

ENABLING JUSTICE PROJECT CONSULTATION PAPER

PEOPLE LIVING WITH AN ACQUIRED BRAIN INJURY USING
THEIR EXPERIENCES OF THE CRIMINAL JUSTICE SYSTEM TO
ACHIEVE SYSTEMIC CHANGE

“You get in trouble for falling through the cracks”

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EXECUTIVE SUMMARY

Forty-two per cent of men and 33 per cent of women in prison have an Acquired Brain Injury (ABI)¹, compared to 2 per cent in the community.² The *Enabling Justice* project seeks to understand why people with an ABI are so overrepresented in the criminal justice system and to offer alternative responses that would provide greater support to this group and direct them away from the criminal justice system. Despite their centrality to the criminal justice system, justice users are not consulted about whether their needs are being met and, if not, how they might be. The identification of this failure was the stimulus for the development of the *Enabling Justice* project. Adopting an approach which combines the participation principle from the disability rights movement, “nothing about us without us,”³ with the pragmatic idea of design thinking,⁴ the *Enabling Justice* project partners sought out those with the greatest insight: people with experience of the criminal justice system and of ABI.

Through one-on-one interviews and the establishment of a justice user group, the reasons why people with ABI are so over-represented in the criminal justice system have been explored. Justice users themselves identified areas in need of reform and participated in discussions where those issues and ideas for improving the criminal justice system were interrogated. This Consultation Paper gives voice to the experiences and views of the justice users involved in this project and invites stakeholders to engage with their perspectives of the criminal justice system.

In Part 2 of this Consultation Paper, snapshots of the criminal justice system capture the experiences of justice users, powerfully demonstrating the ways in which the criminal justice system fails to accommodate their needs and harness opportunities to direct this cohort away from the revolving prison door and towards meaningful lives in the community. The snapshots contain the following experiences:

POLICE

During encounters with the Police, justice users described feelings of intimidation, an environment inhospitable to asking for assistance and repeated failures by Police (and other workers in the criminal justice system) to identify the need for support (such as an Independent Third Person) and offer it. Some justice users described violence and abuse at the hands of police. Some experienced poor treatment from the police even when they were victims of serious crime and believed that their criminal history coloured the response they received.

COURTS

At Court, justice users commonly described feeling fearful and stressed, often drinking or taking drugs prior to court in response to their emotions. Plain language and respectful treatment appear

¹ Martin Jackson, Glen Hardy, Peter Persson and Shasta Holland, ‘Acquired Brain Injury in the Victorian Prison System’ Corrections Victoria Research Paper Series Paper No. 04 April 2011.

² See Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, September 2015, pg 87.

³ See James Charlton, *Nothing About Us Without Us*, University of California Press, 1998. See also Eilionoire Flynn 2015, 19.

⁴ Tim Brown and Jocelyn Wyatt, ‘Design thinking for social innovation’ Winter 2010 *Stanford Social Innovation Review*, 31-35.

to be rare experiences and despite the introduction of some solution-focused Courts (and lists within Courts) in Victoria, the vast majority of justice users had not experienced these. Many justice users described not understanding what occurred at Court and many described drinking or using drugs prior to Court as a coping mechanism for the stress and fear it instilled. Troublingly, some described arriving in prison with no understanding of why they were there.

PRISONS

Justice users described two conflicting reflections: for some, prison was a place of routine and comfort compared to the challenges of life in the community; for others it was terrifying, a place where the help needed could not be accessed, whether that related to ABI, mental health issues or addiction issues. Those who had experienced prison both before and after their ABI described prison as a more frightening place with an ABI. Seemingly simple matters, such as following the direction of prison guards or remembering medical appointments were challenging for those with ABI who were unable to access the support they needed and often faced punishment or adverse outcomes (missing health appointments, denied access to programs) for their non-compliance. Justice users spoke of wanting to keep their ABI hidden, for fear it would be seen as a weakness and a reason for unwanted attention from other prisoners and prison staff.

POST-RELEASE, PAROLE AND COMMUNITY CORRECTIONS

Justice users identified the lack of appropriate housing for people exiting prison as the most significant reason why people reoffend. Many justice users described being released into homelessness, sleeping rough, in hostels or with people who were still engaged in drug-taking or criminal activity. For most in that situation, it was only a matter of time – sometimes weeks, sometimes months – before they found themselves back in prison. Justice users also described a distinct lack of support both immediately prior to release and after being released from prison. Many justice users said that support, targeted to the individual's needs, along with secure housing, was a missing element in their experience and is critical to breaking the cycle of recidivism, especially for people with ABI.

This paper explains that, although research commissioned by Corrections Victoria⁵ identified a significant proportion of Victoria's prisoner population as having ABI, for most people, their ABI remains either unknown or undisclosed. ABI is often referred to as a 'hidden' disability and commonly occurs alongside (and is masked by) other complex issues such as mental health conditions, substance abuse, family violence and/ or homelessness. Therefore, actions which seek only to improve the criminal justice system for people with a formal diagnosis of ABI will not have the broad reaching impact that is required if we are to reduce the numbers of people with ABI who are incarcerated in Victoria. In detailing the opportunities for action, this paper contains both changes that will improve the response to those individuals whose ABI is unidentified, as well as those whose ABI is 'known'.

Two broad themes have emerged from the justice user experience. These are:

- negative experiences with the culture, language, processes and procedures of the criminal justice system (these relate to **a system that does not respond to the needs of its users**); and

⁵ Martin Jackson, Glen Hardy, Peter Persson and Shasta Holland, 'Acquired Brain Injury in the Victorian Prison System' Corrections Victoria Research Paper Series Paper No. 04 April 2011.

- lack of access to resources such as adequate housing and support in the community (these relate to **exclusion within the community**).

More specifically, this paper contains the observations outlined below about how the criminal justice system responds (or fails to respond) to people with ABI. The observations are based upon the feedback of justice users through one-on-one interviews with justice users and meetings of the Justice User Group over the course of the *Enabling Justice* project to date. Justice users have told us that:

- People with ABI feel vulnerable in police interactions and would benefit from clearer language and respectful communication;
- Improving police communication with all people will assist people whose ABI is unknown;
- The Independent Third Person Program is not always offered to those who need it, yet demand already outstrips supply. The Program provides important support to people with ABI and complex needs and should be enhanced;
- Plain, clear language and respectful communication at Court is important for people to understand and engage with what is happening to them, but it is rarely experienced;
- Court should be an opportunity to access treatment and support, and to investigate any underlying influences on a person's behaviour;
- Current sentencing options for people with an ABI are too limited, meaning that prison is often the only available option;
- In light of the prevalence of cognitive impairment and other complex needs in Victoria's prisoner population, Corrections workers should assume prisoners have complex needs and respond to them accordingly;
- Prison should be an opportunity for assessment and connection to social support, particularly for those found to have cognitive impairment and/or multiple and complex needs;
- A term of imprisonment should truly be a punishment of last resort for low-level offending;
- A breach of a CCO may be an indication of a cognitive impairment and/or multiple and complex needs and should prompt referral to a solution-focused Court or list rather than an immediate return to mainstream Court and prison;
- Transitional centres seem to be a necessary bridge between prison and the community and reduce recidivism; but there are not enough to meet demand (no participants had experienced a transitional centre);
- Investment in post-release housing is necessary to reduce recidivism, ensure community safety and allow ex-prisoners to live dignified lives; and
- While some measures have been introduced make the criminal justice system, or elements within it, more accessible to people with a disability, including people with ABI, these are not readily offered or made broadly accessible.

OPTIONS FOR CHANGE

This Consultation Paper proposes a number of options that seek to address the issues faced by people with ABI in the criminal justice system. The Justice User Group have told us, broadly, that the things they need are:

- Respect
- Support
- A home

These seemingly simple needs should be considered and addressed at each point of the criminal justice system and in the wider community. These needs are recognised within the concepts identified below. These five concepts have influenced the implementation of innovative approaches within parts of criminal justice systems within Victoria and other parts of the world, with many demonstrating their ability to reduce recidivism rates and, ultimately, make the community safer⁶. The following concepts have informed the options outlined in Part 3:

Procedural justice: the idea that if people feel they have been treated fairly and respectfully, they are more likely to comply with the law and regard it as legitimate

Universal vulnerability: because of its design, everybody who comes before the criminal justice system can be vulnerable. A criminal justice system that responds as if all its users are vulnerable assists everyone, including those with cognitive impairment.

Universal design: ‘the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible...’

Solution-focused justice: the criminal justice system viewed as an opportunity to improve the lives of those who encounter it, including addressing the underlying causes of offending.

Justice reinvestment: prioritising spending on social and health services in local communities over incarceration.

While some measures have been introduced into parts of the criminal justice system to support the needs of people with a disability, overwhelmingly, justice users who participated in the *Enabling Justice* project did not have access to those programs. For example, only two of the justice users who have participated in the project had been offered an Independent Third Person by Police and only three had been referred to a solution-focused list, such as the Assessment and Referral Court List. Due to the tendency of ABI to be hidden (from both those with the impairment and those around them) improvements to the way that people are communicated with, offered help and assessed are each necessary to ensure that existing measures have their intended impact.

Options include measures that are universal improvements to the criminal justice system, meaning that these will benefit all justice users, including those with an ABI or complex needs as well as measures that specifically address the needs of justice users with an ABI or complex needs.

For example, options that seek to improve the criminal justice system for all people include:

- Should a review be conducted of the structure and resourcing needs of the Independent Third Person program delivered by the Office of the Public Advocate, enabling the program to be strengthened and funded to meet growing demand? Should this review consider the

⁶ For example, see an audit of Victoria’s Neighbourhood Justice Centre and the Court Integrated Services Program in Victorian Auditor-General’s Report, April 2011, *Problem-Solving Approaches to Justice*; and an evaluation of mental health courts in the US in Ray Bradley, *Long-term recidivism of mental health court defendants*, *International Journal of Law and Psychiatry*, 37 (2014) 448–454. See also Mazerolle, Lorraine, Sarah Bennet, Emma Antrobus, and Elizabeth Egins. 2012. ‘Procedural Justice, Encounters and Citizen Perceptions of Police: Main findings from the Queensland Community Engagement Trail (QCET)’. *Journal of Experimental Criminology* 8(4):343–67

potential benefits of introducing a legislative requirement for the use of Independent Third Persons into the *Crimes Act 1958*?

- Should a 'universal precaution' approach be adopted by Victoria Police,⁷ including the use of plain language and improved communication strategies when interacting with all members of the public? Should all communication with members of the public that is in a prescribed form, such as the caution read out at the beginning of recorded interviews, be reviewed and revised to improve its clarity and accessibility?
- In light of the difficulties that many people with cognitive impairment have complying with CCOs, should special measures be introduced in CCO breach proceedings to identify whether a person has particular needs? For example, should there be solution-focused judging in CCO breach proceedings, whereby breach matters are referred to solution-focused court lists?

Options that seek to provide targeted support for people with ABI or complex needs include:

- Should a professional advocacy and referral service be trialled, which offers support to persons with a cognitive disability who are interacting with the criminal justice system? Should this service be delivered as an expansion of the Independent Third Person program delivered by the Office of the Public Advocate or by a separate volunteer or paid workforce? Should support be made available during police interviews as well as during court attendance and other points of contact with the criminal justice system?
- Should section 80 of the Sentencing Act be amended to make Justice Plans available to offenders with ABI, as well as intellectual disability?
- Should the now defunct role of 'ABI Clinician/s' be either reinstated, or redesigned (i.e. expanded) and reintroduced into the criminal justice system?
- Should the ABI Clinician roles (see above) have a specific emphasis on ensuring that there is an organised and supported pathway for people to access the NDIS if eligible? Should this role support prisoners as well as people completing parole or community corrections orders, and should it include brokerage to obtain diagnostic reports if necessary?
- Should post release housing and support programs be expanded so that longer periods of post release case management are available for offenders with complex needs and so that more offenders are eligible? Should a new 'risk' category of offenders in need of increased supports be identified, being low level recidivist offenders who are identified as having complex needs and have returned to prison repeatedly in the past 24 months? Should all people with ABI be provided with transitional support?

⁷ Asquith and Bartokwiak-Theron, 'Policing Precariousness: ontological and situational vulnerability in policing encounters', 2016, in press. Cited with permission from the authors.

HOW TO PROVIDE FEEDBACK

This Consultation Paper asks stakeholders to engage with the options outlined in more detail in Part 3, and to provide feedback about those options to the Project Partners by **31 July 2016**.

Meetings with key stakeholder organisations will be arranged over the coming months to discuss the options and the feedback we receive in more detail.

A final report will be released in early 2017.

PART 1: ABOUT THIS CONSULTATION PAPER

This Consultation Paper gives voice to the experience of a range of individuals who have an Acquired Brain Injury (ABI) and who have experienced the criminal justice system. Through participation in interviews and, in some cases, regular, facilitated meetings of justice users, individuals described their experiences of having an ABI in the criminal justice system; provided ideas for improving the criminal justice system for people with ABI; and responded to proposals suggested by others.

Throughout this Consultation Paper, the term ‘justice user’ is used to describe people who have experienced the criminal justice system first hand. This has been a deliberate choice by the *Enabling Justice* project partners. Firstly, and consistent with a person-centred approach, the term ‘justice user’ emphasizes that the criminal justice system should be designed with the needs of the people who come before it in mind. The designers of the criminal justice system have, typically, failed to consider the needs of justice users. Such failure may be responsible for growth in both crime and recidivism rates, at huge financial and social cost, particularly in communities with high levels of socio-economic disadvantage. Secondly, the term ‘justice user’ is neutral and, unlike the terms ‘offender’ and ‘prisoner’, does not attach stigma to the person.

Justice users described their experiences at each point of contact with the criminal justice system: the police, the courts, prison and, finally, post-release, parole and community corrections and identified the issues which were most significant to them. The purpose of this Consultation Paper is to seek feedback from stakeholders about these issues and the opportunities for action (termed ‘options’) which are identified.

STRUCTURE AND METHODOLOGY

The Consultation Paper is broken down into the following three Parts:

Part 1 outlines the purpose of the Consultation Paper and provides context by describing the alarming over representation of people with ABI in the criminal justice system, as well as details of the *Enabling Justice* project, its partners, aims and the reasons for seeking stakeholder feedback.

Part 2 presents snapshots of each point of justice users’ contact with the criminal justice system, being the police, the courts, prisons and post-release, parole and community corrections. Each snapshot contains stories and quotes taken directly from justice users who were involved in the *Enabling Justice* project, some of whom also became members of the Justice User Group. Issues discussed by the Justice User Group are also explored and act as a prompt for the options proposed in Part 3.

Part 3 identifies recurrent themes which have emerged from the reflections of justice users, which can be summarised as:

1. Common negative experiences with the culture, language, processes and procedures of the criminal justice system, some but not all related to how the system fails to recognise and respond to cognitive difficulties; and
2. The significant impact that lack of access to resources such as adequate housing and support has on justice users who are undergoing community orders and leaving prison.

In this part, the issues raised by the justice users are discussed, along with the limitations, failures and successes of the current criminal justice system. Concepts which are useful tools for building necessary change are introduced in response to the issues raised by justice users.

Finally, Part 3 proposes a series of options for change, supported by the Justice User Group. These options include measures which would improve the criminal justice system for all justice users, as well as measures which specifically seek to improve the criminal justice system for users with ABI. Some of those options are likely to have a universal impact, improving the accessibility of the criminal justice system for all people, while others are intended to specifically meet the needs of people in the criminal justice system with an identified ABI.

THE ISSUE

It's just a part of my life now. It's all I know. I just always get in trouble

In 2011, a study commissioned by Corrections Victoria⁸ revealed that 42 per cent of men and 33 per cent of women in a sample Victorian prison population had a diagnosis of ABI. This compared to around two per cent in the general Australian community.⁹ Similar rates of overrepresentation have been found in other states and territories of Australia, and in other English speaking countries, including the United States, Canada, New Zealand and the UK.¹⁰ Across jurisdictions, people with cognitive disabilities are susceptible to imprisonment, suggesting that something is missing in the community and the criminal justice system for this cohort.

Various factors can influence the over-representation of a particular group in prison populations.¹¹ The group may be more likely to have contact with police; more likely to be arrested and charged if they do have contact; more likely to be refused bail and remanded in custody; more likely to be convicted of a crime; or more likely to be sentenced to imprisonment. All factors can combine to produce over-representation in prisons, but not enough information exists about the pathway of people with ABI through the criminal justice system to know which factors are more responsible than others, if any.

⁸ Martin Jackson, Glen Hardy, Peter Persson and Shasta Holland, 'Acquired Brain Injury in the Victorian Prison System' Corrections Victoria Research Paper Series Paper No. 04 April 2011.

⁹ Ibid, citing Australian Institute of Health and Welfare, 'Disability in Australia: Acquired Brain Injury', Bulletin 55:(2007), 3.

¹⁰ See Shiroma, E. et al. (2010). Prevalence of traumatic brain injury in an offender population: A meta-analysis. *Journal of Correctional Health Care*, 16, 148, Tracey V. Barnfield and Janet M. Leathem, 'Incidence and outcomes of traumatic brain injury and substance abuse in a New Zealand prison population' (1998) *Brain Injury* 12(6) 455-466, Peter W. Schofield, Tony G. Butler, Stephanie J. Hollis, Nadine E. Smith, Stephen J. Lee and Wendy M. Kelso, 'Traumatic brain injury among Australian prisoners: Rates, recurrence and sequelae' (2006) *Brain Injury* 20(5) 499-506. See also Huw Williams, *Repairing Shattered Lives: Brain injury and its implications for criminal justice*. col. ill., port., 2012, p 18-19. Downloaded from http://www.t2a.org.uk/wp-content/uploads/2012/10/Repairing-Shattered-Lives_Report.pdf.

