CRIMINOLOGY
RESEARCH GRANT

Young people with acquired brain injury: Preventing entrenchment in the criminal justice system

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Report to the Criminology Research Advisory Council
Grant: CRG 09/18–19

June 2022

This project was supported by a Criminology Research Grant.
The views expressed are the responsibility of the author and are not necessarily those of the Council.

Published by the Australian Institute of Criminology
GPO Box 1936 Canberra ACT 2601
Tel: (02) 6268 7166
Email: front.desk@aic.gov.au
Website: www.aic.gov.au/crg

ISBN: 978 1 922478 54 2 (Online)

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This report was reviewed through a double-blind peer review process.

Edited and typeset by the Australian Institute of Criminology.

Contents

Tables

Acknowledgements

The authors wish to thank the judicial, legal and medical officers as well as the numerous service providers who took the time to share their experiences and speak with us about issues concerning young people with acquired brain injury and complex trauma. The views expressed in the report are the responsibility of the authors.

We would like to acknowledge and express our appreciation to Ciara Farrelly and Ariel Yap for their research contributions. Ciara assisted in data collection, transcription and data analysis, while Ariel also analysed and coded data and assisted with the production of this report and the related publications.

Finally, we would also like to acknowledge the assistance of the Australian Institute of Criminology in funding us to carry out this research under a Criminology Research Grant (CRG 09/18–19).

Acronyms and abbreviations

ABI	Acquired brain injury
ADHD	Attention deficit hyperactivity disorder
AIHW	Australian Institute of Health and Welfare
ARC	Assessment and Referral Court
CALD	Culturally and linguistically diverse
CJS	Criminal justice system
FASD	Fetal alcohol spectrum disorder
ID	Intellectual disability
OOHC	Out-of-home care
PTSD	Post-traumatic stress disorder
TBI	Traumatic brain injury

Abstract

This report examines whether children and young people with acquired brain injury (ABI) are entrenched in the criminal justice system in Victoria and, if so, why? It analyses the current system's strengths and weaknesses in responding to young people's needs, particularly when they are brain injury affected. The findings stem from interviews with adults who work closely with young people with brain injury and complex trauma, either in the social service system or the legal system. Our findings explore young people's comprehension of legal and administrative processes; the interaction between ABI, complex trauma and co-occurring conditions; the identification of ABI and supports provided; and the appropriateness of responses to young people with challenging medical and social issues. Our findings suggest the need to establish early, individualised support services to counter the unnecessary involvement of cognitively-impaired young people in a system that is not designed to address their needs.

Executive summary

Our research suggests ways to better respond to young people with acquired brain injury (ABI), or ABI symptoms, involved in Victoria's youth justice and criminal justice system (CJS). This report draws on the voices of community and legal professionals to describe how the CJS currently responds to young people with ABI, and also considers whether existing sentencing outcomes are constructive and apt or inappropriate and unjust. Enhanced knowledge of the needs of young people with ABI promotes better understanding and empathy, which can lead to reduced over-representation and entrenchment in the CJS, as well as encouraging effective policies that aid with early identification, diagnosis and individualised support of these young people with ABI and complex needs. Our research findings stem from interviews with lawyers, judges and magistrates working in the Children's Court and the County Court of Victoria; the Assessment and Referral Court List members in the Magistrates' Court; and some community service providers and neuropsychologists who work closely with young people. This study was undertaken between May 2019 and September 2020. Interview approaches and the numbers participating were revised in response to public health measures implemented in Victoria from March 2020 in light of the COVID-19 pandemic.

Report structure

This report opens with a brief overview of the findings from our research. A literature review follows an initial discussion of the implications of the research findings. Five core themes emerged from the research interviews. Similarly focused research projects in western jurisdictions have identified comparable themes. An outline of our research aims follows a discussion of the core themes. Previous research related to complex needs and cognitive disability or impairments including ABI in Australia and the United Kingdom is reviewed. The methodological and ethical considerations are then explained, and the methods section includes a description of the data collection stages, the recruitment and interview process, the participants, and data analysis, coding and cross-coding. Themes and subthemes that emerged from the 27 interviews are then presented. A discussion of the research results in the context of the reviewed literature then follows. Recommendations stemming from our findings are made, and the report concludes with suggestions for further research.

Findings

The interview data, coded in the program NVivo, produced 14 initial themes, which were then condensed into the following five main themes:

- Professionals who come into contact with young people with cognitive issues fail to identify, assess for or diagnose an ABI;
- A young person with an ABI typically suffers a challenging childhood, complex trauma and co-occurring conditions;
- Young people with an ABI have limited or no comprehension of complex legal processes;
- Young people with an ABI in the CJS experience inappropriate and indifferent responses and attitudes; and
- Living with an ABI, in and out of the CJS, is precarious.

ABI appears to be under-diagnosed in young people. However, it appears nevertheless that, like adults with ABI, young people with ABI and/or associated cognitive impairments may be over-represented in the CJS. An ABI refers to 'multiple disabilities arising from damage to the brain acquired after birth' (Australian Institute of Health and Welfare (AIHW) 2015: 112). Varied causes such as stroke, trauma to the head, infection, or substance abuse also mean that different terms might be applied to the condition such as 'traumatic brain injury'. ABI may also fall within the umbrella term of cognitive 'disability' or 'impairment', depending on the severity of the injury. Symptoms can include cognitive impairments such as memory loss, communication difficulties, lack of insight, difficulty concentrating, understanding social cues, behavioural issues including impulsivity and physical disabilities (Williams 2012).

The language used to define terms relating to disability and impairment appears inconsistent across users. For example, AIHW (2020a) refers to disability as an 'umbrella term' for 'impairments of body function or structure, activity limitations or participation restrictions'. The Assessment and Referral Court List in Victoria refers to 'intellectual disability, acquired brain injury, autism spectrum disorder, a neurological impairment', as being 'cognitive impairments'. In this paper the terms 'disability' and 'impairment' are used interchangeably in the context of cognitive issues and this would also include fetal alcohol spectrum disorder. Other developmental disabilities such as attention deficit hyperactivity disorder (ADHD) may exist in tandem or may be a precursor to ABI diagnosis with the ABI existing before the symptoms of ADHD become apparent (Narad et al. 2018).

These young people may become entrenched in a CJS that they negatively experience from first point of contact. Factors such as gender, age, complex or intergenerational trauma (Victorian Council of Social Service 2017), cultural and linguistic diversity, and multiple other co-occurring conditions also appear to play a part in each young person's experience (Frohmader & Sands 2015). These variables intersect and overlap, resulting in young people with ABI being more vulnerable to experiencing 'a CJS revolving door'. Moreover, with each period of institutionalisation, the young person appears to be placed at risk of acquiring further brain injury or trauma. The five core research themes are summarised below and discussed in depth in the *Results* section of this report. These themes are discussed in descending order of significance, starting with the theme that was recurrent in most interviews.

Failure to identify or reluctance to diagnose ABI

Despite an increase in research on how ABI presents in adult populations (including memory loss, difficulties in concentration and communication, and issues with impulse or emotional regulation), it is concerning that too many professionals appear to have limited awareness of ABI symptoms, in both older and younger cohorts. It is notable that young women are reported to less overtly than young men display physical and behavioural indicators of an ABI, but they are more prone to self-harm and to suicidal ideation (see, for example, Baidawi & Sheehan 2019). Given this, it is also concerning that ABI in young people appears to often remain undiagnosed due to specialist professionals' reluctance to label young people with an ABI diagnosis. Specialists cite both incomplete biological and neurological development and the inevitable stigmatisation processes to which young people with a diagnosed ABI might be exposed, especially in custodial settings, as well as in everyday interactions.

Challenging childhoods, complex trauma and co-occurring conditions

Enhanced evidence of complex trauma in young people's lives, a consistent theme in our interviews, aligns with the findings of previous studies on adult cohorts with ABI in Victoria (Eriksson et al. 2019; Lansdell et al. 2018a, 2018b; Saunders et al. 2018), as well as other research findings on cognitive and intellectual disability (Baldry et al. 2018; Goldson 2006). Our research revealed that complex trauma stems from neglect, family violence and other forms of victimisation, substance misuse, intergenerational trauma, and childhood exposure to war zones around the world. Hesitation to diagnose ABI at an earlier age may lead to misidentification of brain damage and other resulting cognitive disabilities. It is apparent that many children and young people who are imprisoned tend to have experienced school expulsion, family violence, and placement in out-of-home care (Baidawi & Piquero 2020). Moreover, the theme of 'system as trauma' links directly to the acquisition of additional trauma or brain injuries due to exposure to violence in punitive custodial environments, and involvement in a system that may have targeted people of particular racial or ethnic backgrounds or citizenship status.

Comprehension of complex legal processes

This theme cast light on the lack of essential training and communication tools needed to enhance young people's understanding of and inclusion in courts. Young people are dealing with complicated bail conditions, court processes and court outcomes. With limited knowledge and understanding, young people (especially with an ABI, and from a disadvantaged background) struggle to follow proceedings and understand and comply with orders. In turn, this contributes to a negative interaction and relationship with youth justice and criminal justice system professionals and employees. Failure to address speech and communication barriers during court processes and police interactions leads to further issues with communication and results in missed opportunities for diversion, early intervention and support.

Inappropriate and indifferent responses and attitudes in the criminal justice system

There remains a lack of appropriate responses from officials within the youth justice and CJS. Responses to young people, particularly those with an ABI or cognitive impairment, suggest indifference and disrespect for the individual and the challenges they face as a result of the limitations that accompany brain damage. Overtly punitive attitudes and misunderstanding of some young people's behaviours are particularly evident during interactions with police and when a young person is in custody. A duty of care to address young offenders' comprehension difficulties is not frequently evidenced (Saunders, Lansdell & Fredericks 2019). Judicial and legal representatives' time is limited, and so too may be the accurate assessment of young people's presenting behaviours and circumstances. In this context, there is a need to shift from a punitive process that seeks to hold young people with ABI responsible for their 'behaviours of concern' towards a therapeutic welfare-based approach, where welfare and rehabilitative support is prioritised as an aim of sentencing, rather than retribution and general deterrence. Young people are subjected to punitive attitudes within the CJS, and may thereby experience further trauma, enhanced vulnerability, frustration and disempowerment.

Poor criminal justice responses can be addressed by increasing awareness of ABI through education and training initiatives. Professionals' knowledge and understanding of, and empathy for, young people's behaviour and their patterns of interaction with others as a result of an ABI and associated cognitive disabilities is imperative. Understanding the impact of complex trauma, as well as the circumstances of young people and their families from culturally and linguistically diverse communities, will be a necessary component. Our findings also suggest the need for greater investment in ensuring professionals have up-to-date knowledge about processes, services and pathways available to young people with ABI and complex trauma, as current 'know-how' appears to be based largely on experience. Staff need to be confident to appropriately assist young people to manage their challenging behaviours, which likely stem from ABI and complex trauma.

Precarious living conditions

This theme emphasises the importance to young people with an ABI and cognitive disabilities of stable and supported accommodation, with easy access to appropriate medical and emotional support. Too many young people who 'age out' of the system find themselves homeless and subject to minor offences related to everyday survival in precarious living conditions. Moreover, such conditions often expose young people to drug and alcohol misuse, especially in cases where medication is no longer affordable or accessible. Concerningly, periods of unstable living often lead to further injuries and trauma.

Implications

Our research findings emphasise the importance of establishing appropriate, individualised support for young people with ABI as early as possible. Individualised and appropriate responses to young people with complex needs and multiple health and social conditions are lacking in Victoria's CJS. Case studies presented in our research results emphasise the urgent need to effectively identify, respond to and support young people with ABI, especially given their experiences of complex trauma, the likelihood that their ABI will not be diagnosed and recognised, and the risk that they will experience further trauma or injury as a result of their existing conditions. Young people with an ABI are vulnerable and may travel through winding and intersecting pathways that too often lead to detention, and sometimes long-term entrenchment within criminal justice institutions. Factors that enhance the likelihood of this occurring include poor familial and social support; neglect and maltreatment at home, and in state care, including child protection or youth justice institutions; abrupt, interrupted and unstable support, education and housing; and societal and professional ignorance, discrimination and bias. A shift from punitive responses is needed. Rehabilitative, therapeutic, integrative, diversionary and welfare-based responses would appear to be a more appropriate and effective response not only to young people with ABI and cognitive disabilities but to the broader population of young people who come into contact with the CJS.

Literature review

The issue of young people in detention has long been highlighted as a critical area for research, policy and practice. (The term 'young people' is used to refer to children and young offenders aged up to 21 collectively, according to legal definitions and Sentencing Advisory Council guidelines. For more information, see https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentence-types-for-children-and-young-people.) The importance of understanding the pathways into youth justice and the adult CJS has been persistently stressed in legal, academic and media reports across Australian jurisdictions (see Baidawi & Sheehan 2019; Baldry et al. 2018; Mendes, Snow & Baidawi 2014; Savvas & Jeronimus 2017). This literature review seeks to outline key academic discussions based on research conducted in western countries on issues pertaining to youth justice and acquired brain injury (ABI). The discussion also highlights gaps in existing literature and public knowledge on how to support young people with ABI. This literature review comprises mainly academic literature, while several governmental and non-governmental reports were referenced for up-to-date statistics and legal and practical guidelines.

Previous research

Existing research documents a complex picture and a wide range of difficulties that people with cognitive disabilities consistently face when engaging with justice systems (Horn & Lutz 2016; Hughes et al. 2012; O'Rourke et al. 2016; Sentencing Advisory Council 2020). Baldry and colleagues (2018) stress the importance of discussing mental health and cognitive disabilities simultaneously, as these areas have been largely overlooked in youth justice research. These overlooked factors interact to create complex support needs that often result in 'heavy embroil(ment)' of individuals in youth justice and the adult criminal justice system (CJS; Baldry et al. 2018: 637; see also Baldry 2017; Goldson 2006).

Adults with ABI have been inappropriately incarcerated because of the failure of both prosecutorial authorities and legal representatives to identify individual disability early (Lansdell et al. 2018a, 2018b). General misconceptions and lack of awareness about ABIs across Victorian organisations have also led to potential over-representation and entrenchment within the system. Problematically, previous research findings by the research team identified that children and young people living with an ABI, and other frequently co-occurring forms of cognitive disability, are also drawn into the youth justice system in a similar manner as a result of overlapping factors including low educational levels, family violence, minor offending, and child protection matters, which have the capacity to escalate and lead to the criminalisation of behaviour exhibited as a result of related neurological and trauma issues.

