

The Community Restorative Centre

Alison Churchill

Mindy Sotiri

Simone Rowe

Access to the NDIS for people with cognitive disability and complex needs who are in contact with the criminal justice system: Key challenges

January 2017

Table of Contents

Executive Summary	3
Purpose	3
Target Group	3
Development of the paper	3
Summary of key challenges and concerns	4
Introduction	7
1. Disability versus non-disability behaviours: The need for holistic support	9
2. Choice and control: The need to reconsider 'capacity'	14
3. Risks to the community	17
4. Marketisation of services and 'cherry picking' commodified clients	18
5. The impact of incarceration and the critical importance of throughcare	21

Executive Summary

Purpose

To identify and provide evidence of the key challenges and concerns associated with current NDIS policy and practice for people with cognitive disability and complex needs who are involved with the criminal justice system.

Target Group

Research has established that the vast majority of people with cognitive disability who come into contact with the criminal justice system have 'complex support needs'. That is, they experience multiple and intense forms of disadvantage, including: psychosocial disability, mental illness, having more than one form of disability, homelessness, substance abuse, poverty, ill health and violence¹. Indigenous Australians are disproportionately represented in this group².

It is now well recognised that the complex needs of this group originate not from an individual, but rather from the systemic failure of services to appropriately support people with cognitive disability who experience intense social disadvantage³. Research has established that in the absence of appropriate service provision, these individuals are criminalised and cycle in and out of the criminal justice system more rapidly and more frequently compared to those without complex needs⁴. The economic and human costs to governments, communities, families and individuals associated with their entrenchment in the criminal justice system (for example, the costs associated with police, courts, prison and victimisation) are significantly greater than the financial cost of providing appropriate services to support them in the community⁵.

Development of the paper

In preparing this paper, the authors reviewed extensive documentation provided by practitioners at the Community Restorative Centre (CRC) who have been directly involved in assisting clients from the target group to transition to the NDIS. Key issues from these documents were identified and thematically organised. To ensure an accurate understanding of these issues, the author's conducted follow-up interviews with relevant practitioners. This report summarises the key challenges and concerns identified from this process.

¹ Baldry E & Dowse L (2013) 'Compounding mental and cognitive disability and disadvantage: Police as care managers', In D Chappell (ed), *Policing and the Mentally Ill: International Perspectives*, CRC Press.

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: UNSW.

³ Cunneen C, Baldry E, Brown D, Brown M, Schwartz M & Steel, A (2013) *Penal Culture and Hyperincarceration: The Revival of the Prison*, Surrey: Ashgate.

⁴ Baldry E, Dowse L & Clarence M (2012) *People with Intellectual and Other Cognitive Disability in the Criminal Justice System*, Sydney: UNSW.

⁵ McCausland R, Baldry E, Johnson S & Cohen A (2013) *People with mental health disorders and cognitive impairment in the criminal justice system: Cost-benefit analysis of early support and diversion*, Sydney: PricewaterhouseCoopers & UNSW.

Summary of key challenges and concerns

Disability versus non-disability behaviours: The need for holistic support

Since its inception the NDIA has adopted a position that ignores the multiple, compounding and inextricably connected complex support needs that arise from an individual's disability; an approach manifest most in its attempt to distinguish between disability and non-disability behaviours in order to identify and fund only disability-specific needs. For criminalised people with cognitive disability and complex needs, this over-simplified, siloed approach to funding and support is highly problematic.

There is no doubt that criminalised people with cognitive disability and complexity of need require support packages that work holistically. There are two well-documented reasons why this is so: 1) research in the field establishes that it is impossible to separate out and attribute causation to the multiple interlocking experiences and factors that span disability, intense social disadvantage and criminalisation; and 2) this population are frequently *excluded* from mainstream services; they are excluded as a consequence of both their disabilities and their offending behaviours.

The experience of CRC/CJP clients in the NDIS Hunter trial site demonstrates that the forced distinction between disability and non-disability behaviours under the NDIS means that clients with complex needs simply do *not* receive the specialised services they require. To introduce a system change as substantial as the NDIS that will in effect push people back into mainstream service and incarceration systems that are already failing to provide holistic support perpetuates the very lack of planning that has defined the criminal justice pathways, extreme disadvantage and marginalisation of this group for decades.

Choice and control: The need to reconsider 'capacity'

The founding principles of choice and control central to the NDIS premises a particular conception of the disability experience, which at its foundation excludes the majority of the target group. By assuming all individuals with disability have the capacity to make positive life choices, the schemes founding principles present significant concerns for this group.

CRCs extensive practice experience with the target group indicates that for the vast majority of criminalised people with cognitive disability and complex support needs, the extent of their disadvantage and marginalisation often means that they have never had the privilege of experiencing control over their own lives. Moreover, their *capacity* to make positive life choices is significantly impaired.

Many CRC/CJP clients are engaged in behaviours that place them at serious risk to themselves and others, including non-compliance with medication, extensive drug and alcohol misuse, impulsivity, aggression, and criminal activity. The very nature of their disabilities means that the vast majority of our clients do not recognise the negative outcomes of these behaviours. Our experience as a

service provider to this group shows that to *self identify* a need for support for these issues is highly unlikely.

Risks to the community

The NSW NDIS Quality and Safeguarding Transitional Working Arrangements and Provider Registration document is focused primarily on two key types of risk: the risk that people with a disability could receive poor quality supports; and the risk that people with a disability could be harmed in some way. These are clearly important parameters.

However as evidence provided in this paper clearly demonstrates, in the context of working with people with cognitive disability and criminalised behaviours, it is paramount that attention is also paid to a third area of risk, that is the risk to community safety.

Without urgent consideration of the current removal of funding from services qualified to address the range of complex issues relating to offending behaviour for the target group, the already disproportionality high incarceration rates for people with cognitive disability and complex needs will continue to escalate.

Marketisation of services and 'cherry-picking' commodified clients

The marketisation of services under the NDIS has resulted in a situation where appropriate service provision for the target group is financially unsustainable. In particular, the provision of 24-hour support for clients with highly complex needs is simply not possible using the individualised funding model of the NDIS.