¹¹ See Don Weatherburn, *Arresting Indigenous Incarceration: pathways out of Indigenous Imprisonment*, Aboriginal Studies Press, 2014, 41-42.

What is an ABI?

An Acquired Brain Injury (ABI) is any damage to the brain that takes place after birth which results in deterioration in cognitive, physical, emotional or independent functioning.¹² Causes include a traumatic head injury leading to loss of consciousness caused by, for example, a serious accident or an assault, or non-traumatic damage often caused by part of the brain being deprived of oxygen, as in the case of drowning or drug overdose. Other leading causes of ABI in the general community are alcohol and /or drug abuse and stroke.

The impacts of ABI can be as diverse as its causes and the type, extent and location of damage to the brain. Some cognitive and emotional problems experienced by people with an ABI can include: poor memory and concentration, reduced ability to plan and problem solve, inflexible thinking, depression, emotional instability, irritability, impulsivity and inappropriate behavior (disinhibition).¹³ Sometimes brain injury is not at all obvious as it can affect specific and isolated areas of functioning.

Because a brain injury can happen at any time in a person's life, in either childhood or adulthood, it is possible for the injury to go undetected, particularly if it is the result of a cumulative process (as with alcohol related brain injury), or the person was experiencing homelessness, mental illness, family violence, or drug and alcohol misuse, where comprehensive medical treatment and rehabilitation services may never have been accessed.

A person with ABI could experience the emotional and cognitive changes listed above without his/her brain injury being recognised as such, and with some of these issues being put down to behavioural and personality issues both in childhood and adulthood¹⁴. ABI is often referred to as a 'hidden' disability.

What we do know is that people with co-occurring socio-economic disadvantage and mental illness and/or cognitive disability face significant barriers to accessing adequate and appropriate services in the community.¹⁵ Complex needs are an integral part of explaining the over-representation of people with ABI in our prisons, demonstrating that viewing the problem as one of disability alone will fail to capture the extent of the issues.

The leading risk factor thought to have led to an ABI for Victorian prisoners in the study was drug and/or alcohol misuse.¹⁶ This suggests many people in prison with an ABI may have had pre-existing difficulties that put them at risk of both criminal justice involvement and ABI, and that they may well have been involved with the criminal justice system before acquiring their disability.

¹² Some disability organisations and advocates, such as Brain Injury Australia, advocate for an expanded definition of ABI that includes fetal alcohol spectrum disorder (FASD), which involves alcohol-related damage to the brain incurred during fetal development.

¹³ Australian Institute of Health and Welfare, 'Disability in Australia: Acquired Brain Injury', Bulletin 55:(2007), 3.

¹⁴ See Nick Rushworth, '*Policy Paper: Inflicted Traumatic Brain Injury in Children*', Brain Injury Australia, 2010. Accessed online at <http://www.braininjuryaustralia.org.au/docs/ITBipolicypaperFINAL.pdf>. See also Huw Williams, *Repairing Shattered Lives: Brain injury and its implications for criminal justice*. col. ill., port., 2012. Downloaded from http://www.t2a.org.uk/wp-content/uploads/2012/10/Repairing-Shattered-Lives_Report.pdf.

¹⁵ Leanne Dowse, Melissa Clarence, Eileen Baldry, Julian Trofimovs and Sharleen James, 'People with Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System: the impact of acquired brain injury', April 2011.

¹⁶ Martin Jackson, Glen Hardy, Peter Persson and Shasta Holland, 'Acquired Brain Injury in the Victorian Prison System' Corrections Victoria Research Paper Series Paper No. 04 April 2011.

While problems rooted in early trauma and disadvantage need to be addressed prior to repeated involvement in the criminal justice system¹⁷, the fact that more than half of Victoria's prisoners have been incarcerated more than once means that vast amounts of money are being spent on repeatedly processing people – arresting them, trying them, detaining and incarcerating them. This calls into question whether the enormous resources currently committed to this system are focussed on making things better, rather than making things worse.

Further background to the issue is provided in Appendix A of this Paper.

ABOUT THE *ENABLING JUSTICE* PROJECT

With philanthropic funding administered by the Office of the Public Advocate, the Centre for Innovative Justice and Jesuit Social Services have partnered to deliver the *Enabling Justice* project.¹⁸ The *Enabling Justice* project is of three years' duration and will finish in March 2017. It is underpinned by a human rights approach which follows the United Nations Convention on the Rights of Persons with a Disability and its primary focus is to engage people who know what it is like to have an ABI within the criminal justice system to take an active part in developing recommendations and advocating for change. In short, our purpose is to support the justice users to participate in discussions which seek to improve the criminal justice system for people with ABI and to be a vehicle through which they can deliver their ideas.

This approach combines the participation principle from the disability rights movement, "nothing about us without us,"¹⁹ with the pragmatic idea of design thinking.²⁰ Both concepts are based on the view that systems, services, products and environments should be designed with their users in mind. Our legal system, however, has been designed with convention and procedural convenience in mind, with people's experience seeming to be irrelevant.²¹ Despite their centrality to the criminal justice system, justice users are not consulted about whether their needs are being met and, if not, how they might be. The identification of this failure was the stimulus for the development of the *Enabling Justice* project. *Enabling Justice* project partners agreed that we must listen to and include users of the criminal justice system - prisoners, offenders, victims – in discussions about improving the system.

With this in mind, the *Enabling Justice* project partners have established a **Justice User Group** of individuals with lived experience of ABI and the criminal justice system. The Justice User Group has been meeting bi-monthly since June 2015 to discuss their experiences of the criminal justice system, the recommendations of others²² and their ideas for change. When recruiting members for the

¹⁷ See Australian Senate, Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, June 2013. Accessed online at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index.

¹⁸ For details of the grant and all ABI projects funded under it please see <http://www.publicadvocate.vic.gov.au/advocacy-research/justice-system>.

¹⁹ See James Charlton, *Nothing About Us Without Us*, University of California Press, 1998. See also Eilionoire Flynn 2015, 19.

²⁰ Tim Brown and Jocelyn Wyatt, 'Design thinking for social innovation' Winter 2010 *Stanford Social Innovation Review*, 31-35.

²¹ See Tom R. Tyler 'Procedural Justice and the Courts' *Court Review* (2008) Volume 44, 31.

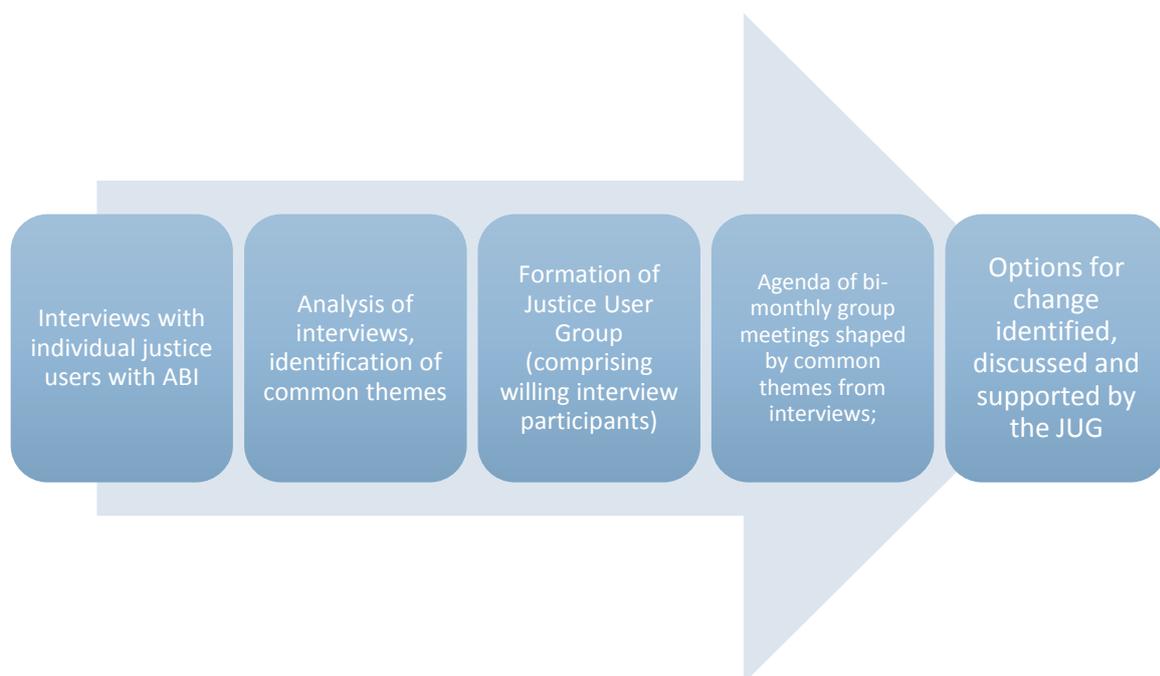
²² Such as the recommendations contained in Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, September 2015; and Tony Vinson, Margot Rawsthorne, Adrian Beavis and Matthew Ericson,

Justice User Group, we have also interviewed a number of individuals with experience of ABI and the criminal justice system to gain a snapshot of peoples' experiences and inform the discussions held with the Justice User Group.

Crucial to the project is the provision of flexible and person-centred support to the participants by Jesuit Social Services' Brosnan Services. This has enabled the participants to remain engaged with the project, as all experience a range of ongoing complex needs and challenges.

The diagram below demonstrates how the *Enabling Justice* project partners have engaged justice users and how the experiences, discussion and options contained in this paper have been informed by the Justice User Group.

Figure 1: Justice User participation explained



The project has two aims. The first is to combine literature review, stakeholder consultation and direct consultation with the Justice User Group to develop practical and achievable suggestions for change that are designed to improve the system generally, and to reduce the rate of incarceration of people with ABI. Second, it aims to build the capacity of the Justice User Group to participate in discussions and to draw on their own experience to be advocates themselves. This has involved activities such as media training and working with the Justice User Group to identify priority areas that they wish to work on, without needing to focus only on the institutions of the criminal justice system.²³

Dropping off the Edge 2015: persistent communal disadvantage in Australia, Jesuit Social Services and Catholic Social Services Australia, 2015.

²³ In this phase of the project, the Justice User Group are being supported to explore options for undertaking advocacy around the issue of homelessness, post-release housing and incarceration, which they have nominated as a priority policy area. We thank the Council to Homeless Persons' Peer Education and Support Program in particular for its support to the project and the JUG in this endeavour. At the point of releasing this Paper, the JUG had taken up a number of advocacy

PURPOSE AND SCOPE OF THIS CONSULTATION PAPER

Now that a substantial amount of work has occurred, this Consultation Paper seeks feedback on a range of interim options and questions as the project moves into its final year. A number of options and relevant questions are posed in Part 3 of the paper. Inviting stakeholder feedback at this point in the project provides project partners and the Justice User Group opportunity to consider feedback before the project and the final report is completed.

By focusing this paper on the issues identified by our Justice User Group, its recommendations are of course biased towards their experiences. Necessarily, the Justice User Group participants all self-identify as having an ABI and most have obtained a formal diagnosis of such. In light of the research commissioned by Corrections Victoria referred to earlier,²⁴ this means that they are part of only a small percentage of people in the criminal justice system who are aware that they have ABI. Accordingly, changes that will improve the response to those individuals whose ABI is unidentified, as well as those whose ABI is 'known', are an important feature in many of the options proposed.

As the project has progressed, it has become increasingly clear that over-representation of people with ABI, and cognitive disability more generally, relates to the disadvantage and social exclusion that they experience in the community, as well as to the ways in which their disability impacts on that disadvantage.²⁵ The experiences of our justice users consistently demonstrated that the same factors which make a person more vulnerable to having an ABI, make a person more likely to have contact with the criminal justice system. Therefore, this project adds to a growing body of work which recognises that vulnerability and disadvantage are woven into the story of a large proportion of people in the criminal justice system. This means that responsibility lies with all government portfolios, and with the whole of the community.

To be targeted properly, however – and to harness the expertise of its partners - the *Enabling Justice* project focuses on elements of the criminal justice system, being policing, the courts, prisons and community correctional services, and how this system responds to people with an ABI. By identifying realistic and practical options that might make this system less likely to propel people into incarceration, the *Enabling Justice* project can help to address one of the major drivers of disadvantage, homelessness and social exclusion.

opportunities, including a segment on ABC Radio National's program 'The Law Report'; a presentation to the Minister for Housing, Disability and Ageing at a Disability Housing Forum, a training session to lawyers and support workers at community legal centres about working with people with an ABI.

²⁴ Martin Jackson, Glen Hardy, Peter Persson and Shasta Holland, 'Acquired Brain Injury in the Victorian Prison System' Corrections Victoria Research Paper Series Paper No. 04 April 2011.

²⁵ This is acknowledged in Corrections Victoria's *Disability Framework 2016-2019 – Expanding the Opportunities*, November 2015. Accessed online at http://assets.justice.vic.gov.au/corrections/resources/e0ed5b65-babf-4de7-ace5-f07b129678ca/cv_disability_framework_2016-2019s.pdf.

PART 2 – SNAPSHOTS OF JUSTICE USER EXPERIENCE

This second part of the Consultation Paper provides a platform for the voices and experiences of justice users who have participated in the project. Drawn from a combination of semi-structured interviews with individuals and discussions held with the Justice User Group, it provides a snapshot of the experiences of people living with ABI in the criminal justice system. Names and other features of the stories that could identify the individuals involved have been removed.

Snapshots are split into the four broad themes of policing, courts, prison and post-release, parole and community corrections, which reflect the basic structure of the interviews initially completed with each participant, whether or not they then went on to participate in the . Using this approach, we try to follow the pathway of a person through the criminal justice system from initial contact with police to being charged, to presenting at court, followed by sentencing and undergoing sentence, either in prison or the community and transitioning back into the community.²⁶

In Part 3 of this Consultation Paper we then use this pathway to discuss each part of the system, identifying points at which people could be referred to services, diverted from prison or sentenced in more constructive ways. The Figure 2, below demonstrates how a person experiences the criminal justice system, from first contact with the police, through to release from prison. The snapshots contained in Part 2 follow the trajectory – police, court, prison, community corrections - portrayed below. We note, of course, that a person’s trajectory through the criminal justice system is not always clockwise. For example, a person who breaches a CCO may be referred back to Court and, ultimately, prison.

POLICING

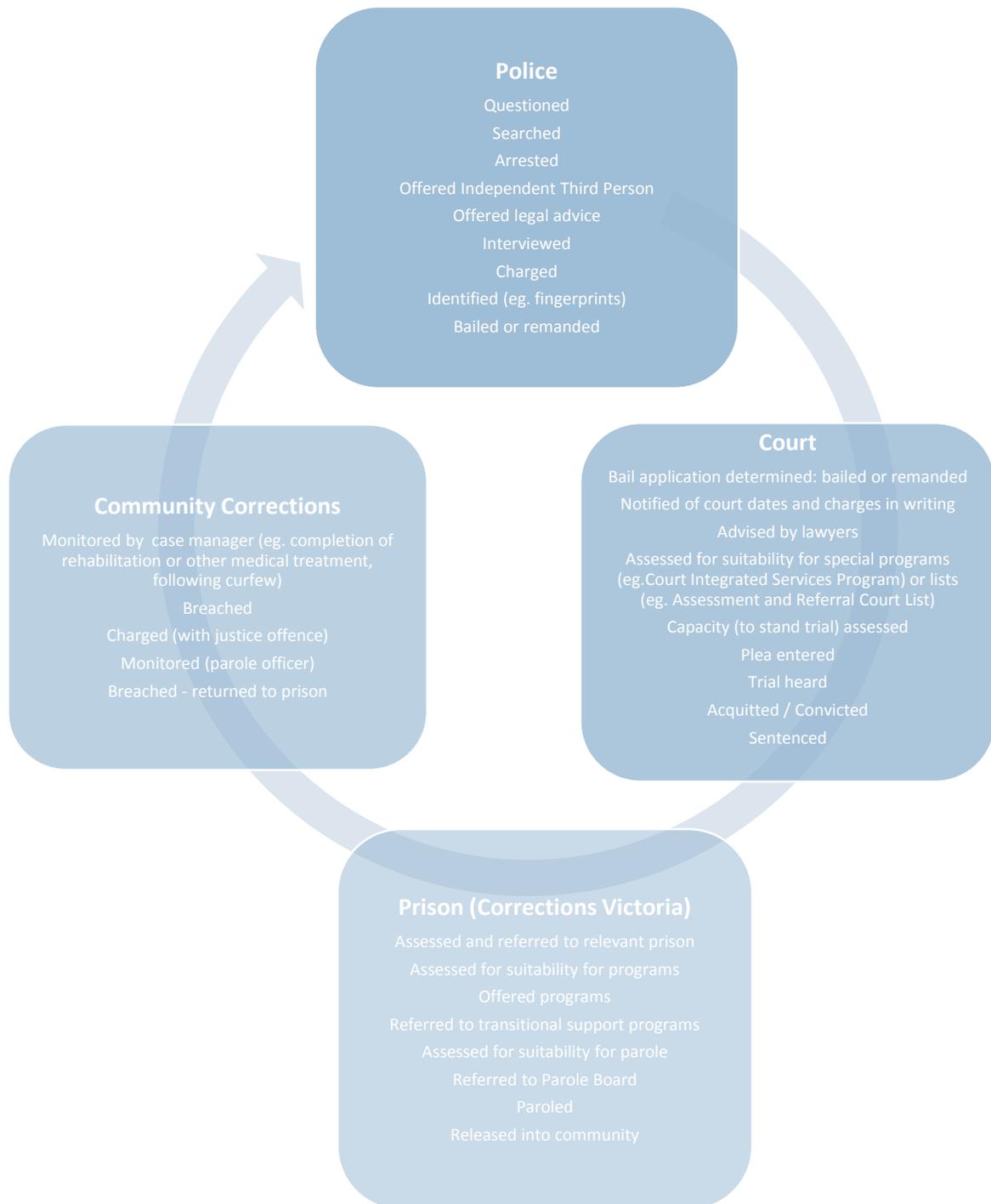
DISABILITY AWARENESS

Some participants said that police were not aware of disability and did not ask about it either. In some cases, people being interviewed by police as suspects did not feel that they could direct the conversation or raise an issue such as having disability. This power imbalance and the stress inherent in being interviewed by police, as well as cognitive problems related to their injury, affect their comprehension and ability to respond to the situation. Some participants did not see the issue as simply one of education, however, as they were concerned that police having knowledge of their disability might lead to them being taken advantage of in some way.

