



Submission to the Royal Commission into Violence,
Abuse, Neglect and Exploitation of People with Disability
– *Criminal Justice System Issues Paper*

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Jesuit
Social Services
Building a Just Society

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Jesuit Social Services: Who we are and what we do

Jesuit Social Services has been working for more than 40 years delivering support services and advocating for improved policies, legislation and resources to achieve strong, cohesive and vibrant communities where every individual can play their role and flourish.

We are a social change organisation working with some of the most marginalised individuals and communities, who often experience multiple and complex challenges. Jesuit Social Services works where the need is greatest and where we have the capacity, experience and skills to make the most difference.

Our services span Victoria, New South Wales and the Northern Territory where we support more than 57,000 individuals and families annually.

Our service delivery and advocacy focuses on the following key areas:

- **Justice and crime prevention** – people involved with the justice system.
- **Mental health and wellbeing** – people with multiple and complex needs including mental illness, trauma, homelessness and complex bereavement.
- **Settlement and community building** – recently arrived immigrants and refugees, and disadvantaged communities.
- **Education, training and employment** – people with barriers to sustainable employment.
- **Gender Justice** – providing leadership on the reduction of violence and other harmful behaviours prevalent among boys and men, and building new approaches to improve their wellbeing and keep families and communities safe.
- **Ecological justice** – inviting discussion on what practices, policies and actions can be taken within Australia to build an ecologically just society.

Research, advocacy and policy are coordinated across all program and major interest areas of Jesuit Social Services. Our advocacy is grounded in the knowledge, expertise and experiences of program staff and participants, as well as academic research and evidence. We seek to influence policies, practices, legislation and budget investment to positively influence people's lives and improve approaches to address long-term social challenges. We do this by working collaboratively with governments, business and the community sector to build coalitions and alliances around key issues, and building strong relationships with key decision-makers and the community.

Our Learning and Practice Development Unit builds the capacity of our services through staff development, training and evaluation, as well as articulating and disseminating information on best practice approaches to working with participants and communities across our programs.

We acknowledge the Traditional Custodians of all the lands on which Jesuit Social Services operates and pay respect to their Elders, past and present. We express our gratitude for their love and care of people, community, land and all life.

Introduction

Every Australian must have access to the opportunities in life that will enable them to flourish – to complete their education, to get a job, to access safe and affordable housing, to raise their children in safe communities, and to see the next generation thrive.

Our submission draws on our experience engaging with vulnerable people and communities throughout Australia. It focuses on the intersections of disability with complex needs, disadvantage and involvement in the justice system. We note that Aboriginal and Torres Strait Islander peoples, people with multiple and complex needs, women, children and young people are particularly vulnerable cohorts.

Who we work with

Jesuit Social Services works with and advocates for people with multiple and complex needs. They can face a range of co-occurring and interrelated issues, such as homelessness, disability, substance misuse, mental and primary health problems, and involvement in the child protection and criminal justice systems. These overlapping issues often mean that recovery is harder to achieve and sustain, with people often experiencing inter-generational cycles of entrenched disadvantage.

For this particular cohort, the complexity of their needs means that they struggle to both engage and remain engaged in formal treatment and support services. While our social, welfare and justice systems are able to meet the needs of the majority of Australians, they are often not adapted to cater for Australia's most vulnerable people. For people with multiple and complex needs, a coordinated whole-of-person approach is critical in addressing the unique mix of intersecting and overlapping issues that each individual faces.

With this understanding, we recognise that a whole-of-government approach, where the service systems work together and target locations of entrenched disadvantage, is the most effective way to meet the needs of society's most vulnerable, including those with disability involved in the justice system. However, we know that this is often not the case – people with a disability commonly do not have the means or capacity to navigate and negotiate a complex service system.

Jesuit Social Services welcomes the opportunity to contribute to the *Criminal Justice System Issues Paper* prepared by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. We support the Royal Commission's focus on key issues that people with disability face when they come into contact with the criminal justice system, and affirm the critical issues identified in the Issues Paper, such as:

- The power imbalance between justice agencies and people with a disability who are brought into contact with the system.
- The multiple forms of hardship the many people with a disability face, including unemployment, poverty and homelessness.
- Discrimination and disadvantage faced by First Nations people.
- The vulnerability of children and young people in youth justice.

Our submission will address specific areas of concern that we believe warrant further attention:

- Indefinite detention of people with cognitive and psychiatric impairment.
- Children and young people with disabilities in out-of-home care/Care Services.

- Children with disability in the youth justice system.
- People with acquired brain injury (ABI) who interact with the criminal justice system.
- The over-representation of Aboriginal and Torres Strait Islander people with disability in the justice system.
- The NDIS and people with a disability in prison.
- The NDIS and Aboriginal and Torres Strait Islander peoples in the justice system.
- Isolation in youth and adult prisons.

Defining disability

Jesuit Social Services understands that ‘disability’ is a complex concept for which there is no concise, universally-agreed definition – no single diagnosis can adequately describe the concept of disability or encompass the full range of specific types of disability. This complexity is reflected in the broad description of disability used by the Australian Institute of Health and Welfare:

an umbrella term for impairments, activity limitations and participation restrictions; all of which can interact with a person’s health condition(s) and environmental and/or individual factors.

There are varying degrees of disability—from having no impairment or limitation to a complete loss of functioning. It can be the result of genetic disorders, illnesses, accidents, ageing or a combination of these factors.¹

This complexity is also reflected in the Royal Commission’s provisional definition of disability as “an evolving concept [that] results from the interaction between people with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”²

Our submission is based on the experiences of those with whom we work – this includes young people and adults with a range of disabilities, which may be diagnosed but are often not.

Key issues

Indefinite detention of people with cognitive and psychiatric impairment

The Senate Inquiry report on the *Indefinite detention of people with cognitive and psychiatric impairment in Australia* found that more than 100 people are detained around Australia without conviction due to a cognitive or psychiatric impairment.³

Jesuit Social Services is deeply concerned by the detention of people with cognitive impairment who are found unfit to plead. The failure to provide adequate accommodation and support services for them and, subsequently, the effectively arbitrary nature of their detention constitutes an abuse of human rights. We support the Australian Human Rights Commission’s arguments in *Equal before the law*:

¹ Australian Institute of Health and Welfare (2019). *People with disability in Australia 2019: In brief*, p. 1.

² Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with a Disability (2020). *The Criminal Justice System - Issues Paper*, p. 11.

³ The Senate Community Affairs References Committee (2016). *Indefinite detention of people with cognitive and psychiatric impairment in Australia*. Canberra: Australian Government: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IndefiniteDetention45/Report.

Towards Disability Justice Strategies, as well as the recommendations highlighted in the Senate's Inquiry report.⁴

People with cognitive impairment can experience longer terms of imprisonment, despite being found unfit to plead, due to the justice system not catering for their disability.⁵ In the Northern Territory, the absence of appropriate disability accommodation and supports has led to the indefinite detention of Aboriginal people with disabilities in prisons, despite them being unfit to plead to criminal charges.⁶ People with cognitive impairment should have equality before the law and not be discriminated against by a system that fails to identify their support needs.

Responses to offending by young people and adults with cognitive impairment should identify the underlying causes driving their behaviour and provide a therapeutic response that meets their needs and effectively prevents reoffending. People found unfit to plead due to cognitive impairment should be placed in therapeutic, community-based environments with intensive support to prevent further contact with the justice system, including appropriate supervision if required.

