



People in Corrections and the National Disability Insurance Scheme (NDIS)

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CONTENTS

1.	The Public Advocate	3
2.	The Disability Advocate	3
3.	Introduction	4
4.	Meetings.....	5
5.	The Royal Commission into Violence Abuse Neglect and Exploitation of People with Disability (The Royal Commission).....	5
6.	Issues.....	6
6.1.	Data/ information on people with disability in prison	6
6.2.	Training for staff in disability	7
6.3.	Access to NDIS supports in prison.....	9
6.4.	Barriers to accessing NDIS in Prison.....	10
6.5.	Prisoners detained indefinitely.....	11
6.6.	Criminogenic needs vs disability-related needs	11
6.7.	Coordination and planning for release	12
6.8.	Expertise of Support Coordinators	13
6.9.	NDIS related guidelines	13
7.	Positive steps	14
7.1.	Justice Liaison Officer (JLO).....	14
7.2.	Department for Correctional Services NDIS – Offender Services Team.....	15
7.3.	Offender and Prisoner with Disability Early Identification Project (OPDEIP).....	15
7.4.	National Disability Data Asset	15
7.5.	Queensland Corrective Services – Service Delivery Reform project.....	16
8.	Discussion	17
9.	Recommendations	18
10.	Glossary.....	19
11.	References.....	20

1. The Public Advocate

The Public Advocate promotes the rights and interests of people with impaired decision-making capacity. The Public Advocate is supported by the Office of the Public Advocate (OPA) to provide guardianship, investigation, advocacy, dispute resolution, and information to support people who need assistance with decision making.

The Public Advocate is a statutory officer who advocates for and on behalf of people with impaired decision-making capacity and their families, carers, and supporters. In particular, the Public Advocate administers South Australian laws that relate to guardianship for adults who are unable to make decisions for themselves, who are at risk of abuse or neglect and may require assistance with decision making.

The OPA's Dispute Resolution Service can provide preliminary assistance and mediation if a person has made an Advance Care Directive (ACD), if there is a dispute about consent to medical treatment, and if there is a disagreement about decisions or decision-makers.

The Public Advocate can be appointed by the South Australian Civil and Administrative Tribunal (SACAT) as a guardian of last resort if a person has impaired decision-making capacity, there is a lifestyle, accommodation, and/or health decision to be made and there is no other appropriate person to be appointed.

What this means in practice is that the Public Advocate will only be appointed if there is no one else in a person's life able or willing to make necessary decisions, or if there is family conflict meaning that agreement on decisions is difficult or not possible. Consequently, the Public Advocate often must make decisions for people who have complex needs or experience complex situations and who may be without support networks.

2. The Disability Advocate

The Disability Advocate is a position located within the Office of the Public Advocate (OPA) and was established in November 2018. The purpose of the role of the Disability Advocate is to "ensure that South Australians with a disability and their families are getting a good deal from the National Disability Insurance Scheme (NDIS)."

Throughout 2019 the Disability Advocate attended over 150 meetings with people with disability, families, advocates, and carers to speak with people about their experiences with the NDIS - what was working well and areas for improvement. Regular reports were presented to Ministers and senior State and NDIA officers.

The role has since been extended with funding until 2023. COVID-19 and other work (such as the Safeguarding Taskforce) made it difficult to undertake face to face meetings in 2020. However, the Disability Advocate managed to conduct over 270 virtual meetings with external stakeholders during the year. Meetings recommenced in 2021 and regular reports were prepared for the NDIA and State ministers. All reports are available on the OPA website at opa.sa.gov.au.

3. Introduction

This report highlights the unique challenges relating to accessing and securing appropriate supports through the NDIS for adults with disability in correctional facilities.

The Disability Advocate addressed the challenges faced by young people with disability in the youth justice system in a separate report, entitled *Children and Young People and the NDIS Report (June 2021)*.¹

As noted by the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (The Royal Commission), people with disability, including First Nations people and young people, are overrepresented in the criminal justice system throughout Australia and are at higher risk of violence, abuse, neglect and exploitation within that system.²

People with disability are disadvantaged across all aspects of the justice system as victims, convicted persons, defendants, and witnesses.

The *National Disability Strategy 2010 – 2020* (NDS), *Priority 2: Rights, Protection, Justice and Legislation* recognised the need for people with disability to have effective access to justice on an equal basis.³ In response to the NDS, South Australia was the first state to develop a plan aimed at making the criminal justice system more accessible and responsive to the needs of people with disability. The Disability Justice Plan 2014-2017⁴ included a range of legislative reforms intended to protect and promote the rights and safety of people with disability.

Australia's Disability Strategy 2021-2031 (ADS), which succeeds the NDS, continues to reflect this priority under *Outcome Area: Safety, Rights and Justice*, in particular under:

- Policy Priority 5: People with disability have equal access to justice
- Policy Priority 6: The criminal justice system responds effectively to the complex needs and vulnerabilities of people with disability.⁵

Reducing the over-representation of people with disability across the criminal justice system, as well as other forms of detention, requires appropriate strategies, including adoption of court diversionary approaches and transition to community support.⁶

The focus of this report examines only one portion of the criminal justice system, namely the interplay between Corrections and the NDIS. It is important to note that other aspects of the criminal justice system also present enormous challenges for people with disability, including:

¹ Children and the NDIS Report, Disability Advocate (June 2021)

http://www.opa.sa.gov.au/what_we_do/disability_advocate

² Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability, - Overview of responses to the Criminal Justice System Issues Paper (December 2020)

<https://disability.royalcommission.gov.au/system/files/2020-07/Issues-paper-Criminal-justice-system.pdf>

³ National Disability Strategy 2010-2020

https://www.dss.gov.au/sites/default/files/documents/05_2012/national_disability_strategy_2010_2020.pdf

