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Joint submission to the NSW Law Reform Commission: Bail Law in NSW



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THE OPINIONS EXPRESSED IN THIS SUBMISSION ARE THOSE OF THE BRAIN INJURY ASSOCIATION OF NSW AND THE BLAKE DAWSON PRO BONO TEAM. THEY ARE NOT NECESSARILY THOSE OF BLAKE DAWSON NOR ITS OTHER CLIENTS.

1. INTRODUCTION

The Brain Injury Association of NSW and Blake Dawson welcome the opportunity to make submissions to the NSW Law Reform Commission (the **Commission**) on bail law in NSW.

Through these submissions we aim to bring to the Commission's attention:

- the distinct characteristics of acquired brain injury (**ABI**) as a cognitive impairment;
- the inadequacy of aspects of bail law in NSW in recognising the cognitive impairment of people with ABI and addressing the symptoms of ABI which may lead to contact with the criminal justice system; and
- recommendations on specific issues raised in the Terms of Reference and Questions for Discussion.

We consider that the criminal law in NSW does not adequately recognise the specific cognitive and behavioural effects of ABI. Progress has been made in recognising other conditions causing cognitive impairment, in particular mental illness and intellectual disability, but ABI remains a "hidden disability" despite its prevalence in the community.

Like other conditions of cognitive impairment, ABI is relevant at many stages of the criminal justice process, including eligibility for diversionary programs, bail, fitness hearings, giving evidence at trial, culpability, special consideration at sentencing, and the need for support in custody or to comply with sentencing orders.

Bail law in NSW is an area in which the lack of recognition of ABI is very apparent. Section 32(1)(b)(v) of the *Bail Act 1978* (NSW) (the **Bail Act**) provides an exclusive list of criteria to be considered in bail applications. It expressly refers to the special needs of an accused person with an intellectual disability or who is mentally ill. A person with ABI who does not also have one of these conditions cannot have the impact of ABI raised in his or her bail hearing though it may be as relevant as another person's intellectual disability or mental illness.

A bail application is often the first contact a person with ABI has with the criminal court system. It provides an early opportunity for the person's ABI to be identified and taken into account. Yet because of the current lack of recognition of ABI, people with ABI are disadvantaged from the earliest stages of their interaction with the criminal justice system, even in comparison with people with mental illness and other cognitive impairments.

Our submissions are set out as follows:

- our recommendations (**section 2**);
- the experience of the Brain Injury Association of NSW and Blake Dawson (**sections 3 and 4**);
- information about ABI and its prevalence in the community (**section 5**);
- the difference between ABI, intellectual disability and mental illness (**section 6**);
- the relevance of ABI to the criminal justice system (**section 7**);
- ABI and bail law in NSW (**section 8**); and
- our response to specific issues and questions raised by the Commission's Terms of Reference (**section 9**).

We have also set out some of the effects of ABI relevant to a person's contact with the criminal justice system in a **Schedule** to this submission.

2. RECOMMENDATIONS

Our recommendations are set out below and discussed in more detail in Section 9.

2.1 Recommendation 1: Amend s 32(1)(b)(v) of the *Bail Act* to include ABI

Our principal recommendation is that s 32(1)(b)(v) of the *Bail Act* (or any equivalent provision inserted into the *Bail Act* following this review) be amended to ensure the special needs of a person with ABI are considered when determining bail. ABI is a distinct condition with cognitive effects which are as relevant to a consideration of bail as mental illness and intellectual disability. ABI should be expressly referred to in s 32(1)(b)(v) or any equivalent new provision.

The most clear, consistent and comprehensive amendment would be to introduce an umbrella definition of "mental impairment" into s 32, including an express reference to ABI. We endorsed an umbrella definition in our submissions to the Commission's earlier reference on People with Cognitive and Mental Health Impairments in the Criminal Justice System (the **earlier reference**).¹

We recommend s 32(1)(b)(v) be amended as set out in the box below.

2.2 Recommendation 2: Amend s32(1)(b)(v) of the *Bail Act* to clarify that a person's vulnerability is a factor to be considered in favour of a grant of bail

Section 32(1)(b)(v) of the *Bail Act* states that the interests of certain vulnerable people, having regard to the person's special needs, should be taken into consideration in a determination as to a grant of bail.

Generally the interests of a defendant in that class of vulnerable people would suggest a need to be released to bail. However, unlike ss 32(1)(b)(ii) and (iii), the *Bail Act* does not state that the special needs of a vulnerable person should only be taken into account as a factor in favour of a grant of bail.

Due to the inadequacy of services for people with ABI (particularly those people with ABI with a dual diagnosis or challenging behaviour which makes it more likely they will come into contact with the criminal justice system) an authorised officer or court may say the person's special needs cannot be met in the community and therefore justify withholding bail on the basis of s 32(1)(b)(v).

We submit that such a result is open under the legislation as currently drafted, though it would be against the intent of the legislation and would be discriminatory.

We therefore submit that s 32(1)(b)(v) of the *Bail Act* be amended to ensure that a person's vulnerability cannot be used as a reason to refuse bail or impose more onerous conditions than would be imposed on a person who was not in the class of people falling within s 32(1)(b)(v).

Adopting the language of ss 32(1)(b)(ii) and (iii) of the *Bail Act*, we recommend s 32(1)(b)(v) be amended as set out in the box below.