These concerns are further emphasised by the fact that there is a potential over-representation of people with ABI, including child and youth cohorts, in the CJS (Baidawi & Piquero 2020; Durand et al. 2017; Hughes & O'Byrne 2016; Snow & Powell 2008). The Sentencing Advisory Council's (2020) recent report highlighted the impact of cognitive impairments and brain injury on development and daily functioning, as over one-third of young people in Victoria presented with cognitive difficulties (Youth Parole Board 2019). Moreover, almost half of Victorian 'crossover children' had at least one diagnosed neurodevelopment or neurological condition (Baidawi & Sheehan 2019: 9), and research from the United Kingdom found that 65 percent of youth in correction systems had a traumatic brain injury (TBI; Chitsabesan & Hughes 2016). Baidawi and Sheehan describe this category of child protection-involved youth, known as 'crossover children', as being over-represented in the criminal justice system. This trajectory is also known as a 'care-to-custody pipeline', consisting of 'children who come to the attention of statutory child protection services due to abuse, neglect or parental incapacity' (Baidawi & Sheehan 2019: 2). The need to identify systemic issues, potential entrenchment and responsiveness to ABI in the youth justice system and CJS in Victoria was therefore central to the current research project supported by the Australian Institute of Criminology. This research sought to explore and identify best practice in this area.

Entrenchment in a punitive system

Generally, academic and grey literature discuss similar trends across youth and adult justice systems, with recidivism and entrenchment of young people from vulnerable backgrounds being a key concern for researchers in Australia, the United Kingdom and New Zealand (Baldry et al. 2018; Goldson 2006; New Zealand Ministry of Justice 2013). Although separate courts were established over 200 years ago in Australia to reduce the 'harmful effects of contamination and stigma' (Cunneen, White & Richards 2015: 12), holistic approaches to effectively rehabilitate and reintegrate youth offenders continue to be discounted in western jurisdictions (with the exception of Germany and New Zealand; see Urwin 2018 and Stanley 2017 respectively). Vulnerability to youth justice and CJS contact is exacerbated by a lack of understanding and of the skills required to support the complex needs of young people, especially those with histories of trauma, neglect and brain injury. Moreover, ABI and common co-occurring conditions that render many individuals in detention unable to effectively participate in the limited programs offered all too often go unrecognised and misunderstood. Such oversight ultimately leads to the potential entrenchment of young people with an ABI and other co-occurring conditions when they come to the attention of justice institutions.

Additional vulnerability to criminal justice involvement intersects with over-representation relating to gender, race or perceived ethnic background, as well as trauma legacies. Importantly, children with neurodevelopment issues and neurodisability are substantially over-represented in child welfare, community and custodial youth justice initiatives (Baidawi & Piquero 2020; Chitsabesan & Hughes 2016; Cho et al. 2019; Haight et al. 2016; Halemba et al. 2004; Hughes & O'Byrne 2016; Snow & Powell 2008; Youth Parole Board 2019). Neurodisability is an 'umbrella' term used by some of these authors (Baidawi & Piquero 2020; Chitsabesan & Hughes 2016) to denote varying conditions of cognitive impairment.

Age of criminal responsibility

Most systems aim to support young people through the provision of welfare and rehabilitation, while holding them accountable for behaviours that are considered criminal, offensive, deviant, dangerous or problematic (Shore 2018; Urwin 2018). Welfare and rehabilitation continue to be juxtaposed against responsibility and accountability (Cavadino & Dignan 2006), as Australia has set the age of criminal responsibility at 10 years, which is younger than international averages and guidelines (O'Brien & Fitz-Gibbon 2017). In regards to children's criminal responsibility, in all Australian jurisdictions there exists a rebuttable presumption (*doli incapax*) that children aged 10–13 years (inclusive) lack the capacity to form criminal intent (Jesuit Social Services 2015). However, O'Brien and Fitz-Gibbon (2017) conducted a qualitative study on the presence of *doli incapax* in Victorian court proceedings, concluding that the principle 'is not engaged for all children in a manner consistent with the common law' (2017: 140). Therefore, the protection it may afford in preventing younger children from being regarded as criminally responsible for their actions is questionable.

Notions of criminal responsibility add to institutional involvement, with little consideration of co-occurring conditions (eg homelessness, mental illness, substance misuse), case history or complex trauma. Research reveals that early entry to the CJS (amplified by low minimum ages of criminal responsibility) has adverse outcomes for a significant number of young people (Baidawi & Piquero 2020; O'Brien & Fitz-Gibbon 2017; Wishart 2018). As Wishart has suggested, if and when the age is to be increased it should 'reflect the stages of developmental maturity obtained' (2018: 319). This sentiment reflects an approach driven by proportionalism. It reasons that the arguably harsh consequences of institutionalisation and early exposure to the criminal justice system are far from proportionate to the capacity and capability of developing and highly impressionable minds.

Most recently, 5,694 young people aged 10 and over were reported to be under youth justice supervision across Australia, with 17 percent of this cohort in detention (Australian Institute of Health and Welfare (AIHW) 2020b). A further nine percent remain under community-based supervision, and another 11 percent subject to other supervision types in Victoria (AIHW 2020b). Of great concern is that 63 percent of young people in detention were unsentenced (AIHW 2020b). Significantly, 88 percent of young people in Western Australian detention centres were further found to have a least one domain of severe neurodevelopmental impairment, while 36 percent were identified to have fetal alcohol spectrum disorder (FASD; Bower et al. 2018).

Evidence of early youth justice involvement indicates the importance of understanding the pathways in and out of the system, as many young people have been found to come from abusive and violent environments (Fitton, Yu & Fazel 2020). Young people who come from deprived backgrounds also have fewer opportunities for social mobility (Bailey 1996; Muncie 2014) and are often victims of other types of crimes including child abuse and neglect (Phoenix & Kelly 2013). In 2020, the Department of Justice and Community Safety Victoria reported 53 percent of young people (under 18 years of age) currently under a formal supervision order or incarcerated were victims of abuse, trauma or neglect as children, while 42 percent had witnessed family violence and 21 percent lived in unsafe or unstable housing. It is therefore crucial that these outcomes and potential pathway factors are recognised and understood in relation to early life adversity experienced by the majority of children who later become embroiled in the CJS. There is broad support for increasing the minimum age of criminal responsibility to at least 12 years with the aim of reducing net-widening and adhering to international obligations (O'Brien & Fitz-Gibbon 2017).

Cumulative adversity: Overlapping factors of over-representation

Young people with an ABI are also subject to what can be termed 'cumulative adversity', where several factors overlap, which in turn may lead to an over-representation of this group in the CJS. Factors of over-representation illustrate the significance of cumulative adversity when it comes to over-represented subgroups in child protection, out-of-home care (OOHC) and the CJS (AIHW 2018b; Malvaso et al. 2018), especially children who come from diverse racial and cultural backgrounds. Shared experiences of trauma, abuse, homelessness, mental health disorders and cognitive disabilities are not only misunderstood and wrongfully responded to by police (see Grieg, McGrath & McFarlane 2019 and Richards & Ellem 2018 for issues with police responses to behavioural challenges), but found to further propel young people into the system with each official interaction (Baldry et al. 2018).

Life experiences and family backgrounds

Additionally, the nature of discrimination needs to be understood in accordance to 'type, severity, timing, and duration of [each episode] of abuse and neglect' (Baidawi & Sheehan 2020: 8), especially given that each occurrence of abuse differs according to social and familial factors. Each occurrence potentially compounds existing trauma through re-exposure in abrupt placements in OOHC and welfare services (see AIHW 2016; Fernandez et al. 2014; Fitzpatrick & Williams 2016; Prison Reform Trust 2016 and Redmond 2015 for multiple trauma; see Mendes, Johnson & Moslehuddin 2011 for abrupt placement and services), as well as instances of institutional abuse that retraumatise and add stress to an already challenging pathway (Baidawi & Piquero 2020).

Children placed in OOHC are also more likely to have experienced neglect and abuse due to parental incapacity, maltreatment, relinquishment or parent–child conflict. This highlights the fact that the quality of family and peer relationships has a strong impact on youth offending (Ingram et al. 2007), and childhood abuse, physical abuse and neglect are significant factors increasing the risks of adult criminal justice involvement and violent offending (Fitton, Yu & Fazel 2020; Jonson-Reid & Barth 2000; Malvaso, Delfabbro & Day 2017; Maxfield & Widom 1996; Stewart, Dennison & Waterson 2002).

The fact that poor parental supervision, and rejection, neglect and emotional abuse have been found to be consistent predictors of youth and adult offending indicates the need to understand and better respond to such occurrences (Loeber & Stouthamer-Loeber 1986; Maxfield & Widom 1996). These underlying experiences should be explicitly recognised for subsequent rehabilitation and recovery to occur, aimed at a reduction in recidivism. This evidence not only highlights the significance of holistic approaches and consistent support, but importantly the inability of 'get tough' and overly punitive approaches to successfully rehabilitate or even effectively respond to complex and compounding needs of young people in youth justice institutions (Victorian Council of Social Service 2017).

Institutional abuse

Previous research has also established that young people who enter youth justice systems are often exposed to traumatic experiences beforehand (Baldry et al. 2018; Baidawi & Sheehan 2020). The impetus for official intervention and OOHC is mainly childhood abuse and familial neglect, and occasionally neglect that resulted from familial breakdown, death of family members or familial substance abuse (Baidawi 2020; Maclean et al. 2017; Spencer et al. 2005; Sullivan & Knutson 1998). Instances of institutional abuse that retraumatise add stress to an already challenging pathway (Armytage & Ogloff 2017: 50, recommendation 8.2). The trauma that young people bring with them into custody and incarceration needs to be met with understanding and professionalism, which in turn reinforces the need to provide better oversight and training of staff across all institutions that come into contact with these children and young people (Cunneen 2016; Moore 2017; Trevitt 2019).

Furthermore, the criminalisation of behaviours linked to disadvantage, such as homelessness and drug use, have also been found to create similar patterns of structural exclusion for young people with mental health disorders and cognitive impairments, further complicating and compounding the phenomena to varying degrees (Baldry et al. 2018). Consistent state failure to investigate institutional abuse and discrimination and to provide adequate support arguably constitutes a form of systemic neglect (Cashmore 2011; McFarlane 2017), whereby crossover adolescents in 'concerning circumstances (eg those facing significant family conflict, engaging in risk-taking behaviour, or needing mental health, behavioural health or disability support) may not receive intensive responses until their behaviours attract [more] serious youth justice sanctions' (Baidawi & Sheehan 2019: 17).

Containment as a last resort

Problematically, Australian jurisdictions frequently use containment as an early response rather than a 'last resort' (Greig, McGrath & McFarlane 2019; see Garland 2001). This includes justice responses to people with brain injury (see Lansdell et al. 2018b). Prioritisation of containment stems from a reported lack of suitable programs inside and outside of justice centres for individuals who come to the attention of protection and justice services. Young people who display 'challenging behaviours' including ABI-related behaviours are frequently turned away from school and health and welfare services, but are then often placed in unstable environments, further compounding the issue that led to the problem in the first place (Baskin & Sommers 2011; Cutuli et al. 2016; Ryan 2012). Research and statistics across Australia, the United Kingdom, Northern Ireland, Canada and New Zealand continue to indicate 'troubling outcomes of child protection-involved youth and their vastly disproportionate involvement in the criminal justice system' (Baidawi 2020: 5; see also Finlay 2009; Sentencing Advisory Council 2020; Taflan 2017).

The lack of opportunity to 'rise up' above youth and criminal justice entrapment needs to be construed as both a social and educational issue that concerns justice systems as much as broader communities in schools, health and welfare services, and the general population. Research has revealed that prosocial relationships and activities can impact the effect of community disadvantage on reoffending among young people and potentially break a cycle of reoffending (Intravia et al. 2016; Trotter 2013). Prosocial modelling refers to the manner in which support workers and professionals work with offenders by modelling and reinforcing prosocial values in order to elicit these same values in the offenders (Trotter 2013).

A lack of awareness about neurological issues in communities also contributes to the potential over-representation of people with brain injury, mental health issues and associated complex needs (Baldry et al. 2018; Goldson 2018; Urwin 2018). Training, support, understanding and knowledge is required to support the complex needs of young people, especially those with histories of trauma, maltreatment, mental and psychological issues, neurological conditions, and injuries, as well as cognitive impairment.

Education, housing and youth justice

Common co-occurring conditions influence the ability of young people with an ABI to comprehend and ask for help that could prompt alternative non-punitive diversionary responses. This inability or unawareness can stem from limited educational backgrounds, a learning disability and speech impediments, among other things. Young offenders have been found to have similar levels of learning disability and speech and language needs to adult cohorts (Gregory & Bryan 2010; Newman et al. 2010). Increasing evidence also indicates that young offenders in Australia and in international jurisdictions who have language and literacy vulnerabilities come into contact with youth justice systems more often than their peers without such vulnerabilities (Snow et al. 2020; see Anderson, Hawes & Snow 2016 for a review of international evidence). Most youth offenders had little or no schooling prior to involvement in the justice system (Barrett et al. 2006; Mirza-Davies & Brown 2003), even though educational outcomes remain crucial to the reduction of recidivism. Further research also indicates that most young people in court had cognitive functioning, reading and writing levels well below the age of criminal responsibility (10 years), although some of these deficits and developmental delays can be attributed to upbringing and parental mental health issues (Bowman et al. 2020; Stewart, Livingston & Dennison 2008) or maltreatment (Hamilton, Powell & Brubacher 2017). These processes illustrate the problematic trajectory from 'challenging' and 'disruptive' behaviours in school into care of the state that all too often results from the criminalisation of disability and disadvantage (Baldry et al. 2018).

Inconsistent referral pathways

The quality of and access to necessary services remains problematic, with referral pathways being inconsistent (Brown & Kelly 2012: 45; Royal Commission into Victoria's Mental Health System 2019b), although local general practitioners in rural districts were nevertheless more likely than their colleagues in urban areas to follow up with respondents and refer patients suspected of having an ABI (Lansdell et al. 2018a). The inability to facilitate assessments stems from a lack of systemic processes and the complex funding arrangements, as different funding bodies are responsible, depending on legal situation, age and location. Problematically, clients over the age of 18 years fall outside the scope of youth government-funded neuropsychological services due to age cut-offs (also known as 'ageing out'). The Royal Commission into Victoria's Mental Health System (2021, recommendation 20) recognised this and recommended that 'age boundaries and transitions [for young people between 12 and 25] be applied flexibly'.

