was about \$3000 per client, compared with \$24741 per client for a successful CCO completion. The evaluation was conducted by PricewaterhouseCoopers in December 2018: Kerry Cowling, 'Transitional Transformation: Interventions that Work for Young Adults (18-25 years) Involved in the Criminal Justice System' (Conference Paper, International Criminal Law Conference, 20 November 2019).

²⁰³ The ALRC said "the Victorian CCO regime represents an example of a sentencing model that allows for flexibility in both the sentencing structure and the imposition of conditions", *Pathways to Justice* (n 153) 248.

²⁰⁴ As noted in: Victorian Auditor-General's Office, *Managing Community Corrections Orders* (Report, February 2017) <<https://www.audit.vic.gov.au/sites/default/files/20170208-Community-Corrections.pdf>>.

²⁰⁵ The example of the Visy cares hub, referred to above in relation to community sentences (page 54), has been evaluated as cheaper and more effective than a CCO for young people with complex needs.

Recommendation 54: Reorient Community Corrections Orders to have a therapeutic focus

The Victorian Government should:

- (a) reorient Community Correction Orders through legislative amendments and operational changes to enable a therapeutic focus; and
- (b) resource direct access to relevant services while subject to treatment conditions under a Community Correction Order.

b) Access to secure forensic hospital facilities

Secure forensic treatment facilities provide for the humane compulsory treatment of people in secure custody. Thomas Embling Hospital is Victoria's only secure forensic mental health facility. There has been no significant growth in the number of beds since the system was designed around much smaller numbers, and the number of beds has not kept pace with the growth in the prison population. Forensicare's submission to this Commission noted that Victoria's major acute psychiatric units operating at or above 95 per cent capacity.²⁰⁶

These shortages impact across the criminal justice and forensic mental health systems, whether a person is on remand, sentenced, or found not guilty by reason of mental impairment. As the demand exceeds the number of available beds, people in custody are waiting to get in to secure forensic beds for compulsory treatment, which has a detrimental impact on their mental health, making it harder to transition out of custody, and can also result in the prolonged detention in prison of people who have been found unfit to be tried.

Recommendation 55: Expand secure forensic mental health facilities

The Victorian Government should resource a sufficient number of secure forensic hospital beds in a designated mental health service (or services) for the compulsory treatment of prisoners where required.

See also recommendation 41: Youth forensic mental health response.

c) Improve Access to assessment, voluntary treatment and therapeutic supports in custody

The growing offender and prison population in Victoria has added to the challenges of health care and support for people experiencing mental health issues in the criminal justice system.²⁰⁷ Impacts range from delays in assessments for sentencing decisions (delaying finalisation of proceedings), to delays in custodial intake assessment and screening for mental health issues.²⁰⁸ When a person is not able to access support at the level and intensity they require, there is an impact on their stabilisation, recovery and wellbeing.²⁰⁹

²⁰⁶ Forensicare, *Submission to the Royal Commission into Victoria's Mental Health System* (Submission July 2019) (**Forensicare Submission**) 2; Royal Commission Interim Report (n 6) 165.

²⁰⁷ There were 7,666 prisoners in the Victorian prison system on 30 June 2018. This represents an increase of 81.5 per cent on the 30 June 2008 figure of 4,223: Corrections Victoria, *Corrections Statistics: Quick Reference* (Web Page, 30 June 2019) <<https://www.corrections.vic.gov.au/prisons/corrections-statistics-quick-reference>>.

²⁰⁸ Victorian Auditor-General's Office, *Managing Rehabilitation Services in Youth Detention* (Parliamentary Report, August 2018) 10 <<https://www.audit.vic.gov.au/sites/default/files/2018-08/20180808-Youth-Detention.pdf>>.