Sarah has been interviewed as a suspect many times since adolescence, but says that she wouldn’t normally mention to anyone that she has had a brain injury. *“They didn’t ask. And I didn’t even think about it. You don’t...when you’ve got them asking questions.”* However, Sarah says that police will sometimes realise something is not right, *“after they see I’m a lot confused about their questions. I don’t know how to answer a lot of them and I’m taken in different places from their questions to what the answer is.”*

²⁶ This follows the ‘sequential intercept model’. See Patricia A Griffin, Kirk Heilbrun, Edward P. Mulvey, David DeMatteo and Carol A. Schubert (eds.) *The Sequential Intercept Model and Criminal Justice: promoting community alternatives for individuals with serious mental illness*, Oxford University Press 2015.

Figure 2: A justice user's pathway through the criminal justice system



I was standing at a bus stop....I lost my balance....So the cop asked me, "how much have you had to drink?" and I said, "I have an ABI", and they didn't know what an ABI was.... Disability awareness training should be part of the course for PSOs and police cadets... after all, they have contact with the community.

A copper, a good copper, can turn around and say "Well this cunt's not all there. When you lock him in the cell, take his shoelaces so he can't hang himself",, or get a doctor and say "no-one's allowed to assess this guy or come in or get a false report until after the doctor sees him."

INDEPENDENT THIRD PERSONS

Not all of the *Enabling Justice* project participants were aware of the Independent Third Persons²⁷ program, while those who were aware reported having very limited access to it. Interviewees who had used the program felt that it was valuable, although one who had not used it before was concerned that disclosing their cognitive impairment to police would make them vulnerable to deliberate manipulation. The Justice User Group has discussed the Independent Third Persons program and supported a recommendation that the program be made more accessible and be used in a more intensive way in the case of people with an ABI. The group agreed that the presence of an Independent Third Person would have a positive effect on the conduct of police and that the reliability and speed with which an Independent Third Person could be sent was important.

It [having the ITP] changed the way the police asked the questions. I think they were a lot more softer, softly spoken. ...Knowing that you had an independent third person there, you realise yourself that you're not capable of answering the questions correctly. So you're very slow on answering, double checking, saying to the person, 'Is this what they said? Is this what they want to know?'

I used it, it was grouse. They treated me so differently with that third person.

The things that would change them [police officers], like we said, have that independent person come in...because then they're in the eyes of the public then, they can't do what they would normally do, if that independent person was there.

Clearly I've got an ABI and I'm meant to have a third person. But half the time they'll interview me without a third person...It's on the computer and yeah, I've asked them before. Like I'm meant to

²⁷ The ITP program is a program of the Office of the Public Advocate (OPA). The program trains volunteers to provide independent support to victims, witnesses and suspects in police interviews or other formal procedures such as taking fingerprints or bail applications heard at a police station. Police must get an Independent Third Person, either a family or friend or a trained volunteer from OPA, where they are interviewing a person with a cognitive disability (including an ABI). Where police fail to provide an ITP, any evidence obtained during the interview should be not be relied upon. Despite the program not being offered as it should, demand currently outstrips supply for this important program.

have a third person here and they've just gone ahead and done it.If there had been an ITP there, I would've spoke to them about it and they would've given me info, because, I didn't know much about the justice system, they took advantage of it.

VICTIM OR OFFENDER?

Several participants had been victims of violence or abuse. A small number had reported this to police and were required to cooperate with a formal investigation. One participant, a victim of family violence, found that their cognitive impairment affected their capacity to be understood and that instead of being supported to provide information, their complaint was 'not taken seriously'.²⁸ Participants who had cooperated with an investigation said that it was not a positive experience and felt they were treated poorly because they were known as offenders themselves. As a result, they felt that police were only interested in investigating the offence but not in supporting or following up the person who had been the victim of it. These participants said they did not receive clear or helpful information or support about the criminal process or Victims of Crime Assistance Tribunal.

I got assaulted in a boarding house... and they came to the hospital and officers took down my name. Then I had to go to the police station to see them and when I did, all they really wanted was the bloke that had done it obviously, but about me, when they found out that I was in trouble with the law - then they changed.The police were good to me up until the court case, like got me to tell my side of the story, who it was. This needed to be because he's going to hurt someone real bad. But they pretty much didn't want to know me after that...

[Once] I had to report a crime. [a family member] bashed me pretty badly once and I had to report [it].....they just wanted to get that statement off me and then it was like "see ya later. We've got what we want off you".

RESPECT, COMMUNICATION AND VIOLENCE

Several participants felt that they were treated disrespectfully by police, or were afraid when dealing with police. They did not feel able to communicate that they had an ABI, as they were focused on getting through the interaction as quickly as possible. This meant that there were instances of miscommunication or lack of communication, with participants not understanding what had occurred, or the processes of the justice system in general. Some participants said that they were treated well when they behaved appropriately towards police. Others said that they had experienced violence from police.

²⁸ The concerns of people with a disability around reporting abuse and violence are comprehensively catalogued and explored in the Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: the experiences of people with disabilities reporting crime* 2014, available online at <http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/reports/item/894-beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime>. We are also aware that Victoria Police have committed to implementing all the recommendations of *Beyond Doubt* and that Victoria Police are developing a disability action plan in response to its own report which led to the establishment of the Priority Communities Division, *Equality is Not the Same: Victoria Police Response to Community Consultation and Reviews on Field Contact Policy and Data Collection and Cross Cultural Training* 2013, available online at http://www.police.vic.gov.au/content.asp?Document_ID=39350.

Many participants had repeated contact with police from an early age. As people often acquire their ABI after already having experienced contact with police, their past offending behaviour rather than their disability is the defining feature that characterises these interactions. In short, Police did not recognise them as vulnerable people in need of additional support. Their stories suggest that they are seen first and foremost as a suspect/defendant. This affects the way in which people with ABI feel about police. It will also affect the way in which police do, or do not, acknowledge and respond to these individuals' circumstances.

Joe was arrested at age 17 for car theft. He was intoxicated and taken by divisional van to a police station. Joe was frightened, and didn't understand what was going on. He was interviewed and released on bail with charge sheets but was too afraid to ask where he was or how to get home. Joe walked for hours until he finally recognised where he was and managed to get home "... *Once they've pinched you a couple of times, every time they see you they pull over...*"

I was drunk in a public place and I was dragged in and there were 5 police officers at the desk, and they were all jeering at me, making fun of me...and they were saying things like 'If you don't do what you're told, we're going to stick you with the men, see how you like that.' ... [It would be] wonderful if they would be open to perhaps considering that people freak out because they're frightened and not because they're an arsehole or their intention is to attack you. Like me, I get scared really easy. And I get loud when I get scared. That doesn't mean it's people's jobs to stop and say 'Oh, are you feeling frightened now, ?' I get that. ... [But] could things be done differently? Absolutely.

THE COURTS

STRESS AND LACK OF UNDERSTANDING

Interviews with justice users revealed that people often cannot understand what is happening at court. This is due to a combination of stress and confusion, with each contributing to the other. Some of these experiences can be seen as ABI-specific, where the person's cognitive impairment seems to have made it more difficult for them to understand what is occurring and respond appropriately. Some accounts, however, could equally apply to people who are vulnerable for a whole range of reasons, or even simply to people who do not have expert legal training. Describing any person who lacks professional legal training as 'vulnerable' or 'disabled' certainly challenges the way that we normally understand these terms, but this is precisely the effect that the court environment has on many people.²⁹

I didn't understand the paperwork, I heard 'You have to go to court on this day' so I understood I had to go to court on this day but I had no concept of a lawyer or a solicitor, I had no idea.

²⁹ Asquith and Bartokwiak-Theron, 'Policing Precariousness: ontological and situational vulnerability in policing encounters', 2016, in press. Cited with permission from the authors..

For me, even to be alone with the solicitor, it's terrible, but to be alone without a solicitor, I had no idea what if any rights I had, or what I could do and I didn't question anything. I didn't ask, I didn't have the courage to ask. I just went along.

The judges throw around big words.... you know, I'm thinking what the shit is she on about. But I'd say to the bloke next to me, the lawyer, what did she mean by any of that. Well he says this is what happened...you just got to pull your head in...it's more confusing than scary...I mean it's scary cause to the extent like what the hell are they on about, but once my solicitor whispered in my ear and said, this is just the way it is, just break it down into easier sentences for you.

The things I hear are very dismissive, in the court. It's real heavy. Real heavy on your brain. And you try to listen, by the time you understand what's been said, something else has been put in front of you... the whole time I was there, I'm thinking 'I'm getting locked up here' and the words just went straight over my head...Because I was nervous and they speak too quickly. It's like you're playing catch up all the time. Like I said before, they ask you one question and by the time you understand the question, they've rattled off another one.

I've been very misplaced with what goes on in the court. I've been sent home and put my hands together to get locked up because I thought I was going to jail. I was waiting for him to come and get me but he let me go.

As soon as I looked at the magistrate in the ARC list, [they turned to me and go] "why don't you come up here and sit at the table?" ... I didn't have my stomach rumbling... and he shook my hand one time too, the prosecutor... When I used to go to court ... outside ... I'd go out for a smoko, ... straight to where [a bottle of alcohol was hidden], have a drink... because I didn't have [the ARC list] then, like some of the judges the way they'd treat you, and the way they'd talk to you, like "well you should have a bit more brains!" ... I wanna go back there [to the ARC list] some day, just to say hello...

LEGAL REPRESENTATION

Participants spoke about the value of having a lawyer to explain the 'jargon' used in court. Interestingly, none mentioned their own legal representatives using jargon or being difficult to understand but only spoke of them spending too little time to take adequate instructions about their circumstances, including their ABI. The question then becomes whether, if lawyers did not have to translate jargon, they would have some time freed up to take their clients' instructions in a more meaningful way.

... I'm sitting up the back of this court room and this man...strode over to me and said his name and said you're going to prison, we just have to work out how long. That's how I met my barrister... So there actually wasn't the opportunity to say, hang on a minute, this, this and this.... I was still

drinking and taking drugs. I was suicidal and I was homeless... I was in no fit mental state for anything.

Like, if some bloke's at court, and he just gets a legal aid [duty] solicitor, his legal aid solicitor is going to ask his basic details, walk in, give them to the magistrate, talk a little bit of nonsense, and really not do much. That kid's probably got one of the worst IDs, that's why he keeps getting pinched – [either an intellectual disability] or an ABI.

I feel like my solicitor comes down and explains it to me while they're talking in their jargon... it's pretty easy to communicate with my lawyer. I've had her for a long time. Like a friend. She's looking out for my best interest.

I get legal aid and I think they do marvellous work...the way they treat you with respect is very good and it makes you feel at ease and your life story answers their questions for what they want to know about this person, so when they face up to the judge they can say 'this guy tries'.

NOT TURNING UP TO COURT OR TURNING UP SUBSTANCE AFFECTED

Participants' stories about not turning up to court or turning up affected by drugs or alcohol were connected with stress, confusion and the belief that attending court automatically meant going to prison. When justice users describe deliberately avoiding court or being so substance affected that they did not know what occurred at court, it is an example of how poor design of a system and its processes can lead to more breaches and higher incarceration.

I only realised after lunch that day that I had to be in court that day. ... I was actually sick but I didn't look at the date and when I did look at the date, I'd missed it...so I said I was sick and I'll get a doctor's certificate sort of thing and my friend stood up and said I was asleep on the couch, and that didn't go too well. The judge didn't like that... I think they locked me up straight away... I think I got community work for that one ...but I had to wait another two weeks [in custody] to go back to court.

You go there and straight away you think it's prison, no ifs or buts – I'm off! I always turn up off my guts – majority of the time....you don't have to have a brain injury to feel all that...but the way I see it, if you've got impairment, it is really the volume of it is increased to a much higher degree.

Through the decades, [when attending court] I'll get up earlier, and I'll go and use drugs first... to be able to cope with it.

There was a good salvo worker years ago at court, but, other than him, you know, there was no one there and it's just an annoying wait and everyone's angry, everyone's swearing, they know they're going to be waiting for their name to be called, waiting, you know. I self-medicate.

SENTENCING

Several justice users thought that there were not enough sentencing alternatives to imprisonment, particularly sentencing options that would tackle the reasons for their offending.

Once you've been in prison, every time you do something wrong you go to prison.

Yeah, well most times I end up in jail when I got to court, it's not very often that I've gone there and walked away from there. I've got my lengthy history now I suppose... [O]nce you've done a bit of jail, they're not going to go any lesser on you, it's only going to get harder you know?

When I went to court I got sentenced under the Verdins case – and I should have been classified to – not a maximum security prison [but that's where they sent me] – I didn't get any help ... They haven't got the staff in there.

I breached one of my orders with community service, and then they had abolished suspended sentences. The judge didn't know what to do with me then, he said well we'll just have to throw you in gaol and hopefully you'll get some help in there, but ...instead it just went downhill further.

I was in a housing commission place for a bit over ten years right, and like any longer than 6 months [in prison], you lose your housing commission place, and the [magistrate] was told that, but I got 18 months, and now I'm back to homelessness ... They might as well have thrown me on the street, I was so more settled when I had public housing... I lost everything that I had...it just went out the window and I've got to start all over again....

I had to go to court for not even half an hour, but they understood that I had this ABI and when they found that out, when the judge found that out, instead of putting me in gaol, the magistrate, he read the paper and they gave me a fine and off you go. No community order or anything like that, just pay the fine and it's because I had this mental issue and that's why he looked into it further and that's what helped me get out of it with only a fine instead of being in prison.

They're going to have to really sit down, the powers that be, when it comes to sentencing, and put more alternatives in there, because the prison system is overloaded and can't cope with the amount of people that have got ABIs.

I think there should be more [sentencing] alternatives than just that [unpaid community work]. Like find out why what and how and where we can go about treating these people and find out why they're doing these things and try and get them resolved.

I used to not want a bar of community work. I'd rather go to jail and just get it done. But now I've grown up a little bit and things are going a little bit better in my life, I don't want to go back to jail... Because I've got stable accommodation, I'm not hanging around with the people I used to hang around with. Yeah, I'm just trying to keep a bit more busy.

PRISON

COGNITIVE DIFFICULTIES IN THE PRISON ENVIRONMENT

Justice users gave examples of misunderstandings that occurred while they were in prison which resulted in serious consequences. This included ending up 'in the slot' (in solitary confinement) or in protection, which can put their wellbeing at risk, as well as impact upon a person's capacity to access programs needed to become eligible for parole.³⁰ Some of these issues, for example missing the correct time for medication dispensation, seemed to be directly related to cognitive function. It is the way that correctional staff respond to prisoners, however, that seems to cause problems as much as the prisoners' level of understanding.

They need to really learn a lot more about it [ABIs]. Even their correctional staff. Because I've seen the way they talk to some people, and I know the blokes have got ABIs or other issues, and I'll often step in between and stop something happening.... they need to build another place like Thomas Embling...

You get in trouble for falling through the cracks.

That's the reason you got in that shit, because you aren't thinking properly... You can be in prison and they can call meds and call this and all that but sometimes...well it's happened to me, because of the ABI, my mind's been in one other place all together, I'm not even here. And.. if you don't hear the call

³⁰ See Victorian Ombudsman, *Investigation into Deaths and Harm in Custody*, 2014.

and you aren't there in 2 ½ minutes, you miss out. And that's it. ...That can put you in a psychotic episode and next minute, you're in the slot. With the canvass dress on.

I told them from the day I was put in there that I'm not right in the head at times and if things go wrong, I need to talk to somebody about something and I don't want to talk to no screws, I'd rather talk to the nurse, or someone who's in a bit of an understanding about this situation.

A lot of prisoners just use swear words for guards because they're in front of their mates, and this is what they're known to be and they get nowhere and they don't ever get parole ... I'm still telling people, 'No, [now] you've got to apply for parole'... they don't know. I mean, they can send out a form, forward the information...prisoners don't like to read, especially when there's one [sheet] of information put on the table between ten of you... [in prison] any information is given to the unit as a unit and you have to wait your turn to read the paperwork.