Speech impairments, ADHD, FASD and substance misuse

As a result of inconsistent support and access to medication, individuals in youth justice were also more likely to experience higher levels of substance misuse than their peers in the general population (Newbury-Birch et al. 2016; NSW Health & NSW Juvenile Justice 2016). Other 'disruptive' behaviours are also related to speech and language impairments, borderline intellectual function (FISQ<79), head injury, attention deficit hyperactivity disorder (ADHD), and FASD (see Anderson, Hawes & Snow 2016; Farrer, Frost & Hedges 2013) with consistent patterns of over-representation compared to other issues discussed above. Furthermore, high rates of mental health disorder, cognitive disability and neurological injury in youth justice populations indicate the need to implement holistic, individually tailored approaches that support rather than criminalise neurological issues, and related experiences of abuse or victimisation (Baldry et al. 2018; Cunneen White & Richards 2015; Lansdell et al. 2018b).

Stigma associated with brain injury and cognitive impairment

In conjunction with the lack of police training and understanding, as well as added criminalisation processes that problematise disability, mental health conditions and ABI in the media, systemic stigmatisation of ABI reflects the 'deeper moral judgement' present in the Australian justice system (Lansdell et al. 2018b: 751; see also Winford, Howard & Richter 2019). Research has identified different treatments for ABI based on the nature of the injury and how it was acquired. For example, support for clients with TBI and other types of brain injuries caused by transport accidents was recognised as greater than that of people with brain injuries caused by substance misuse, which are perceived to be 'self-inflicted and thus more blameworthy' (Lansdell 2018b: 751; see also Saunders et al. 2018). These poor perceptions contribute to feelings of stigma and shame, which often lead to difficulties in communicating with people or understanding social situations, and a fear of being perceived as 'stupid' or being 'ridiculed' (Eriksson et al. 2019: 5; see also Winford, Howard & Richter 2019). The stigma experienced by individuals with TBI, however, appeared to be lower.

Support for young people with ABI in the youth justice system

The issue of youth justice and CJS responsiveness to ABI is pertinent to Victoria as there remains 'an inconsistent and ad hoc approach to service planning and coordination between Child Protection and Youth Justice' (Armytage & Ogloff 2017: 39). Models observed in New Zealand (McLaren 2011; New Zealand Ministry of Justice 2013) and the Northern Territory (AIHW 2017; Northern Territory Government 2011), where young people with complex needs are supported from court processes onwards, signify opportunities and room for improvement in Victoria. Despite significant systemic failure, the increase in the number of children on remand and human rights abuses within youth justice centres (Corsetti 2018; Fitz-Gibbon 2018; Parliament of Victoria 2018), state governments have expanded youth justice centres in Victoria. As a result, there is a need to investigate system responsiveness, productivity and institutional bias (Victorian Government 2019). Furthermore, police contact is often used as a first option, due to community support such as schools and health and welfare services being unable or unwilling to provide support because of misunderstandings or misrecognition of 'disruptive' behaviour (Baldry et al. 2018: 641; Baldry & Dowse 2013: 230–233), irrespective of the mounting evidence that police contact is harmful to young people in general and persons with ABI more specifically.

Even though protocols relating to vulnerable and disadvantaged children in the youth justice system were established in 1994, young people who come into contact with the CJS continue to be overlooked and under-supported (Department of Human Services 2005; see also Baidawi & Sheehan 2020; Baldry et al. 2018). This includes children who have experienced abuse, neglect or maltreatment or who have been under the supervision of child protection or youth justice systems. Such continual familial and formal systemic neglect emphasises the need to consider and recognise each young person's circumstances, especially in light of 'onerous bail or community supervision conditions' (Baldry et al. 2018: 641). Issues with understanding and complying with supervision orders remain especially relevant for people with cognitive impairment and brain injury.

The evident vulnerability and social disadvantage faced by young people indicates the limited capacity of youth justice institutions, nationally and internationally, to support young offenders, especially in cases of complex mental and neurological issues (Baldry et al. 2018) and when the principle of *doli incapax* is applied (Baidawi & Sheehan 2019). Mounting evidence indicates that disadvantaged young people in Australia with complex needs are 'excessively criminalised' and systems seek to control them rather than care for and support them through community, health or welfare services (Baldry et al. 2018: 648). Researchers therefore recommend implementing state-wide protocols to reduce contact with the CJS. If such contact is already taking place, then there needs to be targeted diversionary schemes to prevent crossover children from becoming entangled in the CJS in the long term (Baidawi & Sheehan 2019; Gough & Hayden 2010; Mendes, Snow & Baidawi 2014; NSW Ombudsman 2010; Savvas & Jeronimus 2017).

Nevertheless, adequate, sustainable and appropriate support for young people with brain injury is unlikely to be implemented as the CJS is often the last and only resort for people with brain injury (Lansdell et al. 2018b). There is a general lack of access to services or treatment for young people with ABI in the general community or for crossover or other vulnerable populations, whereas appropriate support services are more readily available during criminal justice detention. This lack of access in everyday life outside youth and criminal justice institutions increases the risk of children and young people becoming entrenched in the CJS, reinforcing a paradoxical approach of using custody as an opportunity to identify, diagnose and support these young people (Baldry et al. 2018: 642–643). This is despite current detention practices that have been described as 'dangerous', 'ineffective', 'unnecessary', 'wasteful' and 'inadequate' (Goldson 2018: 251).

Gaps in knowledge and research

Overall, the literature review found that there are gaps in brain injury research, particularly in the areas of gendered and age-specific experiences of children and young people who come to the attention of the CJS in Australia. Literature concerning youth justice in Australia and international jurisdictions is recent and broad, but understandings of ABI are primarily informed by research on brain injury and cognitive impairment in adult populations. Moreover, evidence of systemic discrimination experienced by racial and ethnic minorities in academic literature and some interviews conducted in the current research project indicate the need to consider culturally and linguistically diverse (CALD) and young migrant communities who have been subject to increased surveillance and policing in Victoria (see Benier et al. 2018 and Deng 2017 for South Sudanese Australians).

These gaps in literature, practitioner training, community support and public education are addressed in the current project, which seeks to identify effective solutions to the potential over-representation of young people with ABI in the CJS in Australia. The current systems of supports and education need to be examined to determine how they can be strengthened to better equip practitioners when dealing with young people who come into contact with the CJS. Community member engagement in prevention and diversion schemes may also help to decrease contact with care and justice systems. Significantly, these improvements need to be made in consideration of the complex and compounding nature of brain injury as trauma, mental health issues, behavioural and cognitive issues, abuse and maltreatment, and gender and ethnicity intersect and contribute to potential over-representation and entrenchment of young people with ABI in the CJS.

Aim and approach

The research aimed to identify the needs of children and young people with ABI so that effective strategies can be developed within and surrounding the Victorian justice system to reduce the likelihood of detention. For the purpose of our research, people with complex needs (also referred to as 'complex support needs' (Baldry et al. 2018) are defined as people 'who have a disability and are experiencing (or are at risk of experiencing) multiple and interrelated conditions or factors which contribute to an intensity of support need' (Department of Family and Community Services 2014: 25). This includes individuals with ABI, which is defined as 'any damage to the brain that occurs after birth', but excludes FASD, where brain damage occurs in utero (AIHW 2015: 112).

Research on how young people with cognitive disability experience the justice system is scarce, even though the prevalence of ABI among children and youth offenders in Australia has been highlighted as a significant area of concern (Sentencing Advisory Council 2020). There is a need to establish effective diversion and therapeutic measures to prevent potential entrenchment and crossover of these young people into the adult CJS. Although research on young people's experiences should ideally be grounded in their realities and voices, evidence presented in this report is based on narratives of participants who work closely with young people. The reasons for this approach are explained in the *Methodology* section.

Evidence on the factors that make young people with ABI vulnerable to criminal justice involvement is limited in Australia and corresponding state jurisdictions (Durand et al. 2017; Jackson & Hardy 2010; Ryan, Williams & Courtney 2013). The current study sought to contribute to this scholarship, as well as providing a research base for policy reform and changes in practice. The research focused on the potential for children and young people with ABI to become entrenched in the CJS in Victoria, and the strengths and weaknesses of the current system in that state in responding to their specific needs.

Methodology

Data collection

The research design used a combination of non-probability sampling techniques including purposive sampling and, in some cases, snowballing methods to recruit participants who worked in key criminal justice and community support organisations (Berg 2006). We acknowledge that snowballing as a method of recruitment may be inherently biased but it was used sparingly in this research. Support letters and endorsement from Youth Law, Jesuit Social Services, the Alcohol Related Brain Injury Association and the Victorian Children's Court, Magistrates' Court and County Court were included to aid in recruitment and snowballing of interviewees from the youth legal sector as well as social and medical service providers. Many of the organisations from which participants were drawn provide support to young people with suspected brain injuries before, during and after criminal justice involvement and could speak authoritatively about that journey and the intersections with schools, family and care settings, as well as criminal justice institutions.

Primary data collection occurred in Victoria. Contact with non-court participants was either based on existing professional relationships from previous research projects, or through local service providers' suggestions including recognised brain injury service providers and other private support organisations including community legal centres. In turn, participants recommended other potential participants. Court-based participation was facilitated by relevant court registrars sending correspondence about the aims of the project to all judicial officers and court staff within their respective courts, inviting participation. Those judicial officers who responded were then interviewed. All participants were provided with a plain language statement and consent form. At this time, they were also informed about the research aims, how the results would be released and the nature of their involvement. To meet the inclusion criteria, participants had to be a legal representative or other professional working with a young person (aged 14–21 years) with an ABI who had experienced one or more of the following: being accused of a crime; being charged with a crime; or coming into contact with a lawyer, the police or the courts in relation to a criminal matter. There was also an English language requirement.

Prior to the social distancing restrictions introduced in 2020 in response to the COVID-19 pandemic, interviews were conducted in person and recorded, once written informed consent to participate was established. Interviews following COVID-19 restrictions were conducted via the online platforms of Skype or Zoom, or by phone. All interviews were recorded once written informed consent to participate was established. Interviews were also pre-scheduled and semi-structured in nature. Discussions were open ended to allow participants to share some of the experiences of young people with whom they had worked or, in the case of judicial officers, the experiences of young offenders who had appeared before them. The interview questions were provided to participants in advance (a requirement of our ethics approval), and the semi-structured format also allowed discussion to be tailored to each type of participant group and for participants to raise issues spontaneously.

The interview questions for the non-court based participants included: how they determined the young person had an ABI, what other co-occurring conditions were present, what the common offences recorded among these young people were, what challenges arose when assisting them, their experiences of police and court practices when assisting young persons with an ABI, their views on the strengths and weaknesses of the system in responding to young people with an ABI or cognitive disability, improvements that could be made to procedures with respect to identifying and responding to young persons, and alternative ways of dealing with and supporting them in the system. Court-based participants' questions were similarly worded but adapted slightly for their respective roles within the system.

The largest interview cohort (community support and service providers) work in a range of public and private service organisations (including charities), specifically focusing on providing legal, housing, financial counselling and family assistance to persons living with ABI and other co-occurring disabilities. Some organisations focus on providing services to young persons with substance abuse histories who also experience homelessness. The participants interviewed from this group held qualifications predominantly in psychology, social work or occupational health.

Ethics approval was obtained from the Monash University Human Research Ethics Committee and the Victorian Department of Justice Human Research Ethics Committee. Approval was also sought and obtained from the ethics committees of respective organisations which participants were from. Ethical considerations were discussed prior to interviews, with the representation of young people with ABI experiences at the forefront of our research consideration. These ethical considerations led us to prioritise interviews with participants who work closely with young people with ABI, as opposed to interviewing young people directly. Although keen to have their voices represented, after discussing the possible ways of interviewing young people with an ABI with some of their service providers and legal representatives, we decided to leave them out. This decision was informed by considerations about the potential risk of retraumatisation and sensitisation to the realities of already vulnerable populations and our ethics clearance precluding our research from having negative impacts on the persons interviewed.

Twenty-seven interviews were conducted between November 2019 and August 2020 with participants from a range of professional organisations in the youth and criminal justice sectors whose work brings them into contact with young people with ABI. By the 27th interview we believed we had reached saturation point with respect to themes emerging and had obtained enough quality data from the various represented groups to draw some conclusions and propose recommendations to meet the aims and objectives of the project.

Most interviews were conducted individually, except for two interviews which were conducted in pairs (joint interviews). Joint interviews were beneficial as they allowed participants to engage in open dialogue where inconsistencies and gaps were raised during the collegial 'back-and-forth'. The duration of interviews varied from half an hour to two hours. Two interviews were also conducted in a rural location (Morwell) to capture differences in understanding, support and other issues between rural and urban areas. Issues stemming from Morwell interviews included family violence, poverty and distance from support services.

Table 1 provides details of the interviews.

Table 1: Interview details, 2019 to 2020

Participant group	Number of interviews
Magistrates (Children's Court of Victoria)	3
Magistrates (Magistrates' Court of Victoria)	1
Judges (County Court of Victoria)	3
Lawyers (private practice and community legal services including youth legal services)	5
Neuropsychologists (private organisations assisting persons with ABI)	3
Assessment and Referral Court (AC)a List Case Managers (Magistrates' Court)	2
Community support and service providers	10
Total	**27**

a: The Assessment and Referral Court is a specialist List in the Melbourne Magistrates' Court which commenced in 2010. The main focus of the court is the use of therapeutic case-managed programs ranging from 3–12 months with the aim of breaking the cycle of offending for persons living with a range of mental illness including cognitive disabilities, ABI and other neurological impairments (https://www.mcv.vic.gov.au/about-us/assessment-and-referral-court-arc)

Data analysis

Two members of the research team coded the interview transcripts using NVivo qualitative data analysis software. The major themes and subthemes that represent the data collected (see Braun & Clarke 2006) constitute the research results identified and discussed below. The principal researchers reviewed and discussed the data analysis process and outcomes throughout the process. The first phase consisted of open coding, treating each theme and case study as a unit of analysis to be understood as an independent set of elements. Two subsequent iterative coding processes also established relationships between the elements (Clarke, Friese & Washburn 2017). The coding occurred in three respective stages.