²⁰⁹ See e.g.: Victorian Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (Report, October 2018) <<https://www.ombudsman.vic.gov.au/News/Media-Releases/imprisonment-of-woman-found-unfit-to-stand-trial>>. We emphasise that any

The flow on impact of insufficient forensic mental health beds is that more prisoners with mental health issues are incarcerated in mainstream prison facilities. Forensicare has highlighted that inadequate treatment of a prisoner's mental health issues during imprisonment in general corrections facilities can 'have adverse effects on their health and wellbeing and in turn, their rehabilitation and ability to effectively reintegrate into the community.'²¹⁰

Overcrowding and custodial management practices, such as lockdowns and rotations, the use of solitary confinement and irregular access to programs and support can have a direct and harmful impact on people with mental health conditions. These practices can both cause and exacerbate mental health issues.²¹¹

Recommendation 56: Improve mental health assessment and treatment in custody

The Victorian Government should resource a sufficient number of specialist beds for voluntary mental health treatment while in custody.

Corrections Victoria should improve access to voluntary assessment, treatment and therapeutic supports in custody.

8.5 Transition planning and therapeutic supports to exit the criminal system

In our experience, proper transition support upon release into the community is critical to averting relapses and reducing the risk of re-entry back into the justice system.²¹² Yet our clients are often released into the community without supports. Following parole law changes there has been an increasing number of prisoners facing straight release from prison without supervision or formal post-release support in the community, even after serving lengthy sentences.²¹³ Prisoners subject to short terms of imprisonment are not eligible for parole,²¹⁴ and are unlikely to be able to access transition support services given the wait times and length of time taken to organise entry into the limited spots.²¹⁵

People released from prison are admitted to hospital at higher rates for mental health issues and substance use disorders than the general population,²¹⁶ and are at risk of poor health outcomes including an increased risk of death by preventable causes, such as suicide and overdose, compared to the general population.²¹⁷ VLA supports increased funding of programs like the Judy Lazarus

consideration of additional forensic beds should always be carefully balanced with the need for less restrictive alternatives and access to adequate services in the community.

²¹⁰ Forensicare Submission (n206) 5.

²¹¹ See e.g.: Victorian Ombudsman, *Investigation into the reintegration and rehabilitation of prisoners in Victoria* (Report, September 2015), 67 (recommendation 6).

²¹² Victorian Auditor-General's Office, *Problem-Solving Approaches to Justice* (Report, April 2011) 1.

²¹³ There was a 60 per cent reduction in the number of adults released on parole in 2019 from 2013, and a concomitant increase in the number of parole denials: Adult Parole Board, *Annual Report 2017 – 2018*, 24.

²¹⁴ Which requires a minimum term of 12 months imprisonment.

²¹⁵ Adult Parole Board of Victoria, *Annual Report 2018 – 2019* (Report, September 2019) 30.

²¹⁶ Michael Hobbs et al, 'Mortality and morbidity in prisoners after release from prison in Western Australia 1995-2003' (2006) 320 *Australian Institute of Criminology: Trends and issues in crime and criminal justice* 1.

²¹⁷ Daniel Jones and Alan Maynard, 'Suicide in recently released prisoners: a systematic review' (2013) 17(3) *Mental Health Practice* 20; Simon J Forsyth et al, 'Incidence and risk factors for mortality after release from prison in Australia: A prospective cohort study' (2018) 113(5) *Addiction* 937.

Transition Centre²¹⁸ and Forensicare's Tambo program,²¹⁹ to facilitate re-integration into the community.

We note above the importance of secure and stable housing for people released from custody and recommend this be addressed at recommendation 18.

Recommendation 57: Improve transition planning and exit support

The Victorian Government should:

- (a) resource practical transition support for people exiting custody;
- (b) improve access to supervision or parole upon release; and
- (c) improve transition planning and continuity of care with post-release supports.

²¹⁸ The staged release Judy Lazarus Transition Centre has been shown to reduce recidivism is limited to 25 beds for men; there are none for women. See also: Corrections, Prisons and Parole, *Judy Lazarus Transition Centre: Information specific to Judy Lazarus Transition Centre* (Web Page) <<https://www.corrections.vic.gov.au/prisons/judy-lazarus-transition-centre>>.