⁴ Disability Justice Plan, Attorney-General's Department South Australia

<https://www.childabuseroyalcommission.gov.au/sites/default/files/WEB.0121.001.0184.pdf>

⁵ Australia's Disability Strategy 2021-2031 <https://www.disabilitygateway.gov.au/document/3106>

⁶ *Ibid.*

- The criminalisation of disability where behaviours that may be related to a person's disability are wrongly interpreted as difficult or defiant, leading to increased interactions with the criminal justice system.
- Lack of appropriate responses from a range of areas of the justice system.
- Fitness to plead.
- Lack of access to culturally appropriate support in the justice system.
- Better access to diversionary programs e.g. the Magistrates Court Diversion Program (available in regional areas of SA) and the Treatment Intervention Court.
- The underuse of *Doli Incapax* for young people in the youth justice system. This is a common law doctrine that children between 10 and 14 years are presumed not yet to have the capacity to know right from wrong so cannot form an intention to carry out a criminal act. This is however rebuttable by evidence to the contrary.
- The age of criminal responsibility in Australia. In South Australia it is currently 10 years of age.
- Indefinite (and sometimes arbitrary use of) detention particularly in relation to people with cognitive impairment.
- The disproportionate and inappropriate use of seclusion/ isolation for people with disability.

These are all significant issues for people with disability in the criminal justice system that are bigger than the NDIS and as such, are not discussed in great detail in this report.

4. Meetings

In preparing this report, we would like to acknowledge the numerous meetings the Disability Advocate has attended over the years with both the Department of Correctional Services (DCS) and Offender Aid and Rehabilitation Services (OARS). Their valuable insights, experience and knowledge have assisted us greatly in preparing this report.

5. The Royal Commission into Violence Abuse Neglect and Exploitation of People with Disability (The Royal Commission)

The Royal Commission held two public hearings in 2021 and one public hearing in 2022, which are relevant to this report.

These are:

- Public Hearing 11: The experiences of people with cognitive disability in the criminal justice system;⁷
- Public Hearing 15: People with cognitive disability and the criminal justice system: NDIS interface;⁸ and
- Public Hearing 27: Conditions in detention in the criminal justice system.⁹

⁷ The Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability, Public Hearing 11: The experiences of people with cognitive disability in the criminal justice system <https://disability.royalcommission.gov.au/public-hearings/public-hearing-11>

⁸ The Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability, Public Hearing 15: People with cognitive disability and the criminal justice system: NDIS interface <https://disability.royalcommission.gov.au/public-hearings/public-hearing-15>

⁹ The Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability, Public Hearing 27: Conditions in detention in the criminal justice system [Public hearing 27: Conditions in detention in the criminal justice system | Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability](#)

Hearing 11 ran from 16 February to 25 February 2021 and Hearing 15 from 12 August to 13 August 2021. Both hearings were held in Brisbane. Hearing 27 was held at the end of September 2022 in Perth.

Information from these hearings has also been considered and referenced in the writing of this report.

6. Issues

The following issues are of concern or create barriers in accessing the NDIS for South Australians with disability in correctional facilities.

6.1. Data/ information on people with disability in prison

In South Australia there are currently nine prisons, including the Adelaide Remand Centre which are overseen by the Department for Correctional Services (DCS). These prisons had a total prisoner population of 2854 in 2019-2020.¹⁰ The exact number of prisoners with disability is difficult to determine as it is not reported in DCS's Annual Report. This is not just a South Australian problem but also one observed nationally across both adult corrections and youth justice settings. The Royal Commission also heard that, while available data demonstrates the overrepresentation of people with disability in the corrections system, there is no nationally consistent data. This gap presents difficulties when developing effective strategies.¹¹

Some contributing factors to the lack of data in South Australia include that DCS clinicians do not have the capacity to screen every person upon admission to prison for disability and have very limited access to key clinical assessments and files such as SA Health information systems. DCS clinicians rely on people with disability entering custody to self-disclose or for other agencies to provide key information.

Assessments undertaken by DCS upon entry to a prison are focused on the criminogenic factors rather than screening for disability. DCS have worked hard to broker in a number of private providers to undertake disability related assessments. However, the diversity of the prison locations makes it challenging to find suitable assessors. In response to the success of the NDIS Offender Services program, DCS has invested in a dedicated team of allied health clinicians (3 Occupational Therapists and 1 Psychologist), in addition to the Principal Advisor, Offender Services (social worker). As at 29 August 2022, DCS Offender Services has successfully referred 477 prisoners to the NDIS and has a waitlist of 90 referrals (see section 6.2 for more information).

Given the lack of consistent and widespread screening upon admission, there is a reliance on self-reporting of disability by the individual when they enter prison.¹² This is problematic for a number of reasons. Some prisoners with cognitive disability may not know that they have a disability, may not identify as having a disability or have never engaged with services or supports relating to disability (including the NDIS). Anecdotally, the Disability Advocate

¹⁰ South Australia State budget papers, 2021-2022 Agency Statement

<https://www.statebudget.sa.gov.au/budget-papers/2021-22-Agency-Statement-Volume-1.pdf>

¹¹ Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability, - Overview of responses to the Criminal Justice System Issues Paper (December 2020).

¹² Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability, Transcript Day 3: [Transcript Day 3: Transcript Day 3 - Public hearing 27, Perth \(royalcommission.gov.au\)](https://www.royalcommission.gov.au/transcript/day-3-public-hearing-27-perth)

has heard that there is also potentially a fear of repercussions from other prisoners or correctional staff if they disclose that they have a disability.