You don't get parole unless you've got someone out there helping you... that's the truth. You can fill out the forms yourself, but all the stuff arounds they give you, you're not meant to understand. You're left in the lurch. There are so many people in jail now that are applicable for parole, but they wouldn't know how to fill out the paperwork.

COMMUNICATION, VIOLENCE AND VULNERABILITY

Given the number of people in our prisons with an intellectual disability or an ABI, this means that, as some researchers suggest, employees in the criminal justice system are working 'as much in a disability system as a justice system'.³¹ Certainly, for a person with cognitive disability, the impact of prison can be even more damaging than it is for those who do not have a disability. This is in part because people with disabilities are often disproportionately exposed to disciplinary action which leads to isolation, as well as to violence and sexual assault at the hands of other prisoners.³² Justice users spoke of actively hiding their ABI, as many felt it made them vulnerable to violence and exploitation from other prisoners and prison staff.

If somebody wants to hurt you, they can. I was in mainstream, I have no experience of protection, I didn't go there, but what I do know is that if somebody wants to hurt you they can really easily. I know that prison officers engage in that behaviour themselves. I know that they turn a blind eye to really horrendous things that go on in there. And my experience of being there was you've got yourself, to keep yourself safe, and that's it.

³¹ Brown and Kelly 2012, p 4.

³² See Victorian Ombudsman, *Investigation into Deaths and Harm in Custody*, 2014. Accessed online at <https://www.sentencingcouncil.vic.gov.au/news-media/news/latest-statistics-show-steady-increase-cco-use-magistrates%E2%80%99-court>.

Prison does not make the person. All it did for me was make me terrified.

To be seen to be seeking help for anything, you're putting yourself in a position to be a target, however ridiculous it is, and it is, but there's all these people, god knows where they've come from or what their problems are. But anything to focus on is probably better than focusing on here [points to himself], so let's target him. So my experience was if you're seen to be seeking help of any sort, you're putting yourself in a position to be targeted and hurt physically, which happened a lot.

They put me up in the psych ward, in between a person who was yelling and screaming and crying and the one that was laughing his head off.... I was left in there for 9 days un-medicated and they said, 6 days in.. 'we've got a spot for you Andrew, just sign this form' I signed the form and I was signing myself into protection. [I didn't know.]...Now once you've been into protection there's paperwork saying you've been in there. It's a special coloured form and if it's seen in your file while you're in mainstream you get bashed. In protection you get nothing done for you. ...I asked plenty of questions and you get nothing [ie programs]...There's so many people in there, that number one, don't know they have to apply for parole...; number two, they're not told; number three, the difficulty in getting the paperwork in the first place and number four, understanding what they're actually signing. Like the paperwork I signed in the past, put me in places I didn't want to go.

When I was in there, I felt as though I wasn't heard. Every time I spoke, I felt like I wasn't being listened to.

ACCESS TO TREATMENT AND REHABILITATION WHILE IN PRISON

Echoing the experiences reported in the Victorian Ombudsman's 2015 Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria³³, project participants spoke of lack of access to programs due to overcrowding or inadequate resources. Many participants expressed a lack of confidence in the integrity of services provided by Justice Health and felt that their health issues were often disregarded or treated with suspicion. They also spoke of barriers to the provision of interventions which are therapeutic, and of their identity as a person with a disability being eclipsed by other identities such as 'drug user'. The effect of this approach meant that certain behaviours which are common features of cognitive impairment were instead attributed a person's drug addiction and while this may have provided access to detox and rehabilitation, it left the possibility of cognitive impairment unexplored and untreated.

Others also commented on lack of access to programs while on remand or serving short sentences.

³³ See Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, September 2015.

[Port Phillip Prison] is a bit busy. It's just busy. [The staff have] got no time for anybody there...to get something done you have to be very forthwith.

I hadn't had a neuro-psych test, nothing. I have asked, all the way through my sentence to do drug and alcohol for start as well because of my memory, I didn't even know my sister's name when I got arrested.

[You] can't say too much or they'll think you're a risk and they'll put you away. They'll put you in the slot. You're better off to shut your mouth when it comes to doctors in jail. Can't help your sickness in there.

Because I'm only there [in prison] for a short time, it doesn't matter whether you look for them or not, they don't put you on the programs.... there's nothing there for ABI people.

They think Panadol and Seroquel cure everything. I don't think there's enough resources for us to access in there.

I was honestly expecting when I went to jail and I'm not just saying this because we're in here talking about this stuff, but I was in a way happy about going to jail because I was thinking - sweet I can get help out of this. Well, no, it didn't work like that at all! First day I went there, the day I got caught, I went to the doctor/nurse and told them straight up that I got brain injury, got mental health, and I'm on Suboxone. Bad mistake. ...I may as well say I'm a heroin addict...As soon as I mentioned Suboxone then things changed. They didn't even want to listen to my brain injury or mental health... They've turned around and thinking, well what disability? - you're just used to drugs mate you'll be right... And what they did was they'd make me drink a little bit of water, open my mouth, hand me a strip, put it under my tongue and show them that it's gone, stand there for 10 minutes after it's dissolved then go back - it's embarrassing and degrading actually. Well, now everyone in jail can see this, and everybody knows I'm on it so now I'm getting drama off criminals.

So I go to the first [counseling] session...no problem...I go to the second session and say 'I'm not coming back', she goes, 'what do you mean'? 'Well you give me all these things, right, to relive me past, so I get all emotional. Then you put me back out into the yard...and then you tell me that I've got to show up for these sessions or you won't give me parole. Well guess what? You're putting my safety and the jail's safety in jeopardy here for the simple reason you're sending me out there without no strategies to deal with it.

THE NEED FOR SUPPORT IN THE COMMUNITY

Conversely, the challenges of living in the community while being socially excluded are never more starkly illustrated than when people talk about preferring prison or feeling 'safer' in prison.

Some guys find it easier to actually be in prison and that happened to me – I go, 'who wants to be out there when I got it so good in here'.

Some people don't [have support]. You'll see 'em back in prison in probably 2 or 3 weeks. I've seen that happen. Seen it with my own eyes. Some of them want to come back because they get a bed, they get a feed.

[Sometimes at court] I am shit scared because I know I've got priors and I know there's a big chance I'm to go to jail, but other times I've walked into the courts with a back pack and said 'Lock me up'....I felt like there was nothing out here for me. I felt like there was no help. I was screaming out for help and, you know? The jail has saved me in a lot of ways. If I hadn't been in jail, I would've been dead.

When you're in that cell and the door pulls shut, it's a relief. When the cell door opens, you wish you could find a closet and lock yourself in the closet. And when you get out of prison, it's the same thing, exactly the same thing.

The majority of participants in the *Enabling Justice* project have a combined lived experience of homelessness, trauma, contact with mental health services, alcohol and/or other drug problems. Experts have consistently found that it is social exclusion, and lack of adequate support in the community, that causes people with a combination of cognitive impairment and complex needs to continuously return to prison. This is particularly the case with those committing less serious offences.³⁴ This means that, the more people that Corrections Victoria can connect with support in the community, the more it will save on those people repeatedly returning to prison.

For me the priority would be housing and the case worker – my case worker is grouse, he picks me up, he comes with me to appointments, he gives me reminders. Had him for six months.

³⁴ E Baldry, L Dowse & M Clarence. 2011. *People with Mental Health and Cognitive Disability: Pathways into and out of the criminal justice system*. Background Paper for the National Legal Aid Conference, Darwin.

I had a [case manager for] years but once it was gone it was gone – and now I don't know how to even approach it now to get the support. There are guys in the system now they're going to have just no idea what to do when they get out – the first thing you do is 'man, I'm back out, I've got my freedom' – but they ain't got housing and that's because the people in the prison system are just doing their job saying 'well we don't care – there's the gate on your way', handing a cheque, giving you your backpack, there you go.

I had parole but I had nowhere to stay or live because they trashed my flat and basically the housing commission, I had to sign my flat away because I was spending more than 6 months in jail. I would've probably got parole if I still had my flat but because I didn't have my flat my parole was denied so I ended up doing the 18 months and called my fines in then and asked to do it. It just makes sense. You get out and then they start bringing all these fines out on you and 'you gonna pay or are we gonna lock you up again?' So I just got it all over and done with. It was just easier.

[T]hey put you in an area where you...say you're on medication, you're on the other side of town and then the parole is all the way back up in Frankston. They just don't do it right, they don't set things up right and you try to do it yourself but it doesn't work.

POST RELEASE, PAROLE AND COMMUNITY CORRECTIONS

We're fighting so hard not to go back to jail. Every day. But it's like the system wants us to go back in there.

POST RELEASE HOUSING AND SUPPORT

Justice users spoke about inadequate, precarious and inappropriate housing as a constant source of worry and instability in their lives, keeping them socially isolated and excluded even when they are back 'in the community'. ABI among offenders strongly overlaps with other indicators of social and economic exclusion like homelessness, and this is true of the Justice User Group participants. Although some of the need for intensive advocacy and support is driven by the complexity of mainstream service systems, some is driven by inadequate resourcing.

...they were supposed to set me up with support services, and they did none of that...They put me in a boarding house. So that was my assistance. They were supposed to get me a proper worker like arbias³⁵ or DHS or something...but they let me out homeless. And that many times I went to Corrections, and seen my parole officer, and said, I need to see you. She'd say, oh alright I'll fit it in after this client. I'd wait around, I'd see her, and she says, 'what's wrong?' I'd say, 'I'm homeless'.

³⁵ arbias Ltd provides specialist services for people with acquired brain injury and high complex needs which include alcohol and other drug and mental health issues.

She'd go, 'what's wrong with these agencies?' Then she'd ring them up, and they'd put me in a hotel for a week or two – this went on for twelve months.

I've asked and asked and asked and asked and asked. And you get nowhere...or you get different answers...and they go fill this form out and put it in the box and we'll get someone to you in the next day or so...You're still waiting a week, and a week, later...you've filled out about 10 forms ...as soon as you turn your back, in the bin. They'll transfer you [to another prison] and start all over again...Unless you threaten them in some sort of way for them to pull their finger out and do something. You basically have to flood your cell out, set the mattress on fire, so they start listening. [But] you end up in the slot. And they video you while you're getting dragged up there. It didn't take you long to put me in the slot but I've been asking for the last 3 days to fucking get something done and you're still fucking me around and they wonder why you lose the plot on them.

It has to start with pre-release planning and support. Keep following it up until the day the person is out and then follow it up further down the track once they're out, follow it on from there. That's the problem, they've got one person, it's all organised with one person, then all of a sudden you're pushed on to another person who's got no idea what's going on.

You just walk out the prison door and if there's no one there to pick you up, well they ain't got a bus. I walked out to the car park, stole a car and went back to [the city]. I was too lazy to walk and where the prison is there's no transport, it's a highway.

I'm lucky because I've been through this bullshit before, right, so as soon as I got breached on parole, I knew to go straight to the housing worker at the prison and get all the paper work in straight away before getting moved to another prison. ...the housing workers at the prison, they should be telling everyone this information right, but they tell you nothing.

The day before I got out [of prison] I got called up to the office and they were dirty on me for whinging about where I'm going to live. I'm homeless...I got a brain injury and no-where to live. They dirtied up on the Arbias form, I showed them the Arbias form. He goes how old are you? Now he starts putting shit on me – you're a big boy. I go, what are you saying, this is why I'm talking to you about this. He wanted me to go straight to the train station with nothing and honestly go back to jail cause that's what was going to happen. See ya later alligator that's the end of story, not get help. He knows I got a brain injury...

Before release, housing should be sorted. Instead of just [having to] throw the garbage bag over your shoulder and find any park bench. I slept under a bush in Flagstaff Gardens the first night I got out.

RELATIONSHIP WITH CORRECTIONS OFFICERS

Justice users spoke of feeling as though Corrections Officers did not see it as their role to support them, but instead only to monitor compliance with their orders. Others spoke of the positive difference it made when they felt Corrections Officers were there to support them.

A lot of them [community corrections officers]..., they're supposed to be your case worker, and you think that your case worker would help you if you had problems, but they won't. Their job is to make sure you do your commitments, their job is not to help you, so that makes it real hard.

I saw so many different parole officers, it was a joke. Nobody knew me. I could've sent a relative in and no one would've known... I'd have to tell them the same information over and over and over because this is a new person. I know what I'm doing, but they don't. So rather than reading all the notes in front of me, they just ask me [to tell my story again]. I got it down pat, I got it like this. Because at first I thought they cared, but then I realised, "oh no, job requirement"...

There's no one you can ask for help, everyone you look at wants to breach you because you're not compliant with this, or you're not compliant with that. So the communication is bad between the person on the order and the actual case worker. You can't be honest, you can't be straight, you have to edit what you talk about.

She [the community corrections worker] had the stuff [sentencing remarks and reports], but either couldn't be bothered reading it or just thought that she knew everything and didn't need to read the sentencing comments of the sentencing judge which sums it up a lot better.

I had a pretty good corrections worker. And I had this CCO, she was pretty good too. She understood you weren't going to just change and you were going to have some stuff ups along the way. It's a women's thing now, something, they only deal with women. I'm not sure what it's called, I'm saying it all wrong. They deal with women and she understood. Not many corrections workers you get that understand it's a hard road. And so it's go back to jail.

BREACHES, COMPLIANCE AND COGNITIVE DIFFICULTIES

Most justice users involved in the project reported struggling to comply with corrections orders, whether parole or CCO. Some reported struggling specifically because of cognitive issues, and a lack of understanding about those issues by Corrections Victoria staff. Others described struggling to

complete orders for a range of reasons that cannot be put down to the impact of cognitive disability specifically, but the broader impact of poverty, homelessness and perhaps chaotic lifestyles. These then combine with disability to increase disadvantage and the likelihood of cycling back through the criminal justice system.

They go, why don't you put it down in your phone? Maybe you might remember stuff like that, but, it just...I don't. You know what I mean? And I think that's a part of having an acquired brain injury, you know what I mean? It's wrong, you know. And then you start getting help when you're locked up. The stupid thing about it is, why can't they do these things when you're not locked up?

She couldn't understand my misunderstanding. She nearly locked me up for not turning up to my appointments, when I made it quite clear to them that it doesn't matter what you say, I'll forget. If you say, come and see us next week on this date and this time, I can write it down on a bit of paper and stick it on the fridge, but that's no good. I don't look at the date. A lot of the time I was unmedicated, but she wanted to lock me up because I hadn't turned up three times. Now, you get 3 strikes and you're out. I just smashed the table and said just bloody lock me up. I'm not going through all of this. Not again. I'll just do my time and have nothing on my head. She's going 'why did you miss your appointments?' And I said, I made it quite clear that I needed a phone call the day I was coming in.

It's a very controversial subject because when it comes to corrections there's a lot of things they need to learn, especially from prisoners, they've been through all this, you know?....[They need to learn to] have a better attitude of people. I think they get too tough. Especially with people that are sick. Like, having a brain injury as far as I'm concerned, you are a sick person and you've got.... I'd like to learn more things to get my brain active because a lot of the time I just, I feel like I'm a bit lost.

I think prison should be for the bad people and ones that aren't, breach an order or something like that, find out why they breach the order and what their problems are and try and resolve them.

I think they need to ease back a bit. So many appointments every day of the week. If they had someone out there to pick you up and take you. Half of us haven't got cars and we struggle to get here there and everywhere. It's hard... with the parole officer...she tried to help me every time. Every turn that I went on, she helped me through.

Originally it was three nine with a two. But I ended up doing about four years because of the parole breach. You don't get street time here in Victoria.

PART 3: EMERGING IDEAS AND OPPORTUNITIES FOR ACTION

This final part of the Consultation Paper draws upon the issues identified in Part 2 to reflect upon the current system and its capacity to address those issues. Concepts which have influenced innovative and holistic ways of delivering justice, generally in pilot programs and on the fringes of the criminal justice system, are introduced and the benefit of extending these responses, and others, are discussed. Finally, in this part, measures supported by the Justice User Group are proposed which seek to ensure that the criminal justice system is responding to the needs of its users, particularly the significant proportion with a cognitive impairment.

TWO BROAD EXPERIENCES, FIVE KEY CONCEPTS, THREE SIMPLE NEEDS

As indicated in the snapshots contained in Part 2 of this Paper, interviews with individual justice users and discussions with the Justice User Group raised a broad range of themes and diverse experiences with the criminal justice system. ABI can be both a consequence and a contributing cause to a person experiencing other issues, such as mental health problems, family violence³⁶ (as both perpetrator, victim or both) and substance abuse. Every participant interviewed in this project identified a co-occurring (and often more than one) other issue. For some, their ABI was one element among many that made navigating life within and outside of the criminal justice system difficult.

With that in mind, two broad categories of observations and experiences emerged which have shaped the possibilities for action outlined at the conclusion of this paper.

1. **Negative experiences with the culture, language, processes and procedures of the criminal justice system.** Some but not all were related to how the system fails to recognise and respond to cognitive difficulties.

Many participants had negative observations about how they felt treated in encounters with police; when attending court; in the prison environment; and when interacting with corrections staff in the community. Common reflections included feelings of being treated disrespectfully or unfairly; of having trouble understanding what was happening; of jargon language being used; of difficulty accessing information; and of feeling like no-one was there to help.