People with complex needs frequently cycle in and out of custody, and services supporting populations with cognitive disability need to be able to support them through this process. If funding is to be withdrawn for individuals when they exit the service and enter a custodial environment often for short periods of time, the sustainability of 24-hour services becomes immediately compromised. As evidence in this paper highlights, people who require assistance most - truly complex and high risk clients cycling in and out of prison - will not be housed as the potential costs to services are too great.

The NDIS holds within it an assumption that the 'market' for social services will address social exclusion. As evidence in this paper indicates, this has resulted in a deeply concerning commodification of one of society's most vulnerable population groups.

The impact of incarceration & the critical importance of throughcare

For people with cognitive disability leaving prison, their disability is overshadowed by their criminal history. Access to traditional disability services is often not granted. Fear, stigma by services and complexity of need are barriers. Few mainstream services have adapted service

provision for people with cognitive disability. To suggest that this population can use self-determination to access services in the community like many other individuals is a fallacy.

People in the criminal justice system have long histories of being monitored and managed by government organisations and systems. Histories of abuse and trauma further exacerbate a person's ability to form relationships of trust. There is significant research identifying that up to 60% of change that occurs for an individual is a result of a trusting therapeutic relationship. The NDIS funding model relies heavily on the utilisation of a casualised workforce; a formula that is not conducive, and in fact works in opposition to maintaining long-term client worker relationships. In order to work effectively with complex needs populations, it is crucial to employ *skilled professional workers*.

Best practice in post-release support has for the last two decades consistently stressed the importance of through-care as a central feature in pre-release planning. Through-care is critical in preventing reoffending, as well as improving community integration and ultimately enhancing community safety. The current disconnect between the NDIS and the correctional settings that house large populations of people with cognitive disability and complex needs must be addressed, urgently. Governments have acknowledged that the NDIS interface with justice is complex. The COAG interface principles arguably suggest a much greater involvement by the NDIS for the provision of through-care for the target group.

Introduction

In Australia very few services in the community are equipped or want to deal with people with cognitive disabilities who have difficult behaviour, complex needs, and a history of criminalisation and incarceration.^{6 7} At the present time there remains a serious under-recognition of the need for special supports for people with cognitive disability and complex needs who are involved in the criminal justice system⁸. Furthermore, for a multiplicity of reasons explained in this paper, research indicates that criminalised people with complex needs are under represented in disability services, with Indigenous people having the lowest levels of service and support⁹.

As a leading provider of services to people affected by the criminal justice system in NSW, the Community Restorative Centre (CRC) is one of the few organisations in Australia with an extensive history of working alongside the target group. Since the establishment of the Community Justice Program (CJP) in 2006, CRC has been able to expand its work with the target group by working closely with CJP to provide a range of disability-specific services for people with cognitive disabilities and criminal justice system involvement. With the introduction of the NDIS in the Hunter region, CRC practitioners have been involved in assisting ten individuals who were engaged in CRCs disability-specific services (CRC/CJP clients) to transition to the NDIS. The challenges and concerns summarised in this paper relate to the experiences of those clients.

The NSW Department of Ageing Disability and Home Care (ADHC) currently fund the CJP. The CJP was established with the intent to work holistically and intensively with people who have an intellectual disability and complex needs, and who are at significant risk of offending, or who have committed serious offences and who are beyond the capacity of regular disability services. Currently it supports 400 individuals. The establishment of the CJP was predicated on extensive evidence of the need for appropriate and specialised service provision to address the over-representation of people with an intellectual disability in prisons¹⁰. This included the NSW Law Reform Commission's conclusion to their 1996 report that existing approaches by government to meeting the needs of people with intellectual disabilities who are in contact with the criminal justice system results in a violation of the human rights of many people with an intellectual disability¹¹.

⁶ Baldry E, Dowse, L & Clarence M (2012) *People with Mental and Cognitive Disabilities: Pathways into Prison*, Background paper for Outlaws to Inclusion Conference, Sydney: UNSW.

⁷ Baldry E, Clarence M, Dowse L & Trollor J (2013) Reducing vulnerability to harm in adults with cognitive disabilities in the Australian criminal justice system, *Journal of Policy and Practice in Intellectual Disabilities*, 10(3), 222-229.

⁸ Baldry E, Dowse, L & Clarence M (2012) *People with Mental and Cognitive Disabilities: Pathways into Prison*, Background paper for Outlaws to Inclusion Conference, Sydney: UNSW.

⁹ Baldry E, Dowse, L & Clarence M (2012) *People with and Other Cognitive Disability in the Criminal Justice System*, Sydney: UNSW.

¹⁰ Simpson J, Martin, M & Green J (2001) *The Framework Report: Appropriate community services in NSW for offenders with intellectual disabilities and those at risk of offending*, Intellectual Disability Rights Service & NSW Council for Intellectual Disability.

¹¹ NSW Law Reform Commission (1996), *People with an Intellectual Disability and the Criminal Justice System, Report no. 80*, Sydney: NSW LRC.

As part of the bilateral agreement between the Commonwealth and NSW, the State government has transferred funding from ADHC to the National Disability Insurance Agency. However the fundamental reasons behind the establishment of the CJP have not as yet been addressed by the NDIS. Rather, evidence provided in this paper reinforces the enduring necessity of such services. Practitioners on the ground estimate that approximately half of existing services funded by CJP (including services provided by CRC) will not remain financially viable providing support to this client group under the terms of the NDIS. Funds have not been commuted to other government agencies, such as health and justice, to provide additional support and management to this group.

It is clear that the NDIS is not designed to provide the same level of holistic, specialised support as that provided by CJP. As such, funding for the target group falls far short of current levels. Clients currently supported by CJP will lose their current level of specialist support. As evidence provided in this paper indicates, costs associated with this reduction will fall to the State in the form of increased rates of hospitalisation, victimisation, contact with police and courts, and imprisonment. Furthermore, it is indisputable that as these individuals become more entrenched in the criminal justice system, the violation of their human rights will ensue. This paper highlights the still unresolved challenges and concerns associated with current NDIS policy and practice for people with cognitive disability and complex needs who are involved with the criminal justice system.

