

*"People with disability engaging in the justice system face significant barriers, with many finding access to justice difficult, hostile and ineffectual. As a result, they are often left without legal redress." (Australian Civil Society 2019)*

## **PREAMBLE**

*"Imagine you are pulled over by the police whilst driving your car. The anxiety and stress of the situation make your mind go blank and your brain quite simply forgets to tell your mouth how to articulate words. What you hope are words come out a bit slurred or slightly babbled. The police think you might be drunk. They arrest you for drink driving. The stress is overwhelming. You are taken into police custody where your brain has become completely unable to process information. The frustration at not being able to say what you want makes you unhappy. Fraught words come out and the police get cross with you. You can't engage with the drink driving procedure. After a short while, the amount of energy it is taking to try and maintain any sort of focus makes you overwhelmed with fatigue and your brain just isn't hearing anything anymore. You're in a police cell. You're in a Court. You don't look like anything is wrong with you. But you're meeting new people who don't know that it takes 15-30 seconds for you to be able to respond. And so, they just keep asking new questions – trying to find one that you answer – before you've processed the last one. And so now you're lost because you were trying to answer the one before. No one can make any sense out of you. You aren't able to say, "I have a brain injury and I just need to stop before I can answer you". Next thing you know you're having a criminal trial."*<sup>1</sup>

The Brain Injury Association of Tasmania (BIAT) welcomes the opportunity to provide a submission to the Tasmanian Legislative Council Government Administration Committee 'B' Inquiry into Tasmanian Adult Imprisonment and Youth Detention Matters, specifically Terms of Reference aspects 1, 2 and 4.

Whilst many factors influence increases in Tasmania's prisoner population, BIAT's submission focuses on the over-representation of people with cognitive impairment, specifically brain injury, in the criminal justice system as a factor driving increases in Tasmania's prisoner population and recidivism rates.

Equally, many evidence-based strategies for reducing contact with the justice system and recidivism exist. BIAT's submission concentrates on court diversion as a strategy for reducing justice system contact and, given that it is already demonstrating significant positive outcomes, provides the Inquiry with information on the JustACE program and the opportunity BIAT has presented to the Tasmanian Government to be a driver of long-term sustainable change in how people with cognitive impairment are managed through the criminal justice system.

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<sup>1</sup> <https://www.mountfordchambers.com/making-headway-improving-the-criminal-justice-system-for-those-with-brain-injuries/>

Given the prevalence of cognitive impairment in all areas of the criminal justice system, investment by the Tasmanian State Government in the JustACE program would ensure the ongoing delivery of appropriate, timely and consistent training and education on recognising and responding to people with cognitive impairment.

Should the Tasmanian Government invest in the JustACE program, the national interest to date in the program outcomes would also provide Tasmania with an opportunity to lead the country in evidence-based criminal justice reforms that improve community safety and break cycles of justice system involvement for people with cognitive impairment.

The savings associated with the Diversion List and reduced contact with other justice agencies along the way could be significant for the Tasmanian Department of Justice. Conversely, without the capacity-building activities JustACE provide, there is a considerable risk of increased demand, recidivism and incarceration for people with cognitive impairment.

## **ABOUT THE BRAIN INJURY ASSOCIATION OF TASMANIA**

The Brain Injury Association of Tasmania was established in January 1998; it is widely recognised as having specialist knowledge and experience of brain injury and its impacts on individuals, families and communities.

BIAT has, for the past 25 years, had the remit to monitor and support the long-term needs of people living with or affected by acquired brain injury (ABI). It achieved this by raising community awareness of ABI; providing education, information and referral to people with brain injury, their families and carers; training organisations and individuals on brain injury and its impacts; and through systemic advocacy.

Prior to March 2020, BIAT was funded primarily by the Tasmanian Government. With the introduction of the National Disability Insurance Scheme (NDIS), BIAT is now dependent upon other sources of funding, including applying for nationally competitive Department of Social Services (DSS) Information Linkages and Capacity Building (ILC) grants. Whilst BIAT has had some success regarding ILC grants, this funding is project-based, time-limited and focuses on specific activities.

BIAT is a state-wide, not-for-profit organisation. Whilst the BIAT office is based in Hobart, BIAT provides services to all regions of Tasmania.

## **BACKGROUND**

In 2019 the Brain Injury Association of Tasmania (BIAT) applied for and was successful in securing Commonwealth Government Information, Linkages and Capacity Building (ILC) grant funding for a 3-year project – the Recognise, Respect, Respond and Reform Program (RRRR).

Initially scheduled to cease at the end of February 2023, the RRRR Program concept was developed to provide opportunities to improve outcomes for people with brain injury who are in, at risk of entering or attempting to exit the criminal justice system.

The RRRR Program encompasses projects targeting various factors that make people with cognitive impairment vulnerable to cycling through the criminal justice system.

Through the establishment of dedicated services, the RRRR Program delivers capacity building activities and solution-focused strategies to:

- address long-standing systemic issues of the over-representation of people with cognitive impairment in the criminal justice system; and
- improve the capacity of people with cognitive impairment to understand and effectively engage with the legal process.

Whilst RRRR Program funding has been extended to 30 June 2024, the formula used by the Department of Social Services (DSS) to calculate the additional funding does not match the level at which the JustACE service is currently running, nor does it provide for expansion of the service to meet the increasing demand. DSS has also advised that there will be no ongoing funding, or extension to existing funding, for the Program beyond 30 June 2024.

In October 2022, BIAT provided a comprehensive 2023/24 State Budget Community Consultation submission – *Making Justice Reinvestment Work for Tasmanians Living with Cognitive Impairment* – to Treasury, requesting funding for the 2023/24 financial year for the expansion of the JustACE program to meet increasing demand and full funding of the program beyond 30 June 2024. A copy of BIAT's State Budget Community Consultation submission is attached.

In February 2023, BIAT met with the Secretary, Department of Justice to discuss the State Budget submission. The Secretary requested that BIAT provide details of the impacts should State Government funding not be forthcoming for 2023/24. A copy of this document, detailing both the direct and indirect impacts, is also attached.

## **DEFINITIONS**

### Brain Injury

Brain Injury is defined as any damage or injury to the brain occurring after birth, resulting in ongoing impairments. (The definition also includes Foetal Alcohol Spectrum Disorder which is brain damage caused by alcohol exposure before birth). Common causes of brain injury include trauma (e.g. motor vehicle crashes, assaults, sporting accidents), stroke, lack of oxygen to the brain, brain tumours and degenerative neurological conditions.

### Cognitive Impairment

The term cognitive impairment refers to changes or reductions in brain functions that affect a person's mental processes and thinking capacity. Cognitive impairment can be caused by a range of factors, including brain injury, neurodevelopmental disorders, serious health conditions, psychological factors, or short-term factors e.g., effects of medications or substances.

### Criminal Justice System

The Criminal Justice System (CJS) consists of the police, the courts, and corrections.

## **INQUIRY TERMS OF REFERENCE**

### **1. FACTORS INFLUENCING INCREASES IN TASMANIA'S PRISONER POPULATION AND ASSOCIATED COSTS**

[Please read in conjunction with attachments]

People with cognitive impairment are over-represented in the criminal justice system<sup>2, 3</sup>; some of the reasons why are explained in more detail in Appendix 3 to the attached State Budget Community Consultation submission. There is a personal cost to people with cognitive impairment and their families, and a significant financial cost to the government and taxpayers for this over-representation<sup>4</sup>.

Brain injury is a common cause of cognitive impairment and is a significant public health problem that disproportionately affects subgroups of the population, such as those who come into contact with the criminal justice system. While there is no data about brain injury in the Tasmanian criminal justice system, one Victorian study found verified rates of brain injury up to 30–40% in prison<sup>5</sup>, while in the general community the rate is around 2%<sup>6</sup>.

In fact, people with brain injury are over-represented at every stage of the criminal justice system and are uniquely disadvantaged at each of these stages. This means people with brain injury are more likely to enter the criminal justice system, less likely to benefit from

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<sup>2</sup> Clarke S, Forell S, Gray A. Cognitive impairment, legal need and access to justice. Justice issues. 2009 Mar(10):1-4. Retrieved from: <https://search.informit.org/doi/abs/10.3316/ielapa.201215083>

<sup>3</sup> Baldry E, Dowse L, Clarence M. People with mental and cognitive disabilities: pathways into prison. Background Paper for Outlaws to Inclusion Conference 2012 Feb. Retrieved from: <https://www.mhdcd.unsw.edu.au/sites/www.mhdcd.unsw.edu.au/files/u18/pdf/MHDCDbackgroundOutlaws%20Conf1.pdf>

<sup>4</sup> McCausland, R. (2013). People with mental health disorders and cognitive impairment in the criminal justice system: Cost-benefit analysis of early support and diversion. University of New South Wales, Sydney. <https://disability.royalcommission.gov.au/system/files/exhibit/DRC.1000.0006.8796.pdf>

<sup>5</sup> Jackson, M. & Hardy, G. (2010). Acquired Brain Injury: screening, identification, and validation in the Victorian correctional system. La Trobe University, Australia.