We see these negative encounters as relating to **a system that does not respond to the needs of its users**, which pushes people who are already in contact with the system further toward incarceration. Three connected concepts have informed our thinking and discussions with the Justice User Group around appropriate responses to these problems within the criminal justice system:

³⁶ At the time of writing this Consultation Paper, interviews with only a small number of female justice users had been completed and a group of female justice users was on the cusp of being convened. All women interviewed so far have experienced family violence but the interplay between family violence, cognitive impairment and imprisonment has not yet been fully explored with this group. Many male participants in the JUG described lived experience of family violence as children, many reported being perpetrators of family violence and described their ABI being an additional layer of difficulty in comprehending and complying with orders.

Procedural Justice³⁷

The way the judge was [in the ARC list], he respected me, so I respected him too, I gave him the same respect back.

Procedural justice theory suggests that if people feel they have been treated fairly and respectfully, they are more likely to comply with the law and regard it as legitimate. Research has linked this to reduced reoffending and evidence links the style used in specialist courts, which take a procedural justice approach, to success in reducing reoffending as well. Key components of procedural justice involve justice users feeling respected, and feeling that they have a voice. This makes meaningful communication essential, with a basic requirement of procedural justice being that people are spoken to and given information in language they understand, in turn making them more willing and able to comply with what the court has said. Procedural justice has informed a number of programs in the criminal justice system in Victoria and in other Australian jurisdictions, but largely these exist at the fringes rather than the mainstream³⁸.

Universal vulnerability³⁹

...you don't have to have a brain injury to feel all that – that's just stock standard anybody. Justice user, about going to Court.

Circumstances, combined with individual characteristics, can make many people vulnerable in encounters with police. This means that anybody and everybody can be disadvantaged when dealing with the criminal justice system, an idea that some researchers call 'universal vulnerability'.⁴⁰ Because of this, these writers argue that police should take an approach of 'universal precaution', treating everyone they come across as potentially challenged in understanding the justice system or knowing how to respond. This means that steps should be taken to make sure that all people understand what is taking place during situations like a police interview and to find out whether additional support is needed. This idea is consistent with a human rights based approach, which views disability not as a fixed medical status, but as created by the social and physical environment which interacts with a person's impairment either to enable or disable them.

³⁷ See Tom R. Tyler 'Procedural Justice and the Courts' *Court Review* (2007) Volume 44, 26-32 and Tom R. Tyler, 'Why procedural justice matters' 2012, presentation at *Community Justice 2012: the International Conference of Community Courts*, recording available online at <http://www.courtinnovation.org/research/why-procedural-justice-matters-tom-r-tyler-community-justice-2012-0>.

³⁸ For example see Mazerolle, Lorraine, Sarah Bennet, Emma Antrobus, and Elizabeth Eggins. 2012. 'Procedural Justice, Encounters and Citizen Perceptions of Police: Main findings from the Queensland Community Engagement Trail (QCET)'. *Journal of Experimental Criminology* 8(4):343–67.

³⁹ See Nicole Asquith and Isabelle Bartokwiak-Theron, 'Policing Precariousness: ontological and situational vulnerability in policing encounters, 2016 in press. Cited with permission from the authors.

⁴⁰ Ibid.

Universal design⁴¹

Universal Design is ‘the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible....’⁴² Universal Design is a useful framework for improving access to justice, because the language and processes, as well as physical environments, of the criminal justice system should be designed to be as accessible as possible to the greatest range of people. This includes eliminating jargon or overly technical language in favour of plain language and Easy English. When Universal Design is applied, people with and without cognitive impairment are less likely to be ‘disabled’ by the confusion many feel when involved with the criminal justice system. Universal Design should create an environment that is as enabling as possible, without ignoring the need for specific supports where required.

2. Lack of access to resources such as adequate housing and support in the community and the impact of this on the experience of justice users who are undergoing community orders or leaving prison.

The second group of observations made by justice users relate to the impact that lack of access to substantive resources and services, as well as to support and advocacy, has on participants. A number spoke of what they see as a direct link between homelessness and offending, re-offending, lack of access to parole, and returning repeatedly to prison.

ABI among offenders strongly overlaps with other indicators of social and economic exclusion like homelessness. Although some of the need for intensive advocacy and support is driven by the complexity of mainstream service systems, some is driven by inadequate resourcing. Our participants talk about inadequate, precarious and inappropriate housing as a constant source of worry and instability in their lives, keeping them socially isolated and excluded even when they are back ‘in the community’.

These factors relate to **exclusion from the community** which propels people into repeated contact with the criminal justice system. This exclusion is then replicated *within* the criminal justice system, by mechanisms which do not acknowledge its existence or know how to address it. The key concepts here therefore revolve around how the criminal justice system might connect people with the supports and services they need in the community, and how some resources that are currently being spent within the criminal justice system (primarily incarceration) could be spent on keeping people out of prison instead (for example, prevention and early intervention).

⁴¹ UD is defined in article 2 of the United Nations Convention on the Rights of Persons with Disabilities. Article 4(f) of the Convention imposes the obligation for States Parties to undertake or promote the research and development of universally designed goods and services. There is very little exploration of the application of universal design to justice systems and also to language and administrative procedures, as opposed to the design of physical environments. There is a very brief discussion in Eilionoir Flynn, *Disabled Justice? Access to justice and the UN Convention on the Rights of Persons with Disabilities*, Ashgate, 2015, 70.

⁴² Eilionoir Flynn, *Disabled Justice? Access to justice and the UN Convention on the Rights of Persons with Disabilities*, Ashgate, 2015, 70.

Solution focused justice⁴³

Like, find out why what and how and where we can go about treating these people and find out why they're doing these things and try and get them resolved.

Solution focused justice (SFJ) is an approach which sees going to court as a chance to address the underlying causes of a person's offending. SFJ is strongly influenced by the concept of 'therapeutic jurisprudence' (TJ), which takes the view that the legal system can and should improve the lives of those who encounter it – reducing crime, strengthening community, and improving the health and wellbeing of both victims and offenders. The most common way of putting SFJ and TJ into practice occurs in 'specialist' or 'problem-solving' courts, which supervise, monitor and support the defendant. Often this occurs through specialist staff who help with referrals to appropriate services which can address issues like drug and alcohol misuse, homelessness and mental health. Most specialist courts only accept participants who plead guilty, which creates concerns that people who are already disadvantaged will plead guilty just to access services which they should receive anyway. For this reason, the Court Integrated Services Program in Victoria is important, because it is a pre-plea/pre-sentence program that uses a solution focused approach.⁴⁴

Justice reinvestment⁴⁵

The taxpayer pays a hell of a lot more, at the arse-end, when we're (prisoners) getting out, than they save by taking your house when you go in

Justice reinvestment makes public spending on social and health services in disadvantaged communities a priority over incarceration. Rates of offending correlate with the levels of social and economic disadvantage in a community.⁴⁶ Justice reinvestment recognises that incarceration is not a cost effective way of addressing harm. Justice reinvestment also recognises that many people caught up in our criminal justice system have experienced 'locational disadvantage'⁴⁷ and that financial and social savings will ultimately come from investment in initiatives that strengthen our most disadvantaged communities. JR is often focused on intervening at the earliest opportunity to prevent offending and thus tends to promote the funding of programs and initiatives that benefit families, children and young people.

⁴³ See Jelena Popovic 'solution focused justice in the time of 'law and order'' in Rosemary Sheehan and James Ogloff (eds) *Working Within the Forensic Paradigm: cross discipline approaches for policy and practice* 2015, Routledge, 98-112. Also see Michael S King *The Solution-Focused Judging Bench Book* 2009, the Australasian Institute of Judicial Administration, Melbourne, Victoria. Accessed online at <https://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>. See also Pauline Spencer, 'From alternative to the new normal: therapeutic jurisprudence in the mainstream' (2014) *Alternative Law Journal* no 39, 22.

⁴⁴ See Popovic, above.

⁴⁵ See Australian Senate, Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, June 2013. Accessed online at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index.

⁴⁶ See Tony Vinson, Margot Rawsthorne, Adrian Beavis and Matthew Ericson, *Dropping off the Edge 2015: persistent communal disadvantage in Australia*, Jesuit Social Services and Catholic Social Services Australia, 2015. Accessed online at http://www.dote.org.au/wordpress/wp-content/uploads/0001_dote_2015.pdf, p 30-34.

⁴⁷ Ibid, p5.

JR developed in the US in response to the expense of mass incarceration and often focuses on the link between geographical disadvantage and incarceration,⁴⁸ although this will not always apply to groups of people who are transient or who feel no connection to a particular community.⁴⁹ Interest in JR in Australia has focused particularly on the need to address the grossly disproportionate imprisonment rates of Indigenous Australians.⁵⁰ It has also been interpreted in broader terms, such as identifying problem solving courts as a form of JR, given that the reinvestment involves a reallocation or re-prioritising of spending within the justice portfolio.⁵¹

Throughout the course of the project, in addition to identifying the limitations of the criminal justice system, Justice User Group have identified the things they most need. These are:

- respect
- support
- a home

These seemingly simple needs should be considered and addressed at each point of the criminal justice system and in the wider community. These needs are recognised in the concepts or theories identified above which have influenced the implementation of innovative approaches within parts of criminal justice systems within Victoria and other parts of the world. There are many examples of where these innovative approaches have been successful in reducing recidivism rates and, ultimately, making the community safer⁵².

REFLECTIONS ON THE ISSUES IDENTIFIED BY JUSTICE USERS

POLICE

Some of the processes and policies that already exist or are being developed to ensure that police recognise and respond to disability appropriately include:

⁴⁸ Legal and Constitutional Affairs Reference Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, The Senate, 2013, p 43.

⁴⁹ Ibid, p 43..

⁵⁰ See Melanie Schwartz and Chris Cunneen, *Redressing Over-incarceration, Addressing Human Rights: what can justice reinvestment do in Australia?* 16 September 2014, Right Now. Accessed online at <http://rightnow.org.au/writing-cat/article/redressing-over-incarceration-addressing-human-rights-what-can-justice-reinvestment-do-in-australia/>.

⁵¹ See Popovic, above n42.

⁵² For example, see an audit of Victoria's Neighbourhood Justice Centre and the Court Integrated Services Program in Victorian Auditor-General's Report, April 2011, *Problem-Solving Approaches to Justice*; and an evaluation of mental health courts in the US in Ray Bradley, *Long-term recidivism of mental health court defendants*, International Journal of Law and Psychiatry, 37 (2014) 448–454. See also Mazerolle, Lorraine, Sarah Bennet, Emma Antrobus, and Elizabeth Eggins. 2012. 'Procedural Justice, Encounters and Citizen Perceptions of Police: Main findings from the Queensland Community Engagement Trail (QCET)'. *Journal of Experimental Criminology* 8(4):343–67

- The ‘ready reckoner’ developed by the Office of the Public Advocate, which is included in the Victoria Police Manual. It prompts police officers to consider whether a person may have cognitive impairment, and provides them with ways to communicate effectively.⁵³
- New diversity and human rights training introduced following the ‘Equality is not the Same’ report.⁵⁴
- The voluntary disclosure scheme, which allows a person with disability or their carer or guardian (only if requested by the person with disability themselves) to notify police about their disability. It also provides relevant information about how best to respond to and communicate appropriately with the individual person to avoid a negative interaction, and who to contact if assistance is required.⁵⁵
- Ongoing implementation of the seven specific recommendations made to police in the ‘Beyond Doubt’ report.⁵⁶ These recommendations include consulting with people with disability and their organisations to improve policies, building disability training into the Victoria Police Education Master Plan, and converting all information to accessible formats such as Easy English and Auslan.

These are positive steps, but the reflections of justice users indicates that Victoria Police’s response to disability and vulnerability in the community could be strengthened by addressing the following matters:

People with ABI feel vulnerable in police interactions, whether they are victims, suspects or witnesses

The recommendations in ‘Beyond Doubt’ are only concerned with the way that police interact with victims of crime who have a disability. The complex profile of the *Enabling Justice* project participants, however, confirms that people with a disability are over-represented as victims of crime *and* as defendants,⁵⁷ making it neither accurate nor helpful to categorise a person as just one or the other. This means that improving police awareness about disability and the accessibility of police services must also extend to people who have been arrested or are a suspect in a criminal matter.

⁵³ See Magdalena Maguire, *Breaking the Cycle: using advocacy based referrals to assist people with disabilities in the criminal justice system*, Office of the Public Advocate 2012, 18. Accessed online at <http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/justice-system>.

⁵⁴ See the 2015 two year progress report on Victoria Police, *Equality is not the Same: Victoria Police Response to Community Consultation and Reviews on Field Contact Policy and Data Collection and Cross Cultural Training* 2013, available online at http://www.police.vic.gov.au/content.asp?Document_ID=39350.

⁵⁵ See Victoria Police Strategic and Emerging Issues Division Factsheet, *Voluntary disclosure of personal information regarding a mental disorder and/or disability*, published 11 September 2013, available online at http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=100221.

⁵⁶ Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: the experiences of people with disabilities reporting crime* 2014, available online at <http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/reports/item/894-beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime>.

⁵⁷ Australian Human Rights Commission, *Equal Before the Law: Towards disability justice strategies* 2014. Accessed online at <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law>.

Improving communication towards all people will assist people with 'hidden' ABI

What's more, the often 'hidden' and complicated nature of ABI makes it difficult to fit into a 'box-ticking' approach.⁵⁸ People are not vulnerable simply because they satisfy one or more items on a list of characteristics. Being arrested and questioned by police makes many people vulnerable for all sorts of reasons. As discussed above, that is why researchers⁵⁹ have proposed a new model that assumes "**universal vulnerability**" and involves police approaching all members of the community with "universal precaution".⁶⁰

This might involve expanding strategies for interacting with people with impairment into all interactions with criminal suspects and witnesses. Open-ended questions, using plain language and Easy English, and asking people to put information into their own words to ensure comprehension, are all possible examples. This approach would help address the issue of 'hidden disability' and the need for police to diagnose an undisclosed impairment. This is because rather than focus on disability status it focuses upon what is really important in the interaction: being whether or not the communication is actually effective and fair.

It would also mean that, if someone is in fact significantly impaired and does require communication or other forms of support, this could become apparent much earlier in the interaction. It may also assist a broad range of other justice users, with or without disability, to understand their rights more effectively, as well as what is occurring during a police interview. Adopting a "universal precaution" approach is also consistent with the human rights principle of **universal design**, enshrined in article 2 of the UN Convention on the Rights of Persons with a Disability and referred to in Part 1.⁶¹ In this way, the approaches of universal design and universal vulnerability support the delivery of procedural justice – a system that is intended to be accessible, understood and more easily complied with by all users.⁶²

Where people are able to access it, the Independent Third Person program clearly has value in improving understanding. In the case of people with a mild cognitive impairment, however, this positive benefit is not necessarily the result of highly specialised skills in communication support but because of having someone other than a police officer present to explain what is occurring in a way that the person can understand. In line with a "universal precaution" approach, police could be required to ask all suspects/interviewees whether they need the Independent Third Person. Justice users considered that requiring Police to raise the possibility of an Independent Third Person in the same way as they are required to give a caution would be the most effective way of making sure that Police comply with this requirement.

⁵⁸ See Asquith and Bartokwiak-Theron, 'Policing Precariousness: ontological and situational vulnerability in policing encounters', 2016, in press. Cited with permission from the authors.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ There is very little exploration of the application of universal design to justice systems and also to language and administrative procedures, as opposed to the design of physical environments. There is a very brief discussion in Eilionoir Flynn, *Disabled Justice? Access to justice and the UN Convention on the Rights of Persons with Disabilities*, Ashgate, 2015, 70.

⁶² See Amy C. Watson and Beth Angell, 'Applying Procedural Justice Theory to Law Enforcement's Response to Persons with Mental Illness' (2007) Volume 58 No 6 *Psychiatric Services*, 787-793.

The Independent Third Person program must be able to meet growing demand.

If we compare the uptake of the Independent Third Person program among police suspects (16 percent in the financial year 2014-15 reported an ABI) with the proportion of prisoners with ABI revealed in Corrections Victoria's study (33-42%) we can see that many people with ABI are not accessing the Independent Third Person program when interviewed by police. This is consistent with the experiences of justice users involved in the project, whereby only two had been offered an Independent Third Person. Despite this, demand is increasingly overtaking the service's ability to meet it.⁶³

Rather than simply compensate for communication that should be more fair and accessible to begin with, however, justice users supported the idea of a more professionalised service. This would include the Independent Third Person program involving people with specific training, perhaps in mental health or disability, who would be able to make appropriate referrals, identify options for bail and refer participants to programs like the Assessment and Referral Court list. These suggestions were similar to the existing proposal by Office of the Public Advocate to introduce an advocacy and referral service linked to the Independent Third Person program.⁶⁴

Examples of targeted programs for persons with a cognitive disability already exist in other states and territories which actively support defendants from the point of contact with police, through to their appearance at court.⁶⁵ An equivalent service in Victoria would need significant investment, but represents an opportunity to step in at the crucial point where people are 'funnelled' into the system. Providing better support can address the factors underlying the person's repeated contact with the criminal justice system (solution focused justice) and invests in resources and support in the community that they may lack (justice reinvestment).

COURTS

The impression given by justice users' accounts of the court system is that:

Plain language and respectful treatment is a rare experience

Rather than engaging with people in a way that helps them address the causes of offending, or just communicating in an understandable way, courts are contributing to negative emotions, alienation

⁶³ Office of the Public Advocate, *Annual Report 2014-2015*. Accessed online at <http://www.publicadvocate.vic.gov.au/opa-s-annual-report-2014-2015>.

⁶⁴ See Magdalena Maguire, *Breaking the Cycle: using advocacy based referrals to assist people with disabilities in the criminal justice system*, Office of the Public Advocate 2012, 18. Accessed online at <http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/justice-system>.