The Disability Advocate heard that, at times, a prisoner will overestimate their own ability/capacity when in fact they have an appointed guardian or financial administrator. This, in itself, causes additional challenges, as DCS are not aware of these appointments and as a result, the OPA and Public Trustee (PT) may not be involved in planning for a release from prison which disadvantages the prisoner. Work is currently underway between DCS, OPA and PT to ensure that all agencies are notified when a person enters and leaves prison and is under formal guardianship or administration orders.

As highlighted through the Royal Commission, disability awareness and the systemic, reliable identification of disability remains critical in promoting diversionary options for people with disability away from the criminal justice system.¹³ The Disability Advocate has also heard that there is a correlation between prisoners being NDIS participants and a decrease in recidivism. DCS is undertaking a study of this issue. This is important in terms of contributing to the evidence-base on the intersection between disability and corrections, which is currently limited.

Recommendation 1: That the Department for Correctional Services expand their disability screening program to all prisoners on admission.

The South Australian Department of Human Services (DHS) has progressed the signing of the Memorandum of Understanding between the National Disability Insurance Agency and South Australian State Government Agencies. Under this head MOU state government agencies such as DCS can negotiate a schedule for information exchange. This schedule could enable the DCS to identify whether people entering prison are known to and or have a current NDIS plan. Knowing that a person is known to or has a NDIS plan will identify that the person has a significant and permanent disability.

Recommendation 2: That the Department for Corrections develop their schedule under the Memorandum of Understanding between the National Disability Insurance Agency and the South Australian Government.

This would allow for information exchange on clients in common between the NDIA and DCS.

6.2. Training for staff in disability

The minimum qualification requirements for staff working in South Australian prisons is a Certificate III in Correctional Practice (Adult Custodial) (CSC30120). After successfully being offered a position, new recruits commence a 14-week training course. This comprises an initial eight weeks of classroom-based training followed by a four-week period of in-service training within a prison environment. A further two weeks of classroom-based training will be

¹³ Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability, - Overview of responses to the Criminal Justice System Issues Paper (December 2020).

conducted prior to the end of the 12-month probationary period.¹⁴ It is noted that, in the final two weeks, staff undertake a module in Mental Health first aid. The course should include units of competence relating to disability, positive behaviour support, human rights or other skill sets to equip Correctional staff with the skills and knowledge needed to understand and work appropriately with prisoners with disability. It is noted that training in disability is provided in-house by the Offender Services team.

The need for increased disability awareness training in all areas of the criminal justice system was a recurring theme in almost all responses to The Royal Commission.¹⁵ This is because, among other things, a lack of disability awareness by staff can lead to prisoners with disability being disproportionately subject to punitive measures such as seclusion or solitary confinement.

The Royal Commission heard that prisoners with disabilities are more likely to be placed in solitary confinement in order to segregate them from the other prisoners. Solitary confinement is the isolation of a person in a cell for 22 hours or more a day without meaningful human contact. Solitary confinement has been shown to exacerbate existing mental health conditions and perhaps cause mental health problems in otherwise healthy individuals.¹⁶ Prolonged solitary confinement is solitary confinement for a period in excess of 15 consecutive days and is prohibited under the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules).¹⁷

The Royal Commission heard from 'Melanie' and her experience of seclusion over a period of approximately 8 years:

*Melanie' was subjected to **23-hour a day** seclusion over 'many, many years', the disability royal commission has heard. After being transferred to adult prison, Melanie was deemed incapable of pleading over the incident due to mental impairment. She left prison in 2011 and became an involuntary civil patient the following year.*

Listening to Melanie's statement at the Royal Commission was extremely saddening and a profound example of why we need to do better.

Another familiar example where lack of training and understanding impacts on outcomes for a person with disability relates to prisoners with auditory processing, communication or language deficits. People with speech and language needs require extra time to process information and respond to requests. They may also require information to be presented in alternative formats, such as visually or in plain English, or need the information repeated. Prison staff who have not had training in disability cannot be expected to understand these needs. As such, without appropriate training and awareness they may interpret this as non-compliance or may assume the prisoner understands something when in fact they may not. The person with disability may have responded appropriately if their needs were understood and staff had the tools to respond.

Lack of appropriate training and awareness of disability, as well as failure to adapt the prison environment and regime to accommodate the needs of prisoners with disability, can lead to

¹⁴ Department for Correctional Services, Become a Correctional Officer <https://www.corrections.sa.gov.au/careers/Working-with-prisoners-and-offenders/roles/applying-to-be-a-correctional-officer>

¹⁵ Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability, - Overview of responses to the Criminal Justice System Issues Paper (December 2020).

¹⁶ The Law Offices of Bemis, Roach and Reed, Prisoners with Disabilities – Discussion from a Social Security Disability Lawyer <https://www.brllaw.com/prisoners-with-disabilities/?nowprocket=1>

¹⁷ The United Nations Standard Minimum Rules for the Treatment of Prisoners [The United Nations Standard Minimum Rules for the Treatment of Prisoners \(unodc.org\)](https://www.unodc.org/documents/standard-minimum-rules-for-the-treatment-of-prisoners/)

other unintended and undesirable consequences. For example, people with disability can be forced to rely on peers to navigate the prison environment and for support with daily tasks.¹⁸ This reliance on the support of peers is problematic in that it can enhance power imbalances and create unnecessary dependencies.

Recommendation 3: That the Department for Correctional Services provide disability-specific training to prison staff, covering topics like disability types, human rights, positive behaviour support, etc.

