



Professor Harry Blagg
Dr Tamara Tulich
Zoe Bush
Faculty of Law
Law School

Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

5 April 2016

Dear Committee Secretary

Inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia

Thank you for the opportunity to make a submission to this inquiry. Our submission addresses items (1)(c), (1)(d), (1)(i), and (1)(j) of the terms of reference.

This submission is informed by research we are currently undertaking in three Indigenous communities in the West Kimberley region of Western Australia, to develop diversionary alternatives for Indigenous young people with Foetal Alcohol Spectrum Disorders (FASD).¹ 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. We have 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'.

In summary, our key submissions are:

- It is crucial that the identification of FASD or other cognitive impairment triggers appropriate responses, and does not itself cause greater harm.
- We support the recent findings of the House of Representative's Standing Committee on Indigenous Affairs that '[t]here is also a great need for diversion programs which redirect individuals [with FASD] who come in contact with the criminal justice system.'² However, to be effective, diversion for Indigenous young people with FASD must involve diversion into Indigenous non-stigmatising therapeutic alternatives, particularly in the emerging sphere of Indigenous on-country initiatives. We call this a 'decolonising' approach because it favours diversion into community-*owned* and managed structures and processes.³ This approach acknowledges the *strengths* of Indigenous families and communities; community-owned initiatives may provide a culturally secure and appropriate environment for stabilising children with FASD not possible within mainstream structures. Immersion in on-country programs may therefore be vital to preventing the emergence of secondary disabilities.

¹ 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. See also, Harry Blagg, Tamara Tulich and Zoe Bush, 'Diversionary Pathways for Indigenous Youth with FASD in Western Australia: Decolonising alternatives' (2015) 40(4) *Alternative Law Journal* 257.

² House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander Communities* (2015) [5.84].

³ Following Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Federation Press, 2008).

- Detention should be a last resort for people with cognitive and psychiatric impairment found unfit to stand trial. Detention should not be for an indefinite period. Persons found unfit to stand trial should not be detained in custodial settings and special provisions should exist for young people. Victoria provides a strong legislative model for this.

(a). Item (1)(c) the differing needs of individuals with foetal alcohol syndrome

FASD is a non-diagnostic umbrella term encompassing a spectrum of disorders caused by prenatal alcohol exposure, including Foetal Alcohol Syndrome (FAS), Partial FAS (pFAS) and alcohol-related neurodevelopmental disorder. The difficulty of obtaining accurate rates of FASD is well documented.⁴ The low reported rates in Australia are frequently attributed to under-diagnosis, under-reporting, lack of information regarding prenatal alcohol exposure, inconsistent diagnostic criteria, and under-representation of high-risk populations.⁵ Most existing prevalence studies report only FAS. Existing Australian estimates of FAS in non-Indigenous populations have ranged from 0.14 to 1.7 per 100 children.⁶ Consistently with prevalence studies internationally,⁷ FASD is disproportionately diagnosed amongst Australia's Indigenous peoples.⁸ Australian estimates in Indigenous populations have ranged from 0.14 to 4.7 per 100 children.⁹ In 2015, Australia's first population-based study on the prevalence of FAS/pFAS, reported rates of 12 per 100 children in the remote Indigenous town of Fitzroy Crossing in Western Australia.¹⁰ This is the highest reported prevalence of FAS/pFAS in Australia and similar to rates reported in 'high-risk' populations internationally.¹¹

As a result of the damage to the frontal lobe of the foetal brain caused by prenatal alcohol exposure, people with FASD may experience cognitive deficiencies, which may include impairments in learning, attention, memory, sensory perception, and language.¹² Damage may also be caused to the limbic system, risking impairments in social judgment, impulse control, and emotional regulation.¹³ Difficulty with abstract reasoning often manifests as a failure to learn from experience, and link consequences