Following the first stage, a coding scheme was developed to compare datasets between interviews, reports, academic studies and grey literature (Jones, Leontowitsch & Higgs 2010: 109). The data was then double-coded against all the themes identified in current research interviews, previous research findings and the literature review (Raskind et al. 2019). The comparison between datasets allowed additional themes to be identified and ranked in terms of significance (see Charmaz 2014 for open exploration of analytic ideas). Groups within the sample (eg magistrates within lawyers) were also compared to identify salient themes (St Ivany et al. 2018).

Qualitative content analysis was chosen to analyse the transcripts as it allows for a 'systematic but not rigid' approach (Altheide & Schneider 2013: 26). This method allows the researchers to be flexible and open to 'constant discovery' throughout the research process, and to move between research stages in a reflective manner (Noaks & Wincup 2004: 122). An inductive analysis also allowed themes and samples to be refined as new information was brought to light. Themes were refined in accordance with 'relevance, forcefulness, and receptiveness' (Bryman 2016: 586). It also allowed for close examination of the written text, interview transcripts, interview notes, and literature on young people, trauma, ABI and TBI. Careful attention was paid to the language participants used, including the choice and arrangement of words, repetition and tone (Van Dijk 1997: 2). Themes emerging from the data were then contrasted with themes apparent in the literature reviewed. Finally, themes and subthemes were reflectively aggregated according to frequency and significance in NVivo Version 12 Plus. As to the criteria for determining the significance of a theme, we made reference to Berg (2004). He proposed as a guide that at least 'three occurrences of something' constitutes a pattern, the first occurrence being an accident and the second 'a co-incidence' (Berg 2004: 287). The final major themes and subthemes comprise the results of the research and are discussed below.

Results

This section presents the results of our interviews. Selected participants' quotes illustrate the themes and subthemes, with reference also made both to relevant literature and to procedures in place in Victorian youth and criminal justice jurisdictions. Our research results largely align with those of previous Australian studies focusing on adult cohorts with ABI and neurological issues. ABI appears to remain under-assessed, misunderstood and largely unidentified in youth and criminal justice institutions.

The research subthemes are presented under the five core themes, noted at the beginning of this report. Themes were organised to 'represent the account' (Crabtree & Miller 1999: 137) under the original themes derived from the literature which were rediscovered in the data; questions asked in the interviews that stimulated insightful participant contributions; and additional, unanticipated themes induced from the data. The final analysis sought to ensure that all views expressed were acknowledged and incorporated, especially cases or comments that deviated from common themes and possible explanations. Berg (2004) has suggested that in the final stage of analysis the researcher seeks to explain the 'thematic (categorical) patterns' (2004: 287) by answering whether they reinforce or question previous similar research and then attempt to explain these differences and similarities.

Failure to identify or reluctance to diagnose ABI

Awareness of ABI and its characteristic symptoms is inadequate across Victorian criminal justice institutions. This was especially the case for younger and female cohorts given professionals' reluctance to diagnose children and young people, and the differing symptoms that 'girls compared to boys' with ABI exhibit (Lawyer 4, Neuropsychologist 3). All participants emphasised issues with identification and awareness and the resulting ineffective response. The current research identified similar issues in relation to presentations and awareness of ABI among young people as have been identified in adult cohorts (see Lansdell et al. 2018a, 2018b). Difficulties identifying ABI and other cognitive and neurological impairments during professionals' interactions with young people were commonly reported. Increased education and training were recommended to improve knowledge about ABI indicators:

> I think education around disability would be great for anyone who works in the courts. I think that would change a lot of things if they [community and legal professionals] understood it really well. I don't know whether they're trained, and I don't know what their understandings are. (Service Provider 10)

However, there remains a reluctance to identify ABI and subsequently respond more appropriately to young people with an ABI across criminal justice institutions but especially in interactions with police (discussed below).

Some participants noted young people's difficulties in managing their behaviour, complying with directions, paying attention, and showing up to appointments. These behaviours appear to raise ABI 'flags' with some legal and judicial officials, who reiterate that educating community professionals could promote early identification and prevention.

> …whether it's training or education or whatever it might be, there just needs to be something around being able to manage someone when they first present [at hospitals] because sometimes it's not drug induced. Sometimes it's not alcohol fuelled. It's just someone that's rocking up that's quite scared, quite confused. And when they're being shoved out the door or having security called on them, it just magnifies the issue. (ARC List Case Manager 2)

> So the kid might just say, "Yeah, you know, I got chucked out of school"," I was in trouble", "I punched the teacher", "I did this", "I did that"…we'll see that kind of impulsive behaviour but we won't necessarily know where it comes from or what the cause of it is. (Children's Court Magistrate 1)

Notably, some legal professionals are more aware of ABI presentations than other legal professionals, and some police and custodial officers. More knowledgeable and/or experienced lawyers are more ready to identify and use discretionary responses when they observe young people's behavioural issues:

> You know we usually get a psychological report for most people…the psychologist will pick up that there is some level of intellectual dysfunction. There will be, you know, some sort of fairly superficial testing done. Also you know…they will say, "There seems to be an indication of intellectual difficulty". They will ask the person, "Has there been a fall, have you been in an assault, have you been in something?" This warrants further investigation. (County Court Judge 1)

These statements also reflect the need for early identification and intervention, as each unconstructive interaction may compound a young person's trauma and negatively impact their wellbeing.

Stigma and reluctance to diagnose

The lack of awareness of ABI is also attributed to a dearth of diagnostic assessments and not enough sharing of official diagnostic reports. Participants conveyed that a lack of assessments contributed to the lack of awareness, and vice versa. Our research revealed that the assessment and formal diagnosis of young people with ABI is contentious for several reasons. Specialist assessments are very expensive, ABI is known to attract unwanted, negative community responses and stigma, and neuropsychologists are reluctant to diagnose ABI in young people:

> We try and avoid giving a diagnosis of an ABI unless we have quite clear evidence… something like that [a diagnostic label] can have a pretty negative affect on you down the line. So if we can't be confident…then we won't make it [ABI diagnosis]. (Neuropsychologist 2)

Service providers, case managers and lawyers described a reluctance to diagnose young people as having an ABI. Many stated that it was rare to come across an ABI diagnosis for people under 18 years of age. This also stems from the fact that the brain keeps developing until age 25, and neuropsychologists are reluctant to diagnose a permanent disability when the brain might partially or fully repair itself. Moreover, practitioners mentioned that because the 'challenging behaviours' that they see can be due to a complex trauma or other underlying issues, one needs to be careful to not reach a diagnosis to soon or too early.

As a result, most of our research participants were made aware of young people's conditions when or if they self-disclosed:

> The most common way we identify a young person has an ABI is that they will self-disclose that…probably through their past experiences with health professionals who have told them that they do have an ABI. So, in my experience, that's like the only way in which I would find out if a person had an ABI…what they had told me. And it was usually backed by a letter from like their GP to say that this person has been diagnosed. (Lawyer 1)

Problematically, many cases may be overlooked because of a reluctance to disclose ABI either because the young person fears stigma or because they are unaware that they have an ABI.

The following case study illustrates a police officer's decision to pursue an interview in relation to a sexual offence without the presence of an independent third person despite the young person's communication and comprehension issues:

> I think most of them [police officers] probably are not very skilled in the area to pick it [ABI] up. I just had a case with a girl who had very poor language skills and comprehension. It was very hard to understand what she was saying, and it was put to the police officer who interviewed her in relation to a sexual offence where she was a complainant…"You didn't get an independent third person in, you didn't do this and whatever"… And the police said, "Well she seemed to get what I was saying"…like it wasn't a sophisticated analysis… I think that's an issue. (Children's Court Magistrate 1)

This case study emphasises the importance of staff training to identify and record 'behaviours of concern' and to consider possible reasons for the behaviours exhibited.

Judges, magistrates, service providers and case managers commonly reported young people's reluctance to reveal personal conditions. Magistrate 1 described not necessarily knowing about young people's traumatic experiences and expressed a concern that young people may not understand court processes and conditions:

> A lot of people wouldn't even reveal their trauma history…So there's no point putting them on an order if they don't understand it. You know, bail conditions…often with someone you suspect might have an ABI or you know has an ID, I will outline the bail conditions or whatever the conditions are, and I'll just say to them, "Can you just tell me what your conditions are?", and you know, that's a very easy way to make sure they understand what's going on. (Magistrate 1)

Currently, most diagnosis referrals come out of court processes—from lawyers, judges and magistrates. This tends to occur when young people are new to the system or not on the Assessment and Referral Court (ARC) List or any other related programs (for example, disability schemes).

Unawareness of ABI, or reluctance to disclose due to stigma?

Being unaware that one has an ABI obviously prohibits disclosure and access to any available supports. The following quote suggests that enhanced self-awareness can take time:

> Sometimes you'll see the same guys multiple times before they actually get to a point where they're just like, "I'm actually sick of this. I keep getting into trouble. I'm not sure why I keep getting into trouble. I'm really tired of it. What's going on? I need some help to figure it out". But it'll take a few times before they might get to that stage. (ARC List Case Manager 2)

An initiative that would be helpful is providing ABI education to all professionals likely to come into contact with young people with an ABI or cognitive impairment, including police; custodial, legal and judicial officers; case officers; and service providers who oversee release programs. Effective identification and appropriate responses and interventions are essential to break the cycle of offending and potential entrenchment in the youth justice system and CJS.

Despite issues of labelling and stigma that can be associated with a formal diagnosis, legal professionals in our research recommended compulsory screening as a minimum requirement to prevent ongoing criminal justice contact and to aid early intervention. These justifications align with fitness to plead and Magistrates' Court Integrated Service Program discourse, where initial assessments are made to enable conversations about housing, mental health and behavioural management plans to begin. Many of our research participants cited the ARC List as an ideal model, as it recognises personal health and social circumstances and provides long-term, constructive support and effective responses.

Research participants drew attention to a number of different issues related to obtaining diagnostic assessments.

> We'll complete an initial screening with them. So they'll talk about things like whether they have had any injuries to the head, whether it's car accidents or long-term drug use, alcohol use, issues with memory, issues with being able to comprehend information that's delivered to them. And if they're ticking those boxes, we'll refer them to get a neuropsychological assessment done. And that assessment will come back with more recommendations as to whether or not they've got a diagnosis. If they don't, they'll lead us in the right direction as to whether it's just a mental health issue or it's drug induced or whatever it might be and we go from there. (ARC List Case Manager 2)

A person's willingness to seek to seek an assessment, even when advised to do so, cannot be assumed, even when it is in their own best interest. Assessments are 'not fun', take time, and the benefits might not be obvious:

> Again, they're quite lengthy and they're not fun, so getting especially young male clients to come in and try and sell the idea of a neuropsych assessment is really difficult. Often the clients don't see what benefit it's going to give them having it done, so it comes down to rapport with the client and them trusting you and respecting you enough to think, okay, they're recommending I do this, maybe it's a good idea. But it comes down to their choice at the end of it, so it depends if they're willing to engage in any assessments or not. (Service Provider 5)

These issues interact with stigma and labelling following a formal diagnosis.

Diagnosis and labelling, stigma and age

A concern that neuropsychologists in our research expressed was diagnosing an ABI when a person is under 25 years old. Their concern related to the young person's developing brain as well as labelling and stigma in custodial settings and everyday interactions. It was recognised that young people might consider themselves, or be considered by others, as 'stupid', 'crap', 'nuffy', and having 'something wrong' with them.

> …as a young person, if you get that diagnosis of an ABI…obviously youth are very aware of identity, and having labels. Something that might be a bit different when they're a bit older…Whereas, you know, young people don't even like to identify as having a disability, let alone that there's something wrong with my brain. So it can be quite triggering. (Service Provider 3)

> It's just another thing that adds to their feeling of, "I'm crap", and there's something wrong with me. (Service Provider 1)

Service providers also expressed concerns about 'jam jar labelling' but nevertheless emphasised the need for early 'appropriate intervention', especially when a young person with behavioural issues has reached the judicial system and supports need to be put in place to avoid long-term engagement in the CJS:

> We get too hung up on a diagnosis and jam jar labelling…we do need diagnosis. We do need a set language for professional people to communicate, and also to plan treatment appropriately. If you've got this definition, then you know that this kind of behaviour goes with that kind of definition…But I think in dealing with people, the diagnosis labels are irrelevant. What's relevant is they're here in the judicial system. They've offended. What's relevant are these other factors that are going on… [especially] if they are young. What's relevant is if we don't do intervention now, an appropriate intervention…it's not worth anything. If it's not an appropriate intervention, then this is going to be their life for a very long time. Not only just for them, we have the dangers of that then transferring on to the next generation. (ARC List Case Manager 1)

Medical professionals and service providers emphasised the dangers of early diagnosis, which can be potentially more harmful than no diagnosis or a misdiagnosis. Neuropsychologists highlighted the available medical evidence, which shows that brain development continues to occur well into young adulthood, confirming the benefits of delayed diagnosis and instead focusing on identifying symptoms and appropriate treatment. It may well be that other neuropsychologists would hold a different view based on progression of the ABI and other factors.

> I probably have a personal preference to not label it an ABI and give…a formulated understanding of what has contributed to their difficulties now. But then if I thought it was going to be helpful in some cases, I would give the diagnosis, but it is a big diagnosis to give a young person. (Neuropsychologist 3)

In discussions about diagnosis, health professionals again stressed the importance of developing individualised treatment plans that focus on the person rather than the label.

> Yes, they are just people. They're not a walking diagnosis. They're human beings… Just think about what you might need, and how would you respond. To be honest, it's not rocket science. I just wish people would just be nice… Most staff here…are passionate about what they do. But still, their frameworks that they've been taught can sometimes be a barrier to just actually being a nice human being. (Service Provider 1)

Early intervention and mandated screening

Treating the person rather than the label is vital. The gap in effective support stems, to an extent, from disparities between age at the time of formal diagnosis and the relatively low age of criminal responsibility in Australia. In this context, early intervention to provide specialised and appropriate support to address each young person's needs is important. Some participants suggested schools as possible sites of early intervention and identification of behaviour related to ABI. Proper assessments and support occurring in inclusive educational systems may aid in preventing youth justice and CJS contact.