6.3. Access to NDIS supports in prison

The Principles to Determine the Responsibilities of the NDIS and Other Service Systems expressed in the *Applied Principles and Tables of Support* (APTOS) have been agreed between all governments. APTOS represents the commitment to the vision of an inclusive Australian society that enables people with disability to fulfil their potential as equal citizens, in line with the intentions of the *National Disability Strategy 2011-2020* (NDS) and now *Australia's Disability Strategy 2021-2030* (ADS). Governments agreed to the APTOS in 2015 and this remains a guiding document to determine the interactions between the NDIS and other service systems. It is worth noting that the APTOS has not been reviewed since its inception. Table 10 in APTOS lists the Applied Principles relating to Justice. For people in a custodial setting (including remand) the only supports funded by the NDIS are those required due to the impact of the person's impairment/s on their functional capacity and are additional to reasonable adjustments, as stated in the APTOS:

- *NDIS supports for people subject to custodial sentences or other custodial orders (including people on remand) include:*
 - *Coordination of NDIS supports with the supports offered by the justice and other service systems;*
 - *Aids and equipment;*
 - *Allied health and other therapy directly related to a person's disability, including for people with disability who have complex challenging behaviours;*
 - *Disability specific capacity and skills building supports which relate to a person's ability to live in the community post-release;*
 - *Supports to enable people to successfully re-enter the community; and*
 - *Training for staff in custodial settings where this relates to an individual participant's needs.*
- *Where a person is remanded in custody, NDIS funding for reasonable and necessary supports in the participant's plan will continue to be available to the person where they are related to their disability.*¹⁹

The NDIS provides information on their website about *Who funds supports you need when you are in custody?*²⁰ This aligns with the APTOS, but the reality of providing these services

¹⁸ Doyle, C; Dodd, S; Dickinson, H; Yates, S; and Buick, F, 2022, 'There's not just a gap, there's a chasm': The boundaries between Australian disability services and prisons, Public Service Research Group, UNSW Canberra, p. 5.

¹⁹ Principles to Determine Responsibilities – NDIS and Other Service
https://www.dss.gov.au/sites/default/files/documents/09_2021/ndis-principles-determine-responsibilities-ndis-and-other-service-1.pdf

²⁰ NDIS Who Funds the support you need when you are in custody?
<https://ourguidelines.ndis.gov.au/how-ndis-supports-work-menu/justice-system/who-funds-supports-you-need-when-youre-custody>

to people with disability in prison is very different. A recent study into the boundaries between disability services and prisons in Australia found that there is a significant lack of clarity in terms of what the NDIS does and does not fund when a person with disability is in prison. In the complex authorising environment of a prison, NDIS service delivery is often only possible when advocates and staff are particularly persistent or when multiple factors align to facilitate a particular outcome. This study found that some clients in custody get a 'great service' while other receive nothing, creating clear inconsistencies and inequities.²¹

Recommendation 4: That the South Australian Government lobbies the Disability Reform Ministers meeting to review the Applied Principles and Tables of Support (APTOS) to provide further clarification on what the NDIA will fund for prisoners with disability when incarcerated.

Recommendation 5: That the Department for Correctional Services utilises the APTOS to ensure that prisoners eligible for the NDIS have in their plan all of the services to which they are entitled and that those services are provided.

6.4. Barriers to accessing NDIS in Prison

More broadly, lack of funding for diagnosis and functional assessment is a barrier for some South Australians in accessing the NDIS. Funding for assessments can be requested in a participant's NDIS Plan but only if they are already an NDIS participant.

In 2021 the NDIA looked to introduce Independent Assessments. This followed recommendations in the *Review of the National Disability Insurance Scheme Act 2013 Report* (December 2019) by David Tune OA PSM. In his report, Tune discussed the successful trial of independent assessments in several regions in New South Wales in 2018. He recommended a review of the *NDIS Act 2013* to legislate the new model for independent capacity assessments, with the view to provide consistent assessment of all NDIS participants and ensure equitable access to the scheme.²² Assessments under this program would have been funded by the NDIA. However, in late 2021 the Commonwealth Government ruled out the concept of independent assessments for now, following feedback from public consultation.²³ It appeared that the concept had been poorly marketed to Australians with disability and their supporters who saw independent assessments as a way for the NDIA to reduce costs and recoup some of the NDIS budget blow-out.

For people with disability in prison, the physical security of a prison makes undertaking even the most basic steps in determining eligibility for the NDIS a significant challenge.

Assessments are usually undertaken by occupational therapists and psychologists. DCS has limited resources in relation to therapists and much of their time and focus is taken up

²¹ Doyle, C; Dodd, S; Dickinson, H; Yates, S; and Buick, F, 2022, 'There's not just a gap, there's a chasm': The boundaries between Australian disability services and prisons, p. 19.

²² The Review of the National Disability Insurance Scheme Act 2019, Removing Red Tape and Implementing the Participant Service Guarantee, David Tune OA PSM December 2019 https://www.dss.gov.au/sites/default/files/documents/01_2020/ndis-act-review-final-accessibility-and-prepared-publishing1.pdf

²³ NDIS: Access and Eligibility Policy with Independent Assessments <https://www.ndis.gov.au/community/we-listened/you-said-we-heard-post-consultation-reports/access-and-eligibility-policy-independent-assessments>

preparing reports for the courts. These reports are not related to assessing a person's functional capacity as required by the NDIA. However, the dedicated team of three Occupational Therapists and one Psychologist in the Offender Services team are now undertaking assessments for eligibility.

This leads to another challenge for people needing an assessment to meet NDIS access requirements in a prison environment. One could seek to bring a therapist into the prison to provide services or assessments to an eligible prisoner, but there are a range of security and operational requirements that can create challenges and barriers to facilitating access.

It has also been reported that there is a hesitancy amongst some professionals about providing services in correctional facilities. Also, market thinness especially in some regional areas makes it difficult to find suitable and skilled professionals willing to work in the prison environment.