<sup>6</sup> Australian Institute of Health and Welfare. (2007). Disability in Australia: acquired brain injury. Bulletin no. 55. Cat no. AUS 96. Retrieved from <http://www.aihw.gov.au/>

services available and are therefore more likely to re-offend or become 'stuck' in the system.

There is a complex range of causes why this occurs, but primarily there is a failure of community and justice-based systems and services to identify, understand, and adequately respond to people with brain injuries and cognitive impairment. Consequently, what is a psycho-social health matter is inadequately managed as a justice or legal issue.

Despite this, prior to the development and implementation of the JustACE program, there were no adequate screening, assessment, or specialised referral pathways for people with brain injuries or other conditions that cause cognitive impairment in the Tasmanian Justice pathways. The lack of screening and assessment makes it difficult to ascertain overall prevalence rates and, subsequent to this, to determine the need for and provide offence-related programs specific to the needs of people with cognitive impairment.

### System failure

The cessation in March 2020 of block funding to specialist brain injury services across Tasmania resulted in magistrates and justice services not having specialised brain injury services in the community to refer people with brain injury, many of whom comprise the 89% of people with disability that the Australian Institute of Health and Welfare (AIHW) estimated will not be eligible for the NDIS<sup>7</sup>.

Justice services, including to people with disability not eligible for the NDIS, are a state government responsibility. However, under the NDIS bilateral agreement signed between Tasmania and the Commonwealth in December 2018, all of Tasmania's disability funding was signed over to the Commonwealth and is primarily being utilised for Individualised Support Packages for NDIS participants.

The Information, Linkages and Capacity Building (ILC) Strategy component of the NDIS, designed to support people with disability not eligible for the National Disability Insurance Scheme (NDIS) is failing many Tasmanians with cognitive impairment, with many worse off than they were before the rollout of the Scheme.

A new report commissioned by National Disability Services and released on 30 March 2023 ([https://www.nds.org.au/images/per\\_capita\\_report\\_march\\_2023/NDIS - Not a one stop shop.pdf](https://www.nds.org.au/images/per_capita_report_march_2023/NDIS_-_Not_a_one_stop_shop.pdf)) states:

*"However, the definition and scope of government support to Tier 2 services were diminished under the previous government, despite calls from the sector, and the Productivity Commission, to return the scheme to its original design.*

*Indeed, recent research shows that 90% of Australians living with a disability who do not receive Tier 3 packages report they are unable to access the services and support they need. (Olney S, Mills, A & Fallon L (2022) The Tier 2 tipping point: access to*

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<sup>7</sup> <https://www.parliament.nsw.gov.au/lcdocs/other/11935/02%20Answers%20to%20questions%20on%20notice%20-%20Ms%20Karen%20Stace%20-%20National%20Disability%20Services%20-%20received%2011%20October%202018.PDF>

*support for working-age Australians with disability without individual NDIS funding. Melbourne Disability Institute, University of Melbourne)*

*Tier 2 funding now accounts for less than 1 per cent of total program investment.”*

The consequences of under-investment in Tier 2 is being disproportionately born by people with disability and resulting in significant negative outcomes for people with cognitive impairment, including increased contact with the criminal justice system.

## **INQUIRY TERMS OF REFERENCE**

### **2. THE USE OF EVIDENCE-BASED STRATEGIES TO REDUCE CONTACT WITH THE JUSTICE SYSTEM AND RECIDIVISM**

A significant body of evidence suggests that offenders living with brain injury and cognitive impairment most commonly commit lower-level offences but at a greater frequency<sup>8</sup>.

Repeated involvement with the justice system comes at a significant cost to the government through court appearances and incarceration costs, as well as the cost to the individuals involved, their families and local communities. Increasing incarcerations and recidivism rates suggest that the current approach to managing criminal behaviour is not working as intended. Without a change in strategy, it is reasonable to expect that, over time, an ever-increasing percentage of the state budget will be required.

Nationally and internationally, there are examples of justice programs that have addressed the psycho-social drivers of offending whilst ensuring disability accessibility and human rights protection. Cost benefit analyses have also shown these programs to reduce government spending over the lifetime of an offender<sup>9</sup>, as well as reducing offending and incarceration.

#### **Court diversion:**

Court diversion programs aim to divert a person with lower-level offending away from traditional justice pathways by providing therapeutic alternatives to address contributing factors for offending.

Recognising the staggering statistics of defendants who suffer from traumatic brain injury (some 42% of those in their District Courts), New Zealand now operates a new specialist Court for young adults aged between 18-25 years old, as part of which neuropsychological research is taking place into adults with traumatic brain injury. Learning from what he

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<sup>8</sup> Baldry E, Dowse L, Clarence M. People with mental and cognitive disabilities: pathways into prison. Background Paper for Outlaws to Inclusion Conference 2012 Feb. Retrieved from:  
<https://www.mhdc.d.unsw.edu.au/sites/www.mhdc.d.unsw.edu.au/files/u18/pdf/MHDCDbackgroundOutlaws%20Conf1.pdf>

<sup>9</sup> McCausland, R. (2013). People with mental health disorders and cognitive impairment in the criminal justice system: Cost-benefit analysis of early support and diversion. University of New South Wales, Sydney.  
<https://disability.royalcommission.gov.au/system/files/exhibit/DRC.1000.0006.8796.pdf>



refers to as “the brain science”, Principal Youth Court Judge John Walker makes the stark comparison: *“If you had someone appearing in your Court who couldn’t speak English, the very first thing you would do as a matter of fairness is provide an interpreter”*. As a result, the Court undertakes neuropsychological assessments in order to screen for brain injury in young adolescent defendants so that they can better accommodate ‘barriers to participation’ throughout the justice process<sup>10</sup>.

In Tasmania, the Magistrate’s Court Diversion List and the Court Mandated Diversion program have provided diversionary pathways for people with severe mental illness and substance use issues, respectively. However, these programs do not adequately meet the needs of people with cognitive impairment or brain injury. Our review of these programs suggests the following:

### Magistrate’s Court Diversion List (‘The List’)

The List aims to:

- assist people in addressing the mental health and/or cognitive disability needs related to their breaking of the law;
- improve community safety and reduce re-offending by people on The List;
- improve the psychological and general well-being of people on The List; and
- reduce the use of criminal justice punishments for health/disability related behaviours.

In 2013, after considerable lobbying by the Brain Injury Association of Tasmania, the Mental Health Diversion List was expanded to include people with brain injury and other cognitive impairments, with the name changed to the Magistrate Court Diversion List. Referral to The List provided individuals with cognitive impairment in contact with the justice system the opportunity to address the behaviours or issues that led to contact.

BIAT funded a neuropsychologist to work with the Diversion List Court Liaison Officers (CLOs) to upskill them in supporting people with brain injury; unfortunately, the CLOs trained to work with people with brain injury moved to other positions, with brain injury training not provided to their replacements.

While The List now technically includes people with cognitive impairment, actual rates of this population being served by this program are very low and disproportionate to the rates of people involved with the justice system. Anecdotal feedback suggests that staff shortages, a lack of screening and assessment, poor understanding of cognitive impairment, a lack of training to support people with cognitive impairment, and limited referral pathways for participants are contributing factors.

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<sup>10</sup> <https://www.mountfordchambers.com/making-headway-improving-the-criminal-justice-system-for-those-with-brain-injuries/>

The List also excludes offences with mandatory sentencing e.g., driving under the influence and family violence. These are common offences for people with cognitive impairment, yet they cannot access a program that would help reduce their offending behaviours.

Lastly, The List is not enshrined in legislation and, as such, is a tenuous collaboration between the Department of Health (Community Forensic Mental Health Services) and the Department of Justice. Without legislation, The List risks being a quasi-diversionary pathway that is not purpose-built to meet the needs of people with complex disability types, such as cognitive impairment and brain injury.

### Court Mandated Diversion (CMD):

Approximately half of all people seeking treatment from a substance use service will have some form of cognitive impairment.

The CMD program primarily runs as a 'drug court' but is not specifically equipped to work with the unique needs of people with cognitive impairment with co-occurring substance use issues. As such, a significant proportion of the substance-using population is unable to benefit from the program. For example, we have reports of people with cognitive impairment having challenges meeting the specific and strenuous requirements of the CMD program.

