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VICTORIAN ombudsman

7 April 2016

Ms Jeanette Radcliffe
Committee Secretary
Senate Standing Committees on Community Affairs
Via email: community.affairs.sen@aph.gov.au

Dear Ms Radcliffe

Inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia

I refer to your correspondence to my office on 7 December 2015 in which the committee invited me to provide a written submission to the committee's inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia.

I am pleased to provide this submission to the inquiry based on evidence I collected during my *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, a report on which I tabled in the Victorian Parliament on 17 September 2015. By way of background, my investigation was prompted by significant growth in prisoner numbers and concerns with rates of reoffending and the costs to the Victorian community.

My investigation examined the effectiveness of rehabilitation and transitional services for prisoners in Victoria and focussed on:

- whether these services were effective in reducing recidivism
- the impact of increasing prisoner numbers on services
- whether there were any particular groups within the prisoner population which were not being adequately supported.

This included looking at the support and programs available to prisoners with a cognitive disability and those with a mental health condition. While I did not specifically consider the indefinite detention of these groups, I consider many of the findings in my report are of relevance to the inquiry, and thus I have included relevant comments below. I have also attached an electronic copy of my tabled report to this submission should the committee wish to peruse it.

Cognitive disability

My investigation noted the heightened vulnerability of prisoners with a cognitive disability in regard to reoffending and their complex support needs in the prison environment. Many prisoners with a cognitive disability have poor communication and living skills[1], as well as other challenges including homelessness, poor family and social networks, lack of employment, substance use and mental illness which can further complicate their support needs[2].

I noted research that has shown that people with a cognitive disability face greater difficulties in dealing with the criminal justice system than other groups, which can lead to a cycle of recidivism. A report prepared by the Victorian Coalition of ABI Service Providers Inc. (VCASP)[3] noted that these people:

> … may have limited understanding of their legal rights, lack confidence and be easily intimidated, respond impulsively without thinking strategically through the issues, have trouble controlling their emotions, or have difficulty communicating. The 'system' may fail to identify that the person has a cognitive impairment, may be prejudiced or fail to provide a fair and reasonable response with respect to dealing with disability issues, be unable to arrange affordable legal services as needed, or not provide adequately trained staff with knowledge and appropriate procedures for dealing effectively with persons with cognitive impairment.

My investigation highlighted the particular complexities in relation to prisoners with an ABI, in that the presentations, behaviours and needs of such prisoners can vary significantly.

Prevalence

My report noted the over-representation of people with a cognitive disability in the justice system, both as victims and offenders, based on Australian and international research[4]. In Victoria, a 2011 study[5] of a sample of prisoners estimated that 42 per cent of male prisoners and 33 per cent of female prisoners had an ABI, compared to 2 per cent of the general Australian population. The study also found that alcohol and other drug use were the most common risk factors for developing an ABI in both male and female prisoners, whereas in the general population traumatic head injury is the most common cause.

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1 Department of Justice, *Embracing the Challenges: Corrections Victoria Disability Framework 2013-2015*.

2 Baldry, Clarence, Dowse and Trollor, 'Reducing Vulnerability to Harm in Adults With Cognitive Disabilities in the Australian Criminal Justice System', *Journal of Policy and Practice in Intellectual Disabilities*, Volume 10, Number 3, pages 222-229, September 2013.

3 Diverge Consulting Inc, *Issues and inequities facing people with acquired brain injury in the criminal justice system, prepared for the Victorian Coalition of ABI Service Providers Inc*, September 2012.

4 S. Brown, and G. Kelly, *Reducing Vulnerability to Harm in Adults With Cognitive Disabilities in the Australian Criminal Justice System*; McCausland, Baldry, Johnson and Cohen, *People with mental health disorders and cognitive impairment in the criminal justice system: Cost-benefit analysis of early support and diversion*, August 2013.

5 Department of Justice, *Acquired Brain Injury in the Victorian Prison System*. Corrections Victoria Research Paper Series, Paper No. 04, April 2011.

The evidence obtained during my investigation suggested that the over-representation of people with an intellectual disability in Victorian prisons was less marked than those with an ABI, comprising three per cent of the total Victorian prisoner population in March 2015. This compared to an estimated one per cent in the general Victorian population.

Identifying needs

My investigation highlighted concerns about the way in which prisoners with a cognitive disability are screened and assessed in Victorian prisons, which inherently has a significant impact on how their needs are identified and supports are implemented.

Particular difficulties were noted in regard to the identification of prisoners with an ABI. The aforementioned 2011 Victorian study into ABI in prisons noted that:

> The very nature of brain injury presents challenges to the systematic identification of ABI in a correctional environment. No individual test can measure all aspects of brain functioning; hence no single measure has yet been found that will universally differentiate brain impaired from non-brain impaired individuals. Indeed diagnosis is often complicated by high levels of reported alcohol and substance use, particularly among offender populations.

