

DIVERSIONARY PATHWAYS FOR INDIGENOUS YOUTH WITH FASD IN WESTERN AUSTRALIA

Decolonising alternatives

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The over-representation of Indigenous youth in the Western Australian criminal justice system has been described as a source of national shame.¹ Rates of incarceration are the highest in the nation: around 80 per cent of youth in detention in Western Australia are of Indigenous descent, while Indigenous youth represent only 6 per cent of the population.² In recent years there has been a growing awareness that Indigenous youth are at a disadvantage because of a high incidence of cognitive disability, preventing meaningful participation in the justice process and leading to enmeshment in the correctional system.³ Foetal Alcohol Spectrum Disorders ('FASD') is increasingly considered to be a significant barrier preventing many Indigenous children from receiving fair treatment in the criminal justice system.⁴

This article reports on a study being undertaken in three Indigenous communities in the West Kimberley region of Western Australia: Fitzroy Crossing, Derby and Broome. The study is designed to develop diversionary alternatives for young people with FASD.⁵ In what we call a 'decolonising approach', the particular focus of the study is on diversion into community owned and managed structures and processes, as opposed to just government owned and controlled, if community based or 'situated', systems.⁶ We propose this approach on the premise that community owned initiatives may provide a culturally secure and appropriate environment for stabilising children with FASD not possible within mainstream structures. Our consultations with Indigenous stakeholders found widespread support within Indigenous organisations and, increasingly, within mainstream service providers, for culturally secure initiatives that draw on the authority of Elders and devolve the care and management of young people to community controlled processes, particularly 'on-country'.

Foetal Alcohol Spectrum Disorders

FASD is an umbrella term that encompasses a range of effects resulting from prenatal exposure to alcohol,⁷ including diagnoses of Foetal Alcohol Syndrome ('FAS'), Partial FAS ('pFAS') to Alcohol Related Birth Defects. The impairments associated with FASD are permanent and irreversible.⁸ FASD is disproportionately diagnosed amongst Australia's Indigenous peoples.⁹ This is attributable to socio-cultural and socio-economic issues rather than genetic dispositions.¹⁰ The primary effects of FASD include difficulties with memory, with linking actions

to consequences, and with controlling impulses. FASD is therefore problematic for traditional sentencing principles such as individual and general deterrence.¹¹ Furthermore, sufferers may be unable (rather than willfully unwilling) to comply with court orders to attend programs and fulfill requirements.¹² Sufferers may also be disadvantaged in police interviews, and have an exaggerated tendency towards gratuitous concurrence in encounters with authority. In short, the usual approaches of the police and the justice system are meaningless, even counterproductive, when dealing with accused persons with a severe cognitive impairment.

Consultations

The consultation process for the research thus far has involved a range of interviews and focus groups with key individuals and groups working in the FASD space. To ensure our research aligns with the aspirations of Indigenous people in the West Kimberley, we formed partnerships with three prominent Indigenous led and managed agencies: *Nindilingarri Cultural Health* in Fitzroy Crossing; *Garl Garl Walbu Alcohol Association Aboriginal Corporation* in Derby and *Life Without Barriers* in Broome. These organisations were identified on the basis of existing relationships of trust with these bodies, formed over several decades of research in the Kimberley by Harry Blagg, and because each was engaged in work that brought them into contact with youths and families where FASD was an issue.

The research is supported by the Magistrates Court and various court user groups (including police prosecutors, the Aboriginal Legal Service, Legal Aid and Regional Youth Justice Services) and we were able to accompany the West Kimberley Magistrate on circuit, including court sittings in Broome, Derby and Fitzroy Crossing. There have been extensive interviews and focus groups with key stakeholders in the West Kimberley region. We have supplemented this place-based research with discussions in Metropolitan Perth, having hosted a roundtable at the University of Western Australia ('UWA') with key agencies and participated in a number of forums, including a FASD Symposium at UWA.¹³

FASD in the West Kimberley

The issue of FASD in the West Kimberley was highlighted by campaigns initiated by Bunuba women June Oscar, Emily Carter (Marninwarntikura Women's Resource Centre) and Maureen Carter (Nindilingarri

