‘I am not drunk, I have an ABI’: findings from a qualitative study into systematic challenges in responding to people with acquired brain injuries in the justice system

Gaye Lansdell^a, Bernadette Saunders ^b, Anna Eriksson^c, Rebecca Bunn^d and Susan Baidawi ^b

^aFaculty of Law, Monash University, Melbourne, VIC, Australia; ^bFaculty of Medicine, Nursing and Health Sciences, Monash University, Melbourne, VIC, Australia; ^cFaculty of Arts, Monash University, Melbourne, VIC, Australia; ^dFaculty of Law, Monash University, Melbourne, VIC, Australia

The over-representation of acquired brain injury (ABI) amongst prisoner and juvenile justice populations is a significant issue across jurisdictions. This article reports on the findings of over 100 interviews conducted in Victoria, Australia with people who have an ABI, as well as key stakeholder groups who work in, or with, the justice system. The study identified systemic problems faced by people with ABI along multiple points of the justice system continuum. Improved identification and diagnosis of ABI, well-resourced support for those with the condition, comprehensive training to improve ABI literacy among all stakeholder groups, and a more appropriate and therapeutic approach to people with ABI in the justice system are all recommended.

Key words: acquired brain injury; corrections; criminal justice system; disability; mental health; thematic content analysis.

Introduction

In recent years there has been growing concern around the experience of people with cognitive disabilities in the justice system. This includes acquired brain injury (ABI), which is defined as any damage to the brain occurring after birth (Australian Institute of Health and Welfare, AIHW, 2015, p. 112) resulting in reduced ‘cognitive, physical and emotional or independent functioning’ (AIHW, 2007, p. 1). The effects of ABI can vary, and may include physical symptoms, such as difficulties with balance, speech and sensory functioning; cognitive symptoms, such as difficulties with insight, problem solving, memory and concentration; and

behavioural issues, including impulsiveness, aggression and impaired judgment (Schneider, 2010; Williams, 2012). ABI is often described as a ‘hidden disability’ because of the nature of its symptoms, as well as its tendency to evade understanding, identification and early intervention (Rushworth, 2011). In the context of the criminal justice system, such factors can lead to particularly troubling outcomes.

The over-representation of people with ABI in prisoner and juvenile justice populations is striking (Farrer & Hedges, 2011; Shiroma, Ferguson, & Pickelsimer, 2010). In Victoria, a 2011 study of ABI within the prison population estimated a prevalence rate of 40% (Jackson, Hardy, Persson, & Holland, 2011). This compares to a rate of

Correspondence: Gaye Lansdell, Faculty of Law, Monash University, Wellington Road, Clayton, Victoria, 3800, Australia. Phone: +(03) 9905 1457. Email: gaye.lansdell@monash.edu

approximately 2% in the wider Australian population (AIHW, 2007). Factors contributing to this over-representation are varied, and the nature of ABI itself is not the sole contributor (Perkes, Schofield, Butler, & Hollis, 2011). Given high levels of co-morbidity and attendant disadvantage (Moore & Haysom, 2014), as well as inadequate institutional responses to the specific needs of this cohort (Hughes, Williams, Chitsabesan, Davies, & Mounce, 2012), broader systemic factors are recognised as exacerbating the involvement of people with ABI in the justice system (Brown & Kelly, 2012).

ABI-specific services are limited, and while numerous social services come into contact with ABI-affected people, understanding around the condition is sorely lacking (Holloway, 2014; Stephens, Cullen, Massey, & Bohanna, 2014). Furthermore, people with ABI are at a greater risk of homelessness (Dowse, Clarence, Baldry, Trofimovs, & James, 2011; Famularo-Doyle, 2010), are less likely to understand their legal rights and responsibilities (Parliament of Victoria, 2013) and are less likely to receive the same level of support as people with other types of disabilities (Baldry, Clarence, Dowse, & Trollor, 2013; Victorian Ombudsman, 2015). Community legal centres in Victoria, for example, have argued that were it not for the inaccessibility of health, housing, and alcohol and other drug (AOD) treatment services, their clients with cognitive disabilities, such as ABI, would be less likely to become entrenched in both the criminal and civil justice systems, respectively (Federation of Community Legal Centres Victoria, FCLC, 2011).

According to Baldry et al. (2013), ongoing community-based support for people with cognitive disabilities is 'extremely rare', meaning that they are much more likely to have frequent contact with 'agencies of control' than 'services of support' (p. 228). While it is possible that a person's ABI might vary or improve over time, it is also true that no such improvement might ever occur

(Williams, 2012). Unfortunately, an assumption that ABI is a temporary condition pervades community thinking around the issue, leading to a lack of adequate, long-term support and differential treatment to other types of disability, such as intellectual disability (Brown & Kelly, 2012; Parliament of Victoria, 2013; Stephens et al., 2014).

In Victoria, Australia, a small number of studies and reports have exposed the barriers facing people with cognitive or intellectual disabilities involved in the justice system. Henshaw and Thomas's (2012) study of Victoria Police, for example, found evidence that many police members could not distinguish between mental illness and intellectual disability. A Parliamentary Inquiry the following year recommended increased training and guidance for police, greater use of independent third persons (ITP) to assist people with disabilities in police interviews, and updating the Victoria Police Manual to adequately distinguish between mental, intellectual and cognitive impairment (Parliament of Victoria, 2013).

It has been suggested that difficulties for people with ABI in accessing legal aid in Victoria can restrict their understanding and exercise of their rights (VLA, 2014), as well as their ability to access costly neuropsychological assessment for diagnosis of their ABI (Brown & Kelly, 2012). There is also evidence that the effects of cognitive disabilities including ABI can make it difficult for some people to comprehend court procedures (Parliament of Victoria, 2013) and the conditions attached to sentencing orders (Rushworth, 2011). Victoria's *Sentencing Act 1991* (s80) allows for the use of Justice Plans to support people with intellectual disabilities to comply with sentencing orders, in order to reduce their risk of recidivism. However, this option is not available to people with cognitive disabilities such as ABI.

Two specialist court interventions that are available to people with ABI in Victoria include the Court Integrated Services Program (CISP) and the Assessment and Referral

Court (ARC). CISP is a pre-sentence diversion programme for people with a range of needs awaiting trial or bail (Magistrates' Court of Victoria, MCV, 2014). ARC is a pre-sentence programme that specifically supports people with a mental illness or cognitive impairment to encourage desistance and referral into treatment (MCV, 2014). However, these two programmes – in particular the ARC – are only available in a limited number of Magistrates' Courts throughout the state.

Many scholars have also argued that people with cognitive disabilities experience significant vulnerabilities that disadvantage them in hostile prison environments (Brown & Kelly, 2012; Ferguson, Pickelsimer, Corrigan, Bogner, & Wald, 2012; Shiroma et al., 2010; Williams, McAuliffe, Coben, Parsonage, & Ramsbotham, 2015). Furthermore, concerns have been raised that the lack of data collection around cognitive disability in the criminal justice system contributes to its 'hidden' nature, and prevents responses to the issue being measured and improved (FCLC, 2011; Parliament of Victoria, 2013). A lack of information sharing between prisons and other services has been found to further exacerbate these problems (Brown & Kelly, 2012).