Effective responses to people with psychiatric or cognitive impairment in the youth and adult justice systems include:

- Better intervention and support services.
- Expanded community visitors' schemes.
- Improved witness support services to people with disabilities.
- Creation of an assessment protocol that assists police, courts and correctional institutions in identifying people with disabilities.
- Transparent, effective and culturally appropriate complaints handling procedures.
- Training for police, lawyers and others in the justice system regarding the needs of people with disability.
- A range of appropriate supported accommodation options across metropolitan and regional locations for people with cognitive and/or psychiatric impairments funded by state and territory governments.

Further details regarding Jesuit Social Services' stance on this issue can be found in our submission to the Senate Inquiry.⁷

⁴ Australian Human Rights Commission (2014). *KA, KB, KC and KD v Commonwealth of Australia*, [2014] AusHRC 80. Canberra: Australian Human Rights Commission, https://www.humanrights.gov.au/sites/default/files/document/publication/KA%20KB%20KC%20KD%20v%20Commonwealth%202014%20AusHRC%2080_WEB.pdf; and Australian Human Rights Commission (2014). *Equal before the law: Towards Disability Justice Strategies*. Canberra: Australian Human Rights Commission, <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law>.

⁵ See, for example, Smith, S. (2012). *Mentally impaired held in NT jails without conviction*. ABC News, <http://www.abc.net.au/news/2012-06-25/mentally-impaired-being-held-in-nt-prisons-without-conviction/4091940>; and Barns, G. (2012). *Kept behind bars: mentally ill trapped in prison politics*. ABC News, <http://www.abc.net.au/news/2012-06-26/barns-mentally-ill-in-jail/4092416>.

⁶ Senate Community Affairs References Committee (2016). *Indefinite detention of people with cognitive and psychiatric impairment in Australia*. Canberra: Parliament of Australia: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IndefiniteDetention45/Report.

⁷ Jesuit Social Services (2016). [Submission to] Senate Inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia. Richmond: Jesuit Social Services: <http://jss.org.au/senate-inquiry-into-the-indefinite-detention-of-people-with-cognitive-and-psychiatric-impairment-in-australia/>.

Recommendation 1: That the holistic disability justice principles and strategies advocated by the Australian Human Rights Commission in *Equal before the law: Towards Disability Justice Strategies (2014)* be adopted by the federal and state/territory governments.

Recommendation 2: That the recommendations made by the Senate Community Affairs References Committee in *Indefinite detention of people with cognitive and psychiatric impairment in Australia (2016)* be implemented.

Children and young people with disability in the out-of-home care system

Our 2014 research, *Thinking Outside*, highlighted that many children and young people in out-of-home care have a disability.⁸ In the Northern Territory, the lack of specialist services, in particular, disability services and especially in remote communities, contributes to the overrepresentation of Aboriginal children in the child protection system.⁹

Children and young people with a disability in out-of-home care are highly vulnerable to being placed on remand. In the residential care setting, in particular, police are often called by staff to respond to behaviour that in other circumstances would not merit police involvement (such as taking food from the fridge), or because young people come under additional scrutiny in residential care facilities and staff call police to report breaches of bail (such as being late for a curfew). The concerning propensity for children and young people to be criminalised in residential care services is well documented – for example, in Victoria¹⁰, where effort is currently also being directed to addressing it¹¹.

The effectiveness of a group conferencing approach to deal with offending and challenging behaviour has been already demonstrated within the youth justice system. A 2010 evaluation of Victoria's Youth Justice Group Conferencing program conducted by KPMG showed that it was effective in diverting young people from more intrusive interventions and in reducing reoffending.¹² Additional investment for group conferencing in the out-of-home care setting would provide an effective therapeutic and restorative intervention to address issues that contribute to young people's challenging behaviour within residential units, and therefore divert them from possible further involvement in the criminal justice system.

⁸ Jesuit Social Services (2013). *Thinking Outside: Alternatives to remand for children*: http://jss.org.au/wp-content/uploads/2015/10/Thinking_Outside_Research_Report_-_Final_amend_15052013.pdf.

⁹ Sims, J. (2014). NTCOSS Submission into the Senate Inquiry "Children living in Out of Home Care." Northern Territory Council of Social Service.

¹⁰ Sentencing Advisory Council (2019). *'Crossover Kids': Vulnerable Children in the Youth Justice System, Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court. Melbourne: Victoria; and Baidawi, S., & Sheehan, R. (2019). "'Crossover kids': Offending by child protection-involved youth." Trends & issues in crime and criminal justice, No. 582, December 2019.*

¹¹ Victorian Government (2020). *Framework to reduce criminalisation of young people in residential care*. Department of Health and Human Services. Melbourne: Victorian Government.

¹² KPMG (2010). *Review of the Youth Justice Group Conferencing Program: Final Report*, prepared for the Department of Human Services: http://old.jss.org.au/files/Docs/Programs/justice%20and%20crime%20prevention/Final_Group_Conferencing_review_full_report.pdf

Recommendation 3: That group conferencing be made available to children and young people placed in out-of-home care placements, especially in residential care units, in the context of all state and territory child protection systems.

Recommendation 4: That all state and territory governments:

- introduce, and/or expand, and promote access to Youth Justice Group Conferencing by legislating for this to be 'opt-out' rather than 'opt-in'; and
- invest in targeted intensive case management support for young people following participation in a Youth Justice Group Conference.

Children and young people with disability in the youth justice system

Evidence tells us that children in custody are likely to be among the most vulnerable and disadvantaged in our community.¹³ Young people with a range of disabilities continue to represent a significant number of those involved in the justice system. For example, an annual survey of young people detained on sentence and remand at Parkville and Malmsbury Youth Justice Centres conducted in December 2018 found that 12 per cent were linked with Forensic Disability Services offered through DHHS, and 4 per cent were accessing NDIS funded disability supports or services.¹⁴ These findings highlight the prevalence of diagnosed disability in the youth justice system, but the numbers of young people presenting with cognitive difficulties that affect their daily functioning was found to be much higher – at 38 per cent in the December 2018 survey. Alongside this are high rates of other vulnerabilities, including being victims of child abuse or neglect, family violence or dysfunction, and/or trauma; being suspended or expelled from school; involvement with the child protection and out-of-home care systems, especially the trajectory from residential care services; histories of alcohol and drug misuse; intergenerational contact with the justice system; mental health problems; poverty; and homelessness.

It is critical that identification of any developmental delay, cognitive impairment or other disability occurs as early as possible in a child or young person's life, and that appropriate service responses be delivered in a timely manner, in order to prevent and/or minimise the potential impacts on their life. Likewise, it is critical that identification of, and appropriate service responses to, any cognitive impairment or other disability occurs as soon as possible after a child or young person enters the child protection and out-of-home care system to prevent their trajectory into the youth justice system, particularly through criminalisation in residential care services, and on into the adult justice system. When the needs of those with cognitive impairment and complex needs are not identified or supported, they are more likely to experience more frequent and longer contact with the justice system. It is critical that people with cognitive impairment have their needs met as children and young people to give each person the opportunity to reach their potential. This necessarily involves assessment of the support needs of, and delivery of appropriate services to them, and their families and/or carers.

Contact with the justice system should act as a warning signal that the child or young person is not receiving the support they need and, also, the likelihood that their family or carers are not receiving the

¹³ Vinson, T., & Rawsthorne, M. (2015). *Dropping off the edge: Persistent communal disadvantage in Australia*. Jesuit Social services and Catholic Social Services Australia.