### **RECOMMENDATIONS:**

- 1. Tasmania legislates a therapeutic court that is adequately designed and funded to meet the needs of all people with a disability or psycho-social disorders; and is coordinated and consistent across all programs and regions of the state.**
- 2. Diversion programs should include pathways for people with cognitive impairment, who may otherwise not benefit from these options.**

### **Therapeutic programs and interventions:**

There is a significant lack of programs and interventions that meet the needs of people with cognitive impairment involved in the Tasmanian criminal justice system as suspects/defendants/offenders. Where programs are running, they often do not adequately meet the needs of people with brain injury and cognitive impairment. Some examples of these limitations include:

- Prison psycho-educational groups: people with prison sentences less than 6 months are not currently eligible for psycho-social educational groups. As people with cognitive impairment are more likely to commit lower severity offences and have shorter sentences (or only be remanded in custody for short durations), they are less likely to benefit from these programs.



- Prison reintegration support: people with cognitive impairment with sentences less than 6 months are not eligible for reintegration planning from the Integrated Offender Management team or from many community-based programs. Occasionally, people with severe cognitive disabilities are identified and provided support, but people with moderate to mild conditions are most likely to go unidentified and unsupported.
- Throughcare programs: A lack of true throughcare programs means people with cognitive impairment are left to navigate returning to the community with little to no support. We have anecdotal reports of people in these situations reoffending intentionally to return to prison due to challenges accessing housing and other necessary supports.
- People with cognitive impairment have reported that they have had difficulty accessing legal representation and have gone without adequate support during police interviews, bail hearings, and court matters.

## **Evidence-Based Programs:**

Justice Reinvestment principles have demonstrated that funding evidence-based programs reduces total expenditure, offending and risks to the community. A range of programs around Australia contributes to the evidence that therapeutic programs are an effective option for defendants/offenders with cognitive impairment. Some examples of programs that work with people with cognitive impairment include:

- Victorian Prison Disability Support Initiative: a new Corrections Victoria disability service that uses a strengths-based approach and multi-disciplinary teams to support individuals with non-physical disabilities within the Victorian prison system.

- Justice Advocacy Service: a program supporting young people and adults with cognitive impairment in contact with the NSW criminal justice system, including as victims, witnesses and suspects/defendants to exercise their rights and fully participate in the legal process pre-sentencing.
- Independent Third Person: Independent Third Persons attend police interviews for adults and young people with disability to ensure that they are not disadvantaged during the interview process. Police interviews often require people to comprehend complex issues and information quickly, understand their legal rights, and be able to communicate with people in positions of authority.

As a response to the lack of services for people with cognitive impairment in Tasmania, the Brain Injury Association of Tasmania undertook a review of the criminal justice system and designed a program – the JustACE program - to meet the needs of adult defendants/offenders with cognitive impairment.

The JustACE program has been active for over a year now and provides an opportunity for much-needed strategy change. The program is a collaboration between The Brain Injury Association of Tasmania and Wellways Australia and is explained in more detail in Appendix 1 to the attached State Budget Community Consultation.

The JustACE program works within a throughcare model and:

- helps people to better understand the justice system and comply with orders;
- supports people to advocate for their rights and needs;
- works with people to build networks of connection and support; and
- empowers people to live a meaningful and safe life.

Building the capacity of the people referred is expected to reduce the likelihood of reoffending and has the potential to significantly reduce prison numbers and recidivism over time.

With the cessation of Commonwealth Government grant funding for the JustACE program in June 2024, an opportunity now exists for the Department of Justice to partner with and fund the JustACE program to focus on the over-representation of people with brain injury and other cognitive disabilities within the criminal justice system.

This would provide:

- significant economic and social benefits associated with reducing demand on all stages of the criminal justice system;
- an opportunity to better manage people with cognitive disabilities using a health and therapeutic approach, which increases the likelihood of sustained change; and
- reduced demand for other government-funded services, including housing, health and homelessness.

Through a partnership arrangement, a Department of Justice contribution to the cost of the JustACE service would also increase the Department's commitment to outcomes and its ability to influence project direction and deliverables.

As evidenced in Appendix 2 to the Budget Community Consultation Submission, the JustACE service is supported by a range of people and services working across the criminal justice sector in Tasmania. Considerable interest in the Service was also expressed by all magistrates when JustACE staff presented at the annual state-wide Magistrate's Conference in October 2022.

Under the current DSS funding allocation, contracts for the North and North West JustACE workers are scheduled to end on 31 August 2023; the contracts for the two Southern JustACE workers are scheduled to end on 29 February 2024.

With Justice reinvestment providing a means for redirecting public money from imprisonment to strengthening individual and community capacity, BIAT is asking the Tasmanian Government to implement a justice reinvestment methodology to drive prison numbers down and increase community safety.

Without investment by the Tasmanian DoJ for the 2023-2024 financial year, the JustACE program will cease to operate in each region at the contract end dates. The direct and indirect impacts of this are detailed in the attached document, recently provided to the Secretary, Department of Justice.

#### **INQUIRY TERMS OF REFERENCE**

#### **4. TRAINING AND SUPPORT INITIATIVES FOR CORRECTIVE SERVICE STAFF RELATED TO INCREASING INDIVIDUAL WELL-BEING, PROFESSIONALISM, RESILIENCE AND REDUCED ABSENTEEISM**

Many staff members in criminal justice agencies are unsure of what cognitive impairment is, and there is an under-recognition of the need for special supports.<sup>11</sup> Improving staff awareness and understanding of cognitive impairment would enhance the quality of assistance provided by the criminal justice system to this vulnerable group.

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<sup>11</sup> Chris Cunneen and others, *Penal Culture and Hyperincarceration: The Revival of Prison* (1st ed, Ashgate Publishing 2013) 98

Currently, a person may serve their entire prison sentence without anyone knowing of their brain injury. Whilst every brain injury is different, identifying inmates with brain injury is critical so that steps can be taken to accommodate for any cognitive deficits, for example, difficulty understanding and/or following instructions, requiring corrections staff to repeat and/or write down instructions, or needing more time to process information; this will require the inclusion of cognitive impairment training for corrections staff.

Changes in prison training and in inmate discipline rules could help inmates with brain injury avoid their current difficulty adapting to prison life and higher number of disciplinary problems <sup>12</sup>.

With many police not recognising brain injury symptoms, police training should also include mandatory education about brain injury, its symptoms and manifestations, and training in the adjustments required to accommodate a person with brain injury.

A key output of the JustACE program is the provision of training and education to upskill and improve how justice services and other community-based services employees recognise and respond to people with cognitive impairment.

Targeted education and training of staff within the criminal justice system, provided through the JustACE Service, will increase the confidence and ability of staff to engage effectively and, more importantly, appropriately with people with cognitive disabilities. Increased confidence and additional skills to engage with people with cognitive impairment will reduce workplace stress and anxiety and promote better outcomes for all concerned.

Following the JustACE program consultation with the Magistrates Court management staff and magistrates, the provision of training and education for staff in the courts to increase awareness around cognitive impairment and improving ways of working with individuals in this space has also been requested. Magistrates are included in this and would greatly benefit from an increased understanding of the identification of cognitive impairment and how this impacts actions and behaviours, particularly regarding bail requirements/court orders and breaches.

Whilst the cognitive, psychological, emotional and behavioural effects of brain injury can be difficult to detect, an immeasurable difference could be made to individuals arriving in police custody or Court cells if their invisible disability was made visible through the provision of specialist training.

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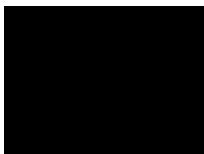
<sup>12</sup> Nick Rushworth 'Out of Sight, Out of Mind: People with an Acquired Brain Injury and the Criminal Justice System' (2011) *Brain Injury Australia* policy paper,

## IN CONCLUSION

People with cognitive impairment are over-represented in the criminal justice system in Tasmania. In order to better respond to the psychological and physical needs of people in contact with the criminal justice system, and break cycles of re-offending, the system must recognise and respond to the congruence of cognitive impairment and criminal offending.

At a practical level, that means:

- Developing intake processes that uniformly screen for cognitive impairment.
- Legislating a therapeutic court that is adequately designed and funded to meet the needs of all people with a disability and/or psycho-social disorders.
- Enabling the ongoing delivery of evidence-based programs such as the JustACE program to meet the needs of adult defendants/offenders with cognitive impairment treatments and therapies within the prison environment.
- Improving education for professionals in law and criminal justice on the indicators and consequences of cognitive impairment.