- ⁴ James Fitzpatrick et al, 'Prevalence of Fetal Alcohol Syndrome in a Population-based Sample of Children living in remote Australia: The Lillilwan Project' (2015) 51(4) *Journal of Paediatrics and Child Health* 450, 451; Heather Douglas, 'The sentencing response to defendants with Foetal Alcohol Spectrum Disorder' (2010) 34 *Criminal Law Journal* 221, 226; Kelly Allen et al, 'Estimating the Prevalence of FAS in Victoria using Routinely Collected Administrative Data' (2007) 31(1) *Australian and New Zealand Journal of Public Health* 62, 65; KR Harris and IK Bucens, 'Prevalence of FAS in the Top End of the NT' (2003) 39 *Journal of Paediatrics and Child Health* 528, 528.
- ⁵ Fitzpatrick et al, above n 4, 451; Douglas, above n 4, 226; Elizabeth Peadon et al, 'Impacts of Alcohol Use in Pregnancy: The Role of the GP' (2007) 36(11) *Australian Family Physician* 935, 936; Diane K Fast and Julianne Conry, 'The Challenge of Fetal Alcohol Syndrome in the Criminal Legal System' (2004) *Addiction Biology* 161, 162.
- ⁶ Allen et al, above n 4, 64; Harris and Bucens, above n 4, 530-531; Carol Bower et al, 'Ascertainment of birth defects: the effect on completeness of adding a new source of data' (2000) 36(6) *Journal of Paediatrics and Child Health* 574.
- ⁷ Larry Chartrand and Ella Forbes-Chilibek, '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* (1996) National Academy Press <<http://www.nap.edu/openbook.php?isbn=0309052920>>.
- ⁸ House of Representatives, 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) 96; House of Representatives, Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *FASD: The Hidden Harm. Inquiry into the prevention, diagnosis and management of Foetal Alcohol Spectrum Disorders* (2012) 33.
- ⁹ Ibid.
- ¹⁰ Fitzpatrick et al, above n 4
- ¹¹ Ibid, 450.
- ¹² Vivian Kulaga, 'Cognitive Processing Speeds Among Children Exposed to Fetal Alcohol' (2006) 4(3) *Journal of FAS International* 1, 1.
- ¹³ Ira J Chasnoff et al 'Neurodevelopmental Functioning in Children with FAS, pFAS, and ARND' (2010) 31(3) *Journal of Developmental and Behavioural Pediatrics* 192; Carmen Rasmussen, 'Executive Functioning and Working Memory in Foetal Alcohol Spectrum Disorder' (2005) 29(8) *Alcoholism: Clinical and Experimental Research* 1359.

with actions.¹⁴ People with FASD may also experience difficulty seeing 'the big picture', in the sense of imagining a future, thinking about others, explaining actions, or restraining impulses.¹⁵ The primary effects of FASD also affect a person's ability to engage in school and employment.¹⁶ Consequently, research indicates that 60% of people with FASD have disrupted or curtailed school attendance that may exacerbate existing cognitive deficiencies.¹⁷

The range of cognitive, social and behavioural difficulties a person with FASD may experience can render them more susceptible to contact with the criminal justice system, and pose challenges at each stage of the criminal justice process. Difficulties with memory and suggestibility mean that a person with FASD is more likely to agree with propositions put to them, and may therefore be disadvantaged in police interviews. Difficulties with memory may make it harder for people with FASD to explain their behaviour, to instruct lawyers and to give evidence in court. Difficulties with memory and linking actions to consequences may mean that people with FASD are unable, rather than wilfully unwilling, to comply with court orders.

Research in the United States suggests that over half of persons with FASD will interact with the criminal justice system: around 60% will be arrested, charged or convicted of a criminal offence, and about half will have spent time in juvenile detention, prison, inpatient treatment or mental health detention.¹⁸ Canadian research also indicates that young people with FASD are 19 times more likely to be arrested than their peers.¹⁹ This is particularly concerning in the context of the worsening over-incarceration of Indigenous youth in Western Australia.²⁰

An inadequate criminal justice response can increase the likelihood of people with FASD developing secondary impairments or disabilities, such as substance abuse, which, in turn, increases their susceptibility to contact with the criminal justice system (either as victims or offenders).²¹ The 'secondary' effects of FASD are those developed as a result of FASD's primary effects. Secondary impairments 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; existence on the margins of society; and institutionalisation.²² Research indicates that over 90% of people with FASD will be diagnosed with a psychiatric disorder during their lifetime,²³ with 30% developing substance abuse problems.²⁴

¹⁴ Douglas, above n 4, 223.