REFERENCES

1. Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system* (2011) 36–7 [2.115].
2. Amnesty International, "There is always a brighter future": Keeping Indigenous kids in the community and out of detention in Western Australia' (Report, May 2015) 12.
3. Heather Douglas, 'The sentencing response to defendants with Foetal Alcohol Spectrum Disorder' (2010) 34(4) *Criminal Law Journal* 221.
4. See, eg, Larry Chartrand and Ella Forbes-Chilibeck, 'The Sentencing of Offenders with Fetal Alcohol Syndrome' (2003) 11 *Health Law Journal* 35, 40; Committee to Study Fetal Alcohol Syndrome, *Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention, and Treatment* (National Academy Press, 1996) <<http://www.nap.edu/openbook.php?isbn=0309052920>>.
5. This project is supported by a grant from the Australian Institute of Criminology through the Criminology Research Grants Program. The views expressed are the responsibility of the authors and are not necessarily those of the Australian Institute of Criminology.
6. Following Harry Blagg, *Crime, Aboriginality and the Decolonization of Justice* (Federation Press, 2008).
7. Douglas, above n 3, 221.
8. Timothy E Moore and Melvyn Green, 'Foetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System' (2009) 19 *Criminal Reports* 99, 99.
9. Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *FASD: The Hidden Harm* (2012) 33 [2.97].
10. Colleen O'Leary, 'Fetal Alcohol Syndrome: Diagnosis, Epidemiology and Developmental Outcomes' (2004) 40 *Journal of Paediatric Child Health* 2.

Cultural Health) as part of a broader campaign to reduce alcohol consumption in Fitzroy Crossing and publicise its catastrophic effects. In 2015, rates of FAS/pFAS of 12 per 100 children were reported in Fitzroy Crossing.¹⁴ This is the highest reported prevalence in Australia and on par with the highest rates internationally.¹⁵ Currently, the FASD space in Western Australia is largely the domain of clinicians, who have initiated new screening and assessment mechanisms in the West Kimberley in close partnership with Indigenous organisations. The Telethon Kids Institute, based in Perth, is leading valuable research into the prevalence of FASD amongst detainees in Western Australia's juvenile detention centre, 'Banksia Hill', in Perth, with a view to developing management plans and through care support.¹⁶ A full assessment of FASD can require input from a developmental paediatrician, a speech pathologist, a neurologist, an occupational therapist and a psychologist. The process can be slow, and expensive.

However, we felt it was essential to also have a socio-legal perspective on the FASD issue and explore pathways out of the justice system. Criminological research in Australia and internationally warns that even well intentioned intervention can have the unintended consequence of drawing young people deeper into the judicial and correctional systems in order for them to receive treatment and support.¹⁷ In Western Australia the stakes are particularly high given that the youth justice system is heavily dominated by an adult, correctional philosophy focused on punishment and compliance, rather than welfare and rehabilitation.¹⁸ It does not offer a therapeutic environment within which to begin to stabilise children with disabilities of this kind.

Diversions practices favour the least intrusive option at any point of interaction between an accused person and the justice system. Intervention must be a last resort and commensurate with the scale of offending, with a presumption towards non-intervention where possible. The system must be employed parsimoniously and subject to rigorous gatekeeping.¹⁹ The problem with this minimalist version of diversion is that it reflects an essentially Eurocentric worldview in which children, left to themselves, will mature out of crime and develop a stake in conformity. In the context of many Indigenous youth, particularly with FASD and other disabilities, maturation does not bring with it desistance from offending, less conflict with the police, or access to the mainstream world of work and domestic stability. To be effective, diversion has to involve diversion *not just out of one system but into another*. It is not just a question of doing less harm, but of promoting a positive good by channelling Indigenous youth into non-stigmatising therapeutic alternatives, particularly in the emerging sphere of Indigenous on-country initiatives. Furthermore, diversion of this kind provides a mechanism for implementing the key recommendations of the *Royal Commission into Aboriginal Deaths in Custody* calling for greater investment in, and referral to, community programs run by Indigenous organisations.²⁰

'The disappeared': Indefinite detention under WA Law

In Western Australia, a diagnosis of FASD can trigger indefinite detention under the *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)* ('the Act'), where a young person is found unfit to stand trial for a criminal offence that carries a term of imprisonment. The Act does not contain special procedures for young people. If a court finds a young person is unfit, and that he or she 'will not become mentally fit to stand trial within 6 months', the court has two options: either release the accused; or make a custody order (where imprisonment is a sentencing option). Where a court makes a custody order, a young person with FASD can only be detained in a juvenile detention centre or a declared place designed to house and support accused young persons with cognitive impairment who are detained under the Act. The young person cannot be detained in a mental health facility unless they also suffer from a treatable mental illness. Until very recently, Western Australia did not have a declared place to house and support accused persons with cognitive impairment. This meant that a young person with cognitive impairment could only be detained in a juvenile detention centre pursuant to a custody order. Western Australia's first and only declared place for the purposes of the Act, the Bennett Brook Disability Justice Centre, opened in Perth in August 2015. This is a welcome development. However, the Centre has less than 10 beds and does not cater for children under 16 years of age.