Deborah Byrne  
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14 April 2023

## Preamble

In 2019 the Brain Injury Association of Tasmania (BIAT) applied for and was successful in securing Commonwealth Government Information, Linkages and Capacity Building (ILC) grant funding for a 3-year project – the Recognise, Respect, Respond and Reform Program (RRRR).

Scheduled to cease at the end of February 2023, the RRRR Program concept was developed to provide opportunities to improve outcomes for people with brain injury who are in, at risk of entering or attempting to exit the criminal justice system.

The RRRR Program encompasses projects targeting various factors that make people with cognitive impairment vulnerable to cycling through the criminal justice system.

Through the establishment of dedicated services, such as JustACE, the RRRR Program delivers capacity building activities and solution-focused strategies to:

- address long-standing systemic issues of the over-representation of people with cognitive impairment in the criminal justice system; and
- improve the capacity of people with cognitive impairment to understand and effectively engage with the legal process.

Whilst RRRR Program funding has been extended to 30 June 2024, the formula used by the Department of Social Services (DSS) to calculate the additional funding does not match the level at which the JustACE service is currently running, nor does it provide for expansion of the service to meet the increasing demand.

DSS has also advised that there will be no ongoing funding, or extension to existing funding, for the Program beyond 30 June 2024.

## Direct impacts should the Tasmanian Department of Justice not invest in the JustACE program for the 2023-2024 financial year

### State-wide staff cutbacks and program closure

Under the current DSS funding allocation, contracts for the North and North West JustACE workers are scheduled to end on 31 August 2023; the contracts for the two Southern JustACE workers are scheduled to end on 29 February 2024.

Without investment by the Tasmanian DoJ for the 2023-2024 financial year, the JustACE program will cease to operate in each region at the contract end dates. Impacts of this include:

- loss of support for existing JustACE participants (both in prison and in the community).
- inability to service the Magistrates Court Diversion List, specifically the cognitive impairment stream. Not having a service in the community for Diversion List magistrates to refer people with cognitive impairment to presents a significant discrimination issue for the Tasmanian Government.
- loss of throughcare referral pathways e.g., support for prisoners transferring from Risdon prison to the community, especially to remote regions such as the North-West.
- loss of support for participants ineligible for other programs e.g., prisoners with shorter sentences unable to access psychoeducational groups or reintegration planning and support.
- loss of support for people with cognitive impairment who are ineligible for or unable to access the NDIS (the Australian Institute of Health and Welfare estimates that 89% of people with disability will not be eligible for the NDIS)
- loss of services in areas, such as the North West, where there is already a shortage of services.

### **Loss of investment**

Significant resources have been invested in the design and set-up of the JustACE program. Meetings were held with the Tasmanian Department of Justice at project commencement to establish that long-term reliance on grant funding was not sustainable and that, if evaluation proved the program successful, State Government investment would be required moving forward.

Losses without this investment include:

- trained staff with program-specific skills, knowledge, experience and training – the JustACE case worker roles require a unique skill set for which significant time and money have already been invested. Without ongoing JustACE employment certainty, existing staff will soon start looking for other employment opportunities.
- key stakeholder relationships and referral pathways - some stakeholders, such as Community Forensic Mental Health Services, have been slow to engage. However, with committed effort, the JustACE program has developed this relationship and now receives referrals from the Magistrates Court Diversion List in all three regions.
- reputation and community awareness - trust is slow to build in this client population and can be damaged easily. JustACE workers have been strategically building their presence in the courts, Safe Space services and other key areas. Any staff cutbacks or losses would damage the program's reputation and erode community awareness and trust.



The investment made to date in the JustACE program demonstrates that the costs of maintaining the program would be significantly less than that of restarting the program or establishing a new service.

### **Poor disability rights and accessibility**

There are significant issues of rights and accessibility for people with cognitive related disabilities involved in the justice system in Tasmania including:

- NDIS service gaps, including difficulty navigating the application process (especially for people with cognitive impairment); and a lack of support for people with cognitive impairment who do not meet the threshold for eligibility.
- The Magistrates Court Diversion List almost exclusively focussing on mental illness. As such, people with cognitive impairment are excluded if they do not experience severe mental illness.
- Many individuals not knowing that they have a disability due to the severity, multiplicity and complexity of disability experienced by people with cognitive impairment. A lack of screening and assessment of cognitive impairment and its causes compounds this, resulting in poor identification of people with cognitive impairment and a lack of reliable data on the number of people with cognitive impairment involved in the justice system in Tasmania.
- Service silos result in people with cognitive impairment and other disabilities not receiving continuity of support and 'falling between the cracks' of supports and services. This is compounded by the lack of throughcare support for people with disabilities, who are significantly disadvantaged by the challenges of navigating services when returning to the community.

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability found that people with disability were overrepresented at all stages of the justice system and that better supports and services are needed to prevent this cohort from coming into contact with the justice system and to navigate the complexities of the system including entering and exiting prison.

The JustACE program offers 'better supports and services' and is currently the only program in the state designed specifically to meet the needs of people with cognitive impairment who are involved with the criminal justice system as suspects, defendants, and offenders.

With the Tasmanian Government a signatory to Australia's Disability Strategy 2021-2031, investment by the Department of Justice in the JustACE program will assist the Tasmanian Government in delivering against the Strategy Outcome Area *Safety, Rights and Justice*, specifically Priority Areas 5 and 6.

## Training and Education

A key output of the JustACE program is providing training and education to upskill and improve how justice services and other community-based services employees recognise and respond to people with cognitive impairment.

Given the prevalence of cognitive impairment in all areas of the criminal justice system, investment by the Tasmanian State Government in the JustACE program would ensure the ongoing delivery of appropriate, timely and consistent training and education on recognising and responding to people with cognitive impairment.

## Indirect and future impacts

The JustACE program, including its staff and program model, provides for engagement with participants, the community, and other key stakeholders. Whilst Tasmanian Government investment in the JustACE program at the current level for the 2023-2024 financial year would provide a stable foundation for the program to continue in its present form, BIAT's budget submission detailed a need for additional investment for:

- Expansion to meet the growing demand for the JustACE program.
- Specialist assessment and interventions; without these, the program will fail to meet the needs of people identified as having severe cognitive impairment, who would benefit from formal assessments and specialist interventions.
- Facilitation of 'Brain Training' (cognitive remediation) groups in the prison and community. This training would provide program participants with strategies and tools to assist with the challenges people with cognitive impairment face in their day-to-day functioning and readjusting when exiting prison and returning to the community.
- Leveraging the JustACE program to work across other related areas, including family violence programs and interventions. This could include:
  - co-designing and facilitating groups with men's behaviour change programs that are adapted to meet the needs and specific presentation associated with cognitive impairment; and
  - working with victims/survivors of family violence who are experiencing cognitive impairment as they navigate the criminal justice system.
- Broadening the scope of the program to work with young people with cognitive impairment at risk of entering or currently involved in the criminal justice system ([https://www.aic.gov.au/sites/default/files/2022-06/crg\\_young\\_people\\_with\\_acquired\\_brain\\_injury\\_v4\\_-\\_250522.pdf](https://www.aic.gov.au/sites/default/files/2022-06/crg_young_people_with_acquired_brain_injury_v4_-_250522.pdf)).
- Maximising opportunities to partner with organisations working in the area of supported housing for people with cognitive impairment experiencing homelessness or returning to the community following incarceration.

Other indirect impacts of the closure of the JustACE program include the loss of:

- benefits from informal interactions with people who are not current or formal participants of the program, for example, JustACE workers attending Prison expos and Prison Peer Mentor groups.
- JustACE representation at key sector development events; sector capacity building, for example, Magistrate Conference presentations; policy input, for example, DoJ Disability Reference Group membership; and advocacy for people with cognitive impairment who are in, at risk of entering, or are exiting the criminal justice system in Tasmania. This also includes people with cognitive impairment who are victims of crime; as reported by the Royal Commission, this is also an area where people with disability are significantly overrepresented.

# 2023-24 State Budget Community Consultation

## Making Justice Reinvestment Work for Tasmanians Living with Cognitive Impairment

Department of Justice



October 2022



## ABOUT THE BRAIN INJURY ASSOCIATION OF TASMANIA

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The Brain Injury Association of Tasmania (BIAT) was established in January 1998; it is widely recognised as having specialist knowledge and experience of brain injury and its impacts on individuals, families and communities.

BIAT has, for the past 24 years, had the remit to monitor and support the long-term needs of people living with or affected by acquired brain injury (ABI). It achieved this by raising community awareness of ABI; providing education, information and referral to people with brain injury, their families and carers; training organisations and individuals on brain injury and its impacts; and through systemic advocacy.

