Acquired Brain Injury

Executive Summary

Acquired brain injury ('ABI') refers to any damage to the brain that occurs after birth.[1] Traumatic brain injury is an ABI caused when an external force applied to the head injures the brain, such as from physical assaults, sport-related injuries and falls.[2] ABI is common in children with a history of family violence and child abuse.[3]

The Brain Injury Association of Tasmania has noted:

> Some people with ABI are at greater risk of entering the criminal justice system due to the effects of trauma to the brain after sustaining a brain injury. They may experience life-long changes to their behaviour and personality, physical and sensory abilities, or thinking and learning. The risk can be further heightened due to a range of other factors including: an increased risk of onset of mental health issues, inadequate or non-existent support and care co-ordination, loss of income and poverty at times resulting in homelessness, decrease in social networks and loss of education and employment opportunities.[4]

The 2012 NSW Law Reform Commission inquiry into *People with Cognitive and Mental Health Impairments in the Criminal Justice System* found:

> People with ABI are more likely to come into contact with the criminal justice system, where they have problems arising from impulsive behaviour, anger and aggression, increased use of alcohol and other drugs, poor self-monitoring, poor concentration, lack of inhibition, inflexibility, impulsivity, an inability to read social cues and memory loss'.[5]

ABI can result in 'deterioration in cognitive, physical, emotional or independent functioning'.[6] Research has found high rates of comorbidity between ABI and mental illness.[7]

The presence of an ABI also has familial and societal impacts, 'can exacerbate and magnify the risk factors associated with homelessness'[8] and may result in 'significant restrictions on an individual's ability to participate fully in education, employment and other aspects of life'.[9]

The potential relevance of evidence of ABI in sentencing proceedings includes an assessment of *moral culpability*; moderating the weight to be given to *general deterrence*; and determining the weight to be given to *specific deterrence* and *protection of the community*. There may also be issues relating to the likelihood of *hardship in custody*, a finding of *special circumstances* and the shaping of conditions to enhance prospects of *rehabilitation*.

[1] Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2018* (Report, 2019) 106.

[2] Brain Injury Australia, *Out of Sight, Out of Mind: People with an Acquired Brain Injury and the Criminal Justice System* (Policy Paper, July 2011) 4.

[3] Brain Injury Australia, 'Acquired Brain Injury and Family Violence' (Fact Sheet 6) 1.

[4] Brain Injury Association of Tasmania, *Acquired Brain Injury and the Criminal Justice System: Tasmanian Issues* (Report, August 2007) 6.

[5] NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion* (Report No 135, June 2012) 126 [5.88].

[6] Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2018* (Report, 2019) 106.

[7] See Brain Injury Association of NSW and Blake Dawson, Submission No 19 to NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System* (6 August 2010) 8 [5.5]; Martin Jackson et al, *Acquired Brain Injury in the Victorian Prison System* (Victorian Department of Justice, Corrections Research Paper Series Paper No 04, April 2011) 17; Leanne Dowse et al, *People with Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System: Impact of Acquired Brain Injury* (Report, April 2011) 23–4.

[8] Brain Injury Australia, 'The Connection between Acquired Brain Injury and Homelessness' (Fact Sheet).

[9] Australian Institute of Health and Welfare, *Disability in Australia: Acquired Brain Injury* (Bulletin No 55, December 2007) 3.