This article presents the findings of a qualitative study into the experiences of people with ABI in the justice system in Victoria, Australia, by drawing on the perspectives of key stakeholder groups, including people with ABI and their families, as well as practitioners working in the system. This article focuses on the findings from our study that relate to systemic issues within both the criminal justice and social service systems, which lead to detrimental outcomes for this particular cohort as they progress through the various stages of the criminal justice system.

Method

This research project sought to investigate the experiences of people with ABI within the

Victorian criminal justice system, as well as the issues faced by practitioners from key stakeholder groups who frequently encounter this cohort. The project was funded by a private philanthropic grant administered by the Office of the Public Advocate (OPA) in Victoria.

Participants

Participants were recruited from organisations either within, or affiliated with, the Victorian justice system, as listed in Table 1. Informed consent was obtained from all individual and focus group participants prior to the interviews taking place. With respect to participants with an ABI, a specific user-friendly consent form was designed, and participants were invited to be interviewed with a family member, carer or friend. Participants with ABI were also gifted a \$50 retail voucher for their involvement in the research project.

Interview process and data analysis

Table 1 also lists the number of interviews conducted with each stakeholder group. One hundred and one interviews and one focus group were conducted between February 2015 and March 2016. Interviews were primarily conducted in person, with only four conducted by telephone. In addition, while most interviews were pre-scheduled, six interviews with people with ABI were undertaken when they attended a community health support agency. All interviews were semi-structured and participant oriented, meaning that participants had the opportunity to discuss issues they considered to be important. Interviews conducted with people with ABI involved two interviewers. Interview data were analysed using NVivo software (v11.0), and coded using thematic content analysis, using both inductive and deductive content analysis methods (Elo & Kyngäs, 2008).

Table 1. Number of participants interviewed by participant group and organisation.

Participant group	Organisation	Interviews conducted (N)
County Court judges	County Court of Victoria	8
Magistrates	Magistrates' Court of Victoria	7
Court staff	Magistrates' Court of Victoria	5
Tribunal members	Victorian Civil and Administrative Tribunal (VCAT)	3
Police prosecutors	Victoria Police	6
OPP staff	The Office of Public Prosecutions	2
VLA lawyers	Victoria Legal Aid (VLA)	10
CLC lawyers	Community Legal Centres ^a	8
Financial counsellors	Community Legal Centres	2
Service providers	A range of community, support and health organisations ^b	25
People living with ABI	Included ex-prisoners and people currently or formerly experiencing addiction, who accessed the support of community service organisations participating in this research project	22
Family members of people living with ABI	Accompanied people living with ABI who participated in this research project	3
Focus groups	Selected social workers and psychologists ^c	1
Total		102

Note: ABI = acquired brain injury; OPA = Office of the Public Advocate; VLA = Victoria Legal Aid; CLC = Community Legal Centres.

^a Justice Connect/Homeless Law; Victorian Aboriginal Legal Service (VALS); Villamanta Disability Rights Legal Service; Goulburn Valley/Loddon Campaspe Legal Centre; Fitzroy Legal Service; and Odyssey House.

^b This included: Victorian Coalition of ABI Service Providers (VCASP); Brainlink, Neighbourhood Justice Centre (NJC); United Brains; Peninsula Health; Australian Community Support Organisation; Salvation Army; Primary Care Connect; Diverge Consulting.

^c Arbias.

Ethics

Ethics approval was obtained from the Department of Justice Human Research Ethics Committee and the Monash University Human Research Ethics Committee. Approval was also sought and obtained from the ethics committees of the organisations from which participants were selected. Victoria Police declined a request to interview police recruits from the Victorian Police Academy; however, they approved the participation of police prosecutors.

Limitations

One limitation of our study was the disparity in numbers of participants from each stakeholder group. Most participants were selected by their organisations to take part because of their relevant expertise or experience with the subject matter. For example, magistrates and police prosecutors who took part in the study only included those with experience in specialist courts. Including participants from the mainstream court division or police recruits would have provided a broader perspective

on the relevant issues. There were also some organisations who perceived that they did not service people with ABI, and therefore were not willing to participate in the research project. Whilst unfortunate, this nevertheless highlights the lack of awareness about ABI among agencies in the criminal justice sector.

Results

Our results are divided into five subsections, each presenting the issues identified by our research participants as they relate to different stages of the justice system: (a) issues that were raised in relation to people with ABI's contact with police; (b) the lack of support available to people with ABI within the wider social service system; (c) problems within the court system that fail to accommodate ABI-affected people's needs; (d) issues identified with sentencing and corrections processes; and finally, (e) the prison environment and the lack of tailored transition support for people with ABI.

Contact with police

Police procedures

Participants commented on the need for police to have access to specific training around ABI as opposed to generalised mental health training. The lack of such specific training was seen to prevent police officers from being aware of the variable ways that ABI may affect people they come into contact with. There were also concerns that traditional policing methods are not sensitive enough to the nuances of the ABI condition:

I think that is not uncommon for people with ABI . . . because of their vulnerability, because they are a bit of a rabbit in the headlights type of thing. . . . Then they see a policeman and then it just escalates from there. It can happen like that. . . . I think there is a natural attraction to say, 'That person looks different?' or 'He's walking different?' or 'behaving different' and they

attract bad attention from the police. (*Financial counsellor, 2*)

Sometimes they can even be a bit abrupt and not have the capacity to deal with it. . . . (*Family member, 3*)

Some police prosecutors also recognised how traditional policing methods may cause difficulties in encounters with people with ABI:

[People with ABI] can come across as quite aggressive and quite often our approach is perhaps a little bit heavy-handed, with a safety-first view in mind. But in hindsight, it was probably more terrifying for them. . . . (*Police prosecutor, 6*)

Concerns were also raised about police questioning or interview processes, including the non-use of independent third persons (ITP), when it may be appropriate to do so. While aiming to provide some safety net for justice-involved people with an ABI, strategies such as the ITP programme were not seen to be seamless. For example, it was acknowledged that knowing when to utilise the ITP programme was complicated by the nature of ABI and the difficulties associated with identifying it:

I think they need more education and training in these areas so that they understand the ramifications but they have a better ability to be able to pick up that things are not quite right, perhaps I better bring an ITP in or perhaps I better make more inquiries with the person or get the surgeon or the nurse to come in and get a check before I go any further. (*Community lawyer, 5*)

Furthermore, a lack of insight or denial on the part of a person with ABI could sometimes result in them refusing the service; or alternatively, lacking the confidence to assert their right to the support of an ITP:

I think the ABI can get my back up. I get the aggressive stance but whenever I have been interviewed, 9 out of 10 times I have gone in without an ITP. Even though they are like, 'You have an ABI', I'm like, 'No, No,

No' – I can handle myself. (*Person with ABI, 1*)

The police deal with that [ITPs] but sometimes they would ring them and say that they are not answering, 'We will continue with the interview'. I don't know if they rang them or not. (*Person with ABI, 15*)

LEAP database

The Law Enforcement Assistance Program (LEAP) is a records management database that 'stores information about all crimes brought to the notice of police' (Australian Bureau of Statistics, ABS, 2013). Many people with ABI described the difficulties they encountered during police contact because the police did not know about, or recognise the symptoms of, their ABI:

I've been put in the drunk tank in the police station that many times when I was dragging my leg they just thought I was absolutely sloshed off my head and I wasn't and because I was stuttering, they thought I was definitely, and [*sic*] that is why I got put in there. (*Person with ABI, 21*)

Some police prosecutors who were interviewed validated these concerns. Some stated that the lack of ability to 'flag' people with ABI in the LEAP database encouraged instances of ABI-related behaviour to be overlooked, or mistaken for other issues, such as drunkenness or anti-social behaviours:

I have been guilty of this many times when you speak to somebody out on the street and you think, 'This person is just drunk' or whatever . . . and then you put them in the cells for a couple of hours and you think, 'Why isn't this person sobering up? What is happening here?' Then you do a little bit more investigation; okay this person has an ABI. It is hard to distinguish between the two. (*Police prosecutor, 2*)

People with ABI gave mixed responses to whether they would feel comfortable disclosing their ABI status to police. These ranged from 'no, they just think you're lying'

(*Person with ABI, 4*) through to 'I recommend any person who has an ABI to register' (*Person with ABI, 1*). However, some of these responses highlighted the difficulty in relying on people with ABI to disclose their ABI status. As one participant noted, '[i]t is just not one of the questions that they [police] ask' (*Person with ABI, 18*).

Among the police prosecutors interviewed, many indicated that only a broad warning flag pertaining to suspected or communicated mental illness is currently available. There was a consensus among the police prosecutors interviewed that it would be helpful to have ABIs specifically flagged on the LEAP database:

Well your expectations would be slightly different. I think that if you understand that this person is not just behaving in this way because they are bad . . . it could well be that they are having difficulty that could be addressed if it was just approached in a different way. (*Police prosecutor, 1*)

Some people with ABI also supported this approach:

I think it should be mandatory that any police member going to a job that they are made to check LEAP and see if these people are on LEAP. (*Person with ABI, 1*)

However, many other participants, including lawyers, court staff and people with ABI, claimed that this was a complicated issue. In particular, many noted the potential negative implications that could result, including that such information may prompt police to assume that people with ABI present a heightened risk of danger:

It can change the police response but in a positive way or in a negative way. . . . I think it needs further work that is not going to result in . . . the police [being] heightened coming into the situation because the system says they might be impulsive, we will change our normal response and be a little bit quicker to use force. (*Court staff, 5*)

Furthermore, there were concerns that sharing information in such a way could breach client confidentiality:

I also wonder about who should flag that. If for example they interact with [a] medical or healthcare provider, whether it is not a breach of confidentiality to do so. I can see the utility in it and I can also see how it can be profoundly problematic and against the interests of the people who are flagged. (*Community lawyer, 8*)

As an alternative, some participants interviewed pointed to a preference for ‘universal precaution’ within the police force as a more effective option to improve the quality of contact between police and people with ABI:

To me, if you go back to rates we had in the 80s [1980s] around the HIV and the sound, sensible thing was around universal precaution. You don’t need to know that somebody is HIV; you just treat everyone as though they are. Why can’t we have the same [with ABI]? (*Court staff, 5*)

Such an approach would begin with the assumption that all people coming into contact with police could potentially have an ABI or other impairment, and that a non-threatening, respectful interaction may reduce the likelihood of escalating aggression between the two parties:

[Do] not assume that the person on the street is drunk. Assume that they might have an acquired brain injury. (*Magistrate, 5*)

As I said, there is good and bad. It is a way . . . the initial conversation or the initial reaction starts off, that will all depend on the outcome. (*Person with ABI, 1*)

Social service system

Nature of support

Many service providers described an implicit expectation amongst stakeholders that people with an ABI ultimately ought to regain independence. This expectation was seen, for

example, in funding shortfalls for case coordination, case management and ongoing carer support, often resulting in people with ABI bearing responsibility for organising their own care. Service providers suggested that this is an unrealistic expectation, which relies on the presence of unpaid carers – such as family members – who may be unavailable or unable to provide adequate support for people with ABI.

Accommodation

A lack of appropriate accommodation for people with ABI was widely recognised as one of the key issues, with one staff member at the Magistrates’ Court describing the issue as ‘endemic’ amongst this cohort (*Court staff, 5*). As another staff member stated:

We get a lot of people who would choose to live on the street rather than go to some of these accommodation options because they are so dangerous and there are so many drugs, very prolific. . . . They are pretty dangerous places so the court gives people swags. (*Court staff, 4*)

Most respondents agreed that very little could be achieved in terms of addressing a person’s complex needs, if they did not have the stability of a home.

Insufficient and under-funded services

An insufficient number of ABI-specific services, compounded by the lack of affordable neuropsychological assessment services, were other key deficiencies that participants identified. Service provider respondents described significant difficulties in accessing appropriate specialist support and therapeutic services for people with an ABI in the community, and noted this was particularly pronounced in regional Victoria. Although defence lawyers were often seen as having a pivotal role in identifying clients with potential ABIs, there was a perceived lack of available referral pathways following such

identification. Magistrates echoed these concerns:

There is such a lack of resources. It takes months and months even just to get a report. (*Magistrate, 2*)

Service providers, magistrates, Victorian Civil and Administrative Tribunal (VCAT)¹ members and police prosecutors all highlighted the inadequate funding and the dearth of support for such a frequently socially disadvantaged cohort, with individuals in rural and remote areas seen to bear further disadvantage because of their geographical location. Furthermore, because of the high incidences of co-morbidity amongst ABI-affected people, a limited availability of alcohol and other drug detoxification and rehabilitation beds, supported accommodation and mental health services were seen by many to compound the problems experienced by people with ABI in the justice system:

... say you have someone who wants to go into detox and residential rehabilitation today, you are not going to get them in for at least 4 to 6 months. (*Magistrate, 1*)

Lack of ABI literacy amongst services

Court staff perceived a reluctance amongst service providers to support ABI clients because of their already strained demand. Other respondents reported on an unwillingness, or lack of capacity, within the broader service system to work effectively with ABI-affected clients:

... generally speaking the service system doesn't work well with brain injury. You send someone off to a GP, they don't work well with brain injuries or you send them off to drug and alcohol, they say they don't work with them. (*Court staff, 5*)

Service providers noted that many community support services were ill equipped to provide services to people with both ABI and

other challenging issues, such as homelessness, mental illness and/or substance abuse problems. There was a perception amongst participants that many services tended to 'cherry pick' clients with the highest likelihood of successful outcomes, in order to secure long-term funding or because they lacked ABI literacy and viewed ABI-affected clients as difficult. Service siloes and an apparent unfamiliarity with appropriate strategies for responding to people with an ABI were seen to jeopardise the chances of people with an ABI having their needs addressed in the community:

Most mental health won't touch people with an ABI ... it is hard to then try and refer them to mental health services because then they go, 'No, it's an ABI. You can deal with it' sort of thing. (*Service provider, 8*)

Exclusion of ABI from justice and disability support services

Many participants described the exclusion of ABI from some disability services and ambivalence towards ABI by both the disability support and justice systems, as 'subtle' rather than necessarily deliberate discrimination. Community lawyers, for example, did not believe that ABI-affected clients were deliberately or specifically treated differently to other people with disabilities. However, they were of the view that on a more hidden, systemic level, people with ABI received different levels of support than, for example, clients with intellectual disabilities:

I would say generally there is possibly more sympathy for intellectual disability. (*Community lawyer, 3*)

If you have an intellectual disability, you are funded for life. If you have a brain injury, you're not funded for life. (*Court staff, 1*)

Some participants noted that the disparity between the justice system's approach to people with intellectual disabilities and those

with ABI could be attributed to the heightened focus on, and advocacy for, people with intellectual disability in recent years. Such focus ultimately led to law reform mandating special sentencing conditions for offenders with intellectual disabilities in Victoria,² as well as specific prison units for this cohort.³ People with ABI – who may experience very similar difficulties to people with intellectual disabilities – are unfortunately excluded from these same opportunities. For example, one community lawyer confirmed that clients with intellectual disabilities would theoretically be prioritised over clients with ABI, if demand for their services was high:

If we didn't have a waiting list with two or three people with a very clear intellectual disability . . . so they [people with ABI] might have to go behind the three people on the waiting list. If it was very immediate . . . we ever so slightly discriminate against anybody who doesn't have clearly an intellectual disability. (*Community lawyer, 4*)

Court processes

Lack of early identification

Lawyers and service providers lamented that many clients with lengthy criminal histories and long periods of justice system involvement were not identified as having an ABI for several decades. According to many, this demonstrated missed opportunities for intervention. Often, clients' or their families' early requests for support fell on deaf ears, with most clients only receiving access to formal neuropsychological assessment once they had committed serious offences:

I see people come to me all the time . . . they have 30 pages of priors and you think, I think we can get a report. You get the report, it turns out they have an ABI or intellectual disability but looking at their priors, they never had a justice plan before. . . . That suggests to me that this hasn't been explored before, which is shocking. It comes up all the time. (*Community lawyer, 2*)

Information sharing

Some community lawyers reported on what they deemed a 'legal-clinical gap' which often occurred between community legal centres and services supporting those with ABI. In this context, a perceived tension between information sharing, client confidentiality and consent often led to community legal centres remaining unaware of an ABI diagnosis, despite other services having knowledge of it. The extent of this gap was seen to vary, often dependent upon the strength of informal relationships between staff.

Many of those interviewed also highlighted the difficulties of information sharing within the justice system itself – in particular between service providers, courts and correctional services. For example, participants claimed that it was often difficult to access ABI assessment information for people in custodial settings:

We can't get medical information or records from Corrections. If somebody has been treated for an ABI or an assault or something in prison, we can't access that information. (*Service provider, 1*)

In addition, magistrates identified gaps in the sharing of assessment information between courts, police, correctional agencies and forensic mental health services. They provided various examples of ABI diagnoses not being shared between these services, including from previous court presentations, or from police evidence:

I've had one guy once, 'I had one of those neuropsych [*sic*] assessments done at Ringwood a few years ago' and there was . . . an ABI neuropsych [assessment] on file sitting at Ringwood that . . . cost hundreds of dollars to attain. It was just sitting there doing nothing, so we managed to get that dug out. But he was the one who told us about it. The only one that knows anything is the person who has no memory or limited memory. (*Magistrate, 1*)

One magistrate articulated that the quality of information received by the court was

typically poor, necessitating additional time for developing an understanding of a defendant's circumstances though questioning:

... the information that is there on the outside that gets to me is impoverished would be a polite way of saying it. (*Magistrate, 5*)

Self-represented litigants

The lack of a systematic assessment processes for ABI in the justice system results in many clients with an undiagnosed ABI having to self-represent in court. Participants asserted that in the context of recently reduced legal aid funding, rates of self-represented litigants have risen substantially. Thus, participants articulated the risk that a greater number of people with ABI will go through the litigation process without their impairment being identified. As one Magistrate noted:

... you have more and more people now running their own pleas. I would ask around a whole range of things but they're not going to come along with a neuropsych [*sic*] report and say, 'Hey, I have a brain injury. That's why I'm here'. That is very unlikely to happen. So you have a whole cohort of people doing their own stuff therefore you're never going to know. (*Magistrate, 4*)

Importantly, where an ABI is not identified amongst self-represented litigants, many flow-on effects were observed to impact upon the sentencing process. This included a lack of understanding around a person's ability to comply with sentencing or intervention orders, or to desist from further offending.

The 'legal benefit' and 'fitness to plead' tests

Several participants, including lawyers, court staff and members of the judiciary, noted the existence of a 'legal benefit test' in relation to ABI. The 'legal benefit test' refers to a tendency for lawyers to only raise a client's ABI if it is likely to lead to favourable legal outcomes. Indeed, it was some legal

practitioners' opinion that, if raising concerns about a client's potential ABI would not have any legal benefit, there was no incentive to verify the existence of the condition:

If they just come in for example, a traffic/first time driving while suspended, regardless of whether they have an ABI, they are going to get the same outcome. So we just, we'll just plead them up and get them out of court because ... identifying and trying to get assistance for them would not change the outcome of their court case. (*Lawyer, 10*)

In fact, some lawyers were of the view that it could be detrimental to raise an ABI as a defence, if there was an absence of support in place for that client. It was explained that, in such circumstances, the court would more likely consider the ABI to be a risk to community safety, rather than a mitigating factor in the client's defence:

Saying someone has an acquired brain injury, if you don't have any solutions or support, you're actually making it worse for them because you're saying, 'This person is a huge risk because of their ABI. We've got nothing in place'. (*Lawyer, 10*)

As a result, many participants described how questions in relation to a client's ABI are often not identified until the sentencing stage. As one County Court Judge reflected:

Well if they go through a trial and they are found guilty at the end of it and they're sentenced, yes you would find out then. You wouldn't find out if they were acquitted. Unless there's been something in the trial itself that alerted you to it. Sometimes that happens. (*Judge, 2*)

A related issue was concern around questions of 'fitness to plead'. Court staff, in particular, claimed that lawyers appeared reluctant to use this mechanism as it did not meet the 'legal benefit test' for their clients. They identified a large grey area where clients were often fit to plead, but not fit enough to comply with sentencing orders. As a result, they often

fell into a middle ground, which did not neatly fit into categories of ‘mental impairment’ or ‘mentally sound’:

If a person can understand the difference between right and wrong, they are fit to be tried. That is a pretty low bar. Most people come above it even if they don’t appreciate the nuances of being able to judge that they shouldn’t have done it at that time. (*Judge, 2*)

However, this meant that the court was often unable to appropriately respond to that person’s particular needs. As one participant noted, the risks associated with being found unfit to plead were often too great for defendants with ABI:

Lawyers don’t want to go down the fitness pathway with some offending because they are exposing the client to a much higher tariff of outcome. You can end up in Thomas Embling [Hospital]⁴ or in DFATS (Disability Forensic Assessment and Treatment Service)⁵ for a number of years. Whereas if you kept it in the Magistrates’ Court, that is not going to happen. (*Court staff, 5*)

The importance of neuropsychological reports

A recurring theme evident across all participant categories was the value of neuropsychological reports for understanding the client’s strengths and weaknesses:

... having that cognitive profile really helps you to then structure your intervention of your work with them. (*Service provider, 3*)

Normally my psychiatrist was able to make me read that the trigger points were coming and so I knew that I needed to divert it and I was still calm. (*Person with ABI, 1*)

Most participants believed that these reports informed effective communication with a person with ABI, and helped practitioners to develop effective support strategies, rather than simply a mechanism to achieve mitigation of sentence. Lawyers in particular

highlighted how these reports could assist them to better represent their clients:

When you have a report often the neuropsych [*sic*] would say, ‘Here is a list of recommendations on how to deal with this person or how to give them advice’, and making sure that they understand or having visual cues, which is super helpful for lawyers. (*Community lawyer, 2*)

Magistrates also placed significant value on neuropsychological reports to assist them to judicially monitor people with ABI effectively.