The effect of a custody order for a person with FASD is essentially 'indefinite imprisonment without significant prospect of treatment of the conditions which have made... [the accused] unfit to plead or which might have precipitated the offending which the State alleges.'²¹ Lawyers representing unfit young persons with FASD are therefore faced with the dilemma of raising unfitness, which could result in their client being indefinitely detained without trial, or advising their client to plead guilty to the charged offences as any custodial sentence imposed will be time limited and therefore shorter.²²

The indefinite incarceration of mentally impaired accused persons with FASD was recently highlighted by the case of Rosie Anne Fulton (referred to as 'one of the disappeared' by a lawyer we interviewed), a young Aboriginal woman born with FASD. Rosie was imprisoned for 21 months in Eastern Goldfields Regional Prison without support or treatment, after being found unfit to stand trial on charges of reckless driving and motor vehicle theft. Media attention and petitioning of the government precipitated her release.²³ The Western Australian Attorney-General's Department is currently reviewing the Act, and the Attorney General indicated in the media that he expected to receive the report of the review in September 2015.

11. See, eg, Douglas, above n 3; David Milward, 'The Sentencing of Aboriginal Accused with Fetal Alcohol Spectrum Disorder: A Search for Different Pathways' (2014) 47(3) *University of British Columbia Law Review* 1025, 1027.

12. The imposition of requirements on an accused with suspected FASD was described as 'unrealistic' in *AH v Western Australia* [2014] WASCA 228 (10 December 2014) [3] (Martin CJ, Mazza JA and Hall J).

13. Foetal Alcohol Spectrum Disorders: Sharing Solutions Symposium, University Club of Western Australia, 13 August 2015. Organised by the School of Advanced Studies, UWA.

14. James Fitzpatrick et al, 'Prevalence of fetal alcohol syndrome in a population-based sample of children living in remote Australia: The Lililwan Project' (2015) 51(4) *Journal of Paediatrics and Child Health* 450.

15. *Ibid* 450.

16. Telethon Kids Institute, 'Research Spotlight: Banksia Hill FASD Project' <http://alcoholpregnancy.telethonkids.org.au/media/1294107/banksia_web-version.pdf>.

17. See, eg, Christopher Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 3rd ed, 2007).

18. Harry Blagg, *Youth Justice in Western Australia: Prepared for the Commissioner for Children and Young People WA* (17 December 2009) Commissioner of Children and Young People <<http://www.ccp.wa.gov.au/files/article/Harry%20Blagg%20report%20-%20Youth%20Justice%20in%20Western%20Australia%20-%20FINAL.pdf>>.

19. See Barry Goldson (ed), *Dictionary of Youth Justice* (Routledge, 2013).

20. Recommendations 62, 235, 236 and 239 in Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) 252, 177, 183.

21. *State of Western Australia v Tax* [2010] WASC 208, [19] (Martin CJ).

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Better practice

Reform of the Act is urgently required to provide judicial officers with more options on finding unfitness — beyond ‘one extreme or the other’²⁴ — and to promote the rights of young people. There are two legislative schemes that could be drawn on to improve the Western Australian regime. In Australia, the Victorian model offers a more child focused approach, being the only Australian jurisdiction with separate provisions for young persons found unfit to stand trial and prohibiting the placing of children in custody unless there are no practicable alternatives.²⁵ Internationally, New Zealand provides a best practice model for young people with FASD. The *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* (NZ), in keeping with its approach to managing young people enshrined in the *Children, Young Persons and their Families Act 1989* (NZ), mandates that, wherever possible, a young person’s family must be fully engaged in decision making.²⁶ This facilitates greater respect for the responsibilities, rights and duties of a young person’s family or community pursuant to the *Convention on the Rights of the Child* art 5.²⁷ In line with the Inspector of Custodial Services, we also advocate the creation of ‘community based alternatives to custody orders for people who are found unfit to stand trial but require some degree of supervision’²⁸ — and these community based alternatives, we argue, need to be grounded in a decolonising approach.

