

Senate Community Affairs References Committee Inquiry

**Effective approaches to prevention, diagnosis
and support for Fetal Alcohol Spectrum
Disorder (FASD)**

***Response to additional question on notice and
submission in response to other evidence***

Contents

	Page	
1	Introduction	1
2	Importance of building understanding of FASD in the criminal justice system	1
3	How should the training happen?	3
4	Who should be responsible for training?	4
5	Training alone insufficient	8
6	Response to matters raised by the NDIA	9
6.1	Underrepresentation of people with FASD on the NDIS	9
6.2	Importance of diagnosis	10
6.3	Streamlining access to the NDIS for people with FASD	10
6.4	NDIS engagement with justice system	11
7	Youth Koori Court pilot project	12
7.1	Background	12
7.2	Outline of the project	13

1 Introduction

The Senate Community Affairs References Committee has asked an additional question on notice arising from our submission and our evidence before its inquiry into *Effective approaches to prevention, diagnosis and support for Fetal Alcohol Spectrum Disorder (Inquiry)* on 25 June 2020. The additional question on notice is as follows:

A number of submissions including yours have advocated that people working in the criminal justice system be trained to recognise FASD so that the system can respond more appropriately. How do you propose this should happen and who should be responsible for making this happen in the different jurisdictions?

In this document we:

- (a) set out our response to the question on notice (sections 2-5);
- (b) respond to the evidence of the National Disability Insurance Agency (**NDIA**) (section 6); and
- (c) provide further information regarding the pilot project being developed for the Youth Koori Court we mentioned in our evidence on 25 June 2020 before the Inquiry (section 7).

2 Importance of building understanding of FASD in the criminal justice system

In our submission to the Inquiry on 13 December 2019 (**Submission**), Gilbert + Tobin recommended that people working in the criminal justice system including police, lawyers, magistrates and judges, and those working in corrective services be trained to recognise Fetal Alcohol Spectrum Disorder (**FASD**) and understand its effect on behaviour (Recommendation 10).

Many features of FASD are criminogenic. FASD can result in learning difficulties, limited and shifting attention, impaired capacity to regulate emotion, impulsivity and impaired capacity to moderate behaviour, difficulty communicating and socialising, difficulty connecting cause and effect and otherwise understanding consequences, and difficulty performing daily life tasks.¹ These primary symptoms predispose a person with FASD to offending behaviour and repeating conduct that previously brought them into contact with the criminal justice system.

Contact with and escalation within the criminal justice system is a recognised secondary disability of people with FASD.² Research indicates that 60% of people with FASD are likely to come into contact with the criminal justice system.³ In addition, people with

¹ 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 Fetal Alcohol Spectrum Disorders* (2012), 1.3; Sara McLean, Stewart McDougall and Child Family Community Australia, *Fetal alcohol spectrum disorders: current issues in awareness, prevention and intervention*, (2014) Australian Institute of Family Studies, 4-5.

² Gideon et al, 'Fetal Alcohol Spectrum Disorder' (2013) 169 *Canadian Medical Association Journal* 11, 1183; Sara McLean, Stewart McDougall and Child Family Community Australia, *Fetal alcohol spectrum disorders: current issues in awareness, prevention and intervention*, (2014) Australian Institute of Family Studies, 4.

³ Foundation for Alcohol Research and Education (2013) *Fetal Alcohol Spectrum Disorder: Knowledge, attitudes and practice within the Western Australian justice system*. Available at <<http://www.aph.gov.au/DocumentStore.ashx?id=ada24c9d-5121-401f-a666-d47af46975b1>>.

FASD are 10 to 19 times more likely to be incarcerated,⁴ and are disproportionately affected by their disability while passing through the criminal justice system because their neurocognitive disability impacts their engagement with every aspect of the process.⁵

The findings from the 2018 Banksia Hill study suggest that FASD is not being identified prior to a person's contact with the criminal justice system with only two of the young people diagnosed with FASD in that study having been previously diagnosed.⁶

Identifying that a person in contact with the criminal justice system has FASD and understanding the impact of FASD on that person is critical in determining:

- Whether or not police should exercise their discretion not to charge the person;
- Whether or not the court should divert the person from the criminal justice system as a result of their disability if they are charged;
- Whether or not the person is fit to be tried;
- Whether or not the person was capable of forming the mens rea for the offence;
- The person's level of culpability for the purpose of sentencing;
- Appropriate orders that the person can comply with and that will ensure the person has the support they need to address their behaviours that lead them into contact with the criminal justice system; and
- The support the person requires to comply with court orders and/or to avoid problematic behaviours if the person is in custody.