¹⁵ Kathryn Paige, 'Fetal Alcohol Spectrum – the Hidden Epidemic in our Courts' (2001) 52 *Juvenile and Family Court Journal* 21, 25.

¹⁶ Justice Committee of FASD Ontario, *FASD: After Sentencing* (2007).

¹⁷ Douglas, above n 4, 224, citing Larry Burd et al, 'Fetal Alcohol Syndrome in the Canadian Corrections System' (2003) 1 *Journal of FAS International* 2.

¹⁸ Ann Streissguth et al, 'Risk Factors for Adverse Life Outcomes in Fetal Alcohol Spectrum Syndrome and Fetal Alcohol Effects' (2004) 25 (4) *Developmental and Behavioral Pediatrics* 228, 230-1. See also Heather Douglas et al, 'The Importance of Foetal Alcohol Spectrum Disorder for Criminal Law in Practice: Views of Queensland Lawyers' (2012) 32 *Queensland Lawyer* 153, 153.

¹⁹ Natalie Novick Brown et al, 'Prenatal Alcohol Exposure: An Assessment Strategy for the Legal Context' (2015) 42-43 *International Journal of Law and Psychiatry* 144, 144.

²⁰ The worsening over-incarceration of Indigenous youth is documented in Loh Nini Sui Nie et al, *Crime and Justice Statistics for WA: 2005* (Report, Crime Research Centre, University of Western Australia 2005) 43; House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time - Time for Doing*, above n 8, [2.2].

²¹ Douglas, 'The sentencing response to defendants', above n 4, 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.

²² Ann Streissguth and Jonathan Kanter (eds) *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* (University of Washington Press, 1997).

²³ 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.

²⁴ Fred J Boland et al, *Fetal Alcohol Syndrome: Implications for Correctional Service* (1998) Correctional Services, Canada <<http://www.csc-scc.gc.ca/text/rsrch/reports/r71/er71.pdf>> [2].

Importantly, secondary impairments can be prevented or reduced by appropriate interventions. That is, by improving the responsiveness of the justice system and support services to young people with FASD. It is crucial that the identification of FASD triggers appropriate responses, and does not itself cause greater harm.²⁵ Criminological research warns that even well-intentioned intervention can have the unintended consequence of drawing young people deeper into judicial and correctional systems in order for them to receive treatment and support.²⁶ Improving diversionary pathways out of the criminal justice system is key to reducing the incidence of secondary impairments

Improving diversionary pathways and interventions requires an understanding of the 'needs' of people with FASD and a close synthesis of medical knowledge and the law. Research indicates that young people with FASD require significant levels of support (an 'external brain')²⁷ to compensate for their incapacity to manage daily life. The aim is to construct a form of external scaffolding around the individual. Emergent research in neurodevelopmental science emphasises the need for interventions focused on optimising the functioning of the frontal lobe and limbic system, such as dance, art, nature discovery and storytelling,²⁸ which have optimal efficacy when repeatedly implemented.²⁹ Research also emphasises the importance of relational health.³⁰ Interventions are of maximum efficacy in environments of relational stability.³¹ The presence of unfamiliar individuals can make a person with FASD more symptomatic and less responsive to interventions.³² Consequently, supports for people with FASD should occur in familiar and safe social networks.

How are these needs best met in a rural/remote Indigenous context? There are already a number of options. Community-owned initiatives such as the *Yiriman* project, representing the four language groups, Nyikina, Mangala, Karajarri and Walmajarri, in the Fitzroy Valley, take young people at risk onto remote desert country to 'build stories in young people'.³³ Children with FASD are already being taken on-country to learn about their skin, history, country and law, and, with support, are undertaking culturally based activities, from making spears to assisting local Rangers to care for country. Anecdotal evidence suggests that the rhythms of life on-country are beneficial for people because there are not being bombarded with stimuli and are able to work within Indigenous notions of time. Research also suggests that, as such programs involve a range of sensory experiences, including patterned repetitive movements of dance, and incur in the intensely relational environment of country, family and Elders, they are particularly effective for persons with FASD due to their repetitive, rhythmic and relational nature.³⁴