Court processes and specialist interventions

Another identified issue was the limited interventions in the justice system aiming to support and divert people with ABI. People with ABI described mainstream court process as ‘scary’ and confusing:

It is scary because I would forget and then the judge would speak and I would be listening and I would be really trying to take in but, as I’m listening, the thing that he said prior has gone in one ear and then out the other because I’m trying to focus and remember what he is saying. It’s just a circle. It goes round and round and round. Then I have to sit there and go, ‘I’m sorry Your Honour, can you please explain that to me again?’ Then they get frustrated and then that can cause me to get incarcerated. (*Person with ABI, 21*)

Specifically, participants claimed that there was not enough access to specialist courts, such as the ARC or CISP, and long waiting lists for those who did qualify. Often, these programmes were seen to experience difficulties engaging with the broader ABI service system or accessing neuropsychological assessments:

When CISP first started ... one of the things that they had funding for was 10 ABI assessments with [key ABI service provider] a month. We went, ‘Oh that’s fantastic’ but ... within a few months there was a

waiting list. To get the assessments with ABI was 5 months. Trouble is that CISP only goes for four. There was that sort of problem. (*Magistrate, 3*)

Participants described the ARC as one of the most effective court responses currently available in Victoria for supporting defendants suspected of having, or diagnosed with, an ABI. Both police prosecutors and lawyers highlighted the programme's significant benefits, including the view that magistrates involved in the ARC had higher levels of understanding around ABI than those in the mainstream court division. In addition, the structure of the programme itself provided greater support and flexibility for clients with ABI to comply with programme requirements:

We sit in the same court, the same floor, the same days, the same registrar . . . people with brain injuries they don't have to then think. They know where to go. They know what to expect . . . and that is why I suppose, sitting it three days a week, if someone is scheduled to come on Tuesday and they don't turn up, someone can ring them and they can turn up on a Wednesday. In mainstream court a warrant is issued. So there is that flexibility. (*Court staff, 1*)

Many participants also described a unique opportunity, when involved with the ARC, for people with ABI to 'be heard', and to develop positive relationships with the court and associated service providers. Magistrates also described the ability to develop rapport with the person with ABI, and to identify individual strategies to assist that person to comply with programme requirements, as crucial. As the following police prosecutor described, the use of a dedicated magistrate puts the client front and centre of the process and helps to build their trust:

The main thing that the client says at the end when they are asked on it, 'How do you feel about the court process that you have been through now?' They without fail say, 'It is

so much better. This is the first time I felt like somebody has listened to me'. (*Police prosecutor, 3*)

However, many weaknesses in relation to the ARC were also identified. Firstly, lawyers and court staff noted significant capacity issues within the programme, with long waiting lists, and often contingent on the limited availability of ABI case managers:

[The waiting list] is really long. We are really understaffed at the moment. You can come into the program and then every month you can come back before the magistrate but it could be more than six months before you are appointed a case manager to start working with you and supporting you. (*Court staff, 2*)

Furthermore, access to the programme can be inconsistent. Defendants must first plead guilty, and offences must take place within a specified area of Melbourne. Some participants raised questions as to the lack of access for individuals outside the catchment area. In addition, access to the programme is through referral from a magistrate or lawyer, thereby dependent on awareness of the programme on the part of that individual. One police prosecutor, for example, raised concerns that some lawyers did not refer to the ARC when they could have. In addition, access to the ARC is only available to those with a diagnosed or suspected condition, thus excluding defendants who are unaware they have an ABI, due to a lack of universal screening.

Importantly, court staff noted that at times the ARC acts as a substitute for community service coordination, which does not necessarily continue when a person concludes their involvement with the programme:

If we talk strength, that can be a weakness as well – there is that rapport that has been built up with the court and it is only time-limited . . . we don't want people to be reoffending to get the support of ARC. (*Court staff, 1*)

Finally, some participants felt that having a specialist intervention, such as the ARC, reinforced a view that disability could be less of a concern for the mainstream Magistrates' Court. This, according to some participants, further masks the prevalence of disability in the general court division:

... it kind of made disability justice less of a mainstream issue that all parties in the justice system collectively have to respond to, to this niche sort of area and I think because disability is so prevalent in the justice system, something that sort of creates the sense that it's just a small group of people is fundamentally a problem. (*Lawyer, 2*)

Victorian Civil and Assessment Tribunal (VCAT)

Formal identification and assessment of ABI within VCAT lists appeared to vary, particularly depending on the list involved. The Guardianship List was identified by some participants as one in which positive engagement with people with ABI was more possible than others. This may have been due to the more established fact of disability preceding involvement in the list; but also because of the nature of the hearing process. Other lists, such as the Residential Tenancies List, were seen to provide more missed opportunities for identification of ABI. Some VCAT members expressed that they felt limited by reduced discretion, particularly within the Residential Tenancies List. Housing issues were widely accepted by participants as a critical feature of the experience of people with ABI appearing in VCAT. There was even the perception that homelessness was a real potential outcome for people with ABI involved in housing disputes appearing at the Tribunal:

If the tenant is not there, there's not much you can do about it. You can't exercise the discretion for example to adjourn the application rather than evict the person to allow for a payment plan unless the person is there. Now the residential tendencies list is

working very hard to try and deal with that issue of low tenant attendance. (*Tribunal member, 1*)

Furthermore, there were difficulties identified in assisting ABI clients in prison to attend their VCAT hearings via video link. This, in turn, led to those serving short prison sentences being at greater risk of homelessness upon release:

For anyone in prison self-representation in VCAT is near impossible because you need to be video linked in and that requires completion of fee waiver forms and even our lawyers get confused a little bit. . . . Generally speaking if you are in prison and you have a possession order application at VCAT, unless we were involved, the clients would just not go. . . . I think if you have an acquired brain injury or mental health circumstances that you weren't able to process the need for you to be there, to defend it, your chances of success would be zero really because if the tenant is not represented, the landlord will always be able to regain possession of a property. . . . It is not just their ability to comprehend it and to call out help from the housing worker or the lawyer but it's also the system itself is not geared towards meeting this civil legal need of prison full stop. (*Community lawyer, 1*)

Finally, many community lawyers and VCAT members discussed the impact of the *Verdins*⁶ decision on the outcomes for people with ABI. The principles set out in that case include that where an offender has a mental impairment, the sentencing aims of denunciation, general deterrence and specific deterrence may be less relevant. The extent to which they are considered relevant depends on the nature and severity of the person's impairment, their associated mental capacity, and the potential adverse effects of punishment (such as imprisonment) on their mental health. However, it was noted by those interviewed that the ability of the precedent to aide in the defence of clients depended on a 'nexus' being established between the client's

ABI and their offending – something made very difficult where an ABI assessment and diagnosis were hard to access. Respondents noted that, despite the *Verdins* decision, there were still obstacles in preventing clients with ABI from being incarcerated.

