

VICTORIAN COALITION OF ABI SERVICE PROVIDERS INC.



**RESPONSE TO THE
INQUIRY INTO ACCESS TO AND INTERACTION WITH THE
JUSTICE SYSTEM BY PEOPLE WITH AN INTELLECTUAL
DISABILITY AND THEIR FAMILIES AND CARERS**

for the

VICTORIAN LAW REFORM COMMITTEE

October 2011

Victorian Coalition of ABI Service Providers Inc.

PO Box 900

Northcote Victoria 3070

policy@vcasp.org.au

Contact:

Kerry Stringer: Chairperson (03) 9894 7006

Marc Paradin: Policy Officer (03) 8388 1288

INTRODUCTION

As an organisation with an acute awareness of the dramatic impact that criminal justice can have on the lives of many people with an acquired brain injury (ABI), the Victorian Coalition of ABI Service Providers Inc. (VCASP) welcomes the opportunity to respond to the Parliament of Victoria's Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers.

The purpose of this submission is to provide an evidence base for the inquiry to have a broader application inclusive of people with an ABI. Three key sources comprising qualitative and quantitative data have been utilised to support this proposition –

- a series of interviews (community interviews) undertaken with people with an acquired brain injury (ABI) who have either been involved in the criminal justice system as an offender or victim or have an interest in advocating for people with an ABI involved in the criminal justice system;
- data from research conducted by Jackson, Hardy, Persson and Holland (2011) *Acquired Brain Injury in the Victorian Prison System*, Corrections Research Paper Series 04 April 2011 on the prevalence, severity and causes of ABI among prisoners; and incidence and prevalence data the Australian Institute of Health and Welfare; and
- consultation with VCASP agency members.

ABOUT VCASP

VCASP was established in 1998 in response to the need for coordinated policy and service development for people affected by acquired brain injury. VCASP is a not-for-profit peak body acting on behalf of public and private sector service providers who assist people with ABI, their families and others involved in their support. VCASP advocates for the availability of appropriate services and resources, as well as information and research that can assist those experiencing the effects of ABI.

ABOUT ACQUIRED BRAIN INJURY

An ABI is caused by events occurring after birth. It usually affects cognitive, physical, emotional, social and/or independent functioning and can result from either traumatic for example assaults, falls, motor vehicle accidents and sporting injuries or non traumatic injury for example stroke, tumors, alcohol and/or other drug misuse. ABI 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 acquired brain injury (ABI) is a permanent disability, which significantly affects a person's ability to be involved in the community in ways that allow quality of life (BIA, 2011).

Previous research indicates that people with an ABI presenting for specialist ABI case management services are 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 therefore are not easily reconciled with a purely generic approach, throughput and/or a crisis model of service response. (Stringer, 2007) This appears to be particularly true of people with an ABI involved in the criminal justice system. Evidence suggests therefore that disability support responses for a person with ABI need to reflect the following:

- Timely and early interventions have a large benefit
- 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
- Many people with an ABI are not diagnosed early enough, reducing opportunities to facilitate recovery and often reducing available social supports
- It is often not recognised that many people with mild brain injury may, as a result of their injury, have severe functional impairment and severe difficulties in effective socialisation.
- The co-ordination of diverse and changing service system responses is an important aspect of ABI support
- Significant numbers of people with an ABI access generic services. There is enormous benefit in increasing the capacity of generic services to respond appropriately to the needs of people with an ABI

KEY FINDINGS ARISING FROM COMMUNITY INTERVIEWS

The following is derived from a series of interviews (community interviews) undertaken with people with an acquired brain injury (ABI) who have either been involved in the criminal justice system as an offender or victim or have an interest in advocating for people with an ABI involved in the criminal justice system.

All of the people interviewed have a significant ABI that has resulted in permanent cognitive and mobility impairments and associated moderate support needs. People interviewed acquired a brain injury from stroke, hypoxia (suicide attempts), as a result of an assault or fall, motor vehicle accident or alcohol and/or other drug misuse. Of note are reports from people involved in the criminal justice system of multiple traumas - for example an initial brain injury from a motor vehicle accident, a consequent assault and/or a fall and/or alcohol and/or other drug misuse. On average people had acquired their brain injury 20 years previously. Three people interviewed reported significant periods of incarceration, with one person having spent a total of 15 years in prison and significant

periods in Youth Justice custodial settings. In addition, two people had spent time, generally overnight, in police cells. Both offenders and the three victims of crime interviewed report ongoing trauma as a consequence of their involvement/interface with criminal justice system, generally manifest as a lack of trust in the justice system and reluctance to report, though one person, a victim of an assault said that he is now afraid to go out. Four people alleged ongoing police harassment including inappropriate use of force and name calling and two women with prior custodial sentences, declined an interview reporting that they were afraid, despite assurances of confidentiality, of possible repercussions. In some instances participant involvement/interface with the criminal justice system spanned 20-30 years.