²¹⁹ Forensicare operates a prison-based psychosocial rehabilitation and reintegration unit, called Tambo, which contains 10 beds in cottage style accommodation. The program is limited to a small number of people seriously impacted by their mental health issues. Since the program commenced in November 2017 there have been 37 admissions. The success of the program lies in its six weeks post release community outreach support, which the service provider described as 'priceless'. Feedback from participants is that they have felt connected and part of community in a way that they rarely have felt before in their lives: Danielle Ashley, 'Psychosocial, Recovery Focused Mental Health Rehabilitation in a Prison: What Does this Look Like?' (Conference Paper, International Criminal Justice Conference 2019, 20 November 2019).

Appendix A: Notes on language

VLA recognises the diversity of views and experiences of those with lived experience of mental health services. We have attempted to be conscious of our use of language and have sought to avoid unnecessarily medical or legal language. There may be examples of clinical or technical language being used for clarity, despite negative connotations.

Informed by IMHA and consumer experts, we have primarily used the term ‘mental health issues’ throughout. ‘Mental illness’ is only used in direct quotes, or when referring to organisations or reports.

We have used ‘mental impairment’ where it relates to that concept as set out in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)*.

We have used ‘patient’ where it relates to that term as defined in the *Mental Health Act 2014 (Vic)*.

We note that ‘appropriate’, ‘specialised’ or ‘therapeutic’ services or programs are subjective terms in the mental health context and should be used carefully, keeping in mind self-determination and safeguards to promote safe and least restrictive treatment. What a clinician considers ‘appropriate’ supports or services may differ significantly to the supports that person would seek and consider appropriate for themselves. ‘Therapeutic’ has a different specific meaning in relation to the criminal justice system, where ‘therapeutic responses, programs and Courts’ refers to justice system approaches which respond to an individual’s needs and circumstances, including mental health issues.

We have used the term ‘consumer’ to refer to people with a lived experience of mental health services, and to people who have used IMHA services. ‘Clients’ generally refers to clients of VLA.

Our understanding of ‘recovery’ is set out in part **Error! Reference source not found.** of *Roads to Recovery*. We recognise that many consumers see the Mental Health Act as incompatible with the concept of recovery, as it facilitates compulsory treatment, which is inconsistent with self-determination, a fundamental aspect of recovery.

Appendix B: List of recommendations

1 Consumer leadership

Recommendation 1: Embed consumer leadership in mental health services

The Department of Health and Human Services should require and fund all designated mental health services to implement the 'Strategy for the consumer mental health workforce in Victoria' and embed Consumer Advisory Groups within their governance, oversight and quality improvement structures.

Mental Health Reform Victoria should oversee the implementation of consumer roles and the mechanisms to support them, in partnership with current consumer leaders and peak bodies, ensuring the diversity of the consumer workforce reflects the diversity of consumers eligible for the service.

Recommendation 2: Require co-production of Royal Commission report recommendations

The Victorian Government and Mental Health Reform Victoria should ensure that implementation of all recommendations made in the Royal Commission interim and final reports is co-produced with consumers.

Recommendation 3: Embed consumer leadership in intersecting systems

The Royal Commission should extend recommendation 6 of the Interim Report to include lived experience workforce initiatives in systems that intersect with the mental health system.

Mental Health Reform Victoria could coordinate this recommendation in partnership with relevant government departments.

2 Access to advocacy

Recommendation 4: Ensure access to non-legal advocacy for consumers on compulsory treatment orders

The Victorian Government should introduce an opt-out system for independent non-legal advocacy for consumers on compulsory treatment orders and provide adequate funding for IMHA to meet service demand.

Recommendation 5: Increase access to legal assistance for Mental Health Tribunal proceedings

The Victorian Government should fund additional Mental Health Tribunal legal assistance services and improve referral, information-sharing and processes to ensure all consumers can access free legal assistance.