¹⁴ Youth Parole Board (2019). *Youth Parole Board, Annual Report 2018-19*. Melbourne: Department of Justice and Safety, Victorian Government.

support they need. This should signal that intervention is required, both directly with the child or young person and with their family or carers. However, services are often limited or not available – in Victoria, for example, there is only one Specialist Forensic Disability Service for young people (Perry House) and nothing specifically for young women or women. In the Northern Territory, there are no specialist forensic disability services for children and young people, or adults for that matter.

Perry House is a supported housing program delivered by Jesuit Social Services for justice system-involved young people who are at risk of, or are experiencing, homelessness. Perry House provides a residential-based living skills program for young people with an intellectual disability who are involved with youth justice and correctional services and require support. Up to four participants at a time reside at the house for up to 12 months, and a further four months supported in an outreach capacity once they have left the house, while they are assisted to develop independent living skills and engage with activities.

Recommendation 5: That the state and territory governments establish/increase investment in specialist forensic disability support services (like Perry House) for young men and women with a disability who are involved in the justice system.

In our work with Aboriginal children and young people in the Northern Territory, the high rates of Fetal Alcohol Spectrum Disorder (FASD) is a key concern. While the FASD prevalence in the Northern Territory is unknown, and there are no national estimates of the prevalence of FASD in Australia, our experience correlates with a recent study in WA that found more than one in three young people in a youth detention centre had FASD.¹⁵ Indeed, our experience suggests that for justice-involved young people in the Northern Territory, the rate of FASD could be even higher.¹⁶

FASD is a significant contributor to children and young people coming into contact with the youth justice system, and the absence of timely assessments and specialist support services provides little opportunity for young people with FASD to find pathways out of the system.

While the Northern Territory Government is working to improve access to assessment for FASD, prioritising young people in youth justice settings, assessment and management remains under-resourced. Barriers to accessing the NDIS and an underdeveloped service system in the Northern Territory mean that an assessment is no guarantee that a child or young person will then go on to receive the necessary supports.

Recommendation 6: That funding and service system responses are improved so that all children have access to a comprehensive assessment at the first sign of potential cognitive impairment or other disability, and that adequate funding is provided to facilitate a tailored response.

Raising the age of legal responsibility

A small number of vulnerable children enter the criminal justice system at a very young age. We know this group is among the most vulnerable in our community and that children first detained between the ages of 10 and 14 are more likely, compared to those first supervised at older ages, to have sustained

¹⁵ Bower, C., Watkins, R., et al. (2018). 'Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia.' BMJ Open: <https://bmjopen.bmj.com/content/bmjopen/8/2/e019605.full.pdf>.

¹⁶ See Department of Health, Northern Territory Government (2018). Addressing Fetal Alcohol Spectrum Disorder (FASD) in the Northern Territory 2018-2024, p.9: https://digitallibrary.health.nt.gov.au/prodjspu/bitstream/10137/7232/1/DOH_FASD_Strategy_Web.pdf.

and frequent contact with the criminal justice system throughout their life – particularly for Aboriginal and Torres Strait Islander children.¹⁷

Child offending experts, psychologists and criminologists agree that younger children have rarely developed the social, emotional and intellectual maturity necessary for legal responsibility before the age of 14 years and also lack the capacity to properly engage in the justice system.¹⁸ Consequently, procedural fairness cannot be assured and criminal justice proceedings fail to guarantee a just response to children’s behaviour. The most effective approach to prevent these children’s trajectories into the justice system is to address the issues driving their vulnerability, such as family violence and dysfunction, trauma, abuse and neglect; and stable, safe and secure housing.

According to an international study of 90 countries, 68 per cent had a minimum criminal age of 12 or higher, with the most common age being 14 years:¹⁹

Age of criminal responsibility: international comparison

AUS	NZ	CAN	ENG	USA	FRA	GER	SWE	NED	CHN	JPN
10	10	12	10	6-12	13	14	15	12	14	14

Source: Hazel (2008)

Recommendation 7: That all Australian governments raise the age of legal responsibility to at least 14, in line with international standards embodied in the *United Nations Convention on the Rights of the Child* and enacted in many overseas jurisdictions.

Our vision for youth justice

Jesuit Social Services has more than 40 years’ experience working with young people intersecting with the justice system, as well as their families and communities, and seeking solutions. As outlined in Jesuit Social Services’ #JusticeSolutions reports²⁰, our **vision** for the youth justice system is to enable young people who offend (or are at risk of offending) to lead healthy, productive and crime-free lives.

If we imagine the youth justice system as a maze that entraps vulnerable young people – all too easy to enter but difficult to escape – we propose to redesign the maze so that the pathways in are narrowed and the pathways out are clear. To achieve this, our **purpose** must be rehabilitation. This means addressing underlying causes of offending and the offending behaviour itself, all with a focus on psychological and therapeutic support, education, specialist disability support, along with access to housing and material supports.

¹⁷ Australian Institute of Health and Welfare (2013). *Young people aged 10–14 in the youth justice system 2011–2012*, <https://www.aihw.gov.au/getmedia/3782934c-9bfa-4367-acb4-f92def5a8ebe/15758.pdf.aspx?inline=true>; and Jesuit Social Services (2013). *Thinking Outside: Alternatives to remand for children*, *Op. cit.*

¹⁸ Cauffman, E., & Steinberg, L. (2000). (Im)maturity of judgment in adolescence: why adolescents may be less culpable than adults. *Behavioral Sciences and the Law*, 18(6): 741-760.

¹⁹ Hazel, N. (2008). *Cross-national comparison of youth justice*. UK: Youth Justice Board for England and Wales: https://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf.

²⁰ Jesuit Social Services (2017). *#JusticeSolutions Tour: Expanding the conversation, August 2017*, <http://jss.org.au/wp-content/uploads/2017/08/SUB-170623-Solutions-Tour-Long-Report-v.15.pdf>; and Jesuit Social Services (2019). *#JusticeSolutions New Zealand Tour, September 2019*, <https://jss.org.au/wp-content/uploads/2019/09/JusticeSolutions-New-Zealand-Tour.pdf>.

Recommendation 8: That all governments and key stakeholders across Australia adopt and implement key principles for good youth justice systems.

Key principles identified by Jesuit Social Services for good youth justice systems include:

- Incarceration as a last resort.
- Relationship-based models.
- Focus on early intervention and diversion.
- Listening to the voices of young people and their families.
- Developmentally appropriate approaches to children and young people.
- Recognising the importance of culture and country for Aboriginal and Torres Strait Islander people.
- Connection to families, communities and culture.
- Thorough assessment and planning, particularly alert to disability and lower level cognitive functioning.
- Access to housing.
- Support for families.
- Addressing offending behaviour.
- Addressing mental health, substance abuse and other health and wellbeing needs.
- Strong frameworks of support and accountability.
- Restorative justice approaches.
- Education focus that builds practical and social skills for re-socialisation.

If children and young people are incarcerated, we must:

- Adopt a relationship-based model across every aspect of operations.
- Offer small community-based settings (prioritising normality, and ongoing engagement with family and community), with highly skilled and trained staff.
- Provide psychological and therapeutic support and specialist intervention and support for children with a disability (e.g. neuropsychological assessment, alternate learning classrooms and activities).
- Facilitate connection with family, community and culture.
- Prioritise education and skills for life – with learning pathways that continue into community.
- Address offending behaviour.
- Address mental health, substance abuse, and other health and wellbeing needs.
- Focus on re-socialisation, transition and re-integration to the community.
- Keep remandees separate from sentenced offenders.
- Engage and support staff who have appropriate personal attributes, qualifications and experience to build relationships of trust and deliver on the re-socialisation goal.