⁶⁵ See, for example, the NSW government funded criminal justice support network, a program of the Intellectual Disability Rights Legal Service in NSW, <http://www.idrs.org.au/support/support.php> and the Justice Support Program, conducted by Queensland Advocacy Incorporated, http://www.qai.org.au/index.php?option=com_content&view=article&id=22&Itemid=32.

and confusion in users of the criminal justice system. This undermines the effectiveness of the criminal justice system, such as when people avoid court or attend court substance-affected.⁶⁶

While there are large gaps in information about the offences for which people with ABI most often go to prison, new research by Victoria Legal Aid⁶⁷ confirms that offences involving breaching court orders are particularly common. Victoria Legal Aid's research indicates that those with an ABI are twice as likely to breach intervention orders as those without an ABI. Given what we know about the cognitive and communication difficulties that people with ABI can experience, and that breaches often result from an inability to follow the verbal and written directions of a magistrate, we see how important effective communication, a critical component of procedural justice⁶⁸, is likely to be in reducing offending and ultimately incarceration.⁶⁹

As well as the need for communication to be clear, justice users indicated that it needed to be respectful. This was mentioned by the justice user who had been a former participant in the Assessment and Referral Court List and, certainly one measure of the Assessment and Referral Court List's success is seen to be its ability to reflect the values and principles of procedural justice.⁷⁰ Making sure that parties feel that they have been treated respectfully is an especially important feature of this and, like many changes that could be made to court culture and procedures, costs absolutely nothing.⁷¹

Court must provide an opportunity to access treatment and support (be solution-focused)

When it comes to sentencing, judges may often feel that their only choices are between Community Corrections Orders (CCOs) and (including if and when CCOs are breached), imprisonment.

In fact, the work of 'solution-focused'⁷² court lists displays a range of opportunities for intervention before, between, and after CCOs and sentences of imprisonment. This includes when resources like

⁶⁶ The number of warrants for failure to appear at court issued by the Magistrates' Court of Victoria has steadily increased over five years, going from 28,567 in 2009-10 to 43,935 in 2013-14. Magistrates Court of Victoria, *Annual Report 2013-14*, 81. Accessed online at <https://www.magistratescourt.vic.gov.au/sites/default/files/Default/Annual%20Report%202013-2014.pdf>. The reverse trend is seen for the Koori court, a specialist court demonstrating solution focused justice and procedural justice in action, which has seen its rate of warrants issued for failure to attend court dropping over the last two years, at p72.

⁶⁷ Sam Bytheway, 'Characteristics of respondents charged with breach of family violence intervention orders', *Legal Aid Research Brief*, November 2015, accessed online at <https://www.legalaid.vic.gov.au/about-us/what-we-do/research-and-analysis/characteristics-of-respondents-charged-with-breach-of-family-violence-intervention-orders>.

⁶⁸ See Tyler 2008 and Tom R. Tyler, 'Why procedural justice matters' 2012, presentation at *Community Justice 2012: the International Conference of Community Courts*, recording available online at <http://www.courtinnovation.org/research/why-procedural-justice-matters-tom-r-tyler-community-justice-2012-0>.

⁶⁹ We also note here the significance of breaching offences or 'offences against justice' among the group with combined complex needs and cognitive impairment examined in Baldry et al.'s research, see E Baldry, L Dowse & M Clarence. 2011. *People with Mental Health and Cognitive Disability: Pathways into and out of the criminal justice system*. Background Paper for the National Legal Aid Conference, Darwin.

⁷⁰ See Chesser 2015 and Wales, H., Hiday, V., Ray, B., 'Procedural justice and the mental health court judge's role in reducing recidivism' *International Journal of Law and Psychiatry* (2010) Volume 33 No 4, 265-271.

⁷¹ See Pauline Spencer, 'From alternative to the new normal: therapeutic jurisprudence in the mainstream' (2014) *Alternative Law Journal* no 39, 22.

⁷² See Jelena Popovic 'Solution focused justice in the time of 'law and order'' in Rosemary Sheehan and James Ogloff (eds) *Working Within the Forensic Paradigm: cross discipline approaches for policy and practice* 2015, Routledge, 98-112. Also

the Court Integrated Services Program are enlisted to support a process of judicial monitoring. The alcohol diversion program at Dandenong Magistrates' Court is another good example. The approach described below could easily be applied to other offenders, such as those who are breaching CCOs and who run a high risk of being imprisoned or returned to prison. Participants who had been referred to the Assessment and Referral Court list or the Court Integrated Services Program spoke of an entirely different experience. Many felt they were listened to and as a result, understood what was being asked of them and felt a greater sense of obligation to comply with their orders.

Figure 3 – Case study: Dandenong Alcohol Diversion Program

Dandenong Alcohol Diversion Program: a local example of solution focused justice

When an intoxicated person is locked up until they get sober, police will charge them with the summary offence of public drunkenness. This can be dealt with through a fine issued as an infringement notice, or sentencing by a magistrate. Where a person has been locked up for public drunkenness more than six times in six months, they are offered the chance to come on to the program.

Police have been supportive because they can see that locking people up repeatedly is expensive and unproductive. The program is voluntary, participants are bailed to attend court and dates are booked in advance to ensure that the same magistrate hears the cases each time. A local Alcohol and Drug service is also notified and is able to come to court on that day and do an assessment. The person then has the option of continuing on the treatment program which the court will monitor and support over a number of months. A range of other services are engaged and come to court on alcohol diversion days, including an employment support agency. The local Alcohol and Drug service hold an alcohol free BBQ in the park on court days.

An added benefit is that, if people engage, the magistrate has the power to discharge their infringements. So far results include increased health and wellbeing of participants, less jail time and significantly improved relations between police and people on the street. This is because police are acting in a therapeutic rather than punitive way. The organisation, cooperation and modification of court processes has been essentially cost neutral.

Current sentencing options for people with an ABI are too limited

The impact of incarceration has negative ripple effects beyond the actual punishment. It also increases the likelihood that people will commit more crime and, particularly for those with ABI, experience greater exposure to abuse, violence and seclusion and less access to parole. This means that incarceration should be treated as a last resort wherever possible.

Solution-focused processes have already been described as an informal and low cost or cost neutral way of identifying viable alternatives to incarceration while mitigating and preventing the harm of

see Michael S King *The Solution-Focused Judging Bench Book* 2009, the Australasian Institute of Judicial Administration, Melbourne, Victoria. Accessed online at <https://www.ajia.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>. See also Pauline Spencer, 'From alternative to the new normal: therapeutic jurisprudence in the mainstream' (2014) *Alternative Law Journal* no 39, 22.

crime. However, there are also opportunities for formally expanding the options of all sentencing courts. For example, section 80 of the Sentencing Act 1991 Vic provides that a sentencing court may impose a Justice Plan on an offender with intellectual disability. A Justice Plan can be imposed in combination with an undertaking from the offender to be of good behaviour (often referred to as a 'good behaviour bond'). It can also be attached as a condition of a CCO, in which the offender might also be required to do unpaid community work, as well as address underlying factors in their offending. The Justice Plan can be put in place for up to two years

The first step in the court imposing a Justice Plan is to request an overview report and a 'plan of available services' from the Department of Health and Human Services. The Department of Health and Human Services will provide crucial information about how the person is impacted by their intellectual disability, and will prepare a plan to address their housing and support needs. A specialist case manager will usually be allocated to support the offender to manage their commitments and coordinate access to services.

Although ABI is a different sort of impairment to intellectual disability, several of the cognitive difficulties faced by people with an ABI are comparable.⁷³ This makes it neither fair nor logical that sentencing courts are not able to formulate a sentence incorporating a Justice Plan for offenders with an ABI as well. While a Justice Plan would not be appropriate for all offenders with ABI, the option should be available as a matter of basic fairness and equality, recognising that people should not be imprisoned simply as a direct result of their disability.

Expanding the use of Justice Plans for offenders with ABI would obviously be expensive and the The Department of Health and Human Services would need to employ adequate numbers of disability justice case managers to take on the extra load of offenders. There could also be increased demand placed upon Victoria Legal Aid to fund neuropsychological reports establishing eligibility. When compared with the savings of sending fewer people to prison, however, the expanded use of Justice Plans appears to make good sense.

PRISON

Corrections workers should assume that prisoners have complex needs (and communicate accordingly)

As mentioned above, given that people with cognitive disabilities remain over-represented in our prisons, Corrections Victoria employees need to be trained as if they are working in a disability setting. This means being provided with understanding of the people they are working with, as well as appropriate strategies for respectful communication with all prisoners, many of whom are likely to have a cognitive impairment. Principles of procedural justice, universal design and universal precaution would all be valuable in this context.

⁷³ See Recommendation 46 and discussion at page 336-337 of the Victorian Parliamentary Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*, March 2013. Available online at http://www.parliament.vic.gov.au/file_uploads/Law_Reform_Committee_-_Access_to_and_interaction_with_the_justice_system_by_people_with_an_intellectual_disability_and_their_families_and_carers_-_Final_report_76JG2vK1.pdf.

Additionally, most people in prison, particularly those with ABI, have experienced trauma before they enter, often as children. Many also experience trauma whilst inside. We know that trauma impacts the brain and can affect the ways in which people respond to situations, particularly where they feel threatened or intimidated⁷⁴. Trauma informed care and practice is a framework which has been developed to assist people working with those who have experienced trauma.⁷⁵ Corrections workers would benefit from undertaking trauma informed training, which would provide insight into the experience and behaviours of prisoners and give them strategies to dealing with their behaviours in prison.

Prison should be an opportunity for rehabilitation, assessment and connection to social supports

If a universal precaution approach is taken, the fact that a person is incarcerated should, for most people, be a signal that they are likely to be socially excluded for a variety of reasons. This means that resources should be targeted to establishing any social connection and support possible, with the service system recognised as complex, rather than those individuals identified as having multiple and complex needs.⁷⁶

Policy and funding parameters dictate that mainstream services such as mental health, housing, drug and alcohol are delivered in silos. Strict criteria separates the responsibilities of organisations and deters them from taking collaborative approaches which put the individual in need at the centre.⁷⁷ This must change if prison is going to stop being the default position for people with complex needs. In the meantime, initiatives essentially designed to get people the support and services they need – such as the ABI clinician role in Corrections Victoria⁷⁸, and the role of case coordinators in the Multiple and Complex Needs Initiative (MACNI),⁷⁹ signal an alternative approach that can get valuable and effective results.

In particular, the now-defunct role of the ABI clinician in the Victorian prison system was able to provide a link between relevant individuals and the supports that existed in the community. It was also able to raise awareness among correctional staff, in turn promoting referral of clients to the service. The national rollout of National Disability Insurance Scheme (NDIS) is a good reason to revisit the value of a linking role like this within the Victorian criminal justice system, and consider

⁷⁴ Delima, J., & Vimpani, G. (2011). The neurobiological effects of childhood maltreatment: An often overlooked narrative related to the long-term effects of early childhood trauma? *Family Matters*, 89, 42-52.

⁷⁵ Harris M, Fallot R. D. *Using trauma theory to design service systems*. San Francisco, CA: Jossey-Bass; 2001.

⁷⁶ See Hamilton, 2010 at above n 38.

⁷⁷ Ibid.

⁷⁸ See Corrections Victoria, *Disability Framework 2013-2015: Embracing the challenges* which describes the ABI clinician role as a successful and substantial program, and significant feature of Corrections Victoria's response to offenders with ABI, at p 11. Accessed online at https://assets.justice.vic.gov.au/corrections/resources/e0ed5b65-babf-4de7-ace5-f07b129678ca/cv_disabilityframework_2013-2015_final2.pdf.

⁷⁹ Margaret Hamilton, at above n 38, outlines the results of a DHS evaluation of the MACNI program, which led to significantly decreased costs related to participants' contact with hospitals and emergency services as a result of case plan coordination under the scheme. As Corrections Victoria data was not made available for the evaluation, it was not possible to conduct a full economic analysis of the value of the MACNI to the state in terms of savings through reduced arrest and incarceration rates, for example. Hamilton recommended this analysis should occur, speculating that it would deliver a business case for further investment in the MACNI.

the potential for its expansion. Such a role could also be responsible for MACNI referral and linking and could be delivered across all corrections services.

It is difficult to know how many people with ABI in prisons may be eligible for individual funding through the NDIS. This is because the eligibility criteria are yet to be thoroughly tested. Those with mild levels of cognitive impairment, for example, may not ultimately satisfy the access criteria for 'substantially reduced functional capacity'.⁸⁰ To test the boundaries of these criteria properly, and to ensure that Victorians get the best possible value and results from NDIS, people with cognitive disability in prisons should have access to robust non-legal *and* legal advocacy and support in seeking to become NDIS participants.

Ensuring that those who may be eligible can get connected with the NDIS and any other available services in the community can be seen in the broadest sense as a form of justice reinvestment. Regardless of the specific initiative, there is much to be gained by establishing an 'enabling infrastructure'⁸¹ particularly for NDIS participation, by the most marginalised and excluded members of the community.

A term of imprisonment should be a last resort for low-level offending

Given the destructive impact of incarceration, we need to question the usefulness of any short prison sentence imposed for non-serious or non-violent offences.⁸² Around a third of all sentenced prisoners serve sentences of less than 12 months, and a quarter of all prisoners are on remand.⁸³ This means that we also need to consider the global impact that short sentences are having on the capacity of prisons to safeguard the welfare of prisoners and address their needs.

Access to programs and support by prisoners on short sentences is incredibly limited, and increasingly so, with Corrections Victoria unable to keep up with the growth of the prisoner population. Justice users consistently told stories of not being able to access programs or the necessary assessment and support while in prison on short sentences. Some described having started programs at one prison, only to be moved to another prison with no such program. Many justice users described making constant requests for appropriate support, but never receiving it.

Even when prisoner populations are stable, providing meaningful programs for prisoners on short sentences is likely to remain a challenge. Given this, the sentencing objective of rehabilitation is unlikely to be met, particularly in a climate of overcrowding. Combined with the criminogenic

⁸⁰ Section 24, *National Disability Insurance Scheme Act 2013*.

⁸¹ Quoting Nick Rushworth in a speech delivered to the Disability Advocacy Network of Australia on 1 November 2013, accessed online at <http://www.dana.org.au/wp-content/uploads/Nick-Rushworth.pdf>.

⁸² See New South Wales Sentencing Council, *Abolishing Prison Sentences of 6 Months or Less*, August 2004. Accessed online at <http://www.sentencingcouncil.justice.nsw.gov.au/nsw-sentencing-council/publications/completed-projects-publications/abolishing-short-prison-sentences>.

⁸³ Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, September 2015 2015, at p 4 and p 13.

impact of incarceration, this suggests that the value of prison sentences of less than twelve months should be reviewed by the Victorian Government.⁸⁴

POST-RELEASE, PAROLE AND COMMUNITY CORRECTIONS

A breach of a CCO should prompt a referral to a solution-focused list and, potentially, assessment for cognitive impairment

People with ABI are twice as likely to breach intervention orders as those without an ABI⁸⁵, and breaching offences or ‘offences against justice’ among people with cognitive impairment is significant.⁸⁶ People should not be incarcerated for breaching corrections orders because of a failure by the system to understand their disability. Nor should they be incarcerated or returned to prison because of the way that disability and disadvantage combine. Failure on a community order should be an indicator that more needs to be done to help people to avoid incarceration. This could occur through breach proceedings being dealt with in a solution-focused court listing. Even prior to the matter reaching court, however, Corrections Victoria should ensure that its resources are focused upon supporting successful completion of orders.

With imposition of non-parole periods becoming less common,⁸⁷ CCOs have the potential to be a particularly important tool in reducing repeat incarceration. They also represent an opportunity to follow the intent of the Sentencing Act and reserve prison as a genuine last resort.⁸⁸

While the Corrections Victoria Disability Framework for 2016-2019⁸⁹ outlines a policy of supporting offenders with disability to complete orders, Justice Users engaged with the *Enabling Justice* project have often felt that they were not supported to complete orders, but merely monitored indifferently for compliance. Some also noted that cognitive difficulties contributed to them being regarded as non-compliant.

Given that thousands of offenders with ABI go in and out of prison, and on and off CCOs, with disability undetected and undisclosed, a specific policy in relation to offenders with known disability

⁸⁴ See New South Wales Sentencing Council, *Abolishing Prison Sentences of 6 Months or Less*, August 2004. Accessed online at <http://www.sentencingcouncil.justice.nsw.gov.au/nsw-sentencing-council/publications/completed-projects-publications/abolishing-short-prison-sentences>.

⁸⁵ Sam Bytheway, ‘Characteristics of respondents charged with breach of family violence intervention orders’, *Legal Aid Research Brief*, November 2015, accessed online at <https://www.legalaid.vic.gov.au/about-us/what-we-do/research-and-analysis/characteristics-of-respondents-charged-with-breach-of-family-violence-intervention-orders>.

⁸⁶ E Baldry, L Dowse & M Clarence. 2011. *People with Mental Health and Cognitive Disability: Pathways into and out of the criminal justice system*. Background Paper for the National Legal Aid Conference, Darwin.

⁸⁷ See Sentencing Advisory Council, *Latest statistics show steady increase in CCO use by the Magistrates’ Court*, 2 March 2016. Accessed online at <https://www.sentencingcouncil.vic.gov.au/news-media/news/latest-statistics-show-steady-increase-cco-use-magistrates%E2%80%99-court>.

