

## Overarching Principles: Sentencing Offenders with Mental Health Conditions or Disorders Consultation – The Disabilities Trust’s Response

*[The Disabilities Trust](#) is a leading national charity providing care and support to people with autism and learning difficulties, those with a physical disability and, through its [Brain Injury Rehabilitation Trust](#), acquired brain injury (ABI). The Disabilities Trust also runs pilot projects through its [Foundation](#) team to identify opportunities to support underrepresented groups within the wider community, including support for prisoners with brain injury.*

*A 2014 study undertaken by The Disabilities Trust demonstrated the potential link between TBI and offending behaviour. This study, the largest in the UK to examine TBI and cognitive function in adult male prisoners, showed that almost half (47%) of the 613 men screened on admission to HMP Leeds reported a history of TBI; the results were compared to the comparison/control group of 50 offenders without a brain injury<sup>1</sup>. Based on this research, The Trust contributed to the 2018 All-Party Parliamentary Group’s Report ‘Time for Change’ and has frequently called for increased awareness, the inclusion of brain injury screening and specialist support to support these offenders. Our further research into women prisoners, published in 2019 found that of 173 women within HMP/YOI Drake Hall, who were screened using the [Brain Injury Screening Index](#) tool, 64% reported a history indicative of brain injury, and of those, almost all (96%) reported a history indicative of traumatic brain injury (TBI). From the women supported through the service, 62% reported they had sustained their brain injury through domestic violence<sup>2</sup>.*

*The Trust’s response has been informed by our work in over ten prisons and the provision of services within probation and community settings.*

### **Question 1: Do you agree with the proposal that the draft guideline only applies to offenders over 18 years? If not, please tell us why?**

Whilst there is a significant body of research, which the DT has contributed to<sup>1,2</sup>, demonstrating the high prevalence of Acquired Brain Injury (ABI) amongst adult offenders<sup>3,4</sup>, studies have also highlighted the high proportion of children and young people with a brain injury within youth offender populations. Studies have indicated, nearly half (46%) of young offenders may have suffered a Traumatic Brain Injury (TBI)<sup>i</sup> also suffering loss of consciousness<sup>5</sup>. This is of particular importance for adolescents as they are one of the age groups most at risk from suffering a TBI. Research has indicated those most likely to sustain a TBI are adolescents aged 15-19 years, along with children aged 0-4 years, adults aged 65 years and older<sup>6</sup>. As such, it is important guidelines not only cover adult offenders, but recognises adolescents not only have a heightened risk of sustaining a TBI, but the neuro-cognitive consequences could have a marked effect on their development.

Youth offenders are at particular risk from their injuries as their brains are undergoing significant developmental changes. At the time of their brain injury, the skills being learnt could be vulnerable to disruption, compared to skills which have already been established.

---

<sup>i</sup> Traumatic Brain Injuries (also known as TBIs) are acquired by sustaining a physical trauma to the head. Causes of TBI can include road traffic accidents, falls and assaults. Research has shown TBIs, in particular to the front of the head, can cause a wide range of cognitive and behavioural issues.

Because of these injuries, young offenders may experience cognitive, behavioural, psychological and emotional difficulties, including poor memory, lack of concentration, poor impulse control and emotional dysregulation<sup>ii,7</sup>. These symptoms may make young and adult offenders alike, more susceptible to offending behaviour (for example, as a result of poor impulse control or an inability to regulate anger) and inhibit their ability to engage with rehabilitation programmes.

The Sentencing Council's guidelines for sentencing children and young people, only mentions ABI once in relation to welfare concerns. If this draft guideline remains focused solely on those over 18 years, there may be a gap in sentencing guidance to meet the needs of nearly half of young offenders who have an ABI or TBI.

**2. Do you agree with the proposed title of the guideline? If not, please tell us why and suggest any alternatives.**

The current title risks the assumption that this guidance solely relates to those with mental health disorders. As such, it minimises the impact of other needs, including ABI or TBI or that the latter may be an essential contributor in an offender's mental health.