While there is no major evidence base suggesting that Indigenous-led diversion has better results than

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- ²⁵ Kent Roach and Andrea Bailey, 'The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing' (2009) 42 *University of British Columbia Law Review* 1, 5.
- ²⁶ See, eg, Christopher Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 3rd ed, 2007).
- ²⁷ Douglas, 'The sentencing response to defendants', above n 4.
- ²⁸ Judy Atkinson, 'Trauma-informed services and trauma-specific care for Indigenous Australian children' (Resource Sheet No 21, Australian Institute of Health and Welfare, 2013) 13, citing Judy Atkinson, *Lifting the blankets: the transgenerational effects of trauma in Indigenous Australia* (PhD Thesis, Queensland University of Technology, 2001).
- ²⁹ Bruce D Perry, 'Examining Child Maltreatment through a Neurodevelopmental Lens: Clinical Applications of the Neurosequential Model of Therapeutics' (2009) 14(4) *Journal of Loss and Trauma: International Perspectives on Stress and Coping* 240, 252.
- ³⁰ Ibid 248.
- ³¹ Ibid 252–3.
- ³² Ibid.
- ³³ 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.
- ³⁴ Bruce D Perry, 'Foreword' in Cathy A Malchiodi (ed), *Creative Interventions with Traumatized Children* (The Guildford Press, 2014) i, xi.

the mainstream, existing research suggests Indigenous-led initiatives do have better outcomes in terms of reduced recidivism.³⁵ A three year review of the Yiriman project found that:³⁶

One ought not expect that the project can be a panacea for the range of difficulties confronting communities in the Kimberley. However, there is good evidence that taking young people and other generations on country is important for their health. There are definitely immediate healthy effects of taking young people away from their poor diets and living conditions that create depression and despair. There is also evidence that Yiriman has assisted in the campaign to minimise young people's involvement in the justice system. Indeed, some, including a magistrate, conclude that Yiriman is more capable in this regard than most other diversionary and sentencing options. There is certainly evidence (tracked through case studies) that a range of young people have been nurtured through their involvement in Yiriman.

Immersion in on-country programs may therefore be vital in terms of preventing the emergence of secondary disabilities.

(b). Item (1)(d) the impact of relevant Commonwealth, state and territory legislative and regulatory frameworks, including legislation enabling the detention of individuals who have been declared mentally-impaired or unfit to plead

An accused's fitness is central to the fairness of the trial process. If a person is unfit to stand trial, he or she cannot be tried without unfairness and injustice to him or her. Each jurisdiction in Australia has separate legislation governing fitness to stand trial. Our submission will focus predominantly on the Western Australian legislative regime for fitness to stand trial contained in the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) (Act). This Act is controversial because it provides for indefinite detention in a custodial setting *without* trial of a person found unfit to stand trial. The regime attracted notoriety with the case of Rosie Anne Fulton, a young Indigenous 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.

The inadequacies of Western Australia's regime with regards to accused persons found unfit have been raised in numerous fora.³⁷ Particular concern has been expressed about:

- the absence of a trial or special hearing process to determine the accused's guilt or innocence (in contrast to regimes in the ACT, NSW (District and Supreme Court proceedings), NT, SA and VIC);³⁸
- the limited options available when a court finds a person unfit to stand trial: unconditional release or a custody order (where imprisonment is a sentencing option);

³⁵ Australian Institute of Health and Welfare. 'Diverting Indigenous offenders from the criminal justice system' *Resource sheet no. 24* produced for the Closing the Gap Clearinghouse, December 2013.

³⁶ Dave Palmer, *We know they healthy cos they on country with old people*: demonstrating the value of the Yiriman Project 2010-2013 (2013) 122.