Sentencing and corrections

Sentencing options, compliance and risk

There was wide acceptance amongst participants that people with ABI have difficulty complying with conditions of Community Corrections Orders, as well as other sentencing orders or bail conditions. Clients with ABI were described as having difficulties understanding the implications of their behaviour, and being vulnerable to exploitation by others, including in relation to committing criminal acts. Memory loss and comprehension difficulties among this cohort were also identified as key issues. Service providers described great difficulties supporting people with an ABI, who often have fairly black-and-white cognitive processes, to understand the nuances of such orders. For example, many clients with ABI have difficulty understanding orders that prohibit them from doing things that are otherwise legal (such as consuming alcohol or contacting a particular individual). Some police prosecutors also recognised these difficulties:

... you might tell somebody in 1,000 different ways ... 'Don't go to [XX] shopping centre'. They just go to [XX] shopping centre and they just steal, 'Don't go there, don't go there, don't go there'. Then they just go there and it is not because they are being bad, it is not because they want to stick it to the man, they just go there because that is what they do. (*Police prosecutor, 2*)

Many interviewees identified the need for a greater understanding of the impact of ABI on the capacity to comply with sentencing orders, even within specialist or diversionary programmes:

On the one hand they set up this list in the court where they say, 'We recognise that people with a brain injury or a mental illness or whatever, we don't want them locked into the criminal justice system' and yet the outcomes that they dispense keep them locked into the criminal justice system with fines. I get very cynical about this. ... on the one hand they say, 'Yes, we have special circumstances, and then, on the other hand, they say, 'Don't do it again'. It is like, 'Haven't you fixed your ABI?' – There is very little understanding. (*Financial counsellor, 2*)

In addition, the stigma attached to ABI, or the possibility that a person with ABI may not have knowledge about their condition (nor the ability to adequately explain their difficulties to the court), can influence whether they admit to not understanding the sentencing process:

... you do get a lot of people who are very street smart and know how to nod and say, 'Yes, I agree to the CCO'. They say the right things and they appear to be able to understand everything. It is only when you ask them the nitty-gritty of it all that you realise how little they have understood. (*Magistrate, 2*)

Some lawyers also noted that courts tended to conflate systemic factors with behavioural factors when considering the risks of reoffending. For example, a lack of housing often sets people with ABI up to fail, yet homelessness or unreliability are often interpreted as the result of the individual's ABI. Often, the non-compliance of people with ABI with sentencing orders could instead be attributed to the lack of available support available:

... when you come to court and say, 'Hey, give them a Corrections order', it is very hard to make that argument unless you have something to say, 'In order for them to comply with the Corrections order or any community-based order, they need this support service, they need an ABI specialist, they need to be physically transported to

appointments. Otherwise they are incapable of complying'. (*Community lawyer, 2*)

As one person with ABI demonstrated, simple support such as reminders of court dates would make a significant difference:

I miss a lot of things. I got arrested not that long ago because I forgot that I had court on the 17th of January. Got arrested yesterday for that actually and that was all because I didn't have anyone around who cared enough to remind me. So yes it has affected me in a lot of ways in my life. (*Person with ABI, 21*)

Differential treatment of ABI

According to many participants, issues in the sentencing process are compounded by a lack of options for people with ABI in comparison to other disabilities. Many respondents lamented the lack of tailored sentencing options for people with ABI in comparison to those with intellectual disability or mental illness. Justice plans – a sentencing option currently provided to people with intellectual disability – were often touted as the missing link for those with ABI involved in the justice system. Magistrates, judges and community lawyers in particular detailed how the lack of such options contributed to the revolving door of the justice system for this vulnerable group:

I don't have enough options. I would like to be able to have people on justice plans with disability service provisions and connections to disability type programs with Community Corrections Orders. (*Judge, 7*)

The inaccessibility of [Justice Plans for people with ABIs] is the biggest frustration for most magistrates. It is nonsensical. (*Magistrate, 5*)

As one service provider explained, making Justice Plans available for this cohort would be significant. However, whilst not everyone with an ABI may require a justice plan, any expansion of the sentencing option would

need to be met with a 'commensurate increase in resources':

It would make things more consistent. It would ensure equity to access to services a bit better. That you aren't disadvantaged by the nature of your disability or how you acquired it. I think, from that perspective, it would be a good thing. In terms of resources, I think there would have to be a commensurate increase in resources because the numbers of people in the criminal justice system, according to studies that have been done by Corrections Victoria, . . . is huge. (*Service provider, 10*)

In particular, the absence of such sentencing options were viewed as potentially discriminatory for offenders with ABI. A range of respondents including magistrates, VCAT members, court staff and lawyers were concerned about the evident disparity between intellectual disability and ABI, of which the absence of justice plans was only one element. These perceived or assumed differences could impact on the formal approach to, or provision of services for, people with ABI:

I wonder if that is not a reflection of some sort of moral judgement to how and why something accrued and at what stage of somebody's lives and whether it was preventable or if it was brought up by their own behaviours. (*Community lawyer, 8*)

Similarly, there were observations of differential treatment *within* the category of ABI, due to the nature of the ABI and how it was acquired – for example, between clients with traumatic brain injury (TBI) and other types of ABI. The identification and support for TBI caused by – for example, transport accidents – were recognised as greater than those available for ABI caused by substance abuse. Many participants considered this to be reflective of a deeper moral judgment present in the justice system, which perceived some types of ABI to be self-inflicted and thus more blameworthy:

It's like there is a lot of empathy for them [TBI clients]. . . . Whereas if they have been

using drugs for years and years and years it is a bit more . . . it is never said but it is a bit more like they brought it on themselves. (Court staff, 2)

. . . I think it is more alcohol-related. I used to think that other people would think, he must be a bad alcoholic to have a brain injury, that sort of stigma, definitely. (Person with ABI, 12)

Some legal participants in our study observed that there are further factors that influence the likelihood of some types of ABI receiving a more effective response. For example, TBI can often be attributed to a clearly identifiable traumatic event, which is often easier to diagnose than an ABI gradually acquired through other ways:

The traumatic ones do not tend to not be an issue because if someone has had a large trauma and they've been in rehabilitation, there is always reports and material that's available to assist. . . . (Judge, 6)

In addition, some legal participants noted that the interdependency of civil and criminal issues was often overlooked for this cohort. For example, some 'challenging' behaviours that are linked to ABI often make people vulnerable to tenancy, credit or debt issues where they fail to make rental or bill payments, conflict with neighbours or fail to comply with contracts. When left unresolved, these civil problems can quickly lead to criminal justice involvement.