As mentioned above, research indicates that 47% of the adult male<sup>1</sup> and 64% of the adult female prison population<sup>2</sup> have a history indicative of a brain injury and therefore represent a significant proportion of people going through the court system. Whilst brain injuries may cause cognitive deficits such as poor memory and concentration, mental health issues (including anxiety and depression) are also common consequences of brain injury and can even act as a barrier to rehabilitation<sup>8</sup>. Death by suicide is also an associated risk with TBI<sup>9</sup>. A broader title which references brain injuries would mitigate any risk of overlooking this significant issue.

**3. Do you agree with the comments on the proposed contents of paragraphs 1 to 6? Do you think the information will be helpful to courts? If not, please tell us why.**

Brain injuries can be defined as either mild, moderate or severe in nature. Whilst moderate to severe brain injuries may be easier to identify, mild brain injuries can be less obvious, but nevertheless can have behavioural, cognitive and psychological consequences which are persistent and life changing. For this reason, Acquired Brain Injury can often be thought of as a 'hidden disability'.

Whilst The Disabilities Trust does not seek to minimise challenging behaviour, many of the less obvious symptoms of brain injury can be 'masked' and misinterpreted as 'difficult' and therefore the guidance to "*to avoid making assumptions*" is particularly welcome. For example, behaviours caused by brain injury which could be misconstrued include:

- Failing to convey important information or frequently missing appointments – seen as the individual being avoidant or irresponsible, this may be due to *poor memory*

---

<sup>ii</sup> Emotion Dysregulation refers to an emotional response which is not considered properly modulated and doesn't fall within the conventional range of emotional responses

- Repeating the same thing over and over again – potentially seen as rude, this could be a result of *poor self-awareness*
- Swearing, or making inappropriate remarks – potentially seen as aggressive behaviour this could be due to poor *emotion dysregulation*, as caused by their brain injury
- Yawning during proceedings – seen as disrespectful to the court however this could be due to *fatigue*, which is a common symptom of brain injury

Moreover, offenders often do not report their injury, as they may suffer from a *lack of insight* and are not aware of the extent of their symptoms. Although these injuries aren't always readily seen or reported they ought to be treated with the same credibility and council. Awareness of brain injury amongst sentencers would increase the chance of the identification of these milder, less obvious brain injuries and ensure offenders can be screened and offered appropriate and specialist support to address their injury.

The premise that “*no adverse inference should necessarily be drawn if an offender had not previously been formally diagnosed*” is also welcome. However, this should also come alongside measures that ensure contact with the criminal justice systems represents an opportunity for screening, enabling the identification of previously undiagnosed conditions known to increase the likelihood of reoffending.

Whilst mental health problems, such as depression and anxiety are already over-represented in prison settings<sup>10</sup>, they are also frequently reported following brain injury<sup>11</sup>. Substance misuse is also linked to brain injury. For example, The Trust found that, amongst young offenders at HMP Hindley, 91% of young adults who had a self-reported TBI had drug-related problems as well<sup>12</sup>. It is crucial that sentencers are aware of brain injury, but also any co-morbid conditions to ensure sentencing is appropriate for the treatment of both.

Any medical reports obtained by the court should not only follow the offender to custody, but also throughout all the stages of community reintegration and care after custody. The failure to provide adequate support for those with a brain injury post-custody may result in re-offending or further marginalisation such as homelessness<sup>13</sup>.

**4. Do you have any comments on paragraph seven? Do you think the information will be helpful to courts? If not, please tell us why. Is there any further information relating to private treatment that you think should be added?**

Research has shown that short custodial sentences are largely ineffective, with 68% of offenders on this sentence-type going on to reoffend within a year<sup>14</sup>. Despite this, the use of community sentences has fallen<sup>15</sup>. Without appropriate rehabilitation for brain injury, which is unlikely to be met during a short custodial sentence, individuals will not receive the support they need to engage in their rehabilitation plan. Further research should be conducted to ensure that community sentences meet the needs of offenders with a brain injury and that individuals are provided with the best possible opportunity for rehabilitation.