Secondary disabilities

There are additional problems potentially confronting a person with FASD. Left undiagnosed and mismanaged, FASD sufferers may develop forms of ‘secondary disability’.²⁹ Secondary disabilities are a cluster of social and psychological problems that develop as a result of FASD’s primary effects being exacerbated by repeated negative contact with the criminal justice and related systems; inadequate support and misdiagnosis (particularly where children are misdiagnosed as having a mental health condition, such as ADHD or bi-polar disorder); existence on the margins of society; and institutionalisation. Secondary disability, therefore, is a consequence of the interaction between a person’s impairments and barriers in the physical, attitudinal, communication and social environment. Research indicates that over 90 per cent of FASD sufferers will be diagnosed with a psychiatric disorder during their lifetime.³⁰

The primary effects of FASD also affect sufferers’ ability to engage in school and employment.³¹ Consequently, 60 per cent of FASD sufferers have disrupted or curtailed school attendance that may exacerbate existing cognitive deficiencies.³² Further, 30 per cent of FASD sufferers will develop substance abuse problems.³³ These secondary effects increase FASD sufferers’ susceptibility to contact with the criminal justice system.³⁴ One of the concerns expressed by justice professionals and community members is that the high prevalence of FASD in the West Kimberley will, unless adequately responded to, lead to increased rates of depression and anxiety disorders amongst young people.

‘Front end’ diversion: The police and FASD

Research and critical scholarship on FASD and the justice system has, understandably, focused on the importance of judicial management of FASD cases. Our research indicates that more could be achieved at the front-end of the justice system by its principal gatekeepers — the police — working with relevant agencies. Western Australia already has a number of diversionary options open to the police under the *Young Offenders Act 1994* (WA), including a formal or informal warning, or, for more serious cases, referral to WA’s flagship diversionary scheme, the Juvenile Justice Teams (‘JJTs’). The latter have been under-utilised in relation to Indigenous youth in Western Australia, but there are positive signs that, in the West Kimberley at least, they are being used more frequently by the police.³⁵

Policing remains an important issue. Good relationships between Indigenous organisations, NGOs and the police in the West Kimberley have resulted in robust multi-agency coordination. There are nonetheless some concerns about police practice, particularly around the supervision of young people on bail and remand. The police in Broome often monitor restrictive curfew conditions by ‘torching’ (where police officers repeatedly appear in the night, shine their torches through the windows, and wake the household to ensure children on bail are fulfilling curfew conditions).³⁶ On the other hand, increasingly closer working relations between clinicians, legal services, Indigenous organisations and the police offers the potential for creating screening and assessment for FASD at the gatekeeping stage, with JJTs acting as a conduit for entry into community owned networks of care and support.

22. Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies*, February 2013. See also the comments of Reynolds J in *The State of Western Australia v BB (a child)* [2015] WACC 2.

23. See, eg, ABC Television, ‘Intellectually impaired Aboriginal woman Rose Fulton to be freed after 21 months in jail with no conviction’, *Lateline*, 26 June 2014 (John Stewart) <<http://www.abc.net.au/news/2014-06-25/aboriginal-woman-in-jail-without-conviction-to-be-freed/5550790>>.

24. *The State of Western Australia v BB (a child)* [2015] WACC 2 (Reynolds J).

25. *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 38J(1), 38ZH(7).

26. *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* (NZ) s 12(a), (b).

27. Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

28. Office of the Inspector of Custodial Services, *Mentally impaired accused on ‘custody orders’: Not guilty, but incarcerated indefinitely* (2014) Office of the Inspector of Custodial Services, WA <[http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3911629ae105e733bb91cb8e48257cf30029ad45/\\$file/1629.pdf](http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3911629ae105e733bb91cb8e48257cf30029ad45/$file/1629.pdf)>.

29. Ann Streissguth and Jonathan Kanter (eds), *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* (University of Washington Press, 1997).

30. Kieran D O’Malley, ‘Fetal Alcohol Spectrum Disorders: An Overview’ in Kieran D O’Malley (ed), *ADHD and Fetal Alcohol Spectrum Disorders* (Nova Science Publishing, 2007) 11.

31. Justice Committee of FASD Ontario, *FASD: After Sentencing* (2007).

32. Douglas, above n 3, 224, citing Larry Burd et al, ‘Fetal Alcohol Syndrome in the Canadian Corrections System’ (2003) 1 *Journal of FAS International* 2.