Research suggests that many justice professionals have a limited understanding of FASD.⁷ A study conducted in Western Australia assessing the awareness and knowledge of FASD among justice professionals, including judicial officers, lawyers, corrective services staff, and police officers, found that most participants indicated a need for more information about FASD, including information to improve the identification of individuals in need of specialist assessment.⁸ Findings from the study emphasise the need for training and education to improve awareness and management of the specific impairments associated with FASD in the criminal justice system.⁹

Similarly, an international systemic literature review of articles relating to FASD and formal criminal justice system involvement published in 2018 found that despite some level of awareness of the pervasiveness of FASD in correctional, legal and judicial

⁴ C Green et al, 'FASD and the Criminal Justice System' (2014) *Canada Fetal Alcohol Spectrum Disorder Research Network, University of Regina* 1, 2.

⁵ K.N. Sherwood, *Fallen by the Wayside: Young People with Fetal Alcohol Spectrum Disorder (FASD) in New Zealand's Youth Justice System* (PHD Thesis, University of Otago, 2020), 40.

⁶ Carol Bower et al, 'Fetal Alcohol Spectrum Disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) 8 *BMJ Open* 1.

⁷ 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; Heather Douglas et al, 'Judicial Views of Foetal Alcohol Spectrum Disorder in Queensland's Criminal Justice System' (2012) 21(3) *Journal of Judicial Administration* 178.

⁸ Foundation for Alcohol Research and Education, 'Fetal Alcohol Spectrum Disorder: Knowledge, attitudes and practice within the Western Australian justice system' (April, 2013).

⁹ Foundation for Alcohol Research and Education, 'Fetal Alcohol Spectrum Disorder: Knowledge, attitudes and practice within the Western Australian justice system' (April, 2013).

settings, there is a lack of adequate training and practice guidelines to assist this work. The review calls for increased opportunities for capacity building, access to information and clinic services, and collaboration across disciplines to prepare justice professionals for responding appropriately to individuals with FASD.¹⁰

Australian evidence has repeatedly shown that staff across the criminal justice sector currently have little access to appropriate FASD training, are in need of further training about FASD, and are repeatedly requesting it.¹¹

As part of the Telethon Kids Banksia Hill study, which investigated the prevalence of FASD in the Western Australian youth justice system, a workforce training intervention was developed in consultation with the youth justice workforce and young people in detention. In 2018, it was implemented and evaluated, with results showing improvements in staff knowledge about FASD and other neurodisabilities, and an increase in staff intent to use more appropriate behaviour management practices with young people in their care. This training involved a face-to-face workshop, delivered to staff by an external facilitator, with both FASD and youth justice expertise. The training included perspectives from health professionals, youth justice staff, and parents and carers of individuals with neurodisability.

To date, this is the only evidence-based training intervention that has been evaluated with an Australian justice workforce. Similar work exploring the current knowledge and practices of justice staff in relation to FASD and other neurodisabilities is currently being undertaken in Queensland, led by The University of Queensland. Further implementation and evaluation of the Telethon Kids training intervention with other jurisdictions across Australia is planned.

3 How should the training happen?

This section outlining recommendations for training people working in the criminal justice system on FASD has largely been informed by Dr Hayley Passmore, Research Officer at the Telethon Kids Institute. Dr Passmore has expertise in the design and delivery of training in FASD in the criminal justice system in Australia.

Across Australia, the limited FASD training that is currently provided to the criminal justice workforce is often ad-hoc, carried out as one-off opportunities for a small group of staff rather than implemented workforce-wide, and relies on the expertise of consultants or facilitators external to the agency.

While ideally training would be the responsibility of a single entity, as discussed in section 4 of this submission, given the separate agencies involved in the criminal justice system that is not possible. We submit, however, there should nonetheless be a standard component of training on FASD common to all people working in the criminal justice system so there is common foundational knowledge. The standard component should be included in routine and mandatory induction training.

¹⁰ Katherine Flannigan et al 'Fetal Alcohol Spectrum Disorder and the criminal justice system: A systemic literature review' (2018) 57 *International Journal of Law and Psychiatry* 42.

¹¹ H Douglas et al, 'Judicial views of foetal alcohol spectrum disorder in Queensland's criminal justice system' (2012) 21(3) *Journal of Judicial Administration* 178-188; H Douglas et al, 'The importance of foetal alcohol spectrum disorder for criminal law in practice: Views of Queensland lawyers' (2012) 32(3) *The Queensland lawyer*, 153-164; S Hamilton et al, 'He has problems; He Is Not the Problem . . .' A Qualitative Study of Non-Custodial Staff Providing Services for Young Offenders Assessed for Foetal Alcohol Spectrum Disorder in an Australian Youth Detention Centre' (2019) 19(2) *Youth Justice* 137-157; R Mutch et al (2013) *Fetal Alcohol Spectrum Disorder: Knowledge, attitudes and practice within the Western Australian justice system*. Available at: <https://alcoholpregnancy.telethonkids.org.au/SysSiteAssets/media-docs---alcohol-preg-fasd/projects/final-report-fasd-justice-system.pdf>; H Passmore et al, 'Fetal Alcohol Spectrum Disorder (FASD): Knowledge, attitudes, experiences and practices of the Western Australian youth custodial workforce' (2018) 59 *International Journal of Law & Psychiatry*, 44-52.