³⁷ *State of Western Australia v BB (a child)* [2015] WADC 2, 16 [55] (Reynolds J); *State of Western Australia v Tax* [2010] WASC 208, [18]-[19] (Martin CJ); Catherine Crawford, 'Families Impacted by the Criminal Justice System on the Frontier: A New Model Required' (2010) 17(3) *Psychiatry, Psychology and Law* 464; Catherine Crawford, 'FASD Clinicians Forum' (Speech delivered at the Telethon Kids Institute, 18 November 2014) <http://alcoholpregnancy.telethonkids.org.au/media/1020099/fasd_clinicians_forum_magistrate_crawford_presentation.pdf>; Hon Chief Justice Martin, 'Indigenous Incarceration Rates: Strategies for much needed reform' (Speech delivered at the Law Summer School, Perth, 20 February 2015) http://www.supremecourt.wa.gov.au/files/Speeches/Indigenous_Incarceration_Rates.pdf; Harry Blagg, Tamara Tulich and Zoe Bush, 'Diversionary Pathways for Indigenous Youth with FASD in Western Australia: Decolonising alternatives' (2015) 40(4) *Alternative Law Journal* 257.

³⁸ *Crimes Act 1900* (ACT) div 13.2; *Mental Health (Forensic Provisions) Act 1990* (NSW), Pt 2; *Criminal Code Act 1983* (NT), Sch 1 Pt IIA; *Criminal Law Consolidation Act 1935* (SA), Pt 8A; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) Pt 3, 5A.

- the unlimited duration of a custody order and place of detention for persons who do not have a treatable mental illness; and
- the pressure the regime places on legal representatives.

The Act does not contain special procedures for persons who are 17 years of age or younger.

No special hearing

If a court finds a young person is unfit, and 'will not become mentally fit to stand trial within 6 months', the court has two options: release the accused; or make a custody order (where imprisonment is a sentencing option). It is for this reason that the regime has been criticised by Reynolds J for allowing only 'one extreme or the other'.³⁹

In deciding whether or not to make a custody order, the court must be satisfied such an order 'is appropriate having regard to':⁴⁰

- a) the strength of the evidence against the accused;
- b) the nature of the alleged offence and the alleged circumstances of its commission;
- c) the accused's character, antecedents, age, health and mental condition; and
- d) the public interest.

While the judicial officer does consider these factors, unlike most Australian jurisdictions, the regime does not involve a special hearing as to guilt or innocence.⁴¹ The case of Marlon Noble, an Indigenous man imprisoned for 10 years upon a finding of unfitness in Western Australia, illustrates the danger of a lack of special hearing. The Australian Law Reform Commission reports:⁴²

Marlon Noble was charged in 2001 with sexual assault offences that were never proven. A decade after he was charged, the allegations were clearly shown to have no substance. Marlon spent most of that decade in prison, because he was found unfit to stand trial because of his intellectual disability.

Special hearings were introduced because unfit accused did not otherwise have a trial or 'opportunity for acquittal'.⁴³ In Australian jurisdictions that have special hearings, an unfit accused is only subject to the coercive provisions of the regime if he or she is found to have engaged in the conduct constituting the offence (often referred to as a qualified finding of guilt). In NSW, NT, ACT, VIC this is a bar to further prosecution in relation to the same conduct. In WA, the Act provides that a person found unfit to stand trial in proceedings before the District or Supreme Court may be indicted or again indicted and tried for the offence (s 19(7)). The benefit of a special hearing is that the evidence against an accused is tested and subject to adversarial challenge. An unfit accused is afforded, as far as is possible, the benefit of the presumption of innocence and the heightened procedural and evidentiary requirements of the accusatorial trial process – and the possibility of acquittal.

Options available to a court

³⁹ Reynolds J, *The State of Western Australia v BB (a child)* [2015] WACC 2.

⁴⁰ See s 19(5) of the Act.

⁴¹ cf *Crimes Act 1900* (ACT) div 13.2; *Mental Health (Forensic Provisions) Act 1990* (NSW), Pt 2; *Criminal Code Act 1983* (NT), Sch 1 Pt IIA; *Criminal Law Consolidation Act 1935* (SA), Pt 8A; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) Pt 3, 5A.

⁴² Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report*, Report No 124 (2014) fn 82.

⁴³ NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences Report No 138* (2013), 141.