Previously, The Disabilities Trust piloted the provision of Brain Injury Linkworkers (BIL) in prisons across England and Wales, to identify and support offenders with brain injury. Most recently, in the first study of its kind, The Trust provided a BIL in HMP/YOI Drake Hall, a

closed female prison<sup>2</sup>. The BIL provided personalised and therapeutic interventions to manage the health, cognitive, behavioural and emotional consequences of brain injury. The service was independently evaluated by Royal Holloway, University of London, who found that the support of the BIL improved women's mood and self-esteem, as well as enhancing their confidence and positivity<sup>16</sup>. It also seemed to support women's engagement with their sentence plan.

The Trust is currently calling for the provision of support for offenders with brain injury, both within prison and the community, similar to the BIL service, alongside brain injury screening, as a routine part of the induction assessments on entry to the criminal justice system<sup>2</sup>.

### **5. Do you think the guidance within paragraphs eight and nine is helpful? Is there any of the guidance that you disagree with? If so please tell us why.**

The identification of brain injury is important in judging the appropriate level of culpability as some of its symptoms (the inability to modify behaviour, risk-taking, impulsivity, irritability and impairments in attention and memory) may diminish culpability.

The sentencing guidance for children and young people provides helpful considerations in assessing culpability for adults with TBI. Point 1.5 of the Children and Young People guidelines urges sentencers to "*bear in mind any factors that may diminish culpability*" including their decision making and risk-taking behaviour, acting impulsively and whether their conduct has been affected by emotional volatility or negative influences. Furthermore, they may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to victims. Many of these are relevant considerations and should be applied to adults with a brain injury.

Moreover, in a 2018 study, researchers investigated a mock jury's perception of morality, guilt and sentencing in cases where a fictional defendant had sustained a TBI<sup>17</sup>. Those who were given information describing the possible consequences of TBI were more likely to find the defendant less guilty of the crime and thought incarceration was a less appropriate form of punishment. This study confirmed that by providing additional education about the neurological, behavioural and cognitive consequences of brain injury, jurors were more considerate of it and the ways in which it may have exacerbated an offender's behaviour.

Screening for Acquired Brain Injury can be both quick and easy. For example, The Trust's Brain Injury Screening Index (BISI), is a free and validated resource for identifying a brain injury, along with denoting its severity. This tool can be used by non-clinical staff to provide a quick identification of a brain injury and can be used in a number of settings, from prisons to the community. Increased awareness and appropriate screening is fundamental to ensure brain injury is considered and the appropriate level of culpability judged.

### **6. Please tell us your views on the contents of paragraph ten – do you think this will be helpful to courts? If not, please tell us why and suggest any alternative approaches to assessing culpability that you think may be more appropriate.**

The questions asked in this section could be helpful to courts in allowing sentencers to consider different ways in which brain injury could affect offenders and increase the chances

of its identification. On the other hand, The Trust would advise that these questions be rooted in clinical guidance for Acquired Brain Injury and caution taken to ensure these questions are not used, in place of a validated and reliable screening tool, such as the Brain Injury Screening Index.

The questions do, however, recognise that one of the consequences of a brain injury is impairment in thinking skills. Some of the listed questions refer to deficits in executive functioning<sup>iii</sup> which are common after TBI (even TBIs which are mild in severity). Research has shown, individuals with TBI are more likely to make quick, impulsive decisions, without always considering the consequences and do not always use the best judgement<sup>18</sup>. Brain injury is also linked to poor decision making, a compromised ability to make rational choices<sup>19</sup> and disinhibited behaviours<sup>20</sup>.

Those with brain injury may also experience lack of insight, wherein they are unaware of the problems they have. The inclusion of these questions will provide further opportunity for the identification of a brain injury. Nevertheless, these questions are not exhaustive, and emphasis should always be placed on the inclusion of a clinical tool.