¹ Where relevant, in this paper we have incorporated parts of our joint submissions in response to the Commission's earlier reference. We encourage the Commission to refer to those submissions for further background on ABI, also available at: www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/pages/LRC_cref120sub

32 Criteria to be considered in bail applications

(1) In making a determination as to the grant of bail to an accused person, an authorised officer or court shall take into consideration the following matters (so far as they can reasonably be ascertained), and the following matters only:

...

(b) the interests of the person, having regard only to:

...

(v) if the person is under the age of 18 years, or is an Aboriginal person or a Torres Strait Islander, or has a mental impairment ~~an intellectual disability or is mentally ill~~, any special needs of the person to be free arising from that fact...

(8) In this section:

Mental impairment includes a mental illness, and/or cognitive disability, however and whenever caused, whether congenital or acquired.

Mental illness means *[insert appropriate definition. We do not express a view on the definition of 'mental illness']*.

Cognitive disability means a disability in comprehension, reason, judgment, learning, volition or memory, that is the result of any damage to, or disorder, developmental delay, impairment or deterioration of, the brain or mind including:

- (a) intellectual disability;
- (b) acquired brain injury; and
- (c) *[insert other relevant conditions]*.

2.3 Recommendation 3: Amend s 37 of the *Bail Act* to include ABI

Section 37 of the *Bail Act* (or any equivalent provision inserted following this review) should be amended to include ABI. We suggest, for clarity and consistency, that the umbrella term "mental impairment" as defined in 2.1 and 2.2 above be used in s 37. Section 37 as currently drafted only requires consideration of intellectual disability when imposing bail conditions. The authorised officer or court determining a person's bail conditions is not required to consider any other condition affecting the person's cognition (such as ABI or mental illness) when imposing bail conditions.

We propose the following amendments:

"37 Restrictions on imposing bail conditions

...

(2A) Before imposing a bail condition on an accused person who has a mental impairment ~~an intellectual disability~~, the authorised officer or court is to be satisfied that the bail condition is appropriate having regard (as far as can reasonably be ascertained) to the capacity of the accused person to understand or comply with the bail condition.

...

(5) In this section:

mental impairment has the same meaning as in Section 32.

2.4 Recommendation 4: Training

To assist in implementing these reforms, authorised police officers and judicial officers who consider bail applications should be provided with training and written guidelines to assist in recognising and considering the impact of cognitive impairment (including ABI) and mental illness.

As bail decisions occur on a continuum of contact with the criminal justice system, police should also be given guidelines to assist in recognising ABI at the earliest opportunity.

2.5 Recommendation 5: Screening questions and assessment of "vulnerable persons"

Depending on the circumstances, bail may be determined by an authorised officer or by the court. Many people with ABI do not identify as having ABI, making it difficult for ABI to be taken into account in determining bail.

Police custody managers and other police officers are already required to consider whether a detained person is a "vulnerable person", which includes a person with impaired intellectual or physical functioning. We recommend that specific references to ABI also be included as part of the existing guidelines for assessment of "vulnerable persons".

When a person is taken into custody they are assessed in the cells through a screening questionnaire. We recommend that, in addition to questions about mental health issues and suicidal ideation, questions be added to assist in identifying ABI. Such questions may include:

- "Do you have an acquired brain injury?"; and
- "Have you had a head injury which resulted in a loss of consciousness?"

Such screening questions would assist an authorised officer, and later, the court, to identify a person's ABI and to take ABI into account when determining bail.

We recommend that if questions about ABI are to be included in the screening questions for a person brought into custody, that the Brain Injury Association of NSW be consulted in formulating these questions.

2.6 Other reform options for consideration

We have identified a number of options for additional protections, support and administrative arrangements for people with ABI. These issues are referred to in Section 13 of the Commission's Questions for Discussion.

We have discussed various options at 9.5. Ultimately we are unable to recommend these options, because, while they may benefit people with ABI, they may adversely affect others with ABI who are particularly vulnerable.

3. THE BRAIN INJURY ASSOCIATION OF NSW

The Brain Injury Association of NSW is the peak advocacy body for people affected by ABI in NSW.² Its primary role is to represent the needs and experience of people affected by ABI to government and policymakers with a view to improving services and legislation. The Association also provides individual advocacy for people with ABI, an information and referral service, and a range of awareness-raising activities including training, education, and media advocacy. The Association has over 600 members, including people with an ABI, carers, service providers, and members of the community.

Due to limited time and resources, we have not been able to consult with members and with other organisations to develop views on a number of issues raised by the Terms of Reference and the Questions for Discussion. We would be grateful for the opportunity to comment on any proposed changes where those changes impact on people with ABI.

4. BLAKE DAWSON'S EXPERIENCE ACTING FOR PEOPLE WITH COGNITIVE IMPAIRMENT AND/OR MENTAL ILLNESS

Blake Dawson is a national (and international) law firm. Since January 2000 a focus of our pro bono program has been assisting people with mental illness and/or cognitive impairment and their carers.³

In NSW, our practice includes:

- seconding a lawyer full-time to the Intellectual Disability Rights Service;
- acting for people with cognitive impairment and/or mental illness in a range of matters including on criminal charges, in apprehended violence order applications as both complainants and defendants, to defend applications for substitute decision-makers, to apply to revoke the authority of a substitute decision-maker, to make a Power of Attorney or Appointment of Enduring Guardian, tenancy, in *Family Provision Act* claims, in credit and debt matters, to apply for victims' compensation, in discrimination and employment claims and in negotiating with the NSW Trustee and Guardian;
- giving talks to parents, carers and caseworkers of people with cognitive impairment and/or mental illness, including on criminal law issues; and
- liaising with and supporting a number of not-for-profit service providers and their clients including Brain Injury Australia, the Intellectual Disability Rights Service, the Disability Discrimination Legal Centre, the Aboriginal Disability Network, Disability Advocacy NSW, People with Disability Australia, Ability First and Northcott.