The introduction of 'community-based' orders has been suggested in order to alleviate the extremity of an accused's indefinite detention or unconditional release.⁴⁴ For example, the Western Australian Inspector of Custodial Services has recommended 'community-based alternatives to custody orders for people who are found unfit to stand trial but require some degree of supervision.'⁴⁵ While this is an important recommendation, the problematic nature of such orders has been noted in the context of Indigenous youth who are fit to stand trial.⁴⁶ Indeed, the over-representation of Indigenous youth in Western Australia's justice system has only worsened since the introduction of 'community-based' orders in the *Young Offenders' Act 1994* (WA).⁴⁷ The difficulties that people with FASD and other cognitive impairments may experience in complying with such orders needs to be taken into account.⁴⁸ Failure to comply may result in charges for breach and compound a person with FASD's criminal history, rendering them more susceptible to a custody order under the Act. With regard to persons affected by FASD, such orders may therefore be counterproductive.

Place and duration of detention

Where a court makes a custody order, a young person with FASD (or other cognitive impairment) can only be detained in a juvenile detention centre or a declared place designed to house and support accused young persons with cognitive impairments who are detained under the Act. The young person cannot be detained in a mental health facility unless they are also diagnosed with a treatable mental illness. Western Australia's 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 can accommodate a maximum of 10 people and does not cater for children under 16 years of age.

Crucially, in Western Australia, a custody order is of unlimited duration. Contrary to the regimes operating at the Commonwealth level, and in VIC, SA, NT, ACT, NSW, where a person is subject to a fixed term or limiting term, in Western Australia a person will be detained under a custody order, until released by an order of the Governor (in practice, on the recommendation of the Mentally Impaired Accused Board (the Board)).⁴⁹ The only protection against an accused's indefinite detention is the Board's reporting requirements under ss 33 and 34 of the Act. On the advice of the Board and Minister, the Governor may order an accused's conditional or unconditional release.⁵⁰

Limiting terms are an improvement on indefinite detention, but not a panacea. The NSW Law Reform Commission reported:⁵¹

From the perspective of the unfit defendant, the procedures set out in the MHFPA [*Mental Health (Forensic Provisions) Act 1990* (NSW)] are a significant improvement on indefinite detention. However, from this perspective the limiting term is still in some ways an unfair outcome compared to a sentence imposed after a normal trial. There is no provision in the MHFPA for a non-parole period, and limiting terms can be longer than terms imposed for an equivalent offence on a fit offender, as the unfit defendant cannot take advantage of a discount for an early guilty plea.

⁴⁴ *State of Western Australia v Tax* [2010] WASC 208, [18] (Martin CJ); Office of the Inspector of Custodial Services, *Mentally impaired accused on 'custody orders': Not guilty, but incarcerated indefinitely*, April 2014, [1.31]-[1.38]; Western Australian Association for Mental Health et al, *Submission to the Review of the Criminal Law (Mentally Impaired Accused) Act 1996*, December 2014, 23.

⁴⁵ Office of the Inspector of Custodial Services, above n 41, 10, Recommendation 1.

⁴⁶ Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, above n 3, 183.

⁴⁷ Loh Nini Sui Nie et al, above n 20, 43.

⁴⁸ This difficulty was noted in *AH v Western Australia* [2014] WASCA 228, [3] (Martin CJ, Mazza JA and Hall J).

⁴⁹ s 24 of the Act.

⁵⁰ s 35 of the Act.

⁵¹ NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences* Report No 138 (2013), 16.

Difficulties for lawyers

The Act places lawyers representing unfit young persons with FASD in a precarious position. This is not unique to Western Australia: similar concerns have been raised in Queensland and Local Court proceedings in New South Wales (where special hearing are not provided for).⁵² Lawyers are 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 limited and shorter.⁵³ This is only further complicated by mandatory sentencing provisions in Western Australia. Reynolds J articulated the problem in *The State of Western Australia v BB (a child)*:⁵⁴

The legislation in its current form puts undue pressure on legal advisers to go down the path of arguing that an accused is fit to stand trial in order to avoid exposing the accused to the possibility of an indefinite custody order. It is highly desirable for that undue pressure to be removed...The obvious downside to accused persons pleading guilty or being found guilty when they are in fact unfit to stand trial is that they can become immersed in the criminal justice system at the expense of the focus being on the provision of appropriate mental health services within the community. That immersion can become particularly problematic if accused persons who are in fact unfit to stand trial plead guilty to offences which can then or later be taken into account for the purpose of mandatory penalties. Further, research shows that early intervention is a key in relation to the improvement of mental health.