Prior to March 2020 BIAT was funded primarily by the Tasmanian Government. With the introduction of the National Disability Insurance Scheme (NDIS), BIAT is now dependent upon other sources of funding, including applying for nationally competitive Department of Social Services (DSS) Information Linkages and Capacity Building (ILC) grants. Whilst BIAT has had some success in terms of ILC grants, this funding is project-based, time-limited and focuses on specific activities.

BIAT is a state-wide, not-for-profit organisation. Whilst the BIAT office is based in Hobart, BIAT provides services to all regions of Tasmania.

## COGNITIVE IMPAIRMENT

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The term cognitive impairment refers to changes or reductions in brain functions that affect a person's mental processes and thinking capacity. Cognitive impairment can be caused by a range of factors, including brain injury, neurodevelopmental disorders, serious health conditions, psychological factors, or short-term factors e.g., effects of medications or substances.



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## IN BRIEF

### Funding Requested

#### Financial Year 2023 – 2024

The Tasmanian Government allocates savings realised **during the Australian Government Department of Social Services (DSS) funded component of the JustACE Service project – August 2020 – February 2023** (ie at no cost to the Tasmanian Government), to cover the shortfall in DSS grant funding for the 2023-2024 financial year and to expand the JustACE Service to meet increasing demand.

#### Forward Estimates 2024-2025

Under a justice reinvestment methodology, the Tasmanian Government allocates cost savings attributable to the expanded JustACE Service to fully fund the JustACE Service. (ie at cessation of DSS project funding on 30 June 2024)

**2023-2024 Funding Requested: \$639,482**

**2024-2025 Funding Requested: \$878,963**

**TOTAL FUNDING REQUESTED: \$1,518,445 million over 2 years**

**This represents less than 1/3 of the savings to the Tasmanian Government attributable to the JustACE Service (refer pg 11 – based on preventing 20 PWCI entering prison).**

### The Opportunities

Building on a project funded through the Department of Social Service Information, Linkages and Capacity Building (ILC) Strategy, the Tasmanian Government has an opportunity to:

- reduce risk factors for offending behaviours and involvement in the criminal justice system (CJS) for the thousands of Tasmanians living with cognitive impairment (PWCI).
- improve the capacity of people with cognitive impairment to understand and effectively engage with the legal process; and
- be a driver of long-term sustainable change in the way people with cognitive impairment are processed through the criminal justice system.



## The Issues

- Incarceration rates of adults has been increasing in Tasmania for the past several years; recidivism rates have also increased.
- People with cognitive impairment are over-represented in the criminal justice system; some of the reasons why are explained in more detail in Appendix 3 to this submission. There is a personal cost to people with cognitive impairment and their families, and a significant financial cost to the government and taxpayers, for this over-representation.
- The cessation in March 2020 of block funding to specialist brain injury services across Tasmania resulted in magistrates and justice services not having specialised brain injury services in the community to refer people with brain injury, many of whom comprise the 89% of people with disability that the Australian Institute of Health and Welfare (AIHW) estimate will not be eligible for the NDIS.
- The Information, Linkages and Capacity Building (ILC) Strategy component of the NDIS, designed to support people with disability not eligible for the National Disability Insurance Scheme (NDIS) is failing many Tasmanians with cognitive impairment, with many worse off than they were before the rollout of the Scheme.

## The Solution

The Tasmanian Government implements a justice reinvestment methodology and funds evidence-based policies and programs, such as the JustACE Service, to drive prison numbers down and increase community safety. Justice reinvestment has been supported on economic grounds, in that it provides a means for redirecting public money from imprisonment to strengthening individual and community capacity<sup>1</sup>.

A collaboration between The Brain Injury Association of Tasmania and Wellways Australia, JustACE (explained in more detail at Appendix 1) provides a service to adult offenders with cognitive impairment in Tasmania's criminal justice system.

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<sup>1</sup> Australian Government Law Reform Commission, Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal And Torres Strait Islander Peoples (ALRC Report 133) 2018

## BACKGROUND TO SUBMISSION

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There is an inherent lack of awareness and understanding of brain injury in the community. Brain injury can be difficult to diagnose, is rarely screened for, and is often overlooked when another injury is present.

This underdiagnosis and lack of community understanding are compounded by the fact that many impacts of brain injury are often 'hidden', cognitive-based issues such as memory and communication difficulties. This can create problems for people with brain injury in the community when their behaviours are misunderstood and their needs are not supported.

Brain injury is a significant public health problem that disproportionately affects subgroups of the population, such as those who come into contact with the criminal justice system, with as many as 80% of adult prisoners reporting a history of traumatic brain injury<sup>2</sup>.

In fact, people with brain injury are over-represented at every stage of the criminal justice system and are uniquely disadvantaged at each of these stages. This means people with brain injury are more likely to enter the criminal justice system, less likely to benefit from services available and are therefore more likely to re-offend or become 'stuck' in the system.

There is a complex range of causes why this occurs, but primarily there is a failure of community and justice-based systems and services to identify, understand, and adequately respond to people with brain injuries. Consequently, what is a psycho-social health matter is inadequately managed as a justice or legal issue. This comes at both a personal cost to people with brain injuries and their families, as well as a significant financial cost to the government and taxpayers.

Despite this, prior to the development and implementation of the JustACE Service, there were no adequate screening, assessment, or specialised referral pathways for people with brain injuries in the Tasmanian Justice pathways. Additionally, the cessation of block funding in March 2020 to specialist brain injury services across Tasmania resulted in Magistrates and Justice services no longer having specialised brain injury services in the community to refer people with brain injury.

In 2019 BIAT applied for and was successful in securing Commonwealth Government Information, Linkages and Capacity Building (ILC) grant funding for a 3-year project – the Recognise, Respect, Respond and Reform Program (RRRR). The RRRR Program commenced in August 2020 and was scheduled to cease at the end of February 2023.

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<sup>2</sup> Schofield et al. (2006). *Traumatic brain injury among Australian prisoners: Rates, recurrence and sequelae*. *Brain Injury*, 20, 499-506.

The RRRR Program concept was developed to provide opportunities to improve outcomes for people with brain injury who are in, at risk of entering, or attempting to exit the criminal justice system.

The RRRR Program encompasses four dynamic projects (including the National Assistance Card) targeting a range of factors that result in people with cognitive impairment being vulnerable to cycling through the criminal justice system.

Through the establishment of dedicated services – JustACE, Justice User Peer Support and the National Assistance Card, the RRRR Program aims to develop and deliver capacity building activities and solution-focused strategies to:

- address long-standing systemic issues of the over-representation of people with cognitive impairment in the criminal justice system;
- improve the capacity of people with cognitive impairment to understand and effectively engage with the legal process; and
- help address the lack of understanding of brain injury in the community.

Whilst DSS has extended funding for the RRRR Program to 30 June 2024, the formula used by DSS to calculate the additional funding does not match the level at which the JustACE service is currently running (see below), nor does it provide for expansion of the Service to meet an increasing demand. The JustACE case worker in the South for example, is already at capacity, with a wait-list now established.

## WHAT BIAT IS REQUESTING AND WHY?

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**Under a justice reinvestment approach, BIAT is requesting funding in the Tasmanian Government 2023-2024 Department of Justice budget be allocated to meet the shortfall in DSS funding and for expanding the JustACE Service to meet increasing demand for the Service.**

**BIAT is also requesting that provision be made in the 2024-2025 budget to fully fund the JustACE Service through cost savings realised through the JustACE Project delivering on its stated outcomes.**

Under DSS Project funding the JustACE Service is currently staffed as follows:

- BIAT Executive Officer/Program Oversight – 2 days per week
- JustACE Program Manager (BIAT) – 5 days per week
- JustACE JUPS/Consumer Voice Project Officer (BIAT) – 2.5 days per week

- JustACE Case worker – South (Wellways) – 4 days per week
- JustACE Case worker – North (Wellways) – 3 days per week
- JustACE Case worker – North West (Wellways) – 3 days per week
- JustACE Manager (Wellways) – 2 days per week
- Admin Support – 2 hours per week

In addition to the requirement to adhere to the project budget, this level of staffing was established in response to extensive consultation across the justice sector. It is important to note that BIAT staffed the JustACE service at this level because of delays in establishing the service (extended consultation, staffing, partnership negotiations and COVID) and on the understanding the project was ceasing at the end of February 2023.