The people interviewed were invited to participate in this process and sourced via VCASP networks and included ABI self- advocacy groups and not for profit ABI specialist services. Face to face interviews took place in rural and metropolitan regions, and two interviews were conducted over the phone. The interviews were open ended. People were asked to speak to their experience of the criminal justice system, knowledge of rights, availability of appropriate services and support, dealings with the police and the operation of the courts. People were also asked to identify strategies to address issues identified. Other data including age, type and date of injury, gender and age of injury and impact of disability on their lives was also collated.

People interviewed were living at home or independently. All participants were eligible for disability services according to eligibility requirements, the Disability Act (2006), with half of all participants receiving Department of Human Services funded specialist ABI case management support while 3 people are in receipt of individualized support packages from a range of sources. Critical to the provision of services, as highlighted by participants, is an understanding that people with ABI do not necessarily experience a decline in their overall intellectual functioning. Prior to acquiring their injuries, the people interviewed were students, blue and white-collar workers, friends and family members, parents and partners. This group were unanimous in their desire to maintain valued roles, though were realistic for example about their capacity to return to work. The youngest person interviewed was 28 years and the oldest 61 years.

Knowledge of Rights

None of the participants were able to articulate their rights as a person with a disability in Victoria. Though some had heard of the Disability Act 2006, they did not know about the Office of the Public Advocate Independent Third Person Program (but thought it was a great idea and would help) nor were they aware of the potential to access DHS Disability Services for case management support. Participants who had direct involvement in the criminal justice system were able to articulate the right to remain silent and the right to have your record expunged after ten years (though did not trust that this actually happened). One person said of a recent incident that he knew that the police could not search his place (a right) without a warrant but they did, despite his protestations.

Dealings with the Police

Several participants stated that they felt like they had done something wrong, were harassed or were not listened too:

A woman alleging sexual assault by her father said *“ the longer they interviewed me the more confused I got... in the end they told me I was not able to provide enough detail and sent me home”*

And *“ I forget to say I have an ABI.. I get so confused, I don't think to call (the case manager) maybe we could carry a card or something like a medical alert”*

And *“ people wonder if the police will take you seriously”*

And *“ Its really scary, they ask you so many questions, pumping too much information into you- it would be great to have an advocate someone to explain things to take the time”*

And *“ It felt like they were using my disability to discredit me not help me”*

And *“ police used to follow me around”*

“If you have an ABI you are an easy target for police and bouncers”

And *“they have their ways of tricking you, tend to make the situation worse, are you being a smart arse, you react - then you're up for resist arrest”*

Availability of appropriate services and support

With regard to access to services and support, a number of participants made comments related to their experiences of the justice system, including:

Participant - “I have a prosthetic leg and they take it off me, even took my wheel chair away – I had to crawl across the cell to the toilet”. Interviewer - Why would they take your equipment? Participant - “They think I will use the spokes as a weapon”

And *“ There are no rails or mats in jail.. the floors are painted so are slippery, only have half a shower because I don't have time to do it properly”*

And *“I fell over and a screw came out of (prosthetic) leg, had to fill out a medical form, if you cant read and write you are in trouble, took two days to get approval, and three days to see a Dr by then I had cellulitis and ended up having an operation in St Vincent's”*

And *“They did not understand how important my medication was Dilantin – they did'nt give it to me and I had lots of seizures and had to be taken to hospital”*

And *“ I got nothing in prison no one saw me nothing, there were no services when I left not even somewhere to live, no wonder I ended up back there”*

And *“ You don't want to be put into protection that's worse that's where the sex offenders go...maybe we could have like a medical unit”*

And *“ You just keep to yourself, told what to do and when to do it terrible place 16 hours locked-up”*

And *“ I was always hungry”*

And “Go to the officers and you end up in more trouble...classed as a dog... always try to stay in mainstream-keep to yourself”

And “ hard to think of what to say, lots of lingo used, like codes, lots of politics (a reference to other prison inmates) ”and “ Give you exactly the same talk as everybody else (a reference to Officers)”

(VCASP, 2011a)

The people with an ABI who were interviewed are a diverse group, however regardless of whether they are/were offenders or victims they share in the main negative experiences and as a consequence were able to identify multiple barriers leading to their exclusion at all levels of the criminal justice system. Overwhelmingly participants agreed that this inquiry was a way to have their voices heard and that ‘more could be done’ in the following areas, including:

- Help to identify as having a disability
- Access to the Independent Third Person Program
- Training about ABI to the police and the courts including lawyers and correctional staff
- Access to advocacy, including information about their rights and help to implement them, case management and post release services - especially accommodation and alcohol and other drug misuse treatment
- Tapping into their enormous potential of people with an ABI, including skills, knowledge and wisdom to support the development and implementation of early intervention and information strategies/approaches

In light of the comments and findings arising from the interviews undertaken with people with an ABI VCASP provides the following recommendations for consideration:

Recommendation 1

That the Inquiry makes findings inclusive of people with an ABI in the areas of knowledge of rights, availability of appropriate services and supports, dealings with the police and operations of the courts.