Even when a suitable and skilled professional is engaged, the ability to assess a prisoner's functional capacity is significantly impacted in the prison environment. For example, prisoners do not have access to kitchens and other areas of the prison which may vaguely resemble a home environment. As a result, a prisoner's skills and functional capacity cannot be accurately tested until after release. This issue alone highlights the importance of a step-down approach within a NDIS plan when a prisoner is released. In the case of prisoners who have been incarcerated for a number of years there is a likelihood of de-skilling within the prison environment requiring them to relearn skills once released.

6.5. Prisoners detained indefinitely

There are a number of prisoners with disability who are currently detained indefinitely under Section 57 of the *Sentencing Act 2017*. These are prisoners who are deemed unwilling or unable to control their sexual impulses. The concern is that many of these prisoners have disability, and the NDIA is unwilling to fund any supports/ services for them.

Recommendation 6: The State Government lobbies the NDIA to work more closely with DCS to address the needs of prisoners detained under Section 57 of the *Sentencing Act 2017*, including training for correctional staff.

6.6. Criminogenic needs vs disability-related needs

The Disability Advocate has heard that one of the challenges in advocating for a NDIS plan for people exiting prison and youth justice is that it is difficult to differentiate between the disability-related and criminogenic needs. This issue was discussed at length at the Royal Commission Public Hearing 15 over both day one and two. Mr Michael Coutts-Trotter, Secretary New South Wales Department of Communities and Justice in his statement summed the issue up well:

The fundamental cause of confusion between roles and responsibilities arises from the attempt to differentiate the supports a person might need as a result of their disability from the supports they may need to manage their risk of offending or re-offending - so-called criminogenic need. The NDIA takes responsibility for the former and State agencies take responsibility for the latter, but the problem is that they are very, very difficult to distinguish and the impact of either disability or risk of re-offending changes over time. So, unless we are able to better clarify how we respond in a coordinated fashion between services funded by the National Disability

Insurance Agency and State services, we're going to continue to see a less-than-adequate response for some people with disability.²⁴

Despite these discussions, the only outcome was the confirmation of the complexity of this area and the need for further work. Supports for people with disabilities who have challenging behaviours, including implementing positive behaviour support plans, inevitably address both disability and criminogenic needs.

Recommendation 7: That the NDIA commit to funding supports for prisoners who are NDIS participants in circumstances where the line between criminogenic and disability related behaviour cannot be defined.

6.7. Coordination and planning for release

There are significant challenges when planning for release of a prisoner with disability.

The NDIA will undertake planning with a participant in prison for up to 6 weeks prior to released. Some parts of DCS have been able to obtain funding up to 12 weeks in advance, but this is not common and hard to achieve. For prisoners who have been incarcerated for an extended period, this funding needs to be in place at least 3-6 months pre-release to prepare them for life outside of prison.

Recommendation 8: That the South Australian Government lobbies the NDIA to commence planning with long term prisoners 6 months in advance of release.

Once a release plan is in place, people with disability exiting prison face challenges in exercising their choice and control and navigating the market. Access to information is a fundamental characteristic of a functioning marketplace so that consumers can make informed decisions. Prisoners are not able to access the internet which limits their ability to make an informed choice around selecting a support coordination and service agency. For many prisoners, even with access to the internet, there may be significant challenges associated with effectively navigating the internet for a range of reasons, including cognitive disability or de-skilling over the period of incarceration. Therefore, prisoners are reliant on information that is provided to them, usually by the prison social worker or a Specialist Support Coordinator (SSC) where the person is already and NDIS participant and this is funded in their plan.

The timing of court appearances and approval of plans is misaligned and can be problematic. For example, a court may not approve a release if there is no address to be bailed/licensed to, yet the prisoner needs an NDIS Plan with a support coordinator to assist them in securing housing. The other side of this dilemma is that the NDIA will not commence planning until a release date has been identified. It is a chicken and egg scenario, which may result in a prisoner remaining incarcerated for longer than they would have otherwise due to not having anywhere to go. This is a concern as it is a violation of their human rights. There

²⁴ Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability, Transcript Day 2
https://disability.royalcommission.gov.au/system/files/2021-08/Transcript%20Day%20%20-%20Public%20hearing%2015%2C%20Brisbane_0.pdf

needs to be some flexibility or responsiveness from the NDIS to plan development for pre-release prisoners. The recent UNSW study mentioned earlier also found significant delays in reinstating NDIS packaged following a person's release was common, leaving them without support during the critical period immediately following their re-integration into the community.²⁵

To add to this challenge, prisoners face significant barriers in finding suitable housing for a range of reasons, including lack of evidence of income, bail/license conditions requiring them to not live in certain locations, and no employment history. This, coupled with the currently tight rental market and a shortage of affordable housing means that some prisoners are released into Short-Term Accommodation (STA) or Medium-Term Accommodation (MTA) funded by the NDIS which is a temporary arrangement. It is also noted that securing suitable housing in the current environment is a challenge for all prisoners leaving custody.

STA and MTA can have benefits in being able to undertake assessments and skill development while living there, which can assist in refining the NDIS Plan but it is not ideal as it is only a short term option.

Housing is a key component of a safe and effective release from prison. Lack of appropriate housing options can impact on recidivism and safety for both the prisoner and the community.

Recommendation 9: That the NDIA consider funding MTA for people exiting correctional facilities to allow for further assessment of skills and refinement of the NDIS plan to identify ongoing support needs.

The Disability Advocate heard that there is a hesitancy of South Australian Housing Authority (SAHA) staff about entering prisons to undertake the required processes to secure housing through SAHA. OARS have offered to assist with this process but to date this has not occurred.