In addition to the work outlined above, Blake Dawson conducts a legal clinic each week both at Lou's Place (a day centre for women in crisis in Kings Cross) and the Exodus Foundation at Ashfield. Well more than half our clients at each clinic have a cognitive impairment and/or a mental illness.

Conservatively, we have acted for more than 1,500 people with a cognitive impairment and/or mental illness and their carers in NSW in the last 10 years. Our submissions are

² The website for the Brain Injury Association of NSW is www.biansw.org.au.

³ Further information on Blake Dawson's Pro Bono Program is available at www.blakedawson.com.

based on our experience in undertaking the work outlined above and on the general feedback we receive from our pro bono clients with cognitive impairment and/or mental illness, their carers and the not-for-profit organisations which work with them.

5. ACQUIRED BRAIN INJURY IN THE COMMUNITY

ABI refers to the multiple disabilities arising from any damage to the brain that occurs after birth.⁴ ABI results in deterioration in cognitive, physical, emotional and/or independent functioning.

Common causes of ABI include physical trauma (such as assault, shaken baby syndrome or motor vehicle accident), stroke, brain tumour, infection, poisoning, lack of oxygen, alcohol and other drug abuse and degenerative neurological diseases such as Parkinson's, Alzheimer's and Multiple Sclerosis.

ABI is often called the "hidden disability" because it affects intangible processes like thinking and behaviour. It is less readily identified and recognised than mental illness and other forms of cognitive impairment such as intellectual disability.

ABI is common in Australia. In 2003, the Australian Bureau of Statistics estimated that 432,700 people (2.2% of the population) had an ABI with "activity limitations" or "participation restrictions" due to their disability. Approximately 160,000 of those people had "severe or profound core activity limitations".

The Australian Bureau of Statistics' sample of 14,000 households excluded people in custody, those living in rural and remote areas and the homeless. All these groups have a high prevalence of people with ABI. Because of the deficiencies in the sample, Brain Injury Australia estimates the real number of Australians with ABI is over 500,000.

People with ABI experience a range of disabilities which affect them physically and the way they think, feel and behave.

Brain injury is different and unique for each person. Each person with ABI has different impairments and different capacity to recognise and compensate for those impairments.

The nature and extent of the changes in a person depends on the type of ABI, the severity of the injury, the location of the injury and how well the person is integrated back into the community.

People with ABI commonly have multiple disabilities. The 2003 Australian Bureau of Statistics survey found one in four people with ABI had four or more disability groups (as against one in 18 for all people with disability) and one in three had five or more health conditions (as against one in eight of all people with disability).

ABI can be difficult to detect. It may be diffuse or focal. A *diffuse* brain injury (which often occurs when a person's head is shaken, for example when babies are shaken or in motor vehicle accidents) manifests with little apparent damage in neuro-imaging studies. Lesions may only be seen with microscopic techniques post-mortem. A *focal* injury, (which is generally acquired from a blow to the head, for example from an assault or fall, or through sports injuries) often produces symptoms relating to the specific functions of the damaged area.

The most common areas to have focal lesions are the orbitofrontal cortex and the anterior temporal lobes. These areas are associated with social behaviour, emotional regulation, sense of smell and taste and decision-making.

⁴ National Community Services Data Committee, *National Community Services Data Dictionary*, Version 4 (2006).

For two in every three people with an ABI, "challenging behaviours" are the most disabling consequence of their injury. Many experience increased irritability, poor impulse control, verbal and physical aggression and disinhibition.

Set out in the **Schedule** to this submission is a list of other potential effects from ABI.

6. ACQUIRED BRAIN INJURY, INTELLECTUAL DISABILITY AND MENTAL ILLNESS

ABI is often mistaken for or conflated with intellectual disability and/or mental illness.

According to the Intellectual Disability Rights Centre, an intellectual disability primarily affects the way you learn. To be diagnosed with an intellectual disability a person must have acquired the disability before the age of 18, have an IQ of 70 or under and have deficits in at least 2 areas of adaptive behaviour.

A person with ABI, on the other hand, generally retains their level of intellectual functioning, may or may not have acquired their disability before the age of 18 and may or may not have deficits in the areas of adaptive behaviour relevant to a diagnosis of intellectual disability.

A mental illness is an abnormality in the functioning of the brain which does not arise from a physical condition. In contrast, an ABI is a physical abnormality in the structure of the brain – a physical condition which causes a change in function. A mental illness is characterised by the presence of symptoms including delusions, hallucinations, serious disorder of thought, severe disability of mood, or sustained or repeated irrational behaviour. Mental illness is generally episodic and a person with a mental illness can generally be assisted by medication to cope with their disability. In contrast, an ABI is permanent and, while some effects may be relieved in part or whole by medication and/or ongoing rehabilitation, many are not treatable.