In addition to the standard component of training, we submit there should be additional ongoing training relevant to particular roles within the criminal justice system. This training should be incorporated into ongoing professional development requirements.

The training should be evidence-informed and developed by people with appropriate expertise in FASD, in consultation with the agencies that will be responsible for implementing the training for police, lawyers, judicial officers, and corrective services.

Careful consideration should be given to the delivery format of the training by each agency. In a recent study with the Western Australian youth justice workforce, the majority (60%) of staff listed face-to-face workshops as their preferred method of training, and the majority (60%) also listed online modules as their least preferred method. This is in contrary to the training commonly implemented by government agencies, with online modules prevalent due to the ease of rolling the training out workforce wide. However, little evaluation has been carried out to determine whether online training about FASD leads to the improvement of knowledge, skills and practices among justice staff. To ensure training delivery translates to improved knowledge and practices, consultation with the workforce and evaluation is recommended.

4 Who should be responsible for training?

It would be preferable for a single agency to be responsible for training people in the criminal justice system on FASD in order to provide common understanding, consistent implementation of training and effective monitoring and evaluation. However, given the variety of departments and agencies engaged in the criminal justice system it is unlikely any single agency could effectively provide training for all roles across the system.

The body responsible for the training of people working in the criminal justice system depends on the person's role and the jurisdiction. As an example, information for NSW is set out below.

(a) Police

Initial training to receive an associate degree in policing practice for entry into the NSW Police Force is delivered by Charles Sturt University and the NSW Police Force. The training integrates field-based education, classroom, practical sessions, officer safety training, corporate computer systems training, and physical fitness.¹² The degree covers areas of law, policy and procedure, investigative practice, communication and police professional standards, conduct and values, officer safety and operational policing.¹³

The Education and Training Command of the NSW Police Force is responsible for the ongoing training of officers. Mandatory training requirements are prescribed by the relevant industrial award and relate to the ability demonstrate competence in Operational Safety and Skills and complete training in a range of Mandatory Continuing Police Education (MCPE) programs.¹⁴ Under the relevant industrial award, non-commissioned and commissioned officers are required to meet a range of competency requirements for incremental progression. In relation to MCPE programs, the NSW Police Force in consultation with key stakeholders, determines mandatory training on an annual basis of

¹² NSW Police Force, 'Associate Degree in Policing Practice'. Available at: <https://www.police.nsw.gov.au/recruitment/the_training/associate_degree_in_policing_practice>.

¹³ Charles Sturt University, 'Associate Degree in Policing Practice'. Available at: <<http://www.csu.edu.au/handbook/handbook18/courses/AssociateDegreeinPolicingPractice.html>>.

¹⁴ NSW Police Force, Education and Training Command, 'Mandatory Training Policy and Procedures'. Available at: <https://www.police.nsw.gov.au/_data/assets/pdf_file/0005/533372/Mandatory_Training.pdf>.

which they believe is imperative to the ongoing professional development of police. The required mandatory training for each year is determined through an *MCPE Directive*.¹⁵

We submit the NSW Police Force should be responsible for ensuring police receive effective training in recognising and working with people with FASD, both at the entry level during initial training and during ongoing training. In particular, we suggest that the NSW Police Force require mandatory FASD training as part of their MCPE programs and also suggest that the NSW Police Force implement a requirement that in order to advance to a higher position or rank, officers must complete a refresher course on identifying and responding to FASD.

Further, we suggest that the NSW Police Force consider implementing a Neurocognitive Disability Intervention Team, similar to the currently established Mental Health Intervention Team (MHIT). The MHIT commenced as a two-year pilot program in July 2007 and developed out of a partnership between the NSW Police Force, NSW Health, the Schizophrenia Fellowship and other relevant agencies. NSW Health supported the MHIT program by funding the secondment of a senior mental health clinician to provide advice on the overall program design, content expertise with regards to the development of an MHIT training package for frontline police, and to provide clinical expertise and organisational linkage between the MHIT and the health setting service providers. Charles Sturt University was engaged by the NSW Police Force to independently evaluate the MHIT. Following the success of the pilot program and positive outcomes from the evaluation, the MHIT was endorsed as a permanent unit of the NSW Police Force Operational Programs Command in July 2009.¹⁶

The MHIT is responsible for shaping policy, strategy, training and operational tactics for the NSW Police Force with regards to mental health and suicide prevention related issues. The MHIT developed a one day mental health training and awareness package which was then also integrated into the curriculum for recruits at the NSW Police Force Academy. The MHIT currently runs a two day Mental Health Enhanced Police Practice Module training program which allows officers to become accredited specialist Mental Health Intervention Officers. This means there is a two-tiered mental health training process for the NSW Police Force in which all officers receive a minimum of one day mental health awareness and response training, with selected officers then progressing to the two-day program to become MHIT specialists.¹⁷