Best practice examples

In Australia, the Victorian model offers a more child focused approach, being the only Australian jurisdiction with separate provisions for young people found unfit to stand trial and prohibiting the placing of children in custody unless there are no practicable alternatives.⁵⁵ The special provisions for unfitness in the Children's Court were introduced into Victorian regime in 2014, and provide that:

- The Children's Court must not order a child to be released unconditionally unless the court is satisfied that, if necessary, the child is receiving appropriate treatment or support for the child's mental health or disability: ss 38Y(6) and 38ZD(3).
- If Children's Court declares that child is liable to supervision Div 5, the court must make a supervision order in respect of the child: s 38ZH(1).
- The court may make 2 types of supervision order:
 - (a) a custodial supervision order, which commits the child to custody; or
 - (b) a non-custodial supervision order, which releases the child on conditions decided by the Children's Court and specified in the order: s 38ZH(5).
- The purpose of a supervision order is to ensure that a child receives treatment, support, guidance and assistance for the child's mental impairment or other condition or disability: s 38ZH(2).

⁵² Betheli O'Carroll, 'Intellectual disabilities and the determination of fitness to plead in the magistrates' courts' (2013) 37 (1) *Criminal Law Journal* 51; NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences* Report No 138 (2013) 345-6.

⁵³ 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.

⁵⁴ [2015] WACC 2 at [55] and [59].

⁵⁵ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 38J(1), 38ZH(7).

- A *custodial* supervision order has an additional purpose of protecting the child or the community while the child receives the treatment, support, guidance and assistance: s 38ZH(3).
- A child may be subject to a custodial supervision order only for as long as is required for the protection of the child or the community: s 38ZH(4).
- The Children's Court must not make a supervision order unless the court finds that:
 - (a) there is no practicable alternative; and
 - (b) the order is required for the protection of the child or community: s 38ZH(7).
- A supervision order is for a term not exceeding 6 months that is specified by the Children's Court: s 38ZI(1). When making supervision order, court must direct that matter be brought back to the court for review at the end of the period specified by the court: s 38ZI(2).
- Term of supervision order may be extended more than once by maximum of 6 months but so that the total period of the order (including custodial supervision orders and non-custodial supervision orders) does not exceed—
 - (a) in the case of a child aged 10 years or more but under 15 years at the time of the making of the supervision order, 12 months; and
 - (b) in the case of a child aged 15 years or more but under 21 years at the time of the making of the supervision order, 24 months: s 38ZI(3).

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.⁵⁶ 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 5.⁵⁷

(c). Items (1)(i)-(j): the role and nature, accessibility and efficacy of programs that divert people with cognitive and psychiatric impairment from the criminal justice system; the availability of pathways out of the criminal justice system for individuals with cognitive and psychiatric impairment.

Diversionary 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.⁵⁸ 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 cognitive impairments, 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*. Diversion for Indigenous young people with FASD must involve diversion into Indigenous non-stigmatising therapeutic alternatives, particularly in the emerging sphere of Indigenous on-country initiatives. We call this a 'decolonising' approach because it favours diversion into community-owned and managed structures and processes. This approach acknowledges the strengths of Indigenous families and communities; a necessary corrective to official and media narratives of deficit and dysfunction. The system may be 'broken': Indigenous Australia is not.

⁵⁶ *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* (NZ) s 12(a), (b).

⁵⁷ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁵⁸ See Barry Goldson (ed) *Dictionary of Youth Justice* (Routledge, 2013).

Our research with Indigenous stakeholders, thus far, finds strong endorsement for an approach that places Indigenous organisations and Indigenous practices at the centre of intervention. Much discussion of FASD has, unsurprisingly, focused on the need for better screening and diagnostic services, as well as increasing the awareness of police and judicial officers regarding the nature of the condition and its implications for the administration of justice.