While ABI is different from mental illness, there is evidence of a strong association between ABI and mental illness. For example, it has been demonstrated that ABI can cause mental illness. After an ABI an individual has a 4 in 5 likelihood of developing a diagnosable mental illness. A 2006 study by the Australian Institute of Health and Welfare found that, when compared with all disability groups, people with ABI were more likely to have multiple conditions including mental health problems.⁵ The disadvantage experienced by a person with an ABI is also compounded by the onset or pre-existence of a mental illness or mental disorder.

7. ACQUIRED BRAIN INJURY AND THE CRIMINAL JUSTICE SYSTEM

ABI is relevant at many stages of the criminal justice system, but is seldom taken into account. It should be considered in dealing with offending behaviour or alleged offending behaviour in the same way as conditions like intellectual disability or mental illness and for the same reasons. However, this is not reflected in legislation governing criminal law and procedure, particularly bail law in NSW.

People with an ABI are more likely to come into contact with the criminal justice system than people without ABI due to their behaviours, their social situation and the treatment and misunderstanding of others. While everyone with an ABI is different, there are common behaviours which make them more vulnerable to engaging in criminal behaviour either wittingly or unwittingly, including:

⁵ Grimshaw, L, *Complexities of co-morbidity (acquired brain injury and mental illness) and the intersection between health and community service systems*, 2007 (http://www.braininjuryaustralia.org.au/docs/FaCSIA%20-%20ABI%20-%20Mental%20illness%20Dual%20DisabilityPaper-%202007_final.pdf)

- impulsivity;
- difficulty processing information;
- impaired decision-making and planning ability and lack of insight;
- unclear speech and problems with gait (which may cause people to assume the person is intoxicated);
- lack of inhibition (which may result in aggression, swearing and inappropriate sexual behaviour);
- uses of substances such as alcohol and other drugs;
- difficulty interpreting social cues and in understanding and communicating; and
- inflexibility in thoughts or action which may be misread as the person being uncooperative, aggressive or obstructive.

There are also more general risk factors that make a person more likely both to come into contact with the criminal justice system and suffer an ABI, including that the person is male, in their late teens or early twenties, has a psychiatric illness, is of lower socio-economic status and/or has engaged in substance abuse.

Once in the system, there is little understanding of the effects of ABI and how it has contributed to the person's contact with the criminal justice system. The system is not equipped to recognise a person has an ABI and the implications of their ABI on their culpability, eligibility for diversion and ability to advocate their interests within the system. People with ABI may further incriminate themselves due to their response to their environment and/or misunderstood behaviour.

Not surprisingly, there is a high rate of persons with ABI in custody. One study found that 82% of those entering the criminal justice system endorsed a history of head injury, with 65% having a history of head injury with loss of consciousness and 43% having four or more head injuries (with an average of three prior head injuries). Similarly, in a 2009 national study by the Australian Institute of Health and Welfare on the health of prisoners, 43% of people entering prison reported receiving a blow to the head with loss of consciousness in their past.

Given the high incidence of assault in prisons in NSW, all people who are imprisoned are themselves at increased risk of acquiring an ABI, and people with an ABI are at risk of acquiring another ABI.⁶

When a person with ABI leaves the criminal justice system, particularly the prison system, they are likely to have difficulty in transitioning back to community life. Many get caught in a cycle of recidivism, due in part to their difficulty transitioning and in part due to effects of their ABI (such as fixed thinking, disinhibition and poor decision-making) for which they receive no support.

8. ABI AND BAIL LAW IN NSW

8.1 Current state of the law

Bail law in NSW is an example of the lack of recognition of ABI in the criminal justice system. Progress has been made towards recognising other conditions like intellectual disability and mental illness in determining bail, but the legislation and caselaw often excludes ABI.

⁶ See for example <http://www.smh.com.au/pdf/jails.pdf>

Section 32 of the *Bail Act* sets out an exhaustive list of factors to be considered in bail applications. The factors include the interests of the accused person, "having regard only to" a limited list of characteristics of the accused.⁷

In 2002, this list was expanded with the introduction of s 32(1)(b)(v). The interests of the accused person that may be considered on a bail application now include:

"if the person ... has an intellectual disability or is mentally ill, any special needs of the person arising from that fact".⁸

An accused with an intellectual disability or mental illness may have their needs considered from their first appearance in court. Their particular needs are taken into account in determining whether or not to grant bail and, for people with intellectual disability, the conditions of their bail. In practice, this early recognition of their condition can flow through to any custodial arrangements if they are refused bail, and to the manner in which their matter proceeds. No similar opportunity is available for an accused to raise issues related to his or her ABI in the bail application.

8.2 ABI does not fall within "intellectual disability" or "mentally ill" in s 32(1)(b)(v)

Neither "intellectual disability" nor "mentally ill" is defined for s 32(1)(b)(v), but it is doubtful whether a person with ABI would fall within these terms unless they also had an intellectual disability or mental illness.

Although intellectual disability is not defined in relation to s 32(1)(b)(v), the commonly accepted meaning of the term is a condition that affects learning. To be diagnosed with an intellectual disability a person must usually have:

- acquired the disability before the age of 18;
- an IQ of 70 or under; and
- deficits in at least 2 areas of adaptive behaviour.