And to achieve all this we need:

- Strong leadership.
- Shared commitment across sectors.

- Evidence-based and best practice interventions.
- Investment in alternatives to detention.
- Qualified and experienced staff.
- Targets to reduce youth offending, incarceration and recidivism, with specific targets for Aboriginal and Torres Strait Islander young people.

*See Appendix 1 for a graphical representation of this.

Screening and assessment

In the context of children and young people with a disability, we note in particular that strong assessment processes are crucial. We need to recognise the importance of assessing each child and his/her individual needs.

In Spain, for example, each Diagrama educational centre has what is termed a ‘technical team’, made up of teachers, psychologists and social workers, who are responsible for the development and delivery of an individualised plan for each child. These plans are tailored to the young person’s offending behaviour – e.g. anger management, family mediation, de-radicalisation, family violence. The interventions are a mix of one-on-one counselling, follow-up after an emotional outburst (seen as normal teenage behaviour), and group work.

Acknowledgement of the benefit of strong assessment processes is also evident in Germany. In Hameln, when young people are incarcerated, there is a four-week period of thorough assessment where a plan for their time in custody is developed. This plan covers their education and training needs, their social needs, and addresses offending behaviour through specific interventions, as required.

In New York, too, we observed provision for intensive multidisciplinary assessment and the preparation of individualised plans for young offenders. The average stay of a young person in an assessment facility is 28 days. In that time they will be assessed by educators, doctors, dentists, psychiatrists, and alcohol and drug specialists. The plan that is developed aims to ensure that the child can re-enter family and community at the end of the sentence in good health.

There is little evidence that more punitive custodial sentences have any significant individual or general deterrent effects.... There is, though, increasing research that suggests that a more comprehensive approach to assessing the particular needs profile of youth at high risk for serious offending generally, and particularly at the earliest developmental stages, and then providing the corresponding validated intervention/treatment programme resources, substantially decreased the likelihood of serious and violent offending in later developmental stages ²¹

As Catherine Neville, Executive Director of Advocacy and Strategic Communications at Jesuit Social Services, reflected on a visit to Korowai Manaaki youth justice residence in New Zealand:

There is a strong focus on relationship with the children and young people, with what they call “care staff” doing regular eight hour shifts, plus a clinical team of social workers and psychologists, each with a caseload of around six young people. The clinical team is responsible for the assessment of each young person, development and implementation of an Individual Support Plan, and the plan for exit from the centre.

²¹ Winterdyk, J., Antonopoulos, G., & Corrado, R. (2016). ‘Reflections on Norway’s juvenile justice model: A comparative context.’ *Crime Prevention and Community Safety*, 18(2): 105-121.

Recommendation 9: That comprehensive assessment processes involving the range of relevant specialists be introduced for all young people who enter the youth justice system in Australian jurisdictions to ensure identification of, and follow-up with appropriate support for, each young person’s individual needs.

People with acquired brain injury (ABI) who interact with the criminal justice system

Our Enabling Justice Report

Jesuit Social Services, together with RMIT University’s Centre for Innovative Justice, published a report entitled *Recognition, Respect and Support: Enabling Justice for People with an Acquired Brain Injury* (the Enabling Justice Report).²³ Focused on criminal justice issues confronting people with ABI, this report affirms the issues highlighted in the Royal Commission’s Issues Paper regarding the obstacles that Australians with disability face in accessing justice. Listening to people who have experiences of the criminal justice system and identifying and responding to their needs is critical to developing effective responses. The Enabling Justice Report captured these experiences and identified three key needs for people with an ABI: recognition, respect and support.

Acquired Brain Injury and the criminal justice system

People with disability tend to have a high level of interaction with the criminal justice system. Taking Victoria as an example, in 2011, Corrections Victoria reported that 42 per cent of men and 33 per cent of women (in a sample of the Victorian prison population) had been diagnosed with an ABI – this compares with just two per cent across the general population.²⁴ The extraordinary overrepresentation of people with ABI in prisons reflects a broader failure of the criminal justice system to recognise and respond to the needs of people with ABI. In fact, ABI is not well-recognised within the justice system, and the basic supports accepted as essential for people with other kinds of disability in other contexts are lacking – leaving people with ABI to fend for themselves in a system that most people without ABI would find overwhelming.

People affected by ABI can experience physical problems, such as “headaches, fatigue, seizures, poor balance, visual and hearing disturbances, chronic pain and paralysis.”²⁵ Most significantly, they may also suffer “cognitive problems, including poor memory and concentration, reduced ability to plan and problem solve and inflexible thinking, and psychosocial/emotional problems, such as depression, emotional instability, irritability, and impulsive or inappropriate behaviour”.²⁶

People with ABI form a particularly vulnerable group in our community; they are often caught up in a complex interplay of social disadvantage and disability. Commonly, people with ABI experience multiple and complex needs, such as alcohol or drug addiction, mental illness, homelessness and family violence.

The symptoms of ABI can severely impact a person’s experience of the justice system. Having ABI can compound an already intimidating experience of the legal system, limiting the person’s ability to

²² Jesuit Social Services and RMIT University Centre for Innovative Justice (2017) *Recognition, Respect and Support: Enabling Justice for People with an Acquired Brain Injury*: <https://jss.org.au/recognition-respect-and-support-enabling-justice-for-people-with-acquired-brain-injuries/>.

²³ *Ibid.*

²⁴ Jackson, M., Hardy, G., Persson, P. & Holland, S. (2011). *Acquired Brain Injury in the Victorian Prison System*. Corrections Victoria Research Paper, Series Paper No. 04, April 2011: http://assets.justice.vic.gov.au/corrections/resources/36d7e731-e819-4ed3-972d-269b829b952d/acquired_brain_injury_in_the_victorian_prison_system.pdf.

²⁵ Australian Institute of Health and Welfare (2007). *Disability in Australia: Acquired Brain Injury, Bulletin 55*, p. 3.

²⁶ *Ibid.*

comply with sentencing orders and even exacerbate their offending behaviour. The justice system can be daunting and difficult to navigate for those without a disability; however, for those with ABI who may struggle to engage in everyday tasks, this can be near impossible.

Key issues identified by project participants

The Enabling Justice project interviewed 21 people affected by ABI who had been in contact with the justice system in order to better understand how they experienced the system, and to identify ‘missed opportunities’ where alternative responses may have led to more positive outcomes.

For Enabling Justice project participants, feeling ignored, fearful, disrespected, confused and unsupported were remarkably common experiences. Participants described feeling:

- **Unrecognised:** That the criminal justice system was not set up to identify or accommodate their needs. As a result – particularly when they were in prison or serving sentences in the community – their ABI-related symptoms were sometimes misconstrued as ‘trouble-making’ or evidence of drug usage. Their disability was often not recognised nor consistently dealt with across various justice processes.
- **Confused:** The symptoms of ABI, together with the use of complicated legal jargon and inconsistent processes, made the justice system particularly confusing.
- **Unsupported:** For some participants, having ABI limited their ability to comply with community corrections orders, as these presumed a functioning memory and comprehension of relatively complex requirements. Yet the level of support they needed to understand and comply with orders was simply not available. They could not openly report their disability for fear of it being exploited by police, corrections officials or other offenders. When their disability was self-reported, it was often not taken into account nor deemed to warrant special consideration or assistance.
- **Disrespected:** Experiences of being treated disrespectfully by police, magistrates, and custodial and community corrections officers caused participants to lose respect for the law and to disengage.
- **Fearful, anxious and afraid:** For many, their ABI exacerbated experiences of anxiety and vulnerability in the face of a complex justice system they could not comprehend and which did not make support available to assist them through it.