Inability to control impulses, and the degree of self-awareness into one's condition also needs to be considered. Using the example within the consultation document, for those with impairments of executive function, it is quite possible that they acknowledge that they should not drink alcohol, yet fail to do so in practice. This is not necessarily because they make an explicit decision to do so, but simply because their condition means that they fail to act on this knowledge, or simply fail to control their impulse. This type of impairment would need to be evidenced through a full neuropsychological assessment, and not only based on self-report of inability to control impulses.

It may also be worth noting that any question on an offenders insight into their condition should come with some further guidance to explain that there are different degrees of 'lack of insight'. Also, explicit acknowledgement of one's condition does not mean that behaviour will not be involuntarily affected<sup>21</sup>.

## **7. Please tell us your views on the contents of section three – do you agree with the guidance in this section. If not, why?**

This section may benefit from further consideration as to whether a brain injury can negatively affect the primary aim of the sentence and engagement with standard offender rehabilitation programmes. In circumstances where the existence of a brain injury may affect the purpose of sentencing, alternative disposals should be considered.

The need for appropriate, "smart" sentences was mentioned by the Justice Secretary in his February 2019 announcement to review short prison sentences of under six months: "*.... It is not a question of pursuing a soft-justice approach, but rather a case of pursuing smart justice that is effective at reducing reoffending and crime*"<sup>22</sup>.

---

<sup>iii</sup> Executive function, also known as executive control refers to the mental processes involved in day-to-day tasks, such as planning, flexible thinking, multi-tasking, self-awareness and learning new rules

## **9. What are your views on the information on common mental disorders? Do you think this is helpful? Is there information missing that you would like to see included?**

The included definition of Acquired Brain Injury is limited. The definition does not differentiate between ABI and TBI, nor does it highlight that these injuries, even mild can have a range of behavioural, cognitive, psychological and emotional consequences which can impact offenders for the remainder of their lives.

In its 2019 consultation (*Mental Health Conditions and Disorders: Draft Legal Guidance 2019*) to update the framework surrounding prosecution in the UK, The Crown Prosecution Service proposed the following definition for brain injury:

*“An Acquired Brain Injury (ABI) is an injury caused to the brain since birth. There are many possible causes, including a fall, a road accident, tumour or stroke. Even after a minor head injury, brain function can be temporarily impaired and this is sometimes referred to as concussion. This can lead to difficulties such as headaches, dizziness, fatigue, depression, irritability and memory problems. While most people are symptom-free within two weeks, some can experience problems for months or even years after a minor head injury. The more severe the brain injury, the more pronounced the long-term effects are likely to be. Survivors of more severe brain injuries are likely to have complex long-term problems affecting their personality, their relationships and their ability to lead an independent life. Even with good rehabilitation, support and help in the community, survivors and their families are likely to face uncertain and challenges futures.”<sup>23</sup>*

This definition more accurately explains the potentially life-changing nature of brain injury. However, further clarification of the causes of ABI and TBI would be useful. For instance, *“Acquired Brain Injuries can be caused by either sustaining a blow to the head (also known as Traumatic Brain Injury or TBIs), for example in a road traffic accident, through assault or fall. Acquired Brain Injuries can also be caused by strokes, brain tumours or loss of oxygen to the brain often caused by a cardiac arrest”* as detailed in The Trust’s ‘*Making the Link Report*<sup>2</sup>.

Further emphasis on the possible symptoms of brain injury could also be included, including lack of insight, poor memory, lack of concentration, slowness to process information, poor impulse control, emotion dysregulation, problems sleeping, fatigue, anxiety and depression.