Challenging childhoods, complex trauma and co-occurring conditions

The occurrence of complex trauma, in combination with conditions such as FASD, post-traumatic stress disorder (PTSD), intellectual disability (ID) and speech developmental issues, is consistent with previous studies in Victoria involving adults with ABI (Lansdell et al. 2018a, 2018b; Eriksson et al. 2019; Saunders et al. 2018), as well as previous academic studies on cognitive and intellectual disability (see, for example, Baldry et al. 2018). The current research results highlight the complex and multifaceted disadvantage that young people with an ABI are likely to have experienced in their lives:

> We've got a horrendous overlap between the Family Division of the kids' court and the Criminal Division. The over-representation is staggering. And, clearly, some of the factors will be exposure to family violence, its impact upon the developing brain, foetal alcohol issues, lack of stimulus, environmental neglect, all of these factors. (Lawyer 4)

> Yes, that's right. Multiple, yes, that's right. Unfortunately, they saw some issues with services. Complex trauma would be a good example. They say this is clinical mental health. This is what we do. This is alcohol and other drugs. This is what we do. This is acquired brain injury. This is what we do. (ARC List Case Manager 1)

The interactive nature of ABI, complex trauma and co-occurring conditions makes it difficult for service providers and lawyers to separate the conditions to arrive at a clear diagnosis such as ABI. If referred to neuropsychologists or other relevant specialists, complex trauma and co-occurring conditions of disability, cognitive impairments and mental health require significant assessments relating to the extent of an injury and individual symptoms, including behavioural issues, to arrive at a diagnosis. Service providers also emphasise that 'another assessment' or diagnosis does not necessarily illuminate the 'many complexities' in separating these behavioural symptoms from 'trauma behaviours to disability, ongoing behaviour' or a diagnosed condition, and ongoing mental health issues (Service Provider 6). This was also identified in a case manager's narrative:

> Probably the biggest catch 22 is we live in a dual diagnosis world where everything is about overlaps and…multiple [diagnosis]…There's nothing that bridges those or there's not even one service that has access to all that clinical expertise under one roof…Not like with schizophrenia where someone presents in a psychotic state. You can adjust their olanzapine or what have you, stabilise them, back out, good to go…So, you've got this massive cohort that is floating around in our communities without actually getting any relevant support. (ARC List Case Manager 1)

Some research participants' recognition of the coexistence of multiple medical and social conditions, and differing behavioural symptoms that typically accompany an ABI, aligns with service providers' advice to 'treat the person, not the label', especially in cases where there are multiple diagnoses.

> Always a co-existing mental health condition, like, in every case that I've seen. Most of the time a co-existing…drug or alcohol problem. Often intellectual disabilities or autism or ADHD, things like that. It's really just like a cocktail of all of these things. The system…will only focus on one. You've got neuropsychs who will focus on cognitive functioning, you've got clinical psychs that will focus on mental health…disability workers that will focus on the ABI or the autism or something. They won't treat the person. They'll treat the label… and they become the label, whether they mean to or not. They just become a label. (Service Provider 5)

The multidimensional factors of ABI and its co-occurring conditions also overlap with precarious living, which can result in the acquisition of additional injury and/or trauma, and subsequent involvement in the CJS. Participants also spoke about complex trauma as the result of an ABI; complex trauma seeming to be more prevalent than ABI; and complex trauma resulting from, and heightened by, being in the system and a custodial environment.

Neurological development issues incurred from neglect was also a core finding that reinforced previous work (see, for example, Snow et al. 2016, 2020). Participants frequently attributed speech, social and other developmental issues to family dysfunction, neglect and a lack of stimulus, contact with the system at a young age, and being moved around frequently with little to no stability (Lawyer 4).

The impact of neglect is further emphasised in the following statement, in which a lawyer discusses gaps in responsibilities and duty of care, and how such gaps in support result in criminal justice involvement:

> As with child protection there is no discussion about what their parental responsibility looks like or what they, the caregiver should be doing when the child is charged with a criminal offence, this is a void area. They [the kid] can't do this alone… are in this situation because they were neglected, ignored, poorly treated, born with an issue not treated and could have been earlier and now we are in the situation where the focus is what is wrong with the kid…poor focus. (Lawyer 5)

These statements also outline the early pathways by which young people enter systems and begin to interact with patchy and inconsistent modes of support that further impact behavioural management. A lack of familial and institutional support also results in trauma and substance use when social and medical support is unavailable.

> Most of them have complex trauma histories, grew up in impoverished environments marred by abuse, neglect, substance abuse, and family violence, early disengagement from school often follows that and then a general pattern of gravitating towards antisocial peers, that's the general picture we commonly see, not to generalize but you do see it time and time again… (Neuropsychologist 1)

The results of trauma and neglect also confirm previous research findings on 'crossover kids' (Baidawi & Sheehan 2019). Types of trauma recounted by participants in the current research include assault or sexual assault by a family member or acquaintance, intergenerational trauma, exposure to war, and systemic trauma or institutional abuse.

Complex trauma resulting from ABI: The prevalence of FASD and other co-occurring conditions

Our research results confirm that too many young people acquire an ABI through living in traumatic circumstances, as revealed in the following statement made by a judge:

> It's the complex stuff [trauma]. Some of these kids are damaged, some are busted. But they don't want to be like that. And I think that's what people don't grasp. You've had your chances. No, they haven't actually. They haven't had their chances. They do not want to be like that. They do not have the capacity or the skills to avert the actions which give rise to consequence. And some of it is unavoidable. When family stuff goes down, they have no choice. (County Court Judge 3)

In this context, some participants observed that young people who had acquired a brain injury as a result of FASD are increasingly recognised in the CJS, emphasising that there may be more than 'officially assessed', 'previously thought' or 'classified' (Service Provider 2, 10; Neuropsychologist 1), adding weight to previous research findings in Western Australia (Bower et al. 2018).

Magistrates and lawyers also reported frequent interactions with child offenders who exhibited FASD symptoms but had never been formally 'diagnosed' or 'classified' with FASD (Children's Court Magistrate 2, Lawyer 2). Although these symptoms were often defined in conjunction with ABI by practitioners in Victoria, Western Australia and the Northern Territory, FASD has not formally been included in the ABI umbrella (Neuropsychologist 1, Lawyer 2, Service Provider 2). Service Provider 3 said of classifying symptoms as being the result of an ABI:

> I think that's really difficult because I think there's a lot more youth in our system that probably are foetal alcohol, if you look at the facial characteristics, and their mannerisms, and just body. But again, assessing that is a long process, and you can't be 100% clear. You've got to do…the brain scans, the chromosomal…but I think there's a lot more, it's a lot more difficult to determine foetal alcohol. And I don't think there's treatment for that either.

FASD was also often reported to be experienced by young people living in disadvantaged and hostile family environments, and they may have not received appropriate support during their lifetime.

PTSD was also described as an additional layer that contributes to the inability of people with ABI to manage their emotions, comply with orders or cooperate during processes and programs. Lawyers and judges further emphasised the frequency with which they see undiagnosed and non-formally recognised instances of PTSD in children who come from protective care or a refugee background.

> Because the cohort that we are looking at here, have such kind of traumatic upbringings and live very turbulent lives, there can be so many explanations for why they are presenting the way they are presenting at that particular time, and then a lack of consistent access to kind of help means that you can't really tell that this is a presentation that is not going to last or is this like a consistent presentation? (Lawyer 2)

> Any DHS [Child Protection] person will tell you this: once you get a boy like that with those PTSD-type symptoms and those behavioural problems, it is impossible to get them fostered. It is impossible. Nobody will take them. So they automatically are resi-d [placed into residential care] at about 13. And that's where they stay. (County Court Judge 3)

Notably, PTSD and ABI appear to frequently co-occur in cases of CALD children who come from refugee or war-torn backgrounds, rendering these young people increasingly vulnerable in youth and criminal justice interactions. Participants discussed cases that included retraumatisation; trauma from brain injury and/or subsequent further injury; racialised trauma due to systemic abuse or discrimination; and trauma from further exposure to violence, assault or bullying.

Other co-occurring conditions mentioned included autism, ADHD, ID, psychosis, bipolar disorder and schizophrenia. Additionally, trauma, neglect and violence have been identified as co-occurring life situations that exist alongside ABI and other diagnosed or undiagnosed mental health issues. These events of neglect and violence also lead to ABI and other cognitive impairments. Trauma, neglect and violence were commonly linked to ABI, family violence and other victimisation.

> Awful, devastating backgrounds. I haven't worked with any youth in the justice system who don't have experience of abuse or trauma in some degree. (Service Provider 5)

Other service providers also emphasised the significance of identifying, recognising and treating trauma in youth justice and child protection institutions. Significantly, trauma was described as the foremost factor in supporting young people with ABI, in spite of disabilities presented, as 'the underlying issues there are [mostly] trauma' or 'some sort of neglect' in 'most cases' (Service Provider 7).

It should also be noted that findings on intergenerational and inherited trauma experienced and/or compounded by the familial environment warrant further consideration. These issues were mentioned in a few interviews, but more evidence and research is needed to uncover the extent of ABI, trauma and injury in Victoria and in Australia more broadly (see *Conclusion* below for directions for future research).

A traumatising system

Further trauma and/or brain injuries are linked directly to the theme of 'system as trauma'; that 'a failing system can itself be the source of trauma' (Royal Commission into Victoria's Mental Health System 2019b: 10; see also Cunneen, White & Richards 2015). Participants described a complex and inconsistent system that results in further trauma and injuries, which also has crossover with structural issues that were highlighted.

> You've got others with no knowledge, who won't even recognise an ABI or call on it, and then just punish them for behaviour immediately, which is a further trauma. And that's what we do, we're re-traumatising traumatised people consistently, because they've been obviously medically somehow, or innately, traumatised in their brain. And then, we're traumatising them for having a traumatised brain. (Service Provider 6)

Formal criminal justice processes that lead to further trauma include being questioned repeatedly during lengthy court processes. Further retraumatisation occurs during detention in instances of institutional abuse and assault during custody, isolation, and being taken off medical and/or emotional support. The following participant's account illustrates how these factors come together to affect a young man with an ABI from a CALD background who experienced complex trauma and other co-occurring mental health conditions:

> The court system itself, terrible. I've been with some really problematic young people… one young man…had an ABI and also acute schizophrenia. He came to us basically in a catatonic state, couldn't come out of his room and know where the kitchen was. The unit is pretty simple. It's a T-bar. Every day, he would have to be taken, physically moved, to the kitchen. Sit down, cut up his toast and I'd help him eat. And he was really catatonic. We got him lots of physical health tests. We were testing for meningitis and all sorts of things, because we didn't know why. What were we seeing? Eventually we put him on antipsychotics and started seeing him come alive again, which was great. But when he had to go to court, because he couldn't go to court because he was so unwell, so then, when he did go to court…it was eight months later. So, he's actually done a sentence on remand. So, we get to court and then there was this to-ing and fro-ing as to whether or not he could actually understand the court process and could he plead? And so, if he couldn't, he was going to stay in custody longer, and I was just like, this is ridiculous.
>
> …his charges were relatively minor. He and another young man had a fight on a train, for Christ's sake. So, he's done well and truly more than his fair share of time in custody. He should be out, but if we decide that he can't plead, he would stay in prison for a lot longer, instead of getting out on an order…
>
> …I was sitting in the courtroom because he was quite difficult to manage. Like, I wouldn't put him on a truck [transport vehicle]. I got two staff and myself in a car and we drove him to court. That never happens. That's completely against all of the rules but a truck [would]…really traumatise him, so we did that and I had to get him in a car—with lollies… and then he threw up all the lollies in the court. (Service Provider 1)

This case study highlights how young people with ABI, complex trauma and co-occurring conditions can be further traumatised in courts and detention facilities, causing their health to further deteriorate. Importantly, this case illustrates how a complex, lengthy and inconsistent system 'sets people up to fail' (Service Provider 1). Behaviours get increasingly difficult to manage within such environments, again making it more likely the young person will accrue additional charges, as participants scramble to provide appropriate and adequate supports in a system than has more punitive than constructive impacts on vulnerable young people with ABI and complex trauma.

Availability of the Assessment and Referral Court

Considering the prevalence of complex trauma in young people involved in criminal justice, the ARC List was repeatedly cited in interviews as an ideal program. The ARC List, however, is currently highly sought after. Participants suggested expanding the ARC List to make it more readily and easily available, and emulating ARC models across youth justice institutions. The time, specialisation, responsiveness and level of individualised support provided to participants in the ARC List have been cited as contributing to its success (Chesser 2016; Magistrates' Court of Victoria 2019) in reducing reoffending behaviours and improving the clients' overall quality of life, as officials are able to use the time provided to establish appropriate long-term supports. Legal officials and service providers also reinforced the need to expand the ARC List to make it available state-wide, with increased focus on complex trauma care. ARC List and youth liaison officers are also reported to be more likely to aid in referral and diversion. Participants emphasised that it would be beneficial if these initiatives were implemented across all youth and criminal justice institutions.

Drug and alcohol use

Excessive drug and alcohol use complicate or 'mask' young people's behavioural presentation. Participants found it difficult to differentiate between presentations of ABI that cross over with other mental health and cognitive issues or impairments, especially when excessive drug and alcohol use was apparent. Notably, participants stressed the lack of time to appropriately identify, assess and manage young people's medical issues and symptoms. The following case manager's statement summarises the overlap of ABIs, mental health issues and substance misuse. When asked how many of the young people they worked with had an ABI, they answered:

> Quite a lot. It's hard to put a percentage on it. Maybe as much as 70%. I think where the issue lies is because those kinds of complex presentations, as we know, come with so many different variables. Like whether it's alcohol and other drugs, whether it's mental health. It's trying to evaluate what appear to be the acute symptoms now. Also, whether we can get those acute symptoms managed, contained or stabilized to where we can then get those referrals made to evaluate the ABI. (ARC List Case Manager 1)

Case managers and service providers further emphasised the complex and lengthy process required to complete a neurological assessment, which often spans at least three hours and requires multiple appointments.