To participate fully and equally in the justice system, people with ABI clearly need increased recognition, respect and support:

- **Recognition:** A number of interviewees felt that their disability was under-recognised within the justice system: “not many people know, it does need more flyers, a few things put out there so people do know... Any other type of injury a person can get, ABI needs a bit more recognition too.”²⁷ For ABI to be recognised as a disability within the criminal justice system, the system must acknowledge ABI as a disability, even though it often occurs alongside other forms of disability and disadvantage. The system must also recognise that a person with ABI may have additional communication and support needs. People working within the system must have an awareness of the causes, symptoms and common support needs of people with ABI. The system must make those supports known and available to people who have or are suspected of having

²⁷ Justice User Group meeting, April 2016.

ABI. Where ABI is understood, people can feel more confident to disclose their ABI and access services suited to their needs.

- **Respect:** Project participants reported the significance of being treated with respect in their contact with the justice system. One interviewee described an encounter with a magistrate who demonstrated sincere respect and concern: “[S]he took a lot of time to see how you were going and what was happening in your life and why you were in jail. And I think, because I was on heroin at the time, she actually got me off heroin. She ... inspired me to get off heroin ... She could’ve just closed her book on me.”²⁸ This experience motivated the person to fully cooperate with the process and make positive life changes. A more respectful justice system should take a ‘solutions-focused’, constructive and therapeutic approach which promotes reintegration into the community. Whether they are offenders, prisoners, victims or witnesses, people with ABI are entitled to respect. This includes treating people with dignity and enabling them to participate meaningfully in processes that affect them. In the criminal justice system, this can take many forms, including the use of plain English to ensure people with ABI can understand and meaningfully participate in their legal processes.
- **Support:** People with ABI require more support to access justice within and outside the criminal justice system. Many participants felt they were ‘set up to fail’ due to the lack of disability-specific services available, both within the justice system and in the broader community. A number of simple measures of support have the potential to make a significant difference: “a lot of people are just a bit confused. If they’re put in the right direction, they’ll change – they will.”²⁹ Interviewees reported insecure housing as a significant factor in their cycles of offending. Supporting people with ABI to access secure housing would make a significant difference in promoting their stability, facilitating long-term support, and ultimately reducing recidivism.

Recommendation 10: That all governments and key stakeholders across Australia acknowledge the need to increase recognition, respect and support for people with Acquired Brain Injury (ABI) in the criminal justice system and improve access to justice for people with ABI in Australia through a range of targeted measures.

Jesuit Social Services has identified the following measures as the highest priorities for future action aimed at improving access to justice for people with ABI in Australia:

- Governments in all Australian jurisdictions must take concrete steps to raise awareness about ABI, including its causes, known risk factors, symptoms and how to seek help.
- All people who work within the criminal justice system must be educated about the circumstances and needs of people with ABI, and trained to be able to recognise people with ABI and respond appropriately.
- Access to appropriate support and programs must be offered to people with ABI at the earliest possible opportunity.
- Governments in all jurisdictions must fund criminal justice advocacy and support services that offer support to persons with a cognitive disability or complex needs at any point of their interaction with the criminal justice system, including police, courts, corrections and prison.

²⁸ Participant interview, 7 June 2016.

²⁹ Participant evaluation interview #7, 8 December 2016.

- Written and verbal communication in the criminal justice system must be made more accessible, including by making sure that plain English is used in all documents of a legal nature, as well as during court proceedings.
- Legal aid providers must structure their services to ensure that participants have adequate time to speak with a lawyer (in an appropriate manner and environment) about their case and their personal circumstances.
- Governments in all jurisdictions must increase funding for legal aid providers so as to reduce the demands on lawyers (especially duty lawyers), enabling them to spend sufficient time with clients to identify relevant personal circumstances, including ABI.
- Governments must make available a larger number of properties to community support organisations that are accessible to people with an ABI and/or complex needs being released from prison.
- Governments – in partnership with community support providers – should establish supported housing programs targeted towards people in contact with the criminal justice system with an ABI or complex needs living in or reintegrating back into the community.
- Governments must provide long-term and increased funding to homelessness and tenancy support services to provide assistance to people who have exited prison and who reside in public and community-based social housing, to sustain their tenancies and provide support to address underlying issues that may place their tenancies at future risk.

Our experience with the adult cohort offers important lessons for working with children and young people, with the above measures applicable to that group as well.

The over-representation of Aboriginal and Torres Strait Islander people with disability in the justice system

Aboriginal and Torres Strait Islander people with disability are significantly over-represented in the justice system. A UNSW study on Aboriginal people with mental and cognitive disabilities in the criminal justice system highlights a number of underlying factors that contribute to their over-incarceration,³⁰ including:

- Institutional racism, stigma and discrimination which impacts access to education, employment, housing and just legal outcomes.
- Little recognition of the ongoing impact of colonisation, intergenerational trauma, loss and grief on Aboriginal and Torres Strait Islander people.
- Systemic normalisation of disadvantage, disability and offending, particularly for people with multiple and complex needs.
- Little acknowledgement of the different meanings of the term ‘disability’ in Aboriginal communities.
- Aboriginal people with a disability often also experience chronic health issues, as well as social and economic disadvantage.

³⁰ Baldry, E., McCausland, R., Dowse, L., & McEntyre, E. (2015). *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*. Sydney: University of New South Wales: <http://unsworks.unsw.edu.au/fapi/datastream/unsworks:37093/binb10f2bda-8816-4112-aeeb-6cd6d8efe6f7?view=true>.

- The lack of adequate support for complex needs in the community means that problems go untreated and worsen.
- The lack of diversionary programs means that incarceration becomes the default response.
- The absence of a coherent framework for holistic disability, education and human services support means that people with complex needs are unlikely to be adequately supported by siloed systems.
- The lack of diagnosis of disability, particularly in the case of Fetal Alcohol Spectrum Disorder (FASD), limits access to needed support and understandings of the behaviour in light of the disability.
- Policy and legislative changes in the last 20 years have had a negative and disproportionate impact on Aboriginal and Torres Strait Islander people with disability.

Aboriginal and Torres Strait Islander people with disability and complex and multiple needs require a holistic, integrated and culturally responsive model of care that brings together multiple service systems in the community to meet their needs. Prevention comes from addressing the underlying factors of disadvantage and strengthening Aboriginal and Torres Strait Islander peoples' self-determination to heal from the detrimental effect of colonisation on communities and culture.

There is a significant need for early diagnosis and culturally appropriate support for children in the justice system, and recognition of, and an appropriate response to, the behaviour that accompanies disability and complex needs. Appropriate treatment and accommodation options in the community (e.g. Perry House) provide suitable alternatives to justice-centred responses and create opportunities for rehabilitation and integration into the community.

Recommendation 11: That all state and territory governments invest in specialist accommodation and support services that have holistic, integrated and culturally responsive models of care for Aboriginal and Torres Strait Islander men and women with a disability who are involved in the justice system.