6.8. Expertise of Support Coordinators

People involved with corrections generally have a range of service systems in their lives and may be subject to court orders and bail/ license conditions that they need to meet. Even the most experienced SSC or Support Coordinator (SC) encounters difficulties with the complexity of the multiple service systems. The skills of the SC to navigate these systems to see outcomes for the person with disability are sorely tested. The best SSC and SC to assist clients in this system have often had years of experience in working across multiple service systems.

Recommendation 10: That the NDIA work to build the capacity of SSCs by providing specialist training in the areas of justice, trauma/mental health and with people from Aboriginal and Torres Strait Islander background.

6.9. NDIS related guidelines

There are a range of NDIS related rules, standards, procedures and guidelines aside from the *NDIS Act 2013*. These are constantly being updated and it was noted at the Royal Commission that even the Justice Operational Guideline was updated between Hearing 11

²⁵ Doyle, C; Dodd, S; Dickinson, H; Yates, S; and Buick, F, 2022, 'There's not just a gap, there's a chasm': The boundaries between Australian disability services and prisons, p. 10.

and 15 of the Royal Commission. Some of the documents referred to in the Royal Commission are listed below:

- Justice Operational Guideline (2 June 2021)²⁶
- Reasonable and Necessary Supports Operational Guideline (1 April 2021)²⁷
- Standard Practice NDIS Planning – Release from custody
- Standard Operating Procedure – Referral for Complex Support Needs
- The NDIS Justice system guideline (June 2021)²⁸

For a prisoner who does not have access to the internet and such a range of documents for consideration, navigating the requirements of the NDIS to secure an NDIS plan upon release is an unsurmountable challenge.

The NDIA needs to provide clear information in a range of formats, which include easy read Easy English, and culturally appropriate formats (including in Aboriginal languages). This may also include the NDIA providing this information verbally to prisoners.

Recommendation 11: That the NDIA provide information about the NDIS for people in prison in an accessible format and provide assistance to navigate the system.

7. Positive steps

There is room for optimism with the justice system. The Disability Royal Commission has highlighted in its two hearings that all human services sectors, both state and Commonwealth can do better for people with disability in the justice space.

The following points are some examples of work currently underway that will hopefully make a difference to people with disability in prisons.

7.1. Justice Liaison Officer (JLO)

The role of the Justice Liaison Officer was announced at the Disability Reform Council meeting on 28 June 2018. The introduction of Justice Liaison Officers (JLOs) by the NDIA was to work across state and territory justice systems. Their role is to provide a single point of contact for workers within state and territory justice systems to coordinate support for NDIS participants in youth and adult justice systems.²⁹

Shortly after this announcement, the first JLO commenced in South Australia. There are currently two JLOs in South Australia who cover all 9 prisons and the one youth justice facility.

²⁶ NDIS Justice System Guideline (July 2021) <https://ourguidelines.ndis.gov.au/how-ndis-supports-work-menu/justice-system>

²⁷ NDIS Reasonable and Necessary Supports Operational Guideline (April 2021) <https://ourguidelines.ndis.gov.au/how-ndis-supports-work-menu/reasonable-and-necessary-supports>

²⁸ NDIS Justice System Guideline (July 2021) <https://ourguidelines.ndis.gov.au/how-ndis-supports-work-menu/justice-system>

²⁹ Disability Reform Council Update <https://www.ndis.gov.au/news/3781-disability-reform-council-update#:~:text=The%20introduction%20of%20Justice%20Liaison%20Officers%20%28JLOs%29%20by,NDIS%20participants%20in%20youth%20and%20adult%20justice%20systems>

The introduction of the Justice Liaison Officer is positive for both the Youth Justice and adult corrections areas. DCS has used the JLO to provide capacity building for all social workers and psychologists in DCS.

For the OPA, the JLO has been an invaluable connection to facilitate release for a number of OPA clients and an additional avenue to escalate matters for OPA clients in corrections with the NDIA.

Although this is yet another person in the cast of players that the Disability Advocate identified in his Annual Report (2020),³⁰ at least it is not an outward facing role and another person a participant needs to deal with directly in relation to the NDIS.

7.2. Department for Correctional Services NDIS – Offender Services Team

The DCS in South Australia has been successful in arguing for the cost effectiveness/savings to be made in identifying people with disability in the prison system and ensuring they access the NDIS. This has resulted in the DCS recruiting four Allied health professionals to undertake functional capacity and cognitive assessments and assist prisoners with disability to access the NDIS through referral. In addition, this team assists with broader referrals to key agencies such as the South Australian Civil and Administrative Tribunal, and plays a key role in discharge planning. It is hoped that this initiative can be up-scaled to see more prisoners secure sufficient funding to support their disability-related needs and reduce the rate of recidivism in this cohort.

7.3. Offender and Prisoner with Disability Early Identification Project (OPDEIP)

The South Australian Office of Data Analytics (ODA) was commissioned by the Legislative Review Cabinet Committee in April 2020 to undertake a data project. The project intends to better identify disability in prisoner and offender cohorts.

The project builds on previous work in the Vulnerable Children's project in which data was linked from five agencies which enabled near real time, seamless and effective sharing of data to improve service planning and delivery for vulnerable South Australian children and their families.

The prisoner project intends to deliver three products:

- a profile of offenders and prisoners with disability by cohort
- types of disability and approximate numbers of offenders and prisoners eligible for the NDIS support upon release
- a linked data set of offenders and prison.

ODA is in the process of finalising a report outlining the findings and recommendations of this project.

7.4. National Disability Data Asset

Although in the pilot phase, the National Disability Data Asset (NDDA) shows promise on a national level for better disability data across a range of sectors to inform government policy.

³⁰ Disability Advocate Annual Report (2020)
[http://www.opa.sa.gov.au/what we do/disability advocate](http://www.opa.sa.gov.au/what_we_do/disability_advocate)

Through the NDDA pilot, governments are testing how to best link data to understand outcomes for people with disability – while protecting people’s privacy.