Correctional supervision and support

Service providers often commented on the perceived quality of correctional supervision for this cohort and the extent to which Corrections Victoria officers supported clients with ABI. This was seen to vary, depending on their level of skill, the resources available to the local Corrections unit and the attendant workload:

. . . new Corrections workers, or who may not have much experience with this cohort,

they can see things very rigidly and not exercise any kind of discretion or flexibility and that can be difficult. . . . It just comes down to experience and training. (Service provider, 10)

Flexibility in response to the behaviours of clients on corrections orders, and increased support for them to comply with order requirements, was seen as important for this cohort:

. . . when people are on Corrections Orders, I find correction staff don't really take into account an ABI – 'He didn't turn up to an appointment, so that's a mark'. But then I would go in and say, 'Hang on, he has a brain injury, did you send him a reminder that he had the appointment?' 'No'. . . . (Service provider, 1)

Some Judges interviewed also expressed frustration that many of the offenders' needs identified at the point of sentencing – including those around an offender's ABI – were not necessarily being considered by the administrative agencies:

Corrections are the gatekeeper and it is not satisfactory – there is an amount of dissatisfaction across the board with what services have been provided. We don't know and a lot of us are putting in judicial monitoring just to make sure that the services have been delivered. (Judge, 1)

Prison

Suitability of the prison environment

Most research participants mentioned the need to better understand and consider the effects and consequences of imprisonment. One of the participants with an ABI provided the following example:

I'm the one that has 27 years jail behind me and I can't live out here and I never will. I believe I can't exist out here. How do I explain that? Your whole life in a prison system, routine, brought out to this and it is hard, in fact impossible. . . . I've always

been told what to do with the routines. I have no routine out here – that’s a problem.
(*Person with ABI, 22*)

One police prosecutor argued that prison was a preferable option for some individuals with an ABI, in the absence of appropriate supports. However, while service providers believed that the absence of equivalent support and structure in the community may render prison a favourable option for some people, they noted that it was the lack of such structural support within the community that should become the focus instead. Like other commentators, court staff recognised the paradox in the ‘prison as routine’ argument:

[W]e’ve seen some guys who do thrive in that environment because of the structure and it is predictable, which also suggests that for me, that is one of the missing bits in the rehabilitation model is the structured environments that don’t have a prison wall but have some of the other routine elements.
(*Court staff, 5*)

Many participants also challenged the ‘problematic’ assumption that people with ABI responded well to the prison environment. Some noted that significant interpersonal difficulties could arise in custodial environments for people with an ABI. In some instances, a diminished capacity to negotiate the complex social world of prison was seen to lead to negative outcomes for people with an ABI, including limited service access, becoming victims of assaults, or receiving penalties for impulsive behaviour in prison:

If I went to jail with this [scars indicating head injury], we’re [*sic*] not going to hit him or anything like that. If you have a brain injury caused by drugs or something that is not going to stop anyone from doing anything to you. . . . Yeah they’ll be treated like idiots – ‘You brought it on yourself mate, you did it yourself’. (*Person with ABI, 6*)

I suppose the third thing that I would be saying to the court is that they are going to do much tougher time during imprisonment

than somebody without an ABI. Prison would be a very bewildering place for someone who has those kinds of issues.
(*Community lawyer, 3*)

Targeted ABI interventions and support in prison

Some participants also noted the limited opportunities to identify ABI in prison, or to provide specialised, targeted and therapeutic support for those with the condition. Some service providers interviewed delivered neuropsychological assessments in adult and youth justice custodial settings. Others delivered secondary consultation in community correctional settings. However, service providers commented that overall there were very few programmes or services specifically targeted or tailored to people with an ABI in mainstream prison settings.

My understanding is there is an excellent group of social workers who are employed externally I think who are in Port Phillip. They are there for clients who are there in the psychosocial ward but I don’t know about the mainstream prisoners. I’m not sure who they are getting support from.
(*Community lawyer, 1*)

Furthermore, concerns were raised as to how responsive broader prison rehabilitation programmes were to the needs of people who may have, or are suspected to have, an ABI:

There’s no special unit for any like ABI clients and no programs that I can think of that have specifically designed for ABI prisoners, not on the top of my head. And then I don’t think that they take into consideration . . . if an ABI prisoner has to do drug and alcohol or sex offending behaviour programs or violence, I don’t think the program takes into consideration that that client also has an ABI. (*Service provider, 9*)

Magistrates, for example, detailed how prison is used, at times, simply as a containment option because of a lack of appropriate alternatives in the community, such as alcohol

and other drug (AOD) detox or residential rehabilitation:

I think it's farcical to think that we are rehabilitating people by sending them to jail. I think we can provide some supports for them but I don't think there's a real issue of rehabilitation because the underlying issues as to why they are there are not being addressed. (*Magistrate, 2*)

Post-release accommodation

Finally, upon release, a lack of stable and appropriate accommodation for offenders with ABI was identified as a significant issue. While some examples of transition support services were noted, many participants lamented the inadequacy of transition planning and post-release support for people with an ABI exiting prison. This paucity of transition support was seen to be exceptionally problematic for people with an ABI, who struggle to move from a structured custodial environment into the community:

That is the biggest problem we have at the moment. People end up going into jail 6, 8, 10 weeks, drying out, they can get their medication, you can get a bit of a review and you can see where they are. Sadly, that puts them in a better place except that now they probably lost their accommodation and all other things. It's a no win. (*Magistrate, 5*)

Discussion and recommendations

Prisons are generally the end of the line default for a system that allows a lot of people to fall through the gaps, whether they are adolescents or adults. The community is not funded and supported well enough to prevent people from ending up on these pathways in the first place . . . if you're not able to be supported well enough in the community it is the criminal justice system at the moment that picks you up. There is no middle ground for it. (*Service provider, 22*)

There was broad agreement amongst our research participants that current systemic

responses to people with ABI actively create pathways to offending, and inadequately assist people with ABI to prevent further offending. The community was seen to have deficient strategies to *support* people with an ABI, while the justice system was seen to have inadequate strategies to *divert* people with an ABI from punitive responses such as imprisonment. Importantly, the results suggest that these deficiencies are present at every stage at which a person with an ABI comes into contact with the justice system.

Paradoxically, it also became apparent that it was often only when involved in the justice system that some people were able to access ABI-related services. In this way, the justice system, at times, was seen to possess access to structures and services lacking in the community, yet still provide a lower level of support to people with ABI than to those with other types of disability. This scarcity of appropriate support was ultimately understood to perpetuate the involvement of people with an ABI in the justice system. Unfortunately, our results support the findings of earlier reports on this issue (Brown & Kelly, 2012; Parliament of Victoria, 2013) and suggest that little has changed in response to the plight of people with ABI in the justice system.

Participants raised numerous examples in which the cognitive, reflective or emotional capacity of people with an ABI were seen to generate disadvantages in their interactions with the justice system. However, our findings demonstrate that these difficulties could be ameliorated – if not eliminated – by targeted, appropriate and well-resourced support for people with ABI, and improved practitioner education and training. Existing research (Brown & Kelly, 2012) supports a focus on systemic issues, rather than attributing all problems to the symptoms of the ABI condition. Holistic, individually tailored support, as well as day programmes and group activities to assist people with ABI and their families, were participants' key recommendations. For example, social rehabilitation and

interventions focused on providing ABI-affected people with routine and structure in the community were viewed as pivotal. Such support needs to cater for the variable ways in which ABI impacts upon individuals, and must recognise that the needs of people with ABI are different to, yet equally as important as, the needs of people with other types of disability, such as intellectual disability. Furthermore, such support must be accompanied by flexible, long-term funding in recognition that some ABIs do not improve over time.