The NDIS and people with a disability in prison

People with a disability in prison are at significant risk of receiving fragmented and inequitable access to support compared to people with disabilities who are not in the prison system. This is in part due to the Council of Australian Governments having agreed that the NDIS will not fund individuals during their time in prison, but will fund disability-specific needs only once they return to the community. This disjointed program response represents a significant barrier that prevents people with disabilities from being able to have continuity of support.

The recently completed Tune review of the NDIS Act³¹ identifies that, at an operational level, there is a lack of clarity concerning the respective lines of accountability between the NDIS and mainstream service systems, including the justice system, which has meant service gaps and confusion for NDIS participants. The Tune report outlines the significant work that has been undertaken by all governments to resolve these interface issues. In relation to the justice system, this has resulted in an agreement to introduce Justice Liaison Officers in each state and territory to work across the respective justice systems, amongst other measures, to ensure that NDIS participants interacting with the justice system receive the supports they require.

³¹ Tune, D. (2019). *Review of the National Disability Insurance Act 2013: Removing red tape and implementing the NDIS Participant Service Guarantee*. Canberra: Australian Government.

However, it remains unclear how people with disabilities who have a custodial history are expected to access funding, support, or even the most basic information about the NDIS once they exit back into the community, unless their needs are specifically addressed through an outreach strategy as recommended by the Tune report:

Recommendation 12: Implementation of the Tune report’s recommendation that the “NDIA develops a comprehensive national outreach strategy for engaging with people with disability who are unaware of, or are reluctant to seek support from the NDIS, with a dedicated focus on Aboriginal and Torres Strait Islander peoples, culturally and linguistically diverse communities, ... people with psychosocial disability”³², and people involved in the justice system – especially those in prison.

Jesuit Social Services has further concerns about the access to disability support for people with cognitive impairment and complex needs in the criminal justice system, including:

- The requirement for people with disability and complex needs to have the computer literacy, and interpersonal and self-advocacy, skills to gain assistance from the NDIS.³³ This concern has been validated through findings from the Tune review³⁴:

people with psychosocial disability require higher levels of support to engage with support services and face some specific challenges understanding and accessing the NDIS. These include... the requirements of putting together the evidence to navigate the NDIS is seen as too burdensome or beyond the skills and abilities of some people living with psychosocial disability, particularly for people who do not have support from an existing service provider or informal supports

- The impact on accessibility to the scheme when it is reliant on access to appropriate diagnostic services.³⁵ This issue has also been validated through the Tune review: “it can be very expensive and time consuming to obtain the required information from health professionals to demonstrate their eligibility, with some professionals indicating it can take up to 20 hours to prepare the required documentation”³⁶
- The uncertainty as to whether the presence of a mild cognitive impairment (particularly when co-occurring with mental illness, substance abuse, and entrenched disadvantage) will meet the eligibility requirement of the NDIS scheme for a ‘substantial and ongoing disability need’.³⁷ This concern has also been confirmed by findings of the Tune review:

The language of disability and permanency is unfamiliar to many people with mental health issues, is different to the recovery language used by mental health professionals and does not reflect the episodic nature of some conditions³⁸

many health professionals are reluctant to determine their clients conditions are permanent, due to uncertainties of the outcomes of medication or treatments and lack of NDIS or academic guidance on criteria for permanency. Many health professionals see themselves working in a strengths recovery-based rather than a deficit model.³⁹

³² *Ibid*, p. 88.

³³ Baldry, McCausland, et al. (2015). *Op. cit.*

³⁴ Tune, D. (2019). *Op. cit.*, p. 87.

³⁵ Baldry, McCausland, et al. (2015). *Op. cit.*

³⁶ Tune, D. (2019). *Op. cit.*, p. 87.

³⁷ Baldry, McCausland, et al. (2015). *Op. cit.*

³⁸ Tune, D. (2019). *Op. cit.*, p. 87.

³⁹ *Ibid*, p. 88.

Recommendation 13: Implementation of the Tune report’s recommendations:

- that “the Commonwealth provides additional funding to support people with disability to navigate the NDIS”,⁴⁰
- that the “NDIS Act is amended to ... allow evidence provided to the NDIA about a prospective participant or participant to be used for multiple purposes under the NDIS Act, including access, planning and plan review processes”,⁴¹ and
- that the “NDIS Act and Rules are amended to: a. provide clearer guidance for the NDIA in considering whether a psychosocial impairment is permanent, recognising that some conditions may be episodic or fluctuating b. remove references to ‘psychiatric conditions’ when determining eligibility and replace with ‘psychosocial disability’”.⁴²

The NDIS and Aboriginal and Torres Strait Islander peoples in the justice system

Jesuit Social Services has particular concerns about the way in which the NDIS caters to the needs of Aboriginal and Torres Strait Islander peoples in the justice system and their capacity to access the scheme.

The scheme’s design has failed to adequately account for the cultural needs and circumstances of Aboriginal and Torres Strait Islander peoples; in particular, for those living in remote communities. Key issues with the NDIS to date include:

- The failure to adequately address the issue of ‘thin markets’ – resulting in many participants in remote Indigenous communities (as well as more populated regional centres) having plans in the tens of thousands of dollars, but little capacity to draw down those funds (in the Northern Territory, there is only a 40 per cent draw down on plans, and less in very remote areas).
- No material provided by the NDIA in an Aboriginal language, despite English being the second (or third or fourth) language of many Indigenous NDIS participants.
- Scheme pricing (in particular for travel) being insufficient to facilitate support for participants on country or to support return to country.
- More work required to integrate understanding of the importance of community and family for Aboriginal people.⁴³
- The capacity of the NDIS to work effectively with other service systems to meet the needs of Aboriginal and Torres Strait Islander peoples with disability and complex needs when it is focussed on ‘disability services’.
- More work required to integrate understanding of the differing understandings of disability in Indigenous communities and the potential unwillingness for people to identify with a disability label for cognitive, social or cultural reasons.⁴⁴

With these concerns in mind, Jesuit Social Services emphasises the need for implementation of our Recommendations above, which support recommendations of the Tune report. Furthermore:

⁴⁰ *Ibid*, Recommendation 3, p. 13.

⁴¹ *Ibid*, Recommendation 7, p. 14.

⁴² *Ibid*, Recommendation 8, p. 14.

⁴³ *Ibid*.

⁴⁴ Baldry, McCausland, et al. (2015). *Op. cit.*

Recommendation 14: That the NDIA publish its progress and the outcomes of the implementation of the Aboriginal and Torres Strait Islander Engagement Strategy⁴⁵ and the Rural and Remote Strategy⁴⁶.

Recommendation 15: That the Federal Government allocate funding for an action research project to design system improvements to ensure the most vulnerable Australians can access the services to which they are entitled, including hybrid models of support to facilitate service provision and capacity building in remote areas.

Isolation in youth and adult prisons

In light of the health and community safety risks associated with solitary confinement as confirmed by both international research and local experience, Jesuit Social Services considers that the use of isolation in youth justice centres should be banned. Practices must ensure that harm to children and young people is minimised and that their rights are protected.

We recognise and support the findings of the World Health Organisation,⁴⁷ which acknowledge the range of detrimental effects that solitary confinement can have on the mental health and wellbeing of those subjected to it. International human rights law requires that the use of solitary confinement be kept to a minimum and reserved for the few cases where it is absolutely necessary and for as short a time as possible.