Given the number of people in the community and in custody with ABI, and the range of causes of ABI, there will be some accused persons with some of these features. However, unless the person meets the definition of "intellectual disability" they will not have their ABI taken into account in a bail application. For example, an accused with ABI would not fall within the definition of intellectual disability if as an adult they received a brain injury as a result of a stroke, an assault or a car accident. Similarly, a person may have an ABI acquired before the age of 18 that does not affect their IQ.

We note that intellectual disability is defined in relation to s 37 *Bail Act*, which covers restrictions on imposing bail conditions. This provision is referred to at 13.1 of the Commission's Questions for Discussion. In our view, the definition of "intellectual disability" in s 37 does not apply to s 32 and in any case would not include those persons with ABI but without an intellectual disability.

Similarly, as discussed above, ABI can cause mental illness, but a person with ABI will not necessarily have a mental illness so as to fall within s 32(1)(b)(v).

8.3 Limited scope for a wide interpretation of s 32(1)(b)(v)

The terms in the *Bail Act* cannot be interpreted widely so as to include ABI.

⁷ Section 32(1)(b) *Bail Act* 1978 (NSW).

⁸ Section 32(1)(b)(v) *Bail Act* 1978 (NSW).

The *Bail Act* has been described as a self-contained code,⁹ and s 32 a "mandatory, exhaustive and exclusive statement of the criteria to be considered in bail applications".¹⁰

In *R v Hilton*, Street CJ observed at 749:

"The legislature could hardly have chosen words which would more clearly indicate an intention to prescribe exhaustively in s 32 the approach to be taken in determining a bail application."

In these circumstances, in our view courts are likely to interpret the terms "intellectual disability" and "mental illness" in s 32(1)(b)(v) strictly so they will not include ABI unless the person's condition also meets the commonly accepted meaning of those terms.

The Second Reading Speech on the introduction of s 32(1)(b)(v) sheds no further light on the interpretation of that section. The Attorney-General merely noted:

"If the accused person is under the age of 18 or has an intellectual disability [sic], the court must consider any special needs of the person arising from that fact when assessing the interests of the person in making a determination about the grant of bail."

The Second Reading Speech does, however, recognise that "intellectually or mentally disabled persons" are vulnerable as accused persons.

The lack of recognition of ABI in s 32 of the *Bail Act* is particularly important given some accused may not themselves recognise that they have ABI or may be reluctant to disclose this fact to others. The effects of ABI for some people may make it more likely an accused person will be refused bail. For example, as a result of their ABI an accused person may be homeless, have unstable living conditions, be unemployed, or have a prior criminal record.

A person with ABI may have difficulty meeting their bail conditions because of the effects of ABI including poor memory, apathy and impaired organisation and planning, which increase the likelihood of failing to report on bail or failing to appear.

Even if a more expansive meaning could be given to the terms "intellectual disability" and "mentally ill", unless ABI is expressly referred to in the legislation it will continue to be a "hidden disability" affecting many accused in NSW.

9. RESPONSE TO ISSUES AND QUESTIONS IN TERMS OF REFERENCE

9.1 ABI should be included in bail application factors

The Commission's Terms of Reference include:

- "2. whether the Bail Act should include a statement of the factors to be taken into account in determining a bail application and if so, what those factors should be"; and
- "7. whether special provisions should apply to vulnerable people including Aboriginal people and Torres Strait Islanders, cognitively impaired people and those with a mental illness. In considering this question particular attention should be given to how the latter two categories of people should be defined".

⁹ *R v Hilton* (1987) 7 NSWLR 745 at 751; *R v Kissner* (unreported, NSWSC, 17 January 1992) per Hunt CJ; *R v Veleviski* [2000] NSWCCA 445 at [14]; Attorney-General Terry Sheahan MP, Second Reading Speech, *Bail (Amendment) Bill* 1987, 6 May 1987. See also s 62 *Bail Act* 1978 (NSW).

¹⁰ *R v Hilton* (1987) 7 NSWLR 745; see also *R v Hall* (unreported, NSWSC, 16 January 1997) per Sully J; *R v Veleviski* [2000] NSWCCA 445 at [14]; *R v Wright* [2005] NSWSC 588.

The Commission's Questions for Discussion also ask in Sections 8 and 13:

- "8.1 In relation to s 32, *Criteria to be considered in bail applications*, should there be prescribed criteria? If so, what should those criteria be?";
- "8.8 ... should the subsidiary considerations currently prescribed in relation to each primary criterion be changed in any way?";
- "8.11 Are any other changes required to the way the criteria operate?"; and
- "13.1 Should the provisions of the Bail Act in relation to "intellectual disability" (a defined term in the legislation) or mental illness be expanded to include people with a wider range of cognitive and mental health impairments? If so, which types of cognitive and mental health impairments should be included?"

In response to points 2 and 7 of the Terms of Reference and Sections 8 and 13 of the Questions for Discussion, and in light of the above submissions, we recommend that:

- if a statement of factors is to be taken into account in determining a bail application, these factors should include ABI;
- this factor should be part of special provisions for vulnerable people already included as subsidiary considerations in s 32(1)(b)(v) *Bail Act*;
- as part of these reforms, an umbrella definition of "mental impairment", which expressly includes ABI, should be included in s 32(1)(b)(v) *Bail Act*; and
- ABI should only be a factor in favour of a grant of bail, given the vulnerability of people with ABI in custody.