The formula used by the Australian Government Department of Social Services (DSS) to extend the RRRR Program grant only provides funding to staff the service as follows:

- JustACE Program Manager (BIAT) – 3 days per week
- JustACE JUPS/Consumer Voice Project Officer (BIAT) – 1.5 days per week
- JustACE Case worker – South (Wellways) – 3 days per week
- JustACE Case worker – North (Wellways) – 2 days per week
- JustACE Case worker – North West (Wellways) – 2 days per week
- JustACE Manager (Wellways) – 1 day per week
- Admin Support – 2 hours per week

This level of funding will (a) significantly impact the ability of JustACE to continue to deliver the statewide service at its current level and achieve its stated outcomes and (b) fails to meet the evidenced increasing demand for the Service.

BIAT is therefore seeking a budget allocation from the Tasmanian State Government for the 2023-24 budget to offset DSS funding and expand the Service to provide staffing of the JustACE service as follows:

- BIAT Executive Officer/Program Oversight – 2 days
- JustACE Program Manager (BIAT) – 5 days per week
- JustACE JUPS/Consumer Voice Project Officer (BIAT) – 3.5 days per week
- JustACE Case worker – South (Wellways) Community – 5 days per week
- JustACE Case worker – South (Wellways) Prison and Magistrate Court – 5 days per week

- JustACE Case worker – North (Wellways) – 5 days per week
- JustACE Case worker – North West (Wellways) – 5 days per week
- JustACE Manager (Wellways) – 2 day per week
- Admin Support – 10 hours per week
- Resourcing to access specialist service/reports - \$35,000

### Rationale

Justice services, including to people with disability not eligible for the NDIS, are a state government responsibility.

The aim of Justice reinvestment is to redirect funding away from prisons and into communities that have high rates of contact with the criminal justice system, through both community-led initiatives and state-wide policy and legislative reform<sup>3</sup>. People with cognitive impairment have high rates of contact with the criminal justice system.

A State Government funded allocation providing access to specialist services and reports will support the JustACE service to work more effectively with clients.

BIAT is committed to continuing our strong collaborative work across the criminal justice sector with State and Local Governments and with Tasmanians who are adversely affected. Through a partnership arrangement, a Department of Justice contribution to the cost of the JustACE service would increase the Department's commitment to outcomes and its ability to influence project direction and deliverables.

As evidenced in Appendix 2, BIAT's budget submission is supported by a range of people and services working across the criminal justice sector in Tasmania. Considerable interest in the Service was also expressed by all magistrates when JustACE staff presented at the annual state-wide Magistrate's Conference this month.

Whilst there is no single "fix" to reduce prison numbers, there is a range of evidence-based policies and programs that will drive prison numbers down and increase community safety – the JustACE Service is one such program.

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<sup>3</sup> <https://www.justreinvest.org.au/what-is-justice-reinvestment/>

## THE OPPORTUNITIES

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Increasing incarcerations and recidivism rates suggest the current approach to managing criminal behaviour is not working as intended. Without a change in strategy, it is reasonable to expect that over time an ever-increasing percentage of the state budget would be required.

An opportunity exists for the Department of Justice (DOJ) to partner with and fund the Brain Injury Association of Tasmania's (BIAT) JustACE Service to focus on the over-representation of people with brain injury and other cognitive disabilities within the criminal justice system. This would provide:

- significant economic and social benefits associated with reducing demand on all stages of the criminal justice system;
- an opportunity to better manage people with cognitive disabilities using a health and therapeutic approach, which increases the likelihood of sustained change; and
- reduced demand for other government funded services, including housing, health and homelessness.

Targeted education and training of staff within the criminal justice system, provided through the JustACE Service, will increase the confidence and ability of staff to engage effectively and, more importantly, appropriately with people with cognitive disabilities. Increased confidence and additional skills to engage with PWCD will reduce workplace stress and anxiety and promote better outcomes for all concerned.

There are also considerable benefits of the JustACE Service for the Department of Justice and the Tasmanian community more broadly. The Service has established processes and supports to address the often nuisance behaviours that often bring PWCD into contact with the criminal justice system, thereby reducing the overall demand for a justice response. This benefits the disproportionate time spent on these cases and minimises the escalation associated with failure to meet requirements and deadlines, a consequence of individuals' cognitive disabilities.

The JustACE Service provides an opportunity to improve the transparency and accountability of other aspects of the criminal justice system, for example, the management of the Magistrates Court Diversion List. Although the Diversion List Procedural Manual includes PWCD, it does not reference any management procedures.

JustACE could assist the Magistrates Court to develop procedures and a referral pathway, enabling people who qualify to receive the health and therapeutic management approach the state government has committed to.

This type of pathway would improve referral efficiency. It would also improve visibility and accountability of the Diversions List which may increase the number of referrals made.

Other benefits of this would include:

- The opportunity to link people with cognitive disability to the NDIS and access support required.
- The opportunity to link people with cognitive disability unable to access NDIS to capacity building and other supports to assist social and economic participation.
- Connecting people with health, housing and other services that will support them and reduce the likelihood of recidivism, a significant contributor to demand on system.

BIAT is fully cognizant that with fixed costs, for example supervision, security, meals etc, there are no substantial savings in preventing 1 or 2 people from entering prison. Given the prevalence however of cognitive impairment within the criminal justice system, the potential exists for substantial savings to be made through expansion and continuation of JustACE.

Based on a current prison level of 650, a cost per day per prisoner of \$385 (Department of Justice 2022 Budget Estimates Brief) and an average sentence of 2 years, the potential (and very conservative) savings of preventing 20 people from entering prison is \$5.62 million.

Expansion of and ongoing funding for the JustACE Service would also allow the Service to explore future opportunities including:

- working with youth
- mentor programs
- provision of a third-party response to people with cognitive impairment during police interactions or interviews, similar to the Independent Third Person in Victoria
- diversion pathways from police, prior to court
- Family Violence Court support



## THE ISSUES

The incarceration rate of adults in Tasmania has been increasing over the past couple of years, as shown in the table below. These figures do not include the approximately 27 percent of prisoners in Tasmania who were unsentenced at this census point.<sup>4</sup> Recidivism rates, or re-incarceration within 2 years of release, was around 44 percent of adults in 2016-17. This is up from approximately 39 percent for the preceding 3 years (Productivity Commission, 2018).

Table 1: Incarceration rates in Tasmania.

	Prisoner numbers	Incarceration rates	Change from previous year	Population change
2015	519	130/100,000		+507
2016	569	141/100,000	+10%	+241
2017				+2,636
2018	614	148/100,000		+4,494

Source: Productivity Commission, 2018.

As would be expected with increasing incarceration rates, prison costs are also increasing with Table 2 below showing year on year increasing costs since 2013-14.

Table 2: Tasmanian Prison Net Operating Costs

Year	Cost ('000)
2017-18	\$63,350
2016-17	\$62,824
2015-16	\$60,907
2014-15	\$57,570
2013-14	\$53,804

Source: Report on Government Service 2017-18

<sup>4</sup> Australian Bureau of Statistics, ABS 4517, Prisoners in Australia snapshot, 2016.

Prison services are one part of the criminal justice system, with police, court services and infrastructure, and the Department of Public Prosecutions also funded from the public purse.

People with brain injury are over-represented at every stage of the criminal justice system and are uniquely disadvantaged at each of these stages. It has also been shown people with traumatic brain injury (TBI) had a greater number of lifetime arrests, and that TBI was associated with recidivism<sup>5</sup>.

Research in Australia and overseas indicates that at any given time, between 30% and 80% of the prison population could be impacted by brain injury. There was however no adequate screening, assessment, or specialised referral pathways for people with brain injury in the Tasmanian Justice pathways prior to the establishment of JustACE.

The cessation in March 2020 of block funding to specialist brain injury services across Tasmania resulted in magistrates and justice services no longer having specialised brain injury services in the community to refer people with brain injury.

Under a bilateral agreement with the Commonwealth, Tasmania agreed to pay a fixed annual contribution to the National Disability Insurance Scheme, set at \$233 million in 2019-20, then escalating at 4.0% per annum. This contribution represents the total of Tasmania's disability budget and, as such, funding ceased for organisations servicing Tasmanians with disability who are not on, or eligible for, the NDIS.

The Australian Institute of Health and Welfare (AIHW) estimates 89% of people with disability will not be eligible for an NDIS individualised funded package (IFP) but will need support to connect with or access community and mainstream services. The expectation is that these people, and their families, will be dependent upon the poorly designed and ever-changing ILC Strategy, advocacy services and/or Local Area Co-ordinators (LACs).

However, to provide effective assistance to NDIS participants, and other people with disability and their families, LACs and advocacy services need to draw on the knowledge of specialist organisations. Many of these specialist organisations – the community's safety net – lost their funding when the NDIS came into effect, with many ceasing to exist due to their inability to secure ongoing funding.