One test case (jointly led by New South Wales Government and the Commonwealth Department of Social Services) relates to people with disability’s experience and interaction with the justice system. The test case aims to better understand the characteristics of people with disability who interact with the criminal justice system, both as offenders and victims.

By having a deeper understanding of the extent to which people with disability interact with the justice system, and the impact of services and supports on their outcomes, governments will be able to plan for better support services.³¹

7.5. Queensland Corrective Services – Service Delivery Reform project

Although not a South Australian initiative, it is worth talking about the Service Delivery Reform project in Queensland. In 2018 -2019, Queensland Corrective Services (QCS) was allocated \$2.86 million to improve service delivery for people with disability and mental illness in contact with the corrective services system. QCS used this funding to implement the Service Delivery Reform project, which focused on improving QCS processes to better support prisoners and offenders to access the NDIS.

Key activities included:

- **Supporting** people to access the NDIS by identifying potentially eligible prisoners and establishing a central team to provide additional assistance to submit access requests;
- **Researching** the prevalence of disability among the Queensland prison population to establish an evidence base to inform future policy development, including investigating screening and assessment tools to help identify prisoners with disability and mental illness; and
- **Implementing** refreshed business processes, communications and governance to improve disability awareness and understanding and develop robust monitoring and oversight mechanisms to proactively manage the transition to the NDIS.

Outcomes from the project included:

- Over 1,100 prisoners had been identified as potentially eligible for the NDIS during the lifespan of the Service Delivery Reform Project;
- Over 360 prisoners were being supported by QCS to gather evidence of their disability and complete their NDIS access requests;
- 74 assessments had been commissioned to help prisoners provide evidence of their disability;
- 157 prisoners had been determined eligible for the NDIS; and 62 prisoners reported as having an NDIS plan.³²

Other Jurisdictions also have initiative regarding prisoners with disabilities (See attachment).

³¹ The National Disability Data Asset <https://ndda.gov.au/about/the-ndda/>

³² NDIS in Queensland Rollout Report 2018-2019

<https://www.dsdsatsip.qld.gov.au/resources/dsdsatsip/disability/ndis/qld-ndis-rollout-booklet.docx>

8. Discussion

People with disability in prison are the under-represented and unseen people in society. In South Australia there has been no external oversight into our 9 prisons. However, the Official Visitor Scheme has recently commenced. Australia is a signatory to the Optional Protocol to the Convention Against Torture (OPCAT)³³ and has committed to a National Preventative Mechanism (NPM) which is yet to be implemented. This will allow independent observers into primary places of detention (including prisons).

People with disability are some of our most vulnerable citizens, in a system that criminalises behaviours arising from a disability, when a more appropriate response is support, diversion and intervention. Evidence was presented at the Royal Commission by Professor Eileen Baldry and others about the cost-benefits of supporting people with disability rather than criminalising disability. Not only is it more cost-effective to provide appropriate supports but also people with disability see better life outcomes and opportunities.

As a state we need to do better and, although the NDIS is only one small part of this, working more collaboratively with the NDIS to see outcomes for people with disability in prisons is a start.

³³ Optional Protocol to the Convention Against Torture
<https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx>

9. Recommendations

Recommendation 1: That the Department for Correctional Services expand their disability screening program to all prisoners on admission.

Recommendation 2: That the Department for Corrections develop their schedule under the Memorandum of Understanding between the National Disability Insurance Scheme and South Australian State Government Agencies to allow for information exchange between the NDIA and DCS.

Recommendation 3: That the Department for Correctional Services provide disability-specific training to prison staff, covering topics like disability types, human rights, positive behaviour support, etc.

Recommendation 4: That the South Australian Government lobbies the Disability Reform Ministers meeting to review the Applied Principles and Tables of Support (APTOS) to provide further clarification on what the NDIA will fund for prisoners with disability when incarcerated.

Recommendation 5: That the Department for Correctional Services utilises the APTOS to ensure that prisoners eligible for the NDIS have in their plan all of the services to which they are entitled and that those services are provided.

Recommendation 6: The State Government lobbies the NDIA to work more closely with DCS to address the needs of prisoners detained under Section 57 of the *Sentencing Act 2017*, including training for correctional staff.

Recommendation 7: That the NDIA commit to funding supports for prisoners who are NDIS participants in circumstances where the line between criminogenic and disability related behaviour cannot be defined.

Recommendation 8: That the South Australian Government lobbies the NDIA to commence planning with long term prisoners 6 months in advance of release.

Recommendation 9: That the NDIA consider funding MTA for people exiting correctional facilities to allow for further assessment of skills and refinement of the NDIS plan to identify ongoing support needs.

Recommendation 10: That the NDIA work to build the capacity of SSCs by providing specialist training in the areas of justice, trauma/mental health and with people from Aboriginal and Torres Strait Islander background.

Recommendation 11: That the NDIA provide information about the NDIS for people in prison in an accessible format and provide assistance to navigate the system.

10. Glossary

ACRONYM	FULL TERM
APTOS	Applied Principles Tables of Service
ATSI	Aboriginal and Torres Strait Islander
CALD	Culturally and Linguistically Diverse
DAIP	Disability Access and Inclusion Plan
DCS	Department for Correctional Services
DSS	Department of Social Services
JLO	Justice Liaison Officer
LAC	Local Area Coordinator
MTA	Medium Term Accommodation
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
NDS	National Disability Strategy
NRM	National Referral Mechanism
ODA	Office of Data Analytics
OPA	Office of the Public Advocate
OPCAT	Optional Protocol to the Convention Against Torture
PITC	Partners in the Community
PT	Public Trustee
SACAT	South Australian Civil and Administrative Tribunal
SAHA	South Australian Housing Authority
STA	Short Term Accommodation
The Royal Commission	Royal Commission into Violence, Abuse, Neglect and Exploitation of people with Disability
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities

11. References

Australia's Disability Strategy 2021-2031

<https://www.disabilitygateway.gov.au/document/3106>

Children and the NDIS Report, Disability Advocate (June 2021)

http://www.opa.sa.gov.au/what_we_do/disability_advocate

Department for Correctional Services, Become a Correctional Officer

<https://www.corrections.sa.gov.au/careers/Working-with-prisoners-and-offenders/roles/applying-to-be-a-correctional-officer>

Disability Advocate Annual Report (2020)

http://www.opa.sa.gov.au/what_we_do/disability_advocate

Disability Justice Plan, Attorney-General's Department South Australia

<https://www.childabuseroyalcommission.gov.au/sites/default/files/WEB.0121.001.0184.pdf>

Disability Reform Council Update [https://www.ndis.gov.au/news/3781-disability-reform-council-](https://www.ndis.gov.au/news/3781-disability-reform-council-update#:~:text=The%20introduction%20of%20Justice%20Liaison%20Officers%20%28JLOs%29%20by,NDIS%20participants%20in%20youth%20and%20adult%20justice%20systems)

[update#:~:text=The%20introduction%20of%20Justice%20Liaison%20Officers%20%28JLOs%29%20by,NDIS%20participants%20in%20youth%20and%20adult%20justice%20systems](https://www.ndis.gov.au/news/3781-disability-reform-council-update#:~:text=The%20introduction%20of%20Justice%20Liaison%20Officers%20%28JLOs%29%20by,NDIS%20participants%20in%20youth%20and%20adult%20justice%20systems)

Disability Service Consulting – Prisons and the NDIS (November 2021)

https://teamdsc.com.au/resources/prisons-and-the-ndis?_kx=jVFQOrl4Z_uPKXstNJCLjqQSVSKmuyEOkKF-uQdXwWc%3D.X8eRsJ

Doyle, C; Dodd, S; Dickinson, H; Yates, S; and Buick, F, 2022, 'There's not just a gap, there's a chasm': The boundaries between Australian disability services and prisons, Public Service Research Group, UNSW Canberra.

The Law Offices of Bemis, Roach and Reed, Prisoners with Disabilities – Discussion from a

Social Security Disability Lawyer <https://www.brllaw.com/prisoners-with-disabilities/?nowprocket=1>

National Disability Data Asset <https://ndda.gov.au/about/the-ndda/>

National Disability Strategy 2010-2020

https://www.dss.gov.au/sites/default/files/documents/05_2012/national_disability_strategy_2010_2020.pdf

NDIS: Access and Eligibility Policy with Independent Assessments

<https://www.ndis.gov.au/community/we-listened/you-said-we-heard-post-consultation-reports/access-and-eligibility-policy-independent-assessments>

NDIS Justice System Guideline (July 2021) <https://ourguidelines.ndis.gov.au/how-ndis-supports-work-menu/justice-system>

NDIS in Queensland Rollout Report 2018-2019

<https://www.dsdsatsip.qld.gov.au/resources/dsdsatsip/disability/ndis/qld-ndis-rollout-booklet.docx>

NDIS Reasonable and Necessary Supports Operational Guideline (April 2021)

<https://ourguidelines.ndis.gov.au/how-ndis-supports-work-menu/reasonable-and-necessary-supports>

NDIS Who Funds the support you need when you are in custody?

<https://ourguidelines.ndis.gov.au/how-ndis-supports-work-menu/justice-system/who-funds-supports-you-need-when-youre-custody>

Optional Protocol to the Convention Against Torture

<https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx>

Principles to Determine Responsibilities – NDIS and Other Service

https://www.dss.gov.au/sites/default/files/documents/09_2021/ndis-principles-determine-responsibilities-ndis-and-other-service-1.pdf

Review of the National Disability Insurance Scheme Act 2019, Removing Red Tape and Implementing the Participant Service Guarantee, David Tune OA PSM December 2019

https://www.dss.gov.au/sites/default/files/documents/01_2020/ndis-act-review-final-accessibility-and-prepared-publishing1.pdf

Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability, - Overview of responses to the Criminal Justice System Issues Paper (December 2020)

<https://disability.royalcommission.gov.au/system/files/2020-07/Issues-paper-Criminal-justice-system.pdf>

Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability, Public Hearing 11: The experiences of people with cognitive disability in the criminal justice system <https://disability.royalcommission.gov.au/public-hearings/public-hearing-11>

Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability, Public Hearing 15: People with cognitive disability and the criminal justice system: NDIS interface <https://disability.royalcommission.gov.au/public-hearings/public-hearing-15>

Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability, Public Hearing 27: Conditions in detention in the criminal justice system [Public hearing 27: Conditions in detention in the criminal justice system | Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability](https://disability.royalcommission.gov.au/public-hearings/public-hearing-27)

Royal Commission into Violence Abuse, Neglect and Exploitation of People with Disability, Transcript Day 2

https://disability.royalcommission.gov.au/system/files/2021-08/Transcript%20Day%20%20-%20Public%20hearing%2015%2C%20Brisbane_0.pdf

South Australia State budget papers, 2021-2022 Agency Statement

<https://www.statebudget.sa.gov.au/budget-papers/2021-22-Agency-Statement-Volume-1.pdf>

The United Nations Standard Minimum Rules for the Treatment of Prisoners [The United Nations Standard Minimum Rules for the Treatment of Prisoners \(unodc.org\)](https://www.unodc.org/documents/prevention/SMR/SMR_english.pdf)