(b) Lawyers

For admission as a lawyer in Australia, lawyers must complete Practical Legal Training (PLT) in order to obtain a Graduate Diploma of Legal Practice (GDLP). In NSW, the PLT requirements include both structured and supervised training and workplace experience. The training includes lawyer's skills, problem solving, work management and business skills, trust and office accounting, civil litigation practice, commercial and corporate practice, property law practice, ethics and professional responsibility, and two electives. A range of different bodies provide PLT training in NSW including The College of Law, University of New South Wales, University of Newcastle, and University of Technology Sydney.¹⁸

After admission, lawyers in NSW are required to complete Continuing Professional Development (CPD) covering ethics and professional responsibility, practice

¹⁵ NSW Police Force, Education and Training Command, 'Mandatory Training Policy and Procedures'. Available at: <https://www.police.nsw.gov.au/_data/assets/pdf_file/0005/533372/Mandatory_Training.pdf>.

¹⁶ NSW Police Force, 'Mental Health'. Available at: <https://www.police.nsw.gov.au/safety_and_prevention/your_community/mental_health>.

¹⁷ NSW Police Force, 'Mental Health'. Available at: <https://www.police.nsw.gov.au/safety_and_prevention/your_community/mental_health>.

¹⁸ The Law Society of NSW, 'Practical Legal Training'. Available at: <<https://www.lawsociety.com.au/practical-legal-training>>.

management and business skills, professional skills, and substantive law. CPD requirements can be achieved through seminars, workshops, lectures, conferences, and discussion groups to name a few. The CPD scheme in NSW is based on self-assessment of educational activities. If a person assesses that an activity extends their knowledge and skills or professional development, they can claim the activity towards satisfaction of the CPD requirements, being 10 units each year. However, this means that training is delivered by a wide range of services.¹⁹

Training on FASD should be prioritised for lawyers practising in criminal law. We suggest that training be implemented both at the PLT stage (for students who undertake Criminal Law Practice as one of their electives) and as a component of CPD training, particularly for accredited specialists in criminal law. The Law Society of New South Wales and the New South Wales Bar Association should be responsible for ensuring such lawyers receive effective training to recognise and respond to FASD.

Gilbert + Tobin suggest Legal Aid New South Wales (Legal Aid NSW) and the Aboriginal Legal Service (NSW/ACT) (ALS NSW) should consider mandatory training on FASD for their staff working in the criminal law practices and for lawyers on the Legal Aid NSW criminal law panel. Legal Aid NSW and the ALS NSW would be responsible for sourcing, implementing and evaluating the training for their own lawyers.

(c) Magistrates and Judges

Under section 9(1) of the *Judicial Officers Act 1986* (NSW), the Judicial Commission of New South Wales may organise and supervise an appropriate scheme for the continuing education and training of judicial officers.²⁰ A national standard has been developed by the National Judicial College of Australia (NJCA) requiring each member of the Australian judiciary to complete at least 5 days of professional development each calendar year.²¹ A review undertaken in 2010 found that 66% of judicial officers undertook 5 days or more professional development.²² A national curriculum for professional development for Australian judicial officers has also been developed by NJCA. The curriculum includes a wide range of programs which relate to the law, judicial management, decision making, judicial conduct, social contexts, developments in knowledge and issues of public policy, information and other technology, and health and well-being.²³

The Judicial Commission of New South Wales and NJCA should be responsible for ensuring Magistrates and Judges receive effective training to recognise FASD. We also suggest that training on recognising and dealing with FASD be incorporated into the national curriculum for professional development for Australian judicial officers. This training should be developed by experts and health professionals that work in the field of FASD in consultation with the Judicial Commission of New South Wales and NJCA.

(d) Corrective Services

Corrective Services New South Wales (CSNSW) is responsible for providing an Integrated Induction Course for new staff at the Brush Farm Corrective Services

¹⁹ The Law Society of NSW, 'Continuing Professional Development'. Available at: <<https://www.lawsociety.com.au/practising-law-in-NSW/working-as-a-solicitor-in-NSW/your-practising-certificate/CPD>>.

²⁰ *Judicial Officers Act 1986* (NSW) s 9(1).

²¹ Judicial Commission of New South Wales, 'Continuing Judicial Education Policy'. Available at: <<https://www.judcom.nsw.gov.au/education/continuing-judicial-education-policy/>>.

²² National Judicial College of Australia, 'Review of the National Standard for Professional Development for Australian Judicial Officers'. Available at: <<https://njca.com.au/wp-content/uploads/2017/12/Review-of-the-National-Standard-for-Professional-Development-for-Australian-Judicial-Officer-Report-2010.pdf>>.

²³ National Judicial College of Australia, 'A Curriculum for Professional Development for Australian Judicial Officers'. Available at: <<https://njca.com.au/wp-content/uploads/2017/12/National-Curriculum.pdf>>.