Disability VS non-disability behaviours: The need for holistic support

The NDIS is responsible for identifying and funding needs that relate only to disability. The process of developing case plans to which funding dollars will be attached relies on the ability to identify and separate disability-related needs and behaviours from *all other* aspects of an individual's life. For criminalised people with disabilities and complex support needs (e.g. active drug and alcohol addiction, mental illness, psychosocial disabilities, long histories of offending), it is impossible to separate the disability from other complex needs. This over-simplified, siloed approach to funding and support for the target group is thus highly problematic. As one CRC practitioner clarifies:

"We have found that we have the NDIS plan, and then we have the 'actual' support needs and goals for the client. The goals and support needs in our client's NDIS plans are over simplified to the extreme, leaving us to fill in the gaps, without the dollars to support the work".

While the NDIS does not fund support that is not specifically disability related, there is no doubt that this client group require support packages that work holistically. This is partly because the interaction of complexity requires it^{12 13}, and also because this population are frequently *excluded* from mainstream services. They are excluded as a consequence of both their disabilities and their offending behaviours.

There are pragmatic service delivery problems with this approach. Firstly, diagnostic tools identifying which aspects of a person's life are affected or compounded by a person's cognitive disability simply do not exist. However there is substantial research that suggests that the presence of a cognitive disability impacts on every area of a person's physical, emotional and cognitive wellbeing^{14 15}. Yet under the NDIS, there are clear boundaries between disability and other social issues, and the systems designed to address them. Such boundaries are fundamentally at odds with a human rights approach, assuming as they do that people's lives and support needs map neatly on to our currently siloed service system¹⁶. CRC has been arguing for a number of years that, in practice, the forced distinction between disability and non-disability behaviours under the NDIS means that clients with complex needs will simply *not* receive the specialised

¹² Dowse L (2014) *At the Sharp Edge: People with Intellectual Disability and Complex Support Needs in the NDIS era*, Paper presented to the National Disability Services CEO meeting, December 9, p. 13.

¹³ Pycroft A (2014) Complexity theory: An overview, In A Pycroft & C Bartollas (Eds.), *Applying complexity theory: Whole systems approaches to criminal justice and social work* (pp. 15-38), Bristol: Policy Press.

¹⁴ Villamanta Disability Rights Legal Service Inc. (2012) *People who have an Intellectual Disability and the Criminal Justice System: A guide and educational tool for people working in the criminal justice system*, Villamanta Disability Rights Legal Service Inc.

¹⁵ New South Wales Law Reform Commission (2012) *People with cognitive and mental health impairments in the criminal justice system: Diversion, Report no. 135*, Ch. 5, Sydney: NSW LRC

¹⁶ Dowse L, & Dew, A (2015) Commentary by Leanne Dowse and Angela Dew on "Reducing the Inequality of Luck: Keynote Address at the 2015 Australasian Society for Intellectual Disability National Conference" (Bonyhady, 2016), *Research and Practice in Intellectual and Developmental Disabilities*, p. 3. DOI: 10.1080/23297018.2016.1220262

services they require. The experience of CRC/CJP clients in the NDIS Hunter trial site is illuminating:

“After being assessed by the NDIS, Alex received a support package of \$4, 343 for 12 months. That’s \$90 per week. How is that going to work? I have often needed to spend several hours each week assessing Alex’s needs, locating appropriate services, and waiting for them to connect with us. Usually by the time we have done that, because of his challenging behaviours and offending history, we find that there aren’t any services that will work with him. And for our other clients who are not on an NDIS plan, the agencies simply don’t want to know about them – literally – they won’t work with them”.

It has also been clear during the process of transitioning to the NDIS that the majority of CRC/CJP clients do not readily identify as having a cognitive disability. They do not want to be identified and defined as being disabled - neither by their peers, nor by agencies. For many individuals, survival within various institutional settings (e.g. adult and juvenile prisons, care) often results in a life-time of separating themselves from their disability so they are not ridiculed, stood over or moved into areas of the prison that further limit freedoms. Yet the NDIS demands people to ‘own’ their disability - a cognitive leap that requires extensive, skilled support and encouragement.

Furthermore, in order to receive appropriate support, a person must be able and willing to identify exactly what challenges or issues they face. They must also be able to connect these challenges directly to the presence of a cognitive disability (as opposed to being the result of mental illness, psychosocial disability, AOD use, trauma, child abuse, being managed in the criminal justice system etc.). Even with support this is extremely challenging for clients. CRC’s experience tells us that clients in the target group require many hours of support in order to readily identify issues that may be a result of a cognitive disability. Many clients do not wish to disclose very personal issues, and as a consequence, under the NDIS those issues do not receive attention or support:

“Our clients don’t want to engage in extensive and complicated discussions about their disability, or about their past, present or future. They are often extremely private and lack the trust required to open up to known staff, let alone someone they’ve just met. I’ve observed several clients undergoing assessments for the NDIS who appeared to come up with something simply to end the assessment. It appears that the NDIS support planners have insufficient experience to effectively conduct and assess the needs of this very complex client group”.

With the completion of the Hunter trial, the hours that have been dedicated to supporting clients to identify their needs, through input from CRC practitioners, will no longer be available. As CRC practitioners reported, they had to cease provision of support *“without [their] clients having appropriate alternative support”*. Yet it is clear that the NDIS process of needs identification is grossly inadequate for this client group:

“Roy identified that he is not happy with [disability service provider X] as they won’t pick him up from his home, or visit him at his home. Roy had a court appearance last week that he failed to attend. Previously Roy identified that this is exactly the type of support that he requires”.

“David is receiving support from [disability service provider X] where there is no outreach support available to identify deterioration or change to his living skills and his ability to maintain accommodation. David recently separated from his wife after FACS (the Department of Family and Child Services) advised her that they would remove their child if David was at the home due to concerns arising from historical allegations of indecent assault. David is experiencing significant crisis yet was unable to articulate this when contacted by his current NDIS support worker”.