Solitary confinement negatively affects an individual's overall level of physical and mental health in custody. Many people describe experiencing physical health impacts, such as deterioration in eyesight, poor appetite and joint pain. Mental health impacts are more profound and include increased difficulty in regulating emotions, constant hypervigilance and paranoia, distortions in time, increased risk of self-harm and suicide, and increased symptoms of anxiety and depression. Solitary confinement also creates significant barriers to achieving successful rehabilitation and reintegration.

For children, researchers have demonstrated the link between isolation and lasting psychological damage.⁴⁸ Children and young people are particularly vulnerable due to the fact that they are still developing mentally and physically. The traumatic nature of isolation can have severe consequences on adolescent brain development, making young people all the more vulnerable to sustained contact with the justice system and to suicide.⁴⁹

The impact of isolation and solitary confinement on young people aged 18 to 24 is also clear and well documented. Based on our experience working with young people in adult justice settings, we have

⁴⁵ NDIS (2017). *NDIS Aboriginal and Torres Strait Islander Engagement Strategy*. National Disability Insurance Agency: <https://www.ndis.gov.au/about-us/strategies/aboriginal-and-torres-strait-islander-strategy>.

⁴⁶ NDIS (2016). *NDIA Rural and Remote Strategy 2016–2019*. National Disability Insurance Agency: <https://www.ndis.gov.au/about-us/strategies/rural-and-remote-strategy>.

⁴⁷ World Health Organisation (2014). *Prisons and Health*. World Health Organization, Regional Office for Europe: http://www.euro.who.int/data/assets/pdf_file/0005/249188/Prisons-and-Health.pdf.

⁴⁸ Lutz, J., Szanyi, J., & Soler, M. (2017) 'Stop solitary for kids: The path forward to end solitary confinement of children', *Protecting Children against Torture in Detention: Global Solutions for a Global Problem*. Washington College of Law, American University: <http://www.stopsolitaryforkids.org/wp-content/uploads/2017/03/Compressed-by-Jason-Stop-Solitary-for-Kids-A-Path-Forward-to-End-Solitary-Confinement-of-Children-Article-Only.pdf>.

⁴⁹ Owen, M., & Goldharen, J. (2016). 'Children and solitary confinement: A call to action.' *Pediatrics Perspectives*, 137(5), pp. 1-5.

found that while this cohort is subject to confinement and isolation in Victorian prisons, it is often overlooked.

Jesuit Social Services' *All Alone: Young Adults in the Victorian Justice System*⁵⁰ highlighted the vulnerability of young people in adult prisons subject to isolation, emphasising the long-term damage created by conditions of confinement when brain development is still occurring. Our report raised a number of concerns regarding the welfare and treatment of young adults in Victorian prisons, and questioned whether the appropriate human rights standards are being met.

We welcome the Victorian Ombudsman's investigation into the isolation of young people in closed environments in Victoria, carrying out inspections according to the standards of the United Nations' *Optional Protocol to the Convention Against Torture (OPCAT)*. The inclusion of the Disability Services Commissioner in the Advisory Group and an expert on young people with disabilities from the Office of the Public Advocate in the inspection team reflects the relevance and importance of specific concerns regarding young people with disabilities to the investigation. For example, the inspection of Malmsbury Youth Justice Precinct conducted in 2019 found, of the 110 children and young people accommodated there, 11 per cent were identified as having a disability.⁵¹

Children and young people who have medical or psychiatric conditions are particularly vulnerable to the negative effects of solitary confinement... Unlike in the adult system, there is no requirement under the CYF Act for consideration to be given to a person's medical and psychiatric conditions before authorising isolation... The inspection was concerned by this, particularly in cases such as ... where a young person with an intellectual disability and anxiety was isolated after becoming agitated because of lockdowns, despite staff being advised that 'being alone and the sound of silence' could trigger his anxiety and that he had a tendency to self-harm when isolated.

We reiterate our recommendation, as made in our Submission to the Australian Human Rights Commission's *OPCAT in Australia Consultation Paper*⁵²:

Recommendation 16: That National Preventative Mechanisms (NPMs) prioritise the prevention of the use of isolation and other methods of physical and chemical restraint in prisons and youth custodial centres.

Medical and chemical restraints

As outlined in *All Alone: Young Adults in the Victorian Justice System*, concerns have also been raised around the use of medical and chemical restraints to manage prisoner behavior, and this is a practice that should be closely monitored. In 2013, the Australian Human Rights Commission found that prison staff respond inappropriately to prisoners with disability, including through the use of medical restraint, often using these tactics when support services are not available.⁵³

⁵⁰ Jesuit Social Services (2018). *All Alone: Young Adults in the Victorian Justice System*: <http://jss.org.au/wp-content/uploads/2018/09/All-alone-Young-adults-in-the-Victorian-justice-system-FINAL-1.pdf>.

⁵¹ Victorian Ombudsman (2019). *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people*. Melbourne: Victorian Ombudsman, p. 185.

⁵² Jesuit Social Services (2018). *Submission to the Australian Human Rights Commission's OPCAT in Australia Consultation Paper: Stage Two*: <https://jss.org.au/submission-to-the-australian-human-rights-commissions-opcat-in-australia-consultation-paper-stage-two/>.

⁵³ Australian Human Rights Commission (2013). *Access to justice in the criminal justice system for people with disability, Disability Issues Paper, April 2013*: <https://www.humanrights.gov.au/our-work/disability-rights/publications/access-justice-criminal-justice-system-people-disability>.

The Australian Association of Developmental Disability Medicine Position Statement describes the Positive Behaviour Support (PBS) framework recommended by the Australian Psychological Society “as evidence-based and best clinical practice in managing behaviours of concern in people with disabilities”. Although the “PBS approach does not specifically preclude the implementation of restrictive practices”, nevertheless “the focus is on maintaining the person’s safety and the safety of others” and “respect for the person and their dignity remains paramount”. The PBS approach mandates that “restrictive practices as a means of discipline, coercion or retaliation are unacceptable and ineffective.”⁵⁴ The PBS is the standard of practice for clinicians working within the disability sector but has not yet been adopted in the justice system in Victoria.⁵⁵

Recommendation 17: That all Australian governments:

- invest in training correctional staff to use therapeutic and restorative approaches when dealing with prisoners;
- increase staffing levels to minimise the need to use punitive practices, such as isolation and restraint; and
- invest in the Positive Behaviour Support (PBS) framework to manage behaviour of concern in people with disabilities in prison.

The use of medical restraint also raises issues around post-release management of medication. Once again, we note the limited transparency and lack of availability of documentation or data on the use of medical and chemical restraints in prisons in Victoria.

As outlined in our submission to the Australian Human Rights Commission’s *OPCAT in Australia Consultation Paper*, it is critical that there is a diversity of mechanisms and responses to ensure that the rights of people are upheld in custodial settings. There is a clear opportunity to better monitor quality and complaints and to explore other avenues to support young people to raise and articulate their concerns.

Recommendation 18: As outlined in the Jesuit Social Services’ submission to the Australian Human Rights Commission’s *OPCAT in Australia Consultation Paper*:

- that appropriate professional support is provided as part of visiting teams to ensure people in custodial environments (especially those with Acquired Brain Injury, cognitive impairment or mental health issues) are able to voice their experiences and concerns;
- that the National Preventive Mechanism (NPM) prioritise the prevention of the use of restraint, as well as lockdowns, isolation and other methods of physical and chemical restraints, in prisons and youth custodial centres;
- that an Independent Custodial Inspector be established in the Northern Territory and this role form part of the NPM framework; and
- that NPMs use third parties (such as community service organisations) to give people a voice once they have been released from detention.

