VCASP CRIMINAL JUSTICE SUB-COMMITTEE

Contribution to the

Brain Injury Australia

2011 paper

to

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INTRODUCTION

Whilst legislation and service provision in Victoria presently offers the capacity for a range of rights-based structures related to disability and criminal justice, there is currently no system in Victoria to support the specific needs of people with ABI involved in the criminal justice system, not withstanding a number of key initiatives in the Victorian Corrections, Justice and ABI Sectors. Examples of such initiatives include:

- Assessment: the Acquired Brain Injury Screening, Identification and Validation in the Victorian Correctional System (arbias Ltd and La Trobe University, 2010) which indicates a significant overrepresentation of people with an ABI involved in the criminal justice system

- Individual case practice examples ABI Specialist Case Management Services for example Melbourne Citymission and arbias Ltd,

- Educational strategies and data collection undertaken by the VCASP Criminal Justice Sub-Committee; for example a checklist designed for the Victorian Police aimed at supporting the identification of ABI to facilitate access to the Victorian Office of the Public Advocate Independent Third Person Program and training to justice workers

- The Statewide ABI Paediatric Coordinators Youth Justice Program: the provision of secondary and tertiary consultation to workers in the Victorian Youth Justice System

- The acquired brain injury clinician within Corrections Victoria adult system, which seeks to improve the management of prisoners and offenders with an ABI and in the longer term reduce offending behaviour. This eighteen month pilot program has been developed in response to groundbreaking research, which established a significant over-representation of people with an ABI in the Victorian prison population. The role of the clinician includes consultation, capacity building, information, education intervention planning and staff training. Emerging from the pilot is a complex profile including the presence of co-morbidities including mental health and substance use issues in addition to a prisoners/offenders cognitive impairment, affirming the need for a specialist response. The service covers the Dame Phyllis Frost Centre, Port Phillip Prison, Melbourne Assessment Centre and Metropolitan Remand Centre, as well as Community Corrections in the North and West Metropolitan Region

- The Assessment and Referral Court: a specialist court list developed by the Department of Justice and the Magistrates Court of Victoria to meet the needs of accused persons who have a mental illness and/or cognitive impairment

- The Koori Court, operating as a division of the Magistrates' Court, which sentences indigenous offenders. Arguably people with an ABI are well represented within these court populations.

This is in stark contrast to the systems response available to people with an intellectual disability involved in the criminal justice system. Critically, services to people with an intellectual disability are mandated for in the Disability Act 2006, where special provisions place obligations on DHS Disability Services before, during and after court. These obligations are based on two basic principles:

- People with a disability who offend should be treated in the same manner as all other alleged offenders, but given additional supports where required. They should also have the same opportunities for a range of support, advocacy and sentencing options
- When a Disability Client Services worker is allocated to support an offender or an alleged offender with a disability, the worker must follow the same case practice process as with all other people with a disability, however there may be additional activities required.

What this ensures is that a person with an intellectual disability involved in the criminal justice system gains priority of access to DHS Disability Services and is allocated a Disability Client Services worker. As a consequence the Disability Client Services worker must fulfil a range of obligations mandated for in the Disability Act 2006 and outlined in the DHS Disability Services Criminal Justice Practice Manual, 2007. These obligations include the:

- provision of ongoing case management
- reference to the Crimes (Mental Impairment and Unfitness to be tried) Act practice guidelines if the fitness to plead of a person they are supporting is raised
- access to legal advice by assisting them to contact their own solicitor or a local community legal service for advice and possibly ongoing help
- provision of a client overview report comprising the level of disability, developmental history, contact with disability services and current circumstances
- Provision of a justice plan which provides information regarding available services aimed at reducing the likelihood of reoffending.

(DHS, 2007 p4-34)

The Disability Act 2006 also establishes special sentencing provisions for people with an intellectual disability involved in the criminal justice system. For example once an adult with an intellectual disability has been found guilty of an offence, the Court may use the *Sentencing Act 1991, Part 3, Division 6: Special conditions for intellectually*

disabled offenders, which offers the court additional sentencing options for people with an intellectual disability, specifically, a plan of available services. (DHS, 2007 p29; DHS, 2006).

An example of a targeted intervention is provided by the Australian Community Support Organisation (ACSO) who amongst other services provides a problematic sexual behaviour program for persons over 12 years who have an intellectual disability and are at risk of committing or have committed sex offences.

VCASP contends that at a minimum people with an ABI who are involved in the criminal justice system in Victoria should have access to a comparable system to that which currently exists for intellectual disability, and argues that this requisite of legislative and policy reform is central to the rights of people with ABI and to any future success in reducing numbers of people with ABI involved in the criminal justice system. VCASP suggests that this system should be configured in recognition of the following evidence and principles.

ABOUT ACQUIRED BRAIN INJURY (ABI) & DISABILITY SUPPORT SERVICES

Incidence and Prevalence

Incidence and prevalence of ABI within the community is increasing. The incidence and prevalence of ABI is estimated to be comparable to intellectual disability. This implies people with ABI would be significant users of the disability support system (Fortune and Wen, 1999).

The prevalence of acquired brain injury in the Victorian Correctional System is high, with 42%of males and 33% of females found to have evidence of an acquired brain injury on formal neuropsychological assessment:

- Severity of ABI
- Moderate 39% males 21% female
- Severe 6% males 7% female

(arbias Ltd and La Trobe University, 2010 p83)

Arguably people with moderate to severe ABI would be disadvantaged in the criminal justice system without additional support to ensure that they are treated in the same way as all other alleged offenders or offenders.