Yet, there is also a need to build the capacity of communities and families to provide for the day-to-day care and support of young people with FASD. Once a diagnosis has been presented, the main issue becomes one of stabilisation and support, by erecting 'external scaffolding' around the child. There is no medical 'cure'. This scaffolding should be provided by Indigenous organisations. There are examples of successful 'on-country' initiatives that could be used as a basis for a new model of Indigenous youth justice. For example, as noted above the *Yiriman* Project, run by Cultural Bosses from around Fitzroy Crossing in Western Australia, takes young people at risk out onto traditional country, where acquire bush skills in a culturally secure environment. While, as noted above, there is no major evidence base suggesting that Indigenous-led diversion has better results than the mainstream, existing research suggests Indigenous-led initiatives do achieve better outcomes in terms of reduced recidivism.⁵⁹ A review of the Yiriman project found evidence that:⁶⁰

Yiriman has assisted in the campaign to minimise young people's involvement in the justice system. Indeed, some, including a magistrate, conclude that Yiriman is more capable in this regard than most other diversionary and sentencing options. There is certainly evidence (tracked through case studies) that a range of young people have been nurtured through their involvement in Yiriman.

Indigenous organisations should be funded to provide mentoring and family support services, interlaced with 'on-country' camps that help to stabilise young people and heal families, thereby reducing the likelihood of further generations being lost to FASD. Such arrangements may also reduce the tendency for misdirected intervention by the justice system to create secondary disabilities.

Facilitating diversion

Our research with community members and justice professionals in the West Kimberley has identified the need to create culturally secure initiatives that draw on the authority of Elders and devolve the care and management of young people with FASD to Indigenous communities. To achieve this, our proposed model is a hybrid version of schemes, initiatives and practices already in existence, particularly in Victoria. Although in its infancy, our proposed model — a Mobile 'needs focused' Court — takes elements from the 'Koori Court' model, with its focus on the involvement of Elders in the court process, and the Neighbourhood Justice Centre model, which has a single magistrate, a comprehensive screening process for clients when they enter the court, and rapid entry into, preferably on-country, support.

Our proposed model draws on the techniques employed by 'problem oriented courts', to promote better outcomes for young people with FASD. These techniques attempt to collectively resolve issues through: problem-solving meetings involving relevant agencies and court workers, with a view to presenting solutions to the Magistrate; and a non-adversarial approach, which commits prosecution

⁵⁹ Australian Institute of Health and Welfare. 'Diverting Indigenous offenders from the criminal justice system' *Resource sheet no. 24* produced for the Closing the Gap Clearinghouse, December 2013.

⁶⁰ Dave Palmer, *We know they healthy cos they on country with old people": demonstrating the value of the Yiriman Project 2010-2013* (2013) 122.

and defence to focus on resolving a young person's underlying issues.⁶¹ 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.

These processes are generally found in metropolitan areas but, we believe, may be suited to the bush, due to closer relations between agencies and all court users — the Magistrate, prosecution, the Aboriginal Legal Service and Legal Aid — travelling on circuit. Furthermore, there is a single Magistrate who has continuous contact with offenders and communities, which is an essential element of 'judicial monitoring'.⁶² The West Kimberley may be an ideal pilot location 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.

We envisage the hybrid 'Koori Court' and Neighbourhood Justice Centre model facilitating greater Indigenous involvement in diversionary options and community-based alternatives. Through enabling culturally secure and community-owned alternatives, this may lead to better outcomes for Indigenous young people with FASD and other cognitive impairments.

We attach, for your information: Harry Blagg, Tamara Tulich and Zoe Bush, 'Diversionary Pathways for Indigenous Youth with FASD in Western Australia: Decolonising alternatives' (2015) 40(4) *Alternative Law Journal* 257.

If you have any questions relating to this submission, please do not hesitate to contact us

Yours sincerely

Professor Harry Blagg

Dr Tamara Tulich

Zoe Bush

⁶¹ Harry Blagg and Nicole Bluett-Boyd, 'Developing a Generic Court Services Model for Victoria's Courts' (Report, For the Courts and Tribunal Branch, Victorian Department of Justice, 2011); Greg Berman and John Feinblatt, 'Problem-Solving Courts: A brief primer' (2001) 23 *Law and Policy* 125, 131.

⁶² Harry Blagg, 'Problem Oriented Courts: Project 96' (Report, Law Reform Commission of Western Australian, 2008); Michael King et al, *Non-Adversarial Justice* (Federation Press, 2nd ed, 2014).