3 Accessibility and safety of services

Recommendation 6: Require screening for family violence risks by mental health services

The Department of Health and Human Services should require and fund mental health services to develop policies to ensure family violence risk screening is undertaken as part of the intake process within the mental health system (e.g. risk identification, referrals to family violence services for safety planning).

Recommendation 7: Improve responses to people experiencing mental health issues who use family violence

The Victorian Government should provide guidance to require all aspects of the mental health and justice systems (e.g. mental health services, Victoria Police, courts) to improve their responses to people who use family violence and are experiencing mental health issues.

Recommendation 8: Respond to local mental health need in the regions

The Victorian Government should ensure people can access specialist and high-quality mental health treatment across rural, regional and remote Victoria.

Recommendation 9: Secure, safe and responsive mental health services for diverse communities

The Department of Health and Human Services should require and fund mental health services to implement specific strategies to provide capacity building, policy development and training, and to ensure their service delivery is trauma-informed, responsive and tailored to the diverse needs of the consumers accessing their services.

Recommendation 10: Build mental health support capacity of intersecting services

The Victorian Government should build the capacity of intersecting services to provide rights based and recovery focused support for people with mental health issues, particularly around identification and referrals to appropriate mental health supports.

4 Service delivery and community supports

Recommendation 11: Embed key recovery principles within mental health services

The Department of Health and Human Services should require and fund mental health services to embed key principles of supported-decision making, recovery and least restrictive practice into their practice through the use of service agreements, policies and procedures and practice support to increase rates of voluntary mental health services and treatment in the community.

Recommendation 12: Require supported decision-making and rights training

The Department of Health and Human Services should require and fund mental health services and all clinicians who can make compulsory treatment decisions to undertake mandatory training on the Mental Health Act (including supported decision-making, recovery and least restrictive treatment) and application of the Victorian Charter.

The Victorian Government should adequately fund IMHA to continue designing and delivering supported decision-making and rights training to designated mental health services to build services' capacity to work from a rights-based framework, as required by the Mental Health Act.

Recommendation 13: Improve access to holistic and flexible treatment

The Victorian Government should increase funding to expand community-based mental health supports and multidisciplinary options in treatment team workforce and service models for consumers to have genuine choice about the type of support they receive.

Recommendation 14: Work with Australian government to expand Medicare funding for Mental Health Care Plans

The Victorian Government should work with the Australian Government to bridge the gap between mental health supports available through a Mental Health Care Plan and an individual's mental health support needs.

Recommendation 15: Ensure cross-governmental coordination of mental health, health and NDIS supports

The Victorian Government should work with the Australian Government to coordinate access and availability of mental health supports and services to ensure consumers have a seamless experience of the mental health system, regardless of governmental responsibility for different types of services.

Recommendation 16: Develop standards for Secure Extended Care Units

The Department of Health and Human Services should define Secure Extended Care Units as a unique service within designated mental health services and develop standards which regulate inpatient care, liveability standards and discharge and transition planning.

Recommendation 17: Facilitate effective discharge from Secure Extended Care Units into the community

The Victorian Government should fund broader options for accommodation in the community, step-down programs and community-based treatment for consumers in Secure Extended Care Units.

The appropriate regulator (e.g. independent regulator or Office of the Chief Psychiatrist) should establish and monitor implementation of effective discharge planning requirements, including consistent outcome measures and public reporting of compliance.

Recommendation 18: Eliminate a key driver of poor mental health by reducing homelessness

The Victorian Government should resource the supply of safe, stable and affordable housing, including access to housing for people experiencing family violence, leaving custody or inpatient units, and for integrated rehabilitation housing programs and Specialist Disability Accommodation.

5 Mental health system oversight

Recommendation 19: Allow consumers with decision-making capacity to make treatment decisions

The Victorian Government should amend the Mental Health Act to allow consumers with decision-making capacity to refuse treatment, unless immediate treatment is necessary to prevent serious harm to another person.