A new kind of mobile 'needs focused' court for rural/remote locations

There are a number of existing options in Australia that could provide ideas for a flexible, mobile response to the FASD problem. Although in its infancy, our proposed model is a hybrid version of schemes, initiatives and practices already in existence, particularly in Victoria. It takes elements from the Koori Court model, with its focus on the involvement of Elders in the court process, and the Neighbourhood Justice Centre ('NJC') in Collingwood. The NJC has a single magistrate, a comprehensive screening process for clients when they enter the court, and rapid entry into treatment. A similar process could be available on circuit. The screening mechanisms would not involve the full panoply of professionals required for a full diagnosis (noted earlier); they would likely need to be reserved for cases where a young person faces a custodial sentence. A 'lite' screening tool could be developed that a psychologist and youth justice worker could use to identify youths potentially on the spectrum. This would be sufficient to trigger an application for the Magistrate to remand the case under *Young Offenders Act 1994* (WA) ss 67 and 68 which allow for alternative forms of punishment to be carried out by responsible adult(s). This needs focused approach shifts the focus from processing offenders to identifying solutions and places emphasis on: the co-location of services; a trauma informed practice; a no wrong door approach to treatment; and respect for Indigenous knowledge. The West Kimberley may be an ideal place to pilot some kind of 'mobile "needs focused" court' as it already has a single Magistrate with a deep understanding of local communities able to take on a judicial monitoring role, and a range of Indigenous services, able, with the right support, to work with affected youth and their families, including on-country options.

Community owned, on-country alternatives

Research indicates that young people with FASD require significant levels of support (an 'external brain')³⁷ to compensate for their incapacity to manage daily life. The aim is to construct a form of external scaffolding around the child. How is this best achieved in a rural/remote Indigenous context? There are already a number of options. Community owned initiatives such as the *Yirimán* project, representing the four language groups, Nyikina, Mangala, Karajarri and Walmajarri, in the Fitzroy Valley, takes young people at risk onto remote desert country to 'build stories in young people'.³⁸ Anecdotal evidence suggests that the rhythms of life on-country are beneficial for people because they are not being bombarded with stimuli and are able to work within Indigenous notions of time. Children with FASD are already being taken on-country and, with support, are undertaking culturally based activities, from making spears to assisting local Rangers to care for country. Immersion in on-country programs may be vital in terms of preventing the emergence of secondary disabilities.

Conclusion

Our research thus far has confirmed the importance of a multi-disciplinary approach in responding to the complex needs of Indigenous children with FASD. However, it also raises the importance of maximum feasible community ownership of the structures and processes that would provide the 'external brain' for sufferers of FASD. Given that there is no cure for FASD, once a child has been screened, clinical interventions may be of less value than strategies of normalisation provided by the community. Indigenous people, particularly Elders, should also play a much greater role in diversionary processes, through engagement in police cautioning and family conferencing, and sitting with Magistrates in court. Place based, community owned, Indigenous services should be resourced to work with and support families of children with FASD. A truly appropriate response requires decolonising the justice system to break down the innumerable barriers (cultural, structural, psychological and epistemological) that prevent Indigenous people from participating on an equal basis. Reform of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) is urgently required, and this should focus on protecting children's rights and finding alternatives to incarceration. The *Young Offenders Act 1994* (WA) is also up for review and serious consideration should be given to returning the management of the youth justice system to a human services, rather than correctional, environment.

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33. Fred J Boland et al, *Fetal Alcohol Syndrome: Implications for Correctional Service* (Correctional Services Canada, 1998) <http://www.rethinking.org.nz/assets/FASD/08_Fetal_Alcohol_Syndrome_Implications_for_Correctional_Service_1998.pdf> [2].

34. Douglas, above n 3, 225, citing Gideon Koren, 'Hypothetical Framework: FASD and Criminality – Causation or Association? The Limits of Evidence Based Knowledge' (2004) 2 *Journal of FAS International* 1, 4.

35. The proportion of Aboriginal young people referred to JJTs in the Kimberley rose from 8.4% in 2008 to around 19% in 2011–13. Police Statistics 2008–2013 from the Western Australia Police to the Kimberley Institute, October 2014.

36. Amnesty International, above n 2, 6, 35.

37. Douglas, above n 3.

38. Harry Blagg, 'Re-imagining youth justice: Cultural Contestation in the Kimberley Region of Australia since the 1991 Royal Commission into Aboriginal Deaths in Custody' (2012) 16(4) *Theoretical Criminology* 481, 481–9.