We considered two possible routes to include ABI in the statement of factors to be taken into account in determining a bail application under s 32 *Bail Act*.

First, a reference to ABI could be added to the wording of s 32(1)(b)(v) in addition to intellectual disability and mental illness.

This is not our preferred approach. As set out in section 8.2 of our submissions to the earlier reference, we support a broad umbrella definition of mental impairment. A broad definition makes it more likely that all conditions in which a person has a disability relating to cognition, reason and volition will be recognised, rather than just the better known and understood disabilities. It makes it more likely that the disability's impact on the person's actions and the person's needs arising from their disability will be taken into account in the criminal justice system.

There are many points in the criminal justice system where a person's mental and cognitive condition may be relevant. An umbrella definition assists to promote consistency in the application of the law to people with cognitive disability across the criminal justice system. At present, mental illness and cognitive impairment are defined differently and taken into account differently (despite equal claim for consideration) at different stages of a person's journey from the time of charge until the matter is disposed of. Indeed, even within particular stages of the system there are different references to and definitions of mental and cognitive impairments. Examples include that "intellectual disability" is defined in relation to s 37 *Bail Act*, but not in relation to s 32 and that intellectual disability and mental illness are taken into account in s 32 in considering whether to grant bail but only intellectual disability is taken into account in s 37 when considering bail conditions.

We note that we do not necessarily support the term "mental impairment" for the umbrella definition, but we have adopted that term here for consistency with the Consultation Papers in the Commission's earlier reference.

We further note that the Commission's Questions for Discussion in Section 8 ask in relation to s 32:

- "8.5 Should prescribed primary criteria be exhaustive?"; and
- "8.9 Respectively in relation to each primary criterion, should subsidiary considerations be exhaustive?"

Even if the primary or subsidiary considerations in s 32 were amended so that they were no longer exhaustive, we consider a reference to an umbrella definition of mental impairment, with express reference to ABI (along with mental illness, intellectual disability and possibly other conditions) is essential. Legislative recognition along with training of authorised officers and courts is necessary to raise awareness of mental and cognitive impairment, in particular ABI, and its effects on accused persons and those in custody.

If the special needs of a person with ABI are included under s 32 *Bail Act*, a further reform is required to ensure that this can only be a factor in favour of a grant of bail.

Generally the interests of a defendant in the class of vulnerable people described in s 32(1)(b)(v) would suggest a need to be released to bail. However, unlike ss 32(1)(b)(ii) and (iii), the *Bail Act* does not state that the special needs of a vulnerable person should only be taken into account as a factor in favour of a grant of bail.

Due to the inadequacy of services for people with ABI (particularly those people with ABI with a dual diagnosis or challenging behaviour which makes it more likely they will come into contact with the criminal justice system) an authorised officer or court may say the person's special needs cannot be met in the community and therefore justify withholding bail on the basis of s 32(1)(b)(v).

We submit that such a result is open under the legislation as currently drafted, though it would be against the intent of the legislation and would be discriminatory.

Because of the cognitive effects of ABI detailed above, a person with ABI in custody is far more likely to be the victim of an assault or to make incriminating statements (whether or not they are in fact guilty). Accordingly, the fact that a person has ABI should only ever be considered in favour of the grant of bail.

Whether a person also presents a flight risk or is a danger to themselves or the community is already separately taken into account as part of the existing provisions in ss 32(1)(a), 32(1)(b)(iv), 32(1)(b1) and 32(1)(c) *Bail Act*.

We therefore submit that s 32(1)(b)(v) of the *Bail Act* be amended to ensure that a person's vulnerability cannot be used as a reason to refuse bail or impose more onerous conditions than would be imposed on a person who was not in the class of people falling within s 32(1)(b)(v).

In line with these recommendations, our suggested amendments to s 32(1)(b)(v) are set out below:

32 Criteria to be considered in bail applications

(1) In making a determination as to the grant of bail to an accused person, an authorised officer or court shall take into consideration the following matters (so far as they can reasonably be ascertained), and the following matters only:

...

(b) the interests of the person, having regard only to:

...

(v) if the person is under the age of 18 years, or is an Aboriginal person or a Torres Strait Islander, or has a mental impairment ~~an intellectual disability or is mentally ill~~, any special needs of the person to be free arising from that fact.

...

(8) In this section:

Mental impairment includes a mental illness, and/or cognitive disability, however and whenever caused, whether congenital or acquired.

Mental illness means [insert appropriate definition. We have no view on the definition of 'mental illness'].

Cognitive disability means a disability in comprehension, reason, judgment, learning, volition or memory, that is the result of any damage to, or disorder, developmental delay, impairment or deterioration of, the brain or mind including:

- (a) intellectual disability;
- (b) acquired brain injury; and
- (c) [insert other relevant conditions].

9.2 ABI should be included in restrictions on imposing bail conditions

In addition to the Commission's Terms of Reference items 2 and 7, the Questions for Discussion ask in relation to bail conditions:

- "9.3 What matters should be considered before such requirements or conditions are imposed, and what limitation should there be on the imposition of such requirements or conditions?"; and
- "9.17 What provision could be made in the legislation to facilitate compliance with conditions or requirements under a grant of conditional bail?"