Academy (the Academy).²⁴ The Induction Program aims to enable staff to learn about how they contribute to the 'big picture' at CSNSW and how the various roles are interdependent. The Induction training consists of 5 online modules plus attendance at a one day face-to-face course. It is mandatory for all new staff.²⁵

The Academy is part of CSNSW and also offers ongoing operational training to departmental staff, including community corrections officers.²⁶ The Academy offers a wide range of courses through the Operational Community Programs Training Unit, the Custodial Training Unit, and the Operational Management Training Unit. Examples of training include:

- Community Corrections Office Training which covers interviewing skills, report writing, case management, risk assessment, case planning, parole requirements and skills to deal with different offender groups;²⁷
- Community Offender Support Program which covers motivational interactions, mental health first aid and standard operating procedures relevant to working within a community offender support program;²⁸
- Disability Awareness Training which provides people with the skills and knowledge required to effectively interact with and facilitate the empowerment of people with a disability;²⁹
- Managing Young Adult Offenders Training which provides a wide range of skills and attitudes to confidently manage and support positive behavioural change;³⁰
- Mental Health Awareness Training which is designed to increase a general understanding and awareness of mental health disorders, including symptoms and associated behaviour;³¹
- Parole Training which covers parole unit work within the Custodial environment, including the preparation of pre-release reports, the classification system, case management and other administrative systems;³²
- Trauma Informed Practice Training which covers introduction to Trauma Informed Practice, understanding the nature and impact of trauma,

²⁴ NSW Department of Communities and Justice, 'Employment Policies and Information'. Available at: <<https://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/work-for-csnew/csnew-workplace-policies.aspx>>.

²⁵ NSW Department of Communities and Justice, 'CSNSW Integrated Induction Program'. Available at: <https://www.bfcsa.nsw.gov.au/Pages/courses/workplace/integrated_induction_program.aspx>.

²⁶ NSW Department of Communities and Justice, 'Brush Farm Academy'. Available at: <<https://www.bfcsa.nsw.gov.au/>>.

²⁷ NSW Department of Communities and Justice, 'Community Corrections Officer Training'. Available at: <https://www.bfcsa.nsw.gov.au/Pages/courses/career/certificate_iv_in_corrections_practice.aspx>.

²⁸ NSW Department of Communities and Justice, 'Community Offender Support Program Centre (COSP)'. Available at: <https://www.bfcsa.nsw.gov.au/Pages/courses/offenders/community_offender_support_program_centre_cosp.aspx>.

²⁹ NSW Department of Communities and Justice, 'Disability Awareness'. Available at: <https://www.bfcsa.nsw.gov.au/Pages/courses/workplace/disability_awareness.aspx>.

³⁰ NSW Department of Communities and Justice, 'Managing Youth Adult Offenders'. Available at: <https://www.bfcsa.nsw.gov.au/Pages/courses/offenders/managing_young_adult_offenders.aspx>.

³¹ NSW Department of Communities and Justice, 'Mental Health Awareness'. Available at: <https://www.bfcsa.nsw.gov.au/Pages/courses/safety/mental_health_first_aid.aspx>.

³² NSW Department of Communities and Justice, 'Parole Training'. Available at: <https://www.bfcsa.nsw.gov.au/Pages/courses/offenders/parole_training.aspx>.

recognition of safety, healing and recovery, responding to disclosure, vicarious trauma, emotional survival,³³ and

- Aboriginal Cultural Awareness Training which provides participants with knowledge regarding the history and culture of Aboriginal and Torres Strait Islander people while understanding the contemporary challenges they are facing today.³⁴

CSNSW should be responsible for ensuring corrective service staff receive effective training to recognise FASD. We suggest that training on recognising FASD and working with people with FASD be included as a module within the mandatory Integrated Induction Course and also be implemented as its own program administered under one of the Units at the Academy.

5 Training alone insufficient

Training on recognising FASD alone is not sufficient to better manage people with FASD in the criminal justice system, reduce recidivism or ensure people with FASD receive the supports they require to lead a fulfilling life. Training will only be effective to the extent that there are other supporting mechanisms for people with FASD in the criminal justice system. These include effective screening, access to diagnostic facilities and access to FASD-informed services.³⁵

We reiterate other recommendations in our Submission relevant to people with FASD in the criminal justice system including:

- that governments across Australia commission a review of law and policy, starting with the critical areas of welfare, education and criminal justice, to determine whether or not people with FASD are able to access the support they need and to have their disability taken into account in the criminal justice system (Recommendation 7);
- that where people with FASD are excluded from government support or from having their disability recognised in the criminal justice system because FASD falls outside the disability criteria in the relevant law or policy, those criteria be amended to ensure that people with FASD are included (Recommendation 8);
- that the Commonwealth support the development of and training in an accessible screening tool, such as the Life History Screen, with screening to be undertaken no later than at the time of charging (Recommendation 11).
- that the Commonwealth review, and where necessary, amend, the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth) to ensure FASD is taken into account in a similar way to intellectual disability when the decision is made to charge a person, in diversionary provisions, in relation to bail, in determining a person's fitness to be tried, in determining guilt and in sentencing (Recommendation 12);
- that the Commonwealth encourage the States and Territories to review, and where necessary to amend, their criminal law and policy to ensure FASD is taken into

³³ NSW Department of Communities and Justice, 'Trauma Informed Practice'. Available at: <<https://www.bfcsa.nsw.gov.au/Pages/courses/offenders/Trauma-Informed-Practice.aspx>>.