⁸⁸ See section 5, *Sentencing Act 1991* (Vic).

⁸⁹ Corrections Victoria, *Disability Framework 2016-2019 – Expanding the Opportunities*, November 2015. Accessed online at http://assets.justice.vic.gov.au/corrections/resources/e0ed5b65-babf-4de7-ace5-f07b129678ca/cv_disability_framework_2016-2019s.pdf.

is insufficient. Instead, where a formal diagnosis of disability has not been made, other hallmarks of complex needs, such as chaotic lifestyle, drug and alcohol misuse and homelessness, should trigger an attitude of caution. They should also trigger the investment of more intensive resources to support the person to complete their sentence in the community.

If a universal vulnerability and solution-focused approach was taken, those offenders failing on orders and those at risk of breaching would and should attract more intensive support and resources. Concerns about protecting the monitoring and supervision function of Community Corrections, could potentially be addressed by an administrative separation of functions (monitoring and support).

Courts can also respond differently, with breach and failure seen as an opportunity for courts and judges to do their most valuable work by reducing the harmful impact and frequency of offending.

Transitional centres are a necessary bridge between prison and the community and reduce recidivism but there are not enough places available.

For successful reintegration in the community, people need access to adequate housing and support. With a huge proportion of Victorian prisoners released to homelessness,⁹⁰ we endorse the findings of the Victorian Ombudsman that there needs to be more investment in post release housing and support to the most vulnerable people exiting Victoria's prisons. This could include the provision of individual brokerage funding packages, as well as increasing the capacity to provide the services offered by the Judy Lazarus transitional centre.⁹¹ The Judy Lazarus Centre provides a small number of prisoners nearing the end of their sentences with intensive transitional support that involves accessing the community while at the centre to aid reintegration. The Judy Lazarus Centre delivers significantly reduced recidivism rates (10% compared to over 40% for prisoners released normally).⁹²

Investment in post-release housing is necessary to reduce recidivism, ensure community safety and allow ex-prisoners to live dignified lives.

This Consultation Paper stated that the focus of our recommendations would be on reforms to the justice sector. For our Justice User Group, however, the issue of housing, particularly post-release housing, was so intrinsically linked to their capacity to avoid further incarceration that it was viewed as a criminal justice system issue. For many of our justice users, lack of adequate housing was a contributing factor to the offending behaviour for which they were sent to prison, as well as for reoffending upon release. One justice user described the loss of his public housing flat, when he received a sentence of 13 months imprisonment, as devastating. The Justice User Group agreed with the following statement by one of the participants:

⁹⁰ Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, September 2015, at p 102

⁹¹ Ibid, at p 156.

⁹² Ibid, at p 102.

There should be a law that DHS can't take your housing if you're in for less than two years. It doesn't have to be the same house, but you should at least be eligible when you come out. It just makes sense.

The Justice User Group recognised that housing stocks are low and that having housing sit vacant while a tenant is in prison is not a pragmatic use of scarce resources. However, they conceded that it is the loss of housing in general, and moving to the bottom of a waiting list upon release from prison, rather than the loss of the specific house, that causes the most hardship. The current policy continues to penalise offenders well beyond the term of their sentences.

PUTTING CONCEPTS INTO PRACTICE: OPTIONS FOR CHANGE

Outlined below are possible responses, grouped thematically around the concepts introduced at the beginning of this part, which address issues identified by the Justice User Group and further explored in this Consultation Paper. Each option is an example of how the concepts identified above might be employed in a practical way to ensure that people with cognitive impairment and complex needs are provided with opportunity to break away from the criminal justice system revolving door. In many cases, the options outlined may be practical examples of more than one of the concepts introduced in this Consultation Paper.

HOW TO PROVIDE FEEDBACK

We invite stakeholders to provide their responses to the options proposed by **31 July 2016**. In particular, stakeholders are asked to consider the options, including:

- the practical limitations of our proposals;
- matters which have may been overlooked or incorrectly presented in this paper;
- alternatives for addressing the issues.

Feedback can be provided in writing to cij@rmit.edu.au or by contacting the Project Coordinator, Anna Howard on 9925 4984 or anna.howard@rmit.edu.au.

Meetings with key stakeholder organisations will be arranged over the coming months to discuss the options and the feedback we receive in more detail.

A final report will be released in early 2017.

OPTIONS

The options that appear below in blue seek to make universal improvements to the criminal justice system, meaning that these will benefit all justice users, including those with an ABI or complex needs. The options that appear below in red specifically address the needs of justice users with an ABI or complex needs.

The following options would extend **procedural fairness** to justice users, by improving their experience at each point of contact with the criminal justice system and consequently, their comprehension and compliance:

- Should a review be conducted of the structure and resourcing needs of the Independent Third Person program, currently delivered by the Office of the Public Advocate, enabling the program to be strengthened and funded to meet growing demand? Should this review consider the potential benefits of introducing a legislative requirement for the use of Independent Third Persons into the Crimes Act 1958?

This would require the support of:

Office of the Public Advocate (implementation)
Victorian Government (funding)

- Should a professional advocacy and referral service which offers support to persons with a cognitive disability who are interacting with the criminal justice system be trialled? Should this be provided by the Office of the Public Advocate (as an extension of the Independent Third Persons program) or another organisation? Should this service be available during police interviews as well as during court attendance and other points of contact with the criminal justice system?

This would require the support of:

Office of the Public Advocate (implementation)
Department of Justice and Regulation and Regulation (implementation and support)
Victoria Police (implementation and support)
Victorian Government (funding)

The following options adopt the concept of **universal vulnerability** and seek to improve the interaction with the Criminal Justice System for people with a cognitive impairment by, firstly, improving the experience for all people and, secondly, fostering a hospitable environment for those who require additional support to request it. Of course, measures which seek to improve the accessibility of the criminal justice system for all people are not, by themselves, sufficient to meet the needs of all people with cognitive impairment and other disabilities. These measures are the baseline, and must be introduced in concert with measures which target the specific needs of people with cognitive impairment.

- Should a 'universal precaution' approach be adopted by Victoria Police,⁹³ including using plain language and improved communication strategies when interacting with **all** members of the public? Should all communication with members of the public that is in a prescribed form, such as the caution read out at the beginning of recorded interviews, be reviewed and revised to improve its clarity and accessibility? Should this approach be expanded to all elements of the criminal justice system, such as courts, prisons, and community corrections?

This would require the support of:

Victoria Police – (implementation)

⁹³ See Asquith and Bartokwiak-Theron, 'Policing Precariousness: ontological and situational vulnerability in policing encounters', 2016, in press. Cited with permission from the authors.

Victorian Government (funding)

The possibilities identified above are also consistent with the principles that inform a **Universal Design** framework, by striving to make the criminal justice system as accessible as possible to the greatest range of people. Additional possibilities consistent with the concept of Universal Design are:

- Should Victoria Police’s work to implement recommendation 5 of the ‘Beyond Doubt’⁹⁴ report to improve communication and translation of documents into Easy English be extended to benefit defendants and suspects, not just witnesses and victims of crime?

This would require the support of:

Victoria Police (implementation)
Victorian Government (funding)

- Should information regarding the availability, nature and purpose of the Independent Third Person program be provided in Easy English to all witnesses and suspects? If so, when should this occur? Should it be as early as possible prior to conducting a recorded police interview? [see example document, Appendix B].

This would require the support of:

Victoria Police (implementation)
Office of the Public Advocate (implementation)
Victorian Government (funding)

- Like Victoria Police, all court forms and other publications produced to provide information to court users be reviewed for clarity and accessibility, and reproduced in accessible form (Easy English)?

This would require the support of:

Victorian Department of Justice and Regulation and Regulation (implementation)

- Should all written information and forms used by Corrections Victoria (including within prisons and in the community corrections and parole setting) be reviewed for their clarity and accessibility, and translated into accessible formats (e.g. Easy English)?

This would require the support of:

Corrections Victoria (implementation)

- Should Corrections Victoria staff who work in prisons and in the community be provided with training to respond appropriately to people with cognitive impairment and/or multiple

⁹⁴ Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: the experiences of people with disabilities reporting crime* 2014, available online at <http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/reports/item/894-beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime>

and complex needs such as trauma informed practice training? Should such training be provided people working across the criminal justice system who interact with justice users? Should the qualification and experience requirements for case management roles with Corrections Victoria be reviewed?

This would require the support of:

Victorian Government (funding)
Corrections Victoria (implementation)
Victorian Department of Justice and Regulation (implementation)

While **solution-focused justice** is not a new concept in Victoria, the current examples of it are accessible by only small samples of the population who live in the “right” postcode. By and large, solution-focused justice has not been introduced into the mainstream criminal justice system, despite evaluation of current examples demonstrating improved outcomes for its users⁹⁵. The following measures seek to expand current examples of solution-focused justice as well as introducing additional measures:

- Should the Sentencing Act be amended to require that judges seeking to sentence someone to prison for less than 12 months must provide reasons why an alternative sentence is not appropriate?

This would require the support of:

Corrections Victoria (implementation)
Department of Justice and Regulation (implementation)
Victorian Government (funding)

- The Victorian Department of Justice and Regulation is planning an expansion and rollout of the Court Integrated Services Program to all headquarter court locations. In addition to this measure, should a solution-focused list be established at every geographical court location?

How should this work? i.e. Should specific magistrates be allocated to oversee the lists with consistency? Should criminal defendant legal representatives, court staff and prosecutors be provided information and training about the purpose of the list, and enabled to refer defendants into the list? Should the list be able to deal with breaches of Community Corrections Orders?

This would require the support of:

Department of Justice and Regulation (implementation)
Magistrates Court of Victoria (implementation)
Victorian Government (funding)
Corrections Victoria (implementation)
Victoria Legal Aid, Law Institute of Victoria, Community Legal Centres (implementation)

⁹⁵ Edgely, Michelle, ‘Addressing the Solution-Focused Sceptics: Moving Beyond Punitivity in the Sentencing of Drug-Addicted and Mentally Impaired Offenders’ [2016] UNSWLawJl 6; (2016) 39(1) *University of New South Wales Law Journal* 206. See also Neighbourhood Justice Centre, Department of Justice (Vic), *Evaluating the Neighbourhood Justice Centre in Yarra: 2007–2009* (Publication, 2010), 10.

- In light of the difficulties that many people with cognitive impairment have complying with CCOs, should special measures be introduced in CCO breach proceedings to identify whether a person has particular needs? For example, should Corrections Victoria direct Corrections prosecutors to give active support to solution-focused judging in CCO breach proceedings, and to refer breach matters into solution-focused court lists?

This would require the support of:

Corrections Victoria (implementation)
 Department of Justice and Regulation (implementation)
 Magistrates Court of Victoria (implementation)
 Victorian Government (funding)

- Should section 80 of the Sentencing Act be amended to make Justice Plans available to offenders with ABI, as well as intellectual disability?

This would require the support of:

Department of Justice and Regulation (implementation)

 Magistrates Court of Victoria (implementation)
 Victorian Government (funding)
 Corrections Victoria (implementation)
 Victoria Legal Aid (implementation and funding)

The following possibilities are examples of **Justice Reinvestment**, being investment in health, housing and social supports rather than the criminal justice system:

- Should the period of absences allowed from a public housing tenancy be extended from the current maximum of 6 months to a maximum of 2 years? Should this apply to all tenants or specifically to where a tenant has a cognitive or intellectual disability? Should it apply to tenants who live in areas with high rates of socio-economic disadvantage?

This would require the support of:

Department of Health and Human Services (implementation)

- Should investment be made in early intervention and prevention programs, particularly focusing on early childhood education and support, in communities which experience high rates of socio-economic disadvantage and high levels of offending?

This would require the support of:

All levels of government, as identified in the *Dropping Off the Edge Report 2015*⁹⁶.

⁹⁶ See Tony Vinson, Margot Rawsthorne, Adrian Beavis and Matthew Ericson, *Dropping off the Edge 2015: persistent communal disadvantage in Australia*, Jesuit Social Services and Catholic Social Services Australia, 2015.

Over time, the concept of **justice reinvestment** has been extended by some to include a reallocation of funding within the criminal justice system towards measures which are proven to divert people away from imprisonment. Possible measures which incorporate this concept might include:

- Should the service provision model of the Judy Lazarus transition centre be expanded to accommodate greater numbers of male prisoners and that an equivalent centre be created for female prisoners? A specific centre or unit could be devoted to reintegration of prisoners with a cognitive impairment.

Requires the support of:

Corrections Victoria (implementation)
Victorian Government (funding)

- Should access to post release housing and support programs be expanded so that longer periods of post release case management are available for offenders with complex needs and so that more offenders are eligible? Should a new 'risk' category be identified of offenders in need of increased supports, being low level recidivist offenders who are identified as having complex needs and have returned to prison repeatedly in the past 24 months?

This would require the support of:

Corrections Victorian (implementation)
Department of Health and Human Services (implementation)
Victorian Government (funding)

- Should individual brokerage funding packages be built into post release housing support provided to offenders with complex needs, including cognitive impairment, as recommended by the Victorian Ombudsman in 2015, at recommendation 21?

This would require the support of:

Corrections Victoria (implementation)
Victorian Government (funding)

- Should a small separate workforce of community support officers to work with offenders with complex needs (including cognitive impairment, mental health and homelessness) who are at risk of breach be trialled? Should these roles include the provision of outreach support and intensive housing advocacy, with the workforce either internal to the Department or externally contracted?

This would require the support of:

Corrections Victoria (implementation)
Transitional (non-government) support services (implementation)
Victorian Government (funding)

- Should the now defunct role of 'ABI Clinician/s' be either reinstated, or redesigned (i.e. expanded) and reintroduced into the criminal justice system?

- Should the ABI Clinician roles (see above) have a specific emphasis on ensuring that there is an organised and supported pathway for people to access the NDIS if eligible? Should this role support prisoners as well as people completing parole or community corrections orders, and should it include brokerage to obtain diagnostic reports if necessary?

This would require the support of:

Corrections Victoria (implementation)
Victorian Government (funding)

- Relevant to the options immediately above, should legal and non-legal advocacy services for Victorian prisoners seeking to access the NDIS be funded to specifically provide this support? Which organisations should be funded to provide this service?

This would require the support of:

Victorian Government (funding)
Victoria Legal Aid / Community Legal Centres / private legal profession
(implementation)
Non-government disability support services (implementation)
National Disability Insurance Agency (implementation, support)
Corrections Victoria (implementation)

ABI and the risk factors for involvement with the criminal justice system

There is significant overlap of the risk factors for sustaining an ABI and for involvement in the criminal justice system. Those factors include poverty, low levels of education, unemployment, drug or alcohol misuse, homelessness, prior experience of domestic violence and poor mental and physical health.¹ In the words of Nick Rushworth, Executive Officer of Brain Injury Australia, ABI ‘tracks socio-locational disadvantage’.² This claim is borne out by a recent study involving over 33000 working age Australians which identified that, compared to peers who experience different types of disability, people with a cognitive impairment like ABI experience the highest rates of socio-economic disadvantage in the areas of education, housing and employment.³

The factors that lead someone to be incarcerated, then, can be the same factors that expose a person to incurring an ABI. Several participants in *Enabling Justice* project have described histories marked by multiple and repeated exposure to risk factors for incurring an ABI as well as being incarcerated including:

- Early experience of head trauma from family violence
- Leaving education early
- Risk taking behavior early in life including driving related offending, being involved in fights, associating with peer groups who break the law, or using alcohol and/or other drugs
- Homelessness from an early age and being exposed to violence on the street
- Continued misuse of alcohol and/or other drugs
- Exposure to violence in intimate relationships

Multiple factors can be and often are experienced by an individual and it is quite possible for a person to sustain brain injury on multiple occasions in their lifetime. This analysis is a very basic one that does not even begin to factor in a broader approach to brain damage, one that takes account of conditions like fetal alcohol spectrum disorder, or the neurological impact of psychological and emotional trauma at key points in brain development. These impacts can underlie and co-exist with brain damage that is formally recognised as disability.⁴ A growing body of researchers and advocates

¹ Leanne Dowse, Melissa Clarence, Eileen Baldry, Julian Trofimovs and Sharleen James, ‘People with Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System: the impact of acquired brain injury’, April 2011. See also Nick Rushworth, ‘Policy paper: Out of sight, out of mind: People with acquired brain injury and the criminal justice system’ July 2011, 5.

² Nick Rushworth, ‘Policy paper: Out of sight, out of mind: People with acquired brain injury and the criminal justice system’ July 2011. Accessed online at http://www.bia.net.au/docs/criminal_justice_systempolicypaperFINAL.pdf.

³ Anne M. Kavanagh, Lauren Krnjacki, Zoe Aitken, Anthony D. LaMontagne, Andrew Beer, Emma Baker and Rebecca Bentley ‘Intersections between disability, type of impairment, gender and socio-economic disadvantage in a nationally representative sample of 33,101 working-aged Australians’, *Disability and Health Journal* 8 (2015) 191-199. See also Australian Institute of Health and Welfare, ‘Disability in Australia: Acquired Brain Injury’, Bulletin 55: (2007), 1, regarding high incidence of ‘complex disability’ among persons with ABI.