We strongly support consideration of a person's ability to understand and comply with bail conditions when setting those conditions. To fail to do so is to set the person up to breach their bail.

We note a person's ability to comply with their bail conditions depends not only on their cognitive capacity to understand the bail conditions but also factors such as:

- the person's cognitive capacity to organise themselves. People with ABI often have impaired ability to organise. This can affect their ability to comply with many bail conditions, most obviously a condition to report to police;
- the person's cognitive capacity to motivate themselves to take the actions required to comply with the condition. Again, a person with ABI may lack motivation and simply not have the cognitive capacity to comply; and
- the availability of resources needed to comply. This may be something as simple as the fact that the person with ABI does not have transport to report to police or to enable them to avoid a certain area as part of their bail conditions. It may be something as complex as the need for a support person to divert a person from the fixed thinking that makes them continue to contact a person in breach of their bail. Again, fixed thinking may be a symptom of ABI.

Section 37 *Bail Act* sets out restrictions on imposing bail conditions. It recognises that a person with an intellectual disability may have difficulty understanding and/or complying with bail conditions and requires the authorised officer or court to be satisfied that the conditions imposed are appropriate.

Just as a person with intellectual disability may have difficulty understanding and/or complying with a bail condition, so too may a person with ABI. We therefore recommend that s 37 be expanded to require an authorised officer or court to be satisfied the bail condition is appropriate having regard to the ability of any person with *mental impairment* (as defined in our suggested amendment to s 32) to understand or comply with the bail condition. Section 37 should be amended as follows:

"37 Restrictions on imposing bail conditions

...

(2A) Before imposing a bail condition on an accused person who has a mental impairment ~~an intellectual disability~~, the authorised officer or court is to be satisfied that the bail condition is appropriate having regard (as far as can reasonably be ascertained) to the capacity of the accused person to understand or comply with the bail condition.

...

(5) In this section:

mental impairment has the same meaning as in Section 32.

9.3 Training to assist authorised officers and judicial officers take ABI into account

The Questions for Discussion ask in Section 19:

"19.1 In relation to the aspects of the legislation that are the subject of this reference, is there any need for revision of forms and subsidiary processes? Please be specific."

To assist in raising awareness of ABI and implementing the above recommended reforms in practice, authorised officers and judicial officers who consider bail applications should be provided with training and written guidelines to assist in recognising and considering the impact of cognitive impairment and mental illness.

As bail decisions occur on a continuum of contact with the criminal justice system, police should also be given guidelines to recognise ABI at the earliest opportunity.

Because ABI is still very much a "hidden disability", we emphasise the importance of educating authorised officers and judicial officers about ABI.

The Brain Injury Association of NSW would be happy to consult with the Commission in detail on the formulation and drafting of any training material and guidelines.

9.4 Police custody screening questions to help identify ABI

The Questions for Discussion in Sections 13 and 19 ask:

- "13.2 Should any other protections apply in relation to people who have a cognitive or mental health impairment?";
- "13.3 Are any changes to bail law required to facilitate administrative or support arrangements in relation to people [with] cognitive or mental health impairments?"; and
- "19.1 In relation to the aspects of the legislation that are the subject of this reference, is there any need for revision of forms and subsidiary processes? Please be specific."

When a person is taken into custody they are assessed in the cells through a screening questionnaire. The police screening process is referred to in the *NSW Police Force Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)*, in particular at pages 21 and 39.¹¹ We understand that police use a standard set of questions as part of this screening process, although the precise questions do not appear to be publicly available.

We recommend that in addition to questions about mental health issues and suicidal ideation, questions be added to assist in identifying ABI. Such questions may include:

- "Do you have an acquired brain injury?"; and
- "Have you had a head injury which resulted in a loss of consciousness?"

We recommend that if questions about ABI are to be included in the screening questions for a person brought into custody, the Brain Injury Association of NSW be consulted in formulating these questions.

Police custody managers are already required to assess whether a detained person is a "vulnerable person" under Division 3 *Law Enforcement (Powers and Responsibilities)*

¹¹ The Code of Practice is available at:
http://www.police.nsw.gov.au/about_us/policies__and__procedures/legislation_list/code_of_practice_for_crime

Regulation 2005 (LEPRR). Under cl 24(1), "vulnerable persons" include those who have impaired intellectual or physical functioning. Under cl 23(1), "impaired intellectual functioning" means:

- "(a) a total or partial loss of the person's mental functions, or
- (b) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction, or
- (c) a disorder, illness or disease that affects the person's thought processes, perceptions of reality, emotions or judgement, or that results in disturbed behaviour."

We note that this definition is likely to apply to many people with ABI, although it differs from the umbrella definition proposed above for ss 32 and 37 *Bail Act*. Given the lack of recognition of ABI and its diverse effects, the definition in cl 23(1) would benefit from a specific reference to ABI in line with the umbrella definition.

Under cl 25 LEPRR, a custody manager is required to assist a vulnerable person in exercising their rights in relation to police investigations and questioning.

Custody managers and police are required to have regard to guidelines in Schedule 2 LEPRR, which sets out factors to assess whether a detained person falls within the definition of "impaired intellectual functioning" and is therefore a "vulnerable person". These include whether the person appears:

- "(a) to have difficulty understanding questions and instructions, or
- (b) to respond inappropriately or inconsistently to questions, or
- (c) to have a short attention span, or
- (d) to receive a disability support pension, or
- (e) to reside at a group home or institution, or be employed at a sheltered workshop, or
- (f) to be undertaking education, or to have been educated at a special school or in special education classes at a mainstream school, or
- (g) to have an inability to understand a caution given to the person under section 122 of the Act."