Recommendation 2

That the Inquiry makes findings inclusive of people with an ABI regarding measures to improve access and interaction with the justice system.

Recommendation 3

That an information and awareness raising strategy regarding rights, generic support and disability support services, designed specifically to meet the needs of people with an ABI, their families and carers, is developed and implemented.

KEY FINDINGS ON THE PREVALENCE, SEVERITY AND CAUSES OF ABI AMONG PRISONERS

The following information comprises data from research conducted by Jackson, Hardy, Persson and Holland (2011) *Acquired Brain Injury in the Victorian Prison System*, Corrections Research Paper Series 04 April 2011 on the prevalence, severity and causes of ABI among prisoners; and incidence and prevalence data, the Australian Institute of Health and Welfare (Fortune and Wen, 1999).

Research on the incidence and prevalence of ABI within the Australian population by the Australian Institute of Health and Welfare (AIHW) provides estimates that 338,700 Australians, 1.9% of the total Australian population have a disability related to ABI, with an estimated 85,000 Victorians affected. This figure is comparable to the estimated prevalence of intellectual disability 1.86% of the total Australian population (Fortune and Wen, 1999).

Relative to the incidence and prevalence rate within the general community, the prevalence of ABI in the Victorian Correctional System is alarmingly high, with 42% of males and 33% of females found to have evidence of an ABI on formal neuropsychological assessment:

Severity of ABI	Males with ABI %	Females with ABI %
Moderate	39%	21%
Severe	6%	7%

(Jackson, Hardy, Persson and Holland, 2011)

As highlighted within the VCASP NDIS submission, people with ABI (often with impaired social cognition), who are homeless and/or within or at risk of entry to the criminal justice system must be considered as a primary focus of government funding.

“focus must also be provided to persons at high-risk ... such as people with ABI experiencing homelessness, people with ABI and complex alcohol and other drug (AoD) issues, and people with ABI within the Criminal Justice system.” (VCASP, 2011b p4)

In addition to the disproportionately high rate of ABI representation, VCASP is also concerned about the appropriateness of sentencing of individuals with severe acquired brain injuries (refer to above table) who arguably experience significantly diminished capacity.

Recommendation 4

That as a priority, targets should be established for the significant reduction of numbers of persons with an ABI within prison populations.

KEY FINDINGS IN CONSULTATION WITH VCASP AGENCY MEMBERS

The following information was generated by VCASP member agencies, and derived from case studies of active clients who are currently involved in the criminal justice system

Complexity of Needs

Clients with an ABI present with a complexity of needs, including:

- combined intellectual disability, ABI, and hearing impairment
- combined intellectual disability, ABI, mental health, including depression and post traumatic stress disorder.
- combined intellectual disability, ABI, depression, alcohol abuse,
- combined ABI, mental health, epilepsy.

Inequity of access to legislated supports

Agencies reported instances of individuals being placed in indoor incarceration for prolonged periods (up to 23 hours/day), and at risk of assault by other inmates, often as a consequence of difficulty in management of their behaviour. Further agencies suggested reported:

- cancellation of parole,
- non-access to treatment intervention, due to ABI-related behavioural management issues.
- unsuitability of 'group-based' programs, therapies and interventions, with an alternative recommendation for individualised support made.
- insufficient funding to support, individuals programs resulting in either denial of parole (for up to 5 years), or for the individual to be paroled into the community without appropriate supports and strategies in place.
- lack of strategic support as a contributor to subsequent re-offending, homelessness, and parole breaches, and subsequent recidivism of a number of individuals.

VCASP member agencies also indicated issues in two specific areas:

- the comprehension of information provided by CJ Sector workers and referred workers
- reticence or reluctance to sign consent forms for entry to programs or medical/neurological consultations

(VCASP, 2011c)

KNOWLEDGE OF ABI WITHIN THE CRIMINAL JUSTICE SECTOR

Whilst sector agencies report a lack of knowledge within the Criminal Justice system of the complex needs of persons with ABI, there is recognition of the high level of knowledge and skills available and being practiced by ABI specialist staff working within, or interfacing with, the Criminal Justice system.