³⁴ NSW Department of Communities and Justice, 'Aboriginal Cultural Awareness Training'. Available at: <<https://www.bfcsa.nsw.gov.au/Pages/courses/offenders/Aboriginal-Cultural-Awareness-Training.aspx>>.

³⁵ Foundation for Alcohol Research and Education, 'Fetal Alcohol Spectrum Disorder: Knowledge, attitudes and practice within the Western Australian justice system' (April, 2013).

account in a similar way to intellectual disability when the decision is made to charge a person, in diversionary provisions, in relation to bail, in determining a person's fitness to be tried, in determining guilt and in sentencing (Recommendation 13);

- that the Commonwealth support the development of and resource diversionary programs and services for people with FASD, including people with dual diagnosis (Recommendation 14); and
- that appropriate support be provided for people with FASD to comply with court orders including bail, bonds, community-based orders and parole conditions (Recommendation 15).

6 Response to matters raised by the NDIA

We have had the opportunity to review the draft Hansard Report from the hearing on 25 June 2020. The submissions below are in response to the evidence provided by National Disability Insurance Agency (**NDIA**) representatives to the Committee (pages 1-8 of draft Hansard Report).

6.1 Underrepresentation of people with FASD on the NDIS

In reference to the low number of participants with FASD accessing the National Disability Insurance Scheme (**NDIS**), the NDIA have suggested that more children with FASD may be participating in the scheme than the reported number, as some children may have been accepted under general development delay criteria, rather than a specific FASD diagnosis.³⁶

Given the challenges of diagnosing children under six years of age, it is likely that this is true for some children. However, the suggestion that people with FASD are participating in the NDIS under the category of general developmental delay is supposition and we note the figures provided by the NDIA indicate a very low number of people with FASD participating in the NDIS across all age groups.

While the lack of prevalence data makes it impossible to know the degree of underrepresentation of people with FASD in the NDIS, we submit it is likely that people with FASD are significantly underrepresented.³⁷ While not all people with FASD will qualify for the NDIS, given the likely prevalence of FASD you would expect to see substantially more than the 907 people who list FASD as their primary disability and the 453 people who list FASD as a secondary disability.³⁸ We note, like FASD, not all people with Autism Spectrum Disorder will qualify for the NDIS, yet the March 2020 NDIS report to COAG states 119,747 people with Autism Spectrum Disorder have accessed the NDIS. The Australian Bureau of Statistics estimates the prevalence of Autism Spectrum Disorder in Australia at 0.7% of the population; well below the lowest estimates of prevalence of FASD.³⁹

As outlined in our previous submission, this limited participation may be due to a number of factors, including the difficulty obtaining a diagnosis of FASD, the exclusion of FASD

³⁶ Proof Committee Hansard, Effective approaches to prevention, diagnosis and support for Fetal Alcohol Spectrum Disorder, 25 June 2020, p1

³⁷ In the United States, which has equivalent or lower consumption of alcohol than Australia, it has been estimated that FASD affects between 2 and 5% of the population (Burns, L., Breen, C., Bower, C. et al 'Counting fetal alcohol spectrum disorder in Australia: the evidence and the challenges', Drug Alcohol Rev. 2013 Sept 32 (5), pp. 461-7).

³⁸ NDIA submission to the Inquiry p3.

³⁹ Re prevalence of Autism Spectrum Disorder see <https://www.aihw.gov.au/reports/disability/autism-in-australia/contents/autism> and re FASD see Note 97.

from the policies designed to streamline access to the NDIS and the failure to establish a FASD reference group for the NDIS. Given the prevalence of FASD in some Aboriginal and Torres Strait Islander communities, a lack of culturally appropriate support may also play a part.

The difficulty in estimating the under-representation of people with FASD in the NDIS again emphasises the importance of research to determine the prevalence of FASD nationally (see our Recommendation 3).

Further to the need for reliable prevalence data, on page 3 of the draft Hansard Report, the NDIA stated that it is rolling out FASD training and awareness for all planners and will prioritise that into areas with the greatest demand.⁴⁰ In the absence of broad prevalence data, the NDIA will be unable to assess whether it has properly targeted and allocated sufficient resources to high-risk areas.

6.2 Importance of diagnosis

In considering the limited number of people on the NDIS with FASD as their primary or secondary disability, there was discussion suggesting that diagnosis was unimportant given the emphasis on functional capacity in the NDIS and strategies for children with FASD were common to children with other disabilities.⁴¹

This discussion again assumes that children with FASD (whether or not diagnosed) are being included in the NDIS under other categories. As far as we are aware there is no evidence base for that assumption.

The discussion also suggests that therapies for children with other forms of disability are transferable to FASD. Children with FASD have particular needs and therapies are not, as we understand it, transferable. The assumption that they are can create difficulty for parents and carers of children with FASD as noted in the case study at the conclusion of our original submission.