The Victorian Office of the Public Advocate reports a significant increase in the numbers of people with ABI and complex presentations referred. OPA also reports significant underrepresentation of people with an ABI accessing the Independent Third Person Program (VCASP, 2011)

THE IMPACT OF ABI

An ABI is caused by events after birth. It usually affects cognitive, physical, emotional, social or independent functioning and can result from either traumatic or non traumatic injury. Acquired brain injury is not to be confused with intellectual disability. People with ABI may have difficulty controlling, coordinating and communicating their thoughts and actions, but they retain their intellectual abilities.

An ABI is a long term disability which significantly affects people's abilities to become involved in the community life in ways that allow quality of life.

The term ABI applies to a diverse group of people. The disability support responses need to be sensitive to the many impacts, causes and life stage implications of all forms of ABI.

- Timely and early interventions have a large benefit
- It is not often understood that severe functional impairment can occur with a diagnosis of mild brain injury
- Successful interventions are informed by an evidence base which includes a knowledge and understanding of ABI and expertise in the delivery of appropriate compensatory strategies
- It is important that people with ABI can enter the disability support system at any time post injury
- Many people with an ABI are not diagnosed early enough reducing opportunities to facilitate recovery
- Coordinating diverse and changing service system responses is an important aspect of disability support.

CURRENT SERVICE SYSTEM CAPACITY

Effective delivery of a disability support system requires a consolidated and well-resourced structure, capable of working in a timely manner across a range of divisions and support needs. In its Draft Report on Disability Care and Support, the Productivity Commission states:

"The disability support system overall is inequitable, underfunded, fragmented and inefficient and gives people with disability little choice. It provides no certainty that people will be able to access appropriate supports when needed. While some governments have performed much better than others, and there are pockets of success, overall no disability system in any jurisdiction is working well in all of the areas where change is required" (Productivity Commission, 2011 p5)

People with an ABI presenting for specialist ABI case management services are often characterised by an active alcohol, or other substance misuse issue, a mental illness, a personality disorder, family breakdown, intellectual disability, homeless or at risk of

homelessness. Generally this client group has had prior involvement with a number of service providers over a long period of time and continues to be resource intensive. The needs of this client group are not easily reconciled with a throughput model of service responses, in the main due to the crisis nature of the intervention provided and the extreme difficulty or unlikelihood of involving an adequate level of non-ABI specialised services. (Stringer, 2007)

- Specialist ABI case management services report between 0.025% and 25% of active/wait listed clients are or have been involved in the criminal justice system. By and large the specialist ABI Case Management sector is not resourced to meet the needs of alleged offenders or offenders with an acquired brain injury (Specialist Case Management Services, 2011).

The experience of ABI Case Managers is that generic services are reluctant to accept referrals given the degree of disability and associated behaviour of the ABI group (Stringer, 2007).

- There are currently no targeted interventions available to people with an ABI involved in the criminal justice system aimed at reducing reoffending behaviour
- People with an ABI involved in the criminal justice system do not receive priority of access to the DHS Disability services in contrast to people with an intellectual disability involved in the criminal justice system
- Supported accommodation options with appropriately trained staff is a critical need
- Access to neuropsychological assessment and a lack awareness of ABI for example by legal representatives is a significant barrier to disability support
- Any response to the service needs of people with ABI involved in the criminal justice system must recognise and include the particular and important needs of people in rural locations, and/or people from CALD and Indigenous cultures.

COLLABORATION PRINCIPLES: BUILDING ON WHAT WORKS IN THE EXISTING SERVICE SYSTEM

Services for people with ABI who are involved in the criminal justice system will build on the existing infrastructure, expertise and the good work undertaken across the Victorian acquired brain injury compensable and non-compensable, neurological and generic disability service systems including DHS Disability Services and the Corrections and Justice systems. There are many examples across these sectors of positive practice and innovation to build on. Notably the work here is characterised by collaboration and partnerships, research, awareness raising, training and development the application of evidence and integrated data to inform policy, the sharing of practice wisdom across health, rehabilitation and disability sectors, planning for sustainability and building joined-up services and whole-of-government solutions.

Given the numbers of people and range of disciplines involved in supporting people with acquired disabilities, there should be universally understood pathways, protocols and processes to ensure individualised responses, complimentary goal setting, seamless transitions and coordinated approaches. Further, the roles and responsibilities of all the respective stakeholders should be understood and valued by the whole system. In this instance there is a need to develop a service system which works collaboratively across divisions of government and non-government sectors such as mental health, housing, justice, youth justice, indigenous and cultural affairs, disability, health, education and employment, in which each relevant agency takes ownership and responsibility for the area of ABI.

CONCLUSION

VCASP recognises the critical need to provide a response to over representation of people with ABI involved in the criminal justice system. Victoria currently provides legislation and a range of programs, which have provided significant benefits to the broader spectrum of persons with a disability, through initiatives such as the Disability Act 2006, and the Independent Third Person Program. However access to, and utilisation of these rights-based services is significantly lower for people with an ABI. VCASP suggests that a systems response should account for profile complexity and the need for specialisation and include a range of strategies to build infrastructure and capacity. At a minimum the response should include access to neuropsychological assessment, case management, justice plans and targeted interventions to reduce reoffending behaviour. VCASP argues that without a commitment to increase resources and implement responses to redress over representation and equity issues, this group will by in large remain lost to the disability system.

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