Participants emphasised that 'suspected' cases of ABI would often result in discretionary practices (Children's Court Magistrates 1, 2, 3; County Court Judges 1, 3). Sentiments about the prevalence of undetected ABI are outlined in the following statement:

> We definitely can suspect there is an acquired ABI, but obviously nothing diagnosed in history. Especially with the alcohol and drug sector, there's a lot of unknown ABI because people wouldn't probably be able to gauge if it's drug-caused ABI. So, yes, it's [ABI] prevalent everywhere. (Service Provider 6)

Magistrates and judges also reflected on substance use. Psychiatric medication may be unavailable and, as one judge observed, it is 'unthinkable' to expect young people with ABIs to oversee their own medication regime and sustain stable accommodation (County Court Judge 1). The following magistrate empathetically noted that substance use might help young people momentarily feel good about themselves:

> Often those groups [young people with ABI] are using substances… I think for any child who feels marginalised in the community…why wouldn't you opt out and use some substances and just feel good about yourself for a short period of time…they don't have a good capacity to weigh up what the risk to their health might be. A lot of people don't do that, but it's worse for kids who don't have the capacity. (Children's Court Magistrate 1)

People whose ABI stems from alcohol and substance misuse typically suffer stigma and labelling (Saunders et al. 2018), yet traumatic brain injuries often lead to alcohol and substance misuse as a means of coping with ABI.

Impaired speech development, literacy and language issues

Many young people with an ABI exhibit speech development disorders, along with literacy and language issues, which result in learning disabilities and impairments during childhood and early education. Communication and behavioural issues were apparent in interactions with police officers and judges.

> [John Doe 2], for example, when I first came across him, which would be now 10 years ago, he'd been sitting on remand for a year. Like a real bad assault. CCTV footage too. It was just shocking—giving a bloke a kicking. He'd been on remand for a year, and he hadn't contacted a solicitor…because he's totally illiterate. And he didn't know how to use the phone, and he was too embarrassed to ask anybody to make the call for him… He sat there for a year because he didn't know how to use the phone. And was too embarrassed… He wouldn't even ask the other fellows to do it for him. (County Court Judge 3)

The case of John Doe 2 illustrates the level of stigma and inadequate support that comes with being labelled as 'backward' in custodial environments. Significantly, it indicates gaps in support that also exist outside court processes, in custodial or detention settings, services and support programs.

> [There is no access to] services, like proper services. So obviously if someone has an ABI, there are never really tailored [services] around memory functioning, managing aggression, communicating, living skills…there's just nothing out there. (Service Provider 3).

Comprehension of complex legal processes

Limited comprehension among young people with ABIs was a strong theme. Participants cited the inability to comply with court orders including engagement in mandated programs, to understand court processes and bail conditions, and to understand the consequences and severity of their actions as key challenges that young people with ABI faced. This was particularly concerning for lawyers, judges and magistrates, who described the inability of young people with ABI to remember court or legal appointments and comply with bail conditions. These tasks were described as 'difficult' and 'impossible' (Lawyers 1 and 4, Service Provider 1 and 3, County Court Judge 3).

> …for those with ABIs and stuff, the ability to actually prioritise going to appointments and getting yourself there and all of that, it's impossible. It's very difficult just for normal adolescents to prioritise those things…the system doesn't acknowledge people's individual difficulties… (Service Provider 1)

Legal professionals found ensuring a young person's understanding of court processes was the 'most obvious challenge' (Lawyer 2, Children's Court Magistrate 1), especially given that cognitively impaired young people's behaviours and aptitudes vary considerably across a broad spectrum. Legal professionals said that their first steps in gauging young people's comprehension are often centred around getting young people to 'understand what's happening, why they are there, what the process is' and 'why they are meeting' (Lawyer 2).

Limited ability to comprehend court processes and requirements was also linked to the young person's willingness and ability to provide lawyers with instructions. The following judicial quote describes the ineffectiveness of dispositions that 'just do not work' as court processes assume comprehension and compliance ability based on assumptions of full cognitive function and average levels of intelligence (County Court Judge 3). Judges and magistrates reiterated lawyer and service provider narratives about young people's inability to keep appointments:

> The [system] works on the basis that the person being sentenced is of average intelligence. They are not. They can't keep appointments. They can't do this. They've got no consequential thinking capacity. So all these conventional dispositions that are for normal people, unless you're really… You have to simplify them. Make them as simple as possible, they're doomed. They can't do it. (County Court Judge 3)

Lawyers frequently reported that young people with an ABI also gave instructions that were not productive or beneficial to justice or trial outcomes, as they often lacked an understanding of consequences. As a result, they are prone to choosing less advantageous outcomes during lengthy and drawn-out processes that tend to impose more conditions, court time or interview time. These tendencies were also said to place the court in danger of potential litigation from unjust and uneven outcomes for young people with ABIs. Lawyer 4 further emphasised the 'trickiness' of the job when 'you have done your utmost to explain what is an advantageous outcome, and the client says, I don't care, finish it today'. These sentiments are also reflected in the following quote, which illustrates what happens when young people with ABIs choose quicker outcomes that are less favourable to them in terms of sentencing or criminal record:

> Yes, a control order. You've got to love that. And they're [orders and conditions] that are impossible. Out of all of the young people that I've ever met that I think I said to one of them, you could do that order. Get out. Because it's either [compliance] or… [jail time] (Service Provider 1)

Structural issues in a complex and inconsistent system

Participants reported inconsistent approaches across interactions, often reliant on various levels of discretion. These interactions were identified throughout sentencing, detention and rehabilitation or reintegration, as police, custodial or legal officials were neither willing nor trained to identify young people's comprehension and compliance issues and to properly support them.

This issue often arose in conjunction with a young person's inability to comply with or understand the Victorian youth justice system and its processes, which participants frequently described as 'too rigid', 'complex' and 'onerous', especially for young people with ABI who come from vulnerable backgrounds:

> They've got limitations. And our system, I don't think caters very well for limitations. It's a very verbal system. So if they've got auditory processing issues, or you know, they just are not very bright, they just don't get it, through no fault of their own, we are trying to talk to them about bail conditions or talk to them about you know, what's going to happen about getting locked maybe, and I feel like there is a disconnect. (Children's Court Magistrate 1)

This Magistrate continued to discuss comprehension and emphasised that this gap in communication could be addressed with visual aids and pictorial illustrations.

> I've just seen a presentation from people from New Zealand, where they put stickers on their bail forms that show the kids what they need to do or a clock for a time for an appointment. So they gave me these cards that they use as well, so all of us in this court to varying degrees, modify our language best as we can…we tend to put too many conditions on bail bonds for example. We are kind of torn because we've got to apply the Bail Act, and we've got to try and want to get them out of custody if at all possible and if that means putting conditions on their bail then that's what we feel like we have to do to minimise the risk of re-offending. (Children's Court Magistrate 1)

Participants also emphasised an inconsistent approach and attributed discrepancies to organisational culture or one's willingness to invest time and effort in training or engaging with each client to ensure that they understand the proceedings. Judges and magistrates emphasised the significance of using discretion and being flexible within time restraints and court process allowances by engaging 'with the child directly' in comfortable 'off bench', informal, non-legal modes (Lawyer 4, Magistrate 1, Children's Court Magistrate 2).

> I frequently speak to them and ensure that they understand proceedings but I am sure a lot of my colleagues would not—a lot of good ones would but some Magistrates wouldn't. (Children's Court Magistrate 2)

Further improvements in communication and comprehension for young people with an ABI present opportunities for prevention and desistance. Recommendations that address gaps in comprehension are discussed later in this report.

Improving communication

Judges and service providers reiterated innovative approaches identified in other jurisdictions (eg Auckland, NZ), such as strong cultural practices and the use of language, symbols and voices of CALD communities (see Jesuit Social Services 2019, for example). As discussed above by Children's Court Magistrate 1, visual aids in the form of pictorial illustrations, cards and stickers are used to bridge gaps in communication.

Other participant suggestions to improve communication and understanding include training and revising the language used in legal proceedings, as well as providing communication experts to ensure that all involved are able to understand court proceedings and bail conditions. Efforts to increase understanding not only aid the outcome of criminal proceedings but diversionary and rehabilitative efforts. Further to diversionary ideals, use of communication potentially aids in de-escalating problematic interactions with police officers (eg cards for educating others about existing conditions) and reduces the chances of official contact, over-representation and entrenchment. Poor police responses to behavioural challenges of maltreated children with cognitive disabilities have also been found to be a crucial pathway into justice system contact (Greig, McGrath & McFarlane 2019; Richards & Ellem 2018).

Accountability versus duty of care: Entrenchment through continuous bail conditions

In addition to challenges young people with ABI face in understanding and navigating youth justice and the CJS, participants cited a lack of support for young offenders in court, and a lack of information sharing or collaboration (for example, assessments and reports). This was noted to be an issue especially for young people who also have disabilities, have been through criminal justice, youth or official welfare institutions, or are crossing over.

> So what happens is when you get these kids you send them off, the younger ones. And some of them have had the disability certificate from way back. And no one knows, especially with Aboriginal kids. Their workers change every three minutes… He [a young person with ABI] got a certificate in Grade Three, and everyone's just forgotten about it. He left school in Grade Four, you know? So when I want to…not lock them up, or [send them to] YTC [a youth training centre] because YTC for them is just deadly [there is no disability certificate available to the court]. (County Court Judge 3)

Responsibility and choice lie with young people who are assumed to have the capacity, the willingness and the initiative to disclose details of their conditions and drive the process. This approach of holding young people responsible for this was further emphasised in the following statements:

> The expectation is on the young person with a lot of difficulties to initiate, but that's not realistic. I think in the end saying…they are not going to be able to do it. And you are setting them up for failure. (Neuropsychologist 3)

> So occasionally [there's] a magical kid whose got some magical diagnosis that fits [legal criteria]…but doesn't have a support [to follow-through with appointments]…you also have to be incredibly self-motivated because you are basically having to rock up every single month and explain what you have done, why you have done it. (Lawyer 2)

Service providers also noted these issues and referred to colleagues in criminal justice institutions who have different perceptions of duty of care, or who are restricted by formal program entry requirements, which often result in shifting responsibility to other organisations or to the child.

> They've got so much trauma that they're carrying…but again, they haven't lived long enough to use enough drugs or hit their head enough times or get into enough fights. So, we send them off to get a neuro psych assessment—no ABI—and then we send them off to mental health and they're saying, 'Sorry, too complex'. We can't do anything here. And then they're stuck in the middle… The amount of times I've hit that roadblock is ridiculous…The amount of arguments I've had with mental health services and their duty of care towards someone, especially within their catchment. They will say to us, 'Even if you're going to send them to us on an inpatient order, or whatever it might be, if they're presenting well at that point in time, they'll be discharged the next morning or that day'. (ARC List Case Manager 2)

These processes that cause young people with an ABI and complex trauma to be 'stuck' while waiting for formal diagnoses to access services, extends their experience of 'onerous', 'lengthy', and 'complex' processes (ARC List Case Manager 1).

Complex processes also contribute to feelings of disempowerment and neglect, as mounting bail conditions provide little to no short-term incentive for young people, but rather act as another official reason to 'check up on' them or 'discriminate against them' (Lawyer 2). For example, youth attendance orders were described as too 'intense' and unhelpful when one is unable to comply or understand, even though these orders are seen as a good alternative to imprisonment. Judges and magistrates further observed frustration and that an inability to comply with mounting orders could feel like 'being on bail forever' (Magistrate 1).

The situation is intensified by the fact that waiting periods for services and court hearings (adjournment) are lengthy and waiting lists are extremely long. This results in clients dropping out of programs or having to restart the process altogether, as the tendency to infringe bail conditions corresponds with an inability to understand or fully contemplate the long-term consequences of one's actions.

Minor infringements impede access to support programs, as these offences can indicate an inability to control impulsive behaviour or to regularly show up to appointments, potentially leading the person to be deemed unsuitable for programs or services offered. The difficulty of qualifying for services is encapsulated in the following statement:

> Your issues have to be sufficiently shit enough, but not too shit, because if they are too shit then you are too psychotic, or too unable…to engage with the ARC case worker so then you are deemed not suitable, so you have to be like in this magical middle ground which is just like, so difficult. (Lawyer 2)

Ending up on the wrong end of this 'magical middle ground' thus renders young people hopelessly caught in a vicious cycle of 'never-ending' conditions.

Additionally, previous involvement in youth justice and the CJS may influence young people's willingness to be forthcoming and to comply with instructions from police or legal officials. Unwillingness to cooperate also stems from feelings of distrust that build when young people are let down on many occasions. This includes inconsistent contact and patchy support prior to youth or criminal justice involvement and having to 'start over' repeatedly with various participants at crossover pathways. Like the issue of 'crossover kids' (Baidawi & Sheehan 2020), ABI has become increasingly prevalent in youth justice, which has a compounding impact. Repeated incidents or additional acquisitions of brain injury rapidly multiply for young people with ABI, who are often misidentified, unrecognised and unscreened or unidentified in official records.

The prospect of further interviews, assessments and questioning also raises issues of labelling and stigma, which particularly impact young people with ABI or any other impairment, as young people have been found to conceal their diagnosis or symptoms out of fear of being labelled or bullied after being identified as a 'nuffy' (Lawyer 4). When medical and emotional support are inappropriate or deficient, custodial environments, as described above, can push them towards potentially problematic peer support in the form of gangs.

> Youth detention, because the Maoris, the black fellows, they get formed into gangs. They get a sense of belonging to gangs. It just really creates, it's dreadful. There's African kids in particular are doing that at the moment…people just don't seem to understand the consequence of locking these kids up. (County Court Judge 3)

Age of criminal responsibility

Judges and magistrates emphasised that court processes and legal language are often too complicated for a layperson. Overlapping layers of trauma, young biological and neurological developmental age, vulnerability and cognitive impairments may further affect one's ability to follow proceedings. This may also contribute to frustration and feelings of disempowerment from not being heard or acknowledged in court processes, which then leads to a quick process with more severe penalties being chosen. The concept of 'choice' is unpacked in relation to comprehending the consequences of choosing quick (and likely unjust) outcomes in the following judge's statement about young people with ABI who have experienced family violence.

> This concept of you had a choice—no, they don't. They don't. And I learnt that very early, doing the really serious children's… The murders and stuff, for kids. And they're not exercising choice. They literally don't know any better, and they can't see past the next 10 minutes. Even if they're not using [drugs]. The intellectually disabled, the ones with a brain injury, they can't see past it [lengthy court processes and conditions]. (County Court Judge 3)

Participants stressed that a good outcome often requires adhering to bail conditions and more assessment, follow-up interviews and court-ordered proceedings. This is often 'lost' on young people with ABI. Lawyers emphasised that the legal concepts of 'reasonableness' and 'understanding' are inappropriately applied to young people with ABI, who are unable to contemplate or understand the consequences of their actions because of their youth (immaturity) and neurological impairments.