⁵⁴ Lewis, A., & Small, J. (2017). *Australian Association of Developmental Disability Position Statement: The Importance of Physical and Mental Health for People with Intellectual Disabilities in the Criminal Justice System*. May 2017: <https://aaddm.com.au/wp-content/uploads/AADDM-The-Importance-of-Physical-and-Mental-Health-for-People-with-Intellectual-Disability-in-the-Criminal-Justice-System-Endorsement-August-2017.pdf>.

⁵⁵ *Ibid.*

OPCAT

OPCAT was ratified by the Australian Government in late 2017, and aims to prevent ill-treatment of people in closed environments through regular independent inspections by a United Nations committee of international experts and local inspection bodies called National Preventative Mechanisms (NPMs). While the structure of OPCAT and the NPM in Australia is yet to be finalised, the Commonwealth Ombudsman has been appointed NPM Coordinator for OPCAT in Australia.

We support the Australian Government's commitment to ratify OPCAT and believe it:

- presents a valuable opportunity to strengthen oversight measures already in place, and enhance Australia's commitment to these protections;
- will help improve oversight mechanisms and ensure that practices in youth and adult detention facilities meet United Nations' standards of treatment and are thoroughly investigated – this includes assessing the use of isolation and solitary confinement, and subjecting these types of practices to investigation by an independent monitoring body, strengthening accountability and improving outcomes for detainees;
- offers a clear opportunity to drive more holistic and therapeutic practices within prisons, and the justice system more broadly; and
- provides children, young people and adults within these environments – many of whom are often disadvantaged in multiple and complex ways – with a voice.

Recommendation 19: As outlined in Jesuit Social Services' submission to the Australian Human Rights Commission's *OPCAT in Australia Consultation Paper: Stage Two*⁵⁶:

- that National Preventative Mechanisms (NPMs) protect the rights of, and ensure that supports are in place for, vulnerable cohorts in places of detention, including Aboriginal and Torres Strait Islander people, individuals with ABI and cognitive impairment, young adults, transgender and gender diverse people, and children and young people;
- that NPMs across Australia explore and implement new feedback channels to complement traditional mechanisms to allow people who have been detained to offer their views post-release;
- that NPMs involve genuine and meaningful community consultation to ensure the standards of OPCAT are upheld in places of detention around Australia;
- that legislation establishing NPMs enshrine their functional and structural independence and autonomy, and a holistic interpretation of prevention; and
- that appropriate experts are included as part of visiting teams in order to effectively act as an intermediary and advocate for people in detention, identify the needs and risks of harm for vulnerable prison cohorts, and make recommendations for the prevention of that harm.

⁵⁶ Jesuit Social Services (2018). *Submission to the Australian Human Rights Commission's OPCAT in Australia Consultation Paper: Stage Two*. Op. cit.

Jesuit Social Services respectfully asks that you take these comments and recommendations into account when drafting your final report.

We would welcome the opportunity to expand further on the matters raised in this submission.

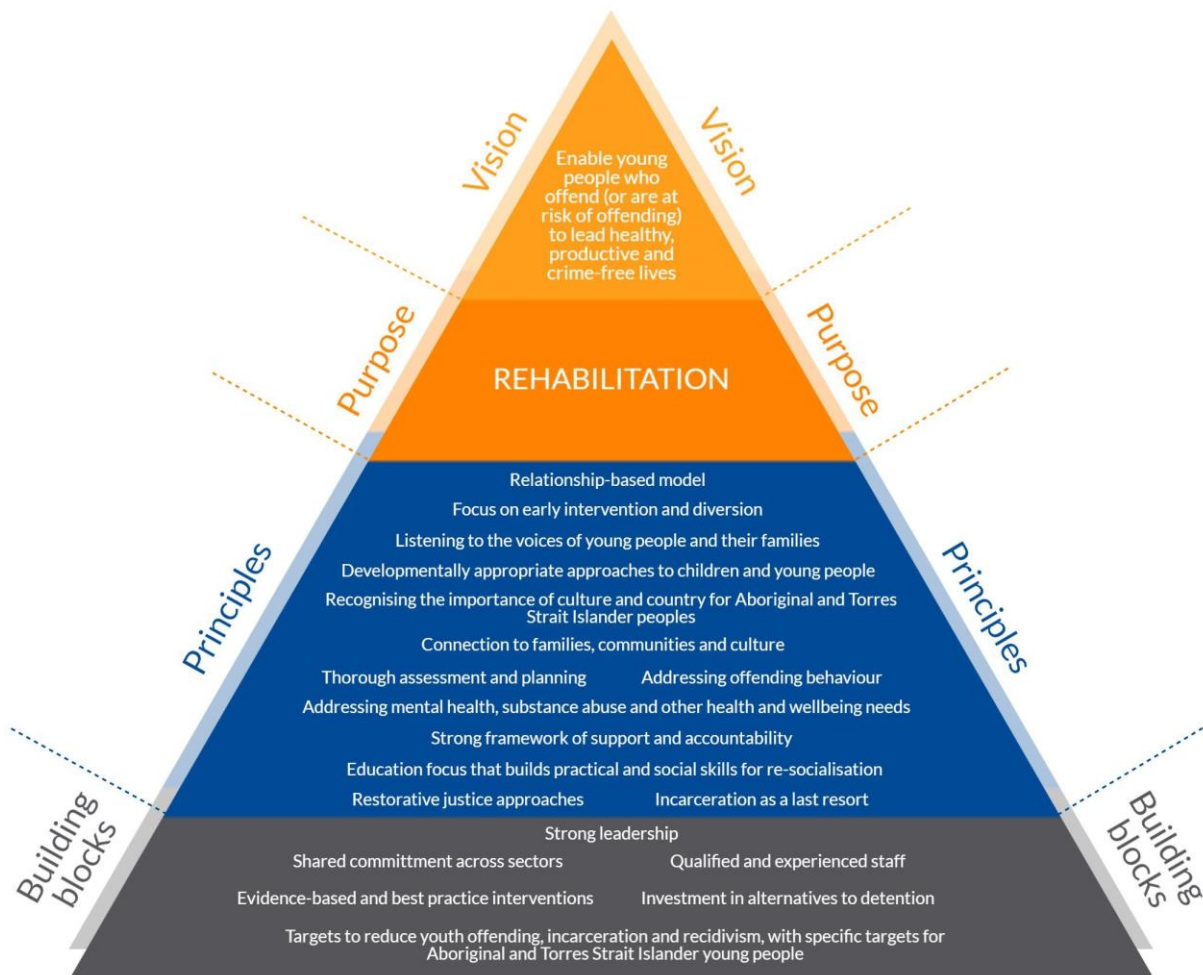
Yours sincerely

Sally Parnell

Acting CEO – Jesuit Social Services

Appendix 1

A model for youth justice



Detention

Adopt a relationship-based model across every aspect of operations
Dynamic security
Offer small community-based settings (prioritising normality, and ongoing engagement with family and community)
Facilitate connection with family, community and culture
Prioritise education and skills for life Address offending behaviour
Address mental health, substance abuse and other health and wellbeing needs
Focus on re-socialisation, transition and re-integration to the community
Keep remandees separate from sentenced offenders
Engage and support staff who have appropriate personal attributes, qualifications and experience to build relationships of trust and deliver on the re-socialisation goal