Most respondents advocated for alternatives to ‘flagging’ ABI on the Victoria Police LEAP database, such as better police training, the adoption of an ABI-informed approach and enhanced sensitivity in police culture to potential ABI persons. Such alternatives would arguably improve the likelihood of ABI being identified – or at least a suspicion of an ABI being taken into account by police when interacting with clients – whilst simultaneously protecting clients’ confidentiality. In addition, some participants advocated for stricter requirements to involve an ITP or other medical practitioner where police had doubts about a person’s capacity to be interviewed. While a previous Victorian inquiry did not recommend legislative change to compel the use of ITPs (Parliament of Victoria, 2013), clearly the under-use of ITPs continues to be an issue.

Our research also identified several issues within the community-based service system. Service providers drew direct links between the absence of robust, long-term supports in the community and the over-representation of people with an ABI in the justice system. Specifically, due to high incidences of comorbidity amongst ABI-affected people, a limited availability of alcohol and other drug detoxification and rehabilitation beds, supported accommodation and mental health services was seen by many to compound the problems experienced by people with ABI in the justice system. These results support previous findings in relation to people with multiple needs involved in the Victorian criminal

justice system (Victorian Ombudsman, 2015). All participants recommended appropriate and affordable supported housing options for people with ABI both prior to their involvement in the justice system and upon exiting prison. It was noted that housing availability was a prerequisite to addressing any other issues. This policy response is increasingly favoured in international jurisdictions (Stefancic & Tsemberis, 2007). In addition, capacity building within non-specialist ABI services in relation to ABI literacy was also recommended. This would ensure that people with ABI experiencing co-occurring difficulties could address those issues earlier and avoid later justice system involvement (Baldry et al., 2013; Holloway, 2014).

Magistrates, in particular, described their current attempts to devise suitable responses to the specific needs of people with ABI, in the absence of any targeted, formal options. They described adopting approaches that could include accessing neuropsychological testing (if and where possible), using judicial monitoring to keep offenders engaged and compliant with sentencing orders, and referrals to ARC or CISP services, in order to craft solutions for individual offenders with an ABI. However, they stressed that such options were only practicable where an ABI was identified in the first instance, and that such options were not available in all cases. In addition, it should be noted that many of the magistrates interviewed were either currently or previously serving on the ARC list. Thus, while the respondents offered informed views about therapeutic alternatives, they are not necessarily reflective of the judiciary as a whole.

Most participants advocated a more therapeutic approach by courts and corrections, although disparities existed around what such an approach should entail. Many participants favoured judicial monitoring and increased access to specialist courts, such as ARC and CISP, but others stressed that these were insufficient in isolation. Participants also highly recommended justice plans, with

strong support for making them available to people with ABI. Their strength was seen to be a focus on service coordination, rather than individual compliance, and their ability to generate individually tailored responses. However, it was noted that if justice plans were made available for this cohort, increased funding for specialist ABI services should simultaneously occur.

Regardless of the approach favoured, all participants agreed that timely access to neuropsychological reports could facilitate a more appropriate, individually tailored and effective response to people with ABI. Lawyers described the frequent need to make a professional judgment about whether it was worth engaging a neuropsychologist to determine the presence of an ABI. Thus, improved training for legal practitioners around how to best support clients with ABI was a common recommendation. In addition, magistrates stressed the need for reports that are brief, containing only relevant information that can assist them to work responsively with people with ABI. They maintained that such reports should be made available in court, in community corrections and in prison contexts. They also stressed that government-funded, impartial services ought to be responsible for the administration of such tests.

People with ABI also require more support to attend and comprehend the content of court hearings, including VCAT hearings. This includes clear and accessible pathways to participate in hearings from prison using Videolink, which lawyers and service providers described as confusing and inadequate. Importantly, some VCAT members stressed that improvements to some court processes were already being considered (such as sending parties text messages to remind them of court dates), and that any further changes should build on such improvements.

Correctional responses were often described as rigid and unsuitable for the needs and abilities of people with ABI. This not only renders such responses largely ineffective, but also places people with ABI

at greater risk of reimprisonment (Rushworth, 2011). Many participants questioned the inherent contradictions in bail, sentencing and corrections processes, where there was a purported acknowledgement of people with ABI's limited cognitive abilities, yet a simultaneous expectation of compliance in the absence of adequate support. Participants recommended increased training for correctional officers, as well as secondary consultation to support correctional programmes to take account of the needs of people with an ABI.

Community lawyers, in particular, questioned the concept of prison being 'good' for people with ABI, because of its level of structure and regime. They suggested that prison could often be more dangerous for people with ABI if they are targeted by other inmates or staff. This is in line with existing research on the prison experiences of people with ABI (Ferguson et al., 2012; Shiroma et al., 2010; Williams et al., 2015). In addition, it was seen as inherently problematic that prison – rather than adequate support in the community – offered such structure to people with ABI. Furthermore, the absence of targeted programmes and services in prison, and upon release, for people with an ABI was seen to be in stark contrast to those available for people with intellectual disabilities. Participants in our study observed this as a wasted opportunity for intervention.

The overwhelming consensus amongst our research participants was that the Victorian justice system lacked an integrated, coherent strategy to respond to people with ABI. Together with a lack of community supports, these systemic failures ensure that people with ABI are at greater disadvantage at every stage of the justice process, and experience poorer outcomes as a result. Moreover, our participants' insights have provided several important recommendations that can assist policy-makers to address the concerns of various stakeholder groups working in the Victorian justice system.

Notes

1. VCAT hears a wide range of civil and administrative legal cases including civil disputes, reviews of government decisions, human rights cases including guardianship matters, and residential tenancies matters.
2. The *Sentencing Act 1991* (Division 6) specifies special conditions for intellectually disabled offenders.
3. This includes the Marlborough Unit at Port Phillip Prison, and a specialist support and mentoring programme at Loddon Prison (Victorian Ombudsman, 2015, p. 92–93)
4. Thomas Embling Hospital is a high-security forensic mental health hospital based in Melbourne, Victoria.
5. The Disability Forensic Assessment and Treatment Service is a residential facility in Victoria providing treatment, supervision and support for people with a disability who are involved in the criminal justice system.
6. *Verdins; Buckley; Vo* (2007) 16 VR 269.

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Ethical standards

Declaration of conflicts of interest

Gaye Lansdell has declared no conflicts of interest
Bernadette Saunders has declared no conflicts of interest

Anna Eriksson has declared no conflicts of interest
Rebecca Bunn has declared no conflicts of interest
Susie Baidawi has declared no conflicts of interest

Ethical approval

All procedures performed in studies involving human participants were in accordance with the

ethical standards of the institutional and/or national research committee and with the 1964 Helsinki Declaration and its later amendments or comparable ethical standards.

Informed consent

Informed consent was obtained from all individual participants included in the study.

ORCID

Bernadette Saunders <http://orcid.org/0000-0003-3830-9874>

Susan Baidawi <http://orcid.org/0000-0003-4394-1313>

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