There is overwhelming evidence that accurate early diagnosis, followed by appropriate intervention, can be successful in achieving better outcomes for people with FASD.⁴²

6.3 Streamlining access to the NDIS for people with FASD

As set out in our previous submission at section 10.2, the NDIA has developed guidelines that streamline access to the NDIS for people with certain types of disability. Of particular relevance to people with FASD are Lists A, B and D in the NDIS guidelines.

Where a person has been diagnosed with a condition/s on List A, the NDIA will be satisfied that the person meets the disability requirements to access the NDIS without further assessment. We have recommended that consideration be given to including Fetal Alcohol Syndrome (**FAS**) on List A. FAS is at the severe end of spectrum of FASD, like moderate, severe or profound intellectual disability and Level 2 autism which are included on List A.

During the hearing on 25 June 2020, the NDIA indicated that new diagnoses are not being added to List A, but rather the NDIS are “focusing on a functional assessment

⁴⁰ Proof Committee Hansard, Effective approaches to prevention, diagnosis and support for Fetal Alcohol Spectrum Disorder, 25 June 2020, p3.

⁴¹ Ibid, pp3 and 5.

⁴² 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 Fetal Alcohol Spectrum Disorders (2012) 4.12.

approach".⁴³ If the focus is, as the NDIA says, on functional assessment, List A should be deleted from the guidelines. If List A remains and FAS cannot or will not be added to List A, the NDIA will continue to preference some comparable disabilities over others, discriminating against people with FAS and maintaining a barrier to increased participation in the NDIS by people with FAS.

We reiterate that there are a number of simple steps the NDIA could take, to ensure the NDIS is more accessible to people with FASD. Our recommendations include:

- that the NDIA establish and fund an NDIS FASD Advisory Group (similar to the NDIS Autism Advisory Group) which consists of experts, service providers and people experienced in FASD to advocate on behalf of people with FASD and support access to services under the NDIS (Recommendation 21);
- that FAS be included as a List A condition, and FASD be recognised as a List B and List D condition in the NDIS Operational Guidelines (Recommendation 22); and
- that the NDIA engage with Aboriginal and Torres Strait Islander organisations and communities to develop a culturally appropriate strategy to enable Aboriginal and Torres Strait Islander people with FASD to access the support they need through the NDIS (Recommendation 23).

6.4 NDIS engagement with justice system

On page 7 of the draft Hansard Report, the NDIA stated that it has 17 justice liaison officers nationally to support people with FASD access the NDIS.

In NSW alone, there are over 35 adult prison facilities⁴⁴ and six youth justice centres.⁴⁵ In March 2020, the average daily number of prisoners in Australia was 44,159.⁴⁶

Evidence indicates that people with mental health conditions or cognitive impairments are significantly over-represented in the prison system. A 2017 report by the Mental Health Commission of NSW estimated the proportion of people with intellectual disability or borderline intellectual disability among prisoners ranges from eight to 20 per cent and suggests that the rate of inmates with cognitive impairment is likely to be higher, given that a significant number of inmates report ongoing neurological effects and psychological symptoms because of a traumatic brain injury.⁴⁷ The Commission stated "in fact, the existence of some form of impairment should in fact be assumed as the norm."⁴⁸ The same report found that half of all adult inmates have been diagnosed or treated for a mental health problem while 87 per cent of youth in custody had or have a psychological disorder.⁴⁹ Similarly, a 2011 report for the Victorian Department of Justice estimated 42%

⁴³ Proof Committee Hansard, Effective approaches to prevention, diagnosis and support for Fetal Alcohol Spectrum Disorder, 25 June 2020, p4.

⁴⁴ <https://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/custodial-corrections/table-of-correctional-centres/correctional-centres.aspx>

⁴⁵ <http://www.juvenile.justice.nsw.gov.au/>

⁴⁶ Australian Bureau of Statistic, 4512.0 - Corrective Services, Australia, March Quarter 2020, released 4 June 2020 available at <https://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0#:~:text=4512.0%20%2D%20Corrective%20Services%2C%20Australia%2C%20March%20Quarter%202020&text=Nationally%2C%20the%20average%20daily%20number,in%20the%20March%20quarter%202019.>

⁴⁷ Mental Health Commission of New South Wales, Towards a just system: mental illness and cognitive impairment in the criminal justice system, July 2017, p8.

⁴⁸ Mental Health Commission of New South Wales, Towards a just system: mental illness and cognitive impairment in the criminal justice system, July 2017, p17.