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<sup>5</sup> *Traumatic Brain Injury and Recidivism Among Returning Inmates*, Criminal Justice and Behaviour, February 2017.

## THE SOLUTION

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Reintegration programs that address the drivers of incarceration are cheaper than building more prisons and far more effective in reducing re-offending and helping our community become a safer place.

Funding the JustACE Service, as detailed in this submission, over the next two years and beyond that based on outcomes, will support the management of people with cognitive impairment who are in, at risk of entering, or exiting the criminal justice system in Tasmania long-term and sustain the benefits into the future.

To address the long-standing over-representation and promote better management of PWCI in the justice system, JustACE is also seeking to partner with the Department of Justice to:

- access and share data and information.
- provide education and training opportunities for all Justice staff.
- co-design procedures that refer people with cognitive disabilities on the Magistrate Court Diversion List to JustACE.
- Embed a screening process of prisoners.

### Divert more people away from detention into community-based support

The Brain Injury Association of Tasmania took part in a review of the Tasmanian Magistrates Court Mental Health Diversion List in 2013 to consider the inclusion of people with cognitive impairment on the list.

The outcome of the review was the addition of a Cognitive Impairment stream to the Mental Health Diversion List across Tasmania and a renaming of the List to 'The Diversion List'.

In theory, this created an alternative pathway for PWCI, who had been charged with non-violent crimes. The diversion program would focus on addressing the reasons behind their alleged offending and ensuring appropriate support and treatment could be put in place to reduce the likelihood of reoffending. Despite the review and the recommendations for the development of a diversion stream for PWCI, the cognitive impairment stream of the Magistrate's Court Diversion List (MCDL) has not been functional.

Both the Chief Magistrate and State Manager, Forensic Mental Health (responsible for the Diversion List Court Liaison staff), are supportive of JustACE working with people with cognitive impairment (PWCI), referred through the Magistrate Court Diversion List - 'cognitive impairment stream', to increase their capacity and reduce offending behaviour.

## THE COST OF INACTION

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At a time when there is a clear demand for more funding for our hospitals, disability and mental health services, schools and infrastructure, currently, there is a long-term dependence on incarceration as the mainstay response of the criminal justice system.

The evidence however clearly shows mass incarceration doesn't make communities safer nor prevent repeat offending. Reforms in Texas for example, since 2007 have seen the state close four prisons, saving an estimated \$US3 billion and reducing reoffending rates.

While there are people who are a serious threat to society and should rightly be imprisoned, Risdon prison is overflowing with too many people who need mental health, disability and support services in the community. These people often leave prison homeless, jobless, and institutionalised, and more likely than not to reoffend and return to prison.

Inaction in the area of cognitive impairment and the criminal justice system will lead to negative consequences for individuals, families, the community, the economy, and society as a whole.

Aside from the human and social costs there are significant financial costs with the Productivity Commission calculating the 40 per cent rise in incarceration rates nationally over the past 20 years has cost taxpayers about \$13.5 billion.

## Introduction to the JustACE Service

The JustACE Service provides a service to adult offenders with cognitive impairment in Tasmania's criminal justice system. It has been designed as an evidence-based response to the needs of people with cognitive impairment (PWCI) in the criminal justice system.

JustACE aims to improve outcomes for PWCI by providing a direct service to PWCI who are at risk of, or who are currently involved with, the CJS as an offender or suspected offender. Furthermore, JustACE aims to be a driver of long-term sustainable change in the way people with cognitive impairment are processed through the criminal justice system.

JustACE provides a direct service to people experiencing cognitive impairment to:

- build the capacity of people with cognitive impairment who are in, at risk of entering, or exiting the criminal justice system to prevent or reduce offending behaviour
- reduce risk factors for offending behaviours and involvement in the criminal justice system.
- build the capacity of the criminal justice system to recognise, understand and respond appropriately to the needs of people with cognitive impairment.
- support the development of alternative pathways, procedures and diversion programs to appropriately respond to the needs of people with cognitive impairment in the CJS
- upskill mainstream and community services (e.g., housing, family violence, alcohol and drug, Centrelink etc), to recognise, understand and respond appropriately to PWCI
- support people with cognitive impairment who are in, at risk of entering or exiting the criminal justice system to connect or reconnect to their community and build pathways to mainstream and community services in a safe and positive way.
- Improve the capacity of people with cognitive impairment to understand and effectively engage with the legal process.

On a broader level, JustACE aims to build community awareness and understanding of cognitive impairment, and work to increase supportive networks of support for PWCI.

The JustACE Service aims to:

- JUSTICE - Help PWCI to better understand the justice system and comply with orders
- ADVOCACY - Support PWCI to advocate for their rights and needs
- CONNECTION - Work with PWCI to build networks of connection and support
- EMPOWERMENT – Assist PWCI to live a meaningful and safe life.

The Service offers:

- CONSULTATION – Meeting with JustACE staff to find out how cognitive impairment could be impacting a person's day to day life and their offending
- BRAIN TRAINING – Learning strategies to improve brain function for day to day living and helping a PWCI to meet their justice service requirements
- CASE MANAGEMENT – Working with PWCI to build support networks, prepare for court or reintegration, and co-ordinate with other services to get their needs met.

To achieve its stated outcomes, JustACE works closely with Risdon Prison and Community Corrections and clients from each stage of the criminal justice system to evaluate alternative avenues for intervention and support.

The JustACE Service is informed by a strength-based and person-centred approach. As well as working directly with PWCI, JustACE works alongside existing services and supports (including families and community), building their capacity, rather than duplicating supports. This approach utilises the cross-section of skills and knowledge of existing personnel across the sector, building organisational capacity, not only for JustACE but also for mainstream services.

## Services consulted with and supportive of the JustACE Service

Service: Tasmanian Prison Service (TPS)

Personnel: Ian Thomas (Director of Prisons) and Emily Chase (Assistant Director Intervention and Reintegration Services)

Supportive of the development of this service and are currently working with BIAT to develop better recognition and identification of people with cognitive impairment entering and in the prison system. TPS are currently consulting with BIAT to make improvements to their current assessment and screening processes for new prisoners.

BIAT is working with TPS to facilitate cognitive remediation groups within the prison. A key focus is that these are available to people on sentences under 6 months who may otherwise not be eligible for support during their custodial sentence.

Service: Magistrates Court of Tasmania

Personnel: BIAT has consulted with multiple people within the Magistrates Court including the Chief Magistrate, management staff and other magistrates regarding the JustACE Service.

The introduction of greater support for people with cognitive impairment in the justice system, particularly in the court space was welcomed by the Administrator, now retired Diversion List Magistrate Glenn Hay and policy staff.

It was reported by staff that there is a significant number of people presenting at the courts who are believed to have some level of cognitive impairment impacting their interactions with courts and ability to meet requirements and court attendances.

The JustACE Service was firmly supported as an avenue to help individuals with CI as well as staff and magistrates to provide better outcomes and greater efficiency in the court system.

Provision of training and education for staff in the courts to increase awareness around cognitive impairment and improving ways of working with individuals in this space has also been requested. Magistrates are included in this and would greatly benefit from an increased understanding of identification of CI and how this impacts actions and behaviours, particularly regarding bail requirements/court orders and breaches.



Service: Connect 42 Personnel: Penny Brewer

Have consulted with BIAT and we have provided information to assist with the implementation of cognitive impairment screening tools (ACE package) for anyone entering their programs. Connect 42 programs are mainly based in the prison, with one running in the community.

Connect 42 will provide data regarding the number of people accessing their programs who are identified as likely to have a form of cognitive impairment.

Service: Community Forensic Mental Health Services

A key stakeholder in the Magistrates Court Diversion List, CFMHS are working with BIAT regarding the development of a referral pathway to the JustACE Service for people involved in the diversion list with cognitive impairment. This has been identified as a gap in support services for people with cognitive impairment previously.

Court Liaison Staff (CLOs) support a high number of individuals through the diversion list and are very keen for this support service to assist them in their work to reduce the rate of recidivism and custodial sentences by providing an open communication and referral pathway between services and the courts.

Service: Community Corrections

Recognising there are significant challenges for people with cognitive impairment in meeting the requirements of their orders Community Corrections expressed a strong interest in the JustACE Service.

a plan has been developed to support Community Corrections staff to work more effectively with people with cognitive impairment, including the JustACE Service providing a cognitive remediation program to people with cognitive impairment being managed under court orders.

Community Corrections are a key referral source for the Service

Service: Tasmanian Police Service

Tasmania Police has been very involved in the development of the JustACE Service, including as members of the steering group.