## **10. What are your views on the information on reports within Annex B? Is it helpful? Is there information missing that you would like to see included?**

Pre-sentence reports (PSR), covering the points listed in Annex B, are important in providing judges and magistrates with an expert assessment on factors which may have influenced their offending and the real risk posed to the public<sup>24</sup>. Moreover, in cases where a PSR was requested, it was more likely that a community sentence would be passed. Despite this, there has been a fall in the number of new PSRs by 22%. In June 2019, Revolving Doors, alongside the Centre for Mental Health, Prison Reform Trust, The Disabilities Trust and Transform Justice recommended that courts should not be able to send people to immediate custody or to a community sentence in the absence of a relevant court report.

Increased awareness of brain injury, alongside identification will better enable sentencers to ensure sentences reflect the need for specialist support to treat an injury, which could affect nearly half of those within the Criminal Justice System.

#### 14. Do you have any further comments on the draft guideline not covered elsewhere?

As mentioned above the guidelines would benefit from a more detailed definition of Acquired Brain Injury, including the mention of TBI and emphasis on the sometimes 'hidden' consequences of brain injury.

The Disabilities Trust endorses Headway's response to this consultation.

For more information, contact The Disabilities Trust's Foundation at:

[www.thedtgroup.org/foundation](http://www.thedtgroup.org/foundation)

[foundation@thedtgroup.org](mailto:foundation@thedtgroup.org)

01444 237294

#### References:

- <sup>1</sup> The Disabilities Trust. (2014). The association between neuropsychological performance and self-reported traumatic brain injury in a sample of adult male prisoners in the UK. Available at: [https://www.thedtgroup.org/media/4061/prison\\_research\\_briefing\\_paper\\_16022015.pdf](https://www.thedtgroup.org/media/4061/prison_research_briefing_paper_16022015.pdf)
- <sup>2</sup> The Disabilities Trust. (2019). Making the Link: Female Offending and Brain Injury. Available at: <https://www.thedtgroup.org/media/163462/making-the-link-female-offending-and-brain-injury-final.pdf>
- <sup>3</sup> Moynan, C. R., & McMillan, T. M. (2018). Prevalence of head injury and associated disability in prison populations: A systematic review. *The Journal of Head Trauma Rehabilitation*, 33(4), 275-282.
- <sup>4</sup> Durand, E., Chevignard, M., Ruet, A., Dereix, A., Jourdan, C., & Pradat-Diehl, P. (2017). History of traumatic brain injury in prison populations: A systematic review. *Annals of Physical and Rehabilitation Medicine*, 60(2), 95-101.
- <sup>5</sup> Williams, H. W., Cordan, C., Mewse, A. J., Tonks, J., & Burgess, C. N. W. (2010). Self-reported traumatic brain injury in male youth offenders: a risk factor for reoffending, poor mental health and violence? *Neuropsychological Rehabilitation*, 20(6), 801-812
- <sup>6</sup> Taylor, C. A., Bell, J. M., Breiding, M. J., & Xu, L. (2017). Traumatic brain injury-related emergency department visits, hospitalizations, and deaths—United States, 2007 and 2013. *MMWR Surveillance Summaries*, 66(9), 1.
- <sup>7</sup> Williams, H. W. (2012). Repairing Shattered Lives: Brain Injury and its implications for criminal justice. Available at: [https://psychology.exeter.ac.uk/media/universityofexeter/schoolofpsychology/ccnr/documents/Repairing\\_Shattered\\_Lives\\_Report.pdf](https://psychology.exeter.ac.uk/media/universityofexeter/schoolofpsychology/ccnr/documents/Repairing_Shattered_Lives_Report.pdf)
- <sup>8</sup> Morton, M. V., & Wehman, P. (1995). Psychosocial and emotional sequelae of individuals with traumatic brain injury: a literature review and recommendations. *Brain injury*, 9(1), 81-92.
- <sup>9</sup> Bahraini, N. H., Simpson, G. K., Brenner, L. A., Hoffberg, A. S., & Schneider, A. L. (2013). Suicidal ideation and behaviours after traumatic brain injury: A systematic review. *Brain Impairment*, 14(1), 92-112.
- <sup>10</sup> Fazel, S., Hayes, A. J., Bartellas, K., Clerici, M., & Trestman, R. (2016). Mental health of prisoners: prevalence, adverse outcomes, and interventions. *The Lancet Psychiatry*, 3(9), 871-881.
- <sup>11</sup> Jorge, R. E., Robinson, R. G., Moser, D., Tateno, A., Crespo-Facorro, B., & Arndt, S. (2004). Major depression following traumatic brain injury. *Archives of General Psychiatry*, 61(1), 42-50.