⁴ We note that Brain Injury Australia has called for FASD, which is presently not formally recognised as a disability at all, to be included in the definition of ABI. See also W. Huw Williams, Karen A. McAuliffe, Miriam H. Cohen Michael Parsonage and General The Lord David John Ramsbotham, ‘Traumatic Brain Injury and Juvenile Offending: Complex Causal Links Offer Multiple Targets to Reduce Crime’, (2015) *Journal of Head Trauma Rehabilitation* Volume 30 No 2, 69-74.

are calling for the expansion of disability definition to include people with ABI.⁵ Development is impacted by trauma and the environment, highlighting how convergent experiences of disability and disadvantage can be. Any meaningful investigation into the over-representation of people with ABI in prisons will acknowledge the intersections of disability, disadvantage, poverty and discrimination.

For a person who is already at risk of involvement in the criminal justice system, an ABI compounds and multiplies the risk factors identified above. ABI is not only a marker of disadvantage, but a cause, contributing to cyclical compounding and intensification of risk factors for incarceration. It can play a causal role in homelessness, family breakdown, unemployment, social exclusion, the development of a psychotic illness or depression and elevated misuse of alcohol and/or other drugs. This is due to a combination of the direct organic consequences of injury to the brain in terms of behavior and personality change, but often also to the trauma by which an injury is acquired, and the related impact the injury can have upon psychological wellbeing, social relationships and status.⁶

If the experience of ABI in Australia is marked by complexity, co-occurring disorders, and social exclusion, then the experience of those with ABI who also go to prison is a highly concentrated version of this experience. The majority of those found to have an ABI in the Corrections Victoria study had mild ABI (as opposed to moderate or severe) (see *Figure 3*), suggesting most individuals with ABI in the criminal justice system are at risk of not having their disability be noticed, diagnosed or acknowledged.⁷

Figure 1 – Complex needs, incarceration and social exclusion

Eileen Baldry and Leanne Dowse led a major research project over several years, using de-identified administrative data from a range of government services to map the pathways of 2,731 people with mental health disorders and/or cognitive disability who had been imprisoned in NSW.⁸

From the cohort of people with mental health disorders and/or cognitive disability in NSW, they found that individuals with complex needs had the worst outcomes of all, including:⁹

- * more episodes of out of home care in childhood
- * highest levels of repeat contact with the justice system from the earliest ages
- * highest levels of repeated incarceration from the earliest ages.
- * highest levels of homelessness and reliance on income support

Complex needs essentially means people who experience a combination of more than one form of disability, disorder or challenge that gives rise to a range of specific support needs – for example, co-occurring cognitive impairment, mental illness, drug and alcohol misuse and homelessness. The targeted and efficiency-focused way service systems are designed does not match up with the overlapping and compounding nature of these needs:

⁵ For example, Brain Injury Australia advocates in the case of Fetal Alcohol Spectrum Disorder, which disproportionately affects Indigenous Australians, is extremely important to facilitating access to desperately needed recognition and services.

⁶ See Sue Brown and Glen Kelly, 'Issues and Inequities facing people with an acquired brain injury in the criminal justice system', September 2012. Report prepared by Diverge Consulting for the Victorian Coalition of ABI Service Providers, 34. Accessed online at http://www.vcasp.org.au/wp-content/uploads/2014/07/L.CriminalJustice_88761-upload-00001.pdf.

⁷ Corrections Victoria, 2011, p8.

⁸ Eileen Baldry, 'Disability at the Margins: the limits of the law' (2014) Vol 23 No 3 *Griffith law review*, 370-388

⁹ Ibid.

“Often individuals with complex needs have a range of issues which coincide to create a chaotic and unstable lifestyle, however, when the individual’s needs are assessed independently by services they may not be deemed severe enough for them to be seen as a priority for any one of the services and they may be placed on a waiting list or receive inadequate intervention.”¹⁰

Exclusion from needed social supports and services has a direct link to contact with the justice system and incarceration:

“The behaviours, social situations and often accompanying chaotic lifestyle of people with multiple needs contribute to them coming to the attention of police and can result in them being brought before the courts. At this point their very situations reduce the likelihood of diversion or community based sentencing options. An increasing number of people with multiple and complex needs are unnecessarily entering the criminal justice system having been effectively excluded from the broader service system.”¹¹

Complex needs disproportionately affect:

- * People with mild cognitive impairment, particularly ABI and;
- * Indigenous Australians, particularly Aboriginal women, the fastest growing group of incarcerated people in Australia.

Access to support in the community

Exclusion from the community and mainstream services are a key factor in explaining the trajectory of incarceration for people who are living with ABI, particularly those with complex needs. It is necessary then, to briefly explore the issues and barriers associated with accessing ABI-specific supports in the community.

For those whose injury was the result of a road or workplace accident, they are likely to have access to funding for needed services from statutory compensation schemes.¹² Other types of injury tend not to be compensable and people are reliant upon their own resources or public services to obtain the support they need. It is not known how many people with ABI who pass through Victorian prisons are registered with and receive disability services from the Department of Health and Human Services. Importantly, unlike under the National Disability Insurance Scheme (NDIS), there is no right to receive services in the old system once deemed eligible, only to be registered and placed on a waiting list. The experience of participants in the *Enabling Justice* project has been to have little if any contact with formal disability services.¹³

¹⁰ Leanne Dowse, Melissa Clarence, Eileen Baldry, Julian Trofimovs and Sharleen James, ‘People with Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System: the impact of acquired brain injury’, April 2011, 9.

¹¹ Margaret Hamilton, ‘People with complex needs and the criminal justice system’ (2010) *Current Issues in Criminal Justice* Volume 22 No 2, 307-324, 308.

¹² Although, there remain significant issues with people who have not accessed their entitlements because of being enmeshed in a chaotic lifestyle and cycling in and out of prison where, for example, TAC compensation cannot be activated: Glenn Kelly, Diverge Consulting, personal communication.

¹³ This experience is echoed in other studies. See Queensland Advocacy Incorporated, *Disabled Justice*, May 2015, 22. See also E Baldry, L Dowse & M Clarence. 2012. *People with Intellectual and Other Cognitive Disability in the Criminal Justice System*. University of New South Wales.

From 2010 an ABI clinician role was introduced within Corrections Victoria¹⁴, providing consultation into the prison system, training for prison staff to recognise signs of ABI, respond to those with acute support needs, and refer people for screening and assessment, brokerage for full assessments, and driving the process of getting prisoners with a diagnosis registered to receive disability services, or referred into ABI support services such as arbias.¹⁵ However, the pilot phase for this role ended and it appears not to have been continued.¹⁶

Some people with ABI who are caught up in the criminal justice system may be eligible for individualised funding packages under NDIS when it rolls out nationally. Those who are already receiving disability services from the DHHS are expected to be automatically transferred to NDIS to be considered for participation.¹⁷ However, concerns have been raised in the disability sector about a potential lack of affordable or free public services in Victoria that can provide pathways to obtain the diagnostic reports necessary for people who are suspected of having an ABI to qualify as NDIS participants, in particular for people who have not had assessments completed following a traumatic brain injury through the mainstream health system.¹⁸

Another potential challenge for persons living with ABI who experience co-occurring conditions and are socially excluded without support networks is that the scheme requires a potential participant to pro-actively self-identify their support needs and advocate on their own behalf.¹⁹ If anything, Corrections Victoria's research (see *Figure 2*) showed there are likely far more people in the prison system living with ABI than are either diagnosed or self-identifying. There are significant issues of shame, fear of being manipulated or stood over, or simply lack of information and insight, that stand in the way of people pro-actively self-identifying their brain injury and advocating for the support they need both in a prison setting and in the community.²⁰

There appear to be significant gaps in access to disability-specific supports and resources in the community for people with ABI, particularly those with mild cognitive impairment who might not qualify for disability specific services, or those with non-compensable injuries. The ambiguous, hidden and precarious nature of disability for many people living with ABI, particularly those with

¹⁴ Corrections Victoria, *Disability Framework Report Card No 2 – the Half Way Mark*, July 2011. Accessed online at http://assets.justice.vic.gov.au/corrections/resources/d26a1fa1-c113-49c4-b02e-9bbe113560f6/disability_report_card2_2011.pdf.

¹⁵ Arbias began as an agency exclusively focused upon providing support for persons with alcohol related brain injury but now provides a range of assessment, case management and accommodation services for people with ABI, see www.arbias.org.au.

¹⁶ Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria*, September 2015, p 90.

¹⁷ National Disability Insurance Scheme, *Fact Sheet on the bilateral agreements for transition to the NDIS and transitioning of responsibilities for aged care and disability services*, accessed online at <http://www.dhs.vic.gov.au/about-the-department/plans,-programs-and-projects/projects-and-initiatives/disability-services/national-disability-insurance-scheme#content-heading-4>.

¹⁸ Personal communication, Glenn Kelly, Diverge Consulting.

¹⁹ Karen Soldatic, Georgia van Toorn, Leanne Dowse and Kristy Muir, 'Intellectual Disability and Complex Intersections: Marginalisation under the National Disability Insurance Scheme' 1(2014) *Research on Practice in Intellectual and Developmental Disabilities*, 6-16.

²⁰ Nick Rushworth, 'Policy paper: Out of sight, out of mind: People with acquired brain injury and the criminal justice system' July 2011, 4. Accessed online at http://www.bia.net.au/docs/criminal_justice_systempolicypaperFINAL.pdf.

complex needs, means a broader approach is required than simply seeking to connect people with disability-specific supports.

The Scale of the Problem

The scale of the problem of ABI in our criminal justice system, and its links to complex social disadvantage and 'layered vulnerability'²¹ suggests that solutions cannot focus solely on responding to the particular features of ABI within a disability silo. There needs to be greater recognition of ABI at a community level, and more accessible ways for those at risk of ABI to obtain a diagnosis, as well as the relevant behaviour support interventions and rehabilitation that can assist tremendously in managing some of the social, emotional and cognitive consequences of ABI.²² However, this alone will not address the scale of this problem. The scale of this problem is in fact as great as that of the link between social exclusion and incarceration itself.

Figure 2 – Corrections Victoria Research

Acquired Brain Injury in the Victorian Prison System: Corrections Victoria, 2011

The findings of this study were published in 2011 as a Corrections Victoria Research Paper.

The study sampled a group of 117 men and women serving a sentence of imprisonment in Victoria.

An initial screening tool and a further screening process were used to determine those at risk of ABI. Those determined to be at risk ultimately progressed to a full assessment stage, undergoing neuropsychological testing. Ultimately, 42% of the men and 33% of the women sampled were found to have a confirmed ABI.

This is not the proportion of prisoners who would normally ever be recognised as having an ABI, or even be aware of this themselves. This study does not reflect numbers of people routinely self-identifying as having an ABI, or being routinely identified through a systematic screening process, but the true prevalence of the disability that is revealed when universal screening is implemented.

The most common identified ABI risk factors for men and women in the sample related to drug and alcohol misuse. The next most prominent risk factors endorsed among this group were suicide attempt and assault. 55% of the male prisoners' ABIs were mild, while 72% of the female prisoners' ABIs were mild. Just 6% of male prisoners and 7% of female prisoners were found to have a severe ABI.

²¹ See Nicole Asquith and Isabelle Bartokwiak-Theron, 'Policing Precariousness: ontological and situational vulnerability in policing encounters, 2016 in press. Cited with permission from the authors.

²² While not the focus of this discussion paper, there is extensive literature focusing on the need for broader social policy initiatives to reduce head injuries as an early intervention, and to better manage the social and individual impact of brain injuries through provision of appropriate rehabilitation services. This is explored by Professor Huw Williams in *Repairing Shattered Lives: Brain injury and its implications for criminal justice*. col. ill., port., 2012, p 18-19. Downloaded from http://www.t2a.org.uk/wp-content/uploads/2012/10/Repairing-Shattered-Lives_Report.pdf.

The numbers detected in the 2011 Corrections Victoria study are much higher than the proportion of people identified as having an ABI interacting with other aspects of the Victorian criminal justice system. For example, about 22 per cent of participants in the Assessment and Referral Court List (ARC) have an ABI²³, and about 16 per cent of people who have the support of an independent third person during a police interview have an ABI. Both Assessment and Referral Court List and the Independent Third Person program are specialist programs accessible by virtue of having a cognitive disability, so they necessarily include people who are aware of and motivated to disclose their disability.

Article 31 of the United Nations Convention on the Rights of Persons with a Disability (the Convention), which Australia ratified in 2008, requires that state parties collect and retain research and statistical data about people with a disability to enable the development and implementation of policies to give effect to the Convention, which among others, provides for the right to bodily integrity and equality before the law. State parties should therefore collect accurate and current data regarding incarceration and detention of persons with disabilities.

There currently is no systematic screening of offenders or defendants in criminal matters conducted at any stage in the Victorian criminal justice system.²⁴ There are also no figures available about the number of people with an ABI who appear before criminal courts in Victoria in general, for example, or who are arrested by police. Corrections Victoria is yet to develop and implement a universal screening tool for prisoners at risk of ABI, which is only a first step. Establishing a diagnosis requires proceeding the costly step of providing full neuropsychological testing to those identified to be at risk. While, as explored in relation to NDIS participation above, it is important for this to occur in prisons, and for it to be facilitated by Corrections Victoria, it would be very difficult and incredibly costly to systematically address the problem in this way.

The prison population has been likened to a fast-flowing river.²⁵ Even if an effective process for systematic screening and diagnosis for each prisoner in Victoria were developed and funded, there may not be time for the full process to play out during the sentence of most Victorian prisoners. Thirty two per cent of women and 25.8 per cent of men in prison are serving a sentence of *less than* one year,²⁶ and a quarter of prisoners are on remand. Additionally, prison overcrowding continues to hinder the implementation of appropriate screening and assessment of prisoners in a timely manner.²⁷ Accurately capturing the numbers of people with an ABI would likely require the allocation of funds and significant cooperation across a number of government portfolios, and an

²³ Magistrates' Court of Victoria Annual Report 2012-13, 91.

²⁴ For participants in the Court Integrated Services Program (CISP), a bail support program currently offered at Melbourne, Sunshine and Latrobe Valley Magistrates' Courts, risk factor screenings are conducted by case managers, and referral for full neuropsychological assessments funded by the court can be made. Deputy Chief Magistrate, Magistrates' Court of Victoria, Jelena Popovic, 'People with ABI coming before the Courts' 18 March 2015, talk delivered at the Summer Foundation Breakfast Club Series, Royal Talbot Rehabilitation Centre.

²⁵ A Corrections Victoria employee, cited in Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria*, September 2015, 90.

²⁶ Corrections Victoria, *Key Statistics on the Victorian Prison System 2009–10 to 2013–14*, 2015, 10-11.

²⁷ See Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, September 2015, p 24-26.

investment of federal funding and support in recognition that this undertaking is in furtherance of Australia's treaty compliance.

The challenge of scale prompts an alternative approach, outlined in this Consultation Paper, related to the assumption of 'universal vulnerability': we need to assume that the majority of people who go to prison have a disability of some kind. This is probably a large majority when different types of cognitive impairment and people who experience mental health conditions are factored in.²⁸ All are over-represented in our prisons.²⁹ The challenge of reducing the incarceration rates of persons with an ABI, then, is nothing less than the challenge of reducing the use of incarceration in Victoria. We need, then, to take a broad view of the criminal justice system, and identify the opportunities to reduce the use of incarceration across the system.

²⁸ Ibid, p 18.

²⁹ Ibid, p73.

APPENDIX B: DRAFT EASY ENGLISH INFORMATION SHEET REGARDING THE INDEPENDENT THIRD PERSON PROGRAM

This document was prepared in consultation with the Justice User Group.

DO YOU NEED SOMEONE TO BE HERE WITH YOU?

- **DO YOU HAVE TROUBLE THINKING CLEARLY AND ANSWERING QUESTIONS?**
- **DO YOU HAVE PROBLEMS WITH READING AND WRITING?**
- **HAVE YOU HAD LEARNING PROBLEMS IN THE PAST?**
- **ARE YOU ON DSP?**
- **HAVE YOU HAD A BRAIN INJURY?**
- **DO YOU HAVE MEMORY PROBLEMS?**

YES? MAYBE YOU NEED AN INDEPENDENT THIRD PERSON

THEY CAN:

- **BE WITH YOU WHILE THE POLICE TALK TO YOU**
- **BREAK DOWN WHAT THE POLICE SAY SO YOU UNDERSTAND**
- **TELL YOU WHAT YOUR RIGHTS ARE**
- **HELP YOU CONTACT A LAWYER**
- **HELP YOU SPEAK TO POLICE**
- **ASK TO STOP AND HAVE A BREAK**

TELL THE POLICE YOU NEED AN INDEPENDENT THIRD PERSON WHEN THEY SPEAK TO YOU.

APPENDIX C: SEMI-STRUCTURED INTERVIEW QUESTIONS

1. Have you ever been in contact with the police? What happened?
2. Have you been arrested?
3. Were you alone when you spoke to the police?
4. Who else was there and what did they do?
5. Have you ever had to go to court?
6. If so, what happened at court? What was it like?
7. Did you go to court by yourself or was someone with you?
8. Did you talk to any court staff or lawyers at court? What happened?
9. What was it like when your case was heard?
10. Did you plead guilty?
11. What was your sentence?
12. Have you ever been on a corrections order? What was that like?
13. Have you ever been to gaol? What happened?
14. When did you get out of prison? What was it like getting out?
15. Were you on parole when you got out of prison?
16. Have you ever been on remand (that is, where you had a court case coming up in the future, but you were not released on bail)?
17. What happened while you were on remand?
18. Did you apply for bail? And what was the outcome?
19. Have you ever been on bail? What were the conditions? What was it like?
20. What do you think about the criminal justice system?