In Victoria at present, prisoners are not routinely screened for an ABI at reception. As a result, the responsibility for identifying a prison can fall to a number of different staff members, not just specialists. Staff are required to refer prisoners for a screening where they 'suspect' a cognitive impairment based on a prisoner's behaviour or interactions, or where a prisoner discloses that they have an ABI.

In my report I noted that historically, correctional agencies have not identified ABI as an issue of specific concern and there has been limited understanding of its prevalence or impact in the correctional system[6]. Witnesses told my investigation that the identification of a prisoner's ABI or intellectual disability at the earliest stage possible is crucial to understand how to address communication, placement, treatment and support needs. They commented however that identification and assessment presents particular challenges, especially with ABI.

While Corrections Victoria has developed a cognitive screening tool for prisoners who appeared to be cognitively impaired, the evidence provided to my investigation indicated that there was a lack of consistency in how prisoners with a possible cognitive impairment or disability were identified in the prison system. The VCASP report mentioned earlier in this submission noted that the high

[6] Department of Justice, *Acquired Brain Injury in the Victorian Prison System*. Corrections Victoria Research Paper Series, Paper No. 04, April 2011.

number of prisoners with an ABI had made detection, assessment and referral to disability/assessment services an unlikely outcome for many[7].

I discussed in my report the significant implications of failing to identify and assess a prisoner's ABI or intellectual disability, which can effectively lead to a lack of adequate specialised support, mismanagement of behaviour and potentially to unreasonable punishment. Evidence provided to my investigation indicated that behaviour commonly associated with ABI could often be interpreted or labelled by prison staff as 'antagonistic', 'non-compliant' or 'difficult', and that the perception was often that 'this person's just a pain'. I noted that if a prisoner's ABI were identified, prison staff would have a better understanding of the reasons a prisoner was behaving in a particular way, and be able to identify better ways to communicate with them and deal with that behaviour, which would produce completely different outcomes.

Prison accommodation options
My investigation highlighted the very limited specialised placement options for prisoners with a cognitive disability in the Victorian prison system, noting that there is only one 35 bed unit available at Port Phillip Prison, one of the largest maximum security prisons in Victoria. I received evidence that due to the limited number of beds, it was only those prisoners who were extremely vulnerable and not coping in the mainstream prison population who were housed in the unit.

I concluded that the number of specialised beds available for prisoners with a cognitive disability was inadequate and noted that at the time of my report there were no plans to provide additional beds for this group. As such, I recommended that the Department of Justice and Regulation explore options for additional dedicated facilities similar to the unit currently in existence. The department supported my recommendation 'in principle'.

Transitional support
My report also highlighted the equal importance of the provision of post-release support to prisoners with a cognitive disability. The Coordinator of the only disability unit in the Victorian prison system described the support that this cohort needed in the community as 'really intensive' and said that many of these prisoners needed long term support and housing placements. They said that to prevent reoffending, they really needed what is provided in the prison disability unit once they are released. They said they see many prisoners reoffending and returning to the prison unit because it is 'the community where all their needs are met', whereas there is very little in the community to provide that same level of support.

[7] S. Brown, and G. Kelly, *Reducing Vulnerability to Harm in Adults With Cognitive Disabilities in the Australian Criminal Justice System.*

In a submission to my investigation the InterChurch Criminal Justice Taskforce also noted that while the gradual state-wide roll out of the National Disability Insurance Scheme (NDIS) will provide much needed services to people with significant and permanent disability, NDIS will not be available to prisoners. It suggested that formal protocols need to be formed with the National Disability Insurance Agency to establish a process for linking prisoners within the target group into the scheme and said:

> This will require processes for determining eligibility and assessment while in prison, and establishing packages of support to commence upon release. It is incumbent on the corrections system to ensure that these arrangements are made in a timely way[8].

Mental health treatment and support

Prevalence

Another focus area of my investigation was the treatment and support provided to prisoners with mental health issues, noting that the prison population has significantly higher rates of mental illness than the wider population[9]. In Victoria at the time of my investigation, 40 per cent of the prison population had a mental health condition[10] and 54 per cent had been identified as having a history of suicide attempts or self-harm[11]. The majority had been assessed as having a stable psychiatric condition, with only a relatively small number of prisoners deemed as having a serious condition requiring immediate or intensive care.

Prison accommodation options

My report noted that prisoners with mental health conditions often do not adapt well to prison and so appropriate placement within the prison system is important[12]. A submission to my investigation from the Human Rights Law Centre noted the potential for an unsuitable prison placement to cause further deterioration to a prisoner's condition:

> It is inappropriate that the mentally ill are often 'managed' by segregation, particularly given that such confinement – often for very long periods – can seriously exacerbate mental illness and cause significant psychological harm[13].

I commented that similarly, failure to properly treat a prisoner's mental health condition during their imprisonment can have adverse effects on their health and wellbeing and in turn, their rehabilitation and ability to effectively reintegrate into the community.