- 
- <sup>12</sup> The Disabilities Trust. (2016). The Brain Injury Linkworker Report (2016 Edition). Available at: [https://www.thedtgroup.org/media/159358/foundation-outcome-report\\_web.pdf](https://www.thedtgroup.org/media/159358/foundation-outcome-report_web.pdf)
- <sup>13</sup> Homeless Link. (2018). *Working with prison leavers: resource for homelessness services*. Available at: <https://www.homeless.org.uk/sites/default/files/site-attachments/Working%20with%20prison%20leavers%20March%202018.pdf>
- <sup>14</sup> Revolving Doors. (2018). Impact: Report 2017/2018. Available at: <http://www.revolving-doors.org.uk/file/2316/download?token=MwIRp0-y>
- <sup>15</sup> Ministry of Justice. (2017). Criminal Justice Statistics quarterly, England and Wales, July 2016 to June 2017 (provisional). Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/660234/criminal-justice-system-statistics-quarterly-june-2017.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/660234/criminal-justice-system-statistics-quarterly-june-2017.pdf)
- <sup>16</sup> Glorney, E., Jablonska, A., Wright, S., Meek, R., Hardwick, N., & Williams, H. W. (2018). *Brain injury Linkworker service evaluation study: technical report*. Royal Holloway, University of London (as the publisher).
- <sup>17</sup> St Pierre, M. E., & Parente, R. (2018). Not guilty by reason of brain injury: perceptions of guilt and sentencing. *Applied Psychology in Criminal Justice*, 14(1).
- <sup>18</sup> Salmond, C. H., Menon, D. K., Chatfield, D. A., Pickard, J. D., & Sahakian, B. J. (2005). Deficits in decision-making in head injury survivors. *Journal of Neurotrauma*, 22(6), 613-622
- <sup>19</sup> Bechara, A., & Van Der Linden, M. (2005). Decision-making and impulse control after frontal lobe injuries. *Current Opinion in Neurology*, 18(6), 734-739.
- <sup>20</sup> Knutson, K. M., Dal Monte, O., Schintu, S., Wassermann, E. M., Raymont, V., Grafman, J., & Krueger, F. (2015). Areas of brain damage underlying increased reports of behavioral disinhibition. *The Journal of Neuropsychiatry and Clinical Neurosciences*, 27(3), 193-198.
- <sup>21</sup> Crosson, B., Barco, P. P., Velozo, C. A., Bolesta, M. M., Cooper, P. V., Werts, D., & Brobeck, T. C. (1989). Awareness and compensation in postacute head injury rehabilitation. *The Journal of Head Trauma Rehabilitation*.
- <sup>22</sup> <https://www.theyworkforyou.com/debates/?id=2019-02-05b.145.3#g146.4>
- <sup>23</sup> Crown Prosecution Service. (2019). *Mental Health Conditions and Disorders: Draft Legal Guidance*. Available at: <https://www.cps.gov.uk/sites/default/files/documents/consultations/Mental-Health-Conditions-and-Disorders-Draft-Legal-Guidance-2019.pdf>
- <sup>24</sup> Centre for Justice Innovation. (2019). The changing use of pre-sentence reports. Available at: [https://justiceinnovation.org/sites/default/files/media/documents/2019-04/cji-changing-use-psr-briefing\\_wip-1.pdf](https://justiceinnovation.org/sites/default/files/media/documents/2019-04/cji-changing-use-psr-briefing_wip-1.pdf)