As part of steps to ensure ABI is recognised at the earliest opportunity, we recommend that specific questions to attempt to identify ABI should be included in the Guidelines set out in Schedule 2 LEPRR.

9.5 Other reform options for consideration

The Commission's Questions for Discussion ask in Section 13:

"13.2 Should any other protections apply in relation to people who have a cognitive or mental health impairment?"

We have considered a number of support mechanisms which might assist people with ABI. We set out these options, their potential benefits and our concerns in the table below.

Ultimately, we are unable to recommend these options because of the drawbacks for many people with ABI.

Option for reform	Benefits	Concerns
<p>Designate a "responsible person", such as a family member, to sign or co-sign bail conditions on behalf of a person with ABI.</p>	<p>Assists the person with ABI to understand and comply with bail conditions. Should increase the support from the 'person responsible' for the person with ABI to comply with the bail conditions.</p>	<p>A person with ABI will not necessarily have a "responsible person" willing to sign bail conditions on their behalf, which may result in the person remaining in custody.</p>
<p>Allow service providers to be designated as a "responsible person" for signing bail conditions on behalf of a person with ABI.</p>	<p>Provides courts with greater reassurance a person is receiving the support necessary to enable compliance with bail. Will assist a person with ABI to understand and comply with bail conditions.</p>	<p>For many reasons, there are considerable numbers of people with an ABI who are not supported by a service provider (and this frequently applies to people with both an ABI and a mental illness, or ABI and addiction).</p> <p>The decision whether or not to grant bail for a person with ABI may be delayed, and the person may be held in custody, while a service provider reviews the case. There may also be significant waiting time for a review or assessment.</p>
<p>Require a person with ABI to report to a service provider rather than police.</p>	<p>Reduces the contact a person with ABI will have with police.</p> <p>May increase compliance with reporting obligations.</p> <p>May increase ability of service provider to support person, given person's obligation to attend at service provider.</p>	<p>As above, may not be able to access a suitable service provider.</p> <p>A service provider is not a party to the bail proceedings and so cannot be bound by any order of the court in relation to bail or reporting requirements.</p> <p>Changes the nature of the relationship between the person with ABI and the service provider.</p>
<p>Where police or a court determines that a person has ABI and bail is refused, the person's ABI should be communicated to the remand centre where the person will be held.</p>	<p>Assists in the protection, management and support of persons with ABI in the criminal justice system.</p>	<p>A person will have to consent to the disclosure that they have ABI.</p> <p>Whether a person has ABI is difficult to determine, may be wrongly suspected in some cases and may be missed in others.</p> <p>A person may be stigmatised because of their ABI.</p>

We are unable to recommend these options without further consideration because of their potential to adversely affect some people with ABI. We hope it is helpful, nevertheless, to raise these options as there are benefits to these options. It may be that they can be implemented in such a way that they do not disadvantage people with ABI who have multiple diagnoses and/or limited support.

Thank you for the opportunity to provide submissions to the Commission's reference on bail law in NSW. If you would like to discuss any aspect of these submissions, please contact in the first instance Anne Cregan, Blake Dawson, (02) 9258 6179.

Schedule: Effects of Acquired Brain Injury

Cognitive Effects

- Difficulty processing information (decreased speed, accuracy and consistency)
- Shortened attention span
- Inability to understand abstract concepts
- Impaired decision-making ability
- Inability to shift mental tasks or follow multi-step directions
- Poor concentration
- Memory loss or impairment
- Language deficit (difficulty expressing thoughts and understanding others)
- Problems learning new information
- Reduced memory for new information
- Problem-solving, planning and organisational difficulties
- Fixed patterns of thinking
- Difficulty interpreting social cues

Perceptual Effects

- Changes in vision, hearing and sense of touch
- Loss of sense of time, space and spatial orientation
- Disorders of smell and taste
- Altered sense of balance
- Increased pain sensitivity

Physical Effects

- Persistent headache
- Extreme mental and/or physical fatigue (exacerbating poor memory, concentration, planning etc)
- Disorders of movement: gaiting, ataxia, spasticity and tremors
- Seizure activity (traumatic epilepsy)
- Impaired small motor control
- Sensitivity to light and/or noise
- Sleep disorders
- Paralysis

- Speech that is unclear due to poor condition of muscles in the lips, tongue and jaw and/or poor breathing pattern
- Weakness and clumsiness
- Chronic pain

Behavioural and Emotional Effects

- Irritability and impatience
- Impulsivity
- Self-centredness
- Lack of insight
- Reduced tolerance for stress
- Lack of initiative – apathy
- Dependant (failure to assume responsibility for one's actions)
- Denial of disability
- Lack of inhibition (may result in aggression, swearing and inappropriate sexual behaviour)
- Inflexibility (causing difficulty recognising and changing thoughts and behaviour)
- Flattened or heightened emotional responses and reactions
- Sadness and/or grief
- Depression and/or anxiety
- Loss of self esteem
- Change in personality including difficulty in emotional control
- Uses of substances such as alcohol and other drugs