Recommendation 20: Update substitute decision-making framework in the Mental Health Act

The Victorian Government should amend the Mental Health Act to make the substituted decision-making framework consistent with the *Guardianship and Administration Act 2019* (Vic)

by requiring a substitute decision-maker to give all practical and appropriate effect to a person's will and preference.

Recommendation 21: Insert a presumption that Mental Health Act treatment criteria do not apply

The Victorian Government should amend the Mental Health Act to include a requirement that a person determining whether the treatment criteria apply must presume that each of the treatment criteria does not apply.

Recommendation 22: Empower the Mental Health Tribunal to make prospective community treatment orders

The Victorian Government should amend the Mental Health Act to allow the Mental Health Tribunal to make an order that the authorised psychiatrist vary the order to a Community Treatment Order within a period specified by the Mental Health Tribunal.

Recommendation 23: Increase oversight of restrictions on consumers' rights

The Victorian Government should consider measures to provide increased oversight of decisions made under the Mental Health Act that restrict a person's rights, that are currently not subject to review by the Mental Health Tribunal.

Recommendation 24: Introduce Mental Health Tribunal evaluation measures

The Victorian Government should introduce quality assurance mechanisms and measures to evaluate the effectiveness of Mental Health Tribunal processes and decision making. Measures should include consumer experience.

Recommendation 25: Improve data collection and public reporting of mental health services

The Department of Health and Human Services and the Mental Health Tribunal should publicly report service level and demographic data to improve transparency and accountability, and support service planning and delivery.

Recommendation 26: Introduce a state-wide mental health system monitoring and evaluation framework for Victoria

The Department of Health and Human Services, Mental Health Reform Victoria or an appropriate regulator should work with mental health services and consumers to develop a state-wide monitoring and evaluation framework which sets out clearly defined targets, basic standards and objectives for the mental health system.

Recommendation 27: Require co-produced monitoring and evaluation frameworks for mental health services

Mental Health Reform Victoria or an appropriate regulator should ensure mental health services develop co-produced service-based monitoring and evaluation frameworks tailored to the needs of consumers accessing each service to ensure effective implementation of existing and new policies and guidelines.

Recommendation 28: Ensure greater oversight and regulation of mental health system

The Royal Commission should ensure greater oversight and regulation of Victoria's mental health system, including consideration of appropriate system regulator/s.

Recommendation 29: Improving complaint handling mechanisms

The Victorian Government should improve the handling of complaints relating to mental health services by

- (a) increasing resources to improve complaint resolution;

- (b) clarifying and developing pathways for consumers to pursue claims for compensation or other redress following substantiated complaints; and
- (c) requiring public reporting of service level complaints data, systemic learnings and quality improvements.

6 Human rights and discrimination law

Recommendation 30: Implement a framework to eliminate use of restrictive interventions

The Department of Health and Human Services should publish a commitment to the reduction and elimination of restrictive practices and develop and implement co-produced strategies to achieve this.

Recommendation 31: Strengthen human rights protections for consumers under the Victorian Charter

The Victorian Government should strengthen human rights protections for consumers by implementing recommendations from the 2015 Human Rights Charter Review and ensuring rights to health and self-determination are protected.

Recommendation 32: Incorporate the Convention on the Rights of People with Disabilities into Victorian laws

The Victorian Government should consider how Victorian laws can better implement the Convention on the Rights of People with Disabilities to better safeguard the human rights of people experiencing mental health issues.

Recommendation 33: Ensure effective implementation of the Optional Protocol of the Convention Against Torture

The Victorian Government should ensure that Victorian mental health services and prisons facilitate inspections by the National Preventive Mechanism and comply with reports in a timely manner.

Recommendation 34: Reduce discrimination as a driver of mental health issues

The Victorian Government should amend the *Equal Opportunity Act 2010* (Vic) to prevent discrimination as a driver of mental health issues, including by introducing an enforceable positive duty, stronger enforcement powers, and reducing the burden on individuals to bring complaints.

