

Foreword

The over-representation of people with neurodisability, including acquired brain injury (ABI), in the criminal justice system isn't news. Or shouldn't be. Adult and juvenile offenders have been surveyed relentlessly for histories of head injuries with loss of consciousness; indicative of traumatic brain injury (TBI), the second largest subgroup of ABI after stroke. Over 20 000 Australians are hospitalised each year for TBI. Depending on which survey you believe, as many as 80 per cent of Australia's 41 000 adult prisoners have lived experience of TBI. It remains a singular failing of the criminal justice system that its interest in identifying potential ABI in offenders hasn't been matched by a curiosity about the unmet criminogenic needs specific to their disability. Brain Injury Australia's check of established offender rehabilitation programmes in our adult prisons found only one for which offenders with an ABI were directly eligible, 'in stark contrast to those available for people with intellectual disabilities'.¹ But disability representative organisations like Brain Injury Australia need to share some of the responsibility for this neglect. While only a small minority of people with an ABI – as those without disability – commit crime, that there is an *association* between, specifically, severe TBI, 'challenging behaviours' (also referred to as 'behaviours of concern') and sometimes violent offending, is now undeniable and should be uncontroversial. But just as disability representative organisations haven't been candid about the association, they've also been reluctant to recruit offenders with an ABI as poster children for raising awareness about the disability.

It's perhaps the human body's defining design flaw. Those parts of the brain responsible for its higher, so-called 'executive', functions – including the regulation of behaviour – are especially vulnerable to the most common type of TBI, from a closed head injury (where, for example, an object strikes the head but does not fracture the skull). A recent study of 659 clients of specialist brain injury rehabilitation services in New South Wales (Australia's most

¹ Gaye T. Lansdell, Bernadette Saunders, Anna Eriksson, Rebecca Bunn and Susan Baidawi (2018) "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' (2018) 25(5) *Psychiatry, Psychology and Law* 737, 756.

populous state) found more than half ‘met criteria for challenging behaviour’² – spanning social and sexual disinhibition to verbal and physical aggression. The more severe the TBI, the more severe the behaviours. Left unchecked, the behaviours can worsen with time. Brain Injury Australia’s constituents living with ‘challenging behaviours’ generally complain about an almost pathological impulsivity – that they literally do and say the first thing that comes into their head – and the radically shortened fuse that comes with it (histories of TBI are much more common in perpetrators of domestic and family violence, for example, than in matched community samples).

That ABI could be both a consequence and a cause of crime is as old as David clocking Goliath or Cain cleaning Abel’s clock. Or for at least as long as men have held clubs. Or grudges. Yet, when law firm Ashurst conducted a survey of the availability of diversion and programmes of therapeutic jurisprudence for offenders with an ABI, it found ‘only a few Australian jurisdictions expressly recognise ABI as a form of cognitive or mental impairment for the purposes of criminal proceedings’.³ As many as three in every four people who sustain an ABI make a good physical recovery. That ABI, with signature impacts on cognition and behaviour, isn’t as visible as other disabilities impedes its recognition throughout the criminal justice system. ABI also tracks social-locational disadvantage. Fewer than one in every five clients of Insurance and Care New South Wales (icare) – with severe TBI sustained in motor vehicle accidents – come from areas with a mean taxable income in the top four deciles.⁴ Likewise, ‘studies which have examined the experiences of

² Mark Sabaz, ‘The Agency for Clinical Innovation New South Wales Brain Injury Rehabilitation Program Challenging Behaviours Project: Adults – Using the Analysis of Prevalence, Course, Co-Morbidity and Burden to Inform the Model of Care’ (Sydney 2014) https://aci.health.nsw.gov.au/__data/assets/pdf_file/0020/165800/Challenging-Behaviours-Project-Adults.pdf [accessed 12 February 2021, 1].

³ *Memorandum: People with Acquired Brain Injury Facing Criminal Charges in the Lower Courts in Australia*, prepared by Blake Dawson (now Ashurst) for Brain Injury Australia 2011, 48.

⁴ Brain Injury Australia obtained data from Insurance and Care (icare) New South Wales’ Lifetime Care and Support Scheme – for people severely injured in motor vehicle accidents, regardless of fault – that merged residential address information for 450 participants with social disadvantage measures used by Jesuit Social Services and Catholic Social Services Australia for its *Dropping Off the Edge* reports (<https://dote.org.au/> [accessed 12 February 2021]). The analysis found scheme participants are ‘more likely to reside in areas of higher disadvantage’: only 19 per cent of participants came from postcodes in the top four deciles – from areas with mean taxable incomes of AU\$55,361 and above.

particular individuals generally find that individuals at the lower end of the socioeconomic status scale are more likely to participate in crime'.⁵

Where the overlap in these disadvantages hasn't masked the additional criminogenic impact of ABI on offenders, it has prejudiced the criminal justice system's response – since the disability is thought to come with the [socioeconomic] territory. The lack of a solid evidence base for non-punitive, non-pharmacological interventions with 'challenging behaviours' represents yet another obstacle to service development with genuine and specific capability in ABI. The world's first controlled trial of positive behaviour support – changing the disabled person's environment and teaching prosocial skills to reduce 'challenging behaviours' – with a group of 50 Australians with severe TBI, was completed just last year.⁶

Brain Injury Australia hopes this volume will throw down the gauntlet to all those working in the criminal justice system – from policy makers to prison administrators – to maximise the opportunities for diversion for *all* offenders, regardless of their type of neurodisability, and to swap spending on screens and surveys for investments in crime prevention – specifically, to engage with research aimed at unlocking the injured brain from unregulated behaviour.

Nick Rushworth
Executive Officer
Brain Injury Australia
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Nick Rushworth has been executive officer of Brain Injury Australia since 2008. He was also president of the Brain Injury Association of New South Wales between 2004 and 2008. In 1996, Nick sustained a severe traumatic brain injury as a result of a bicycle accident. Before joining Brain Injury Australia, Nick worked for the Northern Territory Government setting up their new Office of Disability. Formerly a producer with Australia's Nine Television Network and the Australian Broadcasting Corporation, Nick's journalism has won a number of awards, including a Silver World Medal at the 2003 New York Festival, a National Press Club and TV Week Logie Award. He serves on a variety of governmental and research advisory committees, is a director of the Australian Federation of Disability Organisations, and an ambassador for the National Organisation for Foetal Alcohol Spectrum Disorders and for

⁵ Don Weatherburn, 'What Causes Crime?' (2001) 54 *Contemporary Issues in Crime and Justice* 5.

⁶ The trial's chief investigator is Professor Jennie Ponsford AO from Monash University. With funding from Transport Accident Commission (TAC) – the statutory insurer of third-party personal liability for motor vehicle accidents in Australia's second most populous state, Victoria – the trial's participants are all clients of the TAC.

the Queensland Brain Institute's concussion research. Between 2017 and 2019, he facilitated a Community of Practice in brain injury for Australia's National Disability Insurance Agency.