> I think there is an issue—so many times, young people…commit offences and the burden of proof, or what the prosecution has to prove, is that a reasonable person would have foreseen the possibility. What the fuck is a reasonable person when you have an ABI? Excuse my language. It's just really annoying. Like you've got youth and immaturity on that already like there is this horrible standard. (Lawyer 2)

These comprehension issues apply not only to standards of proof and criminal responsibility but importantly to choosing favourable conditions and orders over jail time and official sentence records.

> It's that [bail conditions and orders] or custody, and for most young people, actually, I'm saying to them, do custody because you are going to end up having all of these charges. Because each time you come back to court, you're not going to manage those orders. You're better off having a shorter period of time [in custody] and get out with nothing. (Service Provider 1)

Overall, participant narratives illustrated how formal interventions are unintentionally disadvantaging young people with ABI at each point of interaction. This raises the question of the need to revise the age of criminal responsibility in accordance with mental and intellectual capacity as it overlaps with each co-occurring condition that underlines symptoms and presentations of ABI.

Inappropriate and indifferent responses and attitudes in the criminal justice system

This theme emerged in almost every interview. Service providers observed inappropriate or disrespectful responses to young people with cognitive impairments from police and custodial officers. These unconstructive responses were attributed to a lack of awareness, inadequate education and training, and institutionalised attitudes that favour punitive actions over responsive, empathetic and rehabilitative approaches. These punitive attitudes are of particular significance to young people with ABI, who might be unable to consistently regulate emotions and behaviours, especially in distressing situations. Service providers and lawyers also observed that improvements in responses to young people with cognitive impairments have been incremental in light of complaints lodged about some police and custodial officials. Punitive attitudes and ineffective responses are not only attributed to institutional culture and environment but may contribute to retraumatisation, entrenchment and over-representation of young people with ABI in the CJS. The following Children's Court Magistrate's insights encapsulate these sentiments:

> It's really cruel. And what I saw, and put in my report is, you can have secure without the razor wire and everything else. You can have a homey environment which is secure…
>
> You don't have people who aren't qualified… [You need people] who understand trauma, who understand kids' responses, and de-escalate. [To] understand you've got to get to the kernel of what the issues are. I understand for some kids it's abuse and trauma and neglect, as you know, but for some of these kids it's something else. But it doesn't mean you can't work with them, help them [to contribute] to society…and improve their quality of life. It's really sad. (Children's Court Magistrate 1)

Such narratives about the custodial environment also align with numerous participants' statements emphasising that prison is inappropriate and harmful for young people with ABI or other disabilities or mental health issues. Punitive and criminalising tendencies in prisons have also been recognised as cultivating an 'us versus them' attitude that further isolates vulnerable young people with ABI or other cognitive and mental health issues. Distrust, unwillingness and fear of speaking up are fostered in such an unnurturing environment.

Custodial approaches: Punitive and hostile versus holistic and therapeutic

Existing punitive and hostile environments can be improved in three main areas, by increasing therapeutic approaches to provide holistic engagement in a 'homely' environment, providing compulsory therapy during periods of containment, and building upon therapeutic approaches in residential care.

Service providers observed that current approaches are 'punitive', 'intrusive' and 'harsh' (Service Provider 9, 5). Holistic, empathetic ideals include providing picture illustrations to aid with comprehension (as discussed above), within a secure, comfortable and homely environment. These ideals are juxtaposed with 'a draconian environment' that some participants suggested currently exists in Victoria (Children's Court Magistrate 1).

Participants also emphasised that periods of confinement in rehabilitative care need to be flexible to cater for 'mid-to-longish-term' care and welfare, all the while balancing the rights of the child (Lawyer 4). In cases where program conditions are broken due to infringements or drug and alcohol use, a welfare-oriented approach should also be flexible and stigma-free to provide effective and meaningful services to young people (see McGorry et al. 2014 for a flexible model allowing multiple re-entry to services).

At present, short-term periods of secure welfare are provided to selected young people who qualify in a long waitlist (Lawyer 2). Such approaches are punitive and contradictory to reintegration, as young people's behaviour is managed with, at best, minimal support and little development of the self-empowerment and self-responsibility required for survival upon release from youth justice.

Exercise of discretion

Judicial and legal practitioners repeatedly referred to 'discretion and difference' when discussing their peers' and other professionals' responses to young people with an ABI. Some advised that they devote time (if policy permits) to understanding each client, especially those who present with ABI-like symptoms.

> Just like in any other profession, it's a hit and miss. Like the officers that you get and how sympathetic…or whether…they are aware of what it means to be diagnosed with an ABI. …I can say both… [positive] and negative. Positive…an officer does understand and…they are more willing to listen… And then, they [other police officers] only look at the brief… they won't listen to you even though you have a whole range of different reports to explain the circumstances of the young person, they are just not interested in that. "You know I have the evidence to make up the charge, I'm going to run [with it]". (Lawyer 1)

Participants also emphasised the significance of interaction with frontline police and custodial officers in shaping a young person's willingness to communicate and come forward with pre-existing conditions or seek support.

Judges' and magistrates' discussion of the use of discretionary power centred less on judicial training than time and court process constraints, such as mandatory sentences and the 'choice' of young people with ABI to prioritise quick outcomes. These narratives on time constraints were also echoed by lawyers, who discussed related challenges including the lack of funding or time to attend training, and resources to support, brief and interview clients. The importance of education and training to identify ABI is apparent in light of the following observation, which highlights the seeming normality of some young people with ABIs during initial interactions:

> I don't know what the training is with the cops or anything like that, but I suppose education around it would be really helpful as well. So, then they know. You see a kid, and this is the thing with cognitive disability, all of my clients look completely normal… If you see one of them running around, doing dumb shit like committing crimes, you're just like, you're a turd and we need to punish you for it. And you're not thinking about their mental capacity or what's going on for them in their history. I suppose if you're in the police force and you've been there for a while, you would only have that view. I don't know. I think it'd be difficult to shift it, but it needs to happen. (Service Provider 10)

Participants also emphasised that the current exercise of police discretion comes across as 'tick the box' exercises rather than genuine efforts to shift attitudes and improve responses (Lawyer 3; ARC List Case Manager 2). These tokenistic exercises could arguably be addressed with mandated policy and education to increase awareness and change attitudes. Lawyers, judges and magistrates cited the ideals of prioritising and expanding diversion through expansion of discretionary power, as described in the following statement:

> …when people have come before the court and they've got no [previous] offending, usually young people, but can be of any age, and if the offending is towards the lower end of the spectrum and also there's some issues…sometimes mental health/ABI—we can put them on a plan, so they do this plan…you have to link in to see a counsellor or you have to go along to disability services or you have to get a mental health care plan, you have to continue to engage with drug and alcohol treatment. If they do that, and the report comes back that they are compliant, they discharge. No conviction, no finding of guilt—so they have a clean criminal history. (Magistrate 1)

Training, skills and experience

As evidenced in the above quotes, participants frequently linked poor responses and attitudes to inadequate training, skills and experience in identifying ABI-related signs and symptoms, thus potentially allowing young people with ABIs to 'slip through the net'. Participants also cited inadequate training and a lack of skills as responsible for discrepancies in approach and case outcomes, as well as poor support along pathways from youth justice to the adult CJS. Staff inexperience was consistently identified and has been attributed to inadequate remuneration and the lack of appropriately qualified people to fill significant and influential positions (Children's Court Magistrate 1, Service Provider 1). A combination of experience, time and effort, flexibility, capacity, willingness, sensitivity and awareness of clients' unique situations were cited as necessary to improve responses towards young people with ABI. The following quote represents many participants' views that young people's unconstructive interactions with staff can be harmful and distressing:

> And that's what I've found a lot in custody with a lot of the officers that are managing these men and women on a day to day basis. They don't receive the training or adequate training to be able to communicate with individuals with an ABI or an ID. You'll find that a lot of them [young people] will spend a majority of their time in lockdown or the slot [solitary] for 23 hours a day, because their behaviours can't be managed any other way… And hospitals [too], whether it's training or education or whatever it might be, there just needs to be something around being able to manage someone when they first present because sometimes it's not drug induced. Sometimes it's not alcohol fuelled. It's just someone that's rocking up that's quite scared, quite confused. And when they're being shoved out the door or having security called on them, it just magnifies the issue. (ARC List Case Manager 2)

Participants advocated for cultural change, education and training for correctional staff as enhanced empathy, awareness and respect improves communication with young people. Service providers further stressed that mutual respect goes a long way in building rapport and accomplishing rehabilitative goals, as young people who feel understood and respected are more willing to work on justice goals.

Better supporting young people from start to finish

The lack of skills, experience, ability and willingness to support young people with ABI was frequently discussed during interviews. Discussion of support in this context does not specifically include the absence of support that stems from not having a diagnosis or undergoing an assessment (discussed above), although these elements remain significant. Support was also raised by participants in relation to tailored measures that respond effectively to each individual based on intersecting factors that render them vulnerable to over-representation and entrenchment. The following statement best represents ideals of providing support for young people with ABI in Victoria:

> I'd like these kids not just to be put away, but to have access to the experts who can try and help them to function in the community and try and [give them] a level of independence they are capable of having. But I think, in our current system, it's easier to put them in the mix with everybody else. Just kind of, they sink or swim. (Children's Court Magistrate 1)

Participants reported young people's inadequate access to support services, in addition to inconsistent or missing information regarding their conditions, previous interactions with welfare services, and other government agencies.

> …It's not so rosy because once you come into the system, even if you're not… The services just really aren't there. It's good on paper, there might be a nice filed paper report, but, again, yes, you haven't got that. (Lawyer 3)

Service providers also emphasised that young people with ABI need greater access to specialised services that provide appropriate support to address their needs. The following service provider emphasises the importance of questioning young people about their access to supports and services:

> If it's someone they work with regularly, or even if it's not, they need to identify what support systems they have in place initially. If you pull a kid off the street, don't just interview them or talk about their crime or whatever. Be like, 'What supports do you have? ', 'Do you have any agencies that work with you?', 'Can we call someone?', 'Do you need to speak to someone?, 'Can we have consent to talk to them?'. And then, we can talk to them… (Service Provider 10)

Even in 'ideal' scenarios, when appropriate and effective individualised support is in place, it needs to be consistent and stable. Participants stressed that there are critical issues related to medication and counselling.

> So when I was a drug and alcohol counsellor, going in there [juvenile detention] to work with the clients that I had engagement with in the community, they would then get locked up and I'd want to continue that relationship and work with them…actually, this is a really good time, because they have less access to drugs. So I can actually do some really good work with them. The system made it so difficult for me to see them. So there's not a lot of… Because actually, what they'd say as well is, there's actually a contracted person that can come in and do this [but] we have a relationship… don't cut that off. (Service Provider 1)

Notably, Victoria Legal Aid (2020) made recommendations for collaborative support across criminal justice institutions as young people progress through court and legal processes, including: more support for people with disability in legal proceedings to enable full participation, better referral pathways, trauma-informed and inclusive services, and client-centred service designs with staff training and education.

Specialised, individual-centric support

Service providers and neuropsychologists further emphasised that support needs to happen in an individualistic and holistic manner that cuts across all levels from initial point of contact to release. Service providers also stressed that a 'more intensive response' is needed to address early exclusion and antisocial behaviours that begin in schools (Service Provider 1). Support should therefore not be restricted merely to early or adequate intervention, but revised as clients progress through each stage to ensure continued effectiveness, appropriate follow-through, and stability.

Similar sentiments can also be identified in other service provider and neuropsychologist statements. Individualised support is required to prevent entrenchment, contact, and further trauma arising from punitive responses in youth or criminal justice—on a case-by-case basis. Participants highlighted the benefits of 'prosocial' activities and support that engages young people with their community. This confirms prior research on the potential benefits of prosocial activities on reducing recidivism.

A specifically tailored approach is based on existing approaches available in Children's Courts, where judicial and legal officers focus on behaviour and attempt to respond in a productive manner to address behavioural issues. As noted above, medical professionals and service providers emphasised 'treating the person not the label' (Service Provider 5, ARC List Case Managers 1 and 2). Other participants also discussed trauma-informed responses specific to situations of family violence, neglect, sexual assault, war-exposure, and other related traumatic and disenfranchising experiences in home life and detention facilities.

Experience and skill: Keys to managing interaction, behaviours and expectations

Despite alternative approaches suggested during interviews, discussed above, participants emphasised discrepancies in institutional approaches. Current discrepancies were attributed to deficiencies in knowledge about processes, services and positive pathways available in the system. As a result, ABI is often confused with ID or FASD, among other cognitive impairments and mental health conditions, meaning that young people may be misdiagnosed or not diagnosed at all.

It follows that appropriate support and pathways may not be identified in a timely manner. The expertise as to referrals and alternative routes available often comes from experience and knowing how to manage interactions and expectations when working with young people with an ABI. One participant emphasised the importance of training, experience and selfless dedication:

> I worked with kids with court orders or in resi care… If you're going to work to get some kind of self-validation or reward or anything you want to call it, you are in the wrong job. These kids, they're going to spit at you, they're going to get violent. They might not get violent with you if you implement the right skills. But things will get smashed, things will get broken. It's not about *whether* they're going to go off, it's about how long is it going to go for? How you're going to manage it, and what's the outcome going to look like? (ARC List Case Manager 1)

Participants emphasised that addressing the knowledge gap is crucial but so is improving negative perceptions of people with ABI, particularly ABIs caused by excessive drug and alcohol consumption. More empathetic and constructive attitudes may decrease criminalisation and increase rehabilitative and reintegrative initiatives. Young people may be more likely to leave the system, reducing recidivism and subsequent entrenchment. The current research adds weight to previous literature that emphasises conflicting punitive and rehabilitative ideals in institutions, and that the former has a negative impact on young people (Goldson 2018; Urwin 2018; Victorian Council of Social Service 2017). These misguided approaches further impact young persons with ABI in a disproportionate way. Overtly punitive and unproductive responses stem from difficulty in differentiating and identifying ABI to begin with, let alone responding appropriately.