Recommendation 35: Prevent and address workplace sexual harassment to reduce mental health impacts

The Victorian Government should implement relevant Australian Human Rights Commission's *Respect@Work* recommendations to reduce workplace sexual harassment as a driver of mental health issues.

7 Children and young people

Recommendation 36: Guarantee specialist supports for children and young people

The Victorian government should ensure that young people can access tailored youth services state-wide (including inpatient care) and improve transitions from youth to adult services.

Recommendation 37: Prioritise mental health supports for young people in out of home care

The Victorian government should ensure that all children in out of home care have access to the mental health supports they need, in recognition that children and young people in out of home care are some of Victoria's most vulnerable community members.

Recommendation 38: Support mental health needs to keep children with their families wherever possible

The Victorian government should provide clear guidance to improve the child protection system's response to families where a parent or child is experiencing mental health issues, including greater access to mental health support services for vulnerable families.

Recommendation 39: Implement expert recommendations to respond appropriately to vulnerable young people's behaviours in the home

The Victorian Government should implement and adequately resource:

- (a) recommendations 123 to 128 from the *Royal Commission into Family Violence* for establishing a specialised response for adolescents; and
- (b) key recommendations of the PIPA project: Positive Interventions for Perpetrators of Adolescent violence in the home report (2020).

Recommendation 40: Raise the minimum age of criminal responsibility

The Victorian Government should raise the minimum age of criminal responsibility to 14, to link young children into treatment and support to recover, rather than become entrenched in the criminal justice system.

Recommendation 41: Youth forensic mental health response

The Victorian Government should:

- (a) expand the availability of the Children's Court Mental Health Advice and Response Service to all locations where the Children's Court sits;
- (b) ensure new youth forensic mental health facilities are available on remand as well as post-sentence for young people up to 25 years of age; and
- (c) extend nominal term limits for children under the CMIA to apply to young people up to 25 years old, mirroring the mainstream dual track system.

8 Criminal justice

Recommendation 42: Resource early intervention and community supports

The Victorian Government should resource community mental health care and treatment options, particularly between primary care and acute care, to help people manage their mental health needs before they escalate to crisis.

See also recommendation 14: Work with Australian government to expand Medicare funding for Mental Health Care Plans

Recommendation 43: Improve mental health responses to people in crisis

The Royal Commission should consider more appropriate organisations or professionals to provide a mental health focused first response to people experiencing mental health issues, to reduce the reliance on Victoria Police as first responders and minimise unnecessary police contact.

Recommendation 44: Consider a Victoria Police direct referral system

The Royal Commission should consider whether a Victoria Police direct referral system to adequately funded mental health services could be a genuine alternative to criminal justice responses, to enable referrals to be made in more circumstances.

Recommendation 45: Introduce health and welfare responses to minor offending behaviours

The Victorian Government should:

- (a) decriminalise or amend minor offences which disproportionately criminalise mental health issues, addiction and poverty, including: begging, offensive language, using a drug of dependence or possession of quantities of a drug of dependence for personal use; and
- (b) implement public health responses for addressing the underlying causes of these behaviours (e.g. additional housing supports, early intervention mental healthcare).

Recommendation 46: Increase use of cautions and diversions

The Victorian Government should:

- (a) introduce a legislated cautioning scheme for children and adults, with an expanded range of offences for which a caution can be given, available if the accused does 'not deny' the offence (rather than requiring the accused to admit the offence), and empowering the Children's Court to issue cautions on the same terms as police;
- (b) amend the *Criminal Procedure Act 2009* (Vic) and the *Children Youth and Families Act 2005* (Vic) to empower the Magistrates' and Children's Courts to order a court diversion without the prosecutor's consent; and
- (c) improve the availability of effective diversionary options, particularly from shared service providers or integrated partnerships which can address intersecting issues.