It is also recognised that within both the justice and the disability sector, there are a range of workers who hold specialist knowledge and experience with diverse and complex populations which can inform appropriate and responsive practices.

Recommendation 5

That a training and development strategy about ABI and the needs of people with an ABI involved in the criminal justice system targeting generic service providers (including the corrections workforce, the youth justice workforce, the courts, the disability workforce the pre and post release justice workforce) is developed and implemented

BENEFICIAL PROGRAMS

Many examples emphasising the benefits of collaborative cross-sectoral communication between the criminal justice system and ABI-specialist staff and organisations were provided by member agencies. These collaborations can facilitate programs that benefit the individual offender, and relieve the financial and social burden upon the criminal justice system, and the general community. The use of Prison plans, 'step-down' approaches, referrals for Target Group Assessment (TGA), supported residential accommodation (SRS) upon release, advocacy through disability service agencies were reported as significant contributors to the rehabilitation of persons within the Criminal Justice system. Individualised Plans when implemented were seen to have significantly improved the outcomes of these individuals in the areas of community transition, accessing accommodation and employment, and accessing alcohol and other drug treatment.

Examples of current best practice include:

- Individual case management practices through agencies such as ABI Specialist Case Management Services, Melbourne Citymission and arbias Ltd.
- 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.
- Targeted intervention, such as that 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.
- The Victorian Office of the Public Advocate Independent Third Person program was identified as an effective targeted intervention of note. However, the Victorian Office of the Public Advocate (OPA) reports significant underrepresentation of people with an ABI accessing the Independent Third Person Program. At the same time, OPA reports a significant increase in the numbers of people with ABI and complex presentations referred for criminal justice-related advocate support. (VCASP, 2011d)

Recommendation 6

That an information and awareness raising strategy targeting the Victorian Police to support the identification of ABI and increase access to the Office of the Public Advocate Independent Third Persons Program is developed and implemented.

Recommendation 7

That the best practice programs identified are expanded to reflect the incidence and prevalence of people with an ABI involved in the criminal justice system.

EQUITY OF ACCESS

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 systemic approach in Victoria to support the specific needs of people with ABI involved in the criminal justice system

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 fulfill 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 re-offending.

(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 provide 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.

Recommendation 8

That at a minimum people with an ABI who have a severe or profound disability as a consequence of an ABI and are involved in the criminal justice system in Victoria should have access to a comparable system to that which currently exists for people with an intellectual disability.

SERVICE DEVELOPMENT/REDEVELOPMENT

Services for people with ABI who are involved in the criminal justice system should 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 capacity building, 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, justice and disability sectors, planning for sustainability and building joined-up services and whole-of-government solutions.

There is a need to develop a service system which offers access to specialist ABI Support and works collaboratively across divisions of government and non-government sectors such as mental health, justice, youth justice, housing, indigenous and cultural affairs, disability, health, education and employment, in which each relevant agency takes ownership and responsibility for the area of ABI.

Recommendation 9

Given the numbers of people and range of disciplines involved in supporting people with acquired brain injuries, including within the criminal justice system, 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.

Recommendation 10

That collaborations and communications between departments be enhanced to promote access to generic support services and specialist ABI support services for people with an 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 and large remain lost to the disability system.

REFERENCES

BIA (2011), 'About Acquired Brain Injury' Brain Injury Australia, available online www.bia.net.au [accessed September 2011].

DHS (2006), *Disability Act 2006*, available online: www.austlii.edu.au/au/legis/vic/consol_act/da2006121/ [accessed March 2011]

DHS (2007), *Disability Services Criminal Justice Practice Manual 2007*, Department of Human Services, Melbourne.

Fortune, N. and Wen, X. (1999). *The Definition, Incidence and Prevalence of Acquired Brain Injury in Australia*. Australian Institute of Health and Welfare, Canberra.

Jackson, Hardy, Persson and Holland (2011), *Acquired Brain Injury in the Victorian Prison System*. Corrections Research Paper no. 4, April 2011. Department of Justice, Melbourne.

Stringer, K. (2007), ABI Case Management Review Discussion Paper, Disability Services, North West Region. available online: www.vcasp.org.au/site/items/2009/05/88761-upload-00003.pdf [accessed March 2011]

VCASP (2011a), *Consultations with persons with ABI on issue of Criminal Justice*, conducted in Melbourne and Bendigo, 15th and 26th September 2011.

VCASP (2011b), *Response to the Productivity Commission Draft Report: Disability Care and Support*. April 2011. Melbourne.

VCASP (2011c), *Consultations with member organisations for Criminal Justice Sub-Committee*, August-September 2011.

VCASP (2011d), *Criminal Justice Sub-Committee roundtable forum*, February 2011. Forum presentation.