Precarious living conditions

The issue of homelessness and unstable, precarious living was frequently raised in interviews. Participants often discussed homelessness in conjunction with issues of family violence and neglect, and drug use. These issues disproportionately affect young people with ABI and may lead them to gravitate towards criminal justice involvement. The following judicial statement outlines the fundamental aspects of stable accommodation, supported living, and managing ABIs through appropriate health and social supports and behaviour management:

> [Community Corrections] Orders contain sort of rehabilitative actions that are taken like drug use or mental health treatments but you know, where do they live? Who supports, what sort of accommodation? Accommodation is a fundamental one, and supportive accommodation. And you know for people with ABI that is a huge difficulty… I mean you know, the bail situation has completely changed, so that you know, two thirds of people who used to get bail, are now not getting bail. That's going to include people with ABI because homelessness virtually assures that you are not going to get bail. (County Court Judge 1)

These sentiments are echoed in other participant statements. ARC List Case Manager 1 emphasised the 'chronic' nature of the problem of homelessness tied to family violence, which was reported to result in substance misuse to cope with intergenerational violence and complex trauma. The significant impact on young people's wellbeing is outlined in the following statement:

> Parents with family violence, substance abuse issues [and] often criminal offending. Kids [with] mental health issues, self-harming, and girls' sexual-exploitation, substance abuse and often ID. Like the numbers they put in are just so low, and there are kids running on roads, running across in front of trains. Throwing rocks. You know, doing all these… (Children's Court Magistrate 1)

Periods of homelessness and unstable, precarious living may lead to additional injury and trauma. Children's Court Magistrate 1 emphasised the need to properly assess whether a young person is homeless and mandate supported accommodation or sustainable living options for young people with ABIs and other disabilities.

> So a kid is not homeless if there is somewhere [like a] residential care place. But if they are not ever there, they are on the streets every night… I think you can form your own view as to whether or not it constitutes that they are homeless. (Children's Court Magistrate 1)

Service providers, case managers and lawyers also observed the prevalence of homelessness experienced by the young people with whom they are in contact. Precarious living has particularly detrimental effects for people based in rural or regional areas. Even though appropriate referral and identification occurs in these locations, individuals still face issues of access to services and relocation that could further destabilise young people with ABI. These findings related to homelessness, precarious living and location highlight the need to revisit release and reintegration initiatives that support enhanced access to accommodation and sustainable living conditions.

Recommendations for reform

In the following sections we suggest an urgent need for policy reform that shifts resources from the punitive aspects of the youth justice and CJS towards rehabilitation, reintegration and diversion. Our below recommendations stem from concerns raised under our five main themes. Empathetic, constructive approaches that reflect understanding and increase communication will better promote young people's progress and empowerment in contexts which currently appear hostile and in which young people may feel unheard, unseen and unsafe. Supportive, welfare-based approaches, rather than punitive, unconstructive ones, are required to encourage desistance from the Victorian CJS and positive reintegration into the community for increasingly disenfranchised young people with ABI.

Introduce compulsory screening and early intervention for young people entering the system, prioritising those exhibiting challenging behaviours

Currently, long waitlists for services mean that assessments are not necessarily available when needed. Judges and magistrates proposed compulsory screening to address identification issues and unjust discrimination. Compulsory screening might also prevent young people from 'falling through the cracks', as more background information would be collected which may assist in preventing later adverse outcomes. The preference is for all young people entering the CJS to be screened, given the high number of young offenders living with ABI, other cognitive disabilities, substance abuse issues and other co-occurring conditions and trauma.

Prioritise rehabilitation through treatment and support, including prosocial behavioural programs

Custodial environments can be improved in three main areas: increase therapeutic approaches to provide holistic engagement in 'homely' custodial environments, provide compulsory therapy during periods of containment, and increase therapeutic approaches in residential care. A transformation in custodial environments can be achieved through education and training that encourages current and new staff members to be more empathetic and supportive, as well as rehabilitative in mindset.

A shift from punitive processes that focus on responsibility and accountability for 'offensive' and 'problematic' behaviour is recommended, as such behaviour is often related to emotional irregularities resulting from ABI, as well as associated comprehension and compliance issues. A duty of care approach in training and practice manuals would provide police, custodial and legal officials with guidance on constructive rehabilitation and treatment of young people with ABI, whereas current approaches are often experienced as overtly punitive. Appropriate support and collaboration with psychologists, psychiatrists and disability specialists is also recommended. A focus on prosocial behavioural programs is required with the aim of breaking the cycle of recidivism. Young people who struggle with drug dependence and alcohol consumption also require therapeutic assistance to address these issues.

Ensure that all staff in criminal justice institutions are alert, empathetic and responsive to the circumstances, experiences and needs of young people with an ABI

All people who work within the CJS must be educated about the circumstances and needs of people with an ABI and be able to recognise people with an ABI and respond appropriately. Further, in recognition of the large number of people with support needs who interact with the CJS, people who work within criminal justice must be encouraged to adopt a cautious approach towards all people in contact with the system. Respect towards others ought to be instilled and approaches in these systems ought to be trauma-informed and positively motivated rather than punishment motivated.

Judges, lawyers and service providers in our research advocated for the provision of neuropsychological education across all youth and criminal justice institutions. They emphasised that increased education would aid legal, judicial, police and custodial officers in awareness, communication and response techniques that are ABI and trauma appropriate. Heightened awareness through well-funded education initiatives will also likely shift attitudes towards respect and understanding of young people with an ABI and its associated challenges.

Provide young people with an ABI with the individualised supports and skills they need to integrate into their communities

Individualised, intensive support for young people with an ABI needs to be holistic and trauma informed. Support services should be restructured in light of shared information about each young person's background, history, interaction with youth justice and the CJS, and their characteristic behaviours and symptoms of ABI. This information should be shared only with the young person's permission. An environment that builds ongoing trust, communication and understanding will enhance the likelihood of rehabilitation and reintegration. Legal, judicial, police and custodial officers, psychologists and medical officers also need to be encouraged to work collaboratively in the young person's best interests.

Increase access to an ARC List

The overall lack of support and access to services reported in this study suggests that more initiatives like youth liaison officers and ARC List officers are required in both youth justice and the CJS. This is especially the case for young people who are not on an ARC List or receiving services through disability schemes. Increasing access to resources and services, exemplified in ARC List models, would strengthen much-needed prevention and diversion initiatives.

Broaden the criteria for prevention and diversion initiatives to include young people with an ABI

Prevention and diversion initiatives respond to the issue of recidivism, which is a core focus of this project. As previously noted, shifting societal expectations from punishment for 'offensive' behaviour to welfare-based approaches—prioritising therapy, rehabilitation and supported integration back into the community—also reduces the possibility of further traumatic experiences within the CJS. These approaches not only support constructive management of ABI symptoms but also divert young people away from the system and exposure to over-policing in the community.

Require clear and constructive communication during police interviews and court questioning

Comprehension and communication issues can be improved through various means. Participants mentioned that pictorial charts, diagrams, stickers, illustrations and other appropriate communication techniques have been successfully implemented to assist young people with ABI in New Zealand. These successful aids and techniques should be more readily available to all criminal justice institutions who frequently interact with young people with an ABI. Significantly, such approaches increase mutual understanding, helping to empower young people who often feel unheard, unseen and unsafe in environments that seem hostile and unreceptive to their needs.

Increase access to suitable employment and supported accommodation

Welfare-based responses to young people with ABI and related cognitive impairments also align with government recommendations for a sustainable mental health framework with appropriate long-term community and home-based care options, in addition to integrated service delivery, to address complex co-occurring conditions, including brain injury. Current short-term acute inpatient unit stays are inadequate (Royal Commission 2019a; see Victorian Council of Social Service 2017 for details of the long-term evidenced-based approaches needed).

Supported housing is also essential for young people when they are released from youth justice and criminal justice facilities. Accommodation needs to be both accessible and stable to assist the development of life skills and routines in a safe environment. Supported accommodation should be provided along with suitable employment opportunities or the financial assistance required to access essential food, medication and social support. Minor reoffending, such as shoplifting to address deficits in essential commodities required for independent living, will also be reduced. Establishing the goal of rehabilitation and reintegration across all youth and criminal justice institutions also increases opportunities for collaboration and sharing between agencies. In turn, this will increase the identification of needs and establishment of tailored support, and build rapport.

Establish service hubs—A 'one-stop shop'

Currently there are not enough well-trained, experienced, specifically skilled staff who can effectively respond to young people with ABI. Many young people with ABI have complex and co-occurring conditions that may require the involvement of professionals from various fields. A one-stop service hub would not only provide access to multiple services, with reduced travel and waiting periods, but be more conducive to well-considered case management to meet clients' needs. A shared database would enable clients' notes and 'flags' about behavioural issues and existing conditions to be communicated, with permission and when appropriate, to better ensure optimal client outcomes. Constructive inter-professional collaboration would also be encouraged.

Conclusion

It is clear from this study, and previous research in Victoria (Eriksson et al. 2019; Lansdell et al. 2018a, 2018b; Saunders et al. 2018), that ABI remains under-assessed, misunderstood and therefore too often unidentified in Victorian youth and criminal justice institutions. The core issues that this research highlighted are:

- a hesitance to diagnose ABI in young people resulting in less than optimal responses to young people exhibiting behaviours consistent with ABI and/or cognitive impairments;
- limited or absent comprehension of court processes and outcomes among many young people;
- structural issues with a complex system resulting in high levels of inconsistent approaches;
- tensions between punitive and rehabilitative responses to young people with cognitive disabilities;
- the discrepancy between biological age intellectual capacity appears to be overlooked;
- professionals' responses to young people with cognitive impairments are often indifferent due to inadequate education and training in identifying and responding to people with ABI or other cognitive disabilities; and
- further evidence of intersecting layers of complex trauma and co-occurring conditions, including PTSD, FASD, ID and speech developmental issues.

Generally, our research adds weight to findings from western jurisdictions that ABI is often unidentified and unscreened, despite a broad range of co-occurring conditions and disadvantage, including substance misuse, mental health issues, social isolation, homelessness and trauma (see Baldry et al. 2018). Complex trauma and co-occurring conditions have been found to enhance the likelihood that people with ABI will come into contact with the CJS (Baldry et al. 2013; Brown & Kelly 2012; Hughes et al. 2012; McKinlay et al. 2014). Our results indicate the co-occurring conditions of FASD, ID and PTSD were common in participants' comments.

Moreover, ABI and co-occurring conditions were found to impact young people's comprehension, compliance, trauma, living conditions following criminal justice contact, treatment outcomes, and the acquisition of further brain injury and trauma. Research to date emphasises that factors leading to over-representation in the CJS intersect with ABI symptoms, traumatic experiences, victimisation, co-occurring physical and mental health issues, and racial or ethnically perceived status (Baidawi & Sheehan 2020; Baldry et al. 2018; Cunneen, Goldson & Russell 2016; Eriksson et al. 2019; Lansdell et al. 2018a, 2018b).

Our recommendations stem from our research participants' insights. In particular, judges, magistrates and lawyers readily presented ideal scenarios and solutions resting on the provision of supportive and rehabilitative responses to young people with ABI and associated cognitive impairments. Service providers from various prominent organisations also expressed an urgent need to reduce the potential over-representation of young people with brain injury, complex trauma and other co-occurring disability or mental health conditions in youth justice and the CJS. Research in Victoria supports the effectiveness of individualised interventions in reducing recidivism in the adult population (Chesser 2016). The individualised nature of the ARC List in Victoria has been lauded as having 'reduced crime and achieve[d] better outcomes for clients and the community' (Magistrates' Court of Victoria 2019: 30). Screening would also help ensure that interventions occurred earlier than they might normally, and early intervention is regarded as significant in reducing over-representation of these young people in the system (Baldry et al. 2018; Hughes & Chitsabesan 2015). Studies recognise the difficulties of creating a single assessment or screening tool that would pick up the various complex conditions discussed (Hughes et al. 2012). However, screening would also assist in targeting resources based on need and potentially allow the development of plans that, resources permitting, could be individualised.

Issues related to race, ethnicity and gender also emerged in some of our interviews as requiring attention and further research. Significantly, the issues of PTSD, ABIs and co-occurring complex trauma from exposure to war zones and forced migration have also been overlooked and under-supported in the case of South Sudanese Australians, resulting in criminal justice entrenchment and over-representation. Legal professionals emphasised that this issue stemmed from systemic discrimination that often resulted in disproportionately poor outcomes for young people from CALD populations, Aboriginal and Torres Strait Islander persons, South Sudanese and other African Australians, and Vietnamese Australians in youth justice and the CJS. The over-representation of these specific communities, which is outside the scope of this report, warrants further investigation and research.

Finally, some participants noted gendered differences in ABI presentation, adding weight to previous academic studies that emphasise female experiences and symptoms of ABI as significantly under-researched (Haag et al. 2016). The gendered nature of ABI presentation among young people needs to be further investigated, especially given the fact that young women are over-represented in youth justice in Australia and the United States (AIHW 2018a; Lee & Villagrana 2015; Ryan, Williams & Courtney 2013). Research sites should be carefully and intentionally selected, with close consultation and collaboration with practitioners in youth and criminal justice institutions, to address gaps in understanding intersecting and compounding layers that contribute to over-representation, gendered experiences, and the lived realities of young people.

Limitations

There are a number of limitations which should be considered when reflecting on the findings. First, we did set out to interview young persons living with an ABI and with a history of experience in the CJS and its processes in order to include their voices in this research. However, based on advice from expert stakeholders about secondary trauma and taking account of our ethics approvals from various agencies including the Victorian Department of Justice, we decided to forgo that aspect of the research and rely on the input and views of professionals working with these young people. It was also not part of this research to interview participants in detention centres. This may be a further area for future research. The number of interviews was therefore reduced. The low numbers also reflect the existence of COVID-19 related restrictions, which affected our ability to recruit participants, particularly judicial officers, during the currency of the funding.

Although the final number (27) is a small sample size, we attempted to ensure the sample was representative by involving a range of groups, although some stakeholder groups may have been over-represented. However, by the 27th interview we believed we had reached saturation point, where no new insights or perspectives were emerging. As this was a qualitative research project, we did not seek representative or generalisable findings (as expected in quantitative research); rather, we sought to explore the diverse insights of participants with life and professional experiences that would contribute to knowledge about this vulnerable group.

Notwithstanding these methodological limitations of the research and the fact that it focuses on Victoria, our findings emphasise the implications of retraumatisation and further acquisition of brain injuries in cases where young people with ABI are neither identified or diagnosed nor empathetically and appropriately supported to integrate into communities that are responsive to their needs. Cycles of reoffending, and spending time in custodial settings, are counterproductive, expensive and inhumane. Much can be achieved through education, a willingness to diagnose, and targeted support, with a view to changing unconstructive and disrespectful community and institutional attitudes, and reducing the over-representation of people with ABI and associated cognitive impairments in youth justice and the CJS.

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CRG 09/18–19

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