Victoria Police should review police cautioning and diversion policies, and provide additional training to increase use and consistency across Victoria.

Recommendation 47: Increase prosecutions initiated by Summons or Notice to Appear

Victoria Police should proceed by way of Summons or Notice to Appear rather than arrest whenever possible, to ensure people experiencing mental health issues can remain connected to treatment and support in the community.

The Victorian Government should introduce legislative amendments to increase the routine use of Summons or Notice to Appear for minor offending.

Recommendation 48: Reduce impact of bail reforms on people with mental health issues

The Victorian Government should make minor amendments to the *Bail Act 1977* (Vic) to avoid people charged with minor offending being held on remand:

- (e) offences against the Bail Act and committing an indictable offence while on conditional liberty should be removed from Schedule 2 of the Bail Act;
- (f) the Bail Act should state that a person should not be remanded for an offence which is unlikely to result in a sentence of imprisonment;
- (g) children should be exempt from the reverse onus tests in the Bail Act, to ensure that detention of children is only used a last resort rather than because of the Bail Act categories;
- (h) the offence of breaching a condition of bail could be removed from the Bail Act to address their disproportionate impact on people who have difficulty complying with conditions, such as people experiencing mental health issues; and the consequences of breaching bail would then be reconsideration of the conditions or revocation of the bail.

Recommendation 49: Expand bail support programs

The Victorian Government should rollout the Court Integrated Services Program state-wide, and resource a mental health specialist bail program to provide case management and link clients promptly with locally based services (e.g. an expanded and specialised Court Integrated Services Program service).

Recommendation 50: Expand therapeutic courts

The Victorian Government and the Magistrates' Court should roll out state-wide access to ARC and the Drug Court, and consider expanded eligibility criteria, acknowledging that the existing facilities and skills gaps which need to be urgently addressed, particularly in regional Victoria.

Recommendation 51: Enable fitness determinations in the Magistrates' Court

The Victorian Government and the Magistrates' Court should develop a mechanism for assessing and determining fitness to plead or participate in proceedings in the summary jurisdiction.

Recommendation 52: Broaden summary jurisdiction dispositions during sentencing

The Victorian Government should increase the range of dispositions available in the summary jurisdiction, to enable tailored options to support recovery where a person's mental health or functioning contributes to their offending, including options for referral to the civil system and forensic supervision for people found not fit or not guilty due to mental impairment.

This should be accompanied by training for magistrates and judicial officers in principles of therapeutic jurisprudence and training around mental impairment and health issues.

Recommendation 53: Increase use of community-based sentences

The Victorian Government should create a presumption against short sentences of imprisonment for people experiencing mental health issues (in favour of sentences which allow the person to stay in the community), combined with a requirement for reasons to be given where a sentence of less than three months imprisonment is imposed.

The Victorian Government should resource pre-sentence programs which can provide integrated case management, intensive supervision, and prompt access to locally based clinicians and services.

Recommendation 54: Reorient Community Corrections Orders to have a therapeutic focus

The Victorian Government should:

- (a) reorient Community Correction Orders through legislative amendments and operational changes to enable a therapeutic focus; and
- (b) resource direct access to relevant services while subject to treatment conditions under a CCO.

Recommendation 55: Expand secure forensic mental health facilities

The Victorian Government should resource a sufficient number of secure forensic hospital beds in a designated mental health service (or services) for the compulsory treatment of prisoners where required.

See also recommendation 41: Youth forensic mental health response.

Recommendation 56: Improve mental health assessment and treatment in custody

The Victorian Government should resource a sufficient number of specialist beds for voluntary mental health treatment while in custody.

Corrections Victoria should improve access to voluntary assessment, treatment and therapeutic supports in custody.

Recommendation 57: Improve transition planning and exit support

The Victorian Government should:

- (a) resource practical transition support for people exiting custody;
- (b) improve access to supervision or parole upon release; and
- (c) improve transition planning and continuity of care with post-release supports.