Training: Police have supported the development of the service and the provision of training, education, and resources to first responders to improve and create awareness around appropriate ways to interact with people with cognitive impairment.

Support: The JustACE Service has liaised with Tasmania Police regarding a referral pathway to the service. The purpose of this is to assist with diverting individuals away from the justice system when appropriate and providing support to address the reasons behind their alleged offending or interactions with police and reducing the likelihood of this cycle continuing. It may also enable linking in with the service to address their needs before and during court appearances to potentially enable a different outcome with consideration of their CI and offending.

Screening and Assessment: Ongoing consultation is currently occurring with Tasmania police to consider ways to identify people with cognitive impairment much earlier in their interaction with the justice system. In addition to the National Assistance Card, JustACE is looking at what screening methods may be appropriate and achievable in light of the often difficult situations that occur in this early interaction. This would assist with alternative pathways to courts and custodial sentences being considered with greater understanding and recognition of how an individual's cognitive impairment, and the challenges that come with this, have led to their offending behaviour. For example, not understanding a direction given by police leading to confrontation or conflict and arrest.

Service: Legal Aid

Key party – lawyers are one of the main groups who provide referrals to the Magistrate Court Diversion List or identify to magistrates the possibility of cognitive impairment. Many are also not aware of the indicators for a client having a cognitive impairment, therefore training and education would be of great benefit.

Steering group member, with a keen interest to work with JustACE around provision of training for the legal sector.

Through discussions with court staff and lawyers, it has been identified that lawyers would be in a good position to refer individuals to the JustACE Service and advocate for this as part of their hearings.



Service: Alcohol Tobacco and other Drug Council of Tasmania (ATDC)

BIAT is an associate member of the ATDC and is currently working closely with ATDC in supporting their rollout of a cognitive screening, assessment and remediation package state-wide.

JustACE is working with ATDC to develop and maintain a Community of Practice within the AOD sector, to support the capacity of services to work with people with Cognitive impairment with specific reference to people with comorbid presentations in the CJS.

Service: Wellways

BIAT has partnered with and entered into an Agreement with Wellways to deliver some state-wide elements of the JustACE Service.

Prior to funding changes, Wellways ran a support service for people with brain injury in the Northwest of Tasmania. With the introduction of the NDIS, this funding ceased resulting in this service no longer being available, creating a significant gap in this area for people with brain injury and cognitive impairment.

Wellways is a national service that holds a wide range of expertise across the disability, mental health, and justice sectors. In addition, as a registered NDIS provider, Wellways is well positioned to provide support for people with cognitive impairment who regularly present with complex needs.

Service: Justice Liaison Officer NDIS Personnel: Trevor Redding

In his role, Trevor interacts with individuals within the prison on a daily basis, those who are referred to the NDIS for support as well as those who are not eligible. We have discussed that there are a significant number of people who are both diagnosed and undiagnosed with cognitive impairment who would benefit from the JustACE Service, as they prepare to return to the community from custody and for people who have recently returned to the community.

This could include provision of cognitive remediation for individuals on preparation for returning to the community and continuation of this program in the community.

While Local Area Coordinators provide some support to people who are not eligible for the NDIS, the JustACE Service provides a tailored option with a specialist response regarding cognitive impairment, which currently does not exist to those outside of the NDIS. Trevor is working with JustACE to ensure the service he provides and JustACE complement rather than duplicate each other.



Service: Red Cross

The JustACE Service and Red Cross work with a similar cohort of people in regard to the justice space. Through our discussions, we have identified areas where we can work together to create better outcomes for people with cognitive impairment.

JustACE has met with the Peer Mentor groups facilitated by Red Cross in Ron Barwick and Mary Hutchinson Women's Prison to gain input from people currently in the justice system regarding recognition of cognitive impairment within the prison space.

### Consumer engagement

JustACE is increasing its capacity to engage with consumers of justice services with cognitive impairment and has been liaising with Health Consumers Tasmania and Deb Siddall (Population Health and Special Projects Coordinator, Forensic Health Services, State-wide Mental Health Services). Deb runs consumer groups within the prison and is working with JustACE to provide access to members of these groups who have lived experience of the justice.

### Research and Evaluation

The JustACE Service has collaborated with the University of Tasmania (criminologist Pat Burton and Emeritus Distinguished Professor of Criminology Rob White) re evaluation of tools and interventions to provide insight into the effectiveness of the JustACE Service within different services and stages of the CJS.

JustACE is also working with Joanne Lunn and Dr Jamie Berry, Macquarie University, regarding their research into rates of cognitive remediation in the Tasmanian criminal justice system.

## People with cognitive impairment and the criminal justice system

Nationally and internationally, people with cognitive impairment (PWCI) are overrepresented at every stage of the criminal justice system (CJS), and evidence suggests they also experience disadvantage disproportionately at each of these stages<sup>6,7</sup>. This means PWCI are more likely to enter the CJS, are less likely to benefit from the services available, and are more likely to re-offend or to become 'stuck' in the system.

There is a complex range of causes why this occurs, but primarily there is a failure of community and justice-based systems and services to identify and adequately support PWCI. Consequently, what is a psycho-social health matter is inadequately managed as a justice or legal issue - at both a personal cost to PWCI and their family, as well as a significant financial cost to the government and taxpayers.

### The effects of cognitive impairment

The term cognitive impairment refers to changes or reductions in brain functions that affect a person's mental processes and thinking capacity. Cognitive impairment can be caused by a range of factors, including brain injury, neurodevelopmental disorders, serious health conditions, psychological factors, or short-term factors e.g., effects of medications or substances.

PWCI experience a range of impacts, including, but not limited to, memory, planning and organisation, predicting and understanding consequences, as well as self-regulating emotions and behaviour. Due to its less visible nature, cognitive impairment can be difficult to identify and diagnose, is rarely screened for, and is therefore often overlooked, particularly when other health or psychosocial disorders are present.

Furthermore, a general lack of community awareness means PWCI are easily misunderstood, and their impairments misinterpreted as personal characteristics or faults. For example, problems with attention processes may be misinterpreted as a lack of interest or rudeness.

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<sup>6</sup> Clarke S, Forell S, Gray A. Cognitive impairment, legal need and access to justice. Justice issues. 2009 Mar(10):1-4. Retrieved from: <https://search.informit.org/doi/abs/10.3316/ielapa.201215083>

<sup>7</sup> Baldry E, Dowse L, Clarence M. People with mental and cognitive disabilities: pathways into prison. Background Paper for Outlaws to Inclusion Conference 2012 Feb. Retrieved from: <https://www.mhdc.d.unsw.edu.au/sites/www.mhdc.d.unsw.edu.au/files/u18/pdf/MHDCDbackgroundOutlaws%20Conf1.pdf>

## **Cognitive impairment and social disadvantage**

The impacts of cognitive impairment, combined with a lack of community awareness means PWCI are more likely to experience challenges in navigating everyday life without assistance. As a result, PWCI are at greater risk of physical and mental ill health, unemployment, financial hardship, homelessness, family and relationship breakdowns, interpersonal conflict, and in some contexts, increased contact with the CJS.

PWCI often experience significant obstacles to accessing and benefitting from social institutions and services, particularly if their cognitive impairment hasn't been diagnosed, or is not regarded as severe.

## **Cognitive impairment in the criminal justice system**

As well as experiencing a range of social disadvantage, PWCI are also significantly overrepresented within the CJS. This is thought to be related to a range of factors, including, but not limited to social disadvantage.

Firstly, the social and behavioural effects of cognitive impairment, such as impulse and behavioural and emotional regulation issues, increase the chances that PWCI will encounter police. Even when not offending, PWCI can be perceived as offending, or behaving in anti-social ways- such as the impacts on communication or movement processes being misinterpreted as the person being 'drunk and disorderly', or aggressive.

Once engaged with the CJS, PWCI are further disadvantaged by the challenges of navigating through a complex, confusing, and stressful process. PWCI have difficulty in effectively engaging in the legal process, resulting in a 'snowball effect'. For example, failing to adhere to court directives or bail conditions results in further fines, bail being denied, or harsher sentences (for less serious crimes).

PWCI may also receive sentences or court orders that do not account for their cognitive capacity, setting them up to 'fail' to comply with community-based orders, or to adjust well to prison- resulting in further sanctions.

## **Over-representation**

The overrepresentation of PWCI in the CJS is compounded by a general lack of understanding of cognitive impairment, its causes, and impacts- by people working within the CJS at every stage. Combined with a lack of effective screening and assessment processes, PWCI can cycle through the CJS without being identified, or having adequate supports to meet their needs and address the underlying causes to their offending. As a result, PWCI have higher rates of recidivism, and are more likely to have ongoing contact with the CJS.