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8 InterChurch Criminal Justice Taskforce, *Submission to Ombudsman's Investigation into the rehabilitation and reintegration of prisoners in Victoria*, December 2014.
9 Victorian Auditor-General, *Mental Health Strategies for the Justice System*, October 2014.
10 Corrections Victoria response to Victorian Ombudsman enquiries, 24 April 2015.
11 Corrections Victoria, email response to Victorian Ombudsman enquiries, 1 June 2015.
12 J.Ogloff, *Good mental health care in prisons must begin and end in the community*, The Conversation, 24 April 2015.
13 Victorian Human Rights Law Centre, *Investigation into the rehabilitation and reintegration of prisoners, Submission to Victorian Ombudsman*, January 2015.

In the Victorian prison system, specialised mental health beds are available for prisoners with severe conditions requiring intensive treatment, however my investigation found that the number of beds across the system is limited. For male prisoners, there is one 16-bed Acute Assessment Unit at the Melbourne Assessment Prison and an additional 30-bed psychosocial unit at Port Phillip Prison. All prisoners assessed as having a serious psychiatric condition must be housed at the Melbourne Assessment Prison, and at the time of my investigation there were 86 male prisoners in the system with the highest psychiatric risk rating[14]. Due to the limited number of beds in the Acute Assessment Unit, the majority of them were living with mainstream prisoners.

My investigation also identified inadequacies in the number of beds available to prisoners requiring involuntary treatment, which can only be provided at the state's forensic hospital, Thomas Embling. This has resulted in significant wait times for seriously mentally unwell prisoners to be transferred from the Melbourne Assessment Prison to hospital for involuntary treatment. The CEO of Forensicare who manages Thomas Embling outlined to my investigation that the consequences of such delays included:

- increased safety risks associated with such wait times, both to the prisoner and others
- possible further deterioration of the prisoner's mental health
- challenges for prison staff in managing the behaviour of the prisoner, who may be refusing to take medication.

Transitional support

I highlighted in my report that if mental health care provided in prison was not continued post-release, an offender's mental health may deteriorate, undoing any improvements achieved while in prison, which then becomes an issue for the community[15]. The Victorian prison mental health care provider Forensicare however highlighted that linking a former prisoner to a community mental health service on release can be difficult particularly when they do not have a permanent address or housing, which is the case for an overwhelming number of prisoners. My investigation found that transitional support in Victoria for people with mental illness is severely limited and failing to meet demand.

My report commented on the benefits of a 'throughcare' approach to mental health treatment as highlighted by a number of agencies that provided evidence to my investigation. A submission from the Australia Institute outlined new research showing that mental health deteriorates in the year following release, stressing the importance of throughcare in addressing the mental health needs of prisoners:

[14] Corrections Victoria response to Victorian Ombudsman enquiries, 24 April 2015.
[15] D. Baker, The Australia Institute, *Unlocking care: Continuing mental health care for prisoners and their families*, December 2014.

> Providing continued care from prison into the community is known as 'throughcare'. The continuation of health services helps overcome some of the barriers people face re-connecting with services in the community and may contribute to a reversal of the decline in mental health following release[16].

Jesuit Social Services expressed similar views in its 2014 report *Strengthening prisoner transition to create a safer Victoria*[17]. This report recommended that the Victorian Government 'put in place processes to enable a seamless transition between health, disability, and alcohol and drug services in and out of custody', including working with the Commonwealth Government and community services to ensure access to services through Medicare and the NDIS.

In light of the issues identified by my investigation, I recommended that the Department of Justice and Regulation, in conjunction with the Department of Health and Human Services, investigate a 'throughcare' model from prison to community health services, to address the health needs, including mental health and disability, of prisoners being released into the community. The department supported my recommendation.

Alternatives to imprisonment

My investigation also examined a number of different initiatives and programs in the Victorian criminal justice system designed to reduce recidivism and imprisonment rates, including diversion programs. One initiative of relevance which I discussed in my report was the Assessment and Referral Court (ARC) List which commenced in 2010 at the Melbourne Magistrates' Court. The aim of the ARC List is to assist defendants on bail experiencing mental illness or cognitive impairment (including ABI), by addressing the underlying causes of their offending behaviour through facilitating access to treatment and support services.

The Department of Justice and Regulation advised my investigation that an internal independent evaluation of the ARC List showed a return on investment benefit of between $2 and $5 for every dollar, when compared to the costs of imprisonment. The most common outcome for those who successfully completed the program was a full discharge of their matter by the court, lowering the imprisonment rate for this cohort of vulnerable offenders.

I noted that despite evidence of the results such programs are achieving and their return on investment, the funding historically made available to them has been very limited compared to the spending in the corrections system more broadly. As a result I recommended that the Department of Justice and Regulation and Court Services Victoria seek further investment to expand the current court-based interventions, such as the ARC List.

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[16] D. Baker, The Australia Institute, *Unlocking care: Continuing mental health care for prisoners and their families*, December 2014.

[17] Jesuit Social Services, *Strengthening prisoner transition to create a safer Victoria*, June 2014.

I hope this submission is of assistance to the inquiry. Please see the attached report for further details of my investigation, and if you have any queries, please do not hesitate to contact Ms Dana Lee, Senior Investigation Officer

Yours sincerely

Deborah Glass
Ombudsman