⁴⁹ Mental Health Commission of New South Wales, Towards a just system: mental illness and cognitive impairment in the criminal justice system, July 2017, p8.

of male prisoners and 33% of female prisoners in Victoria had an acquired brain injury, compared to about 2% of the general population.⁵⁰

As set out in section 8.1 of our previous submission, whilst the research is limited, recent studies suggest that people with FASD are similarly overrepresented in the criminal justice system. The 2018 Banksia Hill study, for example, found of the 99 detainees they assessed at the Banksia Hill Detention Centre in Western Australia, 89% had at least one form of severe neurodevelopmental impairment and 36% had FASD.⁵¹

In light of the high incidence of disability among people in contact with the criminal justice system, and in particular, people in prison, the number of justice liaison officers should be significantly increased to ensure people with FASD and other forms of disability are assisted to access support through the NDIS.

7 Youth Koori Court pilot project

7.1 Background

While ideally a person living with FASD would be diagnosed and receive support early in life, the criminal justice system provides an opportunity to identify and put in place support for people with FASD.

Assessing a person for FASD when they come into contact with the criminal justice system enables diagnosis of FASD. As the Inquiry has heard, FASD is significantly under-diagnosed. As stated, in the Banksia Hill study, only two of the 36 young people diagnosed with FASD had been diagnosed prior to the study. Diagnosis, in turn, enables the identification of appropriate supports for a person living with FASD.

Diagnosis is of particular relevance for a person in contact with the criminal justice system as FASD may impact on the person's culpability for the offence for which they are charged and on their ability to understand and comply with orders made by the court.

FASD may be relevant to:

- (a) Whether the person should be diverted from the criminal justice system as a consequence of their disability;
- (b) Whether or not the person is fit to be tried;
- (c) Whether the person was capable of forming the mens rea for the offence for which they are charged;
- (d) Whether or not the sentencing principles of specific and general deterrence should be applied.

Specific deterrence is intended to dissuade the person charged from offending in future. If a person cannot recognise the link between their conduct and the punishment they receive, there is no point in taking into account specific deterrence is formulating a sentence.

General deterrence is intended to dissuade others from committing an offence similar to the offence with which the person is charged. In

⁵⁰ Corrections Victoria, *Acquired brain injury in the Victorian Prison System*, April 2011, p 19.

⁵¹ Carol Bower et al, 'Fetal Alcohol Spectrum Disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) 8 *BMJ Open* 1, p. 7.

sentencing law, general deterrence would usually not be considered appropriate where the person charged has a disability;

- (e) The nature of the sentencing and other orders imposed by the court.

For a court order to be effective, it should be an order the person charged understands and can comply with. A diagnosis of FASD may assist the court to craft orders that are more likely to be complied with and more likely to reduce recidivism.

7.2 Outline of the project

As outlined to the Committee during the hearing on 25 June 2020, Gilbert + Tobin is currently coordinating the development of a proposal for a pilot project to identify FASD (and other neurocognitive disorders) in young people appearing before the Youth Koori Court in Parramatta.

Through the pilot project, all young people coming before the Youth Koori Court over three years will be screened for neurocognitive impairments, including FASD. Where it appears the young person may have neurocognitive impairment, they will be referred to the Care and Intervention for Children and Adolescents Affected by Drugs and Alcohol (**CICADA**) Centre at Westmead Children's Hospital to undergo a multi-disciplinary neurocognitive assessment.

The Youth Koori Court addresses the underlying social factors contributing to young Aboriginal people coming into contact with the criminal justice system. It employs a deferred sentencing model, working with young people for up to 12 months. Issues of concern for the young person are identified together with ways those concerns can be addressed and an Action and Support Plan is developed for the young person to focus on for 6 to 12 months prior to sentence. The young person is involved with the development of the plan together with Aboriginal and Torres Strait Islander Elders, the Aboriginal Legal Service solicitors, the young person's family and community members.

CICADA will prepare a report for the young person with, broadly, three aims:

- (a) To provide a diagnosis for the young person. Data will also be collected on the incidence of neurocognitive impairment in young people appearing before the Court to add to the understanding of the prevalence of neurocognitive impairment among people appearing before the criminal justice system;
- (b) To inform the Court on matters relevant to the young person's culpability for the offence and on the supports that should be included in the young person's Action and Support Plan; and
- (c) To enable the young person to access the NDIS (where eligible) and to inform an NDIS plan that will address the young person's offending, and any other needs as well as building on the young person's strengths to enable them to more fully participate in the community.

The project will be evaluated and if successful (using indicators including reduced interaction with the criminal justice system, increasing access to the NDIS, ensuring properly formulated and funded NDIS plans, and obtaining appropriate services from appropriate service providers), the intention is to seek government funding to expand the project to all children and young people appearing before the Children's Court.

The cost of the project is approximately \$550,000 per year which will fund:

- (a) Education on FASD for the Youth Koori Court and those involved with the Court such as the lawyers for the young people;
- (b) A coordinator based at the Youth Koori Court to support the young person in their interactions with CICADA and in following up with service providers;
- (c) Part-time clinicians based at CICADA; and
- (d) Evaluation of the project.

The current cost to imprison one young person in NSW for a year is \$227,060.00 per annum.⁵²

⁵² Senate Standing Committee on Legal and Constitutional Affairs, Value of a justice reinvestment approach to criminal justice in Australia, 20 June 2013, p20.