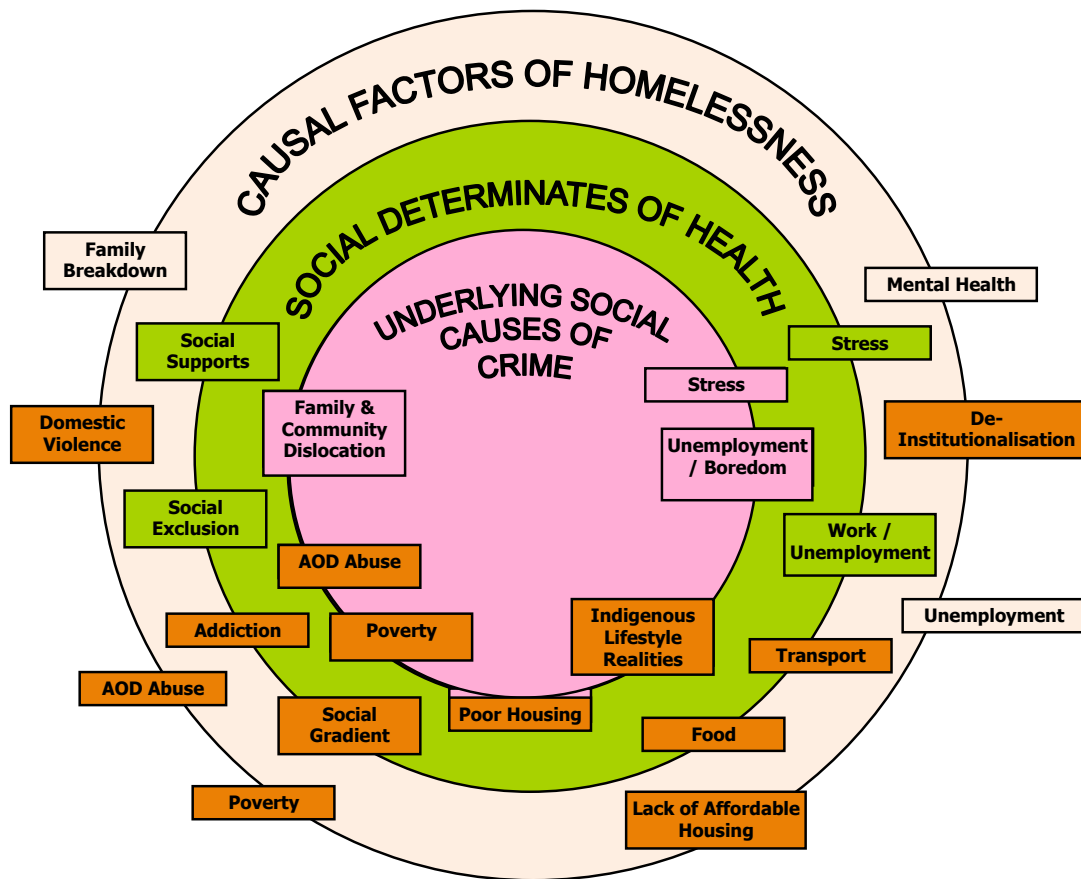
In the absence of support from CRC practitioners, CRC/CJP clients will now be contacted directly by one of the Local Area Coordinators (LACs). This contact will occur by phone and clients will be asked (by an unknown person) to identify their cognitive disability, related challenges and support needs. *From two phone calls* to the client, the LAC’s will apply the issues raised (if any) to a standardised matrix that will point to the hours of support required, and to the dollars that will be attached to a person’s package. Additional information from other sources is not sought unless requested by the client. As CRC practitioners have stressed, the majority of CRC/CJP clients will not talk to people they do not know, and they will almost certainly fail to understand the context for which they are being asked highly personal questions. For clients with hearing impairments (often undiagnosed) this method of communication will obviously fail. As exemplified below, for many CRC/CJP clients, this has resulted in a situation whereby accurate plans have not been established and essential supports are not be provided:

“We have had to cease support for Chris, Michael and Peter, all of whom are still awaiting appointments to be assessed for the NDIS. All of these clients have changed mobile phone numbers frequently over the past few years. They are all unable to read and write and therefore do no check their mail. To date, the process by which they have been contacted for assessments has not been appropriate for these clients. As a result, CRC has had to cease their support without these clients having appropriate supports in place. CRC has attempted to liaise with NDIA regarding this, but because no assessments were completed, there were no records of these clients to refer to”.

Holistic Support

At CRC we work to increase the well being of our clients. In addition, we address the complexity of issues underlying criminogenic and social causes of crime. Many of these factors are not directly supported by the NDIS and so require the individual to have the will, knowledge and drive to address these issues. Moreover, even if written into a plan it will depend greatly on services

being able to provide these services for people with a cognitive impairment. The multiple issues highlighted in orange in the diagram below are currently not funded by the NDIS.



CRC has provided briefings, and had multiple meetings with representatives from FACS about our concerns regarding the NDIS for the target group. The response has been consistent over the past three years: *“The NDIS was never designed to address the full range of issues people with a disability are facing. The NDIS assists with disability related issues only. The rest remains the responsibility of the State’*. Sadly in NSW there is no-one taking responsibility for these issues.

To introduce a system change as substantial as the NDIS that will in effect *push people back* into mainstream service and incarceration systems that are *already failing* to provide holistic support is an excruciatingly flawed approach. Similarly, to make such changes and withdraw state funding before all government departments have worked together to join the dots for complex needs perpetuates the very lack of planning that has defined the criminal justice pathways of this group for decades¹⁷.

¹⁷ Baldry E, Dowse, L & Clarence M (2012) *People with Intellectual and Other Cognitive Disability in the Criminal Justice System*, Sydney: UNSW.

Key questions that need to be urgently addressed for people with cognitive disability and criminal justice histories include:

- If under the NDIS service provision is funded based on the identification of needs relating to a cognitive disability only, *who* is funding the support or services that fall outside of this?
- How is it possible to confidently support a model of service delivery based on the premise that one behaviour is more related to the presence of a cognitive disability than another?
- How can such a model ensure it is funding the real extent of need?
- And importantly, how can a client with a cognitive disability accurately describe which aspects of their lives are directly related to the presence of their disability?

Choice and Control: The need to reconsider ‘capacity’

The NDIS aims to position participants as active consumers with *choice* and *control* over the supports they need to live the life they want.¹⁸ Whilst such an objective is commendable and indeed achievable for many NDIS participants, it is clear that the Schemes central principles of choice and control premises a particular conception of the disability experience, which at its foundation excludes the majority of the target group. Indeed, for people with cognitive impairment and complex needs who are involved in the criminal justice system, the foundational principles of choice and control are highly complex and deeply problematic. Implicit in these concepts is an assumption that the only way to support self-determination with people with disabilities is through the promotion of choice and control. This assumption fails to properly consider the *capacity* of people who experience cognitive disability, intense social disadvantage and trauma to identify positive and unchanging life goals, and to make positive life choices.

CRCs extensive practice experience with this group makes clear that for the majority of individuals who experience cognitive disability, intense social disadvantage and who are involved in the criminal justice system, the extent and complexity of their disadvantage and marginalisation often means that they have never had the privilege of experiencing control over their own lives. Moreover, their *capacity* to make positive life choices is significantly impaired. For this population, unless significant and highly skilled support is provided, it is often inconceivable to imagine what a non-offending, positive life might entail, or by extension, what is required to support such a life¹⁹. As a CRC practitioner explains:

“The needs and wants of our clients are often dependent upon their current mental health status, their level of alcohol and drug use, etc. The nature of their disabilities, together with their histories of trauma and disadvantage results has led to impairment in their decision-making capacity. When supported to identify goals and to make positive decisions, these goals will constantly change. What they want one day can be very different the next. As such there is a critical need for flexibility in service delivery – something we have discovered just simply isn’t there under the NDIS”.

The experience of child protection interventions, removal from families, juvenile justice and prison involvement frequently mean that criminalised people with cognitive disability and complex needs have never had the privilege of experiencing control over their lives. The nature of cognitive

¹⁸ National Disability Insurance Scheme (NDIS) *Building participants’ capacity: Fact sheet*. National Disability Insurance Agency.

¹⁹ Clift K (2014) Access to the National Disability Insurance Scheme for people with intellectual disabilities who are involved in the criminal justice system, *Research and Practice in Intellectual and Developmental Disabilities*, 1(1), 24-33.

disability can also mean that there are 'issues with understanding and recalling, resulting in difficulties with making informed decisions':²⁰

"The very notion of choice and control that drives the NDIS has created a discriminatory process for so many of our clients. It all sounds good in theory, however goals and plans for our client group are usually developed via a long process. This involves staff developing a close working relationship with the client, which is possible under CJP's OSSL (On-Site Supported Living) framework. By spending time together (which we do a lot of in the OSSLs), workers are able to identify certain things over time that clients might bring up in a conversation. We can then reflect that back to them in terms of a goal or strategy. It's a process that takes time but is often very effective. But if we were to sit with them and ask 'what are your goals?' we would inevitably draw a blank".

Many CRC/CJP clients do not have insight into their behaviours, needs and risks. Their lack of positive life experiences, impairments affecting cognition and experiences of imprisonment have significantly affected their capacity to make positive and safe life choices. To assume self-determination is achievable only by supporting an individual to make fundamental decisions that facilitate one's capacity to exercise choice and control over one's life, ignores the extent and complexity of disadvantage experienced by this population group.

Many CRC/CJP clients are engaged in behaviours that place them at serious risk to themselves and others, including non-compliance with medication, extensive drug and alcohol misuse (usually Intravenous Drug Use), impulsivity, aggression and criminal activity. Many of our clients do not recognise the negative outcomes of these behaviours due to their cognitive disability. To *self identify* a need for support for these issues is highly unlikely. A model purely based on the concepts of choice and control by the participant will leave clients and the community vulnerable:

"Under the NDIS, Chris was required to nominate the supports he needs and wants. He stated that he doesn't need help with anything. His support providers have taken this to be the truth. Sadly, it is far from the truth. Chris has an extensive history of violent sexual abuse and neglect. He has significant ongoing issues with illicit drug abuse, suicidal ideation, self-harm and assaultive behaviours towards adults. He also has an extensive history of inappropriate sexual and abusive behaviours toward children with disabilities. As a CRC/ CJP client, he was receiving intensive support for these issues. Yet as a result of Chris' impaired capacity to identify his issues and goals, and the associated support he requires to achieve those goals, after transitioning to the NDIS Chris failed to engage with [disability service provider X]. Consequently, his previously approved NDIS support package has been halved".

²⁰ Dowse L (2014) *At the Sharp Edge: People with Intellectual Disability and Complex Support Needs in the NDIS era*, Paper presented to the National Disability Services CEO meeting, December 9, p. 18.

For many clients currently supported by the CJP program their behaviours are ‘managed’ by specialist support services like CRC to mitigate risk, in addition to increasing health and wellbeing. The evidence from the Hunter trial site shows that under the NDIS, this has not occurred. Rather, the application of the Schemes principles of choice and control for the target group has reinforced negative choices:

“Under the NDIS, John receives funds for transport. He uses that money to purchase cannabis. This leaves him with no money to commute to his regular psychiatry appointments, medical appointments, or to fulfil his compliance orders”.

As per the NDIS limitations on kilometres travelled, we supported Alex to utilise public transport to attend his pharmacotherapy appointment. Previously we would take him to these appointments. He managed very well in getting himself there and back, but he did not remember anything that he had been told when he returned to the OSSL [On-Site Supported Living] site. I eventually discovered that he had been approved for methadone takeaways. Alex has a long history of overdosing on illicit drugs. His cognitive disability also makes him extremely vulnerable to exploitation by his peers, particularly in relation to his drug abuse. In the absence of appropriate support, it is highly likely that this situation would have resulted either in Alex overdosing, or being stood over and exploited.

Many of our clients will chose not to engage in the NDIS at all, as they believe and/ or are hopeful that they are able to function independently in the community. Sadly for many, this is simply not true. Shifting the emphasis for identifying needs to the client, but at the same time not resourcing adequate support to the client in the identification of those needs, will result in a model of service delivery where unfortunately key support needs will not be recognised or responded to:

“Andy and Jim have received intensive support by CRC, including assistance with managing challenging behaviours, addressing significant and ongoing alcohol and drug use, assistance with developing the life skills required to fulfil their goals to live independently, ongoing assistance with taking prescribed medication, and fulfilling their obligations with probation and parole. Despite this, both Andy and Jim continue to adamantly maintain that they want nothing to do with the NDIS”.

The use of the term ‘Dignity of Risk’ has become an increasing part of the vernacular of many disability support services registered to provide support under the NDIS. This term refers to the notion that all clients have the right or choice to make their own decisions, despite the consequences. People are intended to be able to make decisions regarding their lives at their own risk. However when the ability to choose effectively is dramatically reduced due to the presence of a cognitive disability and a history of complex needs, it is difficult to see how this principle will actually be of assistance to this population. But rather as the evidence provided above confirms, it is clear that with this population group, the consequences of making poor decisions regarding support needs extends well beyond the risk to the individual; it extends also to others in the community.

Risks to the Community

The NSW NDIS Quality and Safeguarding Transitional Working Arrangements and Provider Registration document is focused primarily on two key types of risk: the risk that people with a disability could receive poor quality supports; and the risk that people with a disability could be harmed in some way. These are clearly important parameters. But in the context of working with people with criminalised behaviours, we need to broaden the scope of the concept of risk. Attention must also be paid to the risk of community safety.

CJP funds specialist services to manage behaviours that relate directly to offending. Individuals on the Child Protection Register, and people with a high risk of offending; often no longer on orders; are supported by CJP services. With specialist knowledge of criminogenic risk factors and desistance theories, specialist services like CRC can contribute to the increased wellbeing of the individual and the reduction of risk to the community.

Unfortunately the Hunter Trial has demonstrated that risk to the community due to clients' challenging behaviours is not considered to be a priority. *To date all CJP clients have received a maximum of only 10 hours funded behavioural support per year.* For the majority of clients, under the existing service model, 10 hours of behavioural support would be provided every two to three days. For services without any knowledge and skill base within this sector, this holistic model of support will not be possible. As one high risk sex-offender told a CRC practitioner:

"I can't wait for the NDIS, because I'm going to give my funding to [disability service provider X] who will let me do whatever I want, and they won't know what I'm doing."

In relation to another client, a CRC practitioner reported that:

"Geoff advises me that he has met with his preferred disability service provider a couple of times. On each occasion he has been required to meet with them in the community as they have refused to meet him in his home. Geoff told me that he doesn't really know what they do or what support they are providing. They just meet him for a 'coffee and a chat'. Despite a recent court appearance for approaching a child in the community, Geoff is receiving no other support".

Of course, in the absence of appropriate community support, this person will eventually be returned to being managed by the criminal justice system. To remove funding from services that are able to address and support a range of complex issues relating to offending behaviour, and to ignore the knowledge that criminal behaviours are often a consequence of a disability, is to shift the management of a person to the criminal justice system.

Marketisation of services and ‘cherry picking’ commodified clients

Specialist services are required to work effectively with people with disabilities who have also spent time in custody.²¹ However the individualised approach to funding and the competitive approach to the provision of services has already raised concerns for CRC regarding the lack of safeguards for our clients.

Three CRC clients have been approached by services overtly stating that they can provide better support than CRC. One service offered a free dishwasher and gaming console if the client agreed to be supported by them - a strong inducement for a client that has come from a background of extreme disadvantage. An inducement however, driven by product enticements not by quality service delivery. Another visited a CRC client whilst he was incarcerated suggesting he nominate them to be his support provider and advised he shouldn't discuss the issue with CRC staff.

A third involved an organisation making contact with a client of CRC's 24 hour supported accommodation service during his regular appointment to a local community organisation. As his CRC support worker explains:

“Alex has a long history of overdosing on illicit drugs and self-harm. Alex also has schizophrenia and requires extensive support to manage his medication. Without that support he either doesn't take it, or is at risk of overdosing”.

Unaware of this client's history and of his high support needs, the service suggested they could provide support to enable him to live completely independently in the community. He was given forms to read and sign despite the fact that he cannot read or write. After discussions with the organisation in question by a CRC practitioner they have withdrawn their offer and have understood the risks to the client through their interaction.

In order to maintain their financial sustainability, CRC is deeply concerned that vulnerable populations will become commodities to many organisations. CRC is concerned also that services required by clients won't be delivered. Services already operating within the NDIS funding structure have staff KPI's which include the need to continuously increase new client quotas. For this to occur the pressure on staff to provide direct service provision whilst attempting to attract new clients will increase the likelihood of services attempting to 'poach' clients and offer inducements rather than providing quality service provision.

Currently in NSW there is still no decision as to who will own and manage the accommodation infrastructure presently managed by ADHC. This makes the continuity of the provision of specialist services in the current service landscape deeply problematic.²²

²¹ Borzycki M & Baldry E (2003) Promoting integration: The provision of prisoner post release services, *Trends and Issues in Crime and Criminal Justice*, No. 262, Australian Institute of Criminology, p. 4.

²² Dowse L (2014) *At the Sharp Edge: People with Intellectual Disability and Complex Support Needs in the NDIS era*, Paper presented to the National Disability Services CEO meeting, December 9, p. 13.

The provision of 24-hour support for clients with highly complex needs is impossible using the individualised funding model of the NDIS. People with complex needs frequently cycle in and out of custody, and services supporting populations with cognitive disability need to be able to support them through this process. If funding is to be withdrawn for individuals if they exit the service and enter a custodial environment, the sustainability of 24-hour services becomes immediately compromised.

At any given point in time up to 30% of CJP's client group are in custody. This suggests that services will frequently be operating with a vacancy. The NDIS does not fund empty beds. In order to combat short falls in funding and lack of financial viability, beds currently utilised by, and dedicated for high risk offenders will be taken up by less high risk and challenging clients in order for services to maintain a stable income. CJP clients will be displaced from existing services, thereby increasing homelessness and the risks to the client and to the community.

In addition to time away from services due to periods of time in prison, client visits to hospitals, friends, and family can mean clients are away from services for periods of days or weeks. Absences are not always long term, but they are frequent. The NDIS will not fund empty beds resulting in clients being displaced and losing their belongings:

"Soon after transitioning to the NDIS, Jason reoffended and returned to prison. Despite no longer being a client of CRC, Jason's possessions (including his mobility scooter) have been left at the OSSL [On-Site Supported Living] site. Jason has no family support and as such there is no one willing to look after his possessions whilst he is in custody. Nine months have passed and we are still unable to resolve this issue. With the pending closure of our OSSL site, we will probably be forced to give Jason's possession away, leaving him with nothing when he is released from prison".

An inherent factor for the ongoing financial viability of services under the NDIS is client engagement. Clients who have had long term contact with government services and experience complex needs are used to services failing to meet their needs. Attending appointments, being available when activities are arranged are common obstacles for client engagement. Under the existing CJP funding arrangements services can be persistent, constant over a long period of time in order to foster and maintain a positive client service relationship. Under the NDIS lack of client engagement will result in a reduction of income for an organization. Clients that are not compliant and consistent will not be prioritised for support by services.

Complex need clients frequently inflict damage to properties. CRC has one young man that over the past 12 months has caused up to \$6,500 of damage to his property through punching holes in his walls when he is distressed. Another client has caused over \$1,200 worth of damage to doors trying to break in and damage to a CRC vehicle. Three years ago one of our properties was bunt to the point that it was inhabitable. These acts are not altogether unusual with a complex high risk population. There is no recognition from the State or NDIS how these damages will be funded. For

organisations trying to remain viable under the NDIS with no other state financial support the answer is simple. *Truly complex and high risk clients will not be housed as the potential costs to services are too great.* In essence the people that require the assistance most for their own and the communities wellbeing and safety will be placed at the greatest risk as they are financially unviable.

The Productivity Commission Seminal Report (2011) supported these concerns, saying that “while consumer payments should become the industry norm over time, there may still be a role for some block funding where markets would otherwise not support key services. Specific areas where block funding may be required are crisis care; rural areas; community capacity building; some individual capacity building; to support disadvantaged groups (such as Indigenous Australians) and as a tool to promote innovation, experimentation and research”²³.

CRC experienced a challenging situation where a client committed a serious offence against another CRC client. In response, staff were assigned to provide intensive support to each client impacted by the incident. This included a range of emotional and psychological support, writing court reports, court preparation, and support for the clients during the court proceedings. This support included transporting both clients to and from court separately over many days. With the need to back fill staff so they could attend court, and the hours involved in the court preparation, and key staff support requiring overtime, CRC faced costs of several thousands of dollars. This will no longer be funded under the NDIS. This support will no longer be available to clients.

People with cognitive disability and criminal justice involvement often have volatile and fast changing support needs. Life is often dynamic, involving periods of time moving between friends and family, hospitalisation, incarceration and many other factors that interrupt stability. There is a need within NDIS for support providers to have the capacity to react flexibly and quickly to any changes in circumstances.²⁴ The NDIS case planning process focuses on activities and support needs of individuals over a twelve-month period. To plan and cost supports based on a linear, constant needs base is to fail to recognise the often chaotic lifestyles, the capacity of the target group to make positive decisions, the constant changeability of goals, and the multiplicity of other challenges documented in this paper that confront the target group.

²³ Productivity Commission (2011) *Disability Care and Support: Productivity Commission Inquiry Report, No. 54*, 31 July, p. 471

²⁴ Simpson J (2014) *Participants or just policed? Guide to the role of the NDIS with people with intellectual disability who have contact with the criminal justice system*, NSW Council for Intellectual Disability (2014) p. 14.

The impact of incarceration and the critical importance of throughcare

There is significant research that points to the relationship between incarceration and disadvantage.²⁵ Our prisons house a disproportionate number of people with mental illness²⁶ and cognitive disability,²⁷ Aboriginal people are vastly over-represented,²⁸ many people in prison have significant histories of trauma,²⁹ and are often alienated from their families and communities, or come from families and communities that are disconnected from many mainstream opportunities. The majority of people in prison have had limited educational opportunities, have poor functional literacy, and have multiple barriers to paid employment.³⁰ Many people in prison have a problematic relationship with drugs and/or alcohol³¹ and (often as a consequence of unsafe injecting practices) have contracted Hepatitis C.³²

What is also now clear, is that incarceration itself is a risk factor for elevating certain kinds of behavioural problems.³³ Prison has a detrimental impact on mental health,³⁴ and often leads to self-harm and depression.³⁵ For people with cognitive impairment, the experience of imprisonment increases the likelihood of homelessness on release, and also increases the risk of multiple forms of future criminal justice system involvement.³⁶

It is clear that people in prison with cognitive impairment are frequently survivors of complex trauma. It is also clear that offending behaviour and the drug and alcohol use that so often fuels this behaviour is intimately linked to trauma response. However, prison, rather than ameliorating the trauma, tends by its very nature (institutional, de-humanising, punishing, adversarial and deeply stressful) to compound it.

²⁵ Cunneen C, Baldry E, Brown D, Brown M, Schwartz M & Steel A (2013) *Penal culture and hyperincarceration: The revival of the prison*. Surrey: Ashgate.

²⁶ Butler T, Andrews G, Allnutt S, Sakashita C, Smith N & Basson J (2006) Mental disorders in Australian prisoners: A comparison with a community sample, *Australian and New Zealand Journal of Psychiatry* 40(3), 272-276.

²⁷ Butler T & Milner L (2003) *The 2001 New South Wales Inmate Health Survey*, Sydney: Corrections Health Service.

²⁸ Australian Bureau of Statistics (2007) *Prisoners in Australia 2007*, Canberra: ABS.

²⁹ Lawrie R (2003) *Speak Out Strong: Researching the Needs of Aboriginal Women in Custody*, Sydney: Aboriginal Justice Advisory Council.

³⁰ NSW Legislative Council (2001) *Select Committee on the Increase in Prisoner Population: Final Report*, Sydney: NSW Legislative Council.

³¹ Johnson H (2006) Factors associated with drug and alcohol dependency among women in prison, *Trends and Issues in Crime and Criminal Justice*, no. 318, Canberra: Australian Institute of Criminology.

³² Butler T & Milner L (2003) *The 2001 New South Wales Inmate Health Survey*, Sydney: Corrections Health Service.

³³ Simpson J (2014) *Participants of just policed? Guide to the role of the National Disability Insurance Scheme with people with intellectual disability who have contact with the criminal justice system*, Sydney: NSW Council for Intellectual Disability

³⁴ Baldry E (2015) Disability at the margins: limits of the law, *Griffith Law Review*, 23(3), 370-388.

³⁵ Cunneen C, Baldry E, Brown D, Brown M, Schwartz M & Steel A (2013) *Penal culture and hyperincarceration: The revival of the prison*. Surrey: Ashgate.

³⁶ Baldry E, McDonnell, D, Maplestone P, Peeters M (2006) Ex-Prisoners, Homelessness and the State in Australia, *The Australian and New Zealand Journal of Criminology*, 39(1): 20-33.

For many individuals leaving prison, access to mainstream services is frequently denied. For someone with a cognitive disability leaving prison their disability is overshadowed by their criminal history. Access to traditional disability services is often not granted. Fear, stigma by services and complexity of need is a barrier. Few mainstream services have adapted service provision for people with low cognition. For example there is no service in NSW that provides a targeted AOD program for someone with a cognitive disability. To suggest that this population can use self-determination to access services in the community like many other individuals is a fallacy. It is not uncommon for CRC clients to be refused access to community services, including mental health treatment services, without being accompanied by a staff member. This is not because of current behaviours but because the known history of offending causing concern to services. For many of our clients this type of support has not been funded adequately in order to ensure a staff member can always be present.

Best practice in post-release support has for the last two decades, consistently stressed the importance of through-care as a central feature in pre-release planning. That is, pre-release planning should occur while the person is in prison, usually with the same worker who will be involved with supporting the person on release from prison. This way, the worker (and their organisation) become like the metaphorical bridge between prison and the community. Programs that use this model report much higher levels of engagement, sustained engagement, and post-release success, than those programs without it. The current disconnect between the NDIS and the correctional settings that house large populations of people with complex needs *and* disability needs to be addressed, urgently. Through-care is crucial in preventing reoffending,³⁷ as well as improving community integration and ultimately enhancing community safety.³⁸

The first three months is the most high-risk period for re-offending, homelessness and death. For someone with a cognitive disability and minimal or no supports, the risks are far higher. Recognising and addressing the risks that result from having a cognitive disability are crucial in reducing the unnecessary return to prison.

The NDIS currently has no mechanism in which to fund services to continue supporting an individual during a period of incarceration. Neither Justice Health and the Forensic Mental Health Network or Corrective Services have the capacity to provide pre-release engagement and case planning prior to a person leaving prison. As a result of this a person needs to be cognisant of how and where to have a case-plan developed in order for funding to be allocated for supports post release. The steps involved in this process are complex and the inevitable gap in service supports that can result from delays to the process will leave people extremely vulnerable and at risk of re-offending. Again, evidence from the Hunter trial site is illuminating:

“I met with Jason’s current support worker yesterday. Jason returned to prison many months ago. This support worker has not had a single conversation with

³⁷ Baldry, E (2007) Recidivism and the role of social factors post-release, *Precedent*, Issue 81, p. 5

³⁸ Borzycki M & Baldry E (2003) Promoting integration: The provision of post-release services, *Trends & Issues in Crime and Criminal Justice*, no. 262, Canberra: Australian Institute of Criminology.

Jason, but she is trying to work out what services he needs based on his NDIS support plan. This is his NDIS plan that was developed before he went to prison, and in which none of the goals are currently relevant! Like most of our clients, the very nature of Jason's disability and his history of trauma and disadvantage means not only does he require significant support to identify his goals and to make positive decisions, but also that his goals constantly change. What he wants one day can be very different the next. It's deeply concerning that under the NDIS there appears to be no scope for flexibility around goals that change, and very little relationship development with clients".

People in the criminal justice system have long histories of being monitored and managed by government organisations and systems. Histories of abuse and trauma further exacerbate a person's ability to develop trusting relationships. There is much research identifying that up to 60% of change that occurs for an individual is a result of a trusting therapeutic relationship. The NDIS funding model relies heavily on the utilisation of a casualised workforce, which is not conducive, and in fact works in opposition to maintaining long-term client worker relationships.

Support Needs for Providers: The need for highly skilled workers

In order to work effectively with complex needs populations in any long-term sense, it is necessary to employ *skilled professional workers*.³⁹ The culture in some disability services of employing staff with minimal qualifications is deeply problematic with this client group. Workers must have the capacity to 'hold' clients with multiple and complex needs confidently over time, and to avoid the chronic over-referral experienced by this population.

Individuals with multiple layers of trauma who come into contact with the criminal justice system have frequently had exposure to multiple welfare and support agencies. It is clear however that for many people who have been 'through the system' the experience of services (in terms of access and quality) is overwhelmingly negative.^{40 41} Such negative experiences with agencies that are intended to 'help' can have very serious consequences in terms of an individual's ability to build trust and to form relationships with service providers, and can result in further challenges in engaging with mainstream support agencies.⁴²

³⁹ Collings S, Dew, A & Dowse L (2016) Support planning with people with intellectual disability and complex support needs in the Australian National Disability Insurance Scheme, *Journal of Intellectual and Developmental Disability*, 41(3), 272-276.

⁴⁰ Australian Human Rights Commission (2013) *Access to justice in the criminal justice system for people with disability: Issues Paper*, April 2013, Sydney: Australian Human Rights Commission.

⁴¹ Clift K (2014) Access to the National Disability Insurance Scheme for people with intellectual disabilities who are involved in the criminal justice system, *Research and Practice in Intellectual and Developmental Disabilities*, 1(1), 24-33.

⁴² Clift K (2014) Access to the National Disability Insurance Scheme for people with intellectual disabilities who are involved in the criminal justice system, *Research and Practice in Intellectual and Developmental Disabilities*, 1(1), 24-33.

In practical terms this means that workers need to have skills across a range of different areas (i.e., disabilities, mental health, criminogenic needs, substance abuse). In addition this kind of approach requires a work environment and culture which has the capacity to support the workers tasked with assisting people with high needs, at high risk, and often with a range of challenging behaviours. This means organisationally investing significantly in training and supervision, and shifting a culture where 'disability' work is valued differently from other kinds of complex needs work (particularly when this comes to the payment of workers). The fee for service funding structure of the NDIS does not account for the costs associated with professional development and ongoing supervision. The risks to both clients and staff are significant.

CRC recently accommodated a short-term client during his transition from prison to an allocated long-term support service. During a brief visit by three 'inexperienced' staff members from the new long term support service, a scuffle ensued following a disagreement. This scuffle resulted in the client physically assaulting two of the staff members and the client was arrested and remanded in custody. All three staff members from the long-term services have taken long absences from work and are claiming workers compensation. The cost to the clients, the staff members and the financial risk to the organisation due to workers compensation claims as a result of employing unskilled staff are significant. Fee for service funding models rarely take the true costs of managing staff in the work place, or the impact complex clients can have on a service.

Summary

People with cognitive disability and complexity of need require a nuanced, specialist response within the new NDIS service landscape. Serious consideration needs to be given to the option of commissioning services, where it is clear that the market does not provide them. Further attention needs to be paid to supporting specialist organisations that are able to work with and around the impact of incarceration. There is a critical need for pre-release engagement, and for the NDIS to recognise the unique support needs for populations who have historically been managed in